No. 12524

Supreme Court of Illinois

Gale.

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vs.

Dean.

United States of America }
State of Illinois } SS
County of Cook }

Pleas before the Honorable John M Wilson Judge of the Cook County Court of Common Pleas within and for the County of Cook and State aforesaid at a special Term of the Cook County Court of Common Pleas begun and held at the Court House in the City of Chicago in said County in pursuance of an Order of the Judge thereof and to public notice given in accordance with the Statute in such case made and provided on the second monday being the ninth day of November in the year of our Lord one thousand eight hundred and fifty seven and of the Independence of the United States the eighty first

Present the Honorable John M Wilson Judge
Carlos Haven Prosecuting Atty
John L Wilson Sheriff
Attest Walter Kimball Clerk

Be it remembered that on the Seventh day of August in the year of our Lord one thousand eight hundred and fifty seven Philip Dean Plaintiff by Scates McAllister Jewett & Peabody his Attorneys filed in the office of the clerk of the Cook County Court of Common Pleas within and for the County of

Σ 12524-11

Cook and State of Illinois his Affidavit precipe & Bond for attachment in the words and figures as follows to wit

State of Illinois }
County of Cook } ss

Philip Dean of the City of Chicago being duly Sworn deposes and Says that Stephen F Gale who is a non resident of the State of Illinois and a resident of the State of New Hampshire is indebted to him this deponent in the sum of Eight thousand dollars. That on or about the 17th day of May A D 1851 at the City of Chicago the said Stephen F Gale entered into a written contract with this deponent in and by which agreement for a good and valuable consideration therein expressed the said Gale agreed in substance and effect to obtain a deed by quit claim or otherwise of one J & L Fuller the owner thereof for Sub Lot number nine of Lots two. three. & four of Block Eighty four in School Section addition to Chicago. That the consideration of such conveyance was at the time of making said contract fully paid by the deponent to said Gale That no time was fixed or specified in & by said contract for obtaining said deed from said Fuller but that on or about

3

the 10th day of April last this deponent demanded the said deed of the said Gale at the city of Chicago aforesaid but the said Gale refused to deliver the same or to obtain any deed from said Fuller or otherwise for one half of said Sub Lot as aforesaid And this deponent says that at the time of such demand one half of the said Sub Lot was worth the sum of eight thousand dollars

And this deponent further says that he is about to commence a suit by attachment in the Cook County Court of Common Pleas against the Estate of said Stephen F Gale for said indebtedness. Wherefore he the said Philip Dean prays an attachment to be issued against the estate of said Gale under the seal of said Court in pursuance of the Statute in such case made and provided

Philip Dean

Sworn this 7th day of August AD 1857 before me
Walter Kimball Clerk of Cook
County Court of Common Pleas

[12524-5]

4

Cook County Court of Common Pleas

Philip Dean vs Stephen F Gale } Assumpsit Dam $ 8000.00

The Clerk will please ipsue an attachment in the above entitled cause in the plea of trespass on the case upon promises. damages $ 8000.00 returnable to the Sept Term of this Court

Aug 6th 1887 Scales McAllister Jewett & Peabody Plffs attys

"Know all Men by these Presents"

That we Philip Dean & Samuel Myers are held and firmly bound unto Stephen F Gale in the penal sum of Sixteen thousand dollars cents Lawful money of the United States for the payment of which said sum well and truly to be made we bind ourselves our heirs executors and administrators jointly and severally by the presents

Sealed with our seals and dated this 7th day of August A D 1887

The condition of the above Obligation is Such, That whereas the above bounden Philip Dean has on the day of the date

5

hereof prayed an attachment out of the Cook County Court of Common Pleas Cook County at the suit of the said Philip Dean against the Estate of the above named Stephen F. Gale for the sum of Eight thousand dollars cents and the same being about to be sued out of said Court returnable on the second Monday of September next to the term of the said Court thento be holden

Now if the said Philip Dean shall prosecute his said suit with effect or in case of failure therein shall well and truly pay and satisfy the said Stephen F. Gale all such costs in said suit and such damages as shall be awarded against the said Philip Dean his heirs executors or administrators in any suit or suits which may hereafter be brought for wrongfully suing out the said attachment then the above obligation to be void otherwise to remain in full force and effect

Philip Dean (Seal)

S Myers (Seal)

Signed Sealed and
delivered in presence of

Σ/2534-J

And afterwards to wit: on the same day and year last aforesaid there issued out of the office of the Clerk of said Court a writ of attachment which is in the words and figures following to wit: (with the Sheriff's return endorsed)

State of Illinois)
Cook County } SS The People of the State of Illinois to the Sheriff of said County, Greeting

Whereas Phillip Dean hath complained on oath to Walter Kimbark Clerk of the Cook County Court of Common Pleas of Cook County that Stephen F Gale is justly indebted to the said Phillip Dean in the amount of Eight thousand dollars and oath having also been made that the said Stephen F Gale is a non-resident of the State of Illinois so that the ordinary process of law cannot be served upon him. And the said Phillip Dean having given bond and security according to the directions of the act in such case made and provided

We therefore command you that you attach so much of the estate real or personal of the said Stephen F Gale to be found in your County as shall be of value sufficient to satisfy said debt and costs according to the said

7

complaint and such estate so attached in your hands to secure, or so to provide that the same may be liable to further proceedings thereupon according to law at a term of said Cook County Court of Common Pleas to be holden at Chicago within and for the County of Cook on the 2nd Monday of September next so as to compel the said Stephen F Gale to appear and answer the complaint of the said Phillip Dean and that you also summon as garnishee to be and appear at the said Court on the said first Monday of next then and there to answer what may be objected against when and where you shall make known to the said Court how you have executed this writ. And have you then and there this writ

Seal

Witness Walter Kimbael Clerk of our said Court and the seal thereof at Chicago in said County this 7th day of August in the year of our Lord one thousand eight hundred and fifty seven

Walter Kimbael Clerk

SJA504-4J

8.

Endorsed

By virtue of the within writ of attachment I did on the Seventh day of August A.D. 1837 Levy upon all the right title and interest of the within named Stephen F. Gale in and to the following described property to wit. Blocks Thirty eight (38) and Fifty two (52) in Carpenters Addition to Chicago. the within named defendant not found in my County

John S. Wilson Sheriff
By T. M. Bradley Deputy

And afterwards to wit on the eighth day of August in the year aforesaid Phillip Dean Plaintiff by Scates McAllister Jewett and Peabody his attorneys filed in the Office of the Clerk of said Court his declaration in the words and figures following to wit.

Cook County Court
of Common Pleas

Of the September Term A.D. 1837

State of Illinois }
County of Cook } ss Phillip Dean plaintiff in this suit by Scates McAllister Jewett & Peabody his attorneys complains of Stephen F. Gale defendant in this suit of a plea of Trespass on the case upon promises For that

whereas heretofore to wit on the 17th day
of May A D 1851 to wit at the City of Chicago
in the County aforesaid it was agreed
in writing by and between the said
parties in the words and figures follow=
ing that is to say

" Chicago May 17th 1851
" Rec'd of Phillip Dean the sum of seven
" hundred & fifty dollsas follows James
" A Rees Judgment note payl thirty days
" from May 12th 1851 to order of said Dean
" & Endorsed by him for six hundred dolls
" & in cash one hundred & fifty dolls being in
" full for sale of Tax Certificate on Sub Lot 9 of
" Lots 2 3 & 4 of Block 84 in School Section
" addition to Chicago the undersigned
" agreeing to obtain a deed by quitclaim
" or otherwise for one half of said Sub Lot
" 9 of A D Fuller or such other party as may
" have the title to the half part of said Lot
" formerly conveyed to the said A D Fuller
Stephen F Gale "

And the said plaintiff further in fact says
that he has at all times since the making of the
aforesaid contract been ready and willing
to receive the deed aforesaid of one half of
said Sub Lot in said contract mentioned
from the person having the title thereto and

that on to wit the 10th day of April AD 1857 to wit at Chicago aforesaid he demanded of the said defendant that he the said defendant procure and obtain from the owner thereof a deed of one half of said Sub Lot according to the terms of said contract. But the said defendant well knowing the premises and wrongfully contriving &c then & there to injure the said plaintiff in that behalf would not make or obtain such deed as aforesaid, and then & there refused to make or obtain such deed or conveyance of one half of said Sub Lot aforesaid to the said plaintiff, and the plaintiff avers that the said defendant has not at any time since the making of the aforesaid contract made or caused or obtained to be made to this plaintiff any deed of the said premises, but so to do has wholly neglected and refused Wherefore the said plaintiff says that by reason of the premises he has been deprived of divers great gains profits and advantages which he might and would have received and enjoyed if the said defendant had kept and performed his aforesaid agreement and has sustained damages to the amount of eight thousand dollars

He did or one half of said Sub Lot and then & there well knew of and from the said defendant

For that whereas also heretofore to wit on the

17th day of May in the year of our Lord Eighteen hundred and fifty one to wit at the City of Chicago aforesaid in consideration that the said plaintiff at the special instance and request of the said defendant delivered to him the said defendant a certain promissory note made by one James N Rees bearing date the 12th day of May A.D 1851 for the sum of six hundred dollars payable in thirty days from the date thereof and endorsed by the said plaintiff and also the payment by the said plaintiff to the said defendant of the sum of one hundred and fifty dollars he the said defendant undertook and then and there faithfully promised the said plaintiff to obtain within a reasonable time thereafter a deed by quit claim or otherwise of or from one N G Fuller or such other party as might have the title thereto of one half of Sub Lot nine of Lots two three and four of Block Eighty four in School Section addition to Chicago, and the said plaintiff further that he has at all times since the making of the agreement been ready and willing to wit at Chicago aforesaid to accept and receive a deed by quit claim or sufficient deed of one half of the aforesaid Sub Lot and that on to wit the 10th day of April A.D 1857 to wit at Chicago

12

aforesaid he demanded and required of the said defendant that obtain for him such deed as aforesaid of one half of the Sub Lot aforesaid. That although a reasonable time had elapsed since the making of the aforesaid agreement for obtaining the aforesaid deed for the one half of said Sub Lot as aforesaid from the party having the title thereto, yet the said defendant then & there refused to obtain for said plaintiff such deed as aforesaid from the party having the title thereto of said one half of the aforesaid Sub Lot and has hitherto and always since the making of said agreement as aforesaid wholly neglected and refused to obtain or procure any such deed whatever to be made to the said plaintiff of the part of said Sub Lot as aforesaid. Wherefore and by reason of the premises the said plaintiff has been deprived of divers great gains profits & advantages which he might and would have enjoyed & received if the said defendant had performed his aforesaid agreement and has sustained damages to the sum of ten thousand dollars Wherefore he brings this suit &c

Scales McAllister Jewett & Peabody
Pffs attys

13. To the above named defendant

A Copy of the ~~above~~ Contract on which this suit is founded is contained in the first count of the forgoing declaration

Scales McAllister Jewett & Peabody
Plffs Attys

And afterwards to wit on the twenty fifth day of November in the year aforesaid Stephen F Gale defendant in this suit filed in the office of the Clerk of said court his affidavit of merits which is in the words and figures as follows to wit

Cook County
Court of Common Pleas

Stephen F. Gale
ads
Phillip Dean

State of Illinois
Cook County ss Stephen F Gale being duly sworn deposes and says that he is defendant in the above entitled cause and that he has a good defense on the merits as he is advised by counsel and verily believes

Stephen F Gale

Subscribed and sworn to before me the 25 day of Nov 1857

W W Kimball Clk

[illegible]

And afterwards to wit on the twenty eighth day of November in the year aforesaid the said defendant filed in the office of the Clerk of said Court his Plea in the words and figures following to wit

Cook County Court of Common Pleas

Stephen F Gale
ads
Phillip Dean

And the said Defendant by Hoyne Miller & Lewis his attorneys comes and defends the wrong and injury when &c & Says that he did not undertake or promise in manner and form as the said Plaintiff hath above thereof complained against him And of this he puts himself upon the Country &c

Hoyne Miller & Lewis
Defts Attys

And afterwards to wit on the thirtieth day of November in the year aforesaid said day being one of the regular days of the November Special Term of said Court the following among other proceedings were had in said Court and entered of Record to wit

15. Phillip Dean

vs Attach

Stephen F Gale

And now at this day comes the said Plaintiff by Scales McAlister Jewett & Peabody his attorneys and also the defendant by Hoyne Miller & Lewis his attorneys and upon issue joined ordered that a jury come. whereupon come the jurors of a jury of good and lawful men to wit B B Knapp P A Barker D H Howard H B Davis S P Putnam Thomas Fergus R S Hicks James Taylor Samuel Willard W J Reynolds Jno Pierson and S W Carter. who being well and truly elected. tried and sworn to try the issue joined. afterwards were allowed to seperate by agreement of the parties to appear upon the opening of the Court. at its next sitting

And afterwards to wit on the First day of December in the year aforesaid said day being one of the days of the November Special Term the following among other proceedings were had in said Court and entered of Record to wit

[illegible]

11.

Philip Dean

vs Attach

Stephen F Gale

This day again come the parties to this cause by their Attorneys as aforesaid and also the jury empannelled herein, on yesterday and after hearing the evidence, arguments of counsel and instructions of the court, retired to consider of their verdict, and afterwards come into Court and say We the jury find the issues for the plaintiff and assess his damages at the sum of seven thousand five hundred dollars. And thereupon the said defendant by his attorneys as aforesaid, submits his motion for a new trial and in arrest of judgment, which motion after argument by counsel and being full considered by the court was overruled by the Court and exceptions to such ruling by the court entered by the said defendant. Therefore it is considered that the said plaintiff do have and recover of said defendant his damages of seven thousand and five hundred dollars in forma foresaid by the jury assessed together with his costs and charges in this behalf expended and have execution therefor. Who now prayed an appeal to the Supreme Court of the State of Illinois, which is allowed upon filing bond in eight thousand dollars

with security to be approved by the Judge of this court. said bond with the bill of exceptions. to be filed during this term of the Court

And afterwards to wit on the eleventh day of December in the year aforesaid the defendant filed in the office of the Clerk of said Court his appeal bond in the words and figures following to wit.

"Know all men by these presents" that we the undersigned Stephen T Gale and Augustus H Burley are held and firmly bound unto Philip Dean in the penal sum of Eight thousand dollars for the payment of which sum well and truly to be made we do hereby bind ourselves our heirs executors and administrators jointly and severally firmly by the presents Sealed with our seals and dated this seventh day of December A D 1857.

Whereas the above named Philip Dean recovered a Judgment in the Cook County Court of Commin Pleas at the November Special Term of said court A D 1857. against the above bounden Stephen T Gale for the sum of seventy five hundred dollars and costs. from which judgment the

said Stephen F Gale has prayed an appeal now therefore the condition of this obligation is such that if the said Stephen F Gale shall prosecute his said appeal with effect and shall pay the said judgments and all costs interest and damages in case said judgment shall be affirmed then this obligation to be void

Stephen F Gale (Seal)
Augt H Barley (Seal)

And afterwards to wit on the Nineteenth day of December in the year aforesaid the defendant filed in the office of the Clerk of said Court his bill of exceptions in the words and figures following to wit

Cook County Court of
Common Pleas

Philip Dean
vs
Stephen F Gale

Be it remembered that on this thirtieth day of November A D 1857 at the November Special Term of said Court said cause on for trial and the parties the plaintiff and defendant appeared by their respective counsel and a jury being

called and duly sworn the plaintiff called as a witness James A Rees who being duly sworn testified as follows. I am acquainted with defendants hand writing the papers now shown to me is in the defendants hand writing the signature is and I think the body of the instrument is in the defendants hand writing. the plaintiff by his counsel read in evidence said instrument in the words and figures following

Chicago May 17th 1851

Recd of Philip Dean the sum of seven hundred
" & fifty dolls as follows. James A Rees Judgment
" note payl thirty days from May 12th 1851 to or-
" der of said Dean & Endorsed by him for six hun=
" dred dolls & in cash one hundred and fifty dolls
" being in full for sale of Tax Certificate on Sub Lot 9
" of Lots 2, 3 & 4 of Block 84 in School Section addition
" to Chicago the undersigned agreeing to obtain
" a deed by quit claim or otherwise for one half
" of said Sub Lot 9 of H. L Fuller or such other
" party as may have the title to the half part
" of said Lot formerly conveyed to the said H
" L Fuller Stephen F Gale"

Plaintiff thereupon called as witness Patrick Nugent. who being duly sworn testified as follows. I am acquainted with the

parties. I went with Mr Dean to the Tremont House to see Mr Gale in april last on Thursday I think Mr Dean took a paper from his pocket and asked Mr Gale if he could get this matter arranged Mr Gale said he could not do anything about it then that he would have to see Mr Scammon the next day, he wanted a deed of the lot

Being cross examined he said, Mr Dean handed to Mr Gale a paper and asked him what he intended to do about it. Gale said he could not do anything about it then that he would have to see Mr Scammon. I do not recollect anything else that was said I did not say that Mr Dean asked for a deed I cant say that I heard him ask for a deed. I did not see the paper and could not recognize it now if I should see it

The plaintiff by his counsel thereupon called as a witness

Van H Higgins who testified as follows

I had this matter placed in my hands for adjustment by Mr Dean, I wrote to Mr Gale and he called upon me at my office I cannot recollect all that was said but the substance of it was that Mr Gale said he would not do any anything about it He said that Mr Dean induced him to go into the contract and that it was

broader than he intended to have it, that he only intended to sell the tax deed. this was some time during last winter or spring it was after September 1856 and before the next April. it was at all events before I made the change in my office with my successors and that was about the first of April last I should think this interview was during the winter or Spring of 1857

and being cross examined he says I cannot recollect all that was said. Mr Gale might have said that Mr Dean knew all about the title. I do not recollect that he said that Mr Dean knew when he made the contract that one D & L Fuller had the title

The plaintiff by his counsel thereupon recalled

James H Rees who further testified as follows I have been a land agent for seven years and am acquainted with Lot Nine the land described in the contract, and was then acquainted with it in 1851. It is situated on the river near Van Buren Street the sub Lot is 50 feet front by 130 feet dup. It was not improved in May 1851. There was not dock built and there was no dredging done this lot was worth in the fall of 1856 and the winter and Spring of 1857 $300 per front foot. one half of it was worth $7,500 the

abstract I hold in my hand is a correct ~~a correct~~ abstract of the title of the lot. There is however one deed that is not noticed in the abstract. The whole of the Sub Lot was conveyed by tax deed to Mr Dean in 1851

The whole of the half conveyed to Fuller was worth about seventy five hundred dollars in April last. It was worth about the same in September 1856 or in the spring of 1857, a fair value for an undivided half of the lot would be from $600 to $700 in May 1851. say $650

and being cross examined he says

In the fall of 1851. in half of the Sub Lot was worth from $800 to $900. It was worth $1000, in January and Feb of 1852. Mr Dean has been in the occupation of the premises since May 1851. He has continued in the premises of the premises since that time. I was present when the contract was made. the paper now shown to me was executed at the same time. they were both signed at the same interview

The following paper refered to by the witness was then read in evidence

Copy of Agreement with S F Gale

Memo of an agreement entered in this seventeenth day of May A D 1851 between Stephen F Gale party of the first part and Philip Dean party of the second part both of the City of Chicago & State of Illinois. Whereas the party of the first part did on the first day of May A D 1840 purchase at the City Tax sale Sub Lot (nine(9)) of Lots two (2) three

(3) and four (4) in Block eighty four (84) of the school section Addition to Chicago & whereas from an examination of the records & from other information obtained the precitle appears to be held by H S Fuller and Amos C Hamilton & Whereas the party of the first has this day sold to the party of the second part the tax certificate on said Lot 9 upon the following conditions. Viz, That the said Amos C Hamilton or his heirs may have the privilege of redeeming or receiving an assignment from the said Dean or by quit claim deed, one half part of said sub Lot nine (9) upon condition that the said Amos C Hamilton or his heirs pay to said Dean one hundred dollars within six months from this date

Stephen Gale

Philip Dean

I estimated the value of one half of sub lot nine — The tax title to the whole of sub Lot nine was considered to be worth $200. at the time the contract was made. I saw Mr Gale frequently after the contract was made about procuring a deed from Fuller. I don't know that I saw him at Mr Deans instance. I was present when the contract was made and desired to see it carried out I was accustomed to inform Mr Dean of the result of these interviews at one or more of these interviews. Mr Gale told me that he could not procure a deed from Mr Fuller, that Fuller had refused to give a deed, and I soon after told Mr Dean

of it very shortly after. I cant say how long it was after the contract was made that Mr Gale told me this. I cant say positively whether it was during that year. But think it was at the second interview I had with him after the contract was made I presume it was within six months after the contract was made—

and being reexamined says. it was in a casual conversation I had with him that Mr Gale told me this. I had no authority from Mr dean to act in the matter and being reexamined he says. Mr dean probably knew that I talked with Mr Gale frequently about getting a deed from Fuller. and I was accustomed to tell Mr dean what Gale said at those interviews

and thereupon the plaintiff by his counsel called as a witness

Samuel Kerfoot who being sworn testified as follows.

am a land agent and have been for 3 or 4 years I was acquainted with the premises in question in April 1857. My ideas respecting their value coincide with Mr Rees' one half is just as valuable as the other

The plaintiff thereupon called as a witness C W Payton who being sworn testified as follows I am a real estate agent have been for several years was acquainted with the value of the real estate in question in April 1857 should consider

it worth $300 per front foot, & being cross examined he says

I considered it worth $300. per front foot on canal time and about $275. per front foot cash

The plaintiff her rested, and the defendant by his counsel thereupon moved to strike out the evidence given in behalf of the plaintiff in said cause on the ground of a variance between the evidence and the contract ordered on, but the court to which ruling and decision of the Court in overruling such motion overruled such motion, the defendant by his counsel then and there duly excepted, and the defendant by his counsel thereupon called as a witness Walter Kimball, who being duly sworn testified as follows

I was acquainted with the hand writing of N. D. Fuller. I have seen him write, the letter now shown is in the hand writing of Mr Fuller. the defendant by his counsel thereupon read the following letter to the jury

Peru May 15 1851

Mr S. F. Gale

Sir

Since I saw you I have heard from Mr Russell & am in hopes soon to have the papers to satisfy you of my title to ye the lot we were speaking of as soon as I get it I will send or take it to Chicago & will then settle the matter with you and to your satisfac-

tion

Respectfully Yours
H S Fuller

Just previous to the reading of which letter the plaintiffs counsel remarked — that it was not pretended that Mr Gale was guilty of any fraud in bad faith The foregoing being all the evidence given the case, — and thereupon the court was — asked to instruct and did instruct the jury in the part of the plaintiff as follows

Plaintiffs Instructions

That the contract declared upon and read in evidence in this suit required the defendant to obtain for the plaintiff, the title by quit claim deed or otherwise, from the person having the same of the half part formerly conveyed to H S Fuller of Sub Lot nine described in said contract and if the jury believe from the evidence that the plaintiff demanded or requested or caused to be demanded or requested of the defendant such deed and the performance of said contract, and the defendant refused to obtain such deed and to perform said contract in that behalf, the injury of the plaintiff is the loss of the title to the said land to be so conveyed or obtained, and the proper legal compensation and damages for such non-performance is the value of the land at the

time of a demand made & a refusal or neglect to perform

to the giving of each of which instructions the defendant by his counsel then and there duly excepted

and the defendant by his counsel thereupon asked the court to give to the jury the following instructions

Defendants instructions No 2

If the jury shall believe from the evidence that the consideration paid for the defendants undertaking to procure a Quit Claim deed for ½ of Lot nine mentioned in the contract given in evidence was the Sum of five hundred & fifty dollars or any other definite Sum, and that the defendant did not act in bad faith either in making said contract or failing to perform the same, then the measure of damages for the defendants failure to procure said Quit claim Deed is said consideration money with interest at Six per cent per annum from the time the same was paid

but the court refused to give said instructions to the jury, to which ruling of the court in refusing to give said instructions the defendant by his counsel then and there duly excepted #

Defendants Instructions No 3

3d If the Jury shall believe from the evidence that the defendants did not act in bad faith in

and the defendant by his counsel thereupon asked the court to give to the jury the following instructions

[illegible]

making or failing to execute the contract declared on. and that the Plaintiff knew the situation of the title to one half part of said Sub Lot nine at the time when said Contract was made then the measure of damages for defendants failure to procure a Quit claim deed therefor will not exceed the consideration money paid for said premises by the Plaintiff with interest thereon at Six per cent per annum from the time of such payment

but the court refused to give said instructions to the jury. to which ruling of the court in refusing to give said instructions the defendant by his counsel then and there duly excepted

and the defendant by his counsel thereupon asked the court to give to the jury the following instructions.

Defendants Instructions No 4

4 If the Jury shall believe from the evidence that the defendant when he made the contract set forth in the first count of the Plaintiffs declaration acted in good faith supposing that he had bargained for and would receive a quit claim deed from A L Fuller for ½ of said Lot nine. and that the Plaintiff then knew the situation of the title to said premises and if the Jury shall further believe that Defendants failure to perform said contract was owing entirely to his inability to procure such deed then the measure of damages will not exceed the consideration money paid for said premises

with interest thereon at Six per cent per annum from the time of such payment

but the court refused to give said instructions to the jury to which ruling of the court in refusing to give said instructions the defendant by his counsel then and there duly excepted

and the defendant by his counsel thereupon asked the court to give to the jury the following instructions

Defendants Instructions No 5

5 The legal effect of the defendants undertaking mentioned in the first count of the Plaintiffs declaration is that he would procure from H L Fuller or the owner of one half of said Sub Lot Nine a Quit claim deed therefor within a reasonable time after the 17th of May 1851 the date of the making of said contract, or if the Jury shall believe from the evidence that the Defendant did not act in bad faith in making said Contract or in failing to perform the same and that the Plaintiff then knew the situation of the title to said premises, then the amount of the Plaintiffs recovery in this case should not exceed the value of said premises at the time when said contract should have been performed by the defendant according to the legal effect thereof as above stated with interest thereon to the present time at the rate of six per cent per annum

but the court refused to give said instructions

to the jury. to which ruling of the court in refusing to give said instructions the defendant by his counsel then and there duly excepted

And the defendant by his counsel thereupon asked the court to give to the jury the following instructions.

Defendants Instructions No 6

6 According to the terms of the contract set forth in the first count of the Plaintiffs declaration the deed therein refered to should have been procured within a reasonable time after the making of such contract and the defendants failure to procure said deed within such reasonable time was a breach of said contract, and the measure of damages in this case cannot exceed the value of said premises at the time of said breach with interest thereon at the rate of six per cent per annum to the present time

but the court refused to give said instructions to the jury. to which ruling of the court in refusing to give said instructions the defendant by his counsel then and there duly excepted

And the defendant by his counsel thereupon asked the court to give to the jury the following instructions

Defendants Instructions No 7

7 If the Jury shall believe from the evidence that the witness James H Rees had interviews with the defendant at the instance of the

Plaintiff in relation to the procuring of the Quit claim deed referred to in the contract given in evidence, then the statements made by the defendant to said Rees at these interviews and by him communicated to the plaintiff are to be considered by the jury as having been made by the defendant to the Plaintiff and if the jury shall believe that the defendant did not act in bad faith either in making the contract or in failing to perform the same, and that the Plaintiff in the manner above stated was informed of defendants inability to procure said Quit claim, then the measure of damages in this case will not exceed the value of the premises to be conveyed by said Deed at the time when such communication was made to the defendant with interest thereon at six per cent per annum to the present time

but the court refused to give said instructions to the jury. to which ruling of the court in refusing to give said instructions the defendant by his counsel then and there duly excepted

And the defendant by his counsel thereupon asked the court to give to the jury the following instructions

Defendants Instructions No 8

8 If the Jury shall believe that the witness James A Rees was after the making of the contract

in the Declaration mentioned accustomed to see the defendant for the purpose of procuring him to execute said contract, and to inform said plaintiff of the result of his interviews with the defendant, and that at one or more of these interviews, the defendant for the purpose of having his statement communicated to the plaintiff stated to said Rees that Tuller had refused to execute a Quit claim deed for ½ of said Lot 9 and that the plaintiff was immediately or soon thereafter informed of the fact by said Rees and if the Jury shall further believe from the evidence in this case, that the defendant did not act in bad faith in either making or failing to execute said contract, then the measure of damages in this case should not exceed the value of said premises at the time when such communication was so made to said plaintiff with interest at six per cent per annum from that time to the present

but the court refused to give said instructions to the Jury, to which ruling of the court in refusing to give said instructions the defendant by his counsel then and there duly excepted

And the defendant by his counsel thereupon asked the court to give to the Jury the following instructions

Defendants Instructions No 9

9 If the Jury shall believe from the evidence that the witness James H. Rees had interviews with

the defendant in relation to the contract mentioned in the plaintiffs declaration, and that the defendant supposed and had reason to suppose that said Rees was acting as the agent of said plaintiff, and at one of these interviews stated to said Rees that H. L. Fuller had refused to execute a Quit Claim deed for lot of said Lot 9, and that said Rees communicated said statement to said plaintiff shortly after and if the jury shall further believe from the evidence that the defendant did not act in bad faith either in making or failing to execute said contract, — then the measure of damages should not exceed the value of said premises at the time the plaintiff was informed that Fuller would not execut a Quit Claim deed for said premises with interest thereon at six per cent. to the present time but the court refused to give said instructions to the jury. to which ruling of the court in refusing to give said instructions the defendant by his counsel then and there duly excepted

And the said cause having been submitted to the Jury, the Jury after due consideration returned into court with the following verdict

We the Jury find for the Plaintiff & asses the damage Seven thousand five Hundred dollars

Benjamin R Knapp Foreman

[12524-17]

D S & Howard
James Taylor
Samuel Willard
John Pearson
R S. Hicks
Thos Fergus
P A Barker
H W Carter
S P Putnam
H B Davis
W A Ruggles

The defendant by his counsel thereupon moved for a new trial of said cause and the court, overruled said motion for a new trial to which ruling, and decision in over=ruling said motion the defendant by his counsel then and there excepted, and prayed an appeal which was granted

And for as much as the several matters hereinbefore stated do not appear in the re=cord of said cause, in order that the same may be incorporated into the record thereof the said defendant by his counsel prays that this his bill of exceptions may be signed and sealed by the Judge who tried said cause which is done during the said term of said court this day of December A D 1857

John M Wilson (Seal)

35

State of Illinois }
Cook County } S.S.

I Waller Kimball Clerk of the Cook County Court of Common Pleas within and for the County of Cook and State of Illinois do hereby certify that the above and foregoing is a full and true transcript of all the papers on file in my office, and of the proceedings had in said Court and entered of Record in the case wherein Philip Dean is plaintiff and Stephen F Gale defendant

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at the City of Chicago in said County this 29th day of March AD 1858

Waller Kimball
Clerk

State of Illinois
Supreme Court
Stephen F. Gale appellant

Philip Dean
appellee

April Term AD 1858.

Assignments to wit on
the 21 day of April
AD 1858. at this same
term of the Court before the Justices thereof
comes the said Stephen F. Gale by Hoyne Miller
Lee his Attorneys and says that in the record
and proceedings aforesaid and also in the
rendition of the judgement aforesaid there
is manifest error in this to wit: that by the
record aforesaid it appears that the judgment
aforesaid in some aforesaid was given by the said
Philip Dean against the said Stephen F. Gale
whereas by the laws of
the land the said judgment ought to
have been given for the said Stephen F
Gale against the said Philip Dean.
Also in this to wit, that on the trial
of said cause. the Court overruled the
Motion Made by defendants Counsel
to strike out, and exclude from the jury
the evidence given in behalf of the plaintiff
in said cause on the ground that
there was a variance between the
Contract as proved and the Con
tract set forth in the plaintiffs
declaration. Whereas the Court should
have sustained said Motion, and

have excluded said Evidence from the jury—

also in this to wit. That the Court on the trial of said cause gave the instruction in behalf of the plaintiff to the jury. Set forth in the record and proceedings aforesaid whereas the Court should have withheld said instruction from the jury—

also in this to wit.— That the Court on the trial of said cause refused. to give to the jury the instructions set forth in the record and proceedings aforesaid as asked by the counsel for the defendants in said cause. or to give to said jury any or either of said instructions.—

and also in this to wit, That the Court overruled defendants the motion made by said defendants Counsel for a new trial of said cause.

And the said Stephens H Grace prays

[12524-19]

that the judgment aforesaid, for the errors aforesaid and for other errors apparent in the record and proceedings aforesaid may be reversed annulled and altogether held for nothing and that he may be restored to all things which he hath lost by occasion of the said judgment &c —

Wayne Miller & Lewis
Attys for Appellants.

In nullum est erratum
Settles McAllister Jewett
& Peabody for Deft

194

Philip Dean

ats

Stephen F. Gale

Stephen F Gale

vs

Philip Dean

Transcript &

assignt of Errors

Filed April 26, 1850

L. Leland

Clk

$5.50

Fee 9.00

Supreme Court

Philip Dean
ads Appellee
Stephen F Gale
Appellant

Points for Appellee.

II

The true measure of damages, in this cause was the value of the land in question, at the time when performance was demanded and refused.

1st. Where no time is limited for the performance of acts which are transitory, such as the delivery of personal property & the payment of money &c the general rule is conceded to be, that performance is due within a reasonable time. But, "if the condition of an obligation be to do a local act to the obligee to which the concurrence of the obligor and obligee is necessary as to make a feoffment &c (no time being limited) the obligor hath time during his life to perform it, if not hastened by request"

Bothy's Case Part 6 31 b Colles Reps
Eames vs Savage Administrator 14 Mass R 428
Clay vs Hustons Administrators 1 Bibb 461

12504-21

2nd It follows that if this case, falls, within the latter class of obligations, and that Gale had during his life time "performed it" unless hastened "by request," then the breach of the contract necessarily occurred upon request and refusal.

Connelly & others vs Reiss 7 Wend R 129 & cases cited

3d The rule of damages, for non-performance of contracts for conveyance of lands, is the value of the land at the time of breach of the contract.

Buckmaster vs Grundy 1 Scam 310
2 id 344

Hill vs Hobart 16 Maine R 169

Phillpotts et al v Evans 5 Mees & Welsb R 474

Smith et al v Dunlap 12 Ills R 184

II

The cases cited by the appellant's counsel such as the 4th Denio 546 and third Clafs, can have no application to this case.

This is not a case of a party supposing himself to have a title to land and on the faith of such supposition contracting to sell & convey. But this is a contract to obtain a deed by quit claim or otherwise for one half of said Sub lot 9 of H & L Fuller, or such other party as may have the title to the half part of said Sub lot 9

Gale ~~&c~~ received his consideration and agreed to obtain a deed from Fuller who was supposed to have the title, and if he did not have it, from whomsoever did have the title.

Supreme Court
Philip Dean
vs
Stephen D. Gale
Brief

Supreme Court

Stephen H. Gale appellant ads Philip Dean. Appellee } Brief in behalf of Appellant—

The plaintiff in this action declared for the breach of the contract set forth on the first page of the printed abstract. In the first count he set forth the contract in hac verba. In the second count he declared according to its legal effects, averring that the defendants undertaking and promise was to procure a quit-claim deed from D. L. Fuller or such person as might have the title to one half of Sublot nine, within a reasonable time from the making of the contract and alleging as a breach his failure to procure said deed within such reasonable time

On the trial it appeared that the plaintiff and defendant executed at the same time another Memorandum which is set forth on the third page of the printed abstract, and inasmuch as the terms of this second memorandum were not set forth in either count of the plaintiffs declaration, or in any manner refered to, in the declaration, the defendant, after plaintiff had closed his case, moved to strike out the evidence given in behalf of the plaintiff, on the ground that there was a fatal variance between the contract as proved and the contract declared upon. The first question

[12524-23]

arising upon the record is, did the Court err in over=
ruling such motion. —

The two papers were executed at the same time, in relation to the same subject matter, they are therefore to be taken and construed together as evidencing one contract, as much so as if both had been written upon the same piece of paper, and over one signature —

It is a well established rule of pleading that when the plaintiff professes to state the very words of the instrument declared on leaving the construction of it to the Court, every word becomes matter of description for the purpose of identifying the contract, and the omission of any part or portion of the written instrument will be a fatal objection, at the trial, to its introduction in evidence under the declaration. —

The plaintiff in this case having omitted in the first count of his declaration to set forth the memorandum contained on the third page of the printed abstract, and which is as much a part of the evidence of the contract as the memorandum which he did set forth in the first count — The objection was well taken and the Court should have excluded the evidence so far as that count is concerned.

In the second count the plaintiff declares upon the contract according to its legal operation & effect - Even the instrument set forth in the first count and which was given in evidence on the trial is not admissible under the second count, for the reason that in the second count the plaintiff has misdescribed the defendants promise or undertaking -

He says in that count that the defendants promise was that he would obtain a quit-claim deed from H. L. Fuller or such other person as might have the title thereto of one half of Sub lot nine &c without designating which half the promise related to. And this promise would have been satisfied by defendants obtaining a deed of either half of the lot. Whereas the promise as proved was to obtain a deed of the character mentioned of the half part of the lot which had been formerly conveyed to H L Fuller - Designating the half of the lot for which a deed was to be obtained -

There is this further objection to the admission of the evidence - under either of the Counts in the plaintiffs declaration -

The rule is well settled that the plaintiff must state the consideration for the defendants promise accurately, and under this rule it is necessary that the whole of the consideration should be stated and if any part of an entire consideration or of a consideration consisting of several things

be omitted the plaintiff will fail at the trial on the ground of

1 Chitty pleadings 7th Am Ed 327-398.

6 East 669 - 12 East 1

The rule is different in stating defendants promise ~~Here~~ the plaintiff is only required to set forth with ~~correctness~~ that particular part of the Contract which he alleges the defendant to have broken -

1 Chitty Pleadings 398 - 8 East 7 —

The second paper to which no allusion is made in the Declaration recites that the sale of the tax Certificate was upon the condition that Hamilton the owner of the other half of the lot should have the privilege of redeeming from the tax sale made in 1840 upon which the tax certificate issued upon paying $100 within six months from the date of the Contract and the plaintiff agrees upon payment of one hundred dollars within six months either to assign the Certificate or to execute a quit claim deed for one half of this lot either to Hamilton or to his heirs -

What then was the real consideration for defendants promise for a breach of which this action is brought - Clearly the $750 together with Deans undertaking to execute this assignment or

or quit claim deed to Hamilton. Gales object was undoubtedly to secure to Hamilton the right of redeeming his propesty from this tax sale a right which he had lost by lapse of time.

Had this undertaking on the part of Dean been in fact as it was in contemplation of law incorporated into the instrument set forth in the plaintiffs declaration. it would clearly appear to constitute a part of the consideration for the defendants promise and it would appear on the face of the instrument that the defendant had made this undertaking a condition upon which he parted with the tax certificate. to the whole lot

2d The contract was made May 15th 1857 when the premises were worth $650 (See page 9 of printed abstract Testimony of J. H. Rees) The demand for the deed was made April 1857 when the premises were worth $1500 (See evidence of Dan H. Higgins & James H. Rees page 28) – And the Court instructed the Jury that the proper legal consideration Compensation & damages was the value of the land at the time the demand was made and the request of the defendant to obtain the deed – The Jury accordingly gave the plaintiff

12524-25

the $7500

Is there error in this instruction.

We insist that this is not a case where the defendant agreed to sell and convey to the plaintiff the one half of Sub lot nine but he sold the tax Certificate to the whole lot, and agreed to obtain a deed of quit claim of one half of the lot, from such party as might then have the title thereto. In other words that the subject matter of the sale was not the land but of titles to the land of the particular description named in the Contract. Had the defendant agreed to sell and convey the land then his undertaking would not have been performed without his giving a clear and unincumbered title to the land - in which case if he had acted fraudulently or in bad faith the measure of the damages for a non performance would be the value of the land at the time of the breach -

But in this case his contract would have been performed had he procured a quit claim deed from H. L. Fuller (he having the legal title) though the premises might at the time have been subject to an incumbrance by Judgment Mortgage or otherwise to an amount equal to or

even exceeding their whole value -

That part of Defendants agreement respecting the tax title was performed by the defendant by the delivery of the tax certificate and the Plaintiff the same year received a tax deed - See testimony of J. H. Rees

If it shall turn out that the tax deed conveyed a good title to the lot then a quit claim deed from the person who owned the fee at the time of the tax sale or from the grantee of such person, would not to any extent improve such title, nor would anything whatever be conveyed by such quit claim deed - The parties at the time See testimony of J. H. Rees considered the tax certificate as worth $200 — and of course the Quit claim deed as worth $350. Each less than the value of the land at that time - Had the agreement been simply to transfer the tax certificate for $200 - then the measure of damages in an action for a failure to make such transfer would be not the value of the land at the time of such failure but the consideration money with interest - for the reason that this would be an agreement to sell not the land but the tax title, upon which the parties at the time fixed a definite value - Had defendants agreement been to procure for $350 a quit claim deed, the tax title remaining out standing and considered worth at the time $200 - then for the same reason the measure of

damages for a failure to perform would have been not the value of the land at the time of such failure but the consideration money with interest - But both of these undertakings into one contract in an action for a failure to perform one, the other having been fully executed. The rule for the measure of damages must be the same - To give the plaintiff the full value of the land at the time of the breach, or even the whole amount of the consideration money named in the agreement for both undertakings would be to give him damages in respect to that part of the agreement which had been fully performed -

3d Again - The plaintiff took a tax title, in 1851 as assignee of the tax certificate - (See Rice testimony page 3 of abstract) and he has since been in the possession of the premises - and there is no evidence that any other person has made claim to the property or that the plaintiff has ever been disturbed in the enjoyment of it - The plaintiffs possession under his tax deed may ripen under the limitation acts ~~matter~~ into a perfect title even if his tax title is now imperfect for irregularities - While the plaintiff is not

visited with a loss of the land he is certainly not entitled to that which the law fixes as an equivalent for its loss - the damages in this case should therefore have been merely nominal Rawle - Covenants for title 2d Ed page 100. -

4th But even adopting the same rule for the measure of damages as should be adopted for the breach of an agreement to convey the land, & admitting that the breach took place when a demand was made for the deed in April 1857. We insist that in this case the measure of damages is not the value of the premises at the time of the breach but the consideration money with interest -

It is evident from the memorandum set forth on the 3rd page of the abstract that the plaintiff previous to the purchase had examined the records for the title to this property and had ascertained that Hamilton & Fuller then held the title to the whole lot, and he consequently knew as much about the title as the defendant did - There is no colour pretence that the defendant made any false or even unfair representations with regard to the title or his ability to

[12524-97]

procure the title. On the contrary when we introduced
the title written by H. L. Fuller to defendant & set
forth
on page 5 of the abstract for the purpose of showing
that Defendant had previously negotiated with
H. L. Fuller for the title and had reasonable
grounds for supposing that Fuller would
execute a quit claim deed of the property
thereby showing that defendant had acted
in perfect good faith towards the plaintiff in
this transaction, the plaintiffs Counsel
rendered any further proof on this point unnec-
essary by remarking that it was not pretended
that the defendant had been guilty of any
fraud or bad faith in the matter - No
further inquiry was then made into that branch
of the defendants case -

It further appears that the defendant
within six months from the time of the making
of the contract & when he found out that he
could not procure a deed from H. L. Fuller
told James H Rees who appeared to be the
agent for plaintiff in procuring this deed that
Fuller had refused to convey and Rees thereupon
immediately communicated this fact to the plt'f

This case is therefore clearly within the Case
of Flureau vs Thornhill 2 W. Blackstone 1078. Where
the Court say upon a Contract for the purchase of
land
real if the title proves bad and the vendor is

without fraud incapable of making a good title the purchaser cannot be entitled to any damages for the fancied goodness of the bargain which he supposes he has lost. the above case is followed in England. See Walker vs. Moore 10. Barn & Cres 416. Worthington vs Worthington 8. B. C. 134—

The Court proceeding upon the ground that in all contracts for the purchase of land the parties must be considered as having contemplated and contracted with reference to the difficulties attendant upon the Conveyance — and when the seller has acted fairly and has not been guilty of fraud or collision the just & legal measure of damages is the consideration money with interest. Parsons in his note. 2 Parsons on Con. page 504 says this Rule appears to be established in England and generally prevails in this Country.

The Court in 2 Ellend 399 treat the Covenant to convey a title so far as the damages for a breach is concerned as analogous to a Covenant of title in a Conveyance already executed. and for a breach of the latter Covenant. when the grantee has lost the land. it is well settled outside of New England that the measure of damages is the consideration money with interest. And the Court say that in a case

where the vendee has acted in good faith the same reasons which are urged in favor of this rule of damages in the case of a breach of the latter Covenant apply with equal force the case of a breach of the former.

The same rule is adopted in the case of Peters v. McKeon 4 Denio 546 and the same reasons for the rule given. The rule applies to cases where the defendant has acted in good faith & has been prevented from executing his agreement by causes over which he had no control - The same rule is adopted in the following cases

Thompson v. Guthrie 7 Leigh 101

Combs v. Tatton 2 Dana 464

Allen vs Anderson 2 Bibb 415.

Stewart vs Noble 1 Green (Iowa) 26

Bitner vs. Brough 11 Penn State Rep (Bories) 127. ~~Sharp 7 this 11~~

1 Sugden Vendors 425. Chitty on Con 7 Am Ed. 812.

The case of Bitner vs Brought 11 Penn 128. is a very strong case on this point - This was an action on a Covenant to convey premises clear of incumbrances The wife of the covenantor refused to relinquish her dower and Covenantor professed to be unable to procure his wife to join him in the execution of the deed the Court say "On the head of damages

arising from the loss of the bargain the distinction is whether the vendor acts with good or bad faith.

When the vendor of an estate without fraud on his part is incompetent to make a title the purchaser is not entitled to recover damages for the loss of his bargain beyond the money paid with interest and expenses: although it appears that a considerable profit might have been derived by him from the completion of the purchase. This is a reasonable principle laid down in all the text books and is abundantly supported by authority. But the rule only holds good when the vendor acts with good faith. When he is guilty of collusion or artifice or fraud to escape from the effects of a bad bargain it is otherwise. In that case the vendee is entitled not only to compensatory damages but to damages arising from the loss of the bargain or the money he might have derived from the completion of the contract. Thus if the refusal of the wife to execute the deed is a mere pretext the result of collusion at the instigation of the husband to rid himself of an improvident contract the price having risen in the intermediate time between the making the agreement and its completion he must account for the difference in value -

Justice and good policy require this to be the rule for otherwise the advantage would be entirely

on the side of the vendor who would be often under great temptation to violate his contract when the difference in price was so great as to excite his cupidety, a party must not be allowed to gain by the violation of his aguement — The difference is a plain and palpable one consists in the bona fides or mala fides of the transaction from whatever cause the refusal to comply may proceed It is that which determines the question whether the vendee can recover for the loss of his bargain —

The Supreme Court of the United States in 6 Wheaton 118 Say the measure of damages in an action by the vendee against the vendor for a breach of a covenant to convey is the value of the land at the time of the breach — Otherwise the Court say if the land had risen in value the vendor would always have it in his power to discharge himself from his contract & put the enhanced value into his own pocket —

This rule if the reason goes along with it is clearly within the Cases above cited, For it is clearly a fraud on the part of the vendor to withhold the thing sold for the purpose of putting its enhanced value into his own pocket. by doing so he acts in bad faith — and should be compelled to deliver the property

or give its value - And it will be observed in that
case that it was not pretended that the deft
had acted in good faith - and that he failed
to perform his contract because of a defect in
his title unknown to him at the time or that
he was in fact unable to give a deed in
pursuance of his contract -

The same may be said in regard to the
cases in 1 Scam. 410 & in 2 Scammon 344
It did not appear in either of these cases
but what the defendant was able to convey
in pursuance of his contract had he been
willing to do. The question of good faith on
the part of the defendant was not made in
either of these cases, nor is the Court concluded
from considering this question by anything
then decided

5th But if it shall be decided in this case that
the value of the land at the time of the breach
is the measure of damages
when was the breach committed -

In this case no time was fixed
within which the quit claim deed was to
be procured and in cases where the contract
specifies no time, the law implies that it
shall be performed within a reasonable time
and will not permit this implication to be

rebutted by extrinsic testimony going to fix a definite term because this varies the contract.

Lawson vs Rhodes 8 Scott 544
Atwood vs Cobb 16 Pick 227
Roberts vs Beatty 2 Penn 63
Cocker vs Franklin Mar. Co. 3 Sumner 580
Atkinson vs Brown 20 Maine 67

In the case 8 Scott cited above Tindall Chief Justice said "There does not appear on the face of the declaration to have been any express stipulation that the vendor should deduce a good title by any specific time and if no express time was stipulated the law will in this as in every other case imply that a reasonable time was intended" and inasmuch as it was not alleged in the declaration that a reasonable time for the performance of the Contract had elapsed a demurrer to the declaration was sustained -

And in this case had the plaintiff declared upon the contract according to its legal effect the declaration would have been demurrable had he not stated that the defendants promise was to procure a quit claim deed within a reasonable time after the making of the contract & that such reasonable time had then elapsed

And the reasonableness of the time is a question for the Jury - 12 B. 395.
2 Saunders Plead & Evidence 1205 -

The breach was committed then at the expiration of such reasonable time, and if the value of the premises at the time of the breach is to be considered as the measure of damages - then their value should have been estimated at the expiration of such time as the Jury under the circumstances might deem reasonable for the defendant to have within which to perform his undertaking - and not in April 1857 six years after the contract was made -

It may be said that the position that the law presumes that the parties intended a reasonable time, when no time is fixed in the contract, only relates to cases when the subject matter of the contract is personal property. It can be replied that it relates to all contracts as many of the cases cited above (were) actions upon agreements for the sale of real estate - and we do not think that any such distinction can be established.
8 Scott 544. 16 Pick 227.
15 Maine. — 350

[illegible]

To hold that on such an agreement as this the defendant when he has acted in good faith must for a breach of his agreement ~~to~~ respond in damages for the value of the premises at the time when a demand is made for the deed, this giving the purchaser the right to defer such demand until the premises had reached their highest value, would be most unjust and oppressive and such a position could be resisted by every argument ~~urged~~ urged by Chancellor Kent in the case of 3 Caines Rep. 111-113 upon the subject of the rule as to the measurement of damages in an action for a breach of covenant of Warranty in a deed. The parties at the time never could have contemplated such a consequence.

16 lie

The evidence shows that the defendt. told J. H. Rees within six months from the time of the making of the ~~contract~~ that he could not procure a deed from Fuller that Fuller had refused to give a deed. ~~and Rees~~ and Rees immediately after communicated this fact to plaintiff. defendant said ~~that~~ This upon Rees application for a deed in behalf of Fuller. Rees with Pltfs knowledge and

~~aquaintance~~ acquiescence was accustomed to see defendant frequently, for the purpose of procuring a deed for plaintiff and to inform the plaintiff of the result of these interviews. It is true that Rees says that he had no authority from Dean to act in the matter, but we had a right to insist before the ~~[redacted]~~ Jury that the plaintiff knowing that Mr Rees was endeavoring to procure a deed and communicating with him upon the subject of the result of his interviews with defendant recognized him as his agent in the transaction —

And that the defendants statement to Mr. Rees that he could not procure a deed communicated to the defendant was the same in effect as if made to the plaintiff The measure of damages then could not exceed the value of the premises at the time when the defendant informed the plaintiff that he could not procure a deed from Fuller and that Fuller had refused to give a deed — The Court therefore erred in refusing defendants 6th 7th & 8th instruction

After the defendant had informed the plff that he could not perform his Contract, a

[12504-22]

right of action accrued at once and the plaintiff was not bound to demand a deed but could immediately bring his action for a breach of the agreement. He could ~~have~~ have taken the defendant at his word and the defendant could not have objected at the trial that no deed had been demanded of him –

It has been held that when the defendant informs the plaintiff even before the time for performing the contract expires that he cannot execute the agreement on his part the pltff may bring his action at once without waiting until the period for performing the contract had arrived and is at once excused from any further performance on his part

20 Eng. Law & Equity Reps 157 –

6 " " " 230 –

It is also held in numerous cases that when the defendant has disabled himself from performing his agreement as by conveying the property to a third party no demand for a deed is necessary to entitle the plaintiff to bring his suit & certainly a statement made by him to the plaintiff or to a party representing the plaintiff that he could not execute his agreement would entitle the plaintiff to bring his suit at once – It is virtually a refusal to execute

his agreement. The plaintiffs right of action then for the breach complained of accrued within six months from the time of the making of the agreement and if the value of the premises is to be taken as the rule of damages their value at that time should have been the rule of measure of damages. And the instruction was improperly refused.

See below XX

It is said in Bothleys case 3 Coke Rep that when the act to be done must be performed at a particular place and requires the concurrence of the obligee as in the case of a bond to enfeoff then the obligor has the whole of his life time in which to do the act unless hastened by request. But the act to be done in this case was transitory, it could have have been done wherever the plaintiff might have been found. — 1 Bibb 461.

Hoge & Miller & Lewis
for Appellants

— See over —

As one of the tests of determining the time when a breach occurred - it may be asked when did the Plffs right of action accrue?

In general it may be said that it is a rule in Court of Equity (who are more liberal than law Courts) that the cause of action or suit arises when and as soon as the party has a right to apply to the proper tribunals for relief

Angell on Limitations 41.

2 Pick 490 — Page 41

We had a right to insist under the evidence that the right to action had accrued, whenever we informed the Dean of the Rly, that we could not execute the Contract - this was a fact proper to be submitted to the Jury with a view to determining the sum of damages we should pay — as well as the time when the breach occurred

"An action (says Wilde Justice in 2 Pick 490.) accrues to a party whenever he has a right to commence it." (2 Pick 490)

Again it is said a demand in must be made within a reasonable time otherwise the claim is considered stale and generally a reasonable time under

which a demand is to be made must be within the time limited for bringing an action -

Codman v. Rogers

10 Pickg - 119

In accordy to this case, if Dean had laid by for a time over the period of 5 years - within any demand he would have been barred altogether - and the statute of limitations could have been pleaded in bar - in this case - And the demand pretended to have been made may in fact made after the lapse of 5 years from the date of the Contract - (see attached)

But we insist his right of action accrued before, when he was first informed of defts insolvency & his intention to refuse a performance and that the breach must have accrued at that time.

20 Law & Eq Rep 157.

6 do. 230.

also cases cited in them -

Mede Justice in 4 Rick 490. already cited. says - "an action accrues to a party whenever he has a right to commence it - and from that time the statute begins

S12524-34

to operate".

~~Had the Dean taken over 5 years~~

~~By the construction of defts in error they never could have been barred by the statute, and they might have~~

If the construction of defts in error be correct, they never could have been barred if they never had made any demand

Hoyne Miller Lewis
for Plffs in Error

174 = 83

Supreme Court

Stephen F. Gale
ads
Philip. Dean

Arguments for Appellants.

Filed May 6 1858
L. Leland Clk

Hoyne Miller Lewis

Stephen F. Gale
v.
Phillip Dean } Appeal from Bast.

In reply to the plaintiff's argument by Boyne, Miller & Lewis, I deem it unnecessary to notice at length the points in relation to the exclusion of evidence, and special pleading.

The party declared upon the written agreement, substantially and correctly.

The other part of the agreement has nothing to do with that declared on, in respect to the rights of these parties, nor as to their liabilities as declared for.

The Court will see very satisfactorily by an examination of the authorities that defendant is rectus in curia & has not been guilty of a misdescription of the instrument declared on, nor of a fatal variance.

I do not deny that the second instrument will be construed together with that sued on, and the meaning, rights and obligations of the parties ascertained by considering the two together.

S) 2534-38

But it forms no part of the description of the instrument sued on, when & where its terms & conditions to not alter, vary, or change, the sense, intent or meaning of the part declared on Such is the case here. The suit is for breach of the Contract in not purchasing title of D. L. Tuller The second instrument has no relation to this part of the agreement The first is a Special Count on the agreement. The second a Special Count on its terms and effect

The declaration is therefore suppficient to admit this agreement in evidence The Court will not favor a technical point, which would tend to defeat — which would prevent rather than promote the investigation and decision upon the merits

I turn from these technical positions to the real questions in the case.

* Atwood v Cobb 16 Pick R 231 Bow v Huntington 15 Maine R 350 Allmon-ad'r v Brown 20 Maine R 67.

There are two — first as to the time of the breach — and second the true measure of the damages.

First as to the time of breach.

Where no time of performance is fixed in an executory contract the law raises an implication that it shall be done within a reasonable time. This I admit to be the general rule — and that it is a question of law for the court — after ascertaining the special facts and circumstances surrounding the parties & transaction, if any, what that reasonable time is. 6 Coke Rep p 31. 1 Bibb R 462*

This general rule, however, has its exceptions

These exceptions are so succinctly and plainly laid down in Bothy's case 6 Coke Rep p 31. and Clay v Huston's admrs 1 Bibb R 462. that I need only extract them

Where the condition to be performed is transitory, & no time is limited, although

a place be expressed, the condition ought to be performed in a reasonable time. Exceptions:

1st In local acts, where the Concurrence of the Obligor & Obligee is requisite the Obligor shall have during his life, if not hastened by request —

2nd Where the concurrence of a Stranger, is requisite, and not of the Obligee — he shall do the act within a reasonable time

3rd But if the concurrence of a Stranger & the Obligee be necessary — the Obligee ought to hasten the act by request — else he shall have his lifetime

4th Where the act to be done by the Obligor does not concern or benefit the Obligee — and is to be done by the Sole act of the Obligor — he has his lifetime, unless hastened by request

5 So it is where a Stranger is to do the act, which in no manner concerns the Obligor or Obligee

6 But where the Obligee is a party
to whom, or with whose Concur-
rence the act is to be done-
then, whether the act be, to be
done, by the Obligor or a Stranger,
to the Obligee, the Obligor shall
have during his life, unless
hastened by request
7 to where the act to be done, is
by a Stranger, and does not con-
cern Obligor or Obligee, or any
other person — then he shall
have his life time, ~~unless hastened~~ to do it
~~by request~~ absolutely

Now the act to be done here
was to be done by Fuller
by Conveyance to Dean by
quit-claim — and was to be
procured by Gale

The act, though to be done by
a Stranger, Concerned the
Obligee Dean, and was to
be done to him, & with his con-
currence. He must accept
a delivery of the deed, by lien
of the Common law theory

[12524-gv]

The facts, therefore, bring the case expressly within the 6th exception above noted — giving Gale his life-time to perform his agreement unless hastened by request

The breach in this case occurred upon Deans request to convey.

Judge Drummond holds that in such case, an offer on the trial to accept a conveyance, will entitle the plaintiff to prove the value of the property on the day of trial — ~~the time of breach~~

Second. as to the true rule of damages

In Some of the States, the rule of damages on breach of Covenants of Warranty, is the value of the land at the time of eviction

2 Parson on Cont 502 note h & authorities

But I think the rule to be the purchase money with interest
This rule is laid down in those Cases where the existence of incumbrances at the making of the Covenant, show a breach of the Covenant as soon as entered into — although Suit may not be brought for a long time after. Indeed if Suit be brought before eviction — the damages in many Cases would be nominal because, eviction might never take place under the adverse title
But the reason of the rule, is immaterial here. I hold it to be sufficient that the analogy between such an executed Covenant and an executory Covenant to convey, is very far fetched and slight — and not sufficient to support the reason given for its application to executory Contracts

The leading Case, and indeed the only one vouched by all the subsequent Cases, for the purchase money

and interest as the measure of damages for breach of an executory Contract for Conveyance of land, made in good faith & without fraud in the vendor, in the breach, is the case of Flureau v Thornhill 2 W. Blackstone R 1078.

It was placed by the pleaders upon the analogy to a breach of covenant

This decision was in violation of the principles of the Common Law, which gave full and adequate Compensation in damages for breaches of Contract — measuring that Compensation by the value of the thing sold, at the time fixed upon by the parties for its delivery Robinson v Harman 1 Exch R 854

This is in accordance with, and strict analogy to the measure adopted in breaches of Covenant of warranty For there the value fixed at the time of Conveyance or delivery of possession

of Chattels, with interest, is adopted as the true value fixed by the parties themselves. So in executory contracts by analogy the value at the time fixed for such Consummation by conveyance, or delivery, would approach more nearly to the true intent of the parties

But without Combatting the supposed analogy – I may admit that the rule laid down in Flureau v Thornhill has been followed to some extent in England and in New York. Virginia. Pennsylvania, Iowa & Kentucky – and probably some other States

Walker v Moore 10 Barnw & Cress 416
Baldwin v Munn 2 Wend 407
Peters v McKeon 4 Denio 546
Thompson's Exrs v Guthrie's admr 7 Leigh 106
Stewart v Noble 1 Green Iowa 31
Bitner v Brough 11 Pa State 139
Combs v Jarboe's admr 2 Dana 467
Allen v Anderson 2 Bibb 416

There are many others to like effect

Now the English Courts in Robinson
v Harman say that the rule laid
down in Flureau v Thornhill qualified
the rule of the Common law – and
the Court took a distinction in the
case, and sanctioned a full meas-
ure of damages – and the rule laid
down in Hopkins v Grazebrook
6 Barn & Cress 31. in which the
full value of the premises at the time
of the breach was given, on the
ground of a distinction, which
was that the vendor had sold
the estate before he had pro-
cured a conveyance from his
own vendor. Thus selling the
land before he had acquired a
conveyance, though he had bought
the title – was deemed fault or
bad faith enough to distinguish
the case from Flureau v Thornhill
Hopkins v Grazebrook 13 Eng C. L R 100

And I understand the Supreme
Court of N. York in the later case of
Fletcher v Button 6 Wend S. C
R 650. &c. to approve this distinction

So again in Nurse v Bams 1 Rayms R 77 sanctions a full measure of damages for breach of an agreement to Lease

The courts in N. York have not extended the analogy to any other circumstances, than an innocent inability of the vendor to make a good title. & having title, or claim & color of title at the time of Sale

Thus in Burbigame v Burbigame 1 Con R 92, where an infant rendered certain Services upon a parol agreement to give him a certain tract of land the infant was allowed to recover as the measure of the damages for breach in not conveying the land, its value at the time it should have been conveyed according to the agreement, although the agreement itself was void under the Statute of frauds.

L 12524-40

Again in 1839 in Blanchard v
Ely 21 Wend 342 — the Court recog-
nise the true principle of the Com-
mon as giving a full measure
of damages; — the worth of the ar-
ticle at the time that it ought
to have been delivered as laid down in
the Case of Robinson v Hanman
above. This the Court recognises
as the rule of the Civil Law, and
which the Common Law follows
See 1 Pothier on Obg 161 Where
the Common Law rule is fully laid
down, and this instance given
If A sells B a horse to be delivered
at a particular time, and fails
to do so — and horses have risen
in the mean time — A shall be
compelled to pay so much dam-
ages for his breach of contract
as will enable B. to purchase
another horse like the one to
have been delivered
In 1842 the Court again approve
of the rule laid down in
Berlingame v Berlingame — and
so again held in King v Brown

2 Dile 485 that a parol agreement to convey a certain piece of land for stipulated labour to be performed, will entitle the purchaser to recover the value of the land as the measure of his compensation for the labour — though the parol contract may be void as to the land

So far have the English and New York Courts, distinguished by exceptions to the general rule laid down in Fleeman v Thornhile

The Courts in Kentucky has done the same as well as in Pennsylvania

Thus in McConnell's heirs v Dunlap's devisees Hardin R 42 The full value of the land on the day it should have been conveyed, was given — and upon the sole distinction, that the vendor had previously parted with a part of the title, before his sale to the vendee in that case

[12 SH-41]

In Rhor v Kindt — 3 Watts & Serg 563
the court allowed the circumstances
to be sufficient to mitigate the
damages from the value at the
time of the intended conveyance
to the purchase money with in-
terest. I do not think the dis-
tinction here taken a sound one.
The circumstances were that the
title was as well known to the
vendee as to the vendor — who
was not in any fault — but of-
fered to convey what title she
had at the time — giving no-
tice of her inability to make
a perfect title. The court seem
to put the decision upon the
intention of the parties as gathered
from the instrument. In that
point of view the decision
is doubtless correct, and con-
sistent with general authority
Afterwards in Jack v McKee
9 Penn Stat 241. that case is
defended upon the authority
of Burlingame v Burlingame,
& Bopkins v Lee 6 Wheat R 118

and as I understand Justice Rogers who delivered both opinions - with approbation of the rule as laid down in the two latter cases For they are cited & appealed to as sustaining his former decision in Rhor v Kindt, which appears to have been questioned at the argument in Jones v McKee

This is again deliberately approved and the doctrine of Burlingame v Burlingame as to the measure of damages for breach of Contract to convey a certain tract of land for certain Services - is again laid down as the true rule in Bash v Bash 9 Pa State 262 by Ch. J. Gibson

Again in Kentucky in Handley v Chambers - a fraudulent refusal to Convey formed an exception - and the full Value of the land was given

1 Littell R 358.

[1854-42]

Thus the force of the rule as a general rule has been distinguished away by exceptions - and questioned and weakened in authority, until it is manifest that it is adhered to as a precedent against the manifest inclination of the Courts, as against the true reason and analogies of the law distinguishing executed and executory Contracts - and giving just and adequate Compensation in damages for breach of the latter

It may truly be said that instead of forming any longer the general Rule, it has come to form the exception even in ~~the~~ England & such of the States as followed the case of Flureau v Thornhill

But the authority of the rule as a rule is destroyed by the decisions directly to the Contrary in the States of Georgia. North Carolina Alabama. Maryland, Maine

Vermont. Illinois – and the Supreme Court of the United States

In Hopkins v Lee above cited the Supreme court lay down the broad rule in relation to Sales of personal property, is laid down that the measure of damages is the value of the article at the time and place of delivery. And the Court proceed to say; "Nor can it make any difference in principle, whether the contract be for the Sale of real or personal property – if the lands as the case is here, have not been improved or built on

In both cases the vendee is entitled to have the thing agreed for, at the Contract price, and to sell it himself at the increased ~~price~~ value. If it be withheld the Vendor ought to make good to him the difference"

$12524-43

In Buckmaster v Grundy 1 Scam R 312: 3. and McFarland et al v Lewis et al 2 Scam R 344 this Court have fully sanctioned and adopted the rule as laid down in Hopkins v Lee.

This rule is adopted in Cannell v McClean 6. Harris & John R 300 and reaffirmed in Clarke v Delmeau 1 Gill & John 442.

The rule was laid down in Pinkston v Hite 9 Ala R 252. and again, upon a review of the cases to some extent, reaffirmed in Whiteside v Jennings 19 Ala R 790.

Bryant v Hambrick 9 Ga R 134 adopts the same rule — and so does Nichols v Freeman 11 Iredell R 104

Again in Hiles v Hobart 16 Maine R 169 and Warren v Wheeler

2 Maine 491. the rule is adopted and reaffirmed

Boardman Admr v Keeler 21 Vermt R 84 is rested upon the same principle.

In McKee v Brandon 2 Scam 339. the court reaffirm the rule

I might add other authorities to the list — but forbear, thinking upon principle, & ~~I have~~ upon weight of authority, the rule is correctly laid down and acted on here for the last 22 years — and ought now to be disturbed

But we may not rely upon the principle, well settled as it must be considered in this State. For this case falls within the well settled exceptions, taken to the rule even in those States where it is adopted in England

[12534-44]

So that where the proposed vendor is in fault - and either did know, or should have known, that he could not do what he undertook to do, the full value is given

2 Pars Cont 503.4. and authorities heretofore cited

"And this has been extended to cases where the vendor acted in good faith, but knew that he had, at the time, no title; as where the vendor offered for sale at ~~auction~~ public auction, land which he had contracted with a third person to buy from him, and failed to buy, only on account of the inability of that third person to make a conveyance to him"

2 Pars on Cont 504.5

Hopkins v Grazebrook 6 Barnw & Cress 31
Robinson v Harman 1 Exch R 850

How much stronger is the case at bar. The plaintiff had no other title than the tax certificate,

and did not pretend to have
Notoriously & avowedly he purchased
to sell and did sell D. L. Fuller's
title in fee to this Land. to be
procured by purchase by plaintiff
& & conveyed by Fuller to dept

There can be no sort of pretence
of innocency here in the sense
used in Flureau v Thornhill
and that class of authorities
And yet without imputing any
other bad faith or fraud, than that
of selling his another man's
title — we say that he must
answer for the value of the
land at the time of breach.

There is no innocent inability
for want of a good, or by reason
of a defective title — but he
had no title at all — and
did not pretend to have any
other than the tax certificate
We did not buy his title
— but we bought Fuller's
title & his

L12534-45

If having contracted with the supposed owner for the title in good faith, the vendee, unable to obtain a good title, because of the vendor's innocent inability to convey one — is guilty of fault or fraud in selling such land before completion of his own by conveyance from his vendor:- How much stronger is this case where Gale sold Dean, Fuller's title before he had contracted for it himself.

That case (6 B & C. 31. 1 Exch 650) was held to be exception to the rule where it was adopted — How much more shall this case form an exception in ~~a state~~ this State, where the opposite rule has been three times deliberately & solemnly ruled

If under all these facts & decisions, Counsel are unable to give, or clients to rely upon advice that settles the law

of a particular case — the bar can hardly indulge in a shrewd guess upon which reliance can be placed.

We have, upon deliberate examination of the question advised Mr Dean that both upon principle and authority he was entitled to recover the value of this land at the time of his demand for a deed in 1857. — and this was done under a conscientious conviction that the rule had already been adopted here in three decisions — and was supported by the weight of authority — and that these particular circumstances took this case out of the opposite rule at all events

Thus fortified we confidently rely upon an affirmance of this judgement — for we cannot indulge a moment's fear that the technical gues-

[12524-46]

tions of pleadings — or the agency of Reece can possibly be made to bear upon, or prejudice defendants rights

Walter B. Scates
Of Counsel for Deft

194-83

S. F. Gale

v.

P. Dean

Def'ts Replication

Scates

194

12524

1858