No. 8480

Supreme Court of Illinois

John V.& J.N.Davenport

---

vs.

Nathan D.Haynie

Know all men by these Presents that we John V Davenport James A Davenport and ~~Sandy~~ John Cunningham ~~Nelson~~ of the County of Marion State of Illinois are held and firmly bound unto Martha D Haynie and William D Haynie a minor both of the County of Jefferson in said State of Illinois in the penal sum of One Thousand Dollars current money of the United States for the payment of which, well and truly to be made, we bind ourselves, our heirs executors and administrators jointly severally and firmly by these presents. Witness our hands and seals this 21st day of May AD 1861.

The condition of the above Obligation is such, that whereas the said Martha D Haynie and William D Haynie a minor by said Martha D Haynie his next friend, did on the fourth day of April AD 1859 as of the March Term AD 1858 - in the Circuit Court in and for the County and State aforesaid recover a judgment against the above bounden John V Davenport and James A Davenport for the sum of $401.06 to which a credit was adjudged of $80.06 leaving said judgment due for the sum of $321.00 damages and $54.17 costs from which said judgment or decree of the said Circuit Court, the said John V Davenport and ~~John~~ James A Davenport prayed for a writ of error Supersedeas on ~~Appeal~~ to the Supreme

L 8480-17

Court of said State. Now if the said John V Davenport and James A Davenport shall duly prosecute their said Supersedeas and ~~Appeal~~ writ of Error with effect, and shall moreover pay the amount of the judgment, costs, interest and damages rendered, and to be rendered against them in case the said judgment shall be affirmed in the said Supreme Court, then the above obligation to be void, otherwise to remain in full force and virtue

Taken and entered into before me at my Office at Salem this 22nd day of May AD 1861.
J. O. Chance Clk

John V Davenport (LS)
James A. Davenport (LS)
J. Cunningham (LS)

State of Illinois }
Marion County } ss James Bassett of said County being duly sworn saith that John V Davenport. James A Davenport and John Cunningham whose names are mentioned in the foregoing Bond and who executed the same are men of abundant Real and personal Estate in said County to satisfy the condition of the foregoing Bond and more than treble same over and above their just debts and liabilities.

Subscribed and sworn to before me in }

James Bassett

In Subpoena Equity

6

John V. d. Jones &
Davenport.

vs

Martha d. Haynie
et al

Bond & Subpoena
Issued

Filed June 4. 1861.

Noah Johnston Clk

Supreme Court of Illinois.

November Term 1861.

John V. Davenport et al.
vs.
Martha D. Haynie et al.
} Appeal from Marion.

P. P. Hamilton being duly sworn saysth and says that the record in the above styled cause now on file in the Supreme Court is imperfect in this- that it does not contain a copy of the Bill, answers or replications in said cause, nor any thing purporting to be a copy. Wherefore he, as attorney for said plaintiff in error, prays that a certiorari may be awarded to the Clerk of the circuit court of said Marion county, commanding him to send up a full and complete record herein.

P. P. Hamilton

Sworn to & subscribed
before me Nov. 12. 1861
S. Johnston Clk

L 8480-3

6

Iuka Nov. 14-1861

A. Johnston Gen

State of Illinois,
SUPREME COURT,
First Grand Division. } ss

The People of the State of Illinois,

To the Sheriff of Jefferson County.

Because, In the record and proceedings, and also in the rendition of the judgment of a plea which was in the Circuit Court of Marion county, before the Judge thereof between Martha D. Haynie and William D. Haynie a Minor, by his next friend, the said Martha D. Haynie plaintiffs and James Marshall Lee, James A. Davenport, John V. Davenport, Robert M. Nichols and Rufus P. McElwain defendants, it is said that manifest error hath intervened to the injury of said James A. Davenport and John V. Davenport as we are informed by their complaint, the record and proceedings of which said judgment, we have caused to be brought into our Supreme Court of the State of Illinois, at Mount Vernon, before the justices thereof, to correct the errors in the same, in due form and manner, according to law; therefore we command you, that by good and lawful men of your county, you give notice to the said Martha D. Haynie and William D. Haynie minor as aforesaid, &c.

that they be and appear before the justices of our said Supreme Court, at the next term of said Court, to be holden at **Mount Vernon**, in said State, on the first Tuesday after the second Monday in November next, to hear the records and proceedings aforesaid, and the errors assigned, if they shall think fit; and further to do and receive what the said Court shall order in this behalf; and have you then there the names of those by whom you shall give the said Martha D. & William D. Haynie notice together with this writ.

WITNESS, the Hon. John D. Caton Chief Justice of the Supreme Court and the seal thereof, at MOUNT VERNON, this fourth day of June in the year of our Lord one thousand eight hundred and sixty-one.

Noah Johnston
Clerk of the Supreme Court.

SHPO-H

Executed June 5th 1861. By reading to Martha D Haynie. and William D Haynie

Serving 1.00
Returning 1.00

C. G. Vaughn Sheriff
pr E. J. Winton D.S.

111

6

SUPREME COURT.
First Grand Division.

Lewis A. Davenport &
John C. Davenport

Plaintiffs in Error,

vs.

Martha D. Haynie &
William D. Haynie

Defendant in Error.

SCIRE FACIAS.

FILED.

186

The writ of Error which is issued and filed in this Cause, is made a Supersedeas, and as such is to be obeyed by all Concerned —
June 4 — A. D. 1861 —

Noah Johnston Clk

Davenport et al.
Plffs in error
v
Haynie et al
Defts in Error

Sup Ct. 1st G. D.
Nov T. 1861

W H Green being first duly sworn says he is Atty for the above defendts in Error; and on examination of the record filed in said cause, he finds that the abstract & brief are not made from the record, but from papers which should have been therein; also that the assignment of Errors is made on the record and refers to papers not therein; and Affiant has been informed & verily believes that the Bill, answer, replication & Evidence were all purposely omitted by Plffs in Error or their Atty in order for delay in the cause. — Affiant further states that it is apparent the Supersedeas was ordered upon a false abstract, the abstract filed not being an abstract of the record which is herein filed. Affiant therefore prays that said Supersedeas may be quashed, unless the record herein filed shows cause for its Continuance.

W H Green.

[6480-5]

1861

State of Illinois }
Macon County } ss

Error from Macon County
Circuit Court

John V Davenport and
James A Davenport
vs
Martha D Rayne et al

Abstract of Record
& Brief of points for
Plaintiffs in Error.

Abstract.

Pages. 1. The Decree of April A. 1859 of March Term 1859 approving draft final Decree, and directing Record of Judge Breese' Decree.

page 2 to 4 The Decree of Judge Breese directing Reference to Master in Chancery.

page 4 & 5 The Masters Report thereunder

page 5 to 7 Report of Receiver appending to said Report

page 7 to 8 Exhibit A to Report being Abstract of evidence before the Master in Chancery

page 8 & 9 The final Decree entered as of March Term A.D 1858 as

Points

The plaintiffs in Error John V Davenport and James A Davenport. submit the following points.

I The final Decree is unwarranted by the Masters Report and Evidence on which it is based — It is a Decree against James Marshall James A & John V Davenport for $321 and costs. but the Report and evidence in no way show that either of said persons owed complainants Rayne any such sum either jointly or severally

[8480-4]

II The final Decree is contrary to the said Report and Evidence—

1st— The evidence shows that B F Marshall and James A Davenport were tenants from death of A F Harpie to June 15. 1853 at $4 per month. that is from 13th July 1851 to Jan'y 15. 1853. 18 mos at $4. being $72. as in Report. The Decree should be against B F Marshall and James A Davenport for $72. but B F Marshall is not a party to the Cause. (See title of cause). he is a necessary party as a privy to be bound by the Decree.

Bruff v Leder 5 Gill 210. Montgomery v Brown 24 Gil 581 Martin v Dryden 1 Gill 187 Scott v Bennett 1 Gil 646 2 Paige 278 Bailey v Ogden 7 Conn Rep Cowden v Higgins 1 McCord. Russell v Smith Allen v Hall 1 A K Marsh Rep 527. See 3 Am Chy Dig pages 155 & 156 & cases cited—

2nd— The Decree is against James Marshall. John V and James A Davenport for $321. but the evidence shows that. they are owed that B F Marshall and James A Davenport owed $72. James Marshall is not B. F Marshall— ~~The Decree is clearly contrary to the Report and evidence. is therefore erroneous~~

3d— The evidence shows that John V and James A Davenport were tenants from Jan'y 15. 1853 to Dec'r 1853 at $6 per month, that is for 11 months at $6 being $66. This is clearly part of the $144 in Report. If a Decree were to be had against John V and James A Davenport jointly it should be for only $66. But it is a Decree against James Marshall (shown by the evidence to owe nothing) and James A & John V Davenport

for $321. while the evidence shows the Davenports if liable at all jointly were only so for $66 and not for $321, and in no case jointly liable for any sum with James Marshall, or even with B F Marshall.

4th The Evidence shows that Robert McNichols was tenant at $6 per month from Dec 1853 to some time in 1855. That time in 1855 is defined by the Report to be Jan 15. 1855. That is for 13 months at $6. or $78. and is the balance of $144 in Report. — The decree should as to $78 be ~~for~~ against Robert McNichols. but it is not against James Marshall and the Davenports —

5th — The Report estimates the rents from Jan 15. 1855 to April 5. 1856 (time of appointment of Receiver. See Receivers Report) at $108. The Evidence does not show who occupied during that time. the Report says nothing on it. There is therefore no basis for a decree as to that sum against any one. Still less is there any basis for the decree of $321 against James Marshall and the Davenports.

It is clear the decree is contrary to the Evidence and Report and is therefore erroneous.

5480-71

III The decree is inequitable and illegal.

1st It is Inequitable. It binds James Marshall on evidence showing B F Marshall is liable to a certain extent. A debtor is disclosed not a party, yet the Decree overlooks the necessity of his party — 2nd — It binds James Marshall and the Davenports jointly, while no such joint indebtedness is shown by the evidence but the contrary. 3rd — It binds John V Davenport & James A Davenport jointly in $321, while the evidence shows a joint liability (if any) in them for only $66.

4th — It does not bind B F Marshall & James A Davenport jointly for $72, which it should do on the evidence. B F Marshall should be a party. 5th — It does not bind R M Nichols, but it does bind James Marshall and the Davenports strangers to Nichols debt — 6th It binds James Marshall and the Davenports for $321, while $105 of that sum is by the Report not defined as due by any one, and the evidence does not disclose who should pay that $105.

2nd It is illegal — as binding strangers to pay the debt of B F Marshall (not a party) and R M Nichols (a party) the strangers to their debts are James Marshall & the Davenports —

IV

3 Bibb 108
3 am ch Dig 169 —

The Decree should be amended.

1st. B J Marshall should be a party

2nd — Making him a party, the Decree should be against him and James A Davenport for $72.

Sugars v Henderson
1 Bland 256
1 Am Ch Dig 900

3rd — It should be against John D & J A Davenport for $66.

Brown v Dryden
2 Black 230
Conley v Ridgway
Wallace Dig 175
1 Am Ch Dig 572

4th — It should be against R M Nichols or his representative for $78.

Shepherd's Exrs v Starke
3 Munf 29
1 Am Ch Dig 578

5th — The Report should have declared who were liable for the $105.

Scott v Bennett
1 Gil 646.

6th — When that was ascertained, the Decree should be against the persons so ascertained.

The rest of the $401.06 in Report, to wit $80.06 is allowed and accounted for by Receivers Report.

V.

The Decree being unwarranted by the Report and evidence, — being contrary to the Report and Evidence — being irregular and illegal should be set aside, and a new Reference ordered. and a modified Decree made.

Matthews v Dryden
1 Gil 187
Scott v Bennett
1 Gil 646

3 Green Rep 212
1 Am Chy Dig 500
5 Wheat 424
Am Chy Dig 503

Supersedeas is prayed. so that the Supreme Court may settle the Equities

Sugars v Henderson
1 Bland 256
1 Am Chan Dig 506.

P. P. Hamilton & E Beecher

[illegible] Sol^rs for Davenport

[3480-B]

Supreme Court

6

John V L J Wendell

vs

Martha D Haynie
et als

Haynie

Abstract Points

Hamilton Jones &
Bassett

Filed June 4. 1861.

Nash Johnston Clk

8480

At a Supreme Court, of the State of Illinois, begun and held at Mount Vernon, within and for the first Grand Division of said State, on Tuesday the 11th day of November, in the year of our Lord one Thousand eight hundred and sixty-two to-wit: On Friday the fourteenth day of November, in the year of our Lord one Thousand eight hundred and sixty-two.

Present, the Hon. John D. Caton, Chief Justice.
" " P. H. Walker, Associate "
" " Sidney Breese, " "

" James A. Davenport &
" John V. Davenport.
" Plaintiffs in Error.
" vs
" Martha D Haynie &
" William D Haynie.
" A Minor, by his next
" friend, the said Martha
" D Haynie - Defts in Error

Error to Marion.

" On this day came again the said
" parties, and the Court having delegently
" examined and inspected, as well the
" record and proceedings aforesaid, as
" the matters and things therein assigned
" for error, and being now sufficiently
" advised of and concerning the

[0480-9]

" premises, are of opinion, that in the record
" and proceedings aforesaid, and in the rendition
" of the decree aforesaid, there is manifest error:
" Therefore it is considered by the court, that
" for that error and others in the record
" and proceeding aforesaid, the decree of
" the Circuit Court in this behalf rendered,
" be reversed, annulled, set aside, and
" wholly for nothing esteemed, and that
" this cause be remanded to the Circuit
" Court for such other and further
" proceedings as to law and justice
" shall appertain. The whole with the
" costs against the said defendants
" in Error."

Opinion by
Walker. J.

The decree in this case, is not questioned,
" in so far as it requires the master to
" convey the property in controversy, to
" the defendants in error. It is however
" insisted, that it is erroneous, in requiring
" the plaintiffs in error, to pay rents to
" defendants in error, until they are
" reimbursed for improvements made on
" the property. It is admitted, that when
" Moses H. Hayes and James Marshall
" entered into partnership, that the property
" belonged to the former; that alterations

" and additions were made, so as to render
" it more convenient for their business, and
" that the property was occupied by them
" during the continuance of the partnership.
" Upon a dissolution it was agreed, that
" Marshall should repay Haynie his
" capital with fifty per cent advance.
" It is insisted by Marshall, that he
" was to retain the property until his
" advances for repairs, were reimbursed
" by one half of the rents. One witness
" has testified. That Dr Haynie should
" have made such an agreement is at least
" highly improbable. The property was his
" own, he was to pay for the improvements,
" and no reason is perceived why he
" should make a gratuity of such a sum
" to another, having no claims upon
" him. It seems much more reasonable
" to suppose the witness to have been mis-
" taken, or that has forgotten what was
" said by the parties, than to suppose, that
" such a sum would have been given
" without any apparent reason, or without
" some equivalent. Again, another witness
" testifies that Marshall admitted to him,
" that he was to pay four dollars a month
" during the first year and six dollars
" per month afterwards. Nor does it seem,

" that he limited or in any manner qualified
" this admission. If only half of that sum
" was to have been applied on the repairs,
" it is strange, that he failed to state that
" fact at the time. We think the evidence
" fails to show, that the rents was to be applied
" upon the repairs. That such was the
" arrangement for the use of the building
" during the continuance of the partner-
" ship is probably true. And it is probably
" true, that all the matters relating to
" rents and repairs were adjusted up
" to the time of the dissolution.

" But the decree is manifestly erroneous,
" in requiring all of the defendants to pay the
" amount of rents ascertained to be due
" to defendants in error. They did not
" occupy the property jointly, but severally,
" at different periods, and each plaintiff
" in error could only be liable for the rents
" which accrued whilst he occupied the
" property, except James Marshall, from
" whom the others lease. He was undoubtedly
" liable for all the rents, during its occup-
" ancy after Dr. Haynie's death. And each
" of the others for all rents which accrued
" after they were notified not to pay to
" Marshall. There seems to be no evidence
" to hold them jointly liable for all the rents.

" For these reasons the decree of the Court
" below must be reversed and the cause
" remanded."

State of Illinois. SS.
Supreme Court of said State.
First Grand Division.

I, Noah Johnston, Clerk of the said Supreme Court, of the State of Illinois, do hereby certify that the foregoing is a true copy of the final Order and of the Opinion of the said Supreme Court, in the above entitled cause, of record in my Office. In Testimony Whereof, I have hereunto set my hand and affixed the Seal of the said Supreme Court, at Office in Mount Vernon, this Seventh day of May, in the year of our Lord One thousand eight hundred and Sixty-three.

Noah Johnston Clk

L 8490-11

No 6

Davenport et al

vs.

Haynie et al

1862

Supreme Court of Illinois, at Mt Vernon.
Nov. Term. 1862.

James A. Davenport, &
John V. Davenport
vs
Martha D. Haynie et al.

Error to Marion.

Brief of Pltffs in Error.

Although the record in this case is voluminous, yet the facts necessary to be considered on the hearing are few and simple. The question as to the title to the Lot is not now before the Court. That was settled by the decree, and with that part of the case we nothing to do. But it may be, and in fact is, necessary to inquire, whether Marshall was rightfully in possession, and entitled to the rents, of the lot. If he was, and plaintiffs in Error held under him, and paid rent to him, they of course are protected from paying again.

In presenting our views, briefly, we assume that:

1st. Marshall was rightfully in possession of the lot in controversy, and entitled to the rents.

There can be no question but that he went into possession by the consent of Dr. Haynie; and that there was an agreement between them that he should retain the possession until the rents amounted to the sum Marshall had paid out on the building in improvements, is clearly established by the testimony of B. F. Marshall, who was called by the parties to witness their agreement. p. 77. 78. of record. J. V. Davenport, a witness examined by complt, sustains him, although he was not a witness to the contract. p. 71. And in the Supplemental bill filed by complt, they admit there

was such an agreement, alleging however, the amount expended by Marshall was not over $261.08. p. 110.

To avoid the effect of this agreement, complainants set up and rely upon the Statute of Frauds. Marshall, by their statement, had expended on the premises, $261.08, and was in possession under the agreement. If these facts will not take a case out of the statute it is difficult to conceive what will. Possession and part performance, such as payment of the purchase money, have ever been held sufficient for that purpose. Then we think we are justified in saying Marshall had a right to the rents, until he was reimbursed what he had expended, or at least the amount complainants admit he expended.

2d. If we are right in the foregoing proposition, then it follows that Davenports cannot be liable to complainants; for the evidence shows they were the tenants of Marshall and paid the rent to him. pages 70. 77. 78.

3d. Or, if liable for any thing, it would be for but a small part of the amount decreed against them.

The Masters Report shows amount of rent from the death of Dr. Haynie to be $401.06. p. 106. In this was improperly included $80.06, which had been paid to the receiver, and by him to complainants, and for which they consented a credit should be entered on the decree. p. 167- leaving $321.00, as the real amount against defendants below. From this account $261.08, which in the supplemental bill they admit to be due for improvement, and it leaves only $59.92, really due complainants from any one, even if their statement of the amount of improvements is enough.

4th.

But there is another view which we think conclusive, so far as relates to the present plaintiffs in Error. This decree was joint against the Davenports and Marshall for $401.06. The Masters Report shows that B. F. Marshall, (not one of the defendants below), and J. A. Davenport occupied the premises from the death of D. Haynie until the 13th. of January 1833. J. A. & J. V. Davenport occupied from that date until Dec. 1833. Now B. F. Marshall is one that ought to be charged, and yet he is not made a party. J. V. Davenport, who only occupied about one year, is charged with the rent for the whole time. A bare statement will show the error as to the Davenports.

The statement of the time each one occupied is fully set forth in a brief prepared by P. P. Hamilton Esq. and now on file among the papers, to which the Court is referred.

And in conclusion we insist, That under the contract between Marshall and Haynie, Marshall had a right, by himself or tenants, to occupy the premises until he was reimbursed the amount expended by him. That the Davenports having paid the rent to their landlord, they are not now responsible to Complainants. That taking the most favorable view for complainants, Davenports ought not to be charged for any more than the time actually occupied by them; and that J. V. Davenport cannot be made responsible for the time the property was occupied by J. A. Davenport.

Edwin Beecher,
for Plff. in Error.

[8480-14]

6

J. A. Davenport et al

vs.

Martha D. Haynie et al.

Brief of Pltff. in Error.

Filed Dec. 8. 1862.

N. Johnston Clk

Supreme Court---Illinois.---First Grand Division, November Term, A. D. 1862.

STATE OF ILLINOIS, } ss. ERROR FROM MARION.
MARION COUNTY. }

James A. Davenport and John V. Davenport, — PLAINTIFF'S IN ERROR.

vs.

Martha D. Haynie and William D. Haynie a Minor, by his next friend Martha D. Haynie, — DEFENDANT'S IN ERROR.

ABSTRACT OF RECORD.

1 & 2 Precipe and security for costs. R. S. Nelson security filed 25th April, 1853.

2 1853. April 25th. Original Bill filed by Defendants in Error as Complainant against Jas. Marshall, James A. Davenport, John V. Davenport, Thomas F. Houts, Willis D. Green, William D. Haynie and Isham N. Haynie, Defendants.

States—That Complainant Martha D. is mother of Comp't William D. Haynie, a minor under 14 years of age who sues by her as his next friend and that they reside in Jefferson county, Ills., that Martha D. is widow of Abner F. Haynie late of Marion county deceased. That said William D. is the only surviving son and heir at law of said Abner F. with said Martha D.

That at August Term, 1847, of Marion County Circuit Court, the School Comm'r of said County filed his Bill in Chancery against one William D. Haynie to foreclose a Mortgage on Lot 2, Block 2, Square 4, in original Town of Salem, executed by said William D. for the use of the Inhabitants of Town 2, Range 2, in Marion County. Said Bill, Mortgage and Note are annexed to original Bill as Exhibit A.

That at said August Term, 1847 of said Circuit Court a Decree was had in said cause, directing sale of said premises, and appointing Thomas F. Houts, Special Comm'r to sell, who on the 6th of May, 1848, sold same to said Abner F. for $100, who gave note and Mortgage as required by said Decree, and thereupon became entitled to a conveyance thereof from said Houts, whose duty it was to make such conveyance, as will appear from said Decree and Houts reports who made his final report August Term, 1848. The Decree and final report are annexed to original Bill as Exhibit B.

That from some cause unknown to Comp'ts said Houts did not convey, though said Abner F. complied with the Decree and orders of said Court.—Charges that said Abner in Law and Equity is entitled to said conveyance from Houts. That said Abner being then in feeble health died 1st of July, 1851, without getting said conveyance.

That on 11th of June, 1851, said Abner made his last will, and subject to his debts which were few, and are or will soon be paid without recourse to his real-estate, he except a few legacies bequeathed all his real and personal Estate to Complainants share and share alike, and appointed Defendants Willis D. Green, W. D. Haynie and Isham N. Haynie his Executors, who proved said Will in Marion County Court. Will annexed to the Bill as Exhibit D.

Charges that said Comp't Martha D. under said will is entitled to one undivided moiety of said Abner's real and personal Estate, and by law equally with her infant son Co-Complainant to said Town lot No. 2, and to the rents thereof as fully as said Abner could and to an undisturbed title therein and to a deed therefor.

That Def't James Marshall said Abner's brother-in-law, taking advantage of his feeble health for years before his death got possession of said Town lot and for 3 years and upwards last past has retained possession, and has rented or leased same to Def't James A. and John V. Davenport who are in possession, though said Marshall never had any legal or equitable right thereto, and knew he was an illegal intruder therein—that said Davenport well knew Marshall had no right thereto. That Abner in his lifetime in a friendly way besought Marshall to surrender possession, and Compl'ts and others on their part since Abner's death have also so requested, that he refused.

10 Charges combination of said Marshall with the Davenports to defraud her. That they have committed waste by tearing down a partition wall, which divided the store into two rooms and unauthorized by Compl'ts since death of Abner, built another building on the premises, and since Davenports possession of no use to Compl'ts. That said Marshall and Davenports or some of them owe the rents of said Town lot since Abner's death to them—am't $200 and upwards, which they refuse to pay, and keep possession committing waste from day to day without license contrary to Equity.

11 *Pray.*—that Marshall, James A. and John V. Davenport, T. F. Houts, W. D. Green, W. D. Haynie and I. N. Haynie be def'ts. That they answer (oath being waived.) *Pray,* that Houts or some other person to be authorized thereto make Compl'ts a conveyance of said Town lot.—

12 *Pray* account and payment by Marshall and Davenports of the rents since Marshall got possession. *Pray* Injunction against waste. *Pray* Decree of possession and that title be quieted.—

13 *Pray* compensation for waste and summons and further relief.

Exhibit B to Bill.—Being Decree of sale in case in Marion Circuit Court of 11th of August,

14 1847, in cause School Comm'r vs. William D. Haynie on foreclosure of Mortgage for sale of said Town lot and appointing Houts Comm'r to sell and convey, &c.

15 August Term, 1848, Marion Circuit Court. Report of Houts Comm'r of sale of said Town

16 lot to Abner F. Haynie for $100, who complied with the Decree by giving note and Mortgage &c. Report approved.

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17 *Exhibit D.* June 11th, 1851. Will of Abner F. Haynie.

18 Evidence for probate thereon.

19 Order of Marion County Court (4th Aug. 1851) probating said will.

21–25 *Exhibit A.* Copy Bill filed in Marion Circuit Court, School Comm'r vs. W. D. Haynie for foreclosure &c., &c.

25–27 Copy Mortgage and note attached thereto.

28–29 Copy Summons on original Bill. Martha D. Haynie et als vs. James Marshall et als. Sheriff's return.

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30 Answer of Thomas F. Houts—filed 30th Aug't 1853.

31 Admits his appointment at Aug't Term, 1847, by Marion Circuit Court as Comm'r to sell and convey said Real Estate. Admits sale on 6th of May, 1848, of same that James Marshall

32 purchased for $100, who shortly afterwards directed him to make the Certificate of sale to Abner F. Haynie, who was then absent.

That on Abner's return Def't called on him when he perfected the sale and paid fee &c.,

32 when Houts gave him the usual Certificate of purchase.

That about expiration of 15 months from sale, he informed said Abner, he was entitled to a Deed and would get one on surrender of said Certificate. That Abner searched therefor and fi-

33 nally said it was lost. Submits he Houts was not guilty of neglect in not executing the Deed.

That after Abner's death I. N. Haynie one of his Executors conversed with Houts thereon,

34 and agreed to state the matter to the Court which was not done. That Houts told him afterwards if he got the Certificate or made affidavit of loss, he would make the Deed.

That such affidavit was made and is annexed to his Houts' answer. That said Executor ask-

35 ed for the Deed, which Houts executed and gave to W. H. Green, Esq., attorney for Complainant telling him it was worthless, being made to a dead man. That Green said it was not Houts' fault.

Affidavit of I. N. Haynie of loss of Certificate of purchase.

---

36 General Replication to Houts' Answer filed 30th Aug't, 1853, which was afterwards withdrawn, see Record page 61.

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37 *Answer* of Defendant James Marshall filed 30th of Aug't 1853. States—That in Spring of 1847 he was keeping a Drug Store in Salem in his own house, when Abner F. Haynie proposed to him to enter into partnership that they agreed to do so. Stock estimated at $600—$300 one

38 half thereof Abner was to pay. Haynie to attend to his practice as a Physician, Defendant to the Drug store, and to share equally in profit and loss. That they continued in business that year. That said Haynie did not pay said $300, nor for his Drugs during that year.

That in Feb. 1848, Haynie complained of bad health, and wished to enlarge the Store or stock of Drugs and quit Medical practice. That they agreed to enlarge the business, each to contribute $1,500, the house then occupied by Defendant was too small and they agreed to build a new

39 house, which was commenced on Lot 2, (the premises in dispute.) That at time of commencing such building, Haynie had only a fictitious title from his father W. D. Haynie, sen., and had paid nothing for it. It was agreed that Defendant and Haynie should pay said W. D. Haynie a fair price therefor, as the title could be made good by the purchase of a Mortgage on said lot by said Wm. D. before he conveyed to said Abner.

An account of Expenses of material &c., and labor was kept of which Defendant paid $337,04.

39–40 (The items are given at folios 39 and 40 of Record.)

40 That before the House was completed, said Abner was taken sick, and thereby as he told Defendants failed in money matters, told Defendant he loaned Black & Turner $1000 which he could command if well. That said Abner was anxious to go to St. Louis for better medical ad-
41 vice, and did go. That Abner contributed about $300 or $400. That Defendant went on and purchased goods on 6 months time relying on Abner's promise to contribute the balance of the $1500. That Abner soon improved and returned home—the money often talked of, but never paid—when the debt for the goods became due, Defendant had to borrow to pay it. The Defendant was displeased thereat, that he talked to Abner of dissolving the firm, that he objected, and so things went on until winter of 1849–50—frequent talk of Abner's failure to pay, several propositions made, but no answer from Abner until Defendant began making Bills to himself.—Abner wished to keep the stock, but Defendant knew he could not do so unless he concealed money. Defendant proposed to Abner to take the stock, pay the debts and pay Defendant 50 per
42 cent. on his money in the stock and he would go, or that Abner could do the same. Abner reflected and proposed to accede, if Defendant would give him his medical accounts and medicines. Defendant agreed. Abner required 50 per cent. on all medical bills paid in—Defendant agreed. Then the question arose about the house, neither wanted it, Abner said since health was restored, that he would attend exclusively to medical practice, and that Defendant had paid nearly all expenses of building the house, that he did not like to take out what Defendant paid therefor with 50 per cent. Defendant was not willing to keep the house over one year when he intended quitting business. Abner refused to take it, and proposad to Defendant to keep it at $4 per month, one half to Abner, the other half Defendant to keep until he was repaid his outlay in
43 building. Defendant objected the length of time, and finally agreed telling Haynie he would rent it out after first year. The contract was well understood between, and witnesses called thereto. No dissatisfaction for 8 months until Abner and Defendant were settling some old individual dealings. Then Abner expressed dissatisfaction and proposed to Defendant to keep the house at $4 per month and credit it on Defendant's claim on house. That Abner would produce Memoranda and allow certain items, otherwise he had Defendant's note and would never allow them. This was their last conversation.

44 Denies the friendly requests alleged. States that Defendant called on two of the Executors to settle, but could get none. That Defendant could not give up the house to any one who would settle the matter. That he rented the premises to the Davenports for 3 years, and they occupy them.

45 States that the alleged waste (if any) was done by said Davenports, without Defendants consent, that they would if desired surrender the premises at expiration of their tenancy in same condition as received by them.

That the entire amount expended on the building was $430.89 of which said Haynie paid $93.85, the balance $337.04 Defendant paid, for which he has received nothing but the occupancy of said house by him and his tenants since May, 1850

46 August 30th, 1853. General Replication filed to said Answer.

Answer of Defendant James A. Davenport filed Sept. Term, 1853. States:

47 That on or about 18th March, 1851, he entered into partnership with B. F. Marshall as Merchants, that James Marshall then occupying the lot in question rented same to them for $48 a year; that they occupied same to 17th January, 1853, when John V. Davenport purchased B. F. Marshall's share and became Defendant's partner. That Defendant and said B. F. Marshall paid James Marshall all rent due, to time of said dissolution at $48 per year.

48 That Defendant and said John V. rented same from said James Marshall from thence until 1st of April, 1856, at $72 a year and have paid him all rent due to the present time.

That shortly after said Defendant and John V. took possession they removed a partition wall which divided the store into two rooms, making it inconvenient, that no damage arose there, and
49 was removed with intention to replace it at the end of their tenancy if desired. That instead of waste, it rendered the Store more commodious and better fitted for business.

That they erected a shed room attached to said building as a ware or lumber room 20 feet by 14 feet on which they expended $50, the Store not being large enough for ordinary business, that they intend and propose to let it remain with charge or remove it if desired at end of tenancy. That it enhanced the value of the Store, and was absolutely necessary.

That when Defendant and B. F. Marshall rented from James Marshall, they were ignorant of his title only knew Marshall occupied and professed the right to rent it. That Defendant and John V. when they rented were equally ignorant. Deny the charge of knowledge. That they
50 rented in good faith and in good faith paid the rent to said James Marshall.

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51 A General Replication was filed on 15th Sept. 1853, to said Answer.

Answer of John V. Davenport filed Sept'r Term, 1853. States. That on or about the 17th
52 January 1853, he and James A. Davenport rented from Defendant, James Marshall, the Lot in question, from thence to 1st April, 1856, at $72 a year. That when they rented the partition made the store unhandy that they removed it, doing no damage, but a benefit, and will if desired replace it and at end of tenancy deliver premises same as they got them. That at cost of $50 they

53 built a shed adjoining the store, that they did so for want of room it was necesary for their business which they at expiration of their term will leave with charge if desired, or remove. That said alteration and addition were improvements and not waste, and were necessary for the use of the store. That at time of renting they were ignorant of the title or owhership, or that it was disputed until this Bill was filed, except that James Marshall held it, and professed the right of disposing of it. That in good faith they rented, and in good faith paid Marshall all rent due to present time. Positively deny all knowledge of title to or right of possession or question thereon. That he and James A. Davenport are willing at end of their term to deliver up the store if de-
54 sired as they got it, ordinary wear and tear excepted.

A general Replication was filed to said answer Sept'r Term, 1853.

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55 Order of 16th Sept'r 1853. Suggesting resignation of Defendants W. D. Haynie & I. N. Haynie as executors of will of Abner F. Haynie. Appearance of Willis D. Green the other Executor—and rule that he answer by 2 o'clock P. M.

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54 Answer of Defendant Willis D. Green filed Sept's 1853. States. That the allegation in Bill of solvency of Abner's Estate to pay debts without recourse to the Realty is true. Admits that by said Abner's will the title to said Lot is in Complainants ; Martha D. and W. D. Haynie.

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57 1854 May 4th. Exceptions filed to Answer of Defendant Marshall.

1. That the contract set up between him and said Abner F. for the occupation of the premises is verbal, and unless in writing cannot be valid for a longer term than one year.

58 2. That he fails to show how much rent he got from Davenports ; or how long he occupied before renting to them ; or how much it was worth while he occupied, or how long he occupied himself.

3. That he does not show its value per year from time he got possession, or from dissolution of his partnership with Abner F. to present time, or how much rent he received, and from whom he got it.

4. That he has not in his answer accounted with Complainants.

5. General Exception.

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59 1854 May 6th. Order of continuance to September Term, 1854.

1854 May 25th. Complainant's notice to Defendants Davenport, directing them not to pay rents of the premises to Defendant Marshall, and notifying them, that they held said Defendant responsible for the accrued rents, and that if they obtained Decree of possession and Davenports should thereafter pay to Marshall any rent they would risk refunding with costs—said Marshall having no right to the rents, Complainants being lawful owners.

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60 Sheriff's return of service of notice on Defendants Davenport by reading on May 8th, 1854.

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61 1854 Sept. 20. Order of leave to Complainants to withdraw Replication to answer of Defendant T. F. Houts.

Notice by Complaintants of 24th July, 1854, to Thomas F. Houts, Sol'r for Defendant Marshall to take Depositions on part of Complainant of W. D. Haynie, Thos. F. Houts, Geo. W. Haynie, R. Moore and John V. Davenport, before James S. Martin County Clerk at Salem on 9th Sept. 1854.

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62 Sheriff's return of service on Mr. Houts.

Thomas F. Houts for Complainants deposed. That he knew the parties in this cause and the premises. That about the time of the improvements thereon, he was Commissioner to sell and convey same in cause School Commissioner vs. W. D. Haynie. That James Marshall bid them off at $100 and told him to make Certificate to A. F. Haynie, then absent, but who shortly returned and complied with Decree of Sale, and he made him the Certificate. Marshall and Hay-
64 nie occupied after Haynie's purchase, cant say how long. Thinks J. A. Davenport and B. F. Marshall next occupied, who were succeeded by J. A. & J. V. Davenport for a time, and they by R. M. Nichols, who now occupies—not being familiar with rents cannot answer as to what the premises would rent for from 1850 to present time. Rents are 30 or 50 per cent. higher
65 now than then. Gave the Certificate of purchase to Haynie, calling on Haynie for it when he was entitled to Deed, who looked for it, could not find it, and said it was lost. Haynie died.—I. N. Haynie one of his Executors made an affidavit of loss, which was annexed to witness' answer, that on Mr. I. N. Haynie's request he made the Deed, gave it to W. H. Green as Attorney for Complainant, telling him it was worthless, being made to a dead man.

65 William D. Haynie for Complainants deposed that he knew the parties to this cause. A. F.
66 Haynie & James Marshall occupied the premises when the addition was put to it. A. F. Haynie had possession before the addition was made. Being asked if the house were moved in the

present condition would the removal of the partition wall make it shaky and difficult to remove
67 without injury. Witness said, that the braces being taken out, it did not retain the strength it did. That as to moving that depended on circumstances. If the movers understood moving and replaced the braces it could be moved without injury.

On cross examination by Defendants, said, he could not recollect where Dr. Haynie was at time of making the improvements, presumed the object in removing the partition wall was to make the store more convenient.

68 John V. Davenport for Complainants, deposed that he knew the parties to this suit. Knows the premises, heard James Marshall say he rented them the first year for $4 per month and since then for $6 per month. Since Marshall and Haynie dissolved partnership B. F. Marshall and
69 & James A. Davenport occupied it part of the time, James A. Davenport & witness other part of the time, R. M. Nichols other part of the time, and up to the present time. Could not say when Marshall & Haynie dissolved partnership. James A. Davenport and witness moved the partition, was not done by Marshall's directions, was done by witnesses' directions; think J. A Davenport and witness told Marshall of it, who told them to do as they pleased, if they would
70 replace the Store as it was if required. Thinks he meant Dr. Haynie or his Executors or Administrators were meant by the party requiring to put it back. Being asked by Complainants how long he occupied and how much rent he paid Mr. Marshall, witness said that he and J. A. Davenport took possession about 15th of January, 1853, and paid him the rent up to 1st April
71 last, (1854), and $1.50 on present year at $6 per month. Mr. Nichols the present tenant took possession about 20th of Dec. 1854, at $6 per month.

Cross Examined by Defendants.

Witness deposed, that about an hour or an hour and a half, just before time of his testifying in the Court House, James Marshall told him he rented the house at $4 per month first year and at $6 per month since then. To the best of his knowledge Marshall was to have possession of the Store for work he did on it, his understanding was that Marshall was to have it for 3 years and 3 months from the time J. A. Davenport and witness rented it. The removal of the partition greatly added to the comfort, value and convenience of the house for the purposes for which it was built. Witness and J. A. Davenport at cost of about $30 or $35 put a shed-room or
72 ware-room to the building, which adds to it as a store house, they also put two window shutters and fitted up windows worth about $3.

Re-examined by Complainants.

Witness deposed, that it was at the time he and James A. Davenport rented from Marshall, that he told them he was to have the house for three years and three months from time of renting to them for the work and labor he did thereon. Thinks that neither Complainants nor any agent for them was present at that conversation.

73 County Clerk's certificate and Bill of costs.

Defendants' Depositions.

74 Notice by Houts, Defendant's Sol'r to Complainants to take Depositions on 6th Sep't. 1854, before James S. Martin, County Clerk.

75 Sheriff's return—by reading and leaving copy with Defendant Haynie, Aug't 25th, 1854.—W. Dodd, Sheriff of J. C. Ills. by H. W. Goodrich, D. S.

76 B. F. Marshall a witness for Defendant testified, That he is acquainted with the parties to the suit. Knows of Defendant Marshall and A. F. Haynie deceased, doing business as partners,
77 from Oct. 1848 to May 1850 when they dissolved. Defendant Marshall was to pay A. F. Haynie the amount he had in the Stock and 50 per cent. on it, Defendant was to keep the Stock of goods and books, and Haynie to retire from business. They occupied the lot in dispute a part of which was formerly occupied by W. D. Haynie as a residence. When they dissolved Dr. Haynie called witness to witness the contract as to the house, which is, Defendant Marshall was to have it at half rent until the rent amounted to what Defendant had expended in building the house the rent agreed on was $4 a month, being $2 Defendant Marshall was to pay. The house
78 was in possession of Defendant and his tenants from time of dissolution hitherto. Thinks at time of dissolution it was reasonably worth $4 per month, witness and Dr. Davenport rented it since then at that rent. Being asked at whose instance it was that Defendant Marshall continued in possession of the house. Witness said, that there was some contention between A. F. Haynie and Defendant. Defendant wanted A. F. Haynie to take the amount he expended on the house out of what he would owe A. F. Haynie on dissolution. Haynie insisted Defendant Marshall should keep it until the rent amounted to what he had expended thereon as witness before stated.

79 *James Chance*, a witness for Defendants testified that he knows the parties, and the Store house in question. He furnished flooring plank for same, $8 worth and upwards, Defendant Marshall paid him.

80 *William Chance*, a witness for Defendant, testified, that he knew A. F. Haynie and Defendant Marshall. In Spring of 1848 he furnished stone for a house and Defendant Marshall paid him $1.25 for it.

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Cross examined by Complainants.

Don't know for what house he furnished the rock. Don't recollect the year or time of the year.

81 *James Hawkins*, a witness for Defendants, testified. That that he knows Defendants Marshall and A. F. Haynie, and knows the premises in question. Made two window-shutters therefor and furnished the lumber and got $4 for it from Defendant Marshall. Knows that A. F. Brown furnished lumber, made shelves, 3 doors, cased and hung them and furnished plank and made counter table, all of which amounted to $62 and that Defendant Marshall paid Brown for same.

82 Cross examined by Complainants.

Don't know whether Haynie and Marshall were partners then. Defendant Marshall paid Brown in accounts and other indebtedness, his own Bill was paid by debt he owed Marshall.— Was present part of the time Brown and Marshall were settling, some few days after Brown

83 told him they had settled, can't recollect exactly how it was. Thinks the work was done in 1848.

Re-examined by Defendant.

Knows Defendant Marshall at time of Brown doing said work had an Execution against Brown, don't know the amount. Witness was to have pay for his work, and Marshall settled his account, there was not enough left to settle it and witness did not get it, had to look to Brown for it.

Re-cross examined by Complainant.

Knows no more in that matter but what Brown or Marshall told him, only in what he was present at when they were settling.

84 *Henderson Hensley*, a witness for Defendant, testified that he knew A. F. Haynie and Defendant Marshall and knows the premises. Brought a load of lime part of which he left at that house for which Defendant Marshall paid him $5 or something over.

Cross examination by Complainants.

Don't know who occupied then, Mr. Marshall ordered the lime, and he hauled it there, thinks

85 it was the understanding that Marshall and Haynie were building the house together. Can't give the date, the workmen were at work on it then. Can't say what was done with the lime, did not stay, thinks they were preparing to use it. Mr. Marshall paid him in cash.

Edwaad Young, a witness for Defendants, testified. That he knew the parties and the prem-

86 ises, he lathed and plastered the house. Mr. Marshall paid him therefor $36. Knows the lime furnished by Mr. Hensley was used on the House. Mr. Marshall and his sons furnished the sand and waited on witness while plastering, thinks the sand, making mortar and waiting on witness worth $15. Mr. Marshall furnished nails for lathing worth $3, and for shingling worth $2. Mr. Evans hauled some boards, was there when Mr. Chance hauled the rock, which was used

87 on the house. Thinks Mr. Haynie was in St. Louis sick.

Cross examined by Complainants.

Does not know whether Haynie and Marshall were partners then. Thinks Mr. Marshall had the nails on hand. It was the house occupied by B. F. Marshall and Davenport. When the house was finished, there was two rooms lathed and plastered, the smaller one 18 by 20 feet, there was a lathed and plastered partition between them, dont know the size of the other room

88 was same width, not less than 24 feet long and about 10 or 11 feet story. In the inner part of the building Mr. Marshall said he was going to move his drugs. The other room was shelved off for goods, supposed they were going to put goods there. Supposed the house belonged to Mr. Marshall, he told witness it did. Was not in the house since Davenports was in it. The work was done in Spring of 1848. It was finished for occupancy about June 1858.

Re-examined by defendants.

Mr. Marshal boarded witness at Mr. Easleys while the work was doing, can't say what it was worth.

89 *Obadiah Evans*, a witness for Defendants, testified. That he knows the parties, purchased materials for the building connected with the Store house in question, three feet convering boards worth $2,81, thinks he settled with Abner Haynie.

Cross Examined by Complainants.

Settled with Abner Haynie, he being present when witness furnished boards, the reason he settled with Haynie was that he and Marshall were partners then. Did not recollect the year.

90 *Abraham Wimberly*, a witness for Defendant, testified. That he is acquainted with parties and the Storehouse in question, he furnished lathing, some 4000 at $2,50 per thousand and James Marshall paid him for them.

James Adams, a witness for Defendant, testified. That he knows the parties and premises,

91 witness with his father and brother worked on framing, weather boarding, sheeting, flooring and shingling the house and patching old house which was covered anew, it all cost $75, dont know who paid for it. Witness and his brother were working for their father, thinks his father owed Defendant Marshall individually at that time.

Cross examined by Complainants.

92 Understood from his father it was Marshall's house. The old house was 20 by 18 feet, one story, the new house was 24 by 18 feet, 10 feet high. There were two rooms when it was finished, divided by the gable end of the old house, which formed the partition, when finished it was a good and substantial building.

[0490-19]

93 Re-examined by Defendants.

His father told him that Mr. Marshall employed him and was to pay him.

James Young, a witness for Defendants, testified. Knows the parties and the premises, he furnished shingles, and sills, joist, studding, sleepers and rafters, worth $79 which Mr. Marshall paid him.

Cross examined by complainants.

94 Mr. Marshall paid him $18 in note on witness' brother, one horse,, some money and balance in witness' indebtedness.

95 *William G. McKinney*, a witness for Defendants, testified. That he knows the parties and premises, he and Mr. Fulton made counter, a pannel door, desk, charged $10 for counter, $6 for pannel door, Mr. Marshall employed and paid them, witness furnished lumber for the top of counter worth $3, which Mr. Marshall paid in lumber in return. Thinks the removal of the

96 partition a benefit to the house as a store room. It was painted by Marshall, who furnished oil paint and brush, it was worth $12 or $15.

Cross examined by Complainants.

The counter was nailed to the floor, it was in the old room, there was a partition there then the new room was used for drugs and queensware, a small portion of the counter has been turn-

97 ed and put in one end of room. No shed attached then, there is now. If the shed was removed and gable end taken out as it is now it would not add to stability and firmness of the building.

Re-examined by Defendants.

The shed building has not injured, it adds to the convenience of the store.

Re-Cross examined by Complainants.

The building is 44 feet long 18 feet wide, 10 feet high, the removal of gable end has not injured or weakened the building.

98 *Robert D. Easley*, a witness for Defendants, testified. Knows the parties, Mr. Marshall paid him for board of Edward Young two or three weeks while working on house about $6.

99 Cross examined by Complainants.

Knows the premises, it was finished in Spring of 1848, the room built made two rooms in the house, thinks the frame about 40 feet long 18 feet wide, does not think removal of partition injured the house. Understood from Haynie and Marshall that they were preparing the house for a partnership business.

Re-examined by Defendants.

100 Thinks Haynie were not partners before completion of the house.

Mark Tully, a witness for Defendants, testified. Knows the parties, witness and his son sawed some scantling and sheeting at their mill, worth $15 to $20 which Marshall paid.

Cross examined by Complainants.

His son James was paid, was not present.

Re-examined by Defendants.

101 It was paid to his son, witness and he being partners.

James A. Marshall, a witness for Defendants, testified. That he knows the parties, knows Nathan Adams worked on house, and Marshall paid him, he was in debt to Marshall, the bal-

102 ance $15 he was to take in the store. Defendant Marshall furnished locks worth $3, glass, sash and putty worth $4, paints and oil $8. O. Evans furnished boards.

Cross examined by Complainants.

Saw his father and Adams settling, hearing good part of their settlement.

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104 Exceptions to Defendants Depositions filed 23d September, 1854.

1—Complainants except to all the questions and answers as leading and improper.

2—Except to service of notice, it was not served on Complainants, Attorneys or Solicitors.

3— Except to the notice as informal and insufficient.

4—Except to the authentications of the Depositions.

105 Exceptions to Defendants Depositions, filed 23d September, 1854.

1—No service of notice on W. D. Haynie a minor, nor on his Solicitor or Attorney.

2—No service of notice on Martha D. Haynie or her Attorney or Solicitor.

3—Except to B. F. Marshall's testimony, the Complainants counsel not present and without notice.

4—Except to B. F. Marshall's testimony, the facts stated being within the Statute of frauds.

5—Except to questions to and answers of B. F. Marshall as leading and irrelevant.

6—Excepts to Deposition of W. Chance, Complainants not being present and without notice.

106 7—The questions to W. Chance leading and irrelevant.

8—Except to Jas. Chances Deposition. Complainant not present and without notice.

9—Except to questions to James Chance as leading.

10—Except to answers of James Chance as irrelevant.

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107 1854, September 23. Complainants filed amended and supplemental Bill, which stated.

108 That at May term 1853 of Marion Circuit Court, Complainants filed their original Bill, its object was to get possession and account of rents of a town lot in Salem, pray said original Bill as far as material be part of this Supplemental Bill. That at said May Term, answers and replications thereto, were filed and testimony taken on both sides. That by reason of allegations in

[8vso-20] 109 Marshall's answer, and the grossly fraudulent and litigious defense therein, and the collusion of said Marshall and the Davenports and one R. M. Nichols since filing the answers, the Complainants are compelled to amend the Bill and file Supplemental Bill to show true state of the case.

That said Marshall and A. F. Haynie in 1849 and previously were partners, and built a store

house in Salem by adding a room and repairing the old house, the lot being Haynie's, part of the expense paid by Haynie, part by Marshall. Haynie in bad health, and he finding Marshall was acting dishonestly, dissolved the partnership. Marshall gave his note to Haynie for amount
110 of stock and 50 per cent. thereon, and Haynie agreed Marshall should use the store for a short time until re-embursed his outlay, the store then rented for $4 per month. Marshalls outlay inconsiderable not ascertained but did not exceed $261,08. That after said dissolution, Marshall fraudulently tried to claim one half said store and lot and filed his Bill in Chancery in Marion Circuit Court May Term 1851, Haynie, then an invalid, unable to do business, Marshall by filing said Bill sought to take advantage of Haynie's ill health by a default. That Haynie
111 recovered and filed his answer at May Term, 1851 of said Court, sworn to, and complete answer thereto. That Marshall was bound to reply in 4 days or except did neither. Complainants contend that said Bill and answer are conclusive on the right of the parties as far as admitted or denied. That Bill and answer annexed to this Suplemental Bill.

That Marshall in said Bill not only claimed one half the store, but the $261.08 his outlay thereon, and that he should retain the store until repaid his outlay from May, 1851, at rate of
112 $4 per month. That said answer fully explained all, and showed Marshall had no right to possession, and his attempt in another place to claim possession is unconscientious and fraudulent.

That said Haynie husband and father of Complainants respectively died, July, 1851, in Kentucky, that at September Term following, he suffered the cause to abate, to gain advantage, knowing he could not disprove said answer—and was barred thereby of clearing title—yet if he
113 succeeded in a Decree pro confesso, he though since Haynie's death has set up a different case from his Bill, would in case of such Decree have tried to prove his former case, as he now contradicts that case—had said Bill not been answered.

That after said dissolution said store house and lot was occupied by B. F. Marshall son of said Marshall, at $4 per month—that during occupancy of said B. F. Marshall said Haynie sent him word he must pay rent $5 per month, as rents in Salem were rising, all which said James
114 Marshall knew, yet he never signified dissent or set up any claim to same knowing he was reinbursed his outlay.

Charges the alledged contract by Haynie and Marshall for the latter to hold said house was only a parol agreement and void by the Statute of frauds and the Statute of Leases.

Insist Marshall is bound to account for rent of the Store at $4 per month for first year and $6 per month for remaining time he has held same, and has received that amount. That Marshall if he has any claim should look to Haynie's personal estate. That the alleged contract is
115 void against Statute of frauds—and that he has held the Store against Complainants consent, and is bound to account for the rents and pay them over to Complainants.

That Complainants are not only kept three years and a half out of their possession, but said Marshall and James Davenport threaten to pull down part of the building to Complainants injury and disinheritance of said lot.

That at last Term of Marion Circuit Court Complainants notified said James A and John V. Davenport not to pay any more rent to Marshall, that they to avoid same have changed the possession and rented to one R. M. Nichols who with one Rufus P. McElwain now occupy—all
116 which continue said tortuous possession ; in which the Davenports colluded with Marshall.

Charge waste against Davenports in removing a partition wall without license, and thereby forfeited right to occupy as tenants.

Pray—That Houts, Marshall, Davenports, Nichols and McElwaine be made Defendants, to
117 this amended and supplemental Bill, and answer same. *Pray* Decree that Houts against whom no costs are asked may convey said Store and lot Complainants. *Pray* possession and their title be quieted. *Pray* Injunction and Reciever. *Pray* further litigation he ended and perpetual Injunction and writ of Summons.

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119 The Bill filed May, 1851, by James Marshall referred to in said Supplemental Bill and annexed thereto. States

That in April, 1847, Complainant Marshall and Abner F. Haynie a physician agreed to become partners as Merchants, Druggists and Apothecary, on equal footing as to loss and gain,
120 Haynie to account for his medical fees as partnership assets. The house in which they traded and title were Haynie's, but to the repair of which Marshall having contributed $261.08 which was agreed said house and lot should be partnership stock. That they traded as A. F. Haynie & Co., under terms of said agreement until May, 1850, when they dissolved by mutual consent
121 on these terms, Haynie to have proceeds of his practice, Marshall to have the Stock in trade on hand, paying Haynie the amount contributed by him as stock in trade and 50 per cent. thereon, deducting therefrom Haynie's account for goods, drugs and medicines taken by him, and all sums paid by Marshall on account of Haynie's debt. That afterwards pursuant to these terms and on a partial settlement, said Marshall gave Haynie his note for over $1.100, precise sum unknown, payable March, 1851, on which certain sums were to be credited, such as Haynie's account with the firm and sums paid by Marshall at Haynie's request for his debts, the amounts were then unknown to Complainant and he believes also unknown then to said Haynie, but
122 when ascertained were to be credited to Marshall on said note.

That at and before dissolution aforesaid and execution of said note, Marshall paid for Haynie

as follows—To R. D. Easley for Haynie's Board and Lodging $55—Stage fare $10—A Wooster Bank Bill paid in by Haynie, worthless, $10—Medicine to Haynie, and furniture for Apothecary shop $30.—Judgment held by B. Bond against Haynie and a lien on his Real Estate
123 $125.—Insurance on Store $34.25.—Two suits of clothes amount not known, all which items were not taken into account at time of said dissolution and making said note. Complainant Marshall charges he is entitled under terms of dissolution to 50 per cent. additional on all sums that should have been deducted at time of settlement, all which Haynie knew and has the vouchers for in his possession. That since dissolution and during 1850, Haynie bought goods of Com-
124 plainant to amount $130.79. That afterwards in March, 1851, Complainant paid Haynie $700 and at the same time gave an order on J. T. Dwyer for $100 which was paid making in all $938.79 paid since giving said note. That at time of dissolution it was agreed that Marshall was to retain the Store house at $4 per month until said $261.08 outlay on said store was repaid. That said $938.79 paid since note was given and $381.37 amount paid previous to dis-
125 solution and not accounted for makes $1320.16 an amount exceeding the sum due by Complainant to said Haynie. That Complainant has often applied to Haynie to account and settle and give up said note and pay the balance as in equity he ought. Haynie refuses.
126 127 *Prays* answer, and specially interrogates as to each item. *Prays* partnership account. *Prays*
128 account of monies paid since dissolution. *Prays* Decree for amount to be found due, and that
129 Defendant Haynie produce the vouchers and deliver up said note. *Prays* further relief and summons.

The answer referred to in Supplemental Bill and annexed thereto and filed May Term 1851. States:

130 That the time and terms of partnership are correctly stated. Denies Complainant Marshall was to acquire any interest in the Store house, or that it was partnership stock. That if such contract be shown it is parol and void by the Statute of frauds, which is pleaded. Time of dis-
131 solution correct. States the Terms of dissolution to be as follows: Defendant Haynie was a practicing physician, and the proceeds of his practice was joint stock, but on dissolution it was agreed Haynie should retain all these proceeds as well those paid as those unpaid, and all sums paid in to the firm few such practice Marshall was to refund with 50 per cent. thereon—further it was agreed, that Haynie's Store account with the firm be deducted from the assetts thereof, also all monies before that drawn out by said Haynie—a balance was then struck which with 50 per cent. additional was to be paid by Marshall to Haynie, subject to his instructions
132 That Haynie's account for Drugs was not to be charged. That on these terms settlement was had and ballance adjusted for which Marshall gave his note for $1184,40 in full of all was supposed to be due. That the $45 charged as paid Easley is incorrect, no such judgments having
133 been made, there was mutual debts between Easley and Defendant Haynie not yet settled. That any debt to Easley was individual and not partnership, and if paid was done without Haynie's authority. Charge of $10 stage fare incorrect $3 willing to pay, it was a partnership charge, and adjusted. $10 Wooster Bank Bill incorrect, it was received by Marshall for the firm and
134 he should pay it, is willing to deal equitably. That $30 charged for furniture of appothecary shop incorrect, it was not worth $8 which last sum even under their agreement is an improper charge, the $125 paid B. Bond if ever paid was if paid on a judgment not of Haynie, and barred
135 by limitation, and if paid was a payment of a debt of a third person without authority and not a partnership debt. That by the terms of the dissolution Marshall after complying with the terms before stated was to have the entire stock on hand, and pay all the firm debts.
136 The charge for insurance was a firm debt and to be paid by said Marshall—positively denies the charge for two suits of clothes. That the $700 cash and the $100 from J. T. Dwyer were paid and credited on said note. That the statement of Marshall's outlay and agreement are not correct. That said outlay was not then ascertained, no time fixed for payment. That Marshall
137 continued to occupy the store at rent of $4 per month and has occupied and now occupies, said rent should be deducted from said charge for outlay, when the amount paid is proved. That Haynie holds an account against Marshall besides said note for $135,75, has offered to adjust their matters, but could not effect it. Denies anything as to the partnership is open and unsettled so as to require the aid of a Court of Chancery. That for all mutual claims the remedy at
138 Law is complete. That the charge of $138,79 for Store account against Haynie is not partnership and he Defendant Haynie has a right to apply it on any debt of said Marshall, that Defendant Haynie is always ready to adjust it in final settlement.

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139 Order of Judge Baugh of 23d September 1854, refusing to allow filing of amended and Supplemental Bill, and refusing to grant Injunction and Receiver. This order is not entered of Record, it is only filed among the papers.

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140 Order of May Term 1855 continuing said cause.

Order of September Term 1855, giving leave to file amended and Supplemental Bill.

Order of September Term 1855, appointing Silas L. Bryan Receiver &c. and granting Injunc-

tion as prayed

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143 Injunction dated 7th November 1855 against Defendants Marshall, Davenports, Nichols and McElwain for renting or underletting the premises, and from committing waste.

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144 Order of January Term 1856, continuing said cause.

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145 Order of May 7 1856, referring to James S. Martin, Master in Chancery, to take proofs, &c.

Answer of James Marshall of May Term, 1856, to amended and Supplemental Bill, States.

146 That he admits filing of original Bill at May Term 1853, but with an additional object not stated in amended Bill, viz: to get title and possession of said lot and an account. That Defendant answered said original Bill fully and refers to same. Unqualifiedly denies that his defence in said answer was grossly fraudulent and litigious. Denies collusion charged with Davenport, and that same is false. Denies he claimed title to lot, but only a possessory right under contract with A. F. Haynie. That ever since he filed said Bill in 1853 he has been ready
147 and pressing a hearing, but Complainants are postponing same, pretending surprise by Defendants answer, though Complainants well knew before filing said original Bill, the nature of Defendants claim, viz: That he claimed use of said store at a given rent until reimbursed his outlay in said house. That sometime in 1847 Defendant and Haynie became partners in sale of Goods and Drugs. That Haynie was to contribute $1,500, but never paid more than $400.— That the room then occupied was too small. That they agreed to build on lot which Haynie said was his. That Haynie went to St. Louis at that time. That Defendant went on and did build, &c. Haynie paying only a small amount. That Defendant superintended the work and paid individually $227,04. That at that time the lot belonged to W. D. Haynie and not to A. F. Haynie. That it was mortgaged, foreclosed and sold by Houts, Commissioner. That Defendant bid it off for A. F. Haynie. That Defendant bought large stocks of goods, paid for
148 them. Haynie paid nothing more than said $400 and but little personal attention. Defendant obliged to borrow money on personal credit, and began to make bills for goods in his own name, said Haynie promising to pay his share of capital. That finally in Spring of 1849 they agreed that Haynie should go out, Defendant paying him all he had paid in by cash or medical practice and 50 per cent. Defendant previously offered to sell to Haynie on same terms and 50 per cent. There was then a partial settlement and Defendant gave his note for $1000 or $1100 (sum forgotten,) that was all was settled, the memoranda taken down thereof Haynie took. On their settling the Store house was hard to settle, neither wanted it, it was finally agreed that Defendant should keep it at $4 per month rent, $\frac{1}{2}$ to Haynie $\frac{1}{2}$ to Defendant until his outlay was paid then Defendant did not want it for more than a year and would then rent it out. The agree-
149 ment was verbal, but was well understood and witnessed. Defendant submits that the statute of frauds cannot effect said agreement because it was wholly exacted by Defendant by his payment in advance of the rent agreed on, and his having possession and continuing in possession personally or by his sub-tenants, and the contract being made in good faith. Denies he ever claimed said property as his own, or fraudulently filed his Bill in 1854. That said Haynie requested De-
150 fendant to file it to settle their matters, and sent a note to Houts, his Counsel, to bring suit for that purpose. Admits Haynie answered at close of Term, and died before the next Term. Denies he suffered the cause to abate, that he intended in good faith to prosecute it, and prove his Bill. But the court (Judge S. S. Marshall) ruled it must abate by Haynie's death, as it was a cause could not have been originally brought against the legal representative of Haynie dec'd., being for Discovery as well as Relief. That he furnished his Solicitors with items of outlay to $261.09, but since then found items promiscuously charged in the books which aggregate $337.04, and which he submits he has proven almost entirely by Depositions in this cause. De-
151 nies he has set up a Different case since death of Haynie. Knows of nothing of alleged notice to B. F. Marshall to pay $5 per month, does not believe it was given. Did sub-let to Davenport and his son B. F. Marshall—and that McElwain and Nichols now occupy it. Denies waste. Admits repairs, and that the house can be given up in same condition as received (ordinary wear and tear excepted.) Submits he is not bound or concluded by his own Bill or by Haynie's answer, &c.

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152 General Replication to said answer filed.

September Term, 1856—Order continuing cause.

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153 Notice to Houts & Hamilton Sol'r for Defendants to take Testimony before Master in Chancery, May 8th, 1856.

Master's report of Testimony for Complainants.

[8490-23]

George W. Haynie testified, he knew the partners in Spring of 1851, while A. F. Haynie was
154 sick, he directed witness to notify B. F. Marshall the tenant he must pay $5 per month rent, B. F. Marshall made no reply. Thinks $60 a year a fair rent for 1851 and 1852. Thinks it could

rent for $75 a year for 1853, 1854 and 1855, and up to present time worth $125 a year. For sometime before A. F. Haynie's death, he and James Marshall were partners doing a credit business—taking down the partition no injury, but more rent could be got if rented separately.—
155 When the addition was built labor and material was low : thinks it could have been for $150—it was an additional room. A. F. Haynie was husband of Complainant Martha D. Haynie.

Samuel Hull for Complainant testified, he knows the parties, that previously to death of A. F. he, and James Marshall were partners in a credit business. The addition when built could have been done for $250, labor and material being low. Taking down the partition no injury to rent-
156 ing, from 1851 to 1852, it would have rented for $60 a year—from 1852 to 1854 worth $75 a year—from 1854 to present time worth at least from $10 to $12 per month.

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158 Decree of Judge Breese (Circuit Judge,) at August Term, 1857. Hearing by consent of parties, on original Bill, Answers and Replications—and Supplemental Bill of Complainants, Answers and Replications, Depositions and Exhibits.

Decree.—That Thomas F. Houts, convey the Town Lot &c., in question by Deed to Complainant Devisees of Will of A. F. Haynie to hold in equal parts as Tenants in common, and that the Deed heretofore given by Houts to A. F. Haynie since his death be cancelled.

Decree —That Complainants are entitled to the rents &c., of said premises from death of A. F. Haynie, to-wit : from 1st of July, 1851, to time of accounting before Master in Chancery.
159 Cause referred to Master to take and state account of rents and profits, and report to next Term—cause continued therefor.

March 19th, 1858. Master's Report filed. Annexing Receiver's Report and Exhibit A.—State of rents as follows, to-wit :

160

Rents received by Defendants from 1st July, 1851, to Jan. 15, 1853, at $4 per month,	$72.00
Rents received by Defendants from Jan. 15, 1853, to Jan. 15, 1855, at $6 per month,	$144.00
Estimated the rents from Jan. 15, 1856, to April, 5th, 1856, to be,	$105.00
Rents received by Receiver from 5th April, 1856, to 26th April, 1857,	$80.00
	$401.06

161. Report of Silas L. Bryan, Receiver, annexed to Master's Report, stating net receipts to be $80.06 which he paid Complainants. Exhibit A. annexed to Master's Report, being abstract of evidence relating to rents &c., to-wit :

1—B. F. Marshall and J. A. Davenport tenants from death of Haynie to 15th January 1853, at $4 a month.

2—J. A. & J. V. Davenport tenants from above date to December, 1853 at $6 a month.

3—R. M. Nichols occupied from last date to sometime in 1855, at $6 per month.

4—G. W. Haynie, says Lot worth in 1851 and 1852, $5 a month, in 1853, 1854 and 1855, $75 a year and $125 for 1856.

5—S. Hull, says the rents at $60 a year for 1851 and 1852, from 1852 to 1854 at $75 a year, from 1854 to 1856 at $10 or $12 a month.

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163 Order of March 10th, 1858, Judge O'Melveny, refusing to release Houts as Commissioner and appoint P. P. Hamilton, and refusing to alter form of the Decree of Judge Breese.

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164 Decree 17th March, 1858, Judge O'Melveny. That the Decree herein be entered as of last August Term—ordered it be referred to the Master to take an account of the rents &c., Master presents his Report, which is approved and filed.

Decree that Defendants pay Plaintiffs the amount reported to-wit : $401.06 within 30 days.—Execution to issue on default to pay. Ordered that Counsel draw the Decree, submit it to the Court for approval, and on such approval that it be entered as of the present Term.

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165 *Final Decree*, March Term, 1859, Judge O'Melveny presiding. Decree made 4th April, 1859

Recites, that Nelson for Complainants presents Draft Decree. Decree recites order of March Term, 1858.

Recites presentation of Master's Report filed 17th March, 1858.

Recites. The Court examined said Draft, Decree, and also the minutes of Judge Breeze at August Term 1857, and his Decree and the papers. States the Court approved of said Draft Decree, and confirmed same and ordered it of Record as of August Term 1859.
166 *Ordered* the Decree of Judge Breese and the Master's Report be recorded as part of this Decree and cause removed from Docket. (Here followed Judge Breese's Decree for which see pages 157 to 159 of Record herein. Then followed Master's Report, see pages 159 to 163 of Record herein.) The Draft Decree presented by Nelson and approved. Ordered, that Complainants recover of the Defendants James Marshall, James A. and John V. Davenport the sum of $401.06 according to Report of Master. That Execution issue against them unless paid in 30
167 days from this date (17th March, 1858.) Ordered, that Defendants Marshall and Davenports, forthwith deliver up possession of the premises. Order perpetually enjoining them from disturbing Complainant's possession and that this Decree be entered as of March Term, 1858. N. B. This Decree entitled to a credit of $80.06 paid to Martha D. Haynie by the Receiver and he endorsed as a credit on the Execution.

6

Davenport et al

v.

Hayne et al

Abstract.

Filed Nov. 1862 -

N. Johnston Clk

State of Illinois,
Supreme Court,
First Grand Division. } ss.

The People of the State of Illinois, To the Clerk of the Circuit Court of the County of Marion Greeting:

Whereas, in a certain plea between Martha D Haynie and William D Haynie a Minor by his next friend Martha D Haynie plaintiffs, and James Marshall Sen., James A Davenport, John V. Davenport, Robert M Nichols and Rufus P. M'Elwain defendants, lately depending in the Circuit Court of said County wherein judgment was rendered for the said Martha D Haynie and William D Haynie and against the said James A Davenport and John V Davenport - and the said James A Davenport and John V Davenport having sued out their writ of Error and brought the judgment of said Court to review against them as aforesaid, to the Supreme Court holden at Mount Vernon, on the first Tuesday after the second Monday in November next, And in pursuance of the said writ of Error a transcript of the record and proceedings

[8490-25]

in the plea aforesaid was transmitted.
And also whereas it hath been suggested,
on the part of said Defendants that the
said record has been diminished in as
much as a full and complete transcript
hath not been sent up; and for as
much as the said Supreme Court
are not satisfied that there is sufficient
record sent in plea aforesaid, but in
the record there is a diminution;
You are therefore hereby Commanded
that without delay the said transcript
therein, you cause to be transmitted
to the Supreme Court to be held at
Mountpleasant, on the first Tuesday
after the second Monday in November
next without any diminution
or addition whatsoever to the end
that speedy justice may be done in
the premises, according to law; Whereof
you are in no wise to fail; and bring
you then there this writ.

Witness, the Hon John D Caton, Chief
Justice of the Supreme Court and the
Seal thereof, at Mountpleasant,
this 9th. day of September A.D. 1862.

Noah Johnston Clk

8480

Supreme Court.
First Grand Division.

~~M. D. Haynie et al~~

~~[illegible]~~

Jas. A. Davenport et al
vs
M. D. Haynie et al

Certiorari - 9th Sept. 1862.

Executed by making out
and certifying Record as
within commanded
J. D. Chance clerk
Circuit Court
Marion Co Ills
Returned and filed
Oct 21 - 1862.
N. Johnston Clk

Supreme Court---Illinois.---First Grand Division, November Term, A. D. 1862.

STATE OF ILLINOIS, } ss. ERROR FROM MARION.
MARION COUNTY. }

James A. Davenport and John V. Davenport, — PLAINTIFF'S IN ERROR.

vs.

Martha D. Haynie and William D. Haynie a Minor, by his next friend Martha D. Haynie, — DEFENDANT'S IN ERROR.

ABSTRACT OF RECORD.

1 & 2 Precipe and security for costs. R. S. Nelson security filed 25th April, 1853.

2 1853. April 25th. Original Bill filed by Defendants in Error as Complainant against Jas. Marshall, James A. Davenport, John V. Davenport, Thomas F. Houts, Willis D. Green, William D. Haynie and Isham N. Haynie, Defendants.

States—That Complainant Martha D. is mother of Comp't William D. Haynie, a minor under 14 years of age who sues by her as his next friend and that they reside in Jefferson county, Ills., that Martha D. is widow of Abner F. Haynie late of Marion county deceased. That said William D. is the only surviving son and heir at law of said Abner F. with said Martha D.

3

That at August Term, 1847, of Marion County Circuit Court, the School Comm'r of said County filed his Bill in Chancery against one William D. Haynie to foreclose a Mortgage on

4 Lot 2, Block 2, Square 4, in original Town of Salem, executed by said William D. for the use of the Inhabitants of Town 2, Range 2, in Marion County. Said Bill, Mortgage and Note are annexed to original Bill as Exhibit A.

That at said August Term, 1847 of said Circuit Court a Decree was had in said cause, directing sale of said premises, and appointing Thomas F. Houts, Special Comm'r to sell, who on the

5 6th of May, 1848, sold same to said Abner F. for $100, who gave note and Mortgage as required by said Decree, and thereupon became entitled to a conveyance thereof from said Houts, whose duty it was to make such conveyance, as will appear from said Decree and Houts reports who made his final report August Term, 1848. The Decree and final report are annexed to original Bill as Exhibit B.

6 That from some cause unknown to Comp'ts said Houts did not convey, though said Abner F. complied with the Decree and orders of said Court.—Charges that said Abner in Law and Equity is entitled to said conveyance from Houts. That said Abner being then in feeble health died 1st of July, 1851, without getting said conveyance.

That on 11th of June, 1851, said Abner made his last will, and subject to his debts which

7 were few, and are or will soon be paid without recourse to his real-estate, he except a few legacies bequeathed all his real and personal Estate to Complainants share and share alike, and appointed Defendants Willis D. Green, W. D. Haynie and Isham N. Haynie his Executors, who proved said Will in Marion County Court. Will annexed to the Bill as Exhibit D.

Charges that said Comp't Martha D. under said will is entitled to one undivided moiety of

8 said Abner's real and personal Estate, and by law equally with her infant son Co-Complainant to said Town lot No. 2, and to the rents thereof as fully as said Abner could and to an undisturbed title therein and to a deed therefor.

That Def't James Marshall said Abner's brother-in-law, taking advantage of his feeble health for years before his death got possession of said Town lot and for 3 years and upwards last past has retained possession, and has rented or leased same to Def't James A. and John V. Davenport

9 who are in possession, though said Marshall never had any legal or equitable right thereto, and knew he was an illegal intruder therein—that said Davenport well knew Marshall had no right thereto. That Abner in his lifetime in a friendly way besought Marshall to surrender possession, and Compl'ts and others on their part since Abner's death have also so requested, that he refused.

28480-27

10 Charges combination of said Marshall with the Davenports to defraud her. That they have committed waste by tearing down a partition wall, which divided the store into two rooms and unauthorized by Compl'ts since death of Abner, built another building on the premises, and since Davenports possession of no use to Compl'ts. That said Marshall and Davenports or some of them owe the rents of said Town lot since Abner's death to them—am't $200 and upwards, which they refuse to pay, and keep possession committing waste from day to day without license contrary to Equity.

11 *Pray.*—that Marshall, James A. and John V. Davenport, T. F. Houts, W. D. Green, W. D. Haynie and I. N. Haynie be def'ts. That they answer (oath being waived.) *Pray*, that Houts or some other person to be authorized thereto make Compl'ts a conveyance of said Town lot.—

12 *Pray* account and payment by Marshall and Davenports of the rents since Marshall got possession. *Pray* Injunction against waste. *Pray* Decree of possession and that title be quieted.—

13 *Pray* compensation for waste and summons and further relief.

Exhibit B to Bill.—Being Decree of sale in case in Marion Circuit Court of 11th of August,

14 1847, in cause School Comm'r vs. William D. Haynie on foreclosure of Mortgage for sale of said Town lot and appointing Houts Comm'r to sell and convey, &c.

15 August Term, 1848, Marion Circuit Court. Report of Houts Comm'r of sale of said Town

16 lot to Abner F. Haynie for $100, who complied with the Decree by giving note and Mortgage &c. Report approved.

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17 *Exhibit D.* June 11th, 1851. Will of Abner F. Haynie.

18 Evidence for probate thereon.

19 Order of Marion County Court (4th Aug. 1851) probating said will.

21–25 *Exhibit A.* Copy Bill filed in Marion Circuit Court, School Comm'r vs. W. D. Haynie for foreclosure &c., &c.

25–27 Copy Mortgage and note attached thereto.

28–29 Copy Summons on original Bill. Martha D. Haynie et als vs. James Marshall et als. Sheriff's return.

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30 Answer of Thomas F. Houts—filed 30th Aug't 1853.

31 Admits his appointment at Aug't Term, 1847, by Marion Circuit Court as Comm'r to sell and convey said Real Estate. Admits sale on 6th of May, 1848, of same that James Marshall

32 purchased for $100, who shortly afterwards directed him to make the Certificate of sale to Abner F. Haynie, who was then absent.

That on Abner's return Def't called on him when he perfected the sale and paid fee &c.,

32 when Houts gave him the usual Certificate of purchase.

That about expiration of 15 months from sale, he informed said Abner, he was entitled to a Deed and would get one on surrender of said Certificate. That Abner searched therefor and fi-

33 nally said it was lost. Submits he Houts was not guilty of neglect in not executing the Deed.

That after Abner's death I. N. Haynie one of his Executors conversed with Houts thereon,

34 and agreed to state the matter to the Court which was not done. That Houts told him afterwards if he got the Certificate or made affidavit of loss, he would make the Deed.

That such affidavit was made and is annexed to his Houts' answer. That said Executor ask-

35 ed for the Deed, which Houts executed and gave to W. H. Green, Esq., attorney for Complainant telling him it was worthless, being made to a dead man. That Green said it was not Houts' fault.

Affidavit of I. N. Haynie of loss of Certificate of purchase.

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36 General Replication to Houts' Answer filed 30th Aug't, 1853, which was afterwards withdrawn, see Record page 61.

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37 *Answer* of Defendant James Marshall filed 30th of Aug't 1853. States—That in Spring of 1847 he was keeping a Drug Store in Salem in his own house, when Abner F. Haynie proposed to him to enter into partnership that they agreed to do so. Stock estimated at $600—$300 one

38 half thereof Abner was to pay. Haynie to attend to his practice as a Physician, Defendant to the Drug store, and to share equally in profit and loss. That they continued in business that year. That said Haynie did not pay said $300, nor for his Drugs during that year.

That in Feb. 1848, Haynie complained of bad health, and wished to enlarge the Store or stock of Drugs and quit Medical practice. That they agreed to enlarge the business, each to contribute $1,500, the house then occupied by Defendant was too small and they agreed to build a new

39 house, which was commenced on Lot 2, (the premises in dispute.) That at time of commencing such building, Haynie had only a fictitious title from his father W. D. Haynie, sen., and had paid nothing for it. It was agreed that Defendant and Haynie should pay said W. D. Haynie a fair price therefor, as the title could be made good by the purchase of a Mortgage on said lot by said Wm. D. before he conveyed to said Abner.

(Ex 0-28)

An account of Expenses of material &c., and labor was kept of which Defendant paid $337,04.

39–40 (The items are given at folios 39 and 40 of Record.)

40 That before the House was completed, said Abner was taken sick, and thereby as he told Defendants failed in money matters, told Defendant he loaned Black & Turner $1000 which he could command if well. That said Abner was anxious to go to St. Louis for better medical ad-
41 vice, and did go. That Abner contributed about $300 or $400. That Defendant went on and purchased goods on 6 months time relying on Abner's promise to contribute the balance of the $1500. That Abner soon improved and returned home—the money often talked of, but never paid—when the debt for the goods became due, Defendant had to borrow to pay it. The Defendant was displeased thereat, that he talked to Abner of dissolving the firm, that he objected, and so things went on until winter of 1849–50—frequent talk of Abner's failure to pay, several propositions made, but no answer from Abner until Defendant began making Bills to himself.—Abner wished to keep the stock, but Defendant knew he could not do so unless he concealed money. Defendant proposed to Abner to take the stock, pay the debts and pay Defendant 50 per
42 cent. on his money in the stock and he would go, or that Abner could do the same. Abner reflected and proposed to accede, if Defendant would give him his medical accounts and medicines. Defendant agreed. Abner required 50 per cent. on all medical bills paid in—Defendant agreed. Then the question arose about the house, neither wanted it, Abner said since health was restored, that he would attend exclusively to medical practice, and that Defendant had paid nearly all expenses of building the house, that he did not like to take out what Defendant paid therefor with 50 per cent. Defendant was not willing to keep the house over one year when he intended quitting business. Abner refused to take it, and proposad to Defendant to keep it at $4 per month, one half to Abner, the other half Defendant to keep until he was repaid his outlay in
43 building. Defendant objected the length of time, and finally agreed telling Haynie he would rent it out after first year. The contract was well understood between, and witnesses called thereto. No dissatisfaction for 8 months until Abner and Defendant were settling some old individual dealings. Then Abner expressed dissatisfaction and proposed to Defendant to keep the house at $4 per month and credit it on Defendant's claim on house. That Abner would produce Memoranda and allow certain items, otherwise he had Defendant's note and would never allow them. This was their last conversation.

44 Denies the friendly requests alleged. States that Defendant called on two of the Executors to settle, but could get none. That Defendant could not give up the house to any one who would settle the matter. That he rented the premises to the Davenports for 3 years, and they occupy them.

45 States that the alleged waste (if any) was done by said Davenports, without Defendants consent, that they would if desired surrender the premises at expiration of their tenancy in same condition as received by them.

That the entire amount expended on the building was $430.89 of which said Haynie paid $93.85; the balance $337.04 Defendant paid, for which he has received nothing but the occupancy of said house by him and his tenants since May, 1850

46 August 30th, 1853. General Replication filed to said Answer.

Answer of Defendant James A. Davenport filed Sept. Term, 1853. States:

47 That on or about 18th March, 1851, he entered into partnership with B. F. Marshall as Merchants, that James Marshall then occupying the lot in question rented same to them for $48 a year; that they occupied same to 17th January, 1853, when John V. Davenport purchased B. F. Marshall's share and became Defendant's partner. That Defendant and said B. F. Marshall paid James Marshall all rent due, to time of said dissolution at $48 per year.

48 That Defendant and said John V. rented same from said James Marshall from thence until 1st of April, 1856, at $72 a year and have paid him all rent due to the present time.

That shortly after said Defendant and John V. took possession they removed a partition wall which divided the store into two rooms, making it inconvenient, that no damage arose there, and
49 was removed with intention to replace it at the end of their tenancy if desired. That instead of waste, it rendered the Store more commodious and better fitted for business.

That they erected a shed room attached to said building as a ware or lumber room 20 feet by 14 feet on which they expended $50, the Store not being large enough for ordinary business, that they intend and propose to let it remain with charge or remove it if desired at end of tenancy. That it enhanced the value of the Store, and was absolutely necessary.

That when Defendant and B. F. Marshall rented from James Marshall, they were ignorant of his title only knew Marshall occupied and professed the right to rent it. That Defendant and John V. when they rented were equally ignorant. Deny the charge of knowledge. That they
50 rented in good faith and in good faith paid the rent to said James Marshall.

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51 A General Replication was filed on 15th Sept. 1853, to said Answer.

Answer of John V. Davenport filed Sept'r Term, 1853. States. That on or about the 17th
52 January 1853, he and James A. Davenport rented from Defendant, James Marshall, the Lot in question, from thence to 1st April, 1856, at $72 a year. That when they rented the partition made the store unhandy that they removed it, doing no damage, but a benefit, and will if desired replace it and at end of tenancy deliver premises same as they got them. That at cost of $50 they

[8480-89]

53 built a shed adjoining the store, that they did so for want of room it was necesary for their business which they at expiration of their term will leave with charge if desired, or remove. That said alteration and addition were improvements and not waste, and were necessary for the use of the store. That at time of renting they were ignorant of the title or owhership, or that it was disputed until this Bill was filed, except that James Marshall held it, and professed the right of disposing of it. That in good faith they rented, and in good faith paid Marshall all rent due to present time. Positively deny all knowledge of title to or right of possession or question thereon. That he and James A. Davenport are willing at end of their term to deliver up the store if de-
54 sired as they got it, ordinary wear and tear excepted.

A general Replication was filed to said answer Sept'r Term, 1853.

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55 Order of 16th Sept'r 1853. Suggesting resignation of Defendants W. D. Haynie & I. N. Haynie as executors of will of Abner F. Haynie. Appearance of Willis D. Green the other Executor—and rule that he answer by 2 o'clock P. M.

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54 Answer of Defendant Willis D. Green filed Sept's 1853. States. That the allegation in Bill of solvency of Abner's Estate to pay debts without recourse to the Realty is true. Admits that by said Abner's will the title to said Lot is in Complainants ; Martha D. and W. D. Haynie.

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57 1854 May 4th. Exceptions filed to Answer of Defendant Marshall.

1. That the contract set up between him and said Abner F. for the occupation of the premises is verbal, and unless in writing cannot be valid for a longer term than one year.

58 2. That he fails to show how much rent he got from Davenports ; or how long he occupied before renting to them ; or how much it was worth while he occupied, or how long he occupied himself.

3. That he does not show its value per year from time he got possession, or from dissolution of his partnership with Abner F. to present time, or how much rent he received, and from whom he got it.

4. That he has not in his answer accounted with Complainants.

5. General Exception.

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59 1854 May 6th. Order of continuance to September Term, 1854.

1854 May 25th. Complainant's notice to Defendants Davenport, directing them not to pay rents of the premises to Defendant Marshall, and notifying them, that they held said Defendant responsible for the accrued rents, and that if they obtained Decree of possession and Davenports should thereafter pay to Marshall any rent they would risk refunding with costs—said Marshall having no right to the rents, Complainants being lawful owners.

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60 Sheriff's return of service of notice on Defendants Davenport by reading on May 8th, 1854.

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61 1854 Sept. 20. Order of leave to Complainants to withdraw Replication to answer of Defendant T. F. Houts.

Notice by Complaintants of 24th July, 1854, to Thomas F. Houts, Sol'r for Defendant Marshall to take Depositions on part of Complainant of W. D. Haynie, Thos. F. Houts, Geo. W. Haynie, R. Moore and John V. Davenport, before James S. Martin County Clerk at Salem on 9th Sept. 1854.

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62 Sheriff's return of service on Mr. Houts.

Thomas F. Houts for Complainants deposed. That he knew the parties in this cause and the premises. That about the time of the improvements thereon, he was Commissioner to sell and convey same in cause School Commissioner vs. W. D. Haynie. That James Marshall bid them off at $100 and told him to make Certificate to A. F. Haynie, then absent, but who shortly returned and complied with Decree of Sale, and he made him the Certificate. Marshall and Hay-
64 nie occupied after Haynie's purchase, cant say how long. Thinks J. A. Davenport and B. F. Marshall next occupied, who were succeeded by J. A. & J. V. Davenport for a time, and they by R. M. Nichols, who now occupies—not being familiar with rents cannot answer as to what the premises would rent for from 1850 to present time. Rents are 30 or 50 per cent. higher
65 now than then. Gave the Certificate of purchase to Haynie, calling on Haynie for it when he was entitled to Deed, who looked for it, could not find it, and said it was lost. Haynie died.—I. N. Haynie one of his Executors made an affidavit of loss, which was annexed to witness' answer, that on Mr. I. N. Haynie's request he made the Deed, gave it to W. H. Green as Attorney for Complainant, telling him it was worthless, being made to a dead man.

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65 William D. Haynie for Complainants deposed that he knew the parties to this cause. A. F.
66 Haynie & James Marshall occupied the premises when the addition was put to it. A. F. Haynie had possession before the addition was made. Being asked if the house were moved in the

present condition would the removal of the partition wall make it shaky and difficult to remove
67 without injury. Witness said, that the braces being taken out, it did not retain the strength it did. That as to moving that depended on circumstances. If the movers understood moving and replaced the braces it could be moved without injury.

On cross examination by Defendants, said, he could not recollect where Dr. Haynie was at time of making the improvements, presumed the object in removing the partition wall was to make the store more convenient.

68 John V. Davenport for Complainants, deposed that he knew the parties to this suit. Knows the premises, heard James Marshall say he rented them the first year for $4 per month and since then for $6 per month. Since Marshall and Haynie dissolved partnership B. F. Marshall and
69 & James A. Davenport occupied it part of the time, James A. Davenport & witness other part of the time, R. M. Nichols other part of the time, and up to the present time. Could not say when Marshall & Haynie dissolved partnership. James A. Davenport and witness moved the partition, was not done by Marshall's directions, was done by witnesses' directions; think J. A Davenport and witness told Marshall of it, who told them to do as they pleased, if they would
70 replace the Store as it was if required. Thinks he meant Dr. Haynie or his Executors or Administrators were meant by the party requiring to put it back. Being asked by Complainants how long he occupied and how much rent he paid Mr. Marshall, witness said that he and J. A. Davenport took possession about 15th of January, 1853, and paid him the rent up to 1st April
71 last, (1854), and $1.50 on present year at $6 per month. Mr. Nichols the present tenant took possession about 20th of Dec. 1854, at $6 per month.

Cross Examined by Defendants.

Witness deposed, that about an hour or an hour and a half, just before time of his testifying in the Court House, James Marshall told him he rented the house at $4 per month first year and at $6 per month since then. To the best of his knowledge Marshall was to have possession of the Store for work he did on it, his understanding was that Marshall was to have it for 3 years and 3 months from the time J. A. Davenport and witness rented it. The removal of the partition greatly added to the comfort, value and convenience of the house for the purposes for which it was built. Witness and J. A. Davenport at cost of about $30 or $35 put a shed-room or
72 ware-room to the building, which adds to it as a store house, they also put two window shutters and fitted up windows worth about $3.

Re-examined by Complainants.

Witness deposed, that it was at the time he and James A. Davenport rented from Marshall, that he told them he was to have the house for three years and three months from time of renting to them for the work and labor he did thereon. Thinks that neither Complainants nor any agent for them was present at that conversation.

73 County Clerk's certificate and Bill of costs.

Defendants' Depositions.

74 Notice by Houts, Defendant's Sol'r to Complainants to take Depositions on 6th Sep't. 1854, before James S. Martin, County Clerk.

75 Sheriff's return—by reading and leaving copy with Defendant Haynie, Aug't 25th, 1854.—W. Dodd, Sheriff of J. C. Ills. by H. W. Goodrich, D. S.

76 B. F. Marshall a witness for Defendant testified, That he is acquainted with the parties to the suit. Knows of Defendant Marshall and A. F. Haynie deceased, doing business as partners,
77 from Oct. 1848 to May 1850 when they dissolved. Defendant Marshall was to pay A. F. Haynie the amount he had in the Stock and 50 per cent. on it, Defendant was to keep the Stock of goods and books, and Haynie to retire from business. They occupied the lot in dispute a part of which was formerly occupied by W. D. Haynie as a residence. When they dissolved Dr. Haynie called witness to witness the contract as to the house, which is, Defendant Marshall was to have it at half rent until the rent amounted to what Defendant had expended in building the house the rent agreed on was $4 a month, being $2 Defendant Marshall was to pay. The house
78 was in possession of Defendant and his tenants from time of dissolution hitherto. Thinks at time of dissolution it was reasonably worth $4 per month, witness and Dr. Davenport rented it since then at that rent. Being asked at whose instance it was that Defendant Marshall continued in possession of the house. Witness said, that there was some contention between A. F. Haynie and Defendant. Defendant wanted A. F. Haynie to take the amount he expended on the house out of what he would owe A. F. Haynie on dissolution. Haynie insisted Defendant Marshall should keep it until the rent amounted to what he had expended thereon as witness before stated.

79 *James Chance*, a witness for Defendants testified that he knows the parties, and the Store house in question. He furnished flooring plank for same, $8 worth and upwards, Defendant Marshall paid him.

80 *William Chance*, a witness for Defendant, testified, that he knew A. F. Haynie and Defendant Marshall. In Spring of 1848 he furnished stone for a house and Defendant Marshall paid him $1.25 for it.

Cross examined by Complainants.

Don't know for what house he furnished the rock. Don't recollect the year or time of the year.

81 *James Hawkins*, a witness for Defendants, testified. That that he knows Defendants Marshall and A. F. Haynie, and knows the premises in question. Made two window-shutters therefor and furnished the lumber and got $4 for it from Defendant Marshall. Knows that A. F. Brown furnished lumber, made shelves, 3 doors, cased and hung them and furnished plank and made counter table, all of which amounted to $62 and that Defendant Marshall paid Brown for same.

82 Cross examined by Complainants.

Don't know whether Haynie and Marshall were partners then. Defendant Marshall paid Brown in accounts and other indebtedness, his own Bill was paid by debt he owed Marshall.— Was present part of the time Brown and Marshall were settling, some few days after Brown

83 told him they had settled, can't recollect exactly how it was. Thinks the work was done in 1848.

Re-examined by Defendant.

Knows Defendant Marshall at time of Brown doing said work had an Execution against Brown, don't know the amount. Witness was to have pay for his work, and Marshall settled his account, there was not enough left to settle it and witness did not get it, had to look to Brown for it.

Re-cross examined by Complainant.

Knows no more in that matter but what Brown or Marshall told him, only in what he was present at when they were settling.

84 *Henderson Hensley*, a witness for Defendant, testified that he knew A. F. Haynie and Defendant Marshall and knows the premises. Brought a load of lime part of which he left at that house for which Defendant Marshall paid him $5 or something over.

Cross examination by Complainants.

Don't know who occupied then, Mr. Marshall ordered the lime, and he hauled it there, thinks

85 it was the understanding that Marshall and Haynie were building the house together. Can't give the date, the workmen were at work on it then. Can't say what was done with the lime, did not stay, thinks they were preparing to use it. Mr. Marshall paid him in cash.

Edwaad Young, a witness for Defendants, testified. That he knew the parties and the prem-

86 ises, he lathed and plastered the house. Mr. Marshall paid him therefor $36. Knows the lime furnished by Mr. Hensley was used on the House. Mr. Marshall and his sons furnished the sand and waited on witness while plastering, thinks the sand, making mortar and waiting on witness worth $15. Mr. Marshall furnished nails for lathing worth $3, and for shingling worth $2. Mr. Evans hauled some boards, was there when Mr. Chance hauled the rock, which was used

87 on the house. Thinks Mr. Haynie was in St. Louis sick.

Cross examined by Complainants.

Does not know whether Haynie and Marshall were partners then. Thinks Mr. Marshall had the nails on hand. It was the house occupied by B. F. Marshall and Davenport. When the house was finished, there was two rooms lathed and plastered, the smaller one 18 by 20 feet, there was a lathed and plastered partition between them, dont know the size of the other room

88 was same width, not less than 24 feet long and about 10 or 11 feet story. In the inner part of the building Mr. Marshall said he was going to move his drugs. The other room was shelved off for goods, supposed they were going to put goods there. Supposed the house belonged to Mr. Marshall, he told witness it did. Was not in the house since Davenports was in it. The work was done in Spring of 1848. It was finished for occupancy about June 1858.

Re-examined by defendants.

Mr. Marshal boarded witness at Mr. Easleys while the work was doing, can't say what it was worth.

89 *Obadiah Evans*, a witness for Defendants, testified. That he knows the parties, purchased materials for the building connected with the Store house in question, three feet convering boards worth $2,81, thinks he settled with Abner Haynie.

Cross Examined by Complainants.

Settled with Abner Haynie, he being present when witness furnished boards, the reason he settled with Haynie was that he and Marshall were partners then. Did not recollect the year.

90 *Abraham Wimberly*, a witness for Defendant, testified. That he is acquainted with parties and the Storehouse in question, he furnished lathing, some 4000 at $2,50 per thousand and James Marshall paid him for them.

James Adams, a witness for Defendant, testified. That he knows the parties and premises,

91 witness with his father and brother worked on framing, weather boarding, sheeting, flooring and shingling the house and patching old house which was covered anew, it all cost $75, dont know who paid for it. Witness and his brother were working for their father, thinks his father owed Defendant Marshall individually at that time.

Cross examined by Complainants.

92 Understood from his father it was Marshall's house. The old house was 20 by 18 feet, one story, the new house was 24 by 18 feet, 10 feet high. There were two rooms when it was finished, divided by the gable end of the old house, which formed the partition, when finished it was a good and substantial building.

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93 Re-examined by Defendants.

His father told him that Mr. Marshall employed him and was to pay him.

James Young, a witness for Defendants, testified. Knows the parties and the premises, he furnished shingles, and sills, joist, studding, sleepers and rafters, worth $79 which Mr. Marshall paid him.

Cross examined by complainants.

94 Mr. Marshall paid him $18 in note on witness' brother, one horse,, some money and balance in witness' indebtedness.

95 *William G. McKinney*, a witness for Defendants, testified. That he knows the parties and premises, he and Mr. Fulton made counter, a pannel door, desk, charged $10 for counter, $6 for pannel door, Mr. Marshall employed and paid them, witness furnished lumber for the top of counter worth $3, which Mr. Marshall paid in lumber in return. Thinks the removal of the 96 partition a benefit to the house as a store room. It was painted by Marshall, who furnished oil paint and brush, it was worth $12 or $15.

Cross examined by Complainants.

The counter was nailed to the floor, it was in the old room, there was a partition there then the new room was used for drugs and queensware, a small portion of the counter has been turn-97 ed and put in one end of room. No shed attached then, there is now. If the shed was removed and gable end taken out as it is now it would not add to stability and firmness of the building.

Re-examined by Defendants.

The shed building has not injured, it adds to the convenience of the store.

Re-Cross examined by Complainants.

The building is 44 feet long 18 feet wide, 10 feet high, the removal of gable end has not injured or weakened the building.

98 *Robert D. Easley*, a witness for Defendants, testified. Knows the parties, Mr. Marshall paid him for board of Edward Young two or three weeks while working on house about $6.

99 Cross examined by Complainants.

Knows the premises, it was finished in Spring of 1848, the room built made two rooms in the house, thinks the frame about 40 feet long 18 feet wide, does not think removal of partition injured the house. Understood from Haynie and Marshall that they were preparing the house for a partnership business.

Re-examined by Defendants.

100 Thinks Haynie were not partners before completion of the house.

Mark Tully, a witness for Defendants, testified. Knows the parties, witness and his son sawed some scantling and sheeting at their mill, worth $15 to $20 which Marshall paid.

Cross examined by Complainants.

His son James was paid, was not present.

Re-examined by Defendants.

101 It was paid to his son, witness and he being partners.

James A. Marshall, a witness for Defendants, testified. That he knows the parties, knows Nathan Adams worked on house, and Marshall paid him, he was in debt to Marshall, the bal-102 ance $15 he was to take in the store. Defendant Marshall furnished locks worth $3, glass, sash and putty worth $4, paints and oil $8. O. Evans furnished boards.

Cross examined by Complainants.

Saw his father and Adams settling, hearing good part of their settlement.

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104 Exceptions to Defendants Depositions filed 23d September, 1854.

1—Complainants except to all the questions and answers as leading and improper.

2—Except to service of notice, it was not served on Complainants, Attorneys or Solicitors.

3—Except to the notice as informal and insufficient.

4—Except to the authentications of the Depositions.

105 Exceptions to Defendants Depositions, filed 23d September, 1854.

1—No service of notice on W. D. Haynie a minor, nor on his Solicitor or Attorney.

2—No service of notice on Martha D. Haynie or her Attorney or Solicitor.

3—Except to B. F. Marshall's testimony, the Complainants counsel not present and without notice.

4—Except to B. F. Marshall's testimony, the facts stated being within the Statute of frauds.

5—Except to questions to and answers of B. F. Marshall as leading and irrelevant.

6—Excepts to Deposition of W. Chance, Complainants not being present and without notice.

106 7—The questions to W. Chance leading and irrelevant.

8—Except to Jas. Chances Deposition. Complainant not present and without notice.

9—Except to questions to James Chance as leading.

10—Except to answers of James Chance as irrelevant.

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107 1854, September 23. Complainants filed amended and supplemental Bill, which stated.

108 That at May term 1853 of Marion Circuit Court, Complainants filed their original Bill, its object was to get possession and account of rents of a town lot in Salem, pray said original Bill as far as material be part of this Supplemental Bill. That at said May Term, answers and replications thereto, were filed and testimony taken on both sides. That by reason of allegations in 109 Marshall's answer, and the grossly fraudulent and litigious defense therein, and the collusion of said Marshall and the Davenports and one R. M. Nichols since filing the answers, the Complainants are compelled to amend the Bill and file Supplemental Bill to show true state of the case.

That said Marshall and A. F. Haynie in 1849 and previously were partners, and built a store

house in Salem by adding a room and repairing the old house, the lot being Haynie's, part of the expense paid by Haynie, part by Marshall. Haynie in bad health, and he finding Marshall was acting dishonestly, dissolved the partnership. Marshall gave his note to Haynie for amount
110 of stock and 50 per cent. thereon, and Haynie agreed Marshall should use the store for a short time until re-embursed his outlay, the store then rented for $4 per month. Marshalls outlay inconsiderable not ascertained but did not exceed $261,08. That after said dissolution, Marshall fraudulently tried to claim one half said store and lot and filed his Bill in Chancery in Marion Circuit Court May Term 1851, Haynie, then an invalid, unable to do business, Marshall by filing said Bill sought to take advantage of Haynie's ill health by a default. That Haynie
111 recovered and filed his answer at May Term, 1851 of said Court, sworn to, and complete answer thereto. That Marshall was bound to reply in 4 days or except did neither. Complainants contend that said Bill and answer are conclusive on the right of the parties as far as admitted or denied. That Bill and answer annexed to this Suplemental Bill.

That Marshall in said Bill not only claimed one half the store, but the $261.08 his outlay thereon, and that he should retain the store until repaid his outlay from May, 1851, at rate of
112 $4 per month. That said answer fully explained all, and showed Marshall had no right to possession, and his attempt in another place to claim possession is unconscientious and fraudulent.

That said Haynie husband and father of Complainants respectively died, July, 1851, in Kentucky, that at September Term following, he suffered the cause to abate, to gain advantage, knowing he could not disprove said answer—and was barred thereby of clearing title—yet if he
113 succeeded in a Decree pro confesso, he though since Haynie's death has set up a different case from his Bill, would in case of such Decree have tried to prove his former case, as he now contradicts that case—had said Bill not been answered.

That after said dissolution said store house and lot was occupied by B. F. Marshall son of said Marshall, at $4 per month—that during occupancy of said B. F. Marshall said Haynie sent him word he must pay rent $5 per month, as rents in Salem were rising, all which said James
114 Marshall knew, yet he never signified dissent or set up any claim to same knowing he was reinbursed his outlay.

Charges the alledged contract by Haynie and Marshall for the latter to hold said house was only a parol agreement and void by the Statute of frauds and the Statute of Leases.

Insist Marshall is bound to account for rent of the Store at $4 per month for first year and $6 per month for remaining time he has held same, and has received that amount. That Marshall if he has any claim should look to Haynie's personal estate. That the alleged contract is
115 void against Statute of frauds—and that he has held the Store against Complainants consent, and is bound to account for the rents and pay them over to Complainants.

That Complainants are not only kept three years and a half out of their possession, but said Marshall and James Davenport threaten to pull down part of the building to Complainants injury and disinheritance of said lot.

That at last Term of Marion Circuit Court Complainants notified said James A and John V. Davenport not to pay any more rent to Marshall, that they to avoid same have changed the possession and rented to one R. M. Nichols who with one Rufus P. McElwain now occupy—all
116 which continue said tortuous possession ; in which the Davenports colluded with Marshall.

Charge waste against Davenports in removing a partition wall without license, and thereby forfeited right to occupy as tenants.

Pray—That Houts, Marshall, Davenports, Nichols and McElwaine be made Defendants, to
117 this amended and supplemental Bill, and answer same. *Pray* Decree that Houts against whom no costs are asked may convey said Store and lot Complainants. *Pray* possession and their title be quieted. *Pray* Injunction and Reciever. *Pray* further litigation he ended and perpetual Injunction and writ of Summons.

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119 The Bill filed May, 1851, by James Marshall referred to in said Supplemental Bill and annexed thereto. States

That in April, 1847, Complainant Marshall and Abner F. Haynie a physician agreed to become partners as Merchants, Druggists and Apothecary, on equal footing as to loss and gain,
120 Haynie to account for his medical fees as partnership assets. The house in which they traded and title were Haynie's, but to the repair of which Marshall having contributed $261.08 which was agreed said house and lot should be partnership stock. That they traded as A. F. Haynie & Co., under terms of said agreement until May, 1850, when they dissolved by mutual consent
121 on these terms, Haynie to have proceeds of his practice, Marshall to have the Stock in trade on hand, paying Haynie the amount contributed by him as stock in trade and 50 per cent. thereon, deducting therefrom Haynie's account for goods, drugs and medicines taken by him, and all sums paid by Marshall on account of Haynie's debt. That afterwards pursuant to these terms and on a partial settlement, said Marshall gave Haynie his note for over $1.100, precise sum unknown, payable March, 1851, on which certain sums were to be credited, such as Haynie's account with the firm and sums paid by Marshall at Haynie's request for his debts, the amounts were then unknown to Complainant and he believes also unknown then to said Haynie, but
122 when ascertained were to be credited to Marshall on said note.

That at and before dissolution aforesaid and execution of said note, Marshall paid for Haynie

as follows—To R. D. Easley for Haynie's Board and Lodging $55—Stage fare $10—A Wooster Bank Bill paid in by Haynie, worthless, $10—Medicine to Haynie, and furniture for Apothecary shop $30.—Judgment held by B. Bond against Haynie and a lien on his Real Estate
123 $125.—Insurance on Store $34.25.—Two suits of clothes amount not known, all which items were not taken into account at time of said dissolution and making said note. Complainant Marshall charges he is entitled under terms of dissolution to 50 per cent. additional on all sums that should have been deducted at time of settlement, all which Haynie knew and has the vouchers for in his possession. That since dissolution and during 1850, Haynie bought goods of Com-
124 plainant to amount $130.79. That afterwards in March, 1851, Complainant paid Haynie $700 and at the same time gave an order on J. T. Dwyer for $100 which was paid making in all $938.79 paid since giving said note. That at time of dissolution it was agreed that Marshall was to retain the Store house at $4 per month until said $261.08 outlay on said store was repaid. That said $938.79 paid since note was given and $381.37 amount paid previous to dis-
125 solution and not accounted for makes $1320.16 an amount exceeding the sum due by Complainant to said Haynie. That Complainant has often applied to Haynie to account and settle and give up said note and pay the balance as in equity he ought. Haynie refuses.

126 127 *Prays* answer, and specially interrogates as to each item. *Prays* partnership account. *Prays*
128 account of monies paid since dissolution. *Prays* Decree for amount to be found due, and that
129 Defendant Haynie produce the vouchers and deliver up said note. *Prays* further relief and summons.

The answer referred to in Supplemental Bill and annexed thereto and filed May Term 1851. States :

130 That the time and terms of partnership are correctly stated. Denies Complainant Marshall was to acquire any interest in the Store house, or that it was partnership stock. That if such contract be shown it is parol and void by the Statute of frauds, which is pleaded. Time of dis-
131 solution correct. States the Terms of dissolution to be as follows : Defendant Haynie was a practicing physician, and the proceeds of his practice was joint stock, but on dissolution it was agreed Haynie should retain all these proceeds as well those paid as those unpaid, and all sums paid in to the firm few such practice Marshall was to refund with 50 per cent. thereon—further it was agreed, that Haynie's Store account with the firm be deducted from the assetts thereof, also all monies before that drawn out by said Haynie—a balance was then struck which with 50 per cent. additional was to be paid by Marshall to Haynie, subject to his instructions
132 That Haynie's account for Drugs was not to be charged. That on these terms settlement was had and ballance adjusted for which Marshall gave his note for $1184,40 in full of all was supposed to be due. That the $45 charged as paid Easley is incorrect, no such judgments having
133 been made, there was mutual debts between Easley and Defendant Haynie not yet settled. That any debt to Easley was individual and not partnership, and if paid was done without Haynie's authority. Charge of $10 stage fare incorrect $3 willing to pay, it was a partnership charge, and adjusted. $10 Wooster Bank Bill incorrect, it was received by Marshall for the firm and
134 he should pay it, is willing to deal equitably. That $30 charged for furniture of appothecary shop incorrect, it was not worth $8 which last sum even under their agreement is an improper charge, the $125 paid B. Bond if ever paid was if paid on a judgment not of Haynie, and barred
135 by limitation, and if paid was a payment of a debt of a third person without authority and not a partnership debt. That by the terms of the dissolution Marshall after complying with the terms before stated was to have the entire stock on hand, and pay all the firm debts.
136 The charge for insurance was a firm debt and to be paid by said Marshall—positively denies the charge for two suits of clothes. That the $700 cash and the $100 from J. T. Dwyer were paid and credited on said note. That the statement of Marshall's outlay and agreement are not correct. That said outlay was not then ascertained, no time fixed for payment. That Marshall
137 continued to occupy the store at rent of $4 per month and has occupied and now occupies, said rent should be deducted from said charge for outlay, when the amount paid is proved. That Haynie holds an account against Marshall besides said note for $135,75, has offered to adjust their matters, but could not effect it. Denies anything as to the partnership is open and unsettled so as to require the aid of a Court of Chancery. That for all mutual claims the remedy at
138 Law is complete. That the charge of $138,79 for Store account against Haynie is not partnership and he Defendant Haynie has a right to apply it on any debt of said Marshall, that Defendant Haynie is always ready to adjust it in final settlement.

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139 Order of Judge Baugh of 23d September 1854, refusing to allow filing of amended and Supplemental Bill, and refusing to grant Injunction and Receiver. This order is not entered of Record, it is only filed among the papers.

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140 Order of May Term 1855 continuing said cause.

Order of September Term 1855, giving leave to file amended and Supplemental Bill.

Order of September Term 1855, appointing Silas L. Bryan Receiver &c. and granting Injunc-

tion as prayed

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143 Injunction dated 7th November 1855 against Defendants Marshall, Davenports, Nichols and McElwain for renting or underletting the premises, and from committing waste.

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144 Order of January Term 1856, continuing said cause.

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145 Order of May 7 1856, referring to James S. Martin, Master in Chancery, to take proofs, &c.

Answer of James Marshall of May Term, 1856, to amended and Supplemental Bill, States.

146 That he admits filing of original Bill at May Term 1853, but with an additional object not stated in amended Bill, viz: to get title and possession of said lot and an account. That Defendant answered said original Bill fully and refers to same. Unqualifiedly denies that his defence in said answer was grossly fraudulent and litigious. Denies collusion charged with Davenport, and that same is false. Denies he claimed title to lot, but only a possessory right under contract with A. F. Haynie. That ever since he filed said Bill in 1853 he has been ready
147 and pressing a hearing, but Complainants are postponing same, pretending surprise by Defendants answer, though Complainants well knew before filing said original Bill, the nature of Defendants claim, viz: That he claimed use of said store at a given rent until reimbursed his outlay in said house. That sometime in 1847 Defendant and Haynie became partners in sale of Goods and Drugs. That Haynie was to contribute $1,500, but never paid more than $400.— That the room then occupied was too small. That they agreed to build on lot which Haynie said was his. That Haynie went to St. Louis at that time. That Defendant went on and did build, &c. Haynie paying only a small amount. That Defendant superintended the work and paid individually $227,04. That at that time the lot belonged to W. D. Haynie and not to A. F. Haynie. That it was mortgaged, foreclosed and sold by Houts, Commissioner. That Defendant bid it off for A. F. Haynie. That Defendant bought large stocks of goods, paid for
148 them. Haynie paid nothing more than said $400 and but little personal attention. Defendant obliged to borrow money on personal credit, and began to make bills for goods in his own name, said Haynie promising to pay his share of capital. That finally in Spring of 1849 they agreed that Haynie should go out, Defendant paying him all he had paid in by cash or medical practice and 50 per cent. Defendant previously offered to sell to Haynie on same terms and 50 per cent. There was then a partial settlement and Defendant gave his note for $1000 or $1100 (sum forgotten,) that was all was settled, the memoranda taken down thereof Haynie took. On their settling the Store house was hard to settle, neither wanted it, it was finally agreed that Defendant should keep it at $4 per month rent, $\frac{1}{2}$ to Haynie $\frac{1}{2}$ to Defendant until his outlay was paid then Defendant did not want it for more than a year and would then rent it out. The agree-
149 ment was verbal, but was well understood and witnessed. Defendant submits that the statute of frauds cannot effect said agreement because it was wholly exacted by Defendant by his payment in advance of the rent agreed on, and his having possession and continuing in possession personally or by his sub-tenants, and the contract being made in good faith. Denies he ever claimed said property as his own, or fraudulently filed his Bill in 1854. That said Haynie requested De-
150 fendant to file it to settle their matters, and sent a note to Houts, his Counsel, to bring suit for that purpose. Admits Haynie answered at close of Term, and died before the next Term. Denies he suffered the cause to abate, that he intended in good faith to prosecute it, and prove his Bill. But the court (Judge S. S. Marshall) ruled it must abate by Haynie's death, as it was a cause could not have been originally brought against the legal representative of Haynie dec'd., being for Discovery as well as Relief. That he furnished his Solicitors with items of outlay to $261.09, but since then found items promiscuously charged in the books which aggregate $337,04, and which he submits he has proven almost entirely by Depositions in this cause. De-
151 nies he has set up a Different case since death of Haynie. Knows of nothing of alleged notice to B. F. Marshall to pay $5 per month, does not believe it was given. Did sub-let to Davenport and his son B. F. Marshall—and that McElwain and Nichols now occupy it. Denies waste. Admits repairs, and that the house can be given up in same condition as received (ordinary wear and tear excepted.) Submits he is not bound or concluded by his own Bill or by Haynie's answer, &c.

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152 General Replication to said answer filed.

September Term, 1856—Order continuing cause.

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153 Notice to Houts & Hamilton Sol'r for Defendants to take Testimony before Master in Chancery, May 8th, 1856.

Master's report of Testimony for Complainants.

George W. Haynie testified, he knew the partners in Spring of 1851, while A. F. Haynie was
154 sick, he directed witness to notify B. F. Marshall the tenant he must pay $5 per month rent, B. F. Marshall made no reply. Thinks $60 a year a fair rent for 1851 and 1852. Thinks it could

rent for $75 a year for 1853, 1854 and 1855, and up to present time worth $125 a year. For sometime before A. F. Haynie's death, he and James Marshall were partners doing a credit business—taking down the partition no injury, but more rent could be got if rented separately.—
155 When the addition was built labor and material was low : thinks it could have been for $150– it was an additional room. A. F. Haynie was husband of Complainant Martha D. Haynie.

Samuel Hull for Complainant testified, he knows the parties, that previously to death of A. F. he, and James Marshall were partners in a credit business. The addition when built could have been done for $250, labor and material being low. Taking down the partition no injury to rent-
156 ing, from 1851 to 1852, it would have rented for $60 a year—from 1852 to 1854 worth $75 a year—from 1854 to present time worth at least from $10 to $12 per month.

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158 Decree of Judge Breese (Circuit Judge,) at August Term, 1857. Hearing by consent of parties, on original Bill, Answers and Replications—and Supplemental Bill of Complainants, Answers and Replications, Depositions and Exhibits.

Decree.—That Thomas F. Houts, convey the Town Lot &c., in question by Deed to Complainant Devisees of Will of A. F. Haynie to hold in equal parts as Tenants in common, and that the Deed heretofore given by Houts to A. F. Haynie since his death be cancelled.

Decree —That Complainants are entitled to the rents &c., of said premises from death of A. F. Haynie, to-wit : from 1st of July, 1851, to time of accounting before Master in Chancery.

159 Cause referred to Master to take and state account of rents and profits, and report to next Term—cause continued therefor.

March 19th, 1858. Master's Report filed. Annexing Receiver's Report and Exhibit A.—State of rents as follows, to-wit :

160

Rents received by Defendants from 1st July, 1851, to Jan. 15, 1853, at $4 per month,	$72.00
Rents received by Defendants from Jan. 15, 1853, to Jan. 15, 1855, at $6 per month,	$144.00
Estimated the rents from Jan. 15, 1856, to April, 5th, 1856, to be,	$105.00
Rents received by Receiver from 5th April, 1856, to 26th April, 1857,	$80.00
	$401.06

161. Report of Silas L. Bryan, Receiver, annexed to Master's Report, stating net receipts to be $80.06 which he paid Complainants. Exhibit A. annexed to Master's Report, being abstract of evidence relating to rents &c., to-wit :

1—B. F. Marshall and J. A. Davenport tenants from death of Haynie to 15th January 1853, at $4 a month.

2—J. A. & J. V. Davenport tenants from above date to December, 1853 at $6 a month.

3—R. M. Nichols occupied from last date to sometime in 1855, at $6 per month.

4—G. W. Haynie, says Lot worth in 1851 and 1852, $5 a month, in 1853, 1854 and 1855, $75 a year and $125 for 1856.

5—S. Hull, says the rents at $60 a year for 1851 and 1852, from 1852 to 1854 at $75 a year, from 1854 to 1856 at $10 or $12 a month.

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163 Order of March 10th, 1858, Judge O'Melveny, refusing to release Houts as Commissioner and appoint P. P. Hamilton, and refusing to alter form of the Decree of Judge Breese.

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164 Decree 17th March, 1858, Judge O'Melveny. That the Decree herein be entered as of last August Term—ordered it be referred to the Master to take an account of the rents &c., Master presents his Report, which is approved and filed.

Decree that Defendants pay Plaintiffs the amount reported to-wit : $401.06 within 30 days.—Execution to issue on default to pay. Ordered that Counsel draw the Decree, submit it to the Court for approval, and on such approval that it be entered as of the present Term.

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165 *Final Decree*, March Term, 1859, Judge O'Melveny presiding. Decree made 4th April, 1859

Recites, that Nelson for Complainants presents Draft Decree. Decree recites order of March Term, 1858.

Recites presentation of Master's Report filed 17th March, 1858.

Recites. The Court examined said Draft, Decree, and also the minutes of Judge Breeze at August Term 1857, and his Decree and the papers. States the Court approved of said Draft Decree, and confirmed same and ordered it of Record as of August Term 1859.

166 *Ordered* the Decree of Judge Breese and the Master's Report be recorded as part of this Decree and cause removed from Docket. (Here followed Judge Breese's Decree for which see pages 157 to 159 of Record herein. Then followed Master's Report, see pages 159 to 163 of Record herein.) The Draft Decree presented by Nelson and approved. Ordered, that Complainants recover of the Defendants James Marshall, James A. and John V. Davenport the sum of $401.06 according to Report of Master. That Execution issue against them unless paid in 30
167 days from this date (17th March, 1858.) Ordered, that Defendants Marshall and Davenports, forthwith deliver up possession of the premises. Order perpetually enjoining them from disturbing Complainant's possession and that this Decree be entered as of March Term, 1858. N. B. This Decree entitled to a credit of $80.06 paid to Martha D. Haynie by the Receiver and he endorsed as a credit on the Execution.

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Davenport et al

vs.

Haynie et al.

8480

Filed Nov. 1862 –

A. Johnston Clk