The argument of the Hon. Levi Woodbury before the Hon. Messrs. Henry Hubbard, Leonard Wilcox, and Frederick Vose, as referees and arbitrators in the case Isaac Hill against Cyrus Barton, September 29, 1841.

1841

THE ARGUMENT OF THE Hon. Levi Woodbury,

Before the Hon. Messrs. HENRY HUBBARD, LEONARD WILCOX, and FREDERICK VOSE, as Referees and Arbitrators in the case Isaac Hill against Cyrus Barton, September 29, 1841.

Gentlemen:

It is hardly necessary before referees of characters so distinguished to make apologies for counsel. Their assistance can be of little aid to you. But if the exhibition of eloquence to which you have just listened shows that apologies, if proper, are required rather from me and my client than from the opposite side; the facts and legal points in the case are entirely new to me; and I am present now only by accident, which at a late, unexpected and unfortunate moment deprived my client of the other professional aid on which he had relied.

It has been his misfortune also on former occasions to receive little assistance of counsel in preparing the cause or explaining the facts; and I am now without even their minutes and references on the legal questions—while some of the ablest lawyers in the State have constantly aided the other side and been long so familiar with all its difficulties, that before you now, as well as on former occasions, they are fully competent to push forward every thing plausible—omit all which is weak—make prominent what seems calculated to excite sympathy, and gloss over any circumstance likely to prejudice the defence.

But I congratulate both my client and myself, that these considerations are of less consequence in the present hearing than is usual, not only from the strength and goodness of his cause, but from the ability and experience of the arbitrators, which can hardly need any counsel in the legal questions, and most assuredly will not be misled by their ingenuity in selecting the facts or in applying to them principles. I shall proceed with plainness and fairness to give in the case all the aid which I can, however imperfect, by submitting the views, which have struck me most forcibly, though it has not been in my power to advise and aid in the preparation of the evidence, and is less to be regretted from the industry and care exercised by my client.

In the outset I would observe, that the opposite counsel must labor under a mistake in supposing that my client has endeavored either through the press or in any other manner to cause

prepossessions in his favor, or that he now wishes to avail himself of prejudices existing in any way and from any source for or against either party.

I believe he has issued no pamphlets, nor revoked any references, nor even alluded to the subject in the press except in a single instance, and that in self-defence or reply.

On the contrary, I entreat for him, that nothing may bear on the result of your enquiries, but the law and the evidence. I ask nothing from personal or party views—nothing from previous impressions as to the merits—nothing from any consideration before the trial or after it—nothing out of this hall or out of the case itself. Indeed, most earnestly do I appeal to the high stations you yourselves have long filled in society—to the publicity of this hearing before so large and respectable an audience —keen to the honorable standing of both the gentlemen whose regretted difficulties you are now attempting to adjust: I appeal to all as conclusive evidence, that nothing should or easily can influence your deliberations, which is derogatory either to yourselves, to them or the case.

The dispute is certainly an unfortunate one, as separating friends. It has been lamented by their mutual supporters in politics no less than in social life. But the parties are free men, and have the right to judge on their own pretensions, and to pursue them in their own way, under the laws of the land.

All of us may regret and probably have regretted that every attempt at reconciliation hitherto has failed; but no prejudice must be cherished against either for this unhappy result. If either has erred, it probably is the consequence of the true principle of liberty—civil courage—manly independence. They have doubtless both done what they considered to be their duty, and it has now devolved on us to do ours. We can do it, and we all by God's blessing will do it. None of us may in the excitement of the moment be able to meet fully the expectations of the parties; but we can try to meet our own, as guided by conscience and the lights before us. Thus acting in open day before the country as well as the parties, we can properly confide in a just Providence as well as an intelligent public, that all our efforts to do right will in the end be liberally appreciated by all concerned in the result.

I have no reproaches to cast on any one. My business is with the case rather than the parties; and certainly with nothing prejudicial to either, disconnected with the merits. And if any remarks of mine should seem harsh in their consequences or bearings, it will be so only in the discharge with fidelity of what the case itself—its evidence—its principles, and its justice, demand of me, as the representative of my client.

In my apprehension, a plainer case on the face of it, both in law or equity, never came before any judicial tribunal.

Nor is there a provision in the whole contract, about which the original controversy arose, that is either doubtful, unnatural, unusual, or oppressive.

On the contrary I feel constrained to say, that the whole difficulty from beginning to end appears to have originated in an unfortunate neglect and refusal on the part of the defendant to comply with his own express stipulations.

Some may at first be surprised at this exposition. But you and all who have listened to this trial can verify its truth. There is no escape from it. Here is the contract itself signed by the parties. Here is the defendant's pamphlet and letter, admitting his refusal to fulfil the contract. He has repeated his refusal again in your presence to-day. And here as well as elsewhere—to-day and on former occasions, the eloquent defence through his counsel has been, not the fulfilment of the contract, but its supposed hardness, its supposed illegality, and its supposed want of equity.

In one breath you have been urged to exonerate the defendant, because there was no consideration, when the contract is a sealed one; and beside that, as I will soon demonstrate, it had full and ample consideration. In the next breath, you are invoked to ride over all legal points, and look only to equity, in order to avoid the effect of the seal; and a moment after are urged in the strongest manner on account of some strict, technical position in law connected with the post-office establishment, not to do equity to my client and pay him what has actually been received for him, but like Shylocks insist on his losing every thing if there be but a single dollar of illegal matter in the whole six years receipts.

I will, however, soon endeavor to satisfy you, not only of the fairness and justice of the contract, but that the grounds of defence as to the want of consideration, and as to any illegality in any part of the contract, both fail, root and branch—and this whether viewed in strict law or equity.

Indeed, unless resorting to the most hypercritical points of law, while you are sitting as a court of equity, and which the honorable counsel on the other side has in one part of his argument so justly deprecated, there is nothing in the whole case which can prevent my client from recovering all which the contract clearly covers, and which his opponent deliberately and expressly promised.

So far too from there being any consequences from this recovery, as have been suggested, that are hard towards his opponent, or extraordinary, or in any degree injurious, unless he has made it so by carelessness or neglect in keeping his accounts, I will endeavor to show that either of them is impossible.

Why, gentlemen, what are the terms, and what the plain import of the contract?

This is the whole of it!

This agreement made and concluded this thirtieth day of September, A. D. 1834, between Isaac Hill of Concord in the county of Merrimack and State of New Hampshire of the one part, and Cyrus Barton of the same Concord of the other part, witnesseth—that whereas the said Isaac Hill sold to Hill and Barton in the year 1829 the New Hampshire Patriot, and Cyrus Barton has purchased the same establishment exclusively in his own right, and for the security of payment for said purchase has mortgaged the said establishment to said Isaac Hill: now the said Barton agrees that the said Hill may *at his option,* at any time within the space of ten years, resume one half of said establishment on the payment to said Barton, or on accounting to him in the sum of five thousand dollars; and the said Barton further agrees, that at the option of the said Hill (in ease he shall so resume one half of said establishment within the time specified) he may receive one half of the clear profits of said business (meaning all the business which shall be done in said establishment) from and after the said 30th of September, 1834, after deducting all expenses of prosecuting said business (exclusive of clerkhire)—and also the sum of one thousand dollars per annum, as a compensation to said Bartou for his personal services and for clerkhire. It is further understood the accounts of expenses of the establishment are to be so kept that they can at all times, or at the close of every three months be ascertained, and that the receipts shall also be entered from time to time, so as to present a fair view of the establishment.

In witness whereof, we have hereunto set our hands and seals the day and year aforesaid.

CYRUS BARTON, (Seal)

ISAAC HILL, (Seal)

Witness—

Samuel C. Cochran,

Joseph Manahan.

What is there harsh or unnatural in all this? and what is there calculated to beggar one side and enrich the other?

Look to the condition of the parties when it was made. One had spent near a quarter of a century in toil, enterprise and care to build up a newspaper establishment, which had become profitable and favorably known over the whole Union. He had all the capital in the concern—all the wide personal popularity—all the risk. Entering on public life, with a prospect of its continuance for several years, he disposed, before the date of this contract, of his remaining interest in the press to a brother.

It is not necessary to go into the details of that sale any further than to say, that the defendant was the partner of the brother, and in 1834 concluded to take the whole concern, and become responsible to the plaintiff for the brother's half, and on the terms and conditions set out in this obligation.

It was the same, therefore, in law and equity, as if the defendant had then purchased this half of the plaintiff directly.

He stepped into the brother's shoes on the terms agreed between the parties, leaving the whole risk to the plaintiff except the mortgage on the same property, all of which he alone had furnished. Going to the original consideration, by the way of price to be paid for the whole establishment, I understand that it was $7000, and in 1834 the interest had accumulated so as to make that and the principal become a fraction over $9000. Hence the defendant was to pay in money to the plaintiff only half of the original sum, or $3500 for the last half of the establishment, with interest from the time of the original sale, and the plaintiff was to get only $3500 with interest from that time.

Was there any thing large, exaggerated or unjust in this amount? By no means. On the contrary, it was the same deemed just in 1829; and I am instructed to say that, even since this controversy and since the publication of a second Patriot in the same town, the defendant has sold one half to another partner for $500 more than that amount.

Both parties also had experience as to the profits of the press. Both were men acquainted with business and the world, and both acted with deliberation. Under these circumstances, and having every inducement to further each other's interests, there was no means, motive or wish in either to over-reach; they considerately proceeded, after such a sale and purchase, to make an additional arrangement set out in this instrument.

Under these facts, it would be the most common arrangement the whole world over—the most appropriate, legal, equitable and fair, which could be imagined.

No professional man or mechanic in the State is unused to such engagements around him. They have existed from the time of the memory of man; and so far from being illegal for the want of

consideration, or from grounds of public policy, or from inequality, their character in all these respects is the very reverse. The capital and good will come from one side—the future labor and care are to be bestowed by the other, till the contingency provided for happens.

Thus such contracts comport with sound policy, because they start with giving one party an option to return to his former pursuits and to be useful therein to the community and his family, instead of being, after his public employment or new business ends, flung as a drone on society. Nor do they drive the other party into idleness, as he in this case was to restore, when desired, only one half of the establishment, retaining the other. They keep up also in the interim watchfulness and assistance when practicable by the retired partner, to increase the popularity, usefulness and profits of an establishment in which he may again participate. Thus in this case, till the controversy prevented it, the plaintiff continued not only his good will to this establishment, and his great popular influence to promote its interests, but lent often his personal services in its support. For this, let me now remark once for all, he has made no separate charge or claim whatever. Beyond the benefit conferred on the establishment itself he asks nothing and will receive nothing, while the defendant was under and will receive constant pay for his services, beside an equal share in all the profits.

Here, likewise, let me correct another impression very general, and which had reached even my own mind till yesterday, that when the plaintiff, after the controversy began, proceeded to put in operation another press, and to withdraw his aid and countenance from this, he had done it in violation of some agreement to the contrary. But as an illustration of our liability to receive erroneous notions, and of the importance of full and public scrutiny to ensure correctness, it now turns out that the plaintiff never made any such agreement, and never withheld his efforts in favor of the old establishment until he was driven from it by the defendant, and refused any participation in its interests. He was thus compelled to be idle himself, and deprive his sons of their intended pursuits, or establish another press. So far, then, from this last act being a ground to claim damage against him, as has been done by the defendant, or a ground to censure the plaintiff in public or political estimation, it seems that the defendant's violation of his own obligation has been the whole cause of it. The wrong, if any, has been entirely his own; and the plaintiff, though not bound by any engagement to the contrary, yet from both political and personal considerations forebore to take any hostile attitude with another press till every attempt at adjustment failed, and till it became proper for the support of himself and family.

But to return to the other points: Is there any sound or even plausible reason to contend that, under all these circumstances, there was no consideration for the contract in question?

Passing by the seal, which in equity as well as law furnishes a sufficient answer to any such objection, do we not find ample consideration in the agreements themselves on our side? Agreements by one party often constitute the sole, but adequate consideration for agreements by the other.

All of the referees are as familiar with this principle, as with any other principle whatever in the whole body of the law.

One agreement may be as valid and equitable a consideration for another agreement, all the world over, as money paid or property delivered.

In this case the plaintiff agreed to give firstly $5000 for the half he received back. This was $1500 more than he obtained for it originally, and considerable more than both that and the addition of interest down to 1834. This alone furnished an important consideration, emanating from him and going to the defendant, in case the plaintiff should within ten years elect to take back one half of the establishment.

But beside this the plaintiff was in that event to let the defendant exclusively be paid out of the profits for his services and clerkhire a salary of $1000 a year, while the plaintiff was to receive nothing for any aid or assistance of that kind.

And after all this, the defendant was to be allowed, in addition, half of all the net profits.

With what color, then, can the defendant urge, that to fulfil such a contract will turn him out of doors and beggar his children, when he gets for half of the press more than he gave, and in one view $1500 more—when he gets, beside, $1000 a year for his personal services and clerkhire— and pays the plaintiff not a dollar of net profits unless at the same moment he puts another dollar, or an equal amount of them, in his own pocket?

How is it possible for this to impoverish or injure him?

It is utterly absurd, unless you should estimate the profits higher than they appear to be in reality from his own books, or unless he has squandered all the profits as well as salary—neither of which contingencies can properly be presumed, considering both your characters and that of the defendant.

But beside these fair mutual agreements and full considerations, it would be no stretch of law or justice to regard the whole disposal of the establishment, or at least this half of it, as constituting one ground and consideration of this arrangement between the parties. This half of the types,

newspaper subscription, presses, and all, not being paid for by 1834, virtually furnished the consideration for the new notes then given by the defendant, as well as for his new agreement.

All the capital and influence coming originally from the plaintiff, and coupled with the increased price to be paid for it by the plaintiff if taking it back, and the exclusive salary to the defendant beyond half of the profits, I must say, that the consideration for the contract seems full and equitable, as well as legal; and that the defendant cannot possibly suffer by being made to fulfil it, unless he suffers from his own improvidence or carelessness in keeping his own books, and managing his own private expenditures.

In this case, however, if he did his duty under the contract, all is plain, and no damage to him from it is practicable. He was put on his guard by the contract itself, one agreement in it being to keep his accounts with care, accuracy and clearness. In short, he expressly stipulated to keep them so as to show even quarterly all the receipts and expenditures of the establishment. He had within his own control and within his own hands the means to enable the parties to ascertain at any moment how the profits stood, and whether the contract was likely to prove very gainful or otherwise.

If the defendant, from ill-judged advice by others or inadvertance in himself, first omitted to keep his accounts in conformity to his explicit undertaking, and after one year neglected entirely the proper entry of either the expenses or receipts, “so as to present a fair view of the establishment”—he should not now complain of others for any injurious consequences incident to his own neglect. He should expect, that all the doubts, which he ought to have removed, must be presumed against him; that between two controverted sums, which he should have furnished means to explain, the largest against him is to be assumed; that when some of the years are more certain than others, those least so, if arising from his neglect, must be considered to resemble the most certain: in short, that when he omitted from the start to keep a balance sheet of expenses and receipts separately, so that “every three months” the state of things might be readily and clearly known, and drives us and drives you and his friends unnecessarily to grope somewhat in the dark about many things, he must not and cannot expect any award, which shall not in amount go to the full extent of the best evidence the case now admits. It does not lie in his mouth to object, and call for stronger or for higher and more certain evidence—because he was solemnly bound by this very contract to furnish us in a condensed form from his own books with that best kind and the most certain of evidence; and we are driven to more uncertainty and to a laborious examination and analysis of six years charges of a great establishment, only from his breach of duty in this particular.

But my client has gone through with the whole mass. He has given you abstracts of all, and references to every material page under every point. He asks you to verify his results in all cases, if

you please; and assuredly in all where the least doubt exists. He has put witnesses on the stand, who made some of the examinations with him, and corroborate him.

And I will soon show, that the defendant himself, in his own exhibit submitted to day concerning his whole expenditures, confirms amply under that head our own deductions.

The enquiry which remains is then one merely of amounts. For the other question of law made as to the post office order relates in my view only to the amount, and will be fully shown, before I close, to be untenable even to reduce the amount.

What then were the whole profits of the establishment during the six years from September 30, 1834, to September 30, 1840, about the period of the institution of these proceedings? You will of course take the exact time (now seven years;) but I shall make the computation for six years.

It is manifest, that all the expenditures within that time paid and to be paid—deducting the extra materials on hand of paper, ink, types, &c. at the close—should constitute one side of the account. The other side should consist of the actual receipts in money, produce, &c. with the existing claims due and unpaid, after making proper deductions from the latter for expense of collection and bad debts.

The excess of the receipts over the expenditures must then be the net profits. To half of these my client is entitled—his opponent receiving the other half and the $1000 yearly beside, under the head of expenditures. Nor would my client have objected at all, formerly or now, to allow in the adjustment $5000 for half of the establishment, and to receive therefor a conveyance of it. But the defendant in 1839, when this was demanded, explicitly refused to fulfil any part of the contract. He declined, as he does now, to let my client participate in any way or to any extent in the establishment; and it now comes with rather an ill grace from his learned counsel to object to our receiving half of the profits till we tender $5000 for part of the establishment, which he insists shall never be conveyed to us.

It will be recollected, also, that in 1839 and 1840, if not now, the defendant owed the plaintiff $3000 on notes beside half of the profits; and, under those circumstances, with a balance probably much in our favor, it would have been ridiculous as well as unnecessary in either law or equity to make a tender, when requesting a settlement and expressing a willingness to fulfil the contract fully on our part, and being met by an absolute, peremptory, unconditional refusal.

We must, therefore, place that objection along side of the other equitable pretensions set up by the defendant's counsel as equitable reasons before this equitable tribunal to escape paying the plaintiff what might otherwise appear to be his just due.

How much is that just due?

Fortunately we find the books better kept the first year than in the future years, and are enabled to approximate more certainly to the true balance between the Receipts and Expenditures.

Let us, then, take that year first. It will prove a guide to others so far as they are more loose and doubtful. But we will give all in the end, near as may be, from the books themselves; and only ask of the referees, that, after making any suitable allowance for 1835 as likely to be more or less prosperous than the others, these last should in all questionable respects be assimilated to that.

Will the arbitrators turn to their minutes and see, first, what are the aggregate Expenses of the year 1835? They will find them to be near $7000, though somewhat below it. The aggregate is higher—because that year was the first under the new arrangement, and every thing for common use was to be bought, and nothing is deducted from it for ordinary materials left on hand at the close of the year.

Deduct them, with all proper allowances, and the aggregate would not much exceed the average per year proved to you this very day by the defendant himself, which was about $6600, or for six years and two months something under $40,000. I use round numbers in this and most other cases, knowing that the referees have taken down the exact sums, and will consider me as aiming only at correct general results. Surely then when both the plaintiff and defendant coincide, that the actual expenses were less than $7000 in 1835, and indeed less on the average for the whole period, the arbitrators will not go above that sum, in consequence of any conjectures presented by an inexperienced witness late last evening when the other testimony was closed—a witness who did not profess accuracy—who could not attain it without separating private from partnership expenses—and who, thus hastily giving results, differs from both the parties and all the other evidence in the case.

Taking, then, the $7000 as the maximum, and $6600 as near the probable amount of the aggregate expenses in 1835, how is it supported by the details? In them you have every thing—the labor, paper, ink, rent, oil, types, salary to the defendant, interest on the cost of the establishment, freight, fuel, postage, and sundry smaller items.

I have footed them up, and, taking care to deduct what was probably on hand at the close of 1835 and not used till 1836, the aggregate will fall short of the $7000.

All the certainty is thus obtained as to the expense of that year, which is attainable in the nature of things—considering the omission even in 1835 by the defendant to keep a quarterly balance sheet of Expenditures and Receipts as stipulated in his contract.

How stands the evidence as to the Receipts in 1835? Why, Mr. Chairman, the monied receipts alone, entered only within the year, exceed $7152. This is matter of record on the books, and has also been tested by witnesses. But beside this, money was paid in during the next three months for articles furnished the post office within the first year, amounting to $1245, and also for newspapers furnished within the same year, amounting to $1000 more. The aggregate of these in cash received within the first year and a few months after, but all for services and articles furnished within that year, equal $9397.

These alone would make the net profits in that year over $2750, taking about $6600 as the expenses; and near $2400, taking $7000 as the expenses.

But beside all this there was earned in the year ending September 30, 1835, which still remained unpaid, as the books themselves show, near say $1200 for advertising, $600 for job work and for sales, and for newspapers quite $3000. These together make $4800; and if you deduct 30 per cent. from these to cover bad debts and expenses of collecting the rest, it would still leave $3360 to be added to the $9397 received in cash, or an aggregate of receipts and earnings in that year equal to $12,757. From this deduct even $7000 for expenses, and $5757 will remain as net profits—half of which, or $2878, will for that year belong to my client.

The other five years, at a similar rate, will make the whole due to him on this account about $14,300, exclusive of the interest which should be calculated on the annual balances.

The defendant admits, that the expenses for the other five years were less than $7000, or on an average only about $6600. Your minds, then, may well be at ease for the whole period as to them. The only doubt which can arise must be in respect to the Receipts in the other five years. It may be, that in some of them, they fell off from the prosperous era of 1835. But in some I will soon show you, that they exceeded the computed amount in 1835. If they fell off much in any item, why has it not been specified and proved? On the contrary, it is demonstrable from the books themselves, imperfect and loose as the witnesses on both sides admit them to be, that in 1837 the receipts exceeded those of 1835.

Under all these disadvantages to my client and all the omissions favorable to his opponent, the books show the following aggregate of charges for each year, from which Receipts have accrued and are accruing to the defendant.

I quote from data furnished to the arbitrators yesterday for each year, under separate heads, but which I have added together. In round numbers they are, For 1836, $12,000

1837, 14,400

1838, 11,240

1839, 10,770

1840, 12,350

In order that no mistake or misapprehension may arise as to the general data on which these results rest, and from which they have been obtained, I would explain, that a tabular statement was submitted to you yesterday of the charges on the books each year separately for advertisements, jobs including charges under the post office order, and such newspaper charges as were carried to the day book, which last were unequal in the several years, postriders' papers not always being charged. To these I have added $600 a year for advertisements not charged but paid at the time, which, considering the large amount of nonresident advertisements proved to be usually paid in cash, is not high, and $225 per year for paid jobs and sales never charged. I have also added only 3600 newspapers beyond those found on the day book, which is below the number proved to have been issued, and computed on that account perhaps a little above the average receipt for each at $1.50 per annum.

These together make the amount above suggested for each of the last five years of the time. The income of the first year of the term, viz. 1835, we have ascertained in a different and more accurate mode, before explained. But if we adopt the last mode, the succeeding years will not be so large, though the income will reach $12,550 per year; and the whole six years would constitute an aggregate of earnings equal to $73,410

Now suppose that one third of this has not been paid within the year or soon after, and has required or will require extra expense in collection—as was about the proportion in 1835—say $24,470; then allow on this 30 per cent. for bad debts and extra expense for collection; and it will be near a thousand dollars and a third annually on account of difficult and bad debts, and will require a deduction of $7,441

Leaving net receipts, $65,969

Now the net expenses for the six years at $6600 yearly would be only about $39,600

Leaving net profits $26,369

Half of which, belonging to the plaintiff, is $12,184

This is something more than $2000 below what the plaintiff would be entitled to, taking the more accurate and better known year of 1835 on the first data as a guide for the rest.

This is the very lowest sum pretended on the evidence; and if it be not as clearly proved as 1835, then 1835 must be deemed the true test and true average, because that is clear, and these are not clear; and moreover these are not clear by the defendant's own neglect on breach of a part of his contract, requiring him to keep his accounts so as at any time quarterly to show the true state of the receipts and expenditures.

Having come to these conclusions inevitably on the testimony, it does not belong to the plaintiff —nor can it be legally required of him—nor do the means exist in his control, to show what the defendant has done with the profits. That is his own affair, and not ours. To be sure it appears, that in the first three years he was able easily to pay $6000 on his notes, beside maintaining his family, and making any other investments or purchases he deemed proper. Whether then or since he has lost any thing by the mad speculations of the speculating era we have all gone through or witnessed —whether he owns houses, lots, stocks or other property, the fruits of those profits—has money at interest, or from indulgence or policy has permitted his accounts to remain uncollected in large amounts—has nothing to do with the points at issue between the parties, on which you are called to decide.

If I have not included all proved as paid, neither the expenses, then I and my client wish you to include more—though we both believe all duly proved has been included and even something more.

If I have not allowed sufficient deduction for bad debts and for extra expence in collecting what is not usually paid with punctuality, then I and my client ask you to deduct more; though we both believe that ample allowance has been made, according to the evidence and to the experience in similar establishments, as is already in proof before the referees.

But you, of course, can grant nothing as an expenditure or as an allowance, which has not been supported by evidence,or which has not been included in the aggregate charges of business—

because it is manifest that a failure to print the Temperance Herald or less business done of any kind would make the charges less on the books, and has of course been deducted there. The case is to be tried by the evidence alone. There can be no guessing, or lumping, or conjecturing, or giving from sympathy or favor to one or the other. Each insists on his rights legally and equitably, on the contract and the proof; and each must have his rights, and nothing more or less.

Yet all must see, that if the proof itself be any where deficient or uncertain, it is, under the contract, the defendant's own fault, and the presumptions in such case are to be taken against rather than for him.

Here, Gentlemen, I would close. But in this appeal to you on both sides for equity rather than strict law, my client is met by a most labored attack, founded on a technical objection, in strict law alone, because a part of the profits in this case were derived from business done for the Post Office Department under an arrangement contended to have been invalid.

At first it was contended, I understand, that the business of that kind did not come within scope of the agreement; and hence the profits of it should not be allowed on that ground. But the former referees decided that it did come within the agreement, as that expressly includes “one half of the clear profits of said business, meaning *all* the business, which shall be done in *said establishment.* ” It is difficult to conjecture how they or you could come to any different conclusion, when, in so many words, it says “ *all* the business” done; and this was a part of what was done.

The next resort is, to object, that the Post Office business was illegal, or under an illegal contract made between the establishment and the government. It is, therefore, argued, that nothing should be recovered under the agreement between these parties either for the profits of that or any other business. Yes, Mr. Chairman, it seems to be seriously urged on you as an equitable judge, or as a chancellor, not only that the post office order was void—and hence its profits, already received by the defendant, are not to be in part paid over—but that the whole agreement becomes void as to all other profits, though perfectly distinct, legal and just.

There is supposed to be a sort of leprosy, a kind of original sin in that business alone; and though being there and there alone, yet it is to spread and taint every thing else. Like alcohol poured into water, the whole is to become inseparable and poisonous. While, on the contrary, the common sense as well as the equity and law of the case would be, that if one branch of the profits could not and should not be accounted for, because, illegal, the other branches, which were as distinct as the branches of a tree, should of course be made liable.

I have no doubt that this last, in such an event, would be your course both as lawyers and arbitrators, and more especially in a case like this, where the illegality, if existing at all, would result merely from a statutory prohibition, and not from any thing immoral in the transaction. It would not be *malum in se,* but only *malum prohibitum.*

But I apprehend that you will find no difficulty in settling this objection, without ever being obliged to go into the propriety of making such a discrimination.

There was never any thing illegal in the post office business. The law, read to you, avoiding contracts made with the government in which members of Congress are parties or interested, relates to contracts made in writing with any department, and usually sealed, and entered into after advertising for offers and a decision had among the competitors. In such cases, as members of Congress might get information and preferences by their position and influence, which others could not, the contract is made void if they are interested in it. But neither Barton nor Hill, nor they jointly, ever entered into any such contract with the post office department as to this business. Neither they or either of them ever executed any writing or sealed agreement whatever to that department concerning this business.

They merely furnished, when applied to, certain quantities of printed blanks, paper and twine at such prices as the department should from time to time stipulate, and pay was not received until after the accounts were rendered and adjusted on vouchers received from the deputy post masters instructed by the department to order the articles. There was no competition—no writing—nor was there any liability, or responsibility to do or to pay, beyond each application.

Indeed the act of Congress itself has an exception, the spirit, if not the very letter of which exempts all cases like these, as should be the course—because this is not the kind of contracts referred to in the law, nor open in its obligations and character to the evils against which the penalties of the law were aimed.

But were it otherwise, the contracts made void by the act of Congress cannot be avoided except by the party who did not do the wrong, and who is injured by it. It is not competent, in chancery certain, if it be in law, for the offending party, or the party forfeiting by the wrong, to set up an objection in defence, when sued, that he or those associated with him have violated the laws. It is the post office department alone which could justly take such an objection against the wrong doer, because he was obtaining too much on his contract, or violating secretly the laws of the land.

In such case, too, if the post office department had made advances of money before the services were actually performed, it is authorized by another section of the act to recover the advances back, as well as stop and vacate the contract.

But no section and no principle of equity authorises the department to recover back payments which have already been made for services actually performed, or materials really furnished. That would be a species of pillage on the part of the government little short of highway robbery, and one, which I undertake to say was never attempted and would never be countenanced either in a court of chancery or in Congress.

Yet sorry am I to add, that the defendant in this case, though the post office department has not avoided the contract, nor stopped the business done for it by the establishment of the New Hampshire Patriot, but has paid over to the defendant all due for it, and never attempted to recover back a dollar—yet the defendant alone, after the money is safely in his own pocket, directs or acquiesces in a defence like the present. The contract or business appears forsooth not to have been illegal in his eyes at the time when it was made, or of course he would not have participated in it—not illegal in the eyes of the defendant then or since, or they would have avoided it—not illegal in the view of the defendant when he received the profits of it both since and before the plaintiff elected in 1839 to become a partner in them. But the moment the defendant is required, under his own deliberate and solemn engagements, to pay over a portion of those profits as he had done under a previous partnership, then for the first time the illegality is heard of in his mouth. When *getting* the money, all is legal—but when required to *part* with some it, all becomes illegal. Indeed it is argued to be so poisonous, that, like the Bohon Upas, it vitiates almost every other contract or matter of business existing within the wide atmosphere of all other dealings between the same parties on the same occasion.

I beg leave to enter a protest against all such morality, justice, law or honor in the affairs of mankind. I entreat this distinguished board of referees to give no countenance whatever to such a defence.

But beside and over-riding even all these considerations against it, my client was not, in point of fact, a member of Congress when this work or contract with the post office begun, nor when it ended. The contract, so called, if void at all, was void when it was made. But there is no pretence that he became a member of Congress till sometime after, as you yourselves well know from the different dates.

Again, at the time he elected to become a partner in the profits, he had ceased for several years to be a member of Congress.

These circumstances set to rest every shadow of doubt. I will therefore fatigue you no longer about a point so naked of every sound principle as is this late objection by the defendant, to pay over money he engaged for legally, has received legally, and yet would decline to account for to that partner, whose early exertions and untiring industry for a quarter of a century built up the establishment whose reputation and means obtained and executed the business.

The plaintiff has some other claims beyond what have yet been considered.

The unqualified refusal of the defendant to settle as he had agreed, and his neglect to keep a regular balance sheet of Receipts and Expenditures as virtually stipulated in the original contract, have subjected the plaintiff to much additional labor in procuring evidence as well as injurious delays.

He has been compelled likewise, inconveniently and at less profit, to form a new establishment, by the defendant's wrong in not letting him, as agreed, resume half of the old one, on paying the stipulated price for it.

The plaintiff is entitled even to exemplary damages for this last disappointment, inconvenience and loss, rather than the defendant being at all justified to set up as he most strangely does, a claim for damages, which he has sustained by the new press, which he himself forced the plaintiff to organize.

On this monstrous setoff by him, sustained by no contract whatever made by the plaintiff—by no principle of law or justice—by no previous wrong of the plaintiff, nor any act of his until the defendant compelled the plaintiff to establish another press or starve—I do not deem it necessary to offer another single remark before arbitrators so intelligent and experienced.

The claim of the defendant is made upon the wrong side. It is we, who have been damnified by being excluded by him from the old press in the teeth of his contract, and while it had my client's constant good will and aid, and thus driven at last to another press through his own wrong.

Beside damages for that, all the extra expenses of trying and preparing our claims—flung upon the plaintiff by the defendant's breach of his engagement to keep the accounts so as to show a fair view of the establishment—constitute, as before remarked, an additional item of damages.

In both of these particulars, why did not the defendant, at the end of the first year, during which the accounts were kept with greater accuracy, adopt a different course, if resolved not to keep a balance sheet of expenses and receipts, because too burthensome, or showing too large gains? Why did he not then openly and categorically inform the plaintiff of the fact?

If then determined, also, never to account for the profits, nor to restore one half of the establishment when demanded, why did he not manfully communicate this resolve to the plaintiff at once? How much trouble you and all of us, as well as how much vexation and heart burning would thus have been averted? Here was the first misfortune and error on the part of the defendant.

Again, what right had the defendant ever to expect the contract would not be enforced, if it was a beneficial one to the plaintiff? and if not beneficial to the plaintiff, how and why could he, the defendant, neglect to keep the accounts in the separate and careful manner stipulated? This five or six years silence and neglect, independent of the real profits, should therefore be explained, or operate strongly against him.

But I fear, I am fatiguing you, gentlemen, with details. All the case and all the proof are before you. I have said every thing as to the principles and the facts, which seemed necessary to present my client's case fairly before you.

The world can now see what misapprehension and omission of duty by the defendant have led to the difficulty between the parties; and you can, without much trouble except in some of the details, now do equal justice between them. Both have doubtless endeavored to maintain only what they considered their rights. If erring in judgment, it is their misfortune, but is no excuse here. Both must and doubtless will abide by your calm er, cooler, discriminating and disinterested decision between them. The result cannot enrich one or impoverish the other, under the views suggested by me; because, whether either be now wealthy or poor, you will not alter their condition, as you give to the plaintiff in my view nothing but the fair and stipulated proceeds of his own original property and earnings; and you take from the other nothing but what he has manifestly received from the use of that property, leaving himself a reasonable compensation for his labor, and beside that, one half of all the net profits. What more could a young man wish or ask? Why call it harsh?

If the old establishment had not been highly profitable, why was the defendant unwilling to relinquish half of it at an advanced price as he had agreed? And, on the other side, why did the plaintiff desire half of it again, if he did not feel well assured it had been and would continue to be lucrative? And why, but for this, did he rest quiet with his security on it by way of mortgage? Actions speak louder than words.

And though I should rejoice to see the two establishments united, and to have the defendant alter the determination repeated before you not to let the plaintiff participate in the old one, yet I do not doubt both may prove somewhat profitable under the continued industry and enterprise and economy of all the parties. The old one especially can yet have suffered but little, considering that

the defendant is so reluctant to part with it, and has since sold one half of it for more then the original purchase money in 1829. Your award, then, I apprehend, can safely follow the evidence as it should do, without exciting any apprehension of its operating as gainful or oppressive to either side.

MR. WOODBURY.

The following resolution was adopted at a meeting of the democrats at Roxbury, Mass. Oct. 26:—

Resolved —That as sons of New England, we view with proud satisfaction the glorious career of that strong man of New England, Levi Woodbury, especially his course in the Senate of the United States, when thundering against the Panama mission, and the consolidation projects of the sky-light-house administration, the energy with which he introduced order, economy and responsibility into the Navy Department, the unwavering steadiness of purpose with which he steered the Treasury through the stormy sea of peril and rescued our national honor, withoat a stain, from the conspiracies of the Catalines who strove to prostrate the government and the people before the throne of the banking power; and that these splendid services had prepared us for that signal triumph in the Senate of the extra session, wherein he defeated the unrighteous tea tax, advocated by the dictator Clay, and his subservient whig majority in the House, and thereby earned for himself the enduring title of "THE POOR MAN'S FRIEND."

The following is one of the resolutions adopted at the Democratic Meeting, in Marblehead, Oct. 29th —

Resolved, That in contrast with the imbecility of Tho. Ewing, so deplorably manifested in his acts and in his writings, we can proudly point to the skilful administration of the Treasury under the care of Levi Woodbury, who has borne the brunt of the battle of the bank myrmidons against liberty unshaken, firm as his own New Hampshire, who was Granite in the Revolution, was Granite in the war of 1812, is Granite now, and will be Granite forever.

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