

13733

No. \_\_\_\_\_

# Supreme Court of Illinois

Day

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vs.

Gowgoski

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In Supreme Court  
Albert Gorgoski

vs  
Chas Day

From Cook County  
Court of Common Pleas

Pliff for Repleff vs  
Exec.

This was a bill in Chancery brought by Day against Gorgoski for the specific performance of an alleged contract for the sale of Lot 7 in Block 4 "Museum" Addition to Chicago. Day alleges that on Feb 07, he purchased of Gorgoski said lot in agreed to pay him

\$1170  
for it as follows  
\$90.00 down  
90.00 in one year  
90.00 " 2 years  
900.00 " 3 years

\$1170 without interest

Alleges the down payment, that he entered into possession of the premises - and that he has faithfully kept the contract on his part - that the contract is lost - with the usual prayer for relief - answer not called for under oath.

Answer Gorgoski denies in his answer that he ever sold the premises to Day - & he alleges Day entered under a lease - denies the tender and performance even of a contract on Day's part.

Replication to answer and cause submitted to the Court below on bill answer and testimony of witnesses - and they rendered a decree for the Complainant Day - from which Gougoski appeals to this Court. The mas assigned are

II. The Court rendered a decree in favor of said Elyah Day - when they should have rendered one in favor of the defendant

III. The Court below sustains the bill of complaint when they should have dismissed it.

IV. That the decree in this case is erroneous, and not according to law & equity

V. That the decree is erroneous in ordering that the money should be retained in Court till said Gougoski executed a deed of the premises

VI. That said decree is in other respects erroneous.

3  
The questions are principally of fact, and in the outset permit me to say.

Whatever may be the conclusion of the Court, in the case, we ask for a the careful hearing and consideration of the Court.

Gorgoski is a Poleander, of whom Mr Sylvester Lind says. Page 50 of the record. he has but an imperfect knowledge of our language. is puzzled to read or write the language. and that he had been in his employ. over 4 years I have found him honest, and trustworthy to the letter of law, I do not know a man that I would sooner trust, as a salesman in a lumber yard than him.

To those who know the sterling worth of Sylvester Lind. will admit this to be no faint praise. Mr Gorgoski says, that a deep wrong has been inflicted on him by the decree. and that by the combination of conspiracy and fraud. he has been cheated out, or may be cheated out of his property. and that they & his intrep are in combination to cheat & defraud him.

Then are two questions of fact in the case.

I. Did Gougoski ever contract to sell the lot to May.

II. Admitting that May had a contract for the lot, was he performed it, so as to entitle him to a decree.

As these are pure questions of fact, we do not propose to trouble the Court to much of a discussion of the evidence. but under this would say

"a" The Court with in making up their minds on the Evidence, will disregard entirely the testimony of May, when he recalls his contract.

Smith is three times made a witness - others up - &c.

In support of this proposition we cite

Ordinary vs Kille 3<sup>d</sup> Sand C R 512.

Newman vs Herdall 2 H. Marshall 642

Pays vs an Editor 642

Todds vs Keris - 12 Ben Mour. R 298.

Dunkris vs. Eldridge 3<sup>d</sup> Gray 299

These authorities clearly establish the correctness of this position

3  
In reference to the testimony-

Was the contract signed

Smith & White's testimony tend to establish that A was. but by their own statement something remained to be signed. They undertake to say it was an agreement in reference to the insurance of the premises.

Now in our in scanning this testimony we are to look to the position of parties.

1. Their feeling against defendant  
2<sup>nd</sup> The interest they exhibit in the matter  
3<sup>rd</sup> The unreliability of their testimony.

The matter of insurance was clearly for Gogaski interest.

Smith says he presented it to Gogaski to sign and he refused why should he have refused? He is contradicted by Lind. Lind's testimony facts are reasonable and consistent.

Now mark Lind's ~~testimony~~ index.  
Page 46, "I recollect that a paper was handed to me, at my office in Chicago, by James Smith. He stated A was a contact between Gogaski & Day, and he

asked me to get it signed, it was three years ago last Spring.

Page 57. Defendant never signed the paper handed to me, to my knowledge, I talked to him on the subject, at the request of James Smith - he shook his head and said he would not sign the paper. It seems to me he said signing the paper and taking the notes, would make a sale of the property, and he would not do it. Now this is a temperance evidence - and is entirely incompatible with Smith's testimony and of a sale. Nor can they say that defendant had then shown the contract, again Page 49. I do not think the defendant told me, that we had made a final sale of the lot, I understood from the defendant, it was a lease, I understood from Smith's day - it was a sale.

Now in no manner of way could or can the complainants overcome the testimony as the affirmative is thrown upon the complainant

and the defendant claims that the testimony shows a combination between Smith & others to defraud him and that their testimony is inconsistent and is contradicted.

Time is shown to be essence of the alleged contract - and the testimony shows that by their own showing they did not make the payments according to the contract - nor did they pay the taxes.

We ask the Court here to mark the fact, that the complainant Solicitor set up a mark, they were up to it, and their "backs and pills" showing how much credit is to be given to any of their testimony.

On this proposition in cito  
Kemp - vs - Humphreys 13 Ill R 573  
~~13 Ill R 573~~

Benedict vs Lynch 1 Johns R 370 -  
Smith vs Brown 5 Gt R 314

~~We suggest these as thoughts for the Court.~~

f

The case is submitted  
Amo Vop. J. H. F. Chaito  
for Comp Plf in Sues

+ The decree was suddenly erroneous in ordering the money to remain in court, tho' Gogashi made the deed is clearly wrong. They could have ordered the money to make the deed.

The appellant Albert Gogashi being a Exile but now became fully naturalized Citizen of United States prays most humbly Your Honor Judges of the Supreme Court, at whose Decision his last remedy lies for his rights for a just full protection from two Conspirators, particularly J. H. Hedgie (who are not naturalized Citizens) from usurpation in depriving by false & inconsistent testimonies of his property which constitutes all his means for necessities of life.

prays most humbly also in case the present false evidence to strong was against him, to permit for the introduction of newly discovered irrefragable evidence, which was mentioned in Bill of Answer was lost or to use any other remedy for relief, as rehearing of Witnesses, and others, which was by his Attorneys by prejudice & partiality neglected or Concluded the Case. Lastly prays for a protection of the attack by Shrewd ones, taking the advantage of mans peccableness & ignorance. - what is against Law & Equity etc.

May it please Your Honor Judges  
Accept. what here all  
Most respectfully is submitted  
Albert Gogashi.

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Albert Gungui

6

E. May

Print for Pl. in

End

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Cook Co - Court of  
Com - Pleas -  
In Chancery -  
Elijah Day, Compt  
vs  
Albert Gungowski, Deft

Abstract of Bill and  
Answer.

Abstract of Bill - - Abstract of Answer -

page 1.  
(172)

That in Feb 7 - 1857 - between  
20 & 28<sup>th</sup> - but the precise day  
cannot state - parties entered  
into an agreement in writing  
under seal, by which Deft  
agreed to sell, apure & convey  
to Compt. by a good & sufficient  
deed of conveyance Lots No 7  
in Block No 4 in Duwacs  
addition to the City of Chicago  
with the buildings situated  
thereon: the consideration

p. 2. \$1170 - to be paid as follows,  
\$90 on the delivery of the  
articles of agreement, \$90  
in one year, \$90 in two  
years & \$900 in 3 years after  
the date of agreement, without  
interest. \$900 being the price  
agreed upon at 10 per cent  
int payable in advance  
as aforesaid

That by said articles of agree-  
ment Compt agreed to

page 1. Deft. saving & reserving all  
manner of exceptions &c. says -  
That he denies that in the month  
of February in the year 1856 between  
20<sup>th</sup> & 28<sup>th</sup> day of Febly Compt  
made & entered into the agreement  
in writing with this Deft. in and by  
which 5<sup>th</sup> Deft agreed to sell  
Lot 7 (etc) for the sum or price  
as in said bill stated:  
and further answering states  
and charges that this defendant  
never executed any agreement  
for the sale of the said property  
to the 5<sup>th</sup> Complainant, whatsoever  
at any time or upon any terms.

And this Deft further answering  
denies the ex<sup>st</sup> of any agreement  
containing the conditions and  
provisions and terms, as set forth  
in said Complainants bill, and  
states and charges to be the  
truth (See Post - Draw Matter - "A")

make the payments as above specified.

(2) That on the executing and delivery of the articles Compt  
p<sup>r</sup> the Deft the 1<sup>st</sup> paper  
#40, & immediately entered  
into possession of the premises  
under the agreement & has

p<sup>r</sup> 3 actually occupied the same  
ever since & still <sup>lines upon</sup>

The same. A but!

(3) That in about a year  
after the purchase aforesaid  
as nearly as your Orator  
could judge, or a little  
before the expiration of one  
year, being about the 20<sup>th</sup>  
day of Feb<sup>r</sup>. 1852 your  
Orator caused the second  
payment of ninety dollars  
to be tendered to said Deft  
in lawful money of the U.S.  
which s<sup>d</sup> Deft. refused to

accept

(4) That 2 years after s<sup>d</sup> purchase  
your O<sup>r</sup> sought s<sup>d</sup> Deft  
to tender to him the payments  
then due on s<sup>d</sup> lot, to wit,  
the pay<sup>t</sup> then <sup>fully</sup> due  
and the payment  
on s<sup>d</sup> lot - - before tendered,  
but could not find him,  
but was informed by Sylvester  
Lind, with whom Deft

A. if say would meet; instead  
a peacefull quiet person, with  
equal technical shrewdness of arwp.  
to his Counsellor J. H. Kearie, then!  
how he would, or could? Occupy &  
still live ever since -

No reason given why has refused

Page 6

That the, said Sylvester Lind is not  
nor has he ever been the agent of  
this Deft.

that Deft is ignorant & therefore  
cannot state whether Compt  
did ever tender to s<sup>d</sup> Lind  
as the agent of this Deft the  
sum of \$180 as the second & 3<sup>d</sup>

3

was employed. That S<sup>d</sup> Deft was not in the City of Chicago but that he S<sup>d</sup> Lind, was the agent of Deft, whom your O. tendered to S<sup>d</sup> Lind for S<sup>d</sup> Deft the sum of \$180 lawful money as aforesaid for the 2<sup>d</sup> & 3<sup>d</sup> parts on S<sup>d</sup> lot. There due & unpaid, but S<sup>d</sup> Lind refused to accept S<sup>d</sup> money as pay for S<sup>d</sup> lot, but offered to receive it as rent for S<sup>d</sup> premises.

(5<sup>th</sup>)

That on the 22<sup>d</sup> Feby. 1854 he caused to be tendered to S<sup>d</sup> Deft the sum of \$1080 lawful money as aforesaid in full payment of S<sup>d</sup> lot and demanded a deed for the same, but S<sup>d</sup> Deft. refused to receive S<sup>d</sup> sum of money & utterly refused to execute & deliver the your order a deed for S<sup>d</sup> premises.

That on the day last aforesaid he caused to be prepared, at his own expense a deed for S<sup>d</sup> premises from S<sup>d</sup> Deft to your O. which is hereto annexed & marked Exhibit 'A'.

payment on the premises, as is alleged by Compt.

That if such tender was made it was made with the design of defrauding Deft, & to a person not authorized to receive it & without Deft's knowledge or consent,

Page 7.

Deft admits that Compt. did tender to him on or about 20<sup>th</sup> Feby. 1854 \$1080 with a deed & demanded of Deft that he should execute the same, & that Deft refused to execute the same, for the reason that he had never agreed to sell or convey the premises to Compt. as is boldly alleged in the bill of Compt.

4  
I produced to S<sup>d</sup> Deft & demand-  
ed that he should execute  
the same, but S<sup>d</sup> Deft utterly  
refused to execute S<sup>d</sup> deed,

(over)

It is That S<sup>d</sup> articles of agree-  
ment were executed in  
duplicate & that both of the  
copies were signed both  
by S<sup>d</sup> Deft & your O. & one  
copy was delivered to & kept  
by each of the parties;

(over)

That 2 or 3 weeks after the  
executing & delivery of the  
S<sup>d</sup> articles James Smith  
as the agent of your O. took  
your O.'s copy of S<sup>d</sup> articles  
to the office of S<sup>d</sup> Sylvester  
Pond, in whose office Deft  
was then employed, &  
delivered the same to S<sup>d</sup>  
Pond for the purpose of  
having S<sup>d</sup> Deft sign an  
additional agreement  
added to or endorsed  
upon the same, which had  
been proposed by & agreed  
to by S<sup>d</sup> Deft. (as the insurance  
& c) that in case the house  
should be burnt, Deft should  
receive insurance money  
& ~~any~~ credit the same  
to your O. towards the

Page 7.

That Deft never signed any agree-  
ment or agreements to sell or  
convey the said property to Compt.  
as is falsely charged (& c)

(not responsive)

That he never himself or by  
James Smith as his agent ob-  
tained of Compt any agree-  
ment or agreements for the  
sale of the S<sup>d</sup> premises, executed  
or signed by himself or by any  
one as his agent to sell the  
S<sup>d</sup> premises to Compt.

purchase money of 3<sup>d</sup> premises.

p. 6. That after 1<sup>st</sup> agreement had been so left Compt called at Lind's office for the same, but Lind after diligent search could not find the same.

"That 1<sup>st</sup> Dept. clandestinely & secretly obtained possession of 3<sup>d</sup> agreement & has concealed or destroyed the same so that it cannot be used as evidence against him for the purpose of depositing

Page 7.

Dept denies that he ever obtained any such agreement or agreements and destroyed or kept the same as is most falsely and fraudulently charged in said Compt's bill -

Q.

(8<sup>th</sup>)

That Compt has never seen 3<sup>d</sup> copy of agmt since it was taken to Lind's office & has not since then had it in his possession or power. & that it has been concealed or destroyed or otherwise or has been lost, so that it could not be found although Compt has made diligent search for the same.

(9<sup>th</sup>)

"That as early as the month of Feb'y 1852, when the 2<sup>d</sup> part became due, 3<sup>d</sup> Dept denied that any agreement for the sale of 3<sup>d</sup> lot had ever been made or even

existed, and still denies  
that any such agr<sup>t</sup> was  
ever made.

(10)

p. 7. That immediately after the  
purchase the lot began  
to increase in value and  
has increased largely in  
value & is now worth \$2000,  
or more.

(11<sup>th</sup>)

That he has been ready  
and prepared to make  
such and every of the  
pays<sup>t</sup> mentioned in 3<sup>d</sup>  
articles of agreement at the  
times they severally fall  
due, & still is ready & willing  
to make all of 3<sup>d</sup> pays<sup>t</sup>, &  
hereby offers to bring the  
whole amount of the  
back payments with the  
pay<sup>t</sup>-falling due at  
the time of filing this bill  
into Court, and hereby asks  
permission to bring 3<sup>d</sup> money  
into Court, and to deposit  
the same with the Clk of  
this Court for the use of  
3<sup>d</sup> Dept. whenever he shall  
be entitled to receive the  
same under the order  
of this Court.

7

(12<sup>th</sup>)

p. 8. That he (D) has in person and by his agents at various times since the execution & delivery of the articles of agreement of aforesaid, requested the S<sup>r</sup>-Deft that he receive the several profits to be made by your O. & to execute deed in your O. a deed for said premises, & hoped Deft would have complied with such request, but that Deft, confederating with &c -

refuses to receive the said several profits for said premises & also absolutely refuses to execute any deed for the same to your O. sometimes pretending that he, S<sup>r</sup>-Deft. never made or entered into any articles of agreement of any kind with your O. for the sale of S<sup>r</sup>-premises"

(13<sup>th</sup>)

p. 9. Whereas your orator expressly charges the truth to be that said articles of agreement were executed and mutually exchanged and delivered by your orator and S<sup>r</sup>-Deft as stated hereinbefore & that S<sup>r</sup>-Deft

has fraudulently procured  
himself of your O'copy  
of 2 articles & has destroyed  
or ~~concealed~~ <sup>concealed</sup> the same in  
order to deprive your  
writers"

all which doings & actings  
etc.

p. 10. ~~Prayer of bill~~

That Deft & confederates  
answer (with waived)  
fully & particularly etc.

(14<sup>th</sup>)

Prayer of bill.

That Deft be compelled Page 8.

Specifically to perform 2<sup>d</sup>

p. 11. agreement - & to convey  
the premises, & that O.  
have attachment, if nec-  
essary to compel him to  
obey & perform decree  
of the Court.

That in case Deft refuse  
to convey that there be  
Special Commissioners  
be appointed to convey  
& that such commission  
be decreed good etc.

That Court may have  
such other or further  
relief etc

p. 12 That summons issue.

That Deft ought not to be  
compelled to deed or convey  
the 3<sup>d</sup> lot 7 (etc) to Compt.  
for that he never promised  
or agreed to sell or convey  
the same to the 3<sup>d</sup> Compt.,  
as is hereinbefore stated.

(This follows denial of confeder-  
acy & general traverse)

9  
The Replication  
is general &

Does matter in Answer &  
F. 11  
A -

Page 1. That Deft. on 20<sup>th</sup> February  
1850, being owner of Lot 7 (H.C.)  
2. Rented the same for 3 years. for  
\$90 per annum payable in advance  
to Compt. the Compt. agreeing  
to make certain improvements  
& pay 1/2 insurance, & Compt. there  
~~compt~~ p<sup>d</sup> Deft. \$90 as a p<sup>t</sup> of  
1<sup>st</sup> lease, & it was agreed between  
them that the agreement for  
lease of lot should be drawn up  
& executed afterwards,  
That within a few days afterwards  
Compt. called on Deft. with two  
agreements for Deft. to execute  
(false &c) alleging them to be  
leases & requesting that Deft. being  
a frequenter & unable to read the  
English language went to W. H.  
Powers who informed Deft. that  
the articles drawn up were for  
the sale & not for the leasing of  
the premises; that afterwards  
Deft. delivered said agreements  
to Compt. informing Compt.  
that Deft. would not execute  
them. That Deft. at all  
times refused to sign them  
& has never executed any  
agreement for the sale of the  
premises.

Page 3-4

That a few weeks afterwards <sup>Compt</sup> ~~Deft~~ came to Deft to buy the premises & Deft offered to sell the same for \$1500, which offer Compt refused.

That Compt then made <sup>an</sup> ~~an~~ offer in writing, which has been mislaid & lost, & which offer Deft refused.

P. 4 &amp; 5

That on or about July 20-1852 Deft called on Compt & demanded the rent then due, & Compt refused to pay the same, alleging that it was not due.

That Deft frequently called & demanded the rent of Compt, & Compt always requested to pay the same, but promised to pay shortly, as soon as he got any money.

That Compt did not at any of such times claim to hold the premises in any manner except as Tenant under said lease.

P. 5-6.

That on or about 1<sup>st</sup> April 1852 Compt called on Deft & tendered to Deft \$90, which he claimed should be applied as a part payment to be made on said lot, and not as rent, as Deft

//

desired to apply it -  
 " and this Deft avers that he  
 " there and there refused to receive  
 " the aforesaid sum of money as a  
 " part pay<sup>t</sup> on the said premises  
 " hereinbefore described, for that  
 " he, the said Deft had never sold  
 " the aforesaid premises, or any  
 " part thereof to the said Compt.  
 " nor had he, this defendant, ever  
 " agreed to sell the same or any  
 " part thereof to him the 3<sup>d</sup> Compt.  
 " as is most fully & undoubtedly  
 " alleged & charged by the said  
 " Compt. title of Compt. but had  
 " only leased the same to him the  
 " said Compt. for the space of 3  
 " years as is hereinbefore more fully  
 " set forth & stated: "

95  
Cook - Ex - Court of  
Common Pleas  
In Chancery -

Elijah Day Compt

vs  
Albert Gungoski  
Def

Abstract of pleadings  
made by  
W. W. Farnell  
of counsel for Compt.

~~85~~  
1855(?)

Copy of Compt  
to deprive poor wife  
of his property and  
what his wife depends

Testimony  
of Smith  
& White

The proof shows the making of the contract and the substantial parts thereof:

That Deft kept one copy of the same.

That the copy belonging to Compt<sup>s</sup> was, not long after the execution of the same, handed to Wiley, a clerk in Linds office. & that Deft. had access to the safe where the papers of the office were kept.

.. Linds &  
Thomas

that afterwards diligent search was made for the paper & it could not be found:

.. Smith, White  
& Allen

That previous to this time Deft never denied the making of the contract, but repeatedly admitted that he had sold the property to Compt<sup>s</sup>:

..

that since Compt<sup>s</sup> copy disappeared Deft - has uniformly denied that any such contract ever existed:

On the trial the Deft fails to produce the agreement. Under such a state of facts all presumptions, where any of the terms of the contract (as to forfeiture, payment of taxes &c) are not clearly proved, will be against the Deft.

Cook County Court of  
Common Pleas

In Chancery

Elijah Day  
Compt

vs

Albert Gougoski  
Def't

Brief & Points for Aft -

Wm W. Hamwell

of Counsel for Compt.

This suit is brought to compel the specific performance of a contract for the sale & conveyance of land.

The Bill alleges

See Abstract 1<sup>st</sup>  
of Pleadings  
page 1

1<sup>st</sup> That the Compt & Def't in July 1831 entered into an agreement in writing by which Def't agreed to sell & convey the premises, & Compt agreed to pay for the same \$4900 & interest.

The answer denies that any such agreement was ever made.

2<sup>d</sup> That at the time the agreement was made, Compt, made the 1<sup>st</sup> payment took possession under the agreement, & has occupied ever since.

Answer neither denies nor notices this allegation.

3<sup>d</sup> That the second payment was tendered when due & refused by Def't.

Neither denied nor noticed

4<sup>th</sup> That when the 3<sup>d</sup> payment fell due, <sup>Compt</sup> sought Def't to tender to him what was then due, but could not find him, that he tendered the amount due, to Linch, Def't's agent.

Answer denies that Linch was Def't's agent, & denies all knowledge of such tender.

5<sup>th</sup> That when the last payment fell due Compt tendered the whole amount due, & a deed for Def't to execute, but Def't refused to receive the money or execute

page 3

The deed -

Answer admits this tender & refusal, & states the reasons for the refusal to be, that Deft had never agreed to sell or convey.

See Abstract  
page 4.

6<sup>th</sup> - That the articles of agreement were signed by both parties & each took a copy to keep.

Answer denies that Deft signed any agreement -

7<sup>th</sup> - That Compt<sup>r</sup> copy was left by Compt<sup>r</sup>'s agent, Smith, in Linds office, that Compt<sup>r</sup> afterwards called for it, but it could not be found; that Deft was then employed in the office, & that he obtained possession of such copy and concealed or destroyed the same.

Answer denies that Deft obtained such destroyed or kept the same.

page 5

8<sup>th</sup> - That Compt<sup>r</sup> has not seen said copy since, & that it has been lost, or concealed or destroyed as aforesaid.  
Not decided.

9<sup>th</sup> - That when the second payment became due Deft decided that any such agreement had ever been made and still denies the same.

Smith's notice was denied in Answer.

10<sup>th</sup> - That the lot has largely increased in value.  
Not noticed in Answer.

page 6

11<sup>th</sup> - That Compt<sup>r</sup> has been ready to make all the payments when due & is still ready, & offers to bring the money into Court.

Not noticed in answer.

page 7

(12<sup>th</sup>) That Compt<sup>r</sup> has at various times requested Deft to receive the money & execute the deed, but Deft refuses, pretending that he never made any agreement for sale of the premises.

Not noticed in answer.

(13<sup>th</sup>) Charges that the articles of agreement were executed & delivered as aforesaid & that Deft has obtained

Comp<sup>d</sup> copy & has destroyed or concealed the same;

Not noticed in Answer.

page 8<sup>th</sup> - 14<sup>th</sup> Prayer for relief.

Answer says that Deft ought not to be compelled to convey (so that he never agreed to sell & convey, and concludes with general traverse,

page 9 - The answer also sets up certain new matter, either in  
10 & 11 - explanation or defence, but there is not a particle of proof to support it.

The Replication is in the usual form.

See Abstract of Evidence page 1-2 - That the articles of agreement were executed and delivered, and the 1<sup>st</sup> payment made, & possession given is proved by the uncontradicted testimony of the witnesses Smith and White  
5 - - - - - Allens testimony goes to confirm their statements.

3-5 - The loss of Comp<sup>d</sup> copy is clearly proved by witnesses - Smith, Lind & Thomas, & by the affidavit of the Compt.

Testimony was also given (~~affidavit~~) to establish the various allegations in the Bill which are not specifically denied in the answer.

Points - II. The Complainant was entitled to give parol evidence of the contents of the agreement without giving Deft previous notice to produce the original.

2 Phil. Ev-223 The principle of the rule which requires that a party shall have previous notice to produce a written instrument in his possession, before the contents can be proved as evidence in the Court, will not apply to cases where from the nature of the proceedings the Deft has notice that the Plff means to charge him with the possession of the instrument. It cannot in such cases be necessary to give any other notice than the proceeding itself implies.

13 Mand. R. 508 Where the form of action or of the pleadings gives the party notice to be prepared to produce a written instrument, no other notice to produce it is necessary.

14 East 274 Where the form of the action gives the Deft notice to be prepared to produce the instrument, if necessary to falsify the Plff's evidence, it is not necessary to give the Deft notice to produce the instrument.

4 Mand. R. 626 Where the possession of a paper by Deft is one of the circumstances charged in Plff's declaration, it is unnecessary to give any other notice than the action itself implies.

4 Scam-59.

II. Since the Deft. failed to produce in evidence the agreement in writing, proved to be in his possession, all presumptions, as to the contents of the same, are to be taken against him.

7 Mand. R. 34 The refusal of a party to produce his books and papers is not to be regarded as prima facie

evidence that, if produced, they would prove what the party calling for them alleged they contain. The rule is this - The latter, in such case, may give secondary proof of the contents, if the papers are shown or admitted to be in the possession of his adversary, and if the secondary evidence is imperfect, vague and uncertain as to dates, sums, boundaries &c. every intendment and presumption shall be against the party who might remove all doubt by producing the higher evidence."

Rector  
in  
Rector

3 Feb - 180

(This case involves  
actions in Chapel  
Specific performance  
cases & an account  
which was taken  
within retention  
by Deft -)

"The evidence by showing that Deft had the same (the contract) in his possession and neglected or refused to produce it upon the trial, raises strong presumptions and intendments of law against himself." (Here the Justice quotes the foregoing language from 7 West.) "We think there is sufficient evidence to warrant the belief that the Deft once had this contract in his possession. If so the preceding principles of law apply with all their force against him. The most material portions of it are proved. It is only uncertain as to the date, penalty, and unimportant particulars of the covenant or conditions, and in these respects the *off* case is aided by legal intendment & presumptions."

10 Pickering's  
12. 329

Where inferior evidence is given, all inferences from it shall be taken most strongly against the party refusing to produce.

C. & H. Rector  
in Phil. Sec

2064-10424-5

III - The Deft cannot refuse to answer on the ground that the payments were not tendered to him when due, because -

1<sup>st</sup> - There is no evidence that time was of the

force of the contract

Page 35  
of testimony  
interrogatory  
2 & 3

The only evidence on the subject is the testimony of the witness Smith who says he cannot recollect positively that there was any clause of forfeiture in the agreement, but that it is his impression that there was such a clause of forfeiture.

Page 37 -

Smith also says he thinks there were days of grace but cannot tell how many.

Page 45 -

Witness Redgie says that in billing in days of grace in contracts of this description the number allowed is oftener 60 than a less number.

2 - The repeated declarations made by Deft. before any payment was due, & even afterwards up to the time of the commencement of this suit, that no such agreement had been made, & that he would not receive the money as payments for the lot, superseded the necessity of any tender from Plff before the bringing of this suit.

Chitty on  
Contract,  
p 632.

"If before the time arrives at which a party is bound to perform a contract he expresses an intention to break it, this of itself does not amount to a breach thereof. But if such expression of intention remains unrettracted when the time arrives for the other party to perform his part of the contract, this fact will dispense with such performance"

Crawley  
v  
Smith

2 Comstock's  
Rep. - 60

"Where the vendee, in a contract for the sale of lands, gave notice to the vendor of his refusal to perform the contract, held that no tender of a deed by the vendor was necessary in order to sustain a bill for specific performance."

Bellingham  
v  
Kitts -

"The general rule is that a strictly legal tender may be annulled by an absolute refusal to receive the money"

6 Bush. & C. R.  
273.

M. Dranghten  
33  
Copally  
4. M. Lean. 5.30  
To support an action for breach of a contract to receive certain goods at a certain price, notice that the goods will not be received renders a tender unnecessary."

3<sup>o</sup> The Deft in his answer does not set up any such defence. The only ground of defence stated in the answer is, that no contract for sale had ever been made.

The answer expressly states that the money tendered by the Complainant was refused for that reason, & states no other reasons.

See Answer  
page 8 -  
The answer says "That Deft ought not to be compelled to deed or convey the said lot to the Complainant for that he never promised or agreed to sell or convey the same to the said Compt."

Answer  
pages 5 & 6  
The answer admits that about 1<sup>o</sup> Apl 1852 a tender of \$90 was made him, and Deft avers that he then and there refused to receive the aforesaid sum of money as a part payment on the said premises for that the deft had never sold or agreed to sell the same to the Compt."

4<sup>th</sup> Even if time were originally of the essence of this contract, there has been no default on the part of the Complainant -

See Testimony  
of Kedzie.  
In March 1852 when Kedzie tendered to Deft \$91.50 & Deft said it was too late, Kedzie replied that it was Deft's own fault & that Compt had been trying more than a month to get him to take the money, In this Deft made no reply. He also said he wanted no interest.

"Kedzie said  
In July ~~1853~~ In July 1853 <sup>Compt</sup> Deft sought to find Deft to tender him the amount then due - & in July 1854 - when the whole amount \$1180 was tendered to Deft by Kedzie, Deft said it was unnecessary to receive the tender, & that Deft told him so before -

"Kedzie said

IV. According to all the rules which govern Courts of Equity in suits of this nature, the Complainant is entitled to the relief prayed for in his Bill.

There can be no dispute as to the general doctrine that the parties have a right to make their own contracts & to make time, or any other conditions of performance, of the essence of the contract, so that on default at the day, without any just excuse or any subsequent waiver of the other party, the court will <sup>not</sup> help the party in default - This doctrine was established, or at least, recognized by Chancellor Kent in *Benedict vs Lynch*, 1 John Ch. R. 379 & was approved by the Supreme Court of this State in *Smith vs Powers*, 5 Gil. 349. & in *Kemp vs Humphreys* 13 Ill 573. in opposition to the rule laid down by Lord Thurlow in *Gregson vs Riddle* - 7. Vesey 268. But in the case before us, if there has been any default (which is denied) there is not only a 'just excuse' for it but both a prior and subsequent waiver.

2 Story Equity It is also the equally well settled doctrine of the Court of Chancery, both in this and in every other State which has such a court, that time is not necessarily deemed of the essence of the contract, & that relief will be granted in proper cases when the terms for the performance have not in point of time been strictly complied with.

In an ordinary contract for the sale of land, where credit is given and a conveyance is to be made on the payment of the last mentioned instalment, where time is not expressly the of the essence of the contract, a Court of Chancery may, in its discretion enforce the performance of such a contract, although the payments may not have been promptly made. But in doing so the Court will inquire into all the circumstances

Blower  
vs  
Fisher  
11 Ill. R.  
666

Cook Co. Court of  
Common Pleas  
Elijah Day  
vs  
Albert Gowgaski

J. H. Redzie Compt  
Sol<sup>r</sup> for ~~Def~~

Arnold Larned & Lay  
Soll<sup>r</sup> for Def<sup>t</sup>

Abstract of evidence.

1<sup>st</sup> - Copy gone in off<sup>t</sup> of Court showing list of agreement

2<sup>d</sup> - James Smith - witness - page 1 -

p 2 - knows of contract in writing having been made, one  
delivered to each party, Compts<sup>copy</sup> given by witness to Laid,  
to be handed to Court.

Inter<sup>ment</sup> 11 - "I drew the articles of agreement -

1-12. "The copy now produced by me is the same in  
substance<sup>as the original</sup> as nearly as I can recollect it, The amount  
to be paid for the lot & the times of payment are  
the same as in the original - I do not know  
whether the other printed parts are the same  
or not "

2, 13 - "It was dated about the end of February or first of  
March 1851"

2, 14. Thinks he saw them signed -

page 5 2, 16. "When the trade was concluded they stated to me  
the terms of it. They said the terms were to be \$900,  
& \$90 - or 10 per cent interest in advance, \$90 was  
to be paid down, \$90<sup>was to be paid</sup> in one year - \$90 in two  
years & \$90 in 3 years.

2, 18. "There was \$90 paid at the time of signing by the Com-  
plainant to the Def<sup>t</sup> on account of & as first part  
on the premises mentioned in said agreement,  
That was the interest for one year in advance."

Crop Ex

p 9 Crop 9-20. "To the best of my recollection I read the contracts over after I filled up the blanks, and I can state positively the same were agreements for sale."

C. I. 22 - "I think it was in July '51 I delivered the contract to Lynch.  
~~the~~

p 12 Direct - 2-25 - "I do not recollect whether he looked at or examined the same. It is my impression that he took them with him from the office to examine or get someone to examine them before they were signed. He brought them back, as I recollect, & they were executed."

Daniel J. White.

p 13. In 2. I was present at the making of a contract between the parties for the sale of a lot of house being the same where the Court now resides. The agreement was in writing.

3 - It was executed in my presence & the Court & Dept.

4 - I saw Mr. Smith draw it up. I heard it read but I did not read it myself. but I saw it after it was signed.

5 He (Dept) was present at the time it was read before it was signed.

6 I could not say it (Exhibit B) was word for word the same as was read there - but the price and terms and parties are the same, and I think it describes the same property.

8. The court paid \$90 to the Dept.

14. I think they (the premises) had increased in value up to

14 + 15

Int 11 & 12 } witness says that in conversations with Deft  
the next summer after the contract was  
made Deft spoke of having sold the premises  
to Cora - Deft towards the spring of 183-2  
Deft denied he had made such a contract -  
but never denied it before that time -

p. 17

exp. Int.

4 - Deft <sup>was</sup> ~~was~~ told by witness that he saw the agreement  
signed - Deft then asked where the agreement was?

5 - Deft said there was no agreement & that they  
couldn't produce any

23<sup>rd</sup> - July 1854 - about 225 p<sup>er</sup> cent

Crop Ex<sup>m</sup>

p. 16. C. I. 3. (The nature of the agreement was) that Compt was to pay \$900, - \$90 in advance - \$90 in one year & \$90 the second year as interest for each year the principal was to be paid in 3 years. It was an agreement for the sale of the premises.

Sylvester Lind

p. 21. C. I. I recollect that a paper was handed to me at my office in Chicago by James Smith. He stated to me that that was a contract between Gougowski and Day and asked me to get it <sup>(either examined or was made)</sup> signed. It was 3 years ago this spring.

4. I do not know (what has become of it) It was handed to the book keeper in my office - Rev James Wilcox & he died soon after.

p. 22 5. I have made searches and examinations for the same but not until after Wilcox died. When the papers of Wilcox were delivered out of the office I examined them carefully to see if there was any papers belonging to me or the paper in question among them. I have looked only in my safe for it.

6 - They (valuable papers) were kept in my safe in a little tin box & sometimes in a drawer in the safe. The Dept had access to the safe.

8. I never removed the papers to my knowledge. I never

23 11 - saw it after I delivered it up to the book keeper - <sup>was my testimony between the parties before the copy was delivered to Lind.</sup>  
Crop Ex<sup>m</sup>

p. 23. C. I. 1 - James Smith had access (to the safe) and also M. Wilcox

26 Direct Ex<sup>m</sup>

J. 12. I have a remembrance that the complainant did make a proposition to pay me money for defendant, in the

5  
Daniel J. White, recalled.

p. 30. In-2<sup>o</sup>. I know that Compt did take possession of the house on said (premises) the same spring he bought it, with the consent of the said defendant for the purpose of living on it under the purchase made from Deft.

31 3<sup>o</sup>. (He continued to reside on said Lot) upwards of 3 years and until the present time.

Frederick Allen

.. In-2<sup>o</sup>. I have had conversations with Deft about his having sold a lot to Compt, and said conversations were about 3 years ago at Mr. S. Lindley's office in Chicago. I heard Deft say he had sold a house and Lot to Compt & that Compt was to pay him \$4900 for the same, Compt was to pay something down & the balance in 3 years.

3<sup>o</sup>. The same house & lot which Compt now occupies & has occupied for the last 3 years.

Benjamin W. Thomas

33 Testimony of this witness shows that he was Executor of the  
334 Will of & took from Lindley's office all the papers belonging to W. or in which he had an interest - that he had examined them & had seen no such agreement.

James Smith recalled.

35<sup>o</sup> In- (Thinks there was in the agreement a clause of forfeiture & days of grace allowed, but does not know how many if any.) is not certain as to either.)

Cross Ex<sup>o</sup>

In-1<sup>st</sup> That Copy (Exhibit B.) is a true copy in substance of the agreement as near as I can recollect.

2<sup>o</sup> About the printed part of the contract I don't

6  
I recollect any thing about it. It was one of these  
common printed agreements. The written part  
contained in the form is, as near as I can recollect  
about it, the same as the original agreement between  
the parties.

- John H. Redgie testified in substance - that on the  
p. 39 25<sup>th</sup> March 1852 he tendered to Albert Gungoski \$790 in  
gold & 50 cents in silver; as the agent of Compt. - on a/c -  
of Lot 7 (20) claimed by Compt. to have been purchased  
from Dept. Dept. replied "Where is his agreement"  
Deponent said to him "You probably know that better  
than we do" & charged Dept with having Compt's copy  
of the agreement in his possession. To this charge Dept  
40. made <sup>no</sup> reply, but said he should not receive the  
money on the lot, but that he was willing to take it as  
paid. Dept also said, in the conversation, "It is too  
late now any way, the time is gone by". To this  
statement deponent replied "It is your fault that you  
have not the money sooner, as Mr. Day has been trying  
for some time or months to get you to take your  
money". To this charge Dept made <sup>no</sup> denial & <sup>no</sup>  
reply. Deponent informed Dept that the money  
would be left with deponent & that Dept could have  
it at any time of calling on him.
- 42 That on 22 July - 1854 deponent tendered to Dept  
\$1000, in full payment of the lot, as agent of Compt.  
who was present - Dept said, "I suppose the Com. will  
have to decide the matter, but it is unnecessary to make  
the tender. I told you so before."
- 43 Deponent also produced the deed produced in this case  
& requested Dept to execute it, which Dept. refused to do.
- 44 & said he would give no deed whatever.

45- That defendant has had extensive practice in drawing agreements for sale of lands, in Chicago - that in using blanks of the kind of Exhibit B the blank for the number of days of grace is usually filled with the number ten, twenty, thirty or sixty - often 60 though a less number & less than 20 or 30 seldom ~~is~~ allowed.

Cross Ex<sup>o</sup>

47 Inj-1<sup>st</sup> The days of grace are usually matters of special agreement, but in a large portion of these blanks "sixty" is printed - & this is the only printed number defendant has seen.

2<sup>d</sup> There are printed forms which have one blank for days of grace - & no days of grace mentioned.

53. - Counsel to witness claimed that the agreement was executed in any other month than February, but he did not profess to know certainly at what time it was executed.

7<sup>th</sup> Direct resumed

71 "When I offered to said Gougoski 50 cents as interest in addition to the sum of \$90, he said that he wanted no interest."

Evidence on part of Dept -

Sylvester Lind.

75- Inj-2<sup>d</sup> I heard some conversation between the parties in my office after the papers relating to the agreement between them in regard to said premises had been left with me and were lost, but I did not take much heed to what was said until the defendant asked me if I would sign Cop<sup>y</sup> Day note for \$1500.00. It was Gougoski that asked me this and not Day. My answer to Gougoski was, No.

78. In-C<sup>th</sup> Did you in the course of the said commission have the said complainant claim that he had made any previous purchase of said premises?  
Answer - It appears to me that he claimed that he had bought the lot before.

Cross Ex<sup>th</sup>

77x<sup>th</sup> I recollect that James Smith came into my office and delivered to Mr. Kilcox, my book keeper, a paper folded up in the form of a deed or agreement, and gave it to me and said, 'here is Gougeon's agreement to Day, and asked me to get his name to something on the agreement about which he had spoken to me before.

x<sup>2</sup> - State whether it was in the hearing of Capt Day that said Gougeon asked you if you would sign Day's notes for \$1500.

Answer - Well, I could not tell. I was employed at the desk, but whether he heard it or not I could not tell.

78. ~~71<sup>st</sup>~~ I believe that Day & Mr. Redgie in the winter of 1853 only came one day and offered me money for Gougeon. I think this was in the latter part of February 1853. They called for Day and asked for him, and not finding him, offered me money to apply in payment on what Day called his lot. But I was not authorized to receive it, and declined accepting it. I do not recollect the amount offered to be paid, but they offered to pay in gold. They came after me into the yard where I was.

John H. Redgie. recalled of Compt<sup>r</sup>

79. In 1<sup>st</sup> In the latter part of February 1853, I think about

9.  
the 20<sup>th</sup> of that month I went with said Day to the office of J. Lind, in whose employ said Gouyoski then was, with one hundred & eighty dollars in gold to make the payments there due; and inquired for said Gouyoski. He could not find him and I then offered the money to said Lind for Gouyoski, who declined receiving it. I did not mention it before because not having seen said Gouyoski I made no memorandum of the circumstance as I did of the two before mentioned tenders, and it had entirely passed out of my mind until mentioned by Mr. Lind in his last preceding examination.

79 Deft produced in evidence receipts for taxes & assessments on the property paid by him - for years 1851-52 & 53 amounting to \$33.80.

Exhibit A. = Afft of Compt showing copy agreement.

Exhibit <sup>C</sup>B. Notice to Deft to produce agreement in evidence or that parcel evidence would be given of its contents.

Exhibit B.

85  
Cook Co: Court of  
Circuit Pleas -  
In Chancery

Elijah Day  
Compt

vs  
Albert Gougoski  
Deft.

-----  
Abstract of Evidence  
made by W. W. Daniels  
of Counsel for Compt.

13733

Paper of Conspiracy to  
deprive poor man  
of his bread to  
keep him alive