No. 13475

Supreme Court of Illinois

Smith.

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vs.

Powell.

71641  7

STATE OF ILLINOIS,

SUPREME COURT,

Third Grand Division.

No. 158.

Smith
vs
Price

1347

Reversed

Supreme Court of the State of Illinois,

Of the April Term, A. D. 1861.

JOSEPH SMITH, Appellant,
vs.
JAMES POWELL, 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 July 25th, 1857, for conveyance of lot No. 31 in Joseph Smith's subdivision, &c., &c.

July 25th, 1857, to Cash $150,00
To Interest on same to
February 8th, 1858, to Cash 236,00
To Interest on same to
July 2d, 1858, to Cash 112,00
To Interest on same to
October 14th, 1858, to Cash 51,25
To Interest on same to
March 5th, 1859, to Cash 60,75

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: $150,00 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.

Powell

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
13. 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."

On cross examination, Irvin testified: "Powell had with him money enough to make the payment. Did not produce it. Smith frequently stated, at his place and at the attorney's office, that he had transferred the contract
14. 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.

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
14. 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:

"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.
15. 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 either party.

The Court found the issues for the plaintiff and assessed her damages at $688,48.

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.

16. 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 $688,48.

The appellant assigns for error:

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
8. 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.

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.

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. 229

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 Cromp & 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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Smith

vs

Powell

Abstract

Filed May 9th 1861

L. Leland

Clerk

STATE OF ILLINOIS, } ss.
SUPREME COURT,

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 judgment of a plea which was in the Superior Court of Chicago County, before the Judge thereof, between James Powell

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 this complaint the record and proceedings of which said judgment 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 James Powell

that he 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 he 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 James Powell

notice, together with this writ.

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

L. Leland

Clerk of the Supreme Court.

J. B. Rice Deputy

~~146~~ 158

Joseph Smith

No. vs.

James Powell

SCIRE FACIAS.

FILED April 16. A. D. 1861

L. Leland

Clerk.

Served by reading the within writ to the within named defendant James Powell this 5th day of April 1861. paid $ plaintiff fees

Anthony C. Keating Sheriff

by John A Nelson Deputy

Fees
1 Serv 50
3 mails 15
1 Return 10
75¢

IN THE SUPREME COURT

OF THE STATE OF ILLINOIS,

APRIL TERM, A. D. 1861.

JOSEPH SMITH, PLFF. IN ER.
vs.
JAMES POWELL, DEF'T IN ER.

SAME PLFF. IN ER.
vs.
JANE LAMB, DEFT. IN ER.

Error to Superior Court of Chicago.

DEFENDANTS' POINTS AND BRIEF.

The above were actions of *assumpsit* for money *had and received.*— They were brought to recover back-money paid on contracts for the sale of land, because the defendant refused, or was unable on the tender of the last payments, on the day they became due, to make Deeds in accordance with the contracts.

In both cases the last payment became due on 1st of February, 1860; and the contracts and facts are nearly alike in both cases.

I shall therefore make but one argument for both cases, except as to the points that are dissimilar.

The first objection, in the Court below, was, that *assumpsit* was not the proper form of action; that as the contracts were under *seal* on which the money was paid, that we sought to recover back, that action would not lie.— In other words, as the money was paid on agreements, which are evidenced by *sealed* instruments, we are deprived of the right of suing in assumpsit although the contracts so evidenced have been rescinded by bringing these suits, because of the defendant's failure to perform them on his part.

The answer to this is that the bringing of the suits is a recision of the contracts, the default of the defendant justifying the recision.

The contracts are evidence simply—they are not the basis of the action. It is the recision of them, that leaves in the hands of the defendant so much money that belongs to us.

The whole question is comprehensively discussed in 1 *Chitt. Pl.* 354, under the title—Assumpsit—in these words:

"This action is frequently brought to recover back a deposit, or money paid upon an agreement, which the defendant omits or refuses to perform," (referring in a note to 3 *Brevard*, 475. 2 *Id.* 264, 2 *N. Hamp.* 360, 5 *Shep.* 296, 9 *N. Hamp.* 298.) Again, "as a general rule it lies to recover back a deposit paid on the purchase of an estate if the title be defective or the vendor be not prepared to show his title on the day fixed for that purpose between the parties to the agreement, or if neither party be ready, and each make default in performing his agreement."—(Referring to 1 *R. & M.* 394, and *Chitty on Cont.* 5 *Amer. Ed.* 632, 623 *and Notes.*) "So where an act is to be done by each party under a special agreement, and the defendant by his neglect prevents the plaintiff from carrying the contract into execution, the latter may recover back money he has paid upon it, as money had and received for his use."

No distinction is made in reference to the form of the original contract. That seems to be immaterial, the action of assumpsit itself being grounded upon and showing on the part of the plaintiff a recision of the contract. *See Herrington vs. Hubbard*, 1 *Scam.* 572. The defendant's refusal or inability to perform the contract, authorizing the plaintiff to declare it forfeited, as he does by bringing the suit.

In 2 Greenleaf on Ev., sec. 124, it is said: "This count," (for money had and received) "may also be supported by proof that the defendant has received money of the plaintiff, upon a consideration which has failed." * * "or as a deposit on the purchase money of an estate by the plaintiff to which the defendant cannot make the title agreed for." (Referring to 8 T. R. 516, 3 B. & P. 181, &c.) It may perhaps be necessary to make a tender, or of course show that by the acts of the party a tender was dispensed with.

The case of *Weaver vs Bentley*, 1 *Caines*, R. 48, is explicit on this point, affirming the right to bring *assumpsit*, or to elect between covenant and assumpsit.

and by the mutual consent of both parties, and without the default or wrong of either. 2d. *Where the Vendor is incapacitated or unwilling to perform the contract on his part;* or, 3d. Where the vendor has been guilty of fraud in making the contract. In either of these cases it would be against equity and good conscience for the vendor to retain the money, and the law implies a promise on his part to refund it."

Again, on page 421 *Ibid*, the Court said: "I think one good test of the vendee's right to recover in these cases is his right to a specific performance of the contract, on his paying whatever may be due.

In Moses vs. McFarlane, 2 Burr, 1011, Ld. Mansfield said: "If one man takes another's money to do a thing, and refuses to do it, it is a fraud and it is at the election of the party injured either to affirm the agreement, by bringing an action for the non-performance of it, or to disaffirm the contract *ab initio*, by reason of the fraud, and bring an action for money had and received, to his use." If so, were these defendants in a condition to maintain it—or in other words, were they in a position to declare the contract rescinded.

By reference to the evidence (and as to that I ask the Court to look at the record, as I think the abstract does not state it as strong as it is,) these facts appear.

In the Lamb case the agreement bears date Aug. 3, 1857, consideration $750, to be paid $187 50 cash, (the receipt of which is acknowledged)—the balance in three equal payments on the 1st days of Feb. in the years 1858, '59 and '60. with interest at 6 per cent. The usual covenants to pay taxes, &c., to forfeit all payments made, &c., and a failure to perform any of the covenants, &c., &c., to determine contracts at *the election* of the vendor, are in contracts. Time of payment is also made an essential part of the contract, and the vendor covenants to give a warranty deed in fee, clear of all incumbrances.

The cash payment is acknowledged to have been received by contract on date thereof.

Another payment of $180 is endorsed on contract, February 8, 1858, to apply on payment due the 1st Feburary, and is received by the vendor *without objection or condition.* This was within $39 25 of amount due Feb. 1.

On Feb. 16th, 1858, $25 more is paid, and received without objection, leaving only a small balance back of payment, due Feb. 1st, 1858, if any.

On what purports to be Feb. 8th, 1858, a receipt of $210 is endorsed on contract; but it is evidently a mistake in date, as it is endorsed below the payment of Feb. 16th, and necessarily from its place on the contract *after* it. It is fair then to infer it was after Feb. 16th, 1858, and is expressed to be for payment due Feb. 1st, 1859; thereby admitting that all of the payment due Feb. 1st, 1858, had been made.

Strangely, however, the receipt of it has coupled with it the declaration of the vendor that "It is expressly understood to all rights, of forfeiture and other covenants and conditions of the within contract are to remain in full force."

What this quotation means is perhaps not patent; but this seems to be certain that said $210 was received in full for payment of Feb. 1st, 1859, in Feb. 1858, almost a year before it was due.

There was then no default in the payments or instalments; but in truth the poor woman was nearly *a year in advance* of her payments.

This last receipt recites too, among other things, "that ALL the covenants and conditions of the within contract are to remain in FULL FORCE.

This seems to me to put beyond cavil that at that time the vendor was anxious to have it understood that the contract was not forfeited.

But should the court adopt the construction of the appellant, and say the receipt shows that he intended at that time to advertise Mrs. Lamb that he would take advantage of any forfeiture accrued or accruing, still it avails him nothing, because he received at *same time* $210, the payment due the following year. Surely no court would permit the perpetration of such a fraud on a woman, not supposed to be conversant with the manner of transacting business.

The advance payment shows her anxiety to pay up the contract; the conduct of the appellant shows his anxiety to defraud her.

On Feb. 1, 1860, she goes with Irvin, (*see his testimony in full*) to the appellant's place of business, (Powell, the appellee in the other case being also along,) finds him there, and Irvin, in her behalf, (showing him the contract,)

tells him he had come in behalf of Mrs. Lamb "to make last payment due on said contract, and that WHATEVER was *due* him I (he) had and was ready to pay. Smith said, *he had not the title to the lot and could not make a Deed.*"

Then the parties and witness go to the office of Att'y of Appellant, where Smith said Hall was the owner of lots, and perhaps some arrangement could be made with him. Said he had no title, and could not make Deed. Irvin *then* thinks he stated to his Att'y "he would make a tender, if required, and he said it was not necessary."

On cross-examination, witness stated: He had no money with him when he went to Smith's, or his Attorney, but had a blank check, which he intended to fill with *the amount due*—did not fill it up, because he did not know the amount which would be due on contract *including taxes, interest, &c.*

Smith stated at attorney's office he had transferred contract to Hall.—Witness replied he had frequently called on Hall, and that he refused to receive money, or do anything about the matter, and that he had done so (that is—seen Hall.) Also, that he had money in bank—more than balance due on contract.

The Court will perceive from this testimony that on the 1st day of Feb. 1860, the appellant had not thought of or conceived he had any such defence as he now offers.

Then he states emphatically he has no title. That is the ONLY reason advanced why he could not make a deed, as agreed. He does not *then* pretend that the vendee is in *default*, or that a single condition or covenant has been broken by her. He does not pretend *then* he ever had any title; does not say he had assigned contracts to Hall, and that he would make a deed, or that Hall contended contract was forfeited; simply states he had transferred contract to Hall; don't state when, what for, or anything definite about it; don't say either he or Hall had elected to declare contracts forfeited for *any default*; don't put his unwillingness to receive the money on the ground he had *assigned* contract to Hall; but simply states he has no title, and perhaps some arrangement could be made with Hall. What arrangement? Why, if Hall was the *assignee*, would not it have been natural, and could he resisted saying so and telling Mrs. Lamb go and pay the money to Hall, and he will make you a

deed? Not an admission is made, not a syllable lisped by him by which Mrs. Lamb could infer that a deed could be had at all. Indeed the reply of the witness (Irvin) to appellant's remark that "perhaps some arrangement" could be made with Hall; that he had seen him, and "he refused to do anything," conclusively shows that remark was simply a pretext.

What reply does appellant make to this remark of Hall, repeated by witness? None, absolutely none!

Nothing is said at this time by Smith about the non-payment of taxes—not a word; and the testimony of Irvin shows, (what every man, familiar with real estate contracts in Chicago, knows is the custom,) that the vendor paid, or in this case was expected to pay, the taxes, and receive re-payment from the vendee, or that the witness expected to pay the taxes to whomever was entitled to receive them, for he expressly says he did not know the amount "due upon the contract, *including taxes*, interest, &c.," and hence he had not filled up the check.

This evidence shows that Mrs. Lamb expected to pay *whatever* amount was *due*, "*including taxes*," and that she was also ready on the 1st day of Feb., 1860; and it also shows the only reason why installment, interest and taxes were not paid, was, because Smith "had no title, and could not make the Deed."

The appellee was then in fact not in default at all; and the appellant did not put his default on that ground, but simply on the ground that he had *no title.*

Had he put his refusal to convey on the ground that the vendee had failed to pay the taxes, how easy could she have obviated, on the very day, (Feb. 1, 1860,) that objection, by going and paying the taxes, or redeeming; but he did not do it.

The appellant then having put his failure to convey on the ground of having no title, and the appellee having acted on that ground thus put, appellant is estopped from changing his ground now and, setting up that he had covenanted to convey by Warranty Deed in fee simple, free from all incumbrances, and that by non-payment of taxes by vendee, he could not make such a deed.

The excuse that these taxes precluded him from conveying, is idle, for another reason. While the covenant to convey is very broad, being for a Warranty Deed, "free from all encumbrances;" yet it seems to me it will hardly be seriously contended in this Court, that such a covenant binds the vendor to remove or be responsible for any liens or encumbrances done or suffered by the vendee, after the execution of the contract. The statement of the proposition seems sufficient to show its absurdity.

Again, the duty of Mrs. Lamb to make the last payment when due, was *dependent* on the ability of Smith to make the Deed. Smith was required when last payment became due to be ready to make a Deed, otherwise he could not require a payment of the money. It was as much a duty of Smith to have the title on the day appointed for the last payment, as it was the duty of Mrs. Lamb to have the money at that time. Indeed, it was even more a duty of Smith to have the title then, because he had received *three-fourths* of the purchase money, and much of it before it became due.

Smith could not therefore put Mrs. Lamb in default, until he became ready to comply with the contract on his part. Just as the vendee cannot put the vendor in default until he has paid or offered to pay the entire purchase money. (See 12 Ill., 455.)

Indeed the vendee is not in all cases required to make a tender at all in order to recover back what he has paid. He is not required, e. g., where the vendor has conveyed away the land (which the transfer of contract to Hall, spoken of in Irvin's testimony, probably amounts to) and thus put it out of his power to perform the agreement. That is the rule laid down by this court in case of *Hurd vs Denny*, in 16 Ills., 492.

Nor where the vendor has been so negligent as to have no claim in a Court of Equity for a specific performance, is it necessary to demand a deed, as was declared in *Cooper vs. Brown et al.*, 2 *McLean*, 495. In same case it was held vendee may, under those circumstances disaffirm contract, and recover back the money paid in an action for money had and received. So in *Blaun vs. Smith* 4 *Blackf.*, 517, it appearing the vendor had no title in the land, it was held to be not necessary for the vendee to demand the deed.—The Court said: "The utter inability of the defendant to convey, dispensed with the necessity of the demand, as the law does not require a vain or nugatory thing to be done. Again in the case of *Hurst vs. Means*, 2 *Smeeds*, 546, it was ruled that a vendee should not be driven to a suit on the contract for damages, merely because he did not rescind or abandon in a reasonable time, after discovering his vendor's want of title.

But I hold that no tender was necessary in this case. *Cui Bono?* The vendor had no title, had no prospect of having one, and why make tender and demand a deed?

In the case in 4 *Blackf.*, 517, before cited, the court says "The utter inability of the defendant to convey, dispensed with the necessity of the demand, as the law does not require a "*vain or nugatory thing to be done*;" if it dispensed with a demand for deed, why not with the tender?

The appellant, however, is effectually estopped from setting up no tender. Irvin's evidence shows that he had the money in bank, had a blank check ready to fill out as soon as he ascertained the amount of installment, interest, taxes, &c., due, and asked if a formal tender was demanded or required, and received the reply, it was not. The court can therefore have no doubt that the tender was expressly waived, or that the appellee acted on the declaration of the appellant that he could not take the money, because he had no title, and having acted on that declaration, and his refusal or acknowledged inability to deed, he is estopped from defending, on the ground of no tender.

Here let me observe, the only difference in the case wherein Lamb is appellee, and Powell, in reference to tender, is, that in Powell's case the evidence shows that Powell had the money with him ready to pay, and did not pay LAST installment, interest, taxes, &c., *only* because Smith could not make any title.

The question of interest, to the allowance of which objection was made below, I think is effectually settled by the case of *Hurd vs Denny*, 16 Ills, 492. I will cite but one additional. In the case of *Duncan vs Thornhill*, 2 *Black. R.* 1079, Justice Blackstone says: "These contracts are merely upon condition, frequently expressed, but always implied, that the vendor has a good title. If he has not, the return of the deposit, *with interest* and costs is all that can be expected."

It will be seen by reference to the contract between Powell & Smith that it bears date July 25, 1857—consideration $750. Cash payment $150, therein acknowledged to have been received—Balance in three equal annual payments of $200, each on the 1st day of Feb. in each of the years 1858, 1859 and 1860, with 6 per cent. interest from Feb. 1, 1857, payable annually. Also, all taxes, &c. Covenants and conditions same as in Lamb contract, except that thirty days of grace were allowed after default, to make payments.

On Feb. 8, 1858, a payment of $236 is endorsed on said contract, expressed to be for the payment due Feb. 1, 1858.

On July 2, 1858, $112 98 principal and $12 as interest, are endorsed thereon, expressed to be to apply on next payment.

Oct. 11, 1858, $51 25, is endorsed thereon, expressed to apply on next payment.

March 5th, 1859, $60 75 is endorsed thereon, expressed to be in full up to Feb. 1, 1859,

In Powell's case, as in Lamb's, the court will thus see that Smith received much of the money in advance of the installment becoming due.

Irvin's evidence also shows that he went to see Smith on the 1st day of Feb. 1860, when last installment became due, ready with the money to pay it, including taxes, &c.

The questions and evidence in both cases are substantially the same; and I have, as before stated, made one brief and argument, and filed them in both cases. It does seem to me that whether regarded in a strictly technical view or on the merits, these cases as presented by the appellees, commend themselves to the judgment and conscience of the court.

It frequently happens that these land speculators are but sharks imposing upon the feeble, unsuspecting and credulous but honest and worthy part of the community. Every member of the court doubtless can revert to more than one case where sharp practice and fraud has been resorted to by this class of operators. It does seem, therefore, especially as this is an equitable sort of an action, that the court should do equity as far as possible in the premises, and thereby prevent the perpetration of a fraud on these defendants in error. For the court may rationally infer from the evidence that this man Smith never had a title to the premises, and his actions show that when last installments tendered, that he was remorselessly stoical about the matter, and never expected to be in a condition to convey. Such being the case, he is entitled to but little consideration at the hands of the court—only in fact what the rules of *equity* not *law* mete out to a party fraudulently having received, and still endeavoring to retain, money paid without any consideration whatever.

This argument is now too much extended to follow the counsel on the other side, through his objections to a recovery in the cases, and examine his authorities *seriatim.*

Suffice it to say, that I think I have in the progress of the discussion shown the fallacy of his objections when applied to the facts in the cases.—Some of the authorities cited by counsel are good law when applied to the facts of the cases, in which the opinions of the Courts were given. But analogies are often dangerous guides; because the features of cases are like the countenances of persons—no two are exactly alike.

The well settled principles of the law, applied to the facts of a given case, are most likely to evolve the truth and the right. By these, the questions in these cases, seem to me easy of solution.

What are they? Smith enters into contracts to convey to these parties one lot each, for a consideration to be paid at stated times by each. *Three-fourths* of the purchase money is paid on the days agreed, or *is received* by Smith *at and on different days.* Now it will not do for him to say that if not paid on the very day *agreed*, that he received it subject to all the forfeitures accrued. If he had declared a forfeiture, then he had no right to receive the money—*the fact* he received it is conclusive against him that he had done no such thing. No such thought had then entered his mind—it is, as before stated, an afterthought—rather the offspring of his counsel's exuberant brain.

But, says his counsel, true it may be that the appellees made their payments, either *promptly* or otherwise, *without objection;* yet they did not pay taxes, and that is a *continuing breach.* The answer to that, as already given, is, you did not put your *refusal* to convey, when last payment became due, on that ground, nor upon the ground of forfeiture, nor upon *any* other, saving and excepting *only one*—that—your *inability to convey, for want of title.*—Had you said that the objection was the tax sale, or non-payment of taxes, that *could and would* have been *immediately* obviated, for the testimony shows the appellees were prepared to settle, and pay those very taxes.

Do you say you had no knowledge *then* of the non-payment of taxes, and had you given deeds, as contracted, you would have been liable on your covenants to pay those taxes? To whom? To the vendees, the appellees, here,

of course. Vain and impotent conclusion! You cannot be serious, in supposing, that any Court would compel a vendor on such covenants—on any covenants, that *you* could make, to pay taxes accrued after the execution of your contract, and which the vendee had covenanted to pay, on his failure so to do, *to him.*

Clearly then, there is no error in the judgment of the court below. The appellant has had the money of the appellees without consideration, and according to the opinion of Justice Blackstone, before cited, *obtained it fraudulently.* Should he not, therefore, repay it, *with interest?* Ought not he, rather, did law or precedent justify it, pay compound interest? All the appellees have obtained by their judgment may be, nay, actually is, trivial compensation for the damages sustained, *especially,* when it is considered how few judgments are *collected* in *these* times, even from comparatively good men, to say nothing of *bogus* land operators and speculators.

Hence, I conclude by saying, that on one side are presented equitable and meritorious cases, on the other, the party is merely—*only*—seeking to rid himself of a just reponsibility by a resort to the musty precedents of legal technicalities.

S. A. IRVIN,

Att'y for Def'ts.

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vs 163-164
Powell
and
Same
vs
Lamb

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L. Leland
Clerk