No. 14533

Supreme Court of Illinois

Alden

vs.

Garner

STATE OF ILLINOIS,

SUPREME COURT,

THIRD GRAND DIVISION.

No. 204

J. W. Middleton & Co., Stationers, 196 Lake St.

Allen

v.

Garver

Supreme Court of Illinois,

THIRD GRAND DIVISION,

AT OTTAWA.

APRIL TERM, 1863.

ISRAEL ALDEN,

IMPLEADED &C.,

VS.

JOHN ~~GRAVER~~. Graves

APPEAL FROM OGLE.

ABSTRACT OF RECORD.

LELAND & BLANCHARD,

ATTORNEYS FOR APPELLANT.

Filed Apr 22. 1863
S Leland
Clk

OREGON:
PRINTED AT THE OGLE COUNTY REPORTER OFFICE.

1863.

ABSTRACT OF RECORD.

Page of Record.

ISRAEL ALDEN IMPLEADED &C., vs. JOHN GARVER. } APPEAL FROM OGLE.

1 Bill to foreclose mortgage, filed April 9, 1860, which alleges in substance

1 That, on the 4th day of October, 1856, William C. Prouty was
2 the owner of the following lands, viz: Lots 5, 6, 7, 8 and 9, in Section 16, 25, 10, se qr se qr, 3, 25, 10; lots 8, 9, 10 and 11, according to subdivision of e hf ne qr 15, 25, 9, in Ogle County;

That, on said 4th day of October, Prouty contracted to convey
1 said lands to Almon Benton for $8,500—$790 paid down; $1,174.62
7 to be paid January 1st, 1858; $1,174 62 to be paid January 1st, 1859;
7 $1,254.70 to be paid January 1st, 1860; $1,452.20 to be paid January
1st, 1861; $1,382.20 to be paid January 1st, 1862; $1,312.20 to be
7 paid January 1st, 1863; $1,242.20 to be paid January 1st, 1864;
$1,172.20 to be paid January 1st, 1865; $1,102.20 to be paid Janua-
7 ry 1st, 1866; $492.20 to be paid January 1st 1867.
7. Filed for Record, February 13, 1857.

7 Benton went into possession of the premises and made large and valuable improvements, amounting to $1,000.

2 October 3rd, 1856, Benton borrowed of Appellee $301 87.

December 31st, 1856, Appellee became surety for Benton, upon a
3 judgment note, payable to Spafford, Clark & Ellis, for $500, due in sixty days, with 10 per cent. interest. See exhibits C & D, 12 & 13.

To secure said note of $301.87, and to indemnify appellee for so
3 becoming surety, said Benton gave to appellee his Trust deed on said premises, dated December 1st, 1856. Filed for record February 13th, 1857—exhibit, B 8.

That on the day of the date of said trust deed, said Benton was
3 in the actual possession of said premises, without any default of payment. The next installment fell due January 1st, 1858, and said Benton was never in default.

On the 1st of May, 1857, appellee paid said judgment note, then
4 amounting to $525, and said Benton hath not paid the same, nor said promissory note to appelle, and there is now due appellee from said Benton, upon said trust deed, about $1,030.

On the 6th day of November, A. D. 1857, said Prouty purchased
5 of said Benton, his interest in said premises for $1,000; and the said Benton pretended to enter satisfaction of record of said contract, (see exhibit A,) at which time there was no default on the part of Benton, and said Benton continued in possession of said premises until the 6th of November, 1859.

Appellee claimed that, from the date of said trust deed, of said
5 premises, he had such an equitable interest in the same; that no act on the part of said Benton could divest him of the same, except by payment of the sum secured, or by default in the payments due upon said contract of purchase with Prouty.

That said Prouty, on the 30th day of January, 1858, conveyed
5 his interest in said premises;

That, Israel Alden and Daniel Patton claim an interest in the
6 premises as purchasers, subject to the interest of complainant, (appellee);

Also, Edson P. Albee and Edwin M Luther, as mortgagees, sub-
6 ject to complainants (appellees) claim. Answer under oath, waived.

PRAYER:

That said trust deed be held to have the force and effect of a mortgage, upon all the right and equities of the said Almon Benton, at the date of the same, in and to the premises described therein; and that the demands described in the said trust deed, with the interest thereon, be the measure of the indebtedness secured thereby, and that the same be foreclosed as a common mortgage, and that so much of the premises, described in the bill of complaint, be decreed by the Court to be sold as shall be necessary to pay the same and the costs of this Court.

PRAYER FOR GENERAL RELIEF:

Nov. 19, 1860—Bill taken for confessed as to all defendants, except Israel Alden. 22

March 24, 1862—Alden files his answer, wherein is stated in substance— 28

Admits that Prouty was seized of the premises described in bill, and bargained said premises unto said Benton, but requires full proof of the details of said contract; 28

Has no knowledge of the loan of money from complainant (appellee) to Benton, nor of the manner in which Benton secured the same, and demands proof of the same; 28

Don't know whether Benton occupied the premises or was in default to complainant (appellee); 29

Denies all fraud and combination between Prouty and Benton to injure any one; 29

Alleges that Benton represented to Prouty that he was a man of means, when in truth he had no means—that he was hopelessly insolvent, and had agreed to pay far too high a price, and finding it impossible to pay for the same, he surrendered up the same to Prouty without any consideration; that thereby, Prouty met with a large loss; that said Benton's interest in said premises was of no value; 29 30

That this respondent, as a remote grantee of said Prouty, would be willing to receive far less on said contract of Benton to Prouty than, in fact, is due upon the same; 30

That the only lien complainant (appellee) could possibly have upon said premises would be the equity and right which there would be in the same after fulfilling and payment of the amount due Prouty on said contract, or to his grantee who would hold the same subject to said contract, and respondent offers to permit said complainant to fulfil said contract, crediting on the same all payments that have ever been made thereon;

Denies complainants (appellees) right to any relief, until he has performed, or offered to perform, his covenants in said contract between said Prouty and Benton, that had matured up to the time of filing said bill, none of which have been paid; 31

That complainant has forfeited his rights by laches; 31

That said Benton made no valuable improvements upon said premises; 31

While Benton occupied said premises he committed great waste thereon, so that they depreciated in value; 31

March 24, 1862—Replication filed to said answer; 32

Referred to Special Master who reported the following testimony:

C. F. Millen testifies: Knew hand writing of Dexter G. Clark, of the late firm of Spafford, Clark & Ellis; that the entry made at the 34

foot of the judgment note, given by Benton and complainant to said firm, in the sum of $500, payable 60 days after December 31, 1856, is in the hand writing of said Clark, which note is marked as exhibit A.

Counsel for Israel Alden excepted to the above testimony.

Hiram Gitchell testified: Have been acquainted with the premises 35
in question 15 years; first became acquainted with Benton while he 35
resided upon the premises, which was 5 or six years ago; think he resided there about one year; Mr. Armstrong took possession of the premises after Benton left.

Henry A. Mix testified: Drew up the contract between Prouty 36
and Benton, marked B, and tested it as subscribing witness. It was executed by Benton and Prouty.

Wm. C. Prouty said: I sold the premise to Benton, Oct. 4, 1856, 37
and gave him possession. Benton remained in possession until Dec. 1857, then gave possession to me.

That the contract marked exhibit B, is the contract between Ben- 37
ton and myself, for sale of said premises.

Benton and wife quit claimed said premises to me, but I never 37
paid said Benton any consideration therefor. (Complainant objected.)

I suffered largely by rescinding the contract. (Complainant obj'd) 38

I sold the premises to Harvey Woodruff, the latter part of Janu- 39
ary, 1856, and he went into possession. (Objected to.)

Harvey Woodruff sold to either Roswell or Russell Woodruff, who 39
sold to Albie & Luther. Albie & Luther sold to Jewett & Co.; Jewett & Co., reconveyed to Albie & Luther; Albie & Luther sold to Israel Alden, who went into possession April 1859, and continued for two years so far as I know. (All objected to.)

The following are the exhibits introduced in evidence:

Exhibit A—Note of $301.87, given by said Benton to complain- 41
ant, appellee;

The judgment note of $500, given by Benton & Garver to Spafford, Clark & Ellis;

Trust deed from Benton and wife to (appellee) complainant.

Exhibit B—Contract for the sale of said premises by Prouty to 46
Benton.

Exhibit C—Quit claim from Benton to Prouty for said premises. 48

March 26, 1862—Exceptions filed to Alden's answer: 50

First—Said answer does not show any interest in the premises.

Second—Said answer is impertinant—is not responsive—compos- 51
ed of unnecessary recitals.

Exceptions overruled.

March 26, 1862—Decree entered: 51

Finds $1,011.70 due complainant (appellee); that said mortgage 52
is a subsisting lien upon said premises.

Ordered, that said sum be paid within 30 days from adjournment of Court; that in default of such payment, said Special Master in Chancery, is hereby authorized and commanded to sell at public vendue, at the door of the Court House, in Oregon, so much of said
53 premises as may be necessary to pay the said indebtedness, after giving notice; and that said Special Master convey the premises, so sold, to the purchasers if the same are not redeemed.

ERRORS ASSIGNED:

The Court erred in rendering a decree for complainant when it should have been for defendant.

Supreme Court of Illinois,

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1863.

JOHN GARVER, APPELLEE,
vs.
ISRAEL ALDEN, IMPLEADED, &C., APPELLANT.
} APPEAL FROM OGLE.

APPELLEE'S BRIEF.

The bill, in this cause, was filed by the appellee, to foreclose a mortgage which had been made to him by one Benton, a defendant herein.

The lands mortgaged were lands which one Prouty had contracted to sell to Benton in 1856.

Soon after the execution of the contract, Benton executed the mortgage to appellee, which mortgage was in a short time recorded.

Some time after the mortgage had been made and recorded, and before any of the money, which by the contract was to have been paid for the land, fell due, Benton and Prouty made a new contract, by which they released the original contract the said Benton releasing the contract, and also, with his wife, conveying back the land, by deed, to Prouty.

Prouty afterwards sold the land, and it passed by sundry *mesne* conveyances to Alden, the appellant, who held it when the bill in this cause was filed, and the appellee, regarding the mortgage to himself, as a mortgage in the nature of a second mortgage, where a first mortgage had been discharged, and that by the dealings between Benton and Prouty, his mortgage had become a first incumbrance on the land, filed his bill to foreclose his mortgage, as a mortgage on the land.

The original contract of sale between Prouty and Benton was a valid one, which conferred a substantial right in the land, in Benton, which he could mortgage, or deal with as substantial property; and by his mortgage, appellee acquired a substantial right in said land.

This right was subject to be extinguished, by a default in Benton in making the payments, required by his contract; but when no default had occurred, it was not in the power of Benton and Prouty to deal with that contract, except with appellee's consent, in any way which could extinguish appellee's right, or place him in a worse situation in respect to the land than he was before. This seems to be admitted by the other side, and the only question in this cause seems to be, what were the rights of the appellee, after the dealings between Benton and Prouty had taken place.

The appellant says that by those dealings the appellee acquired the right to perform Benton's contract, and claim a conveyance of the land, but we insist that this cannot be true, because that contract itself was controlled by Benton, and appellee's interest was only an incumbrance, and that Benton could control and release all rights under it, subject to the rights of appellee under his mortgage; the appellee had no other right, than that his lien gave him, and he was not an assignee of the whole contract, and Benton having such control, released every right under it which he could release, and only failed to release the incumbrance of appellee, because it was beyond his reach, and could not be released by him; appellee had no right to call upon Prouty to perform that contract, and had no means of compelling him to do so, and this difficulty was very greatly increased by the number of conveyances that had been made of the land after the release by Benton.

Benton and Prouty at the time of the release had no right or power to extinguish or affect the rights of the appellee, nor could they do anything to put him in a worse position than he then was, they having constructive notice of his rights by reason of the recording of his mortgage; but subject to that limitation their control over the contract was complete.

And by the act of Benton and Prouty in making their new contract, all the rights of Prouty were extinguished under the old one, and he had no more power or right left him to insist that Benton or any claimant under him should perform that first contract; and Prouty, no longer having such power, he cannot insist that appellee shall be required to enforce such power; and, in fact, Prouty having no rights under the contract to compel its enforcement, the appellee was equally destitute of it.

In fact, Prouty, by his last contract with Benton, entirely extinguished all rights in himself under the first contract, either to execute it himself, or to require anybody else to do so.

Prouty having extinguished all rights under the contract, while he could not extinguish appellee's rights in the lands, by extinguishing the only claim or

lien on the land prior to appellee's, being his own rights under the released contract, made appellee's right a first mortgage on the land to which his own was subject.

Our case bears some resemblance to the case of *Campbell* v. *Carter*, 14 *Ill.*, 286. In that case, an absolute deed was made by the mortgagor to the mortgagee, of the premises mortgaged, which conveyance was accepted by the mortgagee as a satisfaction of the mortgage debt; it was held by this Court that a judgment subsequent to the mortgage, but prior to the aasolute deed, was a first lien on the land, and that the original mortgage had become merged with the after conveyance, the Court therein deciding that whenever a merger is intended by the party, it always takes place.

Just so Prouty's contract became lost and merged in the after release, and deed of Benton, and the land being subject to the mortgage of appellee, it was by the last conveyance so conveyed to Prouty, who received the land subject to appellee's mortgage, with all rights prior to appellee's extinguished.

In this case, it may be more advantageous to the person holding the land, that the original contract should be adopted and performed by appellee, but such might not have been the case; it might have been for appellee's interest to have obtained the land under the terms of the rescinded contract, but Prouty could have answered, had we attempted it, that our interest in the land was a mere incumbrance, which he had a right to pay, and that we had no interest in the land beyond that, and could not claim the land on any terms.

POINTS.

The bill was properly filed, and a proper decree was rendered in the Court below.

Benton, at the time he mortgaged to appellee, had such an interest in the land mortgaged as was capable of being the proper subject of a mortgage.

20 *Ill.*, 518.

Benton and Prouty, before any default in Benton under his contract, and when no payments had fallen due under it, made a new contract, by which the old one was wholly released, and all rights under it fully discharged.

At the time of such release and discharge, appellee's mortgage was a lien upon the land, which neither Benton nor Prouty, nor both of them, could dis-

charge, and so it continued a lien upon the land, notwithstanding the dealings of Benton and Prouty, Prouty having a constructive notice of it by reason that appellee's mortgage had been recorded.

Benton and Prouty having undertaken to deal with the land without any regard to the rights of appellee, and without obtaining his consent, and Benton having conveyed his whole interest in the land to Prouty, conveyed it subject to the rights of the appellee as mortgagee of the land conveyed.

The effect of the conveyance to Prouty by Benton being to merge all prior rights in Prouty, which grew out of the previous contract between them, and Prouty having bought the land charged with appellee's claim, the said claim of appellee, by virtue of said merger and purchase by Prouty subject to it, became a first mortgage on the land, and it was properly foreclosed as a mortgage, and the decree of sale in the case is right.

Campbell v. *Carter*, 14 *Ill.*, 286.

Holman v. *Bailey*, 3 *Met.*, 55.

5 Pick 62 w

The land was subject to our mortgage in Prouty's hands, and was by him transferred to his vendees, subject to it, and continued subject to it, during all the subsequent conveyances, and so came into the hands of appellant, in whose hands it was when the bill was filed; at that time, Prouty having parted with his interest in it, was not a necessary party to this suit; he was only subject to our mortgage through the land; when he conveyed away his interest in the land, his interest in the mortgage ceased.

JAS. M. WIGHT,

Appellee's Attorney.

~~##~~ 2024

Supreme Court

John Garrod
ads
Israel Allen

Appellees Brief

Filed Apr 27, 1863
L Delancey Clk

Supreme Court of Illinois.

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1863.

ISRAEL ALDEN,

vs.

JOHN GARVER.

BRIEF.

The equity which Garver claims arises solely upon the mortgage given him by Benton. Benton could convey to Garver no greater interest in the land than he himself had, and that interest was the right to a conveyance when the terms of the bond from Prouty to him had been complied with.

If we admit that under the mortgage Garver succeeded to all Benton's rights, then he was entitled to pay for the land and keep it, but he was not entitled to rescind the contract without fault on the part of Prouty, and to recover back the money which Benton had paid.

But it is said that Prouty has put it out of his power to convey to Benton or to Garver, by conveying to Alden. The complete answer is, Prouty had a right to convey his interest in the land, and Alden, as the purchaser, had the right to convey the land to Benton or Garver upon compliance with the contract, he should at least have had the option to do so before his land is sold.

Neither Benton nor Garver had ever paid the money called for by the bond, or offered to do so. Alden in his answer offers to convey the land if they or either of them do. But the Circuit Court said no, you shall not be permitted to to fulfill Prouty's contract according to its exact terms, and on account of the wrong done to Garver, not having the contract fulfilled you shall pay him the amount of this decree.

By the decree Garver is placed in a much better position than Benton, his grantor, was or could be, and Alden is placed in much worse position than Prouty, his grantor, could be under the contract.

One of two things is true: Alden bought the land with notice of Garver's equities, whatever they may have been, or he did not. If he had no notice of the equities of Garver, he took the land without its being subject to them at all, and if he had notice of them, then he occupies the same position of Prouty, his grantor, and Garver's rights were in no way effected by the conveyance of Prouty to Alden, and Alden was trustee for Benton or Garver in the same way that Prouty had been.

But the decree holds that Alden occupies Prouty's position, in so far that he must pay a large sum of money on account of the alleged breach of Prouty's contract, but does not occupy it so far as to allow him to fulfill the contract in Prouty's stead.

There is no single principle of equity, and no single case to be found by which this decree can be sustained.

Prouty should have been made a party, he made the bond to Benton, the grantor of complainant. He had also sold the land, by deed of warranty to the grantor of Alden, he was a necessary party.

Prentice v. *Kimball*, 19 *Ills.*, 320.
Whitney v. *Mayo*, 15 *Ill.*, 255.
Skiles v. *Switzer*, 11 *Ill.*, 533.
McDowell v. *Cochran*, 11 *Ill.*, 34.
Hoore v. *Howes*, 11 *Ill.*, 25,

The evidence fails to support the allegations of the bill.

E. S. LELAND,
B. C. COOK,
For Appellant.

204 ~~105~~ 111

Alden
vs
Garver

Pet. Brief

Filed April 27. 1860
L. Leland
Clerk

Supreme Court of Illinois,

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1863.

ISRAEL ALDEN,

vs.

JOHN GARVER.

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Neither Benton nor Garver had ever paid the money called for by the bond, or offered to do so. Alden in his answer offers to convey the land if they or either of them do. But the Circuit Court said no, you shall not be permitted to to fulfill Prouty's contract according to its exact terms, and on account of the wrong done to Garver, not having the contract fulfilled you shall pay him the amount of this decree.

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Prentice v. *Kimball*, 19 *Ills.*, 320.
Whitney v. *Mayo*, 15 *Ill.*, 255.
Skiles v. *Switzer*, 11 *Ill.*, 533.
McDowell v. *Cochran*, 11 *Ill.*, 34.
Hoore v. *Howes*, 11 *Ill.*, 25,

The evidence fails to support the allegations of the bill.

E. S. LELAND,
B. C. COOK,
For Appellant.

~~105~~ 204

Alden
v.
Gamer

Pefft's. Brief

Filed April 27. 1863
L. Leland
Clerk

Supreme Court Illinois
Third grand division Ottawa

Israel Alden et als
vs
John Garver
} Appeal from Ogle.

To Israel Alden one of the appellants
in the above entitled suit

Sir please take notice that
I shall move said court on the first
day of the next april term thereof
to be held at Ottawa in said State
of Illinois on the third monday of
april next or so soon thereafter
as Council can be heard that a
rehearing be granted me in the above
said when and where you may appear
if you please & oppose my motion for
such rehearing in said court.

Yours &c
John Garver

State of Illinois
Winnebago County ss John Martin Garver being duly sworn says that
he the day serves a copy of the foregoing notice on Israel
Alden Apr 7. 1864—

M. L. Garver.

Subscribed & sworn to before
me this 7th day of April A.D. 1864
M. Darling my hand & official seal
Clerk of Winnebago Co

204

Israel Alden et al

vs

John Gardner

Notice

Filed Apl. 20. 1864.

S. Meland

Clk.

Supreme Court Illinois
Third Grand Division
August Term 1864.

John Gaines Appellee
ads.
Isaac Alden et al Appellants

And now comes the Appellee by Willis & Willis his attorneys and moves the Court for a rehearing in the above entitled Cause. Notice of said motion having been duly served on the Appellants

Willis & Willis attys.
for Appellee

204

Israel Alden et al

v

John Garven

No.

Filed Apl. 20. 1864.

L. Leland Clk.

L Leland Esq
Clk Sup Court NY
Third Jud District

Dear Sir

Please put enclosed
motion & notice on file — we shall
send a written argument soon

Respectfully Yours
Miller & Miller

Rockford April 1864.

The Clerk of said Court will please file the enclosed papers in the said Supreme Court and we will see that fees if any are duly paid

May 11th 1864

Miller & Miller

Supreme Court of Illinois
Third Grand Division
April Term A.D. 1864.

John Garver Appellee
ads
Israel Alden et als Appellants

Petition of Appellee for a rehearing of the above entitled cause.

To the Honorable the Judges of said Court.

Your Petitioner John Garver Appellee in the above suit would respectfully ask your Honors for a rehearing of the above suit and would state that this Court was misled by error in the brief of Appellees' solicitor by which it appeared that no part of the purchase price had been paid to Prouty by Benton at the time the latter executed the trust deed in question to your Petitioner when in fact Prouty received of Benton seven hundred and ninety dollars ($790) of the purchase price being part of the loan advanced by your Petitioner to Benton with which he - Benton - made the first payment to Prouty and for which Benton gave your Petitioner the Trust Deed to secure the loan and the interest thereon.

The fact that your Petitioner furnished to Benton the amount of money with which Benton made his first payment to Prouty and that Prouty had a

knowledge of the fact appears in the papers of the case and is not denied by the appellant. The Article of Agreement for the conveyance of the land from Prouty to Benton and signed by them respectively shows the fact of the payment of seven hundred and ninety dollars ($790) a part of the purchase price of said land the same being a part of the loan made by your Petitioner to Benton and secured to your Petitioner by Benton's Trust Deed.

Owing to a statement in the printed brief of your Petitioners counsel this court assumed in its decision of the case that the mortgage or Trust Deed was executed to your Petitioner before Benton had paid to Prouty any part of the purchase price for the mortgaged premises, whereas the truth is as appears from the papers and evidence in the case that Benton had paid the amount of seven hundred and ninety dollars ($790) before mentioned to Prouty the same having been loaned by your Petitioner with the knowledge of Prouty for the purpose. Upon this misapprehension of the facts in the case the decision of this Court was given against your Petitioner

And your Petitioner would further say that in the decision of this Court given by Judge Caton it appears to have been understood and taken for granted that no payment at any time had ever been made by Benton to Prouty for the mortgaged premises in question and under this misunderstanding of the facts great injustice was done to your Petitioner.

John Carver

Miller & Miller Solicitors for Garver the Appellee the Petitioner for a rehearing in said suit would respectfully submit for the consideration of the Court the following in support of their motion for a rehearing.

Supreme Court of Illinois
Third Grand Division
April Term A.D. 1864.

John Garver Appellee

vs.

Israel Alden Impleaded &c Appellant

The bill in this cause was filed in the Ogle County Circuit Court in 1860 to foreclose a certain Trust Deed (as a mortgage) executed by Almon Benton one of the defendants in the above suit (with his wife) on the lands hereafter refered to: to secure to Appellee the payment of eight hundred dollars and interest.

On the fourth of October 1856 Wm C Brady owned in fee two hundred and fifty acres of land described in the bill of complaint in this suit: which land on that day the said Brady for the consideration of eighty five hundred dollars sold ($790.00 of which was in hand paid) and by article of agreement of that date (acknowledging the receipt of $790.00, part of the principle) agreed to convey to Almon Benton the said premises on the payment of the residue of the purchase price as follows $1174.62 payable on the first of January A.D 1858. and in instalments bi-annually thereafter.

To secure the payment of $800. to Garver, Benton and wife gave to Garver a Trust Deed on said premises which together with the said agreement were duly recorded in said Ogle County on the 18th day of February 1857. Benton continued in possession of said premises until the 20th of November 1857. when he sold all his right and interest in said premises to Brady for the sum of one thousand dollars and by Quit Claim Deed of that date executed by Benton and wife

conveyed said premises to said Prouty, canceled the said agreement of Record, and delivered the possession of said premises to Prouty. All of which without the knowledge or consent of Garver and in violation of his rights. Prouty sold said lands and by Warrantee Deed executed by Prouty, and wife, pretended to convey the fee of said lands free of all incumberance: and by sundry Mesne conveyances to appellant, who held the lands when the bill was filed in said circuit Court, and the decree of foreclosure made from which decree, said Alden, appealed, which cause was heard at the April Term 1863. of this Court and in vacation said decree was reversed.

The said Appellee respectfully asks a rehearing of this cause at this the first subsequent term, for the following reasons.

This court in reversing the decision of the court below; assumes that no part of the purchase price had been paid to Prouty, when in fact $1790.00 of the purchase price were paid Prouty on the said 4th. of October, the receipt was acknowledged by Prouty in said agreement and not denied by Alden in his answer.

"By said sale, and agreement to convey: the interest transferred to Benton, was not a mere seizin or possession in law: but an actual seizin, and possession in fact: Not a mere title to enter upon the land, but an actual estate therein. See 4th. Kent Comises Digest Page 123."

"A bargain and sale is therefore a contract by which a person conveys his lands to another for a pecuniary consideration in consequence of which a use arises to the bargainee:"

"And the Statute 27th Henry 8th immediately transfers the
"legal estates and possession to the bargainee."
"See same book Page 124."
"Every estate of freehold or inheritance in possession in lands
"may be conveyed by bargain and sale Therefore every person
"seized in fee simple may convey his estate by bargain
"and sale See same book Page 126."
"Where a purchaser borrowed part of the purchase price
"which he paid to the seller, and all parties joined in a deed
"which stated the transaction and by which the purchaser
"gave security on the estate to the lender for the money advanced it was held that by the assent of the seller to the transaction
he lost his lien at last as against the mortgagee. See 2d Vol
Sugden on Vendors (marginal) Page 860."
This court in suit of Curtis vs Root 20th Vol Ills Reports Page
538 & 518 decided that Ambrose (a vendee) had a mortgagable
interest which was the subject of sale and assignment and
was subject to execution having a like agreement for land;
who had made no payment of the purchase price.
From these authorities we think it manifest that by said
sale to Benton by Root, a perfect legal, absolute title to
said lands vested in Benton, as if the same had been
conveyed by Warrantee deed; defeasable only by non payment
of the purchase price, as it fell due. Benton had a legal
estate in said lands, saleable and assignable, subject to
execution coupled with possession.
Root had neither possession, or right of possession but
merely a vendors lien which equity would enforce on
default of Benton.

Pouty's agreement to convey, and Benton's Trust Deed to Carver, were recorded on the 13th of February 1857, in the Records of said Ogle County, by which from that time at least Pouty, and all others are charged with notice of Carver's equity. After the said payment of $1790.00 the next instalment became due on the first of January 1858, on the 20th of November 1857, before any payment fell due by said agreement, Benton continuing in possession of the lands - Benton for the consideration of eight hundred dollars sold, and by Quit Claim Deed executed by Benton and wife conveyed to Pouty, all their right, title, interest or claim in and to said lands, and with the consent of Pouty, Benton canceled of Record, the said agreement: All which were without the knowledge, or consent, of Carver. Pouty in January 1858, sold and by Warranted Deed executed by Pouty and wife attempted to convey said lands clear of all incumbrances to subsequent purchasers & by Mesne conveyances to the said appellant.

This purchase by Pouty, of Benton, as to Carver's interest, was as if Pouty had been a stranger to the transaction prior; and who had paid all the residue of the purchase price as by instalments it became due, and received from Pouty a Deed according to the terms of said agreement. Pouty by that act became the assignee of Benton, and held it subject to all the incumbrances imposed by Benton.

Had Benton paid the purchase price under said agreement, and received from Pouty, a deed no one would question Carver's right of foreclosure.

Benton, by the said sale and conveyance, by said Quit claim Deed, of all his interest in said premises and with the consent of Prouty, entering satisfaction of Record of the said agreement before any default occured, as perfectly satisfied the terms of said agreement, so far as Garvers rights are concerned, as if Benton, had sold and conveyed other lands to Prouty, in full satisfaction of said contract.

Garver had no right to the contract: no default occured: no duties were thereby imposed on Garver, to protect his right to said premises under his Trust Deed.

By the recording of the Trust Deed to Garver, Prouty was charged with knowledge that the $790.00 paid to him by Benton was Garvers money which he assumed and received the title from Benton, charged with that incumbrance

Prouty, by his purchase of Benton, united and merged the legal right of Benton, with his Proutys equity.

Bi Campbell vs Carter 20th Illinois Reports Page 286.

This court says "If a party acquires an estate upon which he has an incumberance: the incumberance is in equity considered as subsisting, or extinguished, according to his intentions, expressed, or implied: the intention is the controlling consideration"

Prouty by purchasing Bentons rights, and causing Benton, to cancel of Record, the said agreement, before any default in said agreement, and then selling and attempting to convey the fee in said lands free from all incumberance, to subsequent purchaser of Prouty: unmistakably discloses his intention, so far as in his power to unite and merge the legal and equitable estate.

With all respect, in conclusion we would say, that this Court, sitting as a court of equity, cannot sanction an act that would allow Prouty to receive $790.00 of Garvers money knowing it to be such, and then by collusion with Benton (without the knowledge of Garver) receive back his entire lands sold and cancel of Record the said agreement, before any default or forfeiture under said agreement; but will declare it a lien and incumberance on the lands, in whosesoever hands they may be, and in default of payment to Garver, of his loan, and interest; order said premises to be sold to satisfy the same, or so much as may be required. In deciding this cause at the April term of this Court: the facts upon which that decision is made as set forth by the court as follows

"The facts are these: Prouty, agreed to sell to Benton, the premises in question on time. After this contract was made, and before any money was paid, Benton executed this mortgage on the premises to Garver." The payment of seven hundred and ninety dollars of the purchase price on the date of said agreement, acknowledged by Prouty and not denied by Aldis, is not stated; we therefore are warranted in saying the decision was made, under a misapprehension of the facts; which when brought to the knowledge of this court, a review of the former decision would be made: and the decree of the court below will be affirmed. All which is most respectfully submitted to the consideration of this Honorable Court.

Miller & Miller

Appellees Attorneys

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Alden vs Garden

Petn. for re-hearing

Filed May 12. 1864.
L. Leland
Clk.