No. 13335

Supreme Court of Illinois

Stevens

vs.

Bradley

71641

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IN THE SUPREME COURT.

TALMADGE STEVENS,
Appellant.
vs.
LEONIDAS C. BRADLEY,
Appellee.

APPELLANT'S POINTS.

I.

The case of the plaintiff, as made in the court below, lacks every element of a meritorious cause of action; and it seems impossible that this court, upon review of the record, can be satisfied with the proceedings or judgment:

1st.—Because the plaintiff below proved no such agreement, nor the breach of any such agreement as alleged in the declaration:

2d.—The plaintiff produced, proved, and left unexplained a receipt made by himself, acknowledging payment in full for the very goods, the price of which he sought to recover; which receipt, without explanation, constituted a complete bar to the action.

Harden vs. Gorden, 2 *Mason R.* 561, 1 *Cow. & Hill's Notes* 213, *Note* 194.
Vedder vs. Vedder, 1 *Denio R.* 258.

3d.—Because according to the plaintiff's own showing, the plaintiff received a conveyance from defendant of real estate valued at five thousand dollars, and for the balance of purchase money received Stevens' own notes, (who is presumed to be solvent,) which he retained; and by the uncontradicted evidence given by defendant, plaintiff also received for said balance Tucker's notes, (who also is presumed solvent,) which he likewise retained, and before the time credit had fairly commenced to run, brought this action and recovered a judgment for the balance without surrendering, proving the loss, or in anywise, upon the trial, accounting for any of said notes.

Now if this judgment be not manifestly unjust, then it is not unjust for a man to exact thrice payment of the price he has agreed to take for his goods; for if the judgment is permitted to stand, there is more than a probability, under the facts appearing in this record, that the plaintiff will *realize*, and the defendant *suffer*, the payment of that balance three times over.

II.

"When a negotiable instrument is show to have been taken on account of the debt put in suit, it is not merely a suspension of the right of action until its maturity, but a *continuing bar*, which the plaintiff can only remove by showing *conclusively* that it is still within his control and possession, of which its production and cancellation, at the trial, is the best evidence."

2 *Am. Leading Cases* 190, *and cases cited.*
McConnell vs. Stettinius, 2 *Gilman R.* 713.

By the 3d instruction on the part of the plaintiff, the court instructed the Jury "That if the Jury find from the evidence that the notes given by the defendant to the plaintiff were within the power and control of the plaintiff to be surrendered up and cancelled, and have not been transferred, then the rights of the plaintiff are not to be prejudiced, if he is entitled to recover on the evidence, by a failure to tender them to the defendant at this moment."

The expression, "at this moment," means, if it means any thing, before the jury retired; because they were about retiring, and was in effect giving them the law, that the surrendering and cancellation of the notes, (for the instruction assumed that they were not lost or destroyed,) was not a necessary pre-requisite to a verdict for the plaintiff. And this was evidently the ruling of the court, because the defendant's counsel called upon the plaintiff, by moving to exclude his evidence for want of the notes, to produce or account for them, and the court over ruled the motions. In *Harris vs. Johnston*, 3 *Cranch*, 311, the courts held that an offer to surrender after judgment would not cure the error, for the obvious reason, that their identity might require proof, and the practice would lead to great abuses.

III.

The plaintiff below was not entitled to recover upon the special executory contract set out in the first and second counts of the declaration.

1st.—Because he failed to prove any such contract, or the breach of it.

2d.—Because the witness Thomas testified that Tucker's notes were delivered to and accepted by the plaintiff. There was no conflict of evidence on that point. The witness was in no wise impeached, and the jury were bound by his evidence. *Rankin vs. Crow*, 19 *Ill. R.* 630. This was a performance of the contract and a bar to the action.

IV.

There is no possible view to be taken of this case in which the plaintiff could legally recover on the common counts for goods sold and delivered.

1st.—Not as upon a rescision of the contract; because it was at all events partially executed by the conveyance of the real estate and the delivery of Stevens own notes, and he could not rescind at all unless he rescinded *in toto* and restored what he received under it.

Jennings vs. Gage, 13 *Illinois*, 610.
Cooledge vs. Brigham, 1 *Metcalf*, 547.

2d.—And it is a well settled rule that where goods are sold to be paid for by note, payable at a future day, the vendor cannot maintain assumpsit on the general count for goods sold and delivered, until the credit has expired. Here the sale was on the 29th December, 1856. The first note was to be payable in *two*, the last in *ten* months. The suit was commenced 31st January, 1857. Therefore no recovery could be had upon the *indebitatus assumpsit* count.

Hanna vs. *Mills*, 21, *Wend* 90, *and Cases cited.*
Martin vs. *Fuller*, 16 *Vermont*, 108.

Here he cannot recover upon the special agreement, because the defendant proved the delivery and acceptance of Tucker's notes.

V.

But lastly, the court erred in giving the first and second instructions on the part of the plaintiff.

1st.—The Jury were told that if the notes were not delivered *within the period agreed upon*, they should find for the plaintiff, and the measure of damages, the sum total of all the notes, &c. Evidence was given of the delivery of the notes, but after the expiration of one week: the effect of the instruction was, that although the notes might have been delivered after the time agreed, yet the plaintiff could recover, and the measure of damages would be the whole amount of notes. This is the fair import of that branch of the first instruction, and it is clearly erroneous.

2d.—These instructions were to the effect, that if the defendant failed to keep the special agreement, then the plaintiff could treat the sale as a cash sale.

The Plaintiff has by law no such right. He cannot substitute one contract for another. *Allen* vs. *Ford*, 19 *Pick.* 217, and a cash sale is certainly a very different contract from a barter and credit sale. The plaintiff cannot claim that by a breach of the special contract his rights are to be enforced upon better terms for him, than if the contract had been performed. He is entitled to be made good and no more, and upon this principle the court says in *Hanna* vs. *Mills*, 21 *Wend.*, 92, that the plaintiff is entitled to recover as damages the value of the goods, unless there should be a *rebate of interest* during the stipulated credit." Instead of this rule, the court held that the plaintiff was entitled to the amount of notes, with interest from the time they were to have been given. Besides, this contract was made while the interest laws of 1845 were in force and the plaintiff was not entitled to interest at all.

3d.—But we insist that even if Tucker's notes had been given at all, it is not such a total breach of the contract, as entitled the plaintiff to recover the whole amount of the notes. Stevens was solvent, the plaintiff had his notes, he had the real estate, and he could not be damaged to that amount without showing that Stevens was insolvent. *See opinion of Gibson J. Girard vs. Taggart*, 5 *Sergt. and R.* 33.

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