Supreme Court of Illinois.

NORTHERN GRAND DIVISION.

SEPTEMBER TERM, A. D. 1874.

ELIJAH S. ALEXANDER,
APPELLANT,
vs.
DAVID F. RUNDLE,
APPELLEES.

Appeal from the Circuit Court of Cook County.

BRIEF AND ARGUMENT FOR APPELLANT.

By SLEEPER & WHITON.

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FACTS.

This action was trover, appellee against appellant, in the Circuit Court of Cook County, for $7,000 note of appellant, payable to order Seymour & Rundle, dated June 24th, 1872, one year from date.

Carmichael & Co. had a contract with the Chicago & Northwestern Railway for building a tunnel, on what was called the Baraboo Air Line. Seymour & Rundle had half interest in it. Hopper, Boyle & Co. had a contract with the Philips & Colby

Construction Company, for building forty miles of the Wisconsin Central Railroad, and Seymour & Rundle had a third interest in it, and another contract with the same company for building next sixty miles of the same road, beyond the forty miles. Seymour & Rundle had a third interest in that also. We think that Rundle's name is not known in any of these contracts, though the fact is not material, except as it bears upon Seymour's real interest in this note. Fox & Howard were contractors, having their place of business in Chicago, and as early as April or May, 1872, Seymour began to negotiate with Howard to have his firm buy Rundle's interest in these three contracts. He made statements to Howard, as to the condition of the work, under the several contracts, the character of it, and of their property, supplies, &c., and Howard made computations and calculations, from those statements, to enable him to arrive at a conclusion, as to the desirability of becoming interested in them, and preliminary to determining whether his firm would buy Rundle's interest. From the statements made to him by Seymour, and the computations and investigations made by Howard, based entirely upon Seymour's statements, Howard became satisfied that the contracts were desirable ; that the work was profitable, and money could be made by doing it. Upon consultation with his partner, Fox, they declined to take hold of them, partly for want of time, and partly for want of means to invest, and informed Seymour of their determination. Seymour then asked Howard to refer him to some person who would be a good man to engage in that kind of work, and who would buy Rundle's interest. Howard knew Alexander. Their offices were in the same building, and through Howard's instrumentality Seymour and Alexander were brought together. Negotiations, between Seymour and Alexander, followed their introduction, relative to the sale to and purchase by Alexander of Rundle's interest in the three contracts.

Howard was present at most of the interviews between Seymour and Alexander, indeed all, at which there was anything particularly done or talked. These negotiations continued for considerable time, a fortnight or more. The memoranda of computations which Howard had made, from Seymour's statements, were present at the interviews, or some of them. Rundle and Col. Hopper were present at one or more of the interviews, between Seymour, Howard, and Alexander. At many if not all of these interviews, conversation was had between Seymour and Alexander and Howard, relative to the condition of the work under these three contracts, or really on the Baraboo Air Line Tunnel contract, and the contract for building the first forty miles of the Wisconsin Central Railroad.

SEYMOURS'S STATEMENTS—HOPPER & RUNDLE.

It was stated by Seymour, that he and Rundle had put into the work on the tunnel contract $3000, of which Rundle had put in half. That there had been some accumulation in that work, by way of profits, that it was a good contract and profitable. He also stated, that the firm of Hopper, Boyle & Co., had invested, in plant, supplies, teams, tools, carts, wagons, &c., &c., on Wisconsin Central Railroad contract, from $33.000 to $35.000. That the value of that remaining was say, $18,980, but in round numbers called $18.000; that they had in the hands of the Philips & Colby Construction Company, for building the Wisconsin Central Railroad, retained percentage to the amount of $11.000. It arose in this way, by the contract between this construction company, and Hopper, Boyle & Co., 85 per cent, of each estimate for work, was to be paid to Hopper, Boyle & Co., and 15 per cent retained by the construction company, until the whole work was completed, when it was to be paid over. (Seymour says he told them there was from $8.000 to

$9,000, to $10.000, to $11.000, is not certain just what he did say, while Alexander says, $11,000, and Howard $10,000 to $11,000.) He also stated, that they had made application to the construction company, for a bonus or additional pay for doing the work on this 40 miles, to the amount of $40,000; were sure of getting from $30,000 to $35,000. From Seymour's testimony this application or claim was based upon some action of the construction company, in changing the line, so as to lessen the cuts or excavation and filling on the line, and upon the fact that they had found rock, where there was no estimate for it, as well as on account of some delays by reason of bad whether or other causes. He also stated, that the work was nearly all sub-let to responsible sub-contractors, who were actively at work, and doing well at the prices for which the work was sub-let to them. That the work was self sustaining at the 85 per cent. and the profit was at least the 15 per cent. retained in the hands of the construction company, that the work on this forty miles was in such a state of forwardness, that it would be completed by the 15th, of August, the contract being that it should be completed by July 15th, and that Hopper, Boyle & Co., did not owe debts exceeding in amount $1000 or $1,500. At some time during the negotiations at 441 Wabash avenue Alexander made a memorandum in writing of the items of the plant on the railroad. He produced it on the trial, it is found at page 21, abstract. There is some dispute between Alexander, Seymour, Rundle, and Howard about the memorandum, and we shall refer to the statements of the witnesses, relative to it, farther on in this argument. We shall assume and prove, by an examination of the evidence hereafter, that before the negotiations were closed, Rundle saw this statement and affirmed its correctness. We further assume that Seymour in the negotiations was acting by Rundle's authority, or that he ratified what Seymour had said and

done. During the time the negotiations were going on, Rundle was on the work on the Wisconsin Central Railroad. He came from there to Chicago, some few days before the final consumation of the sale of his interest, to be, and was personally present and closed the trade negotiated by Seymour.

SIXTY-MILE CONTRACT.

Very little work had been done, at this time, on the sixty miles for which Hopper, Boyle & Co. had a contract.

The statements, relative to this contract and work under it were substantially that it was a far better contract than the forty-mile contract; that they were to receive about 25 per cent. more than they were receiving for the same kind of work on the forty miles; that it was a very desirable and profitable contract, and an immense amount of money in it by way of profits.

FINAL PROPOSITION.

The proposition finally made to Alexander, after the matter had been discussed, examined and explained, was that, for the money Rundle had in the Barraboo tunnel contract, Alexander should pay two dollars for one; that Seymour & Rundle together had put in $3,000, of which Rundle had put in half, or $1,500, and for that they required Alexander to pay..... $3,000

Plant on the Wis. Central valued at $18,000. Seymour & Rundle's one-third, $6,000. Rundle's one-half.... 3,000

The percentage retained by the construction company was $11,000. The bonus which the construction company would pay them, $30,000 to $35,000; they finally called the two $42,000. Seymour & Rundle's one-third, $14,000. Rundle's one-half of $14,000 was..... 7,000

Altogether making..... $13,000

The tunnel contract, $3,000, and one-sixth of the plant on the

Wisconsin Central, $3,000, to be taken as $6,000 in hand —which Alexander was to pay in cash. Not in hand, one-sixth of $42,000, $7,000, but would be received in the future; and Seymour & Rundle proposed to take Alexander's note, due in one year, without interest, for that item.

The sixty-mile contract, Alexander was to come into on the "ground floor," as they called it, the same as if he had been one of the original parties to the contract—indeed, they claimed to let him in on the ground floor of the forty-mile contract the same as if he had originally been one of the parties to it, he paying only for the money actually invested on the railroad contract, and one-sixth of the retained percentage and the bonus they were sure to get from the construction company, and which they represented were accumulated profits on the work already done.

ALEXANDER ACCEPTS.

Relying upon the truth of their statements, and having no other knowledge of, or information relative to the character or progress of the work, the value of the plant, the amount of the retained percentage, the prospect of obtaining the bonus from that company, the indebtedness of Hopper, Boyle & Co., whether the work was or not self-sustaining upon the 85 per cent., or whether the sub-contractors were at work and making money at prices they agreed to do their work for—as he expresses it, "without seeing a book or having a figure except what they gave him," Alexander accepted their proposition, and agreed to pay in cash two dollars for one—$3,000 for one-fourth of the tunnel contract, and $3,000 for one-sixth of the value of the plant, and agreed to give his note for $7,000 for one-sixth of the retained percentage and the expected bonus, and to step into Rundle's shoes in the three contracts. They agreed to have writings drawn and executed at a future time.

PREPARATION AND EXECUTION OF THE ASSIGNMENT.

The terms of the contract were agreed upon in the latter part of the week—from the 20th to the 22d of June. Sunday morning Rundle called upon Mr. Edwin Walker, an attorney at law, and Alexander's legal adviser, and at his request Walker went to Alexander's house, to hear their statements of the contract, preparatory to preparing a written assignment of the interest of Rundle in the three contracts, to Alexander. The parties stated the terms of their contract to Walker. (He states them in detail in his testimony, and corroborates Alexander and Howard, and sustains the statement given above, of the proposition.) On the 24th day of June, 1872, he had the paper prepared, the parties appeared at his office, executed the writing prepared by Walker, which is found at page 33 of the abstract. Alexander paid the $6,000 in money, and gave this note in question for $7,000. Seymour and Rundle at once dissolved their partnership, signed articles of dissolution, to which was appended a statement that, the business of the firm would still be continued at 441 Wabash avenue, under the firm name and style of Mark T. Seymour & Co., which firm was composed of M. T. Seymour, Joseph O. Rutter, and E. S. Alexander. (See Abstract page 28.) They printed cards and letter-heads with firm name,fixing the place of business there, and put up their sign there. Rundle surrendered to Alexander the key to the office door; the keys to the safe were carried by the bookkeeper and Seymour.

THEY GO TO THE WORK.

On the 5th of July, 1872, Seymour, Rundle and Alexander left Chicago to go to the work. Rundle had come from there but a few days before. They arrived at Steven's Point, Wisconsin, where the headquarters of Hopper, Boyle & Co. were. They met Flynn, one of the members of the firm, who had come there

from Des Moines, Iowa, sixty days before, and bought into the contract for building the first forty miles. He had pnt in $9,000 in money, and it was all sunk and lost. He was preparing to abandon the work, and take his teams, wagons, carts and tools away. He owned all, or nearly all, teams, carts, wagons, and tools, fit for use on the work. The sub-contractors were not at work, but had surrendered their respective jobs to Hopper, Boyle & Co., with the exception of two, which Rundle admitted he knew when the contract was signed, but he suppressed the truth in relation to it from Alexander. The supplies, that had been represented to be on hand, were not there. The four thousand bushels of corn had dwindled into one hundred to one hundred and twenty-five bags, holding two to two and half bushels each, and what was there was rotten and worthless. The three thousand bushels of oats had dwindled into the same number of bushels as the corn ; the horses and mules were unfit for use, and really the whole of the plant, which they had estimated at eighteen thousand dollars, had dwindled almost to as many hundreds of dollars. The company, instead of owing one thousand to fifteen huudred dollars debts, were owing, as appeared from their books, $28,846,69—(page 29 abstract, and the testimony of Alexander and Montgomery,) and in fact were owing $40,632,52. See Alexander's testimony, page 31 ; Montgomery's testimony, page 55 and following, and 58 and 59 ; and the corrected account made by Montgomery, page 59, abstract. Instead of 85 per cent. paying the cost of the work, the whole amount of the contract price was insufficient by $38,000; and instead of $11,000 retained percentage, there was only a little over $3,100. Everything had been misrepresented.

Alexander finding that Flynn was determined to leave the work, to avoid the demoralization which would result, labored with him, in the presence of Seymour & Rundle, to induce him

to stay till the forty miles was completed; and as a final inducement, agreed to make good his loss of $9,000 to him, if he would do so. Flynn consented to stay.

Having arranged with Flynn to stay, Alexander turned upon Seymour & Rundle, and demanded the return of his money and the note he had given. They refused to comply, but said they would straighten matters up when they got home—would do whatever was right. Alexander, in their presence, and with their acquiesence, at least, directed Montgomery, the bookkeeper, to make out from the books and send him at Chicago, a statement of the liabilities and assets of Hopper, Boyle & Co., and the individual accounts of the members. The statement is found at page 25 of Abstract. It was sent in a letter dated July 13, 1872.

WHAT WAS DONE AFTER THEY RETURNED.

It will be remembered that Rundle came to Chicago from the work, just before the closing of the contract with Alexander, which he and Seymour had been negotiating for some two weeks, more or less ; that prior to this time both Rundle and Hopper had been present at some of the interviews. Rundle in his testimony, at page 69 of Abstract, 469 Record, states that "Seymour, or Seymour and Alexander, exhibited the statement to "me, and asked me if it was correct ; or, he said I suppose it is "correct. I told him I presumed likely, though Seymour knew "as much about it as I did. I refer to the statement Alexander "exhibited here yesterday."

While he dodges around the truth, we insist that, his testimony shows that he knew all about this statement. It will also be remembered that Seymour, Rundle, and Alexander left Chicago for the work July 5th; that immediately on reaching Stevens' Point, the facts which existed there made it evident that, the rose-colored picture, Seymour & Rundle had drawn, was a creature

of their imagination, not even having an outline of truth for its support ; that there never was the least foundation for the statements made, and they were forced to admit it then and there. That Alexander then and there demanded the return of his note and repayment of his money ; that they put him off till they got home, meaning Chicago ; their apology for the condition of affairs being that they were deceived—did not intend to deceive him ; that in their presence, if they did not unite with him, Alexander ordered a statement to be made and sent to him at Chicago ; that they all came home. Alexander at once went to Howard, who, to use his own expression, "had roped Alexander into this matter," and told him he "had been robbed," showing clearer than anything else could, the real truth as it impressed itself upon Alexander at the time. Alexander told Howard the facts as he found them on the work, and invoked his aid, to extricate him from the position in which he found himself. Montgomery, the bookkeeper, sent the statement on the 13th July. In the meantime Seymour, Rundle, Alexander, and Howard, met at 441 Wabash Avenue, Alexander demanding redress ; that his note should be returned to him, and claiming that he had been deceived by misrepresentations as to the condition of things there ; that there was no consideration for the note. Seymour & Rundle sought to parry his demand, by asking him to compromise, to pay part of it. With $3,000 of Alexander's money in their pockets, paid for one-sixth of that plant, that, at the outside figures, was not worth $1,000 ; knowing then that the statements made to Alexander, and upon which he had relied, were untrue ; Rundle knowing that some if not all of them were untrue, as he admitted, and as he must have known, seeing that a week before he made the trade with Alexander, he was on the work, and came direct from there to close it, after it had been negotiated for him by Seymour; they had the coolness and

effrontery to ask him to pay more money, for a thing that was not only worthless, but a curse to any man to have, a certain, sure maelstrom, which had swallowed all that the parties had to put into it, and which, in the language of Flynn, whose $9,000 had been lost in sixty days, was "sure to ruin any company to "undertake to continue it and put it through."

Finally, having received this statement, showing the debts to be $28,846.69—all but the $13,000 "current Pay Rolls," of long standing; that the estimate of the June work, which had cost $13,000 for the mere labor of men, not including teams, supplies, superintendent, &c., was only $11,000; that the retained percentage was only $8,941 instead of $11,000, and which, upon further investigation turned out to be only $3,100, showing debts over the June work of $15,846,69, instead of $1,000 to $1,500; they all knowing the condition of affairs on the work, as well as that there was no possibility of completing it by 15th of August, Seymour, Rundle, Alexander, and Howard met for the last time, July 18, 1872, at the office, 441 Wabash Avenue, and renewed the conversation had at previous meetings, since the return from the work.

THE TRANSACTION OF JULY 18, 1872.

It is evident that, that interview was not smooth and placid, "they were not a happy family." Alexander did not make his demand for the surrender of that note, in honied words; all that kind of talk and manner had been tried and exhausted. He was very pronounced in his language; he did not put his demand as if he were requesting a favor; he demanded it as a right; told them he had been deceived; that they had misrepresented the facts. He was terribly in earnest in what he had come there to accomplish. Seymour and Rundle winced under the charges he made, because he wielded the sword of truth. So fierce and

denunciatory was his language, and so personal was he in his charges of bad faith on their part, that Rundle affected an air of wounded honor, and withdrew from the contest, leaving Seymour in possession of the note, saying to him, "you have as much interest in it as I have, do with it as you are a mind to, and any settlement you may make, I will be satisfied with." We know there is a dispute between them on this point. Rundle says he told Seymour to keep it for him and he would hold him responsible. Seymour says the language was "take the note and do as you are a mind to with it, and I will hold you responsible," and they both undertook to say, and to make the jury believe, that Alexander was not there demanding the surrender of the note. Alexander and Howard say that was just what he was there for. And while Rundle says that, all that Alexander said which made him mad was, that the work was a pretty bad looking piece of work, or language of that kind, Alexander and Howard say that, Alexander charged him with misrepresentation and fraud, and they both say that Rundle's language substantially was, "Mark you have as much interest in the note as I have, take it and do what you are a mind to with it, and any settlement you make with Alexander I shall be satisfied with." Why did Rundle leave the note with Seymour if not to make settlement, which his offended dignity would not allow him to stay and consummate himself? If no settlement were to be made why did he not carry it away with him? Why does he say, as at page six of Abstract, "I gave the note to Seymour because I would just as soon he would hold the note and settle the matter as myself—to settle the matter in regard to that—to make it satisfactory to Alexander?" A casual reading of his testimony, and comparison with Seymour's, and the undisputed facts, will convince any man that, he was wilfully lying on every material

point, or corruptly suppressing the truth, whenever he thought it would injure his cause if brought to light. There is not so wide a difference between Seymour, Alexander, and Howard, as really to affect the case. He says Rundle told him to do what he had a mind to with the note. Alexander and Howard say the same thing. This was authority to make any settlement with Alexander he had a mind to; to comply with Alexander's demand that the note be surrendered to him. (We have seen that Rundle talks about settling with Alexander.) The dispute then was whether the note should be surrendered.

Before an agreement had been reached, Rundle got mad, took the note from his pocket, gave it to Seymour "because he had just as soon he would settle the matter as himself," and told him to do what he was a mind to with it. He left Seymour, Alexander, and Howard there to complete the work begun—and which all had come there to do—to make the settlement, which Alexander demanded, satisfactory to him. What if Rundle did say "I'll hold you responsible?" It did not mean that Seymour should not exercise his judgment, in settling the matter with Alexander, nor did it mean that he would hold him responsible for the note. It meant only that he would hold him responsible for the settlement he made. He gave Seymour power to act in his discretion, and in the exercise of that discretion, even on Seymour's statement, he had authority to make the arrangement he did make, with reference to that note; and when you add the weight of the testimony of Alexander and Howard, there was no question whatever as to Seymour's power to surrender that note to Alexander, as he and Rundle ought to have done at once. The truth is, knowing what they must have known, from being connected with that work as long as they had, they knew better than to make the representation they did. It was

a wicked fraudulent thing in them, to draw anybody into the contract, they led Alexander into. But having done what they had, when the facts were discovered upon the first sight of the work, it was a great fraud on their part to hesitate a moment about surrendering the note. Seymour knew it and felt it, probably Rundle did, but he did not like the alternative of being branded a fool or knave, and so he ran away, leaving Seymour to do what was right, to the extent of surrendering the note, "to settle the matter with regard to that, to make it satisfactory to Alexander."

WHAT WAS DONE AFTER RUNDLE LEFT.

Rundle says Howard was not there when he handed the note to Seymour, and went away. Seymour can't be positive; but, feeling the necessity of having Howard away, he "screws his courage to the sticking point," and swears that it is his impression he was not there. Alexander and Howard both say he was there. Howard gives a reason why he was there. He had "roped Alexander into these contracts," and felt it a duty to see him out. He and Alexander went there to get that note; and Howard is very certain as to what occurred and what was done. There is no doubt of his being there. Even Seymour says (p. 99 Rec., p. 13 Abs.) that he had a conversation with Alexander similar to what Alexander and Howard both swear, in presence of Howard, there, that day—but previous to that.

There are a few things that we may assume as not in dispute. Rundle gave that note to Seymour, and went away, telling him "to do as he was a mind to with it; that he could not stay and talk with Alexander;" implying that Seymour could; and he left the note so that Seymour could settle the matter, and

make it satisfactory to Alexander—to surrender it, if that alone would satisfy him.

After Rundle went away, Seymour put that note in the safe, or directed Gaytes, the bookkeeper to do it, and it was done. Alexander, who, until then, had never had a key to any drawer in that safe, had a key given to him. He swears to it, and produces the key on the trial. Howard swears to it. Seymour does not know whether he did or not. As farther evidence,—Alexander put into that drawer the letter or memorandum given him by his father-in-law to keep safely. Rundle had no key to the outer door of the safe; there were but two—one carried by Seymour, the other by the bookkeeper. When Rundle gave Alexander the key to the office, he asked for the safe key, but Rundle had none. He managed in some way, in September, to get a key to the outside door of the safe; he did not get one to this drawer, but employed a locksmith to pick the lock, and in that way got the note. If Gaytes had had a key to that drawer, Rundle could have obtained it, as well as the outside key. Now when that drawer was set apart for Alexander's private use, and the note placed therein, and the key given to him, it was placed in his possession, and under his control.

Here there is some dispute about the agreement made between Alexander and Seymour at the time. We will refer to the statement of Seymour, Alexander and Howard on that point. Alexander's statement of the whole matter commences with the paragraph at the foot of page 26 of Abstract, where he went to Howard after the return to the work. He states on page 27 what he told Howard; how they spent their time for three, four, or five days; the conversation that was had at 441 Wabash avenue, July 18th; what he said that made Rundle mad; what Rundle did with the note, and what he said to Seymour when he gave

the note to him; how Rundle beckoned him to the door, and he went, leaving Seymour and Howard in the private room. On his return, Howard still being there, he says, "Seymour made "the remark to me, that he had made before, that I should not "pay the note; that I ought not, and that it should be surren- "dered to me; and if it was not satisfactory to Rundle, he would pay his part himself."

"After talking a little, Seymour says: 'Now, Aleck, this "thing may turn out differently, or better than you expect—or "better than it looks to us now. You shall take this note and "put it in the safe, in a drawer that shall be set aside to you, and "the note shall be subject to your order, and be your prop- "erty, and you shall hold it until this work is completed, and if "the work does pay a portion of the profit which we supposed "we did have on hand—that is, of the $42,000 for which it is "given—as a matter of course you are willing to pay your por- "tion of it'"

He then relates that the bookkeeper was called on to clear a drawer for him, which was done, the note put in it, and key given to him, which he produced. He also states that the envelope had this superscription on it: "Alexander's personal and private property; to be delivered to no one without his orders."

Then follows the articles of dissolution.

His statement as to the matter, on cross-examination, is found at pages 39, 40, and 41 of Abstract.

Howard's statements, on direct examination, of the conversations after Seymour, Rundle and Alexander returned from the work, commences at page 48 of Abstract, 315 of Record, and

continues to 325 of Record—and on his cross-examination, page 51 Abstract, 342 Record, and continues to 347.

Seymour's statement on his direct examination is found at page 65 of Abstract, and 444 of Record; on his cross-examination, at page 68 of Abstract, and 462–3 of Record he says, he does not think he stated what Alexander and Howard say he did, but does say, "I will not swear positively that I did not." (Foot of page 68.)

We have some other evidence corroborating our position. Alexander's statement, of what Seymour said to him, the morning after Alexander returned from the burial of his father-in-law (Abs. pp. 29 and 30), both on Michigan ave. and at his office, in the presence of Tyrrell; as well as the contents of the letter written from the Tremont House. Tyrrell's statement, page 53; Wilson's statement, page 54; Seymour's version of these two conversations and the letter, is found at page 15 of Abstract, continuing on pages 16, 17 and 18, of cross-examination, and 20 of redirect; also at page 66 of Abstract. An attempt is made to corroborate Seymour by the testimony of his daughter. Her statement begins at page 71 of Abstract, and continues on to 72.

REVIEW OF ABOVE TESTIMONY.

We say that there is no escape from the position we assume, that this note was surrendered to Alexander on the 18th of July, 1872; and that the abstraction of it from the safe, by Rundle, was a *larceny*.

1. We have the positive unequivocal statement of Alexander and Howard that, it was agreed between Alexander and Seymour that the note was to be cancelled, and that the amount Alexander ever should pay upon it, was what profits ultimately should be made.

2. We have the fact that the note was put into a drawer in the safe, which was set apart to Alexander, and he was given the key to it. Howard says (Abs. p. 49, Rec. p. 322) that "Alexander had a key given him at that time for a drawer in the safe." Alexander says the same thing, and produces the key. Rundle had to pick the lock to get the note.

That, as we have said before, placed the note in Alexander's possession, so that it never could be delivered to any one without his orders, unless the lock was picked or broken, and the note stolen out; as it was, in fact, by Rundle, afterwards.

3. We have Seymour's statement (Abs. p. 19, Rec. p. 113) when Alexander threatened to prosecute Rundle, and have him locked up, that, "*If Rundle did take the note, it was entirely wrong; that he had no more right to take it than he had to take one of his horses.*" And while he attempts to make it appear that his proposition to stand by Alexander in the prosecution of Rundle, was conditional upon Rundle having done wrong, or criminally wrong, it does not lessen the force of his assertion, that, it *was wrong* for Rundle to take the note, and that he had no more right to take it, than he had to take one of Alexander's horses. Had he taken the horse in the same way he did the note, it would have been larceny. If he had no more right to take the note than the horse, he had no right at all. Taking the note under the circumstances he did, without right, was stealing it, just as taking Alexander's horse from his barn would have been larceny.

4. But Wilson and Tyrrell tell us that Seymour not only said Rundle had no more right to take the note than to take one of Alexander's horses,—but they say, he said it was Alexander's personal or private property, corroborating Alexander as to

what he says was written on the envelope. In the note Seymour wrote to Alexander from the Tremont House, he clearly recognized Alexander's right to the possession of the note, because he said, "I have your note," and "If I do not see you before 4 o'clock to give it to you, you will find it in the safe at 441 Wabash avenue." See Alexander's statement of contents, Abs. page 30, Rec. page 180; Tyrrell's statement, Abs. page 53; Seymour's Abs. page 18, Rec. page 118. He says, "I think I did tell him in that note, if I did not see him to give him the note before 4 o'clock, he would find it in the safe."

5. One thing is evident, Seymour's memory was very faulty—no reliance can be placed upon it. There can be no doubt that Wilson, Tyrrell and Alexander tell the truth. It is not necessary to say, Seymour wilfully misstated it. He was struck down with paralysis August 2d. His memory was impaired. We think perhaps he did not try very hard to remember. But whatever we may say about him, having the utmost charity, his version of the matter is not to be relied on, either from weakness of memory, or from a purpose not to remember or state the exact truth. Alexander and Howard were there to get that note back. The reason, alleged by Alexander, was that he *had been robbed*, *deceived*, *defrauded*, that there was no consideration for the note. Howard went there to aid him, because he "had roped Alexander into the contract." Seymour himself says, at page 13 Abstract; 97 and 98, Record, that he did not tell Alexander that he should not pay that note, and if Rundle found fault about that settlement, he would pay it himself—*at the time of the delivery of the note*—at the very instant of time, but farther on, page record 99, he says, while denying that he made such statement, *at the delivery of the note*, *then*, yet that "I had a "conversation with him in the presence of Howard, very similar

"to that. It was in our conversation previous to that there that "day. I had stated almost as much a good many times in other "conversations."

Now this is just what Howard and Alexander say, that all this was said in the presence of Howard. But Seymour endeavors to make it appear that it was not said *at the very instant of time* when the note went into the safe, and by this quibble, break the force of his statement. As though with his treacherous memory he could tell just what was said at any particular time during that day, in the conversations there. But it was all one conversation, both before and after Rundle left. What was said after was but a continuation of what was said before. This matter had been talked over for three, four, or five days. It had been talked over that morning. Alexander was in earnest; made charges of deception, misrepresentation and fraud. Told Rundle he was a fool or a knave. Seymour said, as Alexander and Howard say he said, that he ought not to pay the note—should not. Seymour says they had a conversation similar to that. He "had stated almost as much a good many times, in other conversations." All this having taken place, Rundle got mad—got up, took the note out of his pocket, gave it to Seymour, even as he says at page 6 of Abstract—"*because I would just as soon he would hold the note, and settle the matter, as myself.*" "To settle the matter in regard to that; to make it satisfactory to Alexander." And Seymour did settle the matter with Alexander, but in the settlement he gained one point, that had not been talked of before—that the note should not be destroyed, but held by Alexander, to see whether the work turned out better; whether there would be any of the profits for which it was given, and how much.

If Seymour's story is true, why did he put the note in the safe? If there was no settlement, why did he not keep the note

himself or return it to Rundle? Why does he say that he "considered no one had a right to take the note out of the safe," if Alexander's rights were not to be protected? Why was it put into the safe and Alexander given a key to the drawer, so that no one could have access to it, if the property in it was not changed, if it continued to belong to Rundle, and he to be entitled to the possession? Why did Alexander, when he found it was gone, at once demand its return, and charge larceny upon Rundle, if Rundle had the right to have access to that drawer, and take the note into his own possession? Why did Seymour say, when told by Alexander that Rundle had done wrong, that he had no right to take that note, more than to take Alexander's horse, if Alexander did not have the right to keep that note for some cause? Why say, even as he puts it—if Rundle has done wrong, prosecute him, and I will stand by you; or, as Alexander and Wilson swear, "do it, and I'll stand by you,"—without the qualification, if he has done wrong, or criminally wrong—if Rundle had a right to that note? If he did not know that Rundle had no right to it, and that Alexander had a right to have it remain in that drawer till the question of profits was settled, and if there were none, have it cancelled; why did he not tell Alexander so, and stop his bluster, instead of saying what either he or Alexander or Wilson say he said? Why did Seymour say in his note from the Tremont House, I have your note, and if I do not see you before four o'clock, to give it to you, you will find it in the safe at 441 Wabash Avenue, if he did not know that Alexander was entitled to keep that note, and did not intend that he should have it? Why did he say to Alexander, in presence of Wilson and Tyrrell, that it was Alexander's property, and in the letter, either call it Alexander's note, or recognise it as belonging to him, if he did not know

that that was the fact ? Why did he make any effort to have it returned, why not leave it in Rundle's possession, if it was Rundle's property ; if what he says as to the transaction after Rundle left be true ; if what Howard and Alexander say was the agreement be not true ; if he did not make some settlement with Alexander about that note, by which Rundle was not to have it, or use it, to Alexander's prejudice, before its maturity ; if it be not true that Alexander was not to pay that note or anything on it, if there were no profits realized on that work, which was the consideration of the note ? The thing is too clear for argument. Seymour and Rundle obtained that note and $3,000 in money without consideration, by making statements which did not turn out to be true, in payment for property and rights, which they did not have to sell, and of course could not nor did transfer to Alexander. The money they had, or had spent it. The note they had. The wrong had been discovered. Seymour was partner with Alexander in the work. He desired to keep in with him. He acted as fairly at the time, perhaps, as he could. But after the work was done, after all business relations had ceased between him and Alexander, he lent himself to the work of getting more money from Alexander. He called upon him and said, pay a part, pay him something. Finally, seeing that Alexander would not recognize any claim, but would give as a charity, Seymour joined with Rundle in this second attempt to filch money from Alexander, by a suit in trover for the note.

The attempt to bring in Miss Seymour, to prove the transaction of July 18th is really atrocious. Read her direct examination. She was fixed up,—stuffed,—to say that, she witnessed the transaction of putting that note in the safe. We do not think she came with any wilful purpose, to swear to what she did not think she knew. But we do think, when you read her cross-

examination—read it from the record, it shows itself worse there than in the abstract—but read it, and see what a pitiable aspect she presented before that jury. She remembered that it was July 18th. "I fix the date because I have an account of it in my diary."

CROSS-EXAMINATION.

Says she kept a diary; entered all her transactions daily in it. At page 490 of Record,—"I looked at my diary this morn-"ing. The very words of my memorandum were merely that I "was down to the office that morning—the morning of the 18th. "That is the only memorandum." Yet on her direct examination she carried the idea—said—she had an account of the transaction in her diary. When she comes to give the words, there is not a syllable about the transaction. Then see how uncertain she is as to the time of the day. Again, on her direct examination, she said she saw a note there; thought it was in reference to Rundle and Alexander.

Cross-examined, she repeated what she had said; but being pressed, she says she did not read the note, nor hear it read. When asked if she heard it stated what note it was, she said,—"Well, I knew what note it was; I had heard my father speak of it." But then she says, I did not hear it read then; I did not hear it stated whose note it was, nor what it was given for. She heard no other conversation between her father, Alexander and Gaytes on the subject, than that her father called Gaytes from the front office into the private room, put the note into an envelope, and told Gaytes to put it in the safe. She also says that Howard was not there.

7. Now no one but she pretends that Gaytes was called into that private office. They were there when Rundle went

away. Alexander stepped to the door as Rundle went out, stood and talked there five minutes perhaps. Miss Seymour says Alexander was not there when she went in, but came in afterwards. If she were there that morning, she could not have gone through the door to that room without meeting Rundle and Alexander. If she went in while Alexander was out with Rundle, Howard was there; and if she could not see him, it is incredible that she can remember what else took place there. Howard says she was not there. She says the note was given to Gaytes in the small private room. Howard says it was not. And Alexander and Seymour say that the writing on the envelope was done by Gaytes in the general office. There was a drawer cleared for Alexander, the note put in there, and the key given him. When on her direct examination she verified her statement by saying, "I have an account of it in my diary," we felt a little, of what General Jackson must have felt a great deal, when he exclaimed in reference to John Quincy Adams' diary: "By the eternal that diary will be the death of me." But when we found that there was not a word in it about this transaction, and that the entry in it, which she called "an account of it," was merely "down to the office," we knew that, that was no account of the transaction, and that she could have found like entries on other days, and that had Alexander fixed the surrender of this note on any other day, her diary (had she not conveniently left it home, after reading the entry of July 18th,) would have contained the same account of the transaction, to wit, that she was "down to the office." Of course she was not a witness to the transaction, because Howard was an actor it, and he was not present at the one she talks about. The transaction Howard and Alexander, and Seymour had, was in the general office, not in the private room, while she did not go into the general office. At the trans-

action we proved, Alexander talked earnestly, as well as Seymour, and there was writing done on the envelope by Seymour's direction. In the one she speaks of, Seymour alone spoke, and all he said was to call Gaytes from the other office, hand the note to him, and tell him to put it into the safe, while Alexander was "dumb as an oyster." But why waste words, ink and paper? The farce is too thin, the story too transparent. Her evidence is not of the weight of a gossamer.

8. We think perhaps this is a proper place to call attention to what Rundle says about the continuance of the firm of Seymour & Rundle, after the sale to Alexander, and his claim that their office continued to be at 441 Wabash avenue, as well as that the safe belonged to Seymour & Rundle when he took the note out of it. (Abs. p. 8, Rec. pp. 53 to 62.)

To show how untruthful his statements were, see the articles of dissolution, page 28, abstract, and Alexander's testimony, following them, from page 168 to 173, record—Howard's testimony abstract 49, record 325, to the end of his direct examination. They both say Rundle's interest in the office, furniture and safe, were transferred to Alexander. Seymour, at page 66 abstract, record 448–9, claims that it was all transferred to him. So that in any event, Rundle was out, and did not tell the truth on this point.

Having presented very fully the facts, as we believe the evidence establishes them, we proceed to state the exceptions to the rulings of the Court admitting and rejecting evidence.

I.

Page 8, abstract, Rundle was asked, relative to what Alexander had told him as to representations about corn, and what

they found when they went to the work. The Court ruled the question out and we excepted. It was an important fact; the question was competent, and it was error to rule it out.

II.

Page 11. See our question. The Court ruled it out, and we excepted. Your honors will remember that after Rundle took that note from the safe, Alexander met Seymour on Michigan avenue. Seymour says that he went direct from that interview to the Tremont House to see Rundle. Alexander and Tyrrell both say—though Seymour denies it—that before noon of the same day Seymour came to Alexander's office; told him he had seen Rundle, and thought he could get the note back, and requested Alexander not to prosecute Rundle, till he heard from him again, and promised that, Alexander should hear from him before 4 o'clock that afternoon. About 3 o'clock Alexander received a note from Seymour on a Tremont House letter-head. Seymour, Alexander, and Tyrrell testify to its contents. If Rundle knew that, that letter was written, and knew the contents, we had a right to prove it to the jury, Rundle was a competent witness to prove it by. It was error to refuse us the right to call out the fact from him. We have a right to assume that he knew, and we had almost said that, he would tell the truth. No matter, the question was proper, the evidence was material, the error is palpable. Had we proved by Rundle that he knew the letter was written by Seymour telling Alexander that he would give him the note, if he saw him before 4 o'clock, if not, he would find it in the safe at 441 Wabash avenue, certainly trover could not have been maintained, for the note.

III.

At the foot of page 13, and top of 14, abstract, we put two questions to Seymour on cross-examination. The Court ruled them out, and we excepted. We had proved Rundle at 441 Wabash avenue that morning, and that, conversation passed there between Seymour, Rundle and Alexander, in presence of Howard. We were clearly entitled to probe it to the bottom; to get out all that was said, both to contradict Rundle and to get at the exact truth. It was error to exclude the testimony.

At page 29 of abstract, Alexander had stated that, after the note was put in that drawer in the safe, his father-in-law, who came to Chicago from Springfield, Mass., to die, gave him a letter or sealed paper to put in his safe, directing him to open it after he was gone. That letter was in the drawer when Rundle broke it open; and as he took the note, and as the letter was gone, the evidence was strong to convict Rundle of taking the letter also. If he took it and did not return it, it was calculated to show that the intent on Rundle's part was feloniouus when he took that note. It was competent, and, although the witness answered, yet the court, in ruling out the question, ruled out the answer. It was error.

IV.

We now state our position as to the facts established by the evidence.

1. Seymour was one of the firm of Hopper, Boyle & Co. in the contract with the Philips & Colby Construction Company for building the first forty miles of the Wisconsin Central Railroad; the date of which, as appears from the assignment from

Seymour & Rundle to Alexander (Abs. p. 33), was Sept. 7, 1871, and in the contract for building the next sixty miles (date of same January 25, 1872), and Rundle had been interested therein from the beginning.

2. From their connection with the work, as shown by the evidence, Seymour and Rundle both were in a condition to know the state and condition of the work and the affairs of the company, and their property on the work.

3. Seymour undertook to negotiate a sale of Rundle's interest, which Rundle knew and authorized, and finally consummated in person, after the terms of it had been worked up by Seymour.

4. In the course of the negotiations with Alexander, which resulted in the purchase by Alexander, and sale by both Seymour and Rundle to him of Rundle's one-sixth interest in the plant on the work, and the profits which they represented had been earned on the work up to that time, Seymour made statements relative to the amount and value of the plant, the amount of profits earned and retained by the construction company, the state of progress of the work, the cost of doing it thus far, and the condition of the sub-contractors on the work. And Rundle himself was present at some of the times, and either participated in or knew what representations were made, and adopted them as his own.

5. The representations were, that the firm of Hopper, Boyle & Co., had invested $33,000 to $35,000 in plant, which, by use and deterioration, was reduced in value as they valued it, to $18,000
That they had in construction company's hands..... 11,000
That they were sure of a bonus of $30,000 to..... 35,000
But they called the retained percentage and bonus $42,000, and

with $18,000 makes $60,000, one-sixth of which is $10,000. Further representations were that, the 85 per cent. of their contract price had paid for the work thus far on the forty miles; that Hopper, Boyle & Co. owed no debts; $1,000 or $1,500 would cover everything; that the work was nearly all let to sub-contractors, who were all at work actively, doing well and making money at prices Hopper, Boyle & Co. had sub-let to them for; and that, while they were a little behind on this forty miles, which by the contract was to be finished by July 15, it was in such a state of forwardness that they would have it all done by Aug. 15, when the $11,000 retained percentage and bonus would all be paid over by the construction company. And that the sixty-mile contract was better than the forty miles, as for the same work they were to receive 25 per cent. more than on the forty miles.

6. Alexander did not go on to the work, nor make any examination further than of these statements made to him; he relied upon their correctness and truthfulness, in determining whether to buy the one-sixth interest, and, believing in their truth, agreed to make the purchase.

7. As a part of the negotiation, one-fourth of the Barraboo tunnel contract was also to be sold and bought—the money which they said Rundle had put into it being $1,500, but on account of the accumulated profits, that was valued at $3,000—and the arrangement was that Alexander should pay this $3,000 in money, and the one-sixth of the plant on the Wisconsin Central, $3,000; which he did, and for one-sixth of the retained percentage and bonus, $42,000, gave his note for $7,000, which he did, and which is the note in question.

8. The $13,000 mentioned in the assignment was made up as above stated, and so understood by all parties, notwithstand-

ing it is called one sum in the assignment which was executed, and is given at 33 abstract.

9. Not one of these representations made as to existing facts were true. The plant was not worth $18,000, nor one-sixth of it. The items given as constituting it were not in existence. They only had about $3,100 retained percentage in the hands of the construction company, and the bonus obtained in fact was only $15,000, (though the construction company agreed to pay $30,000,) because the work was not done in the time agreed upon when they agreed to pay the $30,000, and which would have been done, had the work been in the state of forwardness represented. 85 per cent of contract price had not paid for the work as it went along ; they had drawn on the reserve percentage, so that, as above stated, all was absorbed but $3,100. The estimate for June was less than the cost of labor of men, without the other expenses, by $2,000—pay rolls being $13,000 and estimates $11,000. The debts of the company over and above pay rolls were $15,846,69, as shown by statement at page 25 abstract, and $40,186,52 actually, as shown by the correct account at page 59 abstract.

The sub-contractors had all surrendered their jobs to Hoppes, Boyle & Co., but two, because they could not get pay for the work they had done, could not live on their contracts, and the condition of the work was such as to preclude all hope of completing it by Aug. 15. It in fact was not done till after September 15, and, as Flynn said, the work would ruin any company that undertook to continue it. The amount invested by Seymour & Rundle in the Tunnel Contract was only $2,200 or $2,300—$700 or $800 less than they represented it.

10. Rundle knew that many if not all these material state-

ments were untrue. He certainly knew that the sub-contractors had given up their jobs. He knew that Flynn was threatening to leave the work. He knew that their tools, teams, and supplies, were almost worthless. He knew that the work was not self-sustaining at 85 per cent. He knew the work was greatly behind, and could not be completed by 15th of August. He knew, or ought to have known, that the 15 per cent. provided by the contract to be retained by the construction company, had been drawn upon largely. Seymour knew, or ought to have known, the same thing ; and if it be true. as he says, that, he had statements sent to him every month. of liabilities &c., he knew that the company owed more than $1,000 to $1,500. Why even the letter which he produced at page 63 abstract, shows that June 5th the debts were $6,569,33 more than assets, and if your honors will examine that statement, and compare it with the statements at pages 25 and 59, you will see that, that is nothing like the amount of the actual indebtedness, and still Seymour told Alexander and Howard that the debts were only $1,000 or $1,500. They both knew that, they had not invested $3,000 in the Tunnel contract.

11. We wish particularly to call your Honors' attention to the fact, however, that for all the property, plant, and retained percentage, Alexander was paying, on the statement that the company was out of debt; not that it did not owe more than it had assets. So you see here was an actual debt of $19,364.57, which Seymour knew about when he was assuring Alexander and Howard that they owed nothing—a mere trifle, $1,000 or $1,500 at the outside—which, in transactions of as large magnitude as this, was a mere flea-bite—a drop in the ocean. It was so inconsiderable a thing in this magnificent work, so rich in profits and so successful in the past, with such golden harvest promised

in the future,—as to be passed by with a wag of the head, a shrug of the shoulder, and not to weigh a feather's weight.

12. At this point we feel it our duty to remark upon Seymour's pretence that, he showed that letter and statement written by Montgomery June 5, 1872, to Alexander and Howard. They both say he did not; that they never saw it until it was presented in court on the trial. The uncertainty of Seymour's memory, and the want of recollection evinced throughout, is sufficient to convince any one that, it was never shown by him. But it is so utterly unreconcilable with the fact that, Alexander made the contract he did, to pay Rundle $13,000, the full value of his interest in these contracts, and at the same time knew that, he must pay over $3,000 more, as Rundle's share of these debts. Again, when he produced the statement found at page 25, and claimed that they had misrepresented the amount of the debts, why did not Seymour flaunt this letter in his face, as an answer to the charges of deception, misrepresentation and fraud? Why did not Rundle, instead of getting mad and running away, meet the charge that he was a knave or a fool, with this letter, and refute Alexander's charge that, while they had said the Company was out of debt, its debts were over $15,000, besides the current Pay Rolls for June. No man or set of men, were justifiable in finding no fraud here.

13. But suppose we throw the mantle of charity over these men, and, except where the conclusion is inevitable that they knew their statements to be false, say that they did not know that they were untrue; the case is in no way relieved of fraud. They made the assertion; they did not know whether it were true or false; but making it, saying the facts were so and so, was saying that they knew, what they said, was true, even though they did not expressly use the words, "we know our

statements to be true." It turned out that their statements were not true. Hence they did not know they were true, and it does not alter the case for them that, they asserted a fact to exist which they did not know did exist, even if they did not know it did not. Before a man makes a material statement to influence another to act, he is bound to know that the fact is as he states it to be. If it be untrue, and the other is injured, it is fraudulent. If it be true, but he who makes the statement does not know it to be true, he is just as much a liar as if it had not been true, because the statement involved both the assertion of its truth, and that he knew it to be true—knew it was not untrue. In this case, if you please, Alexander has been defrauded of his money and note, by statements made, which in fact were not true at the time they were made, and which Rundle and Seymour did not know were true, although they did not know they were untrue, did not know either that they were true or untrue—whether they were true or false—but made them without inquiring as to their truth, when the means were at hand to learn their truth or falsity, and when they knew Alexander and Howard were relying upon the truth of their statements, and their knowledge of their truth.

14. But we must urge here that they must have known, did know, that some things they stated were not true. Hence, *falsus in uno falsus in omnibus*, is the rule here. And if it be said that, the statements were made by Seymour, and that he did not know they were not true, and that Rundle, though he may have known that some of the facts stated by Seymour were not true, said nothing ; we answer Rundle cannot enjoy the benefit of a false statement made by Seymour in his behalf, Seymour not knowing but it was true, while as a fact it was known to Rundle to be false.

15. But to return to our enumeration of facts proved, we say it is proved that, on the 18th day of June, Rundle, Seymour, Alexander, and Howard, were at 441 Wabash Avenue, and were talking about these false representations. From the facts above established, Alexander was entitled to have the note returned to him. He was demanding its return. We say that, on that day, before Rundle left, Seymour had said to Alexander, that he ought not to pay that note, should not. We say also that Rundle was proposing a compromise. Alexander was charging fraud. After Rundle had heard Seymour's oft repeated statement, he got up mad, gave the note to Seymour to settle the matter with Alexander, as he had a mind to, and went away. Rundle's own testimony proves it, (read page 6 Aabstract,) Seymour's proves it more than Rundle's, because he says Rundle told him to "do as he was a mind to with it." Howard and Alexander both expressly say he told Seymour that any settlement he made with Alexander, would be satisfactory to him; and they say he told Seymour he had as much interest in the note as he had himself.

16. Then we say further that, the proof is conclusive, that, that note was surrended to Alexander by Seymour. Alexander and Howard say it was, and give the language used by Seymour. Seymour contradicts them, as to the language, at the instant of time, but still he put the note in the safe, in a drawer set apart for Alexander of which he carried the key, that was given to him then and there. The least that can be said is, that the arrangment made there, that day, was that Rundle should not have posession of the note; should not take it from the safe. Seymour claims that he was the possessor of the note and entitled to hold it, and never gave Rundle permission to have possession of it. If Seymour was custodian, he held it for Alexan-

der's benefit, so that if no profits came from that work, he should pay nothing. Hence we say that it was either in Alexander's possession, put there by Seymour's direction, or in Seymour's for Alexanders protection, with no right in Rundle to its possession, nor to any payment on account of it unless there should turn out to be earned profits. And we say that it was in fact in Alexander's possession, his note, and his liability to pay any part of the $7000, was contingent upon there being profits. There was no dispute about the fact being proven that Rundle was not entitled to its possession.

17. Seymour's statement made to Alexander, Wilson and Tyrrell, and the letter to Alexander corroborate the proof, and clinch the fact as being within his knowledge. They also throw such discredit on Seymour's testimony as to render it utterly unworthy of belief. He is utterly impeached on the question of ownership of that note.

18. Rundle had never asked Seymour for the note from July 18th to the time he took it from the drawer. He knew it was in Alexander's drawer. He knew Alexander was away—had gone to bury his dead out of his sight. He knew that Gaytes, the bookkeeper, was away; and, taking advantage of all these these things, and Seymour's illness, he made the raid on that office in possession of the colored boy, procured a locksmith, picked the lock or opened it with false keys, and stole that note and the other private papers belonging to Alexander. Rundle claimed to have a right to be in that office—to be part owner of the safe. But the articles of dissolution contradict him. Howard and Alexander swear that Rundle's interest in the safe went to Alexander. Seymour claims it went to him. Rundle gave his key to the office to Alexander, and thereafter the office was

that of M. T. Seymour & Co. They all contradict Rundle in his false claim to any ownership in that safe, or right to occupy that office.

19. Alexander applied to Seymour for the note. When told that Rundle had taken it, his first exclamation was, he has done very wrong. He had no more right to take that note than to take one of your horses. That meant, he had no right to the possession of the note. Seymour obtained it from Rundle, and proposed to deliver it to Alexander before 4 o'clock of that day; but, lest he might not see him, told him where he could find it—as much as told him to go there and take it—if he did not deliver it in person.

20. Now, July 18, Rundle put that note into Seymour's hands, to settle the matter relative to that trade and the note, with Alexander, as he was a mind. The settlement was, to say the least, as Seymour, Alexander and Howard all agree, that Rundle should not have the possession of the note; and that whether Alexander ever should pay any of the $7,000, depended upon the contingency named. That all agree upon.

21. Rundle could not acquire any right to the possession of that note after that settlement. When he took it from that drawer it was a criminal taking. It gave him no right to the possession, nor to dictate any terms to Seymour, upon which he should receive it from him.

22. Rundle did deliver the note to Seymour. Seymour then and there wrote to Alexander that he had *the* note, or *his* note, and if he did not see him to give it to him before 4 o'clock, he would find it in the safe. That was permission to Alexander to take it. It was a recognition of Alexander's right to it—a right which, by the whole evidence is undisputed and indisput-

able. This one act of Seymour, in getting that note from Rundle, and immediately writing that letter, is conclusive, and gives character to Seymour's testimony.

23. We say there is no evidence against Alexander's right to the possession of that note, except the lame, impotent and false statements of Rundle; and upon the facts, the action cannot be maintained; and against all the other facts, it cannot be that the verdict can stand on Rundle's evidence alone.

Haycraft vs. Davis, 49 Ill., 456.
R. R. Co. vs. Herring, 57 Ill., 62.
Express Co. vs. Hutching, 58 Ill., 44.
Peaslee vs. Glass, 61 Ill., 94.

24. We think we have demonstrated that the note was obtained by fraud, from Alexander, and that in an action on the note, Rundle could not recover anything; and that, therefore, he was not entitled to a verdict in this case.

But, if your Honors shall be of the opinion that, the evidence does not show fraud, but merely shows that Seymour was mistaken, as to the matters stated by him to Alexander; and that Rundle was also mistaken as to his statements; then we say that, Rundle could recover nothing, because the money paid by Alexander was more than the interest in the contracts sold to him, and the consideration for this note has failed. They did not have the thing to sell, which they represented they did have, and of course could not nor did give anything for the note. There is no dispute at all, that instead of profit, there was loss, fully equal to and even more than the $3,100 retained percentage and the $30-000 bonus which the construction company agreed to give them, but of which they never paid but 15,000.

VI.

We will now discuss our exceptions to the instructions given for plaintiff.

1. We claim that, under the evidence, there was no question of fact, to submit to the jury, as to the *right* of Alexander to the possession of that note. The evidence is uncontradicted that, Seymour, with power to do so, had placed that note in Alexander's hands, with power to hold it, at least, till Seymour should demand it—which he never did. Rundle had no right to its possession. Hence we claim that the first instruction is erroneous submitting to the jury to find whether the "note came into the possession of the defendant *without right*."

2. The second instruction is erroneous, because, while it admits that Seymour received the note with authority to do what he was a mind to, yet it withholds from the jury the question, whether in the settlement or arrangement Seymour made with Alexander, Rundle was to be excluded from the possession of that note; and it assumes that Rundle had the right to take that note from the safe, and withhold it from Seymour and Alexander, when the fact and the law is that, when Seymour made the arrangement he did, with Alexander, it placed it out of Rundle's power to take that note from the safe, to the injury or prejudice of Alexander; and, as we have said before, neither Rundle nor Seymour could change the conditions under which it was to remain in that safe, as agreed between Seymour and Alexander. Again, it submits the question of fact to the jury to find whether Alexander took the note from the safe by direction of Seymour, when the letter proved settled the question of fact, and was conclusive that Seymour did deliver it to Alexander. The court must construe the written evidence, not the jury.

3. The third instruction is erroneous, because it contains but one element of evidence of the fraud practiced on Alexander. The representations proved were more than as to value; they were as to the existence of actual property, and then there were suppressions of material facts.

4. The fourth instruction is erroneous, because there is no evidence in the case, either that Alexander did not rely upon the statements made, or that he knew they were false. All the evidence tends to prove he did rely upon them, believed they were true, and had no reason to suppose they were not.

5. The sixth instruction is erroneous, because it tells the jury that, unless Seymour and Rundle knew, or had good reason to believe, their statements false—when, as we have demonstrated, if they made statements for the purpose of inducing Alexander to act, which were untrue, but which they did not know were true—knew nothing about; they were false and fraudulent, because the statement of the facts included a statement that they knew about them.

If one swear to the existence of a fact, which he neither knows does or does not exist—has no knowledge of—it is perjury; and it is a lie on his part, if it be not perjury, even though it turn out to exist, for the reason stated, that the assertion of its existence includes the statement of knowledge of it.

6. The seventh instruction is erroneous: Seymour's connection with that note, on his own showing, even, was such as that his declarations were binding on Rundle, certainly as late as September 14, 1872, when Alexander was seeking the note and Seymour was returning it to him.

VII.

Refusal of the Court to give instructions asked by the defendant was erroneous.

1. The evidence in whatever way viewed, did establish that, the note was part of the consideration for Rundle's interest in the contracts mentioned in the assignment. That Alexander, Rundle, and Seymour, had a controversy in relation to the consideration of the note, and whether it should be surrendered to Alexander. That Rundle did deliver the note to Seymour, because of that controversy, as he says, "*because I would just as soon he would hold the note and settle the matter as myself. To settle the matter in regard to that ; to make it satisfactory to Alexander.*" As Seymour says, to "*take this and do as you are a mind to,*" or, "*as you please.*" As Howard and Alexander say, to "*do as you are a mind to, and whatever settlement you make with Alexander, will be satisfactory to me.* That Seymour did put the note in the drawer, not to be taken out, as he says, "*except upon his orders,*" as Howard and Alexander say, "*to be subject to Alexander's control.* This fixed the rights of the parties. Rundle stole it out, and returned it to Seymour, who returned it to the safe, and by that letter, as the Court was bound to construe the language, as given by Alexander, Tyrrell, and Seymour, Seymour directed Alexander to go there and take possession of it, as he did not see him to give it to him in person. In pursuance of the directions in that letter, Alexander took it.

2. These matters of evidence, being undisputed, the Court was bound to construe the language as, giving power to Seymour to do as he did, and therefore Alexander did not get possession of the note by any wrongful act, but by virtue of ar-

rangement between him and Seymour, who had power to make it, and to deliver the note into Alexander's custody.

3. Rundle, by taking it from the safe, could not, nor did determine Seymour's control over the note, nor Alexander's right to keep it from Rundle's hands, as a protection against a transfer of it to an innocent party before maturity.

4. The first, second, third, and fifth instruction go upon the ground; that inasmuch as Alexander came rightfully into possession of the note, under the circumstances detailed in the evidence, Rundle had no right to demand the possession of it, if Alexander had reasonable grounds to contest his liability to pay the whole, or any considerable portion of the money named in it. While it might be that, were the action on the promise, Rundle might recover the whole amount, yet he could not maintain trover for the note, but must wait till its maturity, and bring his action on the contract.

We insist that such is the law of this case, and that these instructions ought to have been given.

Canfield vs. Munger, 12 J., 347.
Graham vs. Warner, 3 Dana, 146.
Pierce vs. Gibson, 9 Vt., 216.

That trover will not be by the maker of a note which has been paid.

See *Todd vs. Hawley*, 3 Johns, 432.
Kingman vs. Pierce, 17 Mass., 247.
Haines vs. Parkman, 20 Pick., 90.

5. The fourth instruction asked by us was clearly proper and ought to have been given. If the note was deposited in

that safe in the manner detailed by Seymour, in pursuance of the mutual agreement of the three, and under the agreement that, the payment of it should be contingent upon the success of the work, under the Hopper, Boyle & Co., contract, as that should appear, when the work was completed, and all accounts and liabilities growing out of it settled and discharged; it is obvious that, such agreement was for the benefit and protection of Alexander. It is equally manifest that, such agreement deprived Rundle of any right to the possession of that note in the mean time. We think we know, that, there is no question that, the key to that drawer was given to Alexander, and the note placed under his control and in his possession. But however that may be, the propositions contained in the instruction might arise upon the evidence, and the agreement, as to the payment of the note, being made contingent upon success in the work, Rundle had no right to the possession of it. There is no dispute that he had violated the agreement under which the note was deposited in the safe. And it was competent and right for Seymour and Alexander, after Rundle had thus invaded the safe and drawer, and after he had returned the note to Seymour, to provide other safe place for keeping it. Therefore since Seymour told Alexander where to get the note if he did not see him to give it to him, and Alexander took it from the safe, upon the implied direction contained in Seymour's letter to do so, such taking by Alexander was not wrongful. And since Seymour had acquiesced in Alexander's possession, and indeed Rundle too, up to a short time before this suit was commenced, the jury ought to have been allowed, when we requested it, to pass upon the question of fact as to the agreement. And since it was clear from the evidence that, the contingency, supposed, had not happened; that under the supposed agreement, the contingencies never can happen, and

Rundle could never be entitled to payment of that note; that there was no liability, on Alexander's part to pay it; that Rundle could not have recovered anything from Alexander on account of the note, the instruction ought to have been given. The jury ought to have been directed to pass upon the questions of fact embraced in that instruction. If Rundle could not maintain an action on the note, he was not entitled to the possession of it, but Alexander was. If, for any cause, Alexander was discharged from liability on the note, having possession of it under the circumstances detailed in the evidence, he was entitled to retain it. If the agreement supposed in the instruction had been made, and there had not been the success on the work, upon which Alexander was to pay, then he was discharged, and if discharged, he, not Rundle, was entitled to the possession of the note.

We asked other instructions, which were given, but none which embodied the propositions contained in this one. We had the right to have the jury pass upon these precise questions. If they had been submitted to them, the verdict might have been different.

6. The Court refused to give our ninth instruction as we asked it. We claim, and in our argument on the evidence have demonstrated that, a party who makes statements, to influence another in his actions, which are not true, are false statements, even though the party did not know whether they were true or false, if he he did not know they were true when he made them. It is fraudulent for one to make statements, which are not true, when he has no knowledge whether they are true or false, and if another acts upon them, and damage ensues, the action for the deceit can be maintained. Carry the thought one step farther. If I assert that a fact is so and so, he to whom I make the asser-

tion, assumes, and with warrant, that I know what I assert, to be true. If I have no knowledge on the subject, or if I am repeating what others have told me, I ought to say so ; my duty is to disclose that fact ; it is a material ingredient in the statement, because to assert a fact, is to assert that I know what I assert ; and my knowledge is material ; hence, if I do not know, or am only giving information derived from others, having no personal knowledge, I suppress a material fact, to wit, that I do not know that to be true which I say is true, or that I am only repeating what I have heard told. A witness who testifies to a fact, speaks of his own knowledge, and his testimony is competent, but if he say I only know what I have been told, it is not competent, and he would not be allowed to say anything. So we say that, the Court ought to have given this instruction, as we asked it, and it was error to alter it by striking out the words "*or which they did not know to be true.*"

For authorities that, an action in case lies for a false affirmation, made with intent to defraud, and damage ensues, and that withholding the knowledge of a material fact, suppressing the truth with like intent, renders a party equally liable.

See *Pasley vs. Freeman*, 1 Term, 51.
Eyre vs. Dunsford, 1 East., 318.
Haines vs. Alexander, 5 Bos. & Pull., 241.
Upton vs. Vail, 6 Johns, 182.
Ward vs. Center, 3 id. 271.
Tapp vs. Lee, 3 Bos. & Pull., 367.
Corbitt vs. Brown, 8 Bing. 35.
Allen vs. Addington, 7 Wen., 9.
Addington vs. Allen, 11 Wen., 374.
Boyds, Exrs., vs. Brown, 6 Bar., 301.
Baker vs. Walker, 2 Harris Pa., 139.

That withholding material facts, is not only evidence of falsehood, but of fraudulent intent.

See *Eyre vs. Dunsford*, 1 East., 318.
Addington vs. Allen, 11 Wen., 371.
Boyds, Exrs., vs. Brown, 6 Bar., 31.

7. The eleventh instruction asked by us should have been given. It is similar to the fourth, and we have given our views as to that fully. There is this further reason why this instruction ought to have been given. This supposes, (and there is evidence to support it,) that, after Alexander's claim that he had been deceived, and in view of all the facts proved by the evidence, it was agreed that Seymour should hold the note, for Alexander's protection, so that Rundle could not assign it before maturity, and thereby cut off any defense Alexander might have to it, after completing the work, and ascertaining whether the result should be loss or profit, and that it should not be delivered to any one except upon Seymour's direction. If such an agreement had been made, it would have been binding and valid, and Rundle would not be entitled to the possession of the note, unless Seymour directed it to be given to him. Not having the right to the possession, he could not maintain trover for it, nor any action till it matured. In view of the fact that, Seymour not only had not directed the note to be delivered to Rundle, but when he stole it out of the safe, where Seymour put it, he at once compelled a return of it, and then directed Alexander to go to the safe and get it, the jury ought to have been directed to inquire into this suggestion in this instruction; and we believe they might have found a verdict for us had they been so directed.

VIII.

The court erred in refusing a new trial. We have discussed all the material points in our motion heretofore in this brief—except the VI—and think we have demonstrated beyond dispute or refutation that, we ought to have been accorded a new trial. We do not think there is any ground for sustaining the verdict on the evidence; and we do think the court greatly erred in giving and refusing instructions, in the particulars we have complained of.

We will add, as to the VIth point in our motion, that, the fact that the verdict was for only about half the note, manifests that, the jury utterly disregarded the facts and the law. Of course we say no verdict should have been given against us. We think that, had the jury regarded at all the instructions given by the court upon our request, no verdict could have been given against us. It is impossible for twelve men, acting honestly and fairly, without prejudice or passion, to find that Alexander was guilty of converting that note to his own use, or that he did not have good right to retain it.

But if Rundle was entitled to recover $3,757.39, he was entitled to recover $7,000 and interest from the 24th day of June, 1873. That man does not live who can, by mathematical calculation, cypher that verdict out of the facts of the case. The data does not exist from which that result follows. It was a gambling verdict, given in utter disregard of law or facts; the result of passsion and prejudice. If you discard Rundle's testimony, there is no evidence tending to prove his case. Seymour, Howard and Alexander contradict him on the real material points; and the bare reading of his testimony convinces the mind that he is utterly unreliable, utterly unworthy of belief.

This court has decided, in this class of cases, that a verdict which rests upon the testimony of a plaintiff, shaken and overwhelmed as Rundle's is in this case, cannot stand. See—

Haycraft vs. Davis, 49 Ill., 436.
R. R. Co. vs. Herring, 57 Ill., 62.
Express Co. vs. Hvtchins, 58 Ill., 44.
Peaslee vs. Glass, 61 Ill., 91.
American Merchants Express Co. (*Barrett & Fargo*) *vs. Spades*, and
Palmer vs. Richardson, M. S. of Sept., Tenn., 1873.

SLEEPER & WHITON,
ATTORNEYS OF APPELLANT.

No..... Agenda No.....

STATE OF ILLINOIS,

Supreme Court,

Northern Grand Division,

September Term, A. D. 1874.

APPEAL FROM COOK.

ELIJAH S. ALEXANDER,
Appellant,

vs.

DAVID F. RUNDLE,
Appellee.

Brief and Points.

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.....

CLERK.

SLEEPER & WHITON,

FOR APPELLANT.

E. B. STILLMAN & Co., Printers, 145 Clark St.