

No. 13474

# Supreme Court of Illinois

Smith.

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vs.

Powell.

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STATE OF ILLINOIS,  
SUPREME COURT,  
Third Grand Division.

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No. 159.

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*Smith*  
*vs*

*Parrell*

1861

134754



# Supreme Court of the State of Illinois,

Of the April Term, A. D. 1861.

JOSEPH SMITH, Appellant,

vs.

JANE LAMB, Appellee.

Error to the Superior Court of Chicago.

## Abstract of the Record.

This was an action of assumpsit brought by the appellee against the appellant, to recover money paid upon a contract for the purchase of real estate, and was tried before the Court, without the intervention of a jury, at the July term of said Court, A. D. 1860.

p. 2 & 3 The declaration contained the common counts for money had and received to plaintiff's use, for interest on payment forborne, and on an account stated.

Attached to said declaration is the plaintiff's bill of particulars, as follows:

JOSEPH SMITH to JANE LAMB,

Dr.

4. To moneys paid on contract made by Joseph Smith (defendant) to Jane Lamb (plaintiff), dated August 3d, 1857, for conveyance of lot No. 30 in Joseph Smith's subdivision, &c., &c.

August 3d, 1857, to Cash ..... \$187,50

To Interest on same to

February 8th, 1858, to Cash ..... 180,00

To Interest on same to

February 16th, 1858, to Cash ..... 25,00

To Interest on same to

February 8th, 1858, to Cash ..... 210,00

To Interest on same to

March 8th, 1858, to Cash ..... 16,25

5. The defendant plead the general issue.

9, 10, 11. On the trial of the cause, the plaintiff offered in evidence a contract or agreement, dated August 3d, 1857, between the said Joseph Smith, (defendant), party of the first part, and the said Jane Lamb, (plaintiff), party of the second part, for the sale from said Smith to said Lamb of the above mentioned lot.

The said Smith therein covenants, that if the said Lamb shall *first make the payments and perform the covenants* in said contract contained on her part, he will convey and assure to her, "*in fee simple, clear of all incumbrances whatever*," by a *good and sufficient warranty deed*," the premises described.

The said Lamb covenants to pay to the said Smith, "*at the office of Clark & Thomas in Chicago, the sum of seven hundred and fifty dollars*," in manner following, to wit: \$187,50 cash (the receipt of which is acknowledged) and the remainder in three equal payments, on the first day of February in each of the years 1858, 1859 and 1860, with interest at 6 per cent. per annum on the whole sum, from time to time remaining unpaid, payable annually on the days aforesaid, from the 1st day of February, 1857, and to pay all taxes, assessments or impositions that may be legally levied or imposed upon said lot. It is further covenanted, that in case of failure of said Lamb to make either of the payments or perform any of the covenants on her part, the contract shall be forfeited and determined at the election of said Smith, and that said Lamb shall *forfeit all payments made by her* on said contract and *such payments shall be retained by said Smith in full satisfaction and in liquidation of all damages by him sustained*, and he shall have the right to re-enter and take possession. It is mutually covenanted, that the *time of payment* shall be an *essential part* of the contract, and that its covenants shall be mutually binding upon the heirs, &c., of the respective parties.

Said contract was recorded in Cook County, August 4th, 1857.

12. The contract has endorsed upon it receipts for the following sums, viz: Feb. 8th, 1858, \$180,00; Feb. 16th, 1858, \$25,00; Feb. 8th, 1858, \$210,00; March 8th, 1858, \$16,25. The receipt of Feb. 8th, 1858, is as follows, viz: "Received,—Chicago, Feb. 8th, 1858,—of Mrs. Jane Lamb, certificate of deposit of R. K. Swift,



Brother & Johnston for two hundred and ten dollars, for payment due hereon Feb. 1st, 1859;—it being expressly understood, that all rights of forfeiture and other covenants and conditions of the within contract are to remain in full force.”

13. *S. A. Irvin*, a witness for the plaintiff, then testified as follows: “On the 1st day of February, A. D. 1860, I went with the plaintiff to the place of business of the defendant, in Chicago, and found him there. I told him I had come on behalf of Mrs. Lamb, (showing him the contract), to make the last payment due him upon the said contract, and that whatever was due him I had and was ready to pay. Smith said he had not the title to the lot and could not make a deed; he desired us to go to the office of his attorney to see whether an arrangement could not be made. He said Mr. Hall was the owner of the lots, and perhaps some arrangement could be made with him. We went to his attorney’s office, when Smith again said he had not title and could not make a deed. Think I stated to his attorney, that I would make a tender if required, and he said it was not necessary;—can’t say positively whether I said so or not.”

14. On cross examination, Irvin testified: “I had no money with me when I went to Smith’s or his attorney’s; I had a blank check which I intended to fill up for the amount due;—I did not fill it up because I did not know the amount which would be due upon the contract, including taxes, interest, &c. Smith frequently stated, at his place and at the attorney’s office, that he had transferred the contract to Mr. Hall. I replied that I had frequently called on Mr. Hall, and that he refused to receive the money or do anything about the matter. I had so called.

“I had enough money in the bank to pay the balance due on the contract.”

The foregoing was all the plaintiff’s evidence.

14. On the part of the defendant, *A. C. Lewis* then testified:

“At the tax sale which occurred on the 17th of March, 1859, for city taxes of 1858, I bought the lot mentioned in the contract from defendant to plaintiff, and received a certificate of purchase therefor. On the 4th of May, 1859, I paid the State and county tax for 1858 on said lot; and on the 9th of March, 1860, I paid the city tax for 1859 on the same. The money paid by me for said purchase and for taxes has never been refunded to me by any one. I still hold the certificate of purchase and tax receipts.” [Said certificate and receipts were produced and offered in evidence.]

On cross-examination, the witness said:

15. “Mr. Smith never said anything about taking up the tax receipts or certificate. Mr. Hall (the owner of the land) has several times spoken to me about taking them up.”

The defendant further proved, that on the 2d day of June, 1859, Smith, the defendant, assigned and delivered to Mr. Hall his copy of the contract with Mrs. Lamb, the plaintiff, and transferred his interest therein to said Hall, and that said Hall was then the owner of the land.

16. The defendant here rested his case, and no further evidence was offered by either party.

The Court found the issues for the plaintiff and assessed her damages at \$695.86.

The defendant moved for a new trial;—because the finding of the Court was against the law; because the finding of the Court was against the evidence, and because the damages assessed by the Court were excessive.

The Court overruled the motion and the defendant excepted. Final judgment in favor of the plaintiff was then rendered by the Court for said sum of \$695.86.

The appellant assigns for error:

8. 1st, The finding of the Court was against the law;  
2d, The finding of the Court was against the evidence;  
3d, The damages assessed by the Court were excessive;  
4th, The Court erred in overruling the motion for a new trial;  
5th, The judgment should have been for the defendant, for costs, and not for the plaintiff.

JESSE B. THOMAS,  
*Attorney for Appellant.*



## Points for Plaintiff in Error.

I. The plaintiff below, to maintain this action, must show the special contract *at an end, without default on his part.* 20 Johns 24; Chitty on Cont. ; 1 Gilm. 99; 19 Maine 77.

By the terms of the contract his obligation was *entire and independent*, and its strict performance, *at the time, a condition precedent* to any claim against the vendor. 4 Scam. 567; 4 Gilm. 66; 2 do. 96.

But by failure to pay taxes, and allowing the land to be sold therefor, he voluntarily committed a breach of his covenant, and, *at law*, forfeited all rights against the vendor; and no subsequent act of *his* could restore them, or put the vendor in default. 12 Ill. 454; 5 Barb. 423; 5 Cow. 270; 20 Johns. 15; 34 Maine 143.

Even in equity, whose "doctrine is compensation and not forfeiture," under a contract like this, the plaintiff could get no relief on the facts disclosed,—he being in default, without excuse. 13 Ill. 576; 5 Gilm. 180, 314; 3 Gilm. 486.

The right to recover back the money paid, as upon a quantum meruit, even on a mutual abandonment—the vendee being in *default*—is precluded by the *express agreement* of the parties that it should be retained by the vendor as *liquidated damages*. 1 Sugd. vend. *(James John 1503 876)*

II. But it is contended that the vendor here had waived the right of forfeiture, and elected to affirm the contract, because there is no proof of a rescission by him, immediately upon the breach of the covenant by vendee.

To this we reply:

1st. The doctrine of *waiver*, as here claimed, belongs to equity, not law,—and even there is established only by some express and unequivocal act of the party entitled to the forfeiture. 2 Sch. & Lef. 347, 684; 1 Sugd. vend. *Chas. 1811*

Mere silence or inaction is not sufficient, except when it has misled the opposite party, and been acted on, and an estoppel arises thereby. 7. Halste, 99; 3. Taunt, 246, 250.

Here the party electing to rescind was not bound to give notice of such election, and his silence could justify no inference of acquiescence or confirmation.—21 Ill. *227*

2d. The failure to keep the taxes paid, or to redeem from the sale, was a *continuing breach*, authorizing the vendor, or his assignee, at any time to rescind. 2 Crompt & J., 668; 4 Taunt, 735, 4 B. & Ald., 402; 9 B. & C. 376; 6 Q. B. 954; 3 Cow. 220.

3d. The transfer of the contract by Smith to Hall, the owner of the land, could not, in any view, amount to an affirmance of the contract, unless Smith, *then* knew of the tax sale, which is not proven. 2 Platt on Leases, 469.

But this Court has ruled, that such transfer indicates a rescission rather than an affirmance. 22 Ill. *656*



In the present case, there was no deed of the land to Hall, for he was already its owner.

4th. The acts or statements of Smith, at the interview when the last payment was due, could not operate a waiver—for,

1st. The time of performance was past, and a subsequent waiver is ineffectual to excuse a prior default. 1 Peters, 467.

2d. By the transfer of the contract to Hall, the election to waive a forfeiture and affirm, passed to him, and Smith had no further power in the matter. The contract was mutually binding on the "assigns" of the parties. 22 Ill. 654.

3d. The statements of Smith were not inconsistent with a prior rescision. The offer to see if "an arrangement could not be made with Hall," was no recognition of any binding obligation, but a mere friendly proposition to negotiate for the vendee with the owner of the land.

5th. The proof is that Hall at first opportunity repudiated.

III. But, admitting that there could be implied a waiver of strict performance of the covenant as to taxes, that waiver extended only to the *time* of performance, and not to performance itself.

The vendee must still, to put the vendor in default, have *paid* the taxes *before*, and *tendered* the last payment upon the contract *on* the day it matured;—mere *readiness* to perform would not be enough. 2 Wend. 533; 13 do. 260; 5 Gilm. 180; 20 Johns. 24.

And the fact that the vendor had no title was no excuse for not making tender. 4 Scam. 261, 265; 9 Cow. 46.

By the contract, the vendor must give a good title, free from incumbrances.—4 Page, 628; 21 Ill. 617; 5 Gilm.

The vendee clearly could not call for such a deed while the inchoate tax title was outstanding, through his neglect.

But, 1st, The taxes were never paid by him; and since this could have been done *without the concurrence* of the vendor, its omission was voluntary, and without excuse. A tender of the amount necessary to redeem, to the vendor, and a refusal to accept, would not have *prevented* performance, or been equivalent thereto.

2d. The alleged *tender* of the last payment was a nullity.

There was no money present, or offered to be paid. 22 Ill. 656; 21 do. 576; 12 do. 336; 7 N. H. 535.

It was not made to the right person; plaintiff knew of the transfer of the claim to Hall. 22 Ill. 656; 1 Sandf. Chy. 244.

It was not at the right place. 22 Ill. 656.

There was no *offer* to pay anything, but a statement that "they were ready to make the *last payment* on the contract;" nothing was said about taxes. 5 Mass. 365

IV. Admitting that a failure to convey was a breach on the part of the vendor, it did not authorize the vendee to *rescind*, without *first* removing the tax lien which had accrued through his neglect. Otherwise a bare rescision would not restore the parties to their original condition. 2 Pars. Cont. ; 5 East. 449; 2 Y. & Jer. 278.

V. The Court should, in any event, have deducted from the amount of payments and interest, the excess, above the actual tax, required to redeem the land from tax sale (the amount of which was before it). 2 Greenl. ev. 117; 13 Wend. 488; 3 Gray 260.

VI. The Court erred in allowing interest. 1 B & P 308; 2 do. 472.

JESSE B. THOMAS,  
*Attorney for Plaintiff in Error.*



159

Joseph Smith

vs

Jane Lamb

Abstract

Filed May 9<sup>th</sup> 1861

L. Seland  
Clerk



# Supreme Court of the State of Illinois,

Of the April Term, A. D. 1861.

JOSEPH SMITH, Appellant,

vs.

JANE LAMB, Appellee.

Error to the Superior Court of Chicago.

## Abstract of the Record.

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Attached to said declaration is the plaintiff's bill of particulars, as follows:

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Dr.

4. To moneys paid on contract made by Joseph Smith (defendant) to Jane Lamb (plaintiff), dated August 3d, 1857, for conveyance of lot No. 30 in Joseph Smith's subdivision, &c., &c.

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5. The defendant plead the general issue.

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On the trial of the cause, the plaintiff offered in evidence a contract or agreement, dated August 3d, 1857, between the said Joseph Smith, (defendant), party of the first part, and the said Jane Lamb, (plaintiff), party of the second part, for the sale from said Smith to said Lamb of the above mentioned lot.

The said Smith therein covenants, that if the said Lamb shall *first make the payments and perform the covenants* in said contract contained on her part, he will convey and assure to her, "*in fee simple, clear of all incumbrances whatever, by a good and sufficient warranty deed,*" the premises described.

The said Lamb covenants to pay to the said Smith, "*at the office of Clark & Thomas in Chicago, the sum of seven hundred and fifty dollars, in manner following, to wit: \$187,50 cash (the receipt of which is acknowledged) and the remainder in three equal payments, on the first day of February in each of the years 1858, 1859 and 1860, with interest at 6 per cent. per annum on the whole sum, from time to time remaining unpaid, payable annually on the days aforesaid, from the 1st day of February, 1857, and to pay all taxes, assessments or impositions that may be legally levied or imposed upon said lot. It is further covenanted, that in case of failure of said Lamb to make either of the payments or perform any of the covenants on her part, the contract shall be forfeited and determined at the election of said Smith, and that said Lamb shall forfeit all payments made by her on said contract and such payments shall be retained by said Smith in full satisfaction and in liquidation of all damages by him sustained, and he shall have the right to re-enter and take possession. It is mutually covenanted, that the time of payment shall be an essential part of the contract, and that its covenants shall be mutually binding upon the heirs, &c., of the respective parties.*"

Said contract was recorded in Cook County, August 4th, 1857.

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The contract has endorsed upon it receipts for the following sums, viz: Feb. 8th, 1858, \$180,00; Feb. 16th, 1858, \$25,00; Feb. 8th, 1858, \$210,00; March 8th, 1858, \$16,25. The receipt of Feb. 8th, 1858, is as follows, viz: "Received,—Chicago, Feb. 8th, 1858,—of Mrs. Jane Lamb, certificate of deposit of R. K. Swift,



Brother & Johnston for two hundred and ten dollars, for payment due hereon Feb. 1st, 1859;—it being expressly understood, that all rights of forfeiture and other covenants and conditions of the within contract are to remain in full force.”

13. *S. A. Irvin*, a witness for the plaintiff, then testified as follows: “On the 1st day of February, A. D. 1860, I went with the plaintiff to the place of business of the defendant, in Chicago, and found him there. I told him I had come on behalf of Mrs. Lamb, (showing him the contract), to make the last payment due him upon the said contract, and that whatever was due him I had and was ready to pay. Smith said he had not the title to the lot and could not make a deed; he desired us to go to the office of his attorney to see whether an arrangement could not be made. He said Mr. Hall was the owner of the lots, and perhaps some arrangement could be made with him. We went to his attorney’s office, when Smith again said he had not title and could not make a deed. Think I stated to his attorney, that I would make a tender if required, and he said it was not necessary;—can’t say positively whether I said so or not.”
14. On cross examination, Irvin testified: “I had no money with me when I went to Smith’s or his attorney’s; I had a blank check which I intended to fill up for the amount due;—I did not fill it up because I did not know the amount which would be due upon the contract, including taxes, interest, &c. Smith frequently stated, at his place and at the attorney’s office, that he had transferred the contract to Mr. Hall. I replied that I had frequently called on Mr. Hall, and that he refused to receive the money or do anything about the matter. I had so called. “I had enough money in the bank to pay the balance due on the contract.” The foregoing was all the plaintiff’s evidence.
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- On cross-examination, the witness said:
15. “Mr. Smith never said anything about taking up the tax receipts or certificate. Mr. Hall (the owner of the land) has several times spoken to me about taking them up.”
- The defendant further proved, that on the 2d day of June, 1859, Smith, the defendant, assigned and delivered to Mr. Hall his copy of the contract with Mrs. Lamb, the plaintiff, and transferred his interest therein to said Hall, and that said Hall was then the owner of the land.
- The defendant here rested his case, and no further evidence was offered by
16. either party.
- The Court found the issues for the plaintiff and assessed her damages at \$695.86.
- The defendant moved for a new trial;—because the finding of the Court was against the law; because the finding of the Court was against the evidence, and because the damages assessed by the Court were excessive.
- The Court overruled the motion and the defendant excepted. Final judgment in favor of the plaintiff was then rendered by the Court for said sum of \$695.86.
- The appellant assigns for error:
8. 1st, The finding of the Court was against the law;  
2d, The finding of the Court was against the evidence;  
3d, The damages assessed by the Court were excessive;  
4th, The Court erred in overruling the motion for a new trial;  
5th, The judgment should have been for the defendant, for costs, and not for the plaintiff.

JESSE B. THOMAS,  
*Attorney for Appellant.*



## Points for Plaintiff in Error.

I. The plaintiff below, to maintain this action, must show the special contract *at an end, without default on his part.* 20 Johns 24; Chitty on Cont. ; 1 Gilm. 99; 19 Maine 77.

By the terms of the contract his obligation was *entire and independent*, and its strict performance, *at the time, a condition precedent* to any claim against the vendor, 4 Scam. 567; 4 Gilm. 66; 2 do. 96.

But by failure to pay taxes, and allowing the land to be sold therefor, he voluntarily committed a breach of his covenant, and, *at law*, forfeited all rights against the vendor; and no subsequent act of *his* could restore them, or put the vendor in default. 12 Ill. 454; 5 Barb. 423; 5 Cow. 270; 20 Johns. 15; 34 Maine 143.

Even in equity, whose "doctrine is compensation and not forfeiture," under a contract like this, the plaintiff could get no relief on the facts disclosed,—he being in default, without excuse. 13 Ill. 576; 5 Gilm. 180, 314; 3 Gilm. 486.

The right to recover back the money paid, as upon a quantum meruit, even on a mutual abandonment—the vendee being in *default*—is precluded by the *express agreement* of the parties that it should be retained by the vendor as *liquidated damages*. 1 Sugd. vend. (7 Am. Ed.) Ch. 1. Sec. 3 § 76

II. But it is contended that the vendor here had waived the right of forfeiture, and elected to affirm the contract, because there is no proof of a rescission by him, immediately upon the breach of the covenant by vendee.

To this we reply:

1st. The doctrine of *waiver*, as here claimed, belongs to equity, not law,—and even there is established only by some express and unequivocal act of the party entitled to the forfeiture. 2 Sch. & Lef. 347, 684; 1 Sugd. vend. Ch. 5 Sec. 1 § 11

Mere silence or inaction is not sufficient, except when it has misled the opposite party, and been acted on, and an estoppel arises thereby. 7. Halste, 99; 3. Taunt, 246, 250.

Here the party electing to rescind was not bound to give notice of such election, and his silence could justify no inference of acquiescence or confirmation.—21 Ill. 227

2d. The failure to keep the taxes paid, or to redeem from the sale, was a *continuing breach*, authorizing the vendor, or his assignee, at any time to rescind. 2 Crompt & J., 668; 4 Taunt, 735, 4 B. & Ald., 402; 9 B. & C. 376; 6 Q. B. 954; 3 Cow. 220.

3d. The transfer of the contract by Smith to Hall, the owner of the land, could not, in any view, amount to an affirmance of the contract, unless Smith, *then* knew of the tax sale, which is not proven. 2 Platt on Leases, 469.

But this Court has ruled, that such transfer indicates a rescission rather than an affirmance. 22 Ill. 656



In the present case, there was no deed of the land to Hall, for he was already its owner.

4th. The acts or statements of Smith, at the interview when the last payment was due, could not operate a waiver—for,

1st. The time of performance was past, and a subsequent waiver is ineffectual to excuse a prior default. 1 Peters, 467.

2d. By the transfer of the contract to Hall, the election to waive a forfeiture and affirm, passed to him, and Smith had no further power in the matter. The contract was mutually binding on the "assigns" of the parties. 22 Ill. 654.

3d. The statements of Smith were not inconsistent with a prior rescision. The offer to see if "an arrangement could not be made with Hall," was no recognition of any binding obligation, but a mere friendly proposition to negotiate for the vendee with the owner of the land.

5th. The proof is that Hall at first opportunity repudiated.

III. But, admitting that there could be implied a waiver of strict performance of the covenant as to taxes, that waiver extended only to the *time* of performance, and not to performance itself.

The vendee must still, to put the vendor in default, have *paid* the taxes *before*, and *tendered* the last payment upon the contract *on* the day it matured;—mere *readiness* to perform would not be enough. 2 Wend. 533; 13 do. 260; 5 Gilm. 180; 20 Johns. 24.

And the fact that the vendor had no title was no excuse for not making tender. 4 Scam. 261, 265; 9 Cow. 46.

By the contract, the vendor must give a good title, free from incumbrances.—4 Page, 628; 21 Ill. 617; 5 Gilm.

The vendee clearly could not call for such a deed while the inchoate tax title was outstanding, through his neglect.

But, 1st, The taxes were never paid by him; and since this could have been done *without the concurrence* of the vendor, its omission was voluntary, and without excuse. A tender of the amount necessary to redeem, to the vendor, and a refusal to accept, would not have *prevented* performance, or been equivalent thereto.

2d. The alleged *tender* of the last payment was a nullity.

There was no money present, or offered to be paid. 22 Ill. 656; 21 do. 576; 12 do. 336; 7 N. H. 535.

It was not made to the right person; plaintiff knew of the transfer of the claim to Hall. 22 Ill. 656; 1 Sandf. Chy. 244.

It was not at the right place. 22 Ill. 656.

There was no *offer* to pay anything, but a statement that "they were ready to make the *last payment* on the contract;" nothing was said about taxes. 5 Mass. 365

IV. Admitting that a failure to convey was a breach on the part of the vendor, it did not authorize the vendee to *rescind*, without *first* removing the tax lien which had accrued through his neglect. Otherwise a bare rescision would not restore the parties to their original condition. 2 Pars. Cont. ; 5 East. 449; 2 Y. & Jer. 278.

V. The Court should, in any event, have deducted from the amount of payments and interest, the excess, above the actual tax, required to redeem the land from tax sale (the amount of which was before it). 2 Greenl. ev. 117; 13 Wend. 488; 3 Gray 260.

VI. The Court erred in allowing interest. 1 B & P 306; 2 do. 472.

JESSE B. THOMAS,  
*Attorney for Plaintiff in Error.*



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JESSE B. THOMAS,  
*Attorney for Plaintiff in Error.*



155-109

Joseph Smith

vs

Jane Lamb.

Argument for ~~Plff~~

Abstract of Record.

Filed May 9 - 1861

L. Leland

Pl-Ok



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JANE LAMB, Appellee.

Error to the Superior Court of Chicago.

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This was an action of assumpsit brought by the appellee against the appellant, to recover money paid upon a contract for the purchase of real estate, and was tried before the Court, without the intervention of a jury, at the July term of said Court, A. D. 1860.

p. 2 & 3

The declaration contained the common counts for money had and received to plaintiff's use, for interest on payment forborne, and on an account stated.

Attached to said declaration is the plaintiff's bill of particulars, as follows:

JOSEPH SMITH to JANE LAMB,

Dr.

4. To moneys paid on contract made by Joseph Smith (defendant) to Jane Lamb (plaintiff), dated August 3d, 1857, for conveyance of lot No. 30 in Joseph Smith's subdivision, &c., &c.

August 3d, 1857, to Cash ..... \$187,50

To Interest on same to

February 8th, 1858, to Cash ..... 180,00

To Interest on same to

February 16th, 1858, to Cash ..... 25,00

To Interest on same to

February 8th, 1858, to Cash ..... 210,00

To Interest on same to

March 8th, 1858, to Cash ..... 16,25

5. The defendant plead the general issue.

9, 10, 11. On the trial of the cause, the plaintiff offered in evidence a contract or agreement, dated August 3d, 1857, between the said Joseph Smith, (defendant), party of the first part, and the said Jane Lamb, (plaintiff), party of the second part, for the sale from said Smith to said Lamb of the above mentioned lot.

The said Smith therein covenants, that if the said Lamb shall first make the payments and perform the covenants in said contract contained on her part, he will convey and assure to her, "in fee simple, clear of all incumbrances whatever, by a good and sufficient warranty deed," the premises described.

The said Lamb covenants to pay to the said Smith, "at the office of Clark & Thomas in Chicago, the sum of seven hundred and fifty dollars, in manner following, to wit: \$187,50 cash (the receipt of which is acknowledged) and the remainder in three equal payments, on the first day of February in each of the years 1858, 1859 and 1860, with interest at 6 per cent. per annum on the whole sum, from time to time remaining unpaid, payable annually on the days aforesaid, from the 1st day of February, 1857, and to pay all taxes, assessments or impositions that may be legally levied or imposed upon said lot. It is further covenanted, that in case of failure of said Lamb to make either of the payments or perform any of the covenants on her part, the contract shall be forfeited and determined at the election of said Smith, and that said Lamb shall forfeit all payments made by her on said contract and such payments shall be retained by said Smith in full satisfaction and in liquidation of all damages by him sustained, and he shall have the right to re-enter and take possession. It is mutually covenanted, that the time of payment shall be an essential part of the contract, and that its covenants shall be mutually binding upon the heirs, &c., of the respective parties.

Said contract was recorded in Cook County, August 4th, 1857.

12. The contract has endorsed upon it receipts for the following sums, viz: Feb. 8th, 1858, \$180,00; Feb. 16th, 1858, \$25,00; Feb. 8th, 1858, \$210,00; March 8th, 12, 13. 1858, \$16,25. The receipt of Feb. 8th, 1858, is as follows, viz: "Received,—Chicago, Feb. 8th, 1858,—of Mrs. Jane Lamb, certificate of deposit of R. K. Swift,



Brother & Johnston for two hundred and ten dollars, for payment due hereon Feb. 1st, 1859;—it being expressly understood, that all rights of forfeiture and other covenants and conditions of the within contract are to remain in full force.”

13. *S. A. Irvin*, a witness for the plaintiff, then testified as follows: “On the 1st day of February, A. D. 1860, I went with the plaintiff to the place of business of the defendant, in Chicago, and found him there. I told him I had come on behalf of Mrs. Lamb, (showing him the contract), to make the last payment due him upon the said contract, and that whatever was due him I had and was ready to pay. Smith said he had not the title to the lot and could not make a deed; he desired us to go to the office of his attorney to see whether an arrangement could not be made. He said Mr. Hall was the owner of the lots, and perhaps some arrangement could be made with him. We went to his attorney’s office, when Smith again said he had not title and could not make a deed. Think I stated to his attorney, that I would make a tender if required, and he said it was not necessary;—can’t say positively whether I said so or not.”

14. On cross examination, Irvin testified: “I had no money with me when I went to Smith’s or his attorney’s; I had a blank check which I intended to fill up for the amount due;—I did not fill it up because I did not know the amount which would be due upon the contract, including taxes, interest, &c. Smith frequently stated, at his place and at the attorney’s office, that he had transferred the contract to Mr. Hall. I replied that I had frequently called on Mr. Hall, and that he refused to receive the money or do anything about the matter. I had so called.

“I had enough money in the bank to pay the balance due on the contract.”

The foregoing was all the plaintiff’s evidence.

14. On the part of the defendant, *A. C. Lewis* then testified:

“At the tax sale which occurred on the 17th of March, 1859, for city taxes of 1858, I bought the lot mentioned in the contract from defendant to plaintiff, and received a certificate of purchase therefor. On the 4th of May, 1859, I paid the State and county tax for 1858 on said lot; and on the 9th of March, 1860, I paid the city tax for 1859 on the same. The money paid by me for said purchase and for taxes has never been refunded to me by any one. I still hold the certificate of purchase and tax receipts.” [Said certificate and receipts were produced and offered in evidence.]

On cross-examination, the witness said:

15. “Mr. Smith never said anything about taking up the tax receipts or certificate. Mr. Hall (the owner of the land) has several times spoken to me about taking them up.”

The defendant further proved, that on the 2d day of June, 1859, Smith, the defendant, assigned and delivered to Mr. Hall his copy of the contract with Mrs. Lamb, the plaintiff, and transferred his interest therein to said Hall, and that said Hall was then the owner of the land.

16. The defendant here rested his case, and no further evidence was offered by either party.

The Court found the issues for the plaintiff and assessed her damages at \$695.86.

The defendant moved for a new trial;—because the finding of the Court was against the law; because the finding of the Court was against the evidence, and because the damages assessed by the Court were excessive.

The Court overruled the motion and the defendant excepted. Final judgment in favor of the plaintiff was then rendered by the Court for said sum of \$695.86.

The appellant assigns for error:

8. 1st, The finding of the Court was against the law;  
2d, The finding of the Court was against the evidence;  
3d, The damages assessed by the Court were excessive;  
4th, The Court erred in overruling the motion for a new trial;  
5th, The judgment should have been for the defendant, for costs, and not for the plaintiff.

JESSE B. THOMAS,  
*Attorney for Appellant.*



## Points for Plaintiff in Error.

I. The plaintiff below, to maintain this action, must show the special contract *at an end, without default on his part.* 20 Johns 24; Chitty on Cont. ; 1 Gilm. 99; 19 Maine 77.

By the terms of the contract his obligation was *entire and independent*, and its strict performance, *at the time, a condition precedent* to any claim against the vendor. 4 Scam. 567; 4 Gilm. 66; 2 do. 96.

But by failure to pay taxes, and allowing the land to be sold therefor, he voluntarily committed a breach of his covenant, and, *at law*, forfeited all rights against the vendor; and no subsequent act of *his* could restore them, or put the vendor in default. 12 Ill. 454; 5 Barb. 423; 5 Cow. 270; 20 Johns. 15; 34 Maine 143.

Even in equity, whose "doctrine is compensation and not forfeiture," under a contract like this, the plaintiff could get no relief on the facts disclosed,—he being in default, without excuse. 13 Ill. 576; 5 Gilm. 180, 314; 3 Gilm. 486.

The right to recover back the money paid, as upon a quantum meruit, even on a mutual abandonment—the vendee being in *default*—is precluded by the *express agreement* of the parties that it should be retained by the vendor as *liquidated damages*. 1 Sugd. vend. *2 Am & Eng Dec 3876*

II. But it is contended that the vendor here had waived the right of forfeiture, and elected to affirm the contract, because there is no proof of a rescission by him, immediately upon the breach of the covenant by vendee.

To this we reply:

1st. The doctrine of *waiver*, as here claimed, belongs to equity, not law,—and even there is established only by some express and unequivocal act of the party entitled to the forfeiture. 2 Sch. & Lef. 347, 684; 1 Sugd. vend. *Ch & Eng 1811*

Mere silence or inaction is not sufficient, except when it has misled the opposite party, and been acted on, and an estoppel arises thereby. 7. Halste, 99; 3. Taunt, 246, 250.

Here the party electing to rescind was not bound to give notice of such election, and his silence could justify no inference of acquiescence or confirmation.—21 Ill. *227*

2d. The failure to keep the taxes paid, or to redeem from the sale, was a *continuing breach*, authorizing the vendor, or his assignee, at any time to rescind. 2 Crompt & J., 668; 4 Taunt, 735, 4 B. & Ald., 402; 9 B. & C. 376; 6 Q. B. 954; 3 Cow. 220.

3d. The transfer of the contract by Smith to Hall, the owner of the land, could not, in any view, amount to an affirmation of the contract, unless Smith, *then knew* of the tax sale, which is not proven. 2 Platt on Leases, 469.

But this Court has ruled, that such transfer indicates a rescission rather than an affirmation. 22 Ill. *656*



In the present case, there was no deed of the land to Hall, for he was already its owner.

4th. The acts or statements of Smith, at the interview when the last payment was due, could not operate a waiver—for,

1st. The time of performance was past, and a subsequent waiver is ineffectual to excuse a prior default. 1 Peters, 467.

2d. By the transfer of the contract to Hall, the election to waive a forfeiture and affirm, passed to him, and Smith had no further power in the matter. The contract was mutually binding on the "assigns" of the parties. 22 Ill. 654.

3d. The statements of Smith were not inconsistent with a prior rescision. The offer to see if "an arrangement could not be made with Hall," was no recognition of any binding obligation, but a mere friendly proposition to negotiate for the vendee with the owner of the land.

5th. The proof is that Hall at first opportunity repudiated.

III. But, admitting that there could be implied a waiver of strict performance of the covenant as to taxes, that waiver extended only to the *time* of performance, and not to performance itself.

The vendee must still, to put the vendor in default, have *paid* the taxes *before*, and *tendered* the last payment upon the contract *on* the day it matured;—mere *readiness* to perform would not be enough. 2 Wend. 533; 13 do. 260; 5 Gilm. 180; 20 Johns. 24.

And the fact that the vendor had no title was no excuse for not making tender. 4 Seam. 261, 265; 9 Cow. 46.

By the contract, the vendor must give a good title, free from incumbrances.—4 Page, 628; 21 Ill. 617; 5 Gilm.—

The vendee clearly could not call for such a deed while the inchoate tax title was outstanding, through his neglect.

But, 1st, The taxes were never paid by him; and since this could have been done *without the concurrence* of the vendor, its omission was voluntary, and without excuse. A tender of the amount necessary to redeem, to the vendor, and a refusal to accept, would not have *prevented* performance, or been equivalent thereto.

2d. The alleged *tender* of the last payment was a nullity.

There was no money present, or offered to be paid. 22 Ill. 656; 21 do. 576; 12 do. 336; 7 N. H. 535.

It was not made to the right person; plaintiff knew of the transfer of the claim to Hall. 22 Ill. 656; 1 Sandf. Chy. 244.

It was not at the right place. 22 Ill. 656.

There was no *offer* to pay anything, but a statement that "they were ready to make the *last payment* on the contract;" nothing was said about taxes. 5 Mass. 365

IV. Admitting that a failure to convey was a breach on the part of the vendor, it did not authorize the vendee to *rescind*, without *first* removing the tax lien which had accrued through his neglect. Otherwise a bare rescision would not restore the parties to their original condition. 2 Pars. Cont. ; 5 East. 449; 2 Y. & Jer. 278.

V. The Court should, in any event, have deducted from the amount of payments and interest, the excess, above the actual tax, required to redeem the land from tax sale (the amount of which was before it). 2 Greenl. ev. 117; 13 Wend. 488; 3 Gray 260.

VI. The Court erred in allowing interest. 1 B & P 306; 2 do. 472.

JESSE B. THOMAS,  
*Attorney for Plaintiff in Error.*



159

Joseph Smith

vs

Jane Lamb

Abstract

Filed May 9<sup>th</sup> 1861

L. Leland  
Clerk



Supreme Court of Illinois  
Of the April Term AD 1861

Joseph Smith, Plff in Error  
Jane Lamb, <sup>Def</sup> in Error } No 159

Argument for Plff in Error

The Defendant in Error in <sup>the</sup> first four pages of his argument labors to show that the right to abandon a special contract, and maintain indebtedness ~~is not~~ ~~extends~~ ~~agrees~~ ~~to~~ sealed, as to simple contracts.

Thus we do not deny; our proposition is that neither party can abandon a special <sup>whether sealed or not</sup> contract, and maintain this action for money paid under it, unless he has strictly performed all his obligations according to the letter of the contract, and his and his adversary has failed. Though one party fail in strict performance, the other can abandon only where, as our Court says, "he is not also derelict."

See Edging v. Baunite & Reed 1 Gilman 99

See also: 2 Sm. Inst. Co (4<sup>th</sup> Am Ed) p 41, where the cases are fully cited — and see cases in Printer Points — (Point 1<sup>st</sup>) —

But by the terms of the contract in question, the payment of the several instalments



and the payment of accruing taxes was expressly made a "condition precedent" to any obligation on the part of the vendor, and "time" was made expressly "the essence of the contract" - It was therefore incumbent on the vendor to show in <sup>the</sup> first instance affirm a time the payment of instalments and taxes at the time and in the manner provided, otherwise no obligation upon the vendor ~~even~~ arose and he could not be put in default.

It is not claimed that there was any default in payments up to Feb 1, 1859, but that by the tax sale of the premises on March 17/59, the first breach by the vendee was committed - and an absolute forfeiture of the rights of the vendee at law under the contract thereby accrued. "A Court of law cannot relieve against a breach of condition, or restore the consideration paid by the party upon whom such breach operates as a forfeiture". -

1 Hillier's Real Estate 384

2 Edwards' Case 78

~~Such a The Contract by its terms was voidable on breach by vendor, at the option of the vendor: but a voidable contract is one enforceable only by one party.~~

~~Thus The forfeiture of the rights of the vendee such~~



a contract like this does not need to be  
perfected by any act of the vendor, as in  
case of a condition subsequent to defeat an  
estate, where a reentry is required.

This is a personal contract, and the forfeiture  
was perfect upon a failure in the actual  
performance of the condition precedent.

See 5 Mass 322 = 2 Edw Chy. Supra

Under a contract of precisely similar character  
the learned Judge remarks, that <sup>after</sup> a failure  
in a part of vendee's covenants, a refusal  
of the vendor to complete the contract, or a  
resale of the estate "prejudices no right of the  
vendee, and can impart to him no right  
to rescind a contract which he has  
already broken" - 1 Sugd Benson (7 Am Ed)

Chap 1. Sec 3 § 76.

If therefore the transfer to Hall, on June 2<sup>d</sup> 1809  
(the sale for taxes having occurred in March preceding)  
was, as the Deft claims in argument (See  
page 8) a refusal to complete the contract  
it was an election which the vendor had a  
right to make, the vendee being in default  
and on making which the money theretofore  
paid was absolutely forfeited as "liquidated  
damages" to the vendor -

But if the acts of the vendor do not  
amount to a rescission by him, and the breach

20 Johns 24  
of Am 46



by the vendee did not create of itself a  
recession of his rights under the contract,  
then the contract was still in existence, and  
the vendee being himself in default could  
not sue and bring this action, but  
should have declared specially on the  
said contract —

The ground assumed by defendants counsel  
(see argument p. 8) that a tender of last  
payment and demand of deed was not  
necessary, because vendor had no title,  
is not supported by the cases cited, which  
turned upon their own peculiar circumstances  
and is expressly overruled by our court in

Dodge v. Treadwell & Scammon 261. 265  
& Foster v. J. A. C. 12 Ill. 455

In the latter case the court say "that although  
the vendor has conveyed away the land, the ven-  
dee has no right of action until he has  
tendered the balance of the purchase money &  
demanded a deed"

Here there was no tender, or offer to pay, no  
money present, but a mere speculation entered  
into without any bona fides, by the vendee,  
to attempt to get a legal advantage of the  
vendor, upon a contract which there was  
no intention or ability on her part to perform.



\* It is claimed in defendant's argument that the vendor under the circumstances of this case can't not be liable to vendor on covenant against covenants to however that might be, it is clear that such a covenant running with the land could secure to subsequent purchasers, and he is liable to them thereon,

But if a tender were not necessary, it was nevertheless necessary that the Contract should have been performed by the vendor so far as lay in his power alone to do. The refusal of a vendor to receive a payment tendered might be held to be a prevention of performance, and therefore equivalent to performance - But the taxes were not to be paid to him, and how can he be said to have prevented or dispensed with <sup>the performance of</sup> this prior obligation of the vendor.

So far as the argument of defendant's counsel addresses itself to <sup>the</sup> supposed equities of the case, it deserves and shall receive from us but little notice - We do not understand it to be an indisputable presumption <sup>of law</sup> that a man who avails himself of what he supposes to be a legal defence to an action, or declines to carry out a Contract which has been without excuse broken by the other party, is therefore a "shant" - The question presented is simply a question of law - In the proper tribunal, and upon the appropriate evidence, we would cheerfully submit the equities of the case to any Court, but having aimed to present the bare question of law, in the evidence and that alone being before the Court, it is not to be presumed that public justice



would be better subserved by a departure from  
the investigation of the law and the facts  
to the presenter in the case, to a canvas of  
the inferences and suggestions of Counsel.

It is clear that under the facts as developed,  
the deft. in Error being without excuse, de-  
linquent, and having assigned no excuse  
for her failure to perform, could in no Court  
of equity have insisted upon a specific  
performance - <sup>See auth. Point 1.</sup> and she certainly cannot be  
contended that her rights would be higher  
under the strict construction of a Court  
of law -

The Plaintiff in Error begs to sub-  
stitute authorities cited in his printed brief,  
every one of which he believes is pertinent  
to the questions discussed, and in many of  
which a state of facts almost parallel with  
that in this record is presented -

Leese B Thomas  
Atty for Plff in Error

1599

Superior Court

Joseph Smith  
Plff in Error

by Isaac  
Laird  
Def in Error

Argument  
for Plff in Error

Filed May 21 1861

L. Ireland

Clerk



STATE OF ILLINOIS, }  
SUPREME COURT, } ss.

The People of the State of Illinois,

To the Sheriff of the County of Cook Greeting:

Because, In the record and proceedings, and also in the rendition of the judgments of a plea which was in the Superior Courts of Chicago, Cook County, before the Judge thereof, between Jane Lamb

plaintiff, and Joseph Smith

defendant....., it is said that manifest error hath intervened; to the injury of the said defendant

as we are informed by his complaints the record and proceedings of which said judgments we have caused to be brought into our Supreme Court of the State of Illinois, at Ottawa, before the Justices thereof, to correct the errors in the same, in due form and manner, according to law: Therefore, We Command You, That by good and lawful men of your County, you give notice to the said Jane Lamb

that she be and appear before the Justices of our said Supreme Court, at the next term of said Court, to be holden at Ottawa, in said State, on the first Tuesday after the third Monday in April A.D. 1861 next, to hear the record and proceedings aforesaid, and the errors assigned, if she shall see fit; and further to do and receive what said Court shall order in this behalf; and have you then there the names of those by whom you shall give the said Jane Lamb

notice, together with this writ.

Witness, The Hon. John D. Caton, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 2<sup>nd</sup> day of April in the Year of Our Lord One Thousand Eight Hundred and Sixty one

L. Leland

Clerk of the Supreme Court.

by J. B. Rice Deputy



152. 159

Joseph Smith

No.

vs.

Jane Lamb

SCIRE FACIAS.

FILED April 16, 1 A. D. 1861

L. Leland

Plck.

Served by reading the within writ to the within named defendant Jane Lamb on the 5<sup>th</sup> day of April 1861

Fees Anthony C. Hising  
1 horse 50c  
6 miles 30  
1 rate 10  
- 90  
by John A. Wilbur  
Deputy



Supreme Court of Illinois  
 Of the April Term 1886  
 Joseph Smith, Plff in Error  
 vs  
 James Powell; Def. in Error } No 156

In this case the Plff desires  
 draw the attention of the Court to the fact  
 that there is no evidence in the record of the  
 payment of any sum whatever on the contract  
 after the first payment.

We also refer the Court to  
 the written arguments in the case of same  
 Plff in Error vs James Lamb Def. in  
 Error No 158.

Robert B. Thompson  
 Atty for Plff in Error



~~157~~ 158

Supreme Court

Joseph Smith  
Plff in Error

<sup>vs</sup>  
James P. Parrell  
Def in Error

---

Ag. for

Plff in error

Filed May 9<sup>th</sup> 1861

L. Leland  
Clerk

H. B. Morris  
Atty



Supreme Court of the State of  
Illinois

After April Term 1861

Joseph Smith } Error to Superior  
                              } Court of Chicago  
James Powell }

It is hereby stipulated between the parties  
to the above cause, that the said cause  
may be reinstated upon the docket of the  
Court, and submitted by both parties  
to the Court upon printed or written  
points and argument filed or to be  
filed —

Joseph B. Thomas  
Atty for Plff in Error  
S. A. Truitt  
Atty for Deft in Error



158  
Smith  
B  
Powell

---

158  
Stapler

Opuntia  
Juncus in vase  
pale flowers large

Filed May 3, 1881  
L. Leland  
Clerk



Supreme Court of the State of  
Illinois -  
Of the April Term A.D. 1881

Joseph Smith & Son & the Superior  
Court of Chicago  
Jane Lamb

It is hereby stipulated  
between the parties to the above cause, that  
the said cause may be constituted upon  
the docket of the Court, and submitted  
to the Court <sup>by both parties</sup> upon printed or written  
points and arguments filed or to be  
filed

Isaac B. Thomas  
Atty for Off in error  
S. A. Erwin  
attys for Dept in Error



159

Smith

Lamb

---

Stipulation

159

Filed May 3<sup>d</sup> 1861  
L. Leland  
Clerk



United States of America  
State of Illinois Cook County, Jp.

Now before the Honorable the judges  
of the Superior Court of Chicago, within  
and for the County of Cook and State of  
Illinois, at a regular term of said Superior  
Court of Chicago, began and holden at the  
Court House in the City of Chicago in said  
County and State, on the first Monday  
being the second day of July in the year  
of our Lord Eighteen Hundred and Sixty and  
of the Independence of the United States of  
America the eighty fourth.

Present the Honorable John M. Wilson Chief Justice  
of the Superior Court of Chicago.  
Vice W. Higgins & Frank Garrison Judges  
Charles Hoffman Prosecuting Attorney  
John Gray Sheriff of Cook County  
Attest  
Walter Kimball  
Clerk.



It is remembered that heretofore, to wit:  
on the 24<sup>th</sup> day of February in the year of  
our Lord One thousand and eight hundred and  
sixty. Jane Lamb. plaintiff by her attorney  
filed in the office of the Clerk of the Superior  
Court of Chicago her certain declaration in  
the words & figures following, to wit:

State of Illinois  
Cook County P.

In the Superior Court of Chicago  
Of the March Term 1866.

Jane Lamb of the County of Cook  
& State of Illinois plaintiff in this suit  
by S. A. Davis her Attorney complains of  
Joseph Smith of same place defend ant  
in this suit, who has been summoned &c. in  
a plea of Trespass on the Case on promises

For that whereas the defend ant  
on the second day of February in the year  
of our Lord One thousand and eight hundred  
sixty at the County aforesaid was in-  
debted to the plaintiff in Twelve Hundred  
Dollars for money before that time had  
& received by the defend ant for the use of  
the plaintiff, and in two hundred dollars



for interest due from the said defendant  
to the said plaintiff for and in respect of  
the plaintiff having foreborn and given  
day of payment of money due from the  
defendant to the plaintiff at the defendant's  
request for a long time then elapsed.

And in Twelve hundred Dollars for money  
found to be due from the defendant to the  
plaintiff on an account then other stated  
between them. And whereas the defendant  
afterwards ad. to wit, on the day & year last  
aforesaid in the County aforesaid in  
consideration of the premises respectively  
promised to pay the said several sums of  
money respectively to the plaintiff on request.

Yet he hath discontinued his prom-  
ises and hath not paid any of said  
money or any part thereof to the plaintiff  
damaged Twelve hundred Dollars.

And therefore she brings suit &c.

S. A. Irwin  
Atty for Plff.



# Copy of Account sued on

Joseph Smith

1860	To Jane Lamb Dr	
July 2	To money had received &c.	\$1200.00
"	" " due for interest &c.	\$200.00
"	" " on account stated	\$1200.00

Bill of Particulars on which  
above suit is brought

To money paid on Contract made by  
Joseph Smith (deft) to Jane Lamb  
(Plff) dated August 3<sup>d</sup> 1857 for  
conveyance of Lot No 30. in Joseph  
Smith's Subdivision of the 1/2 of Sec 16  
90 in Canal Frontier Subdivision of the 1/2  
of Sec 27. in T. 29. N of R 14 E of the 3<sup>d</sup> P.M.

Aug 3. 1857	To Cash	\$187.50
-------------	---------	----------

Interest on same to

July 8 <sup>th</sup> 1858	To Cash	\$180.00
---------------------------	---------	----------

" Interest on same to

" 6 <sup>th</sup> 1858	" Cash	\$25.00
------------------------	--------	---------

" Interest on same to

Jul 8 <sup>th</sup> 1858	" Cash	\$210.00
--------------------------	--------	----------

" Interest on same to

March 8 <sup>th</sup> 1858	" Cash	\$16.25
----------------------------	--------	---------

And afterwards to wit. on the 8<sup>th</sup> day of March in the year aforesaid. the said Deft filed  
in the office of said Clerk his certain Plea. in the words & figures following. to wit:



State of Illinois  
County of Cook

In the Superior Court  
of Chicago  
Of the March Term A. D. 1860.

Joseph Smith  
vs  
Jane Lamb

And the said defendant  
by Jesse B. Thomas his Attorney comes  
and defends the wrong and injury then to  
and says he did not undertake or promise  
in manner and form as the said plaintiff  
has above thereof complained against  
him, and of this he puts himself upon  
the Country &c.

and the plaintiff with  
the like

Jesse B. Thomas  
Atty

S. A. Iron

Atty for Plff.

State of Illinois  
County of Cook

In the Superior Court of  
Chicago. Of the March Term 1860.

Jane Lamb

vs  
Joseph Smith

Joseph Smith of said  
County being duly sworn says he is the de-  
fendant in the above entitled case and



that he has a good reason to the said action  
on the merits of the case as he verily believes.  
Subscribed & sworn to before me  
this 7<sup>th</sup> day of March A.D. 1860 Joseph Smith  
Jesse B. Thomas  
Notary Public

And afterwards to wit, on the 24<sup>th</sup> day  
of May in the year aforesaid, said day  
being one of the days of the May Term of  
said Court the following among other  
proceedings were had & entered of record in  
said Court to wit.

Jane Lamb

vs  
Joseph Smith Applicant

This day comes said Plaintiff  
by S. A. Levin her Attorney, and said  
Defendant by Jesse B. Thomas, his Attorney  
also comes and upon agreement of the parties  
made now here in open Court this Cause  
is submitted to the Court for trial on issues  
joined without intervention of a jury and



The Court now here after hearing evidence  
and arguments of Counsel takes the matter  
under advisement.

And afterwards, to wit, on the 23<sup>rd</sup> day  
of July, in the year aforesaid, said day  
being one of the days of the July Term of  
said Court, the following among other  
proceedings were had and entered of record  
in said Court, to wit:

James Lamb

vs Assumpit  
Joseph Smith

This day again comes the said  
plaintiff by S. A. Drizin his Attorney and  
the said Defendant by J. B. Thomas his  
Attorney also comes and the Court having  
had the issues joined herein under advisement  
since the May Term of the Court, last past  
and being now fully advised in the premises  
finds issues for the said plaintiff and  
assesses her damages herein to the sum of  
Six hundred and ninety five dollars and



eighty six cents, and thereupon defend ant  
submits his motion herein for a new trial  
in this cause, which is hereby overruled  
and defend ant enters his exceptions herein  
to the ruling of the Court.

Therefore it is considered that the said  
plaintiff do have and recover of the said  
defend ant her damages of six hundred  
and ninety five dollars, and eighty six  
cents in form aforesaid by the Court  
here found and assessed and also her  
costs and charges in this behalf expended  
and have execution therefor.

And thereupon the said defend ant  
having entered his exceptions prays an  
appeal herein to the Supreme Court of this  
State which is allowed on filing bond  
in the sum of Twelve hundred Dollars with  
security to be approved by a judge of the  
Court within thirty days with his bill of  
exceptions.

And after wards, to wit on the 14<sup>th</sup> day of  
August in the year aforesaid there was  
filed in the Office of the Clerk of said



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Court, a certain bill of Exceptions in the  
words & figures following. to wit.

Jane Lamb  
vs Joseph Smith In the Superior Court  
of Chicago.

Be it remembered that on the  
trial of the above entitled cause at the  
Term A.D. 1861. of the said Court  
the Plaintiff to maintain the issues on her  
part gave in evidence the following  
contract or agreement.

Articles of Agreement, made this 31<sup>st</sup>  
day of August in the Year of our Lord  
One Thousand and Eight Hundred and Fifty seven  
Between Joseph Smith of the City of Chicago  
County of Cook and State of Illinois  
party of the first part. and Jane Lamb  
of the same place party of the second part.  
Witnesseth. That if the party of the second  
part shall first make the payments and  
perform the covenants herein after mentioned  
on her part. to be made and performed. the  
said party of the first part hereby covenants  
and agrees to convey and assure to the said

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party of the second part. in full simple  
discharge of all incumbrances whatever, by  
a good and sufficient Warranty deed  
the following lot, piece, or parcel of ground  
viz:

Lot number Thirty (30) in Joseph Smith's  
Subdivision of the West half of Block  
Ninety (90) in Canal Tract's Subdivision  
of the West half of Section Twenty seven  
(27) in Township Thirty nine (39) North of  
Range Two South and Four East of the 3rd  
P.M. in the City of Chicago, aforesaid.

And the said party of the second part  
hereby covenants and agrees to pay to the  
said party of the first part at the office  
of Haskell & Thomas in Chicago, the sum  
of Seven Hundred & Fifty Dollars (\$750.)  
in the manner following: One Hundred Eighty  
Seven & 50/100 Dollars (\$187<sup>50</sup>/100) Cash in hand the  
receipt of which is acknowledged, and the  
remainder in three equal payments on the  
First day of February in each of the years  
A. D. 1858, 1859 & 1860. with interest at six  
per cent per annum on the whole sum from  
time to time remaining unpaid, payable  
annually on the days aforesaid. From the  
1st day of February A. D. 1857. And to  
pay all taxes, assessments or impositions that



may be legally levied or imposed upon said  
lot. And in case of failure of the said  
party of the second part to make either  
of the payments, or perform any of the  
covenants on her part, this contract shall  
be forfeited and determined at the election  
of the said party of the first part: and  
the party of the second part shall forfeit  
all payments made by her, on this contract  
and such payments shall be retained by  
the said party of the first part in full  
satisfaction and liquidation of all dam-  
ages by him sustained: and he shall  
have the right to re-enter and take pos-  
session.

It is mutually agreed that  
the time of payment shall be an essential  
part of this contract: and that all the  
covenants and agreements herein contained  
shall extend to and be obligatory upon the  
heirs, executors, administrators and assigns  
of the respective parties.

In Witness whereof the parties to this  
present have hereunto set their hands and  
seals the day and year first above written.

Signed Sealed & Delivered  
in presence of  
Jesse B. Thomas

Joseph Smith



Entered State of Illinois  
Cook County 3 Filed for record 4<sup>th</sup> Aug<sup>th</sup>  
1857. and duly recorded in Book 146 of Deeds  
page 10.

Wm L. Church Clk.

\$180. Received Chicago July 8<sup>th</sup> 1858. of Mrs Jane  
Lamb One hundred eighty dollars to apply  
on payment due hereon July 1<sup>st</sup> 1857

Joseph Smith  
per Clarke & Thomas

\$25 Rec<sup>d</sup> Chicago July 16<sup>th</sup> 1858. of Mrs Jane  
Lamb Twenty five dollars to apply on  
payment due on within July 1<sup>st</sup> 1858

Joseph Smith  
per Clarke & Thomas  
per Russell.

\$210. Rec<sup>d</sup> Chicago July 8<sup>th</sup> 1858 of Mrs Jane  
Lamb. Certificate of deposit of Bk Swift  
Brother Johnston for two hundred and ten  
dollars for payment due hereon July 1<sup>st</sup> 1857.  
It being expressly understood to all rights  
of forfeiture and other covenants and conditions of  
the within Contract are to remain in full force.

Joseph Smith  
per Clarke & Thomas.



at  
Recd on the within Fifteen and <sup>25</sup>/<sub>100</sub> Dollars  
March 8<sup>th</sup> 1838.

\$16 <sup>25</sup>/<sub>100</sub>

Joseph Smith  
per Clarke & Thomas  
per Russell

The Plaintiff further introduced as a witness  
S. A. Smith, who testified as follows:

"On the first day of February  
A. D. 1838. I went with the Plaintiff to the place  
of business of the defendant in Chicago, and  
found him there. I told him I had come on  
behalf of Mrs Lamb (showing him the  
contract) to make the cash payment due  
him upon the said contract, and that whatever  
was due him I had and was ready to pay.  
Smith said he had not the title to the lot  
and could not make a deed. He desired us  
to go to the office of his attorney to see  
whether an arrangement could not be made  
he said Mr Hall was the owner of the lot,  
and perhaps some arrangement could be  
made with him. we went to his attorney's  
office where Smith again said he had not  
title, and could not make a deed. Smith  
stated to his attorney, that I would make  
a tender if required, and he said it was not  
necessary. I can't say positively whether I said so



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Recd on the within Fifteen and <sup>25</sup>/<sub>100</sub> Dollars  
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he said Mr Hall was the owner of the lot,  
and perhaps some arrangement could be  
made with him. we went to his attorney's  
office where Smith again said he had not  
title, and could not make a deed. Smith  
stated to his attorney, that I would make  
a tender if required, and he said it was not  
necessary. I can't say positively whether I said so



or not?

On cross examination the said Devin further testified

"I had no money with me when I went to Smith or his attorney, I had a blank check, which I intended to fill for the amount due. Did not fill it up, because I did not know the amount, which would be due upon the contract including taxes, interest &c.

Smith frequently stated at his place and at the attorney's office that he had transferred the contracts to Mr Hall - I replied that I had frequently called on Mr Hall and that he refused to receive the money or do any thing about the matter - I had done so. I had enough money in the bank to pay the balance due on the contract."

The plaintiff offered no further evidence.

The Defendant then to sustain the issues on his part introduced as a witness W. Lewis who testified as follows:

"At the tax sale which occurred on the 14<sup>th</sup> of March 1837. for city taxes of 1838. I bought the lot mentioned in the contract from Smith to Mrs Lamb (in evidence here) and received a certificate of purchase therefor - On the 4<sup>th</sup>



of May 1859. I paid the State & Co. Taxes for 1858. on said lot, and on the 9<sup>th</sup> of March 1860. I paid the City taxes for 1859. on the same. The money paid by me for said purchase and for taxes has never been repaid to me by any one. I still have the certificates of purchase & tax receipts (said certificate and tax receipts were then produced by the witness, and offered in evidence by the defendant)

On Cross Examination the witness further testified. -

Mr Smith never said anything about taking up the tax receipts or certificates. Mr Hall has several times spoken to me saying he would have to take up the certificates unless other parties did."

J. B. Thomas a witness on the part of the defendant testified - On the second of June 1859. at the request of the defendant Smith and of Mr Hall. I drew upon Mr Smith, copy of his contract with Mrs Lamb. (which was a duplicate of the contract in evidence) an assignment of Smith's interest therein, which was signed by Mr



Smith and delivered to Mr Hall, who was  
the owner of the land, in my presence.

The defendant here rested his case  
and the foregoing is all the evidence of-  
fired by either party in the said cause.

The Court having heard the testimony  
found the issues for the plaintiff and assessed  
the plaintiffs damages at Six hundred  
and ninety five <sup>sq</sup> feet Dollars whereupon the  
defendant by his counsel then and there  
moved the Court for a new trial. Because  
the finding of the Court is against the law.  
Because the finding of the Court is against  
the evidence and because the damages  
assessed by the Court are excessive. But  
the Court overruled the said motion for a  
new trial, and the defendant then and  
there accepted the decision of the Court  
overruling the same.

And because none of the said exceptions  
so offered and made to the opinions and  
decisions of the Court do appear upon the  
record of the said trial, therefore on the prayer  
of the said defendant by his counsel the said  
Judge hath to this bill of exceptions set his seal according  
to the Statute in such cases made and provided



Wm H. Higgins *Seal*  
Judge.

State of Illinois  
Cook County ss. I Walter Kimball  
Clerk of the Superior Court of Chicago  
within and for the County of Cook and  
State of Illinois, do hereby certify the  
foregoing to be a full true & complete  
abstract of all the pleadings on file in my  
office & the proceedings & judgment entered  
of record in said Court, together with the  
bill of Exceptions, in a certain case wherein  
James Lamb was Plaintiff and Joseph  
Smith Defendant.



Witness my hand and seal  
of said Court at the City  
of Chicago, in said County &  
State, this 21<sup>st</sup> day of March  
A. D. 1861.

Walter Kimball  
*Seal*



And the said appellant by Jacob B Thomas  
his attorney comes and says that in the  
~~affidavit~~ <sup>proving</sup> record of the order and proceeding  
of the Court herein, and in the rendition  
of the judgment upon it there is manifest  
error in this

1<sup>st</sup> The finding of the Court was against  
the law.

2<sup>d</sup> The finding of the Court was against  
the evidence

3<sup>d</sup> The damages assessed by the Court  
were excessive

4<sup>th</sup> The Court erred in rendering  
the motion for a new trial

5<sup>th</sup> The Court erred in rendering judg-  
ment for the plaintiff below

Jacob B Thomas  
Att'y for Pff in error

Assignment of Errors

Filed Apr. 16<sup>th</sup> 1861

L. Ireland  
Clerk

There are no errors in the Record & proceedings  
of said Court

S. A. Green  
for Pff in Error



And now comes the said Office  
by J A Henry his Attorney, say that  
is no error in the account pending  
agreed on in giving the judgment  
expressed & says that the same may  
in all things be approved

J A Henry

Att for the paper



159-164

Jane Lamb

<sup>by</sup>  
Joseph Smith

Transcript

Filed April 2 1861

L. Leland  
Clerk

84/50