

No. 12439

Supreme Court of Illinois

Bishop

vs.

Newton, et al

71641  7

United States of America
State of Illinois, Set 80

Place before the Honorable
Isaac S. Wilson Judge of the Thirtieth
Judicial circuit and presiding Judge
of Kaw County Circuit Court, in the
State of Illinois at a Term of said
court began and held at the Court
House in Geneva in said county on the ninth
day of February in the year of our Lord one
thousand eight hundred and fifty seven.

Present,	The Hon Isaac S. Wilson	Judge
"	Edward C. Doherty	State Attorney
"	George C. Connor	Sheriff

Attest,
Paul R. Wright, clerk.

Be it remembered that whereas here-
before to wit: on the 17th day of July AD 1856
a "Bill" was filed with the clerk of said
court, which was in the words and figures
following, to wit:—

Circuit Court of Kaw County.

Aug, Term 1856

To the Honorable Isaac S. Wilson Judge

of the 13th Judicial Circuit, Illinois.

Complaining Showeth unto your honor your orator William W. Bishop of the county of Kane and State of Illinois, that on the 29th day of September AD 1855 your orator entered into an agreement in writing with one Levi Newton for the purchase of the lands mentioned therein, and which said agreement is in the words and figures substantially as follows to wit:—

Know all men by these presents that Levi Newton of the county of Kane and State of Illinois, am held and firmly bound unto William W. Bishop of the County of Worcester and State of Massachusetts party of the second part in the penal sum of Eighteen thousand dollars, to be paid unto the said party of the second part his heirs, executors, and administrators, and assigns to which payment well and truly to be made I bind myself, my heirs, executors and administrators, and every of them, firmly by these presents. Sealed with my seal this 29th day of September AD one thousand eight hundred and fifty five.

The condition of the above obligation is such that whereas the above bounden Levi Newton has this sold to the said party of the

second part his heirs and assigns for the sum of Twelve thousand dollars, payable as follows — One thousand down and Two thousand on the first day of January A.D. 1856 and the other Nine thousand to be paid to one Leonidas Doty, according to a mortgage made on the 14 day of October 1854, which he is to assume and pay, except the interest on the said mortgage for the year 1855 — and to be made on the second payment being made subject to said mortgage. All his right, title and interest in the following described lot or parcel of land to wit: — The land conveyed to said Levi Newton by and from Leonidas Doty & wife on 14 day of October 1854 and acknowledged the four — day of December A.D. 1854, the description of lands which is fully set out in said deed and which said description is made by agreement a part of this bond. It is also agreed that said Newton is to get it surveyed within one year and is not to cut or sell any standing timber on the said land, and has only the right to take firewood for one fire from that which is down, also then give possession of the premises fully.

It is also agreed that if said Bishop fails to make payment within fifteen days

after the first day of January 1856 he forfeits
what he has paid and all rights under this
Bond. Upon the payment of said sum
being made at the time and in the manner
aforesaid, the said Levi Newton his heirs,
executors and assigns covenant and agree
to and with the said party of the second part
his heirs, executors, administrators and assigns
to execute a good and sufficient deed of
conveyance in fee simple free from all
incumbrance, with full and proper covenants
of warranty, for the above described premises
except said mortgage above mentioned.

Now upon payment being made as aforesaid,
if the said Levi Newton shall well and truly
keep observe and perform the said covenants
and agreements herein contained on his part
then this obligation to be void otherwise to
remain in full force and virtue.

Signed sealed and delivered } Levi Newton
in Presence of ——— S. William H. Bishop

Which said Bond was duly recorded in the
office of the Recorder of Kaw County on the
29th day of September 1855 in Book 39
Page 554. — And your orator further
Sheweth unto your Honor that at the time the
above bond was executed, to wit on the 29th day

of September A.D. 1855 your orator paid to the said Levi Newton the sum of one thousand dollars, being the amount mentioned in said Bond as payable at that time.

And your orator immediately took possession of said premises, which are particularly described in the Schedule hereto annexed marked "A" and which your orator prays may be taken and allowed as part of this bill of complaint.

And your orator further sheweth unto your honor that soon after second payment became due, and before the fifteenth day of January, A.D. 1856 he had a conversation with said Levi Newton about the payment of the said One thousand dollars, in which your orator expressed to said Newton his fears that he might not be able to make the payment by the 15th of January 1856 as specified in said agreement, as your orator had not received his funds from the East as he had expected - but that if said Newton required the payment by that time he would borrow the necessary amount and pay him. - That Newton replied, 'a few days will make no difference, but I would like to have the money as soon it will be convenient for you to pay me.'

That relying upon the above statement your orator made no further effort to obtain the required amount— That on or about the 5 day of Feby^{a.d.} 1856, being two to three weeks after the time mentioned in the said agreement when the sum of Two thousand dollars was to have been paid, your orator again called on the said Newton and informed him that he was then ready to make the payment and receive his deed according to the terms of said agreement— That said Newton then informed your orator that he had sold said premises— And your orator further sheweth unto your honor that that the said Levi Newton refused to accept the said sum of Two thousand dollars, and also refused to execute to your orator a deed to said premises in pursuance of the terms of said agreement.

And your orator further sheweth that the said Levi Newton did on the fifth day of February 1856 execute and deliver a deed of conveyance of that date to William A. Goudy and Franklin J. Goudy conveying to them in fee simple the lands mentioned in the agreement between the said Newton and your orator, for the sum of Twelve thousand seven hundred and fifty dollars

a copy of which deed is hereto attached
marked "A" and which your orator prays
may be taken as a part of this his bill of
complaint. — And your orator further
sheweth unto your honor that as soon as
the above mentioned conveyance from
Newton to the Goudys was executed, the
said Goudys by the advice of said Newton,
clandestinely and in the night time,
took possession of said premises during
the temporary absence of your orator — and
still hold possession thereof. That said
Newton absolutely refused to convey said
lands to your orator or refund to him the
sum of one thousand dollars which had
been paid by your orator on said contract
or agreement.

And your orator further sheweth that he
was in the village of Batavia where said
Newton resided from the 15th day of January
1856 up to the time said Newton sold said
premises to the Messrs Goudy which fact was
known to said Newton — That said sale
to the said Messrs Goudy, was purposely and
intentionally concealed by said Newton from
your orator until the sale was consummated
for the express purpose of defrauding your
orator out of the sum of one thousand dollars.

which he had paid on said agreement.

And your orator further sheweth unto your Honor that by the terms of said agreement the said Newton was to pay the interest for the year 1855, on the mortgage mentioned in said agreement, to the said Secordas Doty, which said interest amounted to the sum of one thousand dollars and was due and payable on the first day of January 1856 - That said Newton did not pay said interest as by the terms of said agreement he was bound to do and should have done - That the said sum of one thousand dollars interest, as aforesaid was a lien on said premises by virtue of said Mortgage to ^{the} Doty. - That said Newton did not pay said interest or any part thereof until after the sale of said lands to the Mps Gundy as aforesaid.

And your orator further sheweth unto your ~~orator~~ Honor that he hath repeatedly demanded of the said Levi Newton a deed of said premises - and offered to make payment according to the terms of said agreement - and upon his refusal to make said deed, your orator has demanded a return of the said sum of one thousand dollars - and your orator had well hoped that the said Levi Newton would have

complied therewith, as in equity and good conscience he ought to have done.

But now so it is may, it please your honor the said Levi Newton combining and confederating with the said William A. Goudy and Franklin J. Goudy how to injure and oppress your orator - the said Levi Newton does absolutely refuse to convey said premises to your orator or refund the said sum of one thousand dollars paid by your orator on said agreement - all which acts and doings of the said Newton are contrary to equity and good conscience, and tend to the manifest, wrong injury and oppression of your orator. -

In tender consideration whereof, and for as much as your orator is remediless at and by the strict rules of the common law and can only obtain relief in a court of Equity where matters of this nature are properly cognizable and relievable -

To the end therefore that the said Levi Newton, William A. Goudy and Franklin J. Goudy ^{may} respectively full, true and perfect answers make according to the best of their understanding, information and belief, to all and singular the matters and charges aforesaid, (Your orator hereby waiving

pursuant to the statute the necessity of the answer of such defendants being put in under the oath of the said defendant or the oath of either of them) and that as fully and particularly in every respect as if the same were here again repeated and they thereto particularly interrogated, and more especially that they may respectively set forth and discover according to the best of their knowledge, remembrance, information and belief. Whether your orator and the said Levi Newton did not execute an agreement or bond for a deed a copy of which is substantially set forth in this bill. And whether said bond or agreement was not recorded as set forth in this bill, or how otherwise. And whether at the time said Bond was executed, or at some other and what time your orator did not pay to said Levi Newton one Thousand dollars on said agreement, or some other and what sum of money.³

And whether your orator did not take possession of the premises mentioned in said agreement.

And whether the lands and premises mentioned and described in the Schedule hereto attached marked "A" are the same lands and premises referred to in said

agreement, if not, what other lands were mentioned and referred to in said agreement - describe them particularly.

And whether your orator did not have a conversation with said Levi Newton in regard to the second payment mentioned in said agreement a few days before or after the same became due in which ^{conversation} ~~communication~~ the said Newton said a few days delay would make no difference - and whether your orator did not say to said Newton in said conversation that if he must have the money by the 15th day of January 1856 that your orator would borrow the necessary amount - and whether said Newton did not reply that a few days delay would make no difference - and if not - state fully what conversation was had between your orator and said Newton on that subject.

And whether your orator did not on or about the fifth day of February 1856, or at some other and what time call on the said Newton and inform him that your orator was then ready to make payment of the sum of Two thousand dollars.

And whether the said Newton did not then or at some other, and at what time, tell your orator he had sold said land.

And whether ^{the} said Newton did not refuse to accept said sum of One thousand dollars and make a conveyance of said land to your orator. — And whether the said Newton did not on the 5th day of February or some other and what day, execute and deliver to William W. Goudy and Franklin J. Goudy a deed conveying the lands mentioned in said agreement or some other and what lands, for the sum of Twelve thousand Seven hundred and fifty dollars or some other and what sum. And whether the Schedule hereto attached marked "A" is not a true copy of said deed. And whether said Goudy did not, by the advice of said Newton, clandestinely and in the night time take possession of said premises during the temporary absence of your orator, and whether they do not still hold possession thereof.

And whether said Newton does not refuse to convey the lands mentioned in said agreement to your orator. —

And whether the said Newton does not refuse to refund to your orator the said sum of one thousand dollars paid on said agreement. — And whether your orator was not in the village of Batavia where said Newton then resided, from the 15th day of January

1856 up to the time said Newton sold said premises to said Goudys - and whether said Newton did not know the fact.

And whether said Newton disclosed to your orator his intention to sell said premises to said Goudys or to any other person.

And whether said Newton did purposely conceal from your orator his intention to sell said premises for the purpose of defrauding your orator out of the sum of one thousand dollars.

And whether on the 5th day of February 1856 or at the time said Newton sold said premises to said Goudys he the said Newton had paid the interest for the year 1855 which was due on the mortgage mentioned in said agreement to Leviidas Doty, and if so when did he pay it - and what amount did he pay.

And whether there was not, at the time said Newton sold said premises to the said Goudys a large amount, and what amount due or payable as interest on the mortgage mentioned in said agreement.

And whether the interest due on said mortgage was not a lien on said premises by virtue of said mortgage.

And whether your orator did not and

and at what time, like said Newton,
he was ready to make the payment
mentioned in said contract, and whether
said Newton did not, and at what time
refuse to accept said money, - and execute
a deed for said premises, by informing your
orator that he Newton had sold said
premises, - and whether said Newton does
not or has not refused to refund to your
orator the sum of one thousand dollars,
or any part thereof. - And that the
deed executed by the said Levi Newton &
Rachel C. Newton his wife to the said William
A Goudy and Franklin J. Goudy conveying
to said Goudys, the land mentioned in
said agreement may be set aside, declared
null and void and from for naught
held. - And that the said William A &
Franklin J. Goudy may be decreed to
render an account of the issues, rents
and profits of said premises, and to pay
the same to your orator - And that a
decree may be entered in this honorable
court, requiring the said Levi Newton
to execute and deliver to your orator a
deed to said lands and premises in
pursuance of the agreement hereinbefore
set forth. -

and that your orator may, such further
relief, or may have such other relief
as the nature of his case shall require
and as shall be agreeable to Equity.

May it please your honor to grant
your orator the writ of summons, issuing
out of and under the seal of this Honorable
court, to be directed to the said Levi
Newton, William A. Goudy and Franklin
D. Goudy commanding them and each of
them by a certain day and under a
certain penalty therein to be inserted,
to be and appear before the same County
circuit Court on the first day of the
next term thereof, and then and there
to answer the premises, and further to
stand to and abide by such order and
decree therein as shall be agreeable to
equity and good conscience, and
your orator shall ever pray.

J. C. Moore
Solicitor

William W. Bishop
By J. C. Moore
his Solicitor

Clerk and Ex-Officio Recorder.

Filed on the _____ day of _____
A. D. 185 _____ at _____
o'clock _____ M., and Recorded _____
Page _____ in Book _____

STATE OF ILLINOIS, } ss.
KANE COUNTY.

No. _____

WARRANTY DEED.

Schedule A

WARRANTY DEED.---Printed and Sold by Wilson & Cockroft, Geneva, Ill.

THIS INDENTURE,

Made this Fifth day of February in the year of our Lord One Thousand Eight Hundred and Fifty Six

BETWEEN

Leri Newton and Rachel C. Newton his wife of Batavia of the first part and William A. Gandy and Franklin D. Gandy of the same place of the second part:

Witnesseth, That the said party of the first part, for and in consideration of

Seven hundred and fifty dollars in hand paid by the said party of the second part,

(the receipt whereof is hereby acknowledged, and the said party of the second part forever released and discharged therefrom) have granted,

bargained, sold, remised, released, aliened, and confirmed, and by these presents do grant, bargain, sell, remise, release, alien, and confirm,

unto the said party of the second part, and to their heirs and assigns forever, all the following, described lots pieces or parcels of

Land, situated in the County of Kane, and State of Illinois, and known and described, as follows, to wit: The west fraction

of the North West quarter of section two, Township forty, Range eight East of the

3^d R.M. Also that portion of section three Township forty, North Range eight East

of the third R.M. bounded as follows, commencing at the North East corner of section three

thence West 17 chains 92 links, thence South 28 chains to the river, thence up the river to the

section line, thence North to the place of beginning. Also forty acres off the North side

of the West fractional quarter, Section No. 2, Township 40 North Range 8 East. Also one

other piece or part of section 11, Township 40 North Range 8 East, commencing 12 chains

West of the North East corner of the south West quarter of section 11, thence West 18 chains

and 127 links, thence South 26 chains & 50 links, thence East 18 chains & 27 links, thence

South 4 chains & 50 links, thence East 18 chains & 27 links, thence North 4 chains & 50 links

to the place of beginning. - containing 3²⁰ acres. Also the West fraction of the south West

fractional quarter of section 3, Township 40 North Range 8 East, containing 114⁹/₁₀₀ acres, except

40 acres from the North side heretofore divided to Edward C. Barry. Also a part of sec 11

Township 40, Range 8 East. Commencing 7 chains & 88 links North of the South West corner

of the North East quarter of sec 11, thence East 12 chains & 20 links, thence North 25 chains & 1 link, thence

West 12 chains & 4 links, thence South 27 chains & 61 links, containing 37⁹/₁₀₀ acres. Except 10 acres divided

to William Gillett. Also a part of the south West quarter of sec 2, commencing at the South West corner of

said quarter section - thence North 26 chains & 58 links to the mouth of Croker creek, so called, thence

East 18 chs & 43 links, thence West 28 chains & 90 links, containing 15⁵⁴/₁₀₀ acres. Also the North West

quarter of section 11, containing 129⁹/₁₀₀ acres, also one other piece of land commencing at the

North corner of the South West quarter of section 11, Township 40, North Range 8 East, thence

East 11 chains, thence South 4 chains - thence West 11 chains, thence North 4 chains to the

place of beginning, containing 4⁹/₁₀₀ acres.

Together with all and singular the hereditaments and appurtenances thereto belonging, or in anywise appertaining; and the reversion and

reversions, remainders and remainder, rents, issues and profits thereof; and all the estate, right, title, interest, claim or demand whatsoever of the

said party of the first part, either in law or equity, of, in, and to the above bargained premises, with the hereditaments and appurtenances;

To have and to hold the said premises, above bargained and described, with the appurtenances, unto the said party of the second part

heirs and assigns forever. And the said Leri Newton and Rachel C. Newton

party of the first part for their

heirs, executors and administrators, do covenant, grant, bargain and agree, to and with the said party of the second part, their

heirs and assigns, that at the time of the enrolling and delivery of these presents they are well seized of the premises above

conveyed as of a good, sure, perfect, absolute and indefeasible estate of inheritance in law, in fee simple, and have good right, full power,

and lawful authority to grant, bargain, sell and convey the same in manner and form aforesaid; and that the same are free and clear

from all former and other grants, bargains, sales, liens, taxes, assessments, and incumbrances of what kind or nature soever; and the above

bargained premises, in the quiet and peaceable possession of the said party of the second part, their heirs and assigns, against

all and every person or persons lawfully claiming or to claim the whole or any part thereof, the said party of the first part, shall and will

Warrant and forever defend.

In Testimony whereof, the said party of the first part hereunto set their hands and seals the day and year first above written

SIGNED, SEALED, AND DELIVERED }
IN PRESENCE OF }
(signed) "Leri Newton" Seal.
"Rachel C. Newton" Seal.

STATE OF ILLINOIS, } ss. I, J. C. Moore a Notary Public in Batavia
County of Kane. }
in and for said County, in the State aforesaid, do hereby Certify, that
Leri Newton and Rachel C. Newton
who are personally known to me as the real persons whose names are subscribed to the above Deed, appeared
before me this day in person, and acknowledged that they Executed and Delivered the said Deed, as their free and
voluntary act for the uses and purposes therein set forth. And the said Rachel C. Newton wife of the said
Leri Newton having been by me examined, separate and apart, and out of the hearing of her husband, and
the contents and meaning of the said Deed having been by me made known and fully explained to her, acknowledged that
she had freely and voluntarily executed the same, and relinquished her dower to the lands and tenements therein mentioned,
without compulsion of her said husband, and that she does not wish to retract the same. Given under my hand, and
Notary seal, this 5th day of February in the year of our Lord one thousand
eight hundred and fifty six

And whereas afterwards to wit: on the 18th
day of July A.D. 1856, a summons was issued
by the clerk of said court, which was in the
words and figures following to wit:—

State of Illinois)

Kane County & The People of the State of
Illinois, to the Sheriff of said
County Greeting— We command you that
you summon Levi Newton, William W.

Goudy and Franklin A. Goudy if they shall
be found in your county, personally to be
and appear before the circuit court of said
county, on the first day of the next term
thereof to be holden at the court house in Geneva
in said county on the second Monday of
August next to answer unto the bill of
complaint of William W. Bishop filed on
the chancery side of said court against
them for specific performance and relief.
And have you then and there this writ, with
an endorsement thereon, in what manner
you shall have executed the same

Witness Luther Dearbon clerk of our
said court and the seal thereof at
Geneva in said county this 18 day of
July A.D. 1856 — Luther Dearbon
clerk

Upon which summons appears the

following endorsement to wit:—

Personally served by reading to Levi Newton—also by giving said Newton a true copy of the within summons the 28th day of July A.D. 1856. Also by reading to William A. Goudy, Franklin A. Goudy the 29th day of July 1856—also by giving said W. A. & F. A. Goudy a true copy of the within summons

L. P. Barker
Shuff

And whereas afterwards to wit;—on the 1st day of November A.D. 1856, a plea was filed in the Clerk's office of said court which was in the words and figures following, to wit:—

In Chancery
Wm. W. Bishop

vs.
Levi Newton William A.
Goudy, Franklin Goudy

} Of November Term
of Kansas Terr court
for A.D. 1856

The Plea
of Levi Newton, William
A. Goudy and Franklin Goudy defendants
to the bill of complaint of William W. Bishop
complainant. These defendants by protestation
not confessing or acknowledging all or any
of the matters and things in the said
complainant's bill, ^{containing} to be true in such manner
and form as the same are there set forth

do plead to the said bill. And for a plea say
that on the 18th day of March AD 1856 and long
before the institution of this suit and the filing
of the complainants bill of complaint here in
this honorable court, the said complainant
commenced in the Kow loo lei court an
action at law against the said defendant
Levi Newton in Assumpsit, to recover back
from him the amount of money to wit, the one
thousand dollars paid by the complainant
to the said Newton, on the twenty ninth day of
September AD 1855, the time of the making
the said bond or contract of purchase
mentioned in said bill, and which he
now seeks the specific performance of and
which said suit is instituted as aforesaid by
the said complainant, is still pending and
undetermined in the said court, and instituted
to recover back from the said Newton the
amount of purchase money paid by the
said complainant, towards and on the
purchase of the piece of land mentioned in
the said complainants bill of complaint,
and the same, as he by such bill of
complaint now seeks to enforce the specific
performance of against the said defendants
mentioned therein, all of which matters
and things the defendants are to be true, and

therefore they do plead the same to the said Bill
as aforesaid and humbly demand the judgment
of this Honorable Court whether they shall be
compelled to make further or other answer
to the said bill. And they pray to be hence
discharged with reasonable costs in this behalf
most wrongfully sustained.

O. H. Maylome

Sol for Defts.

Levi Newton

William W. Goady

Franklin Goady

State of Illinois

Kane County ss Levi Newton one of the above
mentioned defendants being first
duly sworn doth depose and say on oath
that he has heard read the foregoing plea
and that he knows the contents thereof and
that the same are true —

Sworn and submitted to
before me this 1 day of

November A.D. 1856 & Debrau clerk

Levi Newton

And whereas afterwards to wit, on the 5th
day of November A.D. 1856 a demurrer was filed with
the clerk of said court, which was in the words &
figures following to wit. —

Kane County Circuit Court, Novemr 1856

William W. Bishop

v

} In Chancery

Sen Newton

William A Gundy

Franklin J. Gundy

The demurrer of William
M. Bishop the complainant to
the plea of the said defendants, This complainant
by protestation, not confessing or acknowledging
all or any of the matters and things in the
said defendants plea to be true, in such
manner and form as the same are therein
set forth and alleged, doth demur thereto,
and for cause of demurr sheweth that the
said defendants have not in and by their said
plea made or stated such a case as doth
or ought to defer or prevent the complainant
from obtaining such relief as is sought and
prayed for, in the said bill of complaint
against the said defendant. Wherefore this com-
plainant demands the judgment of this honorable
court whether he shall be compelled to reply
further to the said plea or any, the matters
and things therein contained.

J. C. Moore
compt Solicitor.

And whereas afterwards to wit, on the 15th day
of November 1856, the same being one of the days
of the November Term of said court, the following
among other proceedings were then had and

entered of record, to wit:—

William H. Bishop

vs

Levi Newton

Wm. A. Goudy

Franklin A. Goudy

} Bill for specific performance

} This day comes the complainant
by Moore his solicitor and files
his demurer to the defendants plea herein, and
thereupon come the defendants by Mayhorne their
solicitor and join, after argument of counsel
the court being fully advised sustains the
same. It is therefore considered by the court that
the plaintiff have and recover from the defendants
his costs in and about this demurer expended
and have execution therefor. And on motion
of complainant the defendants are ruled to
answer by the first day of January next.

And whereas afterwards to wit: on the
24th day of December A.D. 1856 an "Answer"
was filed with the clerk of said court which
is in the words and figures following to wit:—

In Chancery,

William H. Bishop

vs

Levi Newton

William A. Goudy

Franklin J. Goudy

} The joint and several
answers of Levi Newton
William A. Goudy and
Franklin J. Goudy to the
Bill of complaint of William

W. Bishop, complainant.

The said defendants now and at all times hereafter saving and reserving to themselves all and all manner of benefit and advantage of exception which now or may be had or taken to the said complainants said bill of complaint, for answer thereto, or to so much thereof, as they these defendants are advised it is in anywise material or necessary for them to make answer unto.

Answering saide that it is true as the said complainant hath in his bill alleged, that the said defendant Levi Newton did on the ^{day} year mentioned in said bond, make and execute the same, and that said bond was left for record as therein stated asserted, and that said complainant paid to said Newton the first installment or payment of one thousand dollars as in said bill of complaint stated, but they now and at all times deny that the said complainant then took possession of the said premises mentioned in said bond, or at any other time thereafter, nor any portion or part thereof but on the contrary, he was not to have or receive the possession of the same till he made the second payment which was two thousand dollars, and it was to be made on the first of January AD 1856, and then he

was to receive a deed therefor.

And the said defendant, ^{deposition taken at New York} further answering for himself saith, that soon after the making of the said bond as he understood & believes the same true, he the said complainant left the West for the East, and that he did not return to this state, till about the fifteenth day of January A.D. 1856, at all events he did not see him until in the afternoon of that day, and then he called on the said defendant at his shop in the village of Batavia, and after passing the usual salutations the complainant asked the defendant if he did not want to go up and take a look at the farm, and he the defendant stated no, as he was there only the day before, and he had nothing now to go after, or to see, as he had sold all his stock & grain there, and bidding that he was very busy, and could not well spare the time, he said - complainant said that he intended to go up there the next day and he soon thereafter left, and this was all the conversation there was between them upon the subject at that time, although he thought the complainant acted strangely in saying nothing about making the payment of the said two thousand dollars which was over due. And that he did not again see him until about two or three days after

this, and this was at the office of the said defendant in his shop, and then he asked the complainant if he had called upon one Leonidas Doty the mortgage and the person who held the mortgage mentioned in said Bond at Buffalo and paid him one thousand dollars, or had deposited that amount to his credit at any any bank in Buffalo.

The said complainant answered that he had not, as he had not brought ^{over} that amount of money with him, as it was slow times for money at the east, but that he had made or left some paper to be accounted at some bank the name of which this defendant does not remember, and he supposed they would soon send him the money, & soon thereafter left the defendant, and this was all the conversation had at that time respecting the payment, and no extension was asked by the complainant then or before or at any other time by him.

And this defendant further answering for himself says, that early in December he wrote to the complainant at Worcester Massachusetts requesting him to loan or pay to said Doty or some Banker in Buffalo, one thousand dollars for this defendant to pay the interest in the said mortgage for 1855 which

would be six hundred and thirty dollars and the balance the said Doty would apply on some other indebtedness between him and said defendant and that he had written said Doty and said complainant respecting it, and in reply he received a letter from said complainant dated Worcester Dec 6th 1855 of which the following is a copy to wit:

Worcester Dec 16th 1855

Mr Levi Newton,

Dear Sir, Your letter of the eighth is received, and in answer to it I must say I shall not be able to be at Batavia as early as the first of January, but shall endeavor to be there between the first & fifteenth, for it is almost impossible to get any money, people say they cannot pay till after the first of January, the Banks are doing nothing. — In regard to paying Mr Doty a thousand for you, I suppose I shall not be there soon enough, as it will be of the first of the month. — I could stop if I knew it would answer your purpose — But I do not know where I should be likely to find him, I should have to stop at two places, this would be quite an inconvenience to me as I shall have considerable baggage with me, but notwithstanding that I would try to accommodate you if I knew whether it would answer at that time — Yours Truly
Wm. W. Bishop

And that the said defendant immediately upon receiving the said letter, wrote to said complainant, stating to him, that in case he could not stop long enough to see Doty and pay him the said sum, then to deposit it to his credit at any Bank in Buffalo, which he knows that said complainant received before he left his home for the West.

And this defendant further answering, saith that he did not again see the said complainant until about a week after this, and then he saw him at his (Defendants) house when he came to see said defendant at Defendants request, said Defendant, confined to his house by a lame knee. He wanted to see complainant and sent for him. He then told the complainant that he was much in need of money and that he had made engagements which he could not meet unless he paid him the two thousand dollars that was due. And supposing there would be no failure in the payment of it, he had made ~~private~~^{positive} arrangements to use it, a part in payments to Doty as aforesaid, and the balance to Dr Town of Batavia. The said complainant only replied that he had as yet not received any money from the East and until he did receive money from there he could not pay anything, and seemed to be quite

indifferent about it, and not desirous to trouble himself in relation to it, and soon left and this was all that was done or said at that time. But as soon as this defendant was able to get out he called upon the said complainant at the foundry in Batavia - this was perhaps five or six days after the last above stated conversation took place, and then told the complainant he had called on him to see if he would or could pay him the $\$2$ Two thousand dollars. This was about the thirtieth day or January. The complainant again stated that he had not as yet got any money from the East or home, and until that came he could not do so. That if it did not come between then and Thursday morning, that he should return home East, but he did not say that he should do so to obtain the money. This was on Monday or Tuesday. The said defendant then stated to the said complainant, that he seemed to act very indifferently about the matter, and acted like a person who wanted to break his contract or get rid of it, as he had ^{previously} been informed that he had been making enquiries if the said Newton had not cut some more wood than he should have done, or if had not forfeited it on his part or if there was not some way that he could be released from it. The complainant

replied that he knew how to get rid of it well enough if he wanted to do so, and upon the said defendant asking, "how?" he replied "by forfeiting the thousand dollars I have paid and going home. and the defendant asked the complainant if he thought that that would make him whole, and pay him for his damages in not being able to meet the engagements that he had made, on the strength of the sale of his farm, and receiving the money for it, and that he knew that the only inducement that he had in selling it, was to raise money, and to do this he had sold it at a low figure, & that since the sale he had sold his team & stock on the farm at a sacrifice and great loss, as he then had no use for them and would have no place to keep them after the first of January as he supposed, since he was then to give up possession of the place had payment been made. The complainant said men could not always get money when they wanted it, or converting to that effect, and they separated, the complainant not even then or at any other time asking an extension of time. And this defendant further assuming, either, that not seeing anything of the said complainant nor hearing from him on Monday of the next week after the

above last mentioned conversation, he began to look around for other purchasers, as he supposed the said complainant had gone home and given it up. And thereupon finding the said defendants William A. and Franklin J. Goudy desirous of purchasing a farm, he sold it to them, and gave a deed therefor ~~and~~ on the fifth day of February, 1856, but that he never agreed to extend the time of payment a single day, beyond the 15th day of January, the time mentioned for the payment of the purchase money. Gino was with the defendant the evening of the contract of sale as the complainant well knew.

And this defendant further answering, said that on Tuesday Evening the fifth day of February he went into Mr Kemp's hardware store in Butaria.

This was after he had sold and deeded said land to the said Goudys, while in there, said complainant came in. The complainant came up and shook hands with him, when he told complainant that he thought he had gone East - he said No - but nothing further replied. When he left the store, complainant asked him if he was going over the river, he replied that he was, and going home. - Complainant accompanied him, and when they were upon the stone bridge, complainant stated that

now he was ready to close the trade. Defendant replied that he was a little too late, as he had ~~that~~ day sold and deeded the farm to others. Complainant said "then I suppose you will keep the thousand dollars" Defendant replied that "he should." The complainant then said he would have it or sink another thousand with it, and thereupon they separated & they have not met since. Now as the said complainant never offered or tendered him the said defendant the two thousand dollars, or any part thereof, nor any person for him other than as above stated. And the said defendants, William A. & Franklin D. Goudy answering for themselves say that they purchased the said farm in good faith & under the impression and belief that said Bishop the complainant had forfeited his contract of purchase with said Newton and all rights under it and they believe the same to be true. — And in a conversation that they had with said complainant at Batavia soon after they had purchased the same he stated to them that he had the money with him all the time, and could have paid it at any time, if he had chosen to do so, but that he wanted ^{to make} said Newton to get ^{it} surrised first, before he made the payment, and this was what he was holding back for, & that he

thought he could have made him do it, and did not think he could ^{have} so readily found a purchaser for it, & that the purchase price of the said land is expressed correctly in the said deed and they presume the one set out in the bill of exhibits marked "A" is correct and the land correctly described therein. And that he ^{the} said Newton has been fully paid by them all that is to be paid to him on account of the purchase price as they understood it. And these defendants further answering say that they did not enter the premises in a clandestine manner, and that it is true it was rather late in the evening when they got there, and that said complainant was neither there or at any other time before that in the possession of the said premises as they are advised and believe to be true, & that the land purchased by them they believe to be the same as that referred to in said bond.

And the said Newton further answering says that the interest for 1855 has been paid on said mortgage, but that interest was not paid till after sale to said Goady's for reason above stated in this answer, and that he did not suppose that he could sell the said land at the time he had either of the four conversations mentioned with the complainant after his return from the East - and that he did not make an effort to

do so, until after he had held the conversation
with complainant at the foundry, and after
Thursday had passed, and so had heard
nothing from him & he supposed he had gone
home, and in making that rule he did it to
get money or means to take up or meet the
liabilities that he had expected to meet by the
payment of the said two thousand dollars
by said complainant which was due on the first
of January 1856. — And the said defendants
Newton, Wm. A. & Franklin J. Goudy insist upon
& set up as defense & hereby plead the same in
Bar of the complainant claim for relief which
he has insisted upon in his bill of complaint &
as a plea thereto say that on the 18th day of March
A.D. 1856 and long before the filing of the said
complainant's bill of complaint herein, he the
said complainant as plaintiff has commenced
a suit in the Kane County circuit court in
an action of law against the said defendant
Levi Newton in assumpsit to recover back from
him the amount of money mentioned in
said bond that was to be paid down to wit: —
One thousand dollars, and which was paid
on the 29th day of September A.D. 1855 by the
complainant to the said defendant Newton
& the identical sum mentioned in said
complainant's bill as being paid to the defendant

Newton, by the complainant, and which made the first instalment that was to be paid by the complainant on the purchase price of the Piece of land mentioned in said bond, and which the said complainant now seeks by his said bill of complaint to enforce the specific performance, & which said suit so instituted as aforesaid was still pending at the time of the filing of this bill of complaint in said court and it was still undetermined & still being prosecuted by said complainant all of which matters and things they aver to be true. — By means & in consequence thereof the said complainant made his election, therefore they plead the same in bar to the said bill of complaint of said complainant, & his right to enforce the specific performance of the said Bond of & against these defendants, and humbly demand the judgment of this honorable court herein. — And the said defendants further answering say that they are somewhat surprised at the institution of this suit against them by the said complainant touching the premises, whereby these defendants are wrongfully vexed & sued without any just cause. And these defendants submit to this honorable court that all & every of the matters in the said complainant's bill of complaint mentioned

+ complained of, are matters which may be tried, and determined at law & with respect to which the said complainant is not entitled to any relief, from a court of equity, & these defendants hope that they will have the same benefit of this defence as if they had demurred to said complainant's bill, and these defendants deny all equity &c.

O. H. Mayborne
Sol for Defs.

And whereas on the 11th day of February 1857 a "Replication" was filed with the clerk of said court which was in the words and figures following, to wit: William W. Bishop

vs
Levi Newton, William W. Gundy, Franklin J. Gundy

{ Cause in court.
Feb Term 1857
In Chancery
The Replication of

William W. Bishop to the joint and several answer of Levi Newton, William W. Gundy and Franklin J. Gundy the above named defendants. This replicant now and at all times saving and reserving to himself all benefit &c. according to the Statute for replication, to the said answer of the said defendants, says that he will prove and maintain his said bill to be true, certain and sufficient

and the said answer to uncertain, insufficient
& untrue &c

J. C. Moore
Solicitor for complt.

And whereas, afterwards to wit, on the
14th day of March AD 1857, the same being
one of the days of the February Term of said
court, the following among other proceedings
were then had and entered of Record, to wit:
William W. Bishop

v
Levi Newton, William A.
Gondy & Franklin J. Gondy

} Bill for specific
performance.

This day
came the parties to this suit
by their respective solicitors, and the cause
coming on to be heard upon the bill,
answer, & Replication, after argument of
counsel, the court being fully advised
dismisses the complainants bill, to which
decision and order of the court, the complaint,
by Moore his solicitor, excepts. — It is therefore
ordered by the court that the defendants have
and recover of the complainant their costs
herein and have execution therefor.

And thereupon the complainant prays
an appeal to the supreme court of the
State of Illinois which is allowed by the
court on condition that he file single bond

of some person to be approved by the clerk
in the sum of fifty dollars, conditioned
as required by law.

And whereas afterwards to wit, on
the 14th day of March A.D. 1857 an "appeal bond"
was filed with the clerk of said court, which
was in the words and figures following, to wit:

Know all men by these presents that I Thos
C. Morse of the county of Kane and State of
Illinois am held and firmly bound unto
Levi Newton, William A. Gandy and Franklin
J. Gandy in the penal sum of Fifty dollars
for the payment of which will and truly to
be made I bind myself, my heirs, executors
administrators and assigns firmly by these
presents — Sealed with my seal and dated
this 14th day of March A.D. 1857.

The condition of this obligation is such,
that Whereas, William W. Bishop has prayed
an appeal to the supreme court of the state of
Illinois, in a certain suit in Chancery,
Wherein the said William W. Bishop is complainant
and the said Levi Newton, William A. Gandy
and Franklin J. Gandy are defendants heard
and determined before the circuit court of
Kane County, at the February Term thereof, A.D. 1857
Now if the said William W. Bishop

shall prosecute his said appeal with effect
and without delay, and shall all costs
which shall or may accrue in the prosecution
of his said appeal, then this obligation to
be void, otherwise to remain in full force
and effect. J. C. Moore Esq

State of Illinois
Kane County I Paul R. Wright clerk
 of the Kane County circuit court
in the state of on said, do hereby certify that
the above and foregoing is a true and perfect
copy of all the papers filed in the above case,
and of all ~~the~~ orders of the said court entered
therein as appears from the records and files,
of my office
Witness, Paul R. Wright clerk of said
court and the seal thereof at Geneva
in said County this 20th day of March
A.D. 1857

P. R. Wright
clerk

State of Illinois } Supreme Court 3^d Grand
Division June Term 1857

William W Bishop }
vs } Appeal
Levi Newton et als }

And now comes the said
Appellant William W Bishop by Sedand & Sedand
his solicitor & says that in the record & proceed-
ings in this cause there is manifest error in that

1st The Court erred in granting a decree
dissolving the complainant's Bill.

2^d The decree should have been for the
Complainant instead of for the defendants
Sedand & Sedand
Solicitor for Appellant

Chancery. Chancery.

William W. Bishop

vs

Levi Newton et al

Transcript

William W. Bishop

vs

Levi Newton et al

Transcript

Filed April 10. 1857

S. Leland

Clerk

June 11.

William A Bishop } Supreme Court
 v } April Term 1857.
 Levi Newton & al.

Statement

On the 29th of September 1855, the Appellee, Newton, sold to ^{and} the Appellant entered into a written agreement for the sale and purchase of certain lands mentioned in the agreement therein.

By the terms of the agreement, the Appellant, who was the purchaser, was to pay \$12,000. — One Thousand was paid down. \$2,000 was to be paid on the 1st day of January 1856. and the remaining \$9,000 was to be paid to one Leonidas Doty according to the terms of a Mortgage which said Doty held on the premises sold — the payments on which Mortgage, the Appellant was to assume, except the interest due there on for the year 1855. and which fell due on the 15th day of Oct. 1855. — being about one month after the agreement was entered into, and previous to the time fixed for the second payment by the Appellant. On this second payment being made, the Appellee to deliver a deed and give full possession of the premises.

This is a bill for relief. The cause was heard at the February Term 1857, of the Maine Circuit Court, on bill, answer and replication. The bill was dismissed, and an appeal taken to the Court.

The agreement further provides that if the Appellant fail to make the second payment by the 15th day of January 1856 he forfeits the \$1.00, already paid & all rights under the bond or agreement.

The agreement was Recorded in the proper office in Kane County, on the day it was executed, and the sum of \$1.00, paid according to the terms of the agreement, by the Appellant.

On the 5th day of February 1856, the Appellee, ^{Newton} sold the same premises to the Gondys, other Appellees, the Gondys, being just twenty days after the time stipulated for the second payment by the Appellant.

From the first of January 1856, up to the day of sale to the Gondys, the Appellant was in the Village of Batavia where the Appellee resided, and had frequent conversations with him in reference to the ^{second payment} property in question — the Appellee giving no intimation of an intention on his part to rescind the contract until the 5th day of February 1856, when the Appellant called on ^{him} the Appellee and told him he was then ready to make payment and receive a deed for the premises in question: when the Appellee informed him he had that day sold the premises; and should keep

the \$1,000 which he had received.
The lands in question were sold to
the Gaudys for \$12,950, being \$750.
more than the appellant was to pay.
The interest on the Mortgage to Doty,
for the year 1855 which the appellee
was to pay amounted to \$630.00, but
was not paid at the time of the
sale to the Gaudys, when the appel-
lant offered to make payment.
This sum of \$630.00 interest, was a
lien on the premises, secured by the
Mortgage to Doty and should have
been discharged by the appellee.

These facts are all admitted by
the answer.

The Bill is brought to enforce a spe-
cific performance of the Agreement, or
such other relief as to the Court may
seem just and equitable.

Argument — Brief

The Appellee ^{in his answer,} claims the forfeiture
on account of the non payment of
the sum which fell due on the
15th day of January 1856.

Once party to a contract cannot com-
plain of the other until he has put
his adversary in default by a sub-
stantial performance on his part. +
a failure or refusal to perform by
the other. Brown v Canon 5 Ark. 174

Brown
Canon }
5 Ark. 174 }

By the terms of the agreement, the Appellee Newton was to pay the interest on the Mortgage to Doty for the year 1855, which amounted to \$630, and was due at the time of the sale. This sum he had not paid, as the answer admits, on the 5th day of February 1856 - the date of the sale to the Corridys when he claimed the forfeiture.

This interest was a lien on the premises by virtue of the Mortgage, and payment ^{thereof} constituted a condition precedent, which the Appellee was bound to perform before he could complain of the other party - for while this sum remained unpaid, he had not such title; or rather, he could not convey the premises free from the incumbrances, which, by the terms of the Contract, the Appellant had a right to demand.

A purchaser who has bargained for a good title will not be compelled to take one subject to suspicion.

Brown v Leannon 5 Gilb. 174 '76 '77.

3 By the same principle, if a party has bargained for a particular title; or property free from certain incumbrances, he will not be compelled, he will not be compelled to accept a title less

Brown

Leannon

174 '76 '77.

valuable, or until the particular incumbrances be removed.

The Appellee was to give a warranty deed, good and sufficient, free from all incumbrances, except the mortgage, to Doty.

4 Paige 638 }

In the case of *Everson v Hirttane*, 4th Paige 638, Mr Chancellor Walworth was clearly of opinion that an agreement to convey land by a good and sufficient warranty deed, was not complied with by the mere giving of a warranty deed where the grantor had no title to the land or when his title was imperfect. It must be a good and sufficient deed both in form and substance, to convey such a title to the land as the covenantor has agreed should be conveyed - So in the case

17 Wend 244 }

23 Wend 66 }

of *Leopenter v Bailey* 17 Wendall 244
Traver v Halstead 23 Wendall 66.

Before the appellee could receive this contract and declare a forfeiture he must have placed himself in such a position as would have enabled him to enforce a specific performance or against the appellant.

It is familiar law, that the general principles of the contract of sale, recognize and enforce, while it is still executory, the right of the purchaser, to a title clear of

defects and incumbrances. This right is one, not growing out of the agreement of the parties, but which is given by the law, and it naturally follows, that a Court of equity will not decree the specific performance of a contract, when the title is bad. Hence, when an incumbrance exists, which it was not agreed upon should enter into, and form a part of the Consideration, the Vendor must discharge it before he can call for a Completion of the sale. 2 Sug. Rowl 667 '8. } on Vendor, 419 - Rowl on Covenant for title 667 '8.

The agreement may be regarded at least as favorable to the appellant as an agreement containing Mutual Covenants, and it seems to me much more so, as I regard the payment of interest on the Mortgage for the year 1855, a Condition precedent, which the Appellee was bound to perform, before he could declare the contract forfeited. According to the opinion of this Court in Brown v. Canon, already referred to; this Appellee in this case was bound to tender a deed and demand his money before he could declare the contract at an end - and much less, can he claim a forfeiture.

since he did not make a formal demand of the money and place himself in a condition to convey the estate, free from incumbrance as by the terms of the agreement the appellant had a right to demand,

In the case of *Brown v. Brown*, already referred to, the vendor had not completed some fencing which he had agreed to erect, and the vendor did not tender the money, until a few days after the time agreed on so the vendor being equally in default with the other party, the Court refused to decree a specific performance. — Apply the principles of that case to the one at bar — the appellee Newton, could not compell a specific performance without shewing a payment of the interest. Now, if he could not enforce the agreement without this proof — Could he ^{claim} ~~assert~~ a forfeiture; and can he now resist the relief sought, since the appellant has offered to perform? Besides, the doctrine of equity, is compensation, not forfeiture.

The remedy:

The Appellant can have no remedy at law; for, to recover at

Law, he must show a strict performance of the contract, and can only obtain relief, in a Court where compensation can be made. *

At Law, an agreement for the sale of real estate, confers a mere right of action on the vendor, In equity it does more; it vests an equitable estate, attended by most, if not all the incidents of actual ownership. It necessarily follows that while a default in the literal fulfilment of the stipulations of such a contract, will deprive the party by whom it is committed, of all right of recovery at Law against the other, it will not have that effect in equity, unless of such a nature as to render it inequitable to enforce the Contract.

Although, therefore, a party who has committed a default of a nature to be injurious, and which does not admit of compensation, will not be allowed to enforce the contract even in equity, yet when the fault is not injurious, or when the injury which it produces can be compensated, equity will not consider it a sufficient reason for, refusing to carry the contract into execution 1 Dev & Bot Eq 237. - See also White & Carter L & E. V2 pt 2. - 26.

~~A default, no point of time, generally~~

* For altho he was not bound to make the second payment, until the first instalment was removed, yet, to recover at Law, he was bound to make a tender, or offer to perform, in strict performance of the terms of the contract -

+ In all cases, where a
 condition subsequent has not
 been performed by the time a
 compensation can be made,
 Equity will grant relief.
 These cases are decided by
 courts.

2 Com. 299-
 20 " 127.

Nothing is better settled, than
 that whenever the injury inflicted by
 a breach of contract, is susceptible of being
 compensated, equity will restrain the
 injured party from recovering more than
 a fair compensation, and will prevent him
 from acting or enforcing a penalty or for-
 feiture, legally incurred. — Parolles
 to secure the performance of contracts; such
 as the payment of money, at a particular
 day, are of this class — *Walker v Whelan* 2 Com.
 299 + *Bowen v Bowen* 20 Id 127.
 Equity, regards interest, as a compensation
 for the injury inflicted, by delay in the
 payment of a debt. This principle is exten-
 ded and applied by Chancery to cases not
 within positive law and relief afforded
 against penalties or forfeitures incurred
 by the non-payment of money at a day
 certain ~~day~~. On the other hand, relief will
 seldom be given against a forfeiture in-
 curred by the non-performance of a colat-
 eral act, which is insusceptible of admea-
surement, — and therefore of compensation

admittance of compensations.
Time is therefore, here, not to be material
al in its self in equity, although
it may undoubtedly be so in its
consequences.

A failure to comply
with the terms of a contract, on the
day fixed for their fulfilment,
will not, therefore, necessarily, pro-
clude the right to fulfil them af-
terwards, and apply to equity to
compell a corresponding fulfil-
ment by the other party, Pratt v.
Carroll - 8 Crouch 471 - Pratt v.
Lane 9th Crouch 456, 493, 494
and Brashier v. Wheaton 528

1st McLean 375 } In Langworth v Taylor 1 McLean
14 Peters. 372 } 375; 14 Peters 372, the Contract was
made in the year 1814. for the pur-
chase of a city lot, at a stipulated
price, payable one third immedi-
ately, one-third in six months af-
terwards and the residue at the
end of a year - a deed to be given
three months after the first payment
The vendee went into possession af-
ter paying the first instalment, and
giving a Mortgage for the remaining
instalments, but no deed was ex-
ecuted, and before the time fixed
for the payment of the second in-
stalment, the parties made a new

arrangement, postponing the payment of the residue of the money upon payment of interest, Interest was accordingly paid until the close of the year 1819. At that time the purchaser received notice that a suit was about to be instituted for the recovery of the property on an adverse title, and therefore made no further payments on account of the purchase until the year 1825, when this suit was determined in his favor. He then filed a bill for a specific performance against the vendor, who had, in the mean time, recovered possession of the premises in Ejectment; under these circumstances, it was held by the Court, that as the first actual default was on the part of the vendor in not executing a deed at the time fixed by the contract, there was no sufficient reason for refusing a specific performance.

In applying the doctrines of the case above stated to the facts and circumstances of the case at bar, the first remark that occurs is, that the first default was on the part of the Appellee Newton, By his contract he undertook to make a deed of general warranty, and remove certain incumbrances.

He never made any such deed,
nor offered to make it— nor did
he remove the incumbrance, which
would have enabled ^{him} to make such
a deed as by the terms of the agreement
he was bound to make; And if
he had, it is obvious, that instead of
being placed in the situation of
defendant in equity, as he now is,
he would have been compelled to
be a plaintiff, either to enforce
the contract, or rescind it.

But suppose that by the express
terms of the contract, the appellee
was not bound to pay the interest
due on the mortgage for the year
1855, before he had a right to dem-
and the second payment— and if
we suppose that time was delayed
to be of the essence of the contract,
yet, under the circumstances, when
there had been a part performance
by the vendor, and an acquiescence
on the part of the vendor in the
delay of the second payment, the
Court would still be authorized
to compel a specific performance
of the contract. †

The answer claims, that the Appellant
is precluded from recovering, because

Acquiescence may reasonably be inferred from the fact, that the parties
were in the same village, and had frequent conversations, as the answers
fully admits— in regard to the payment— in more of which, did the appellee in-
sist on immediate payment— nor was the slightest intimation given of
an intention to abandon the contract and claim a forfeiture of the ap-
propriate

But, as there is no proof on this point, it is immaterial.
There is nothing in the record showing the commencement
of an action at law, to recover the purchase money.

He instituted, and subsequently dis-
missed, an action at law for the
recovery of the \$100, claimed as forfeited,
by which act, he rescinded the Con-
tract. In all the cases decided
by this Court, where they have held
that the institution of an action
at law, precluded the party from
afterwards enforcing a specific
performance—the action at
law, had been commenced before
the Contract had been rescinded by the
other party—In all those cases, the
Court held, that the institution of a
suit at law amounted to an ^{abandonment}
of the Contract—and as the par-
ty seeking to enforce the Contract, was
the first to break it, he could ^{not} recover.
In the case at bar, the Appellee
had first rescinded the Contract,
by the sale to the Gordys, and a re-
fusal to complete it with the ap-
pellant. ~~But, as there is no proof on this~~

If, under all the circum-
stances, the appellant is not entitled
to a completion of the Contract, yet
he is entitled in this form to recover
the amount claimed as forfeited
with interest.

In the case of *Andrews*
v *Sullivan*, 2 Gill, 333, '4, the vendor
filed a bill to enforce the payment of

2 Geo 333 1/2 }

the consideration money for lands
sold to the vendor: It was contended
that as he had a remedy at law,
equity had no jurisdiction, but the
Court say the vendor may file
his bill for a specific performance
and if the money is not paid,
a sale of the premises will be or-
dered. So that, if the Court in-
fuse a specific performance, they
can, in equity decree a repayment
of the sum claimed as forfeited, and
if it be not paid, decree a sale
of the premises. — He has, by virtue
of the sum paid, a lien on the
lands, which in equity he has
a right to assert, to receive that
sum — in as much as he was not in
default — and the other appellants
purchased with notice.

J. C. Moore

Per cur.

The courts of equity all ways incline to relieve against such punishment & hard bargains and will hold the party seeking such an advantage to a strict compliance before he can enforce a forfeiture. Asst. Justice did not comply by perceiving interest to Quaty.

The bill alleges that the Asst. made the hard - answer admits it -

Bill alleges it was received same day answer admits it - Sanders had notice. Asst. sets up that complainant not induced by bringing suit at law no evidence &

No 41

Wm. H. Bishop

Levi Newton

Weymouth

Filed April 20, 1858
L. Ireland
clerk

De mone
cuty

In Supreme Court
William H Bishop
vs
Leve Newton } Error from
Kane County

To their Honors the
Hon Judges of the Supreme Court of
the State of Illinois

Will your honors do
me the favor to take the points
made in this cause and left with
the Clerk of your court (should
Mr J C Moor wish to set aside the
order dismissing the suit and
have it reinstated on the Docket
for argument) together with
my Brief which is also in
the hands of the Clerk, and by
reference to that your honors
will find full authorities on
each point made by the depe-
dents. Should you wish any.

Mr Moor advises me
that he was mistaken and sup-
posed that it was next week
in the place of this that we
were to argue it, this being the
case I do not wish him or
his client prejudiced by any
action of mine in the
case while at Ottawa, but
my clients wish it disposed
of at this time if possible

he advises me he wishes to set aside
the order of dismissal and file a new
the argument in the ~~case~~ and thus
I am willing he may do. Mr. Moor
also agrees to admit as he did on
the argument in the Court below
that the facts set forth in the
plea in the defendants answer -
are true, and that the suit was
commenced in the Home Co. Circuit
Court as therein stated to recover
back the said sum of one thousand
dollars paid down by compromise
on the execution of bond.

I would also be obliged
if your honors would read the
defendants answer to bill as by
that your honors would obtain
a full knowledge of the facts in
the case and the respective rights
of the parties to this suit.

Genlra May 11 1857-

J H Maybome
atty for defts
is ever

47 To The Hon Judges of Super
Court at Ottawa

Genoa May 11 1857-
Mr Leonard

Dear Sir

In the case of
Bishops vs Newton No 99 which
was dismissed at the time I was
at Ottawa Mr Moor advises me
that he was mistaken at the time
and thought we agreed to take it
up next week, and he wishes
it reinstated and he submits it on
the part of Plowstiff on written agree-
ment I send to you a note
which I wish you to hand to
the judges for me when the
case is submitted to them and
also the points I make on
the part of defendants - My-
self I left with you - you
will recollect when I was
there - Please hand them that also
at some time and oblige me -
please advise me of the judgment
in this case and the decision of
the court in the No 81 which
was submitted by me when at
your place

Yours with
Respect
J H Maybourn

To Mr. Sealand
Clerk of Supreme Court
at Ottawa

Am W. Bishop

Supreme Ct.

April Term 1854.

Leir Newton et al

Brief

One party to a contract, cannot complain of the other, until he has put his adversary in default, by a substantial performance on his part, and a failure or refusal to perform by the other.

Brown, & Canon 5. Sids. 174

Therefore, the defendant cannot claim a forfeiture, until he had paid the interest for the year 1853.

The interest due on the mortgage was a lien on the premises. — A purchaser who has bargained for a good title, will not be compelled to take one subject to suspicion.

Brown & Canon 5 Sids 174

On the same principle, if a party has bargained for a title to be freed from certain incumbrances, he will not be compelled to make payment, or accept title until such incumbrance be removed.

Iverson v Kirtland. 4th Paige. 638.
Carpenter v Bailey 17th Wendall 244
Traver v Halstead 23 Wendall 66.

When an incumbrance exists, which it was not agreed upon should form a part of the consideration, the Vendor must discharge it, before he can call for a completion of the sale.

2nd Sug' on Vendors. 419.
Rawl on Gov' for titles 667 '8

Therefore, the debt could not require the second payment until he had first paid the interest on the mortgage.

The debt should have tendered his due and demanded his money.

Brown v Canon & Sibs. 174

The defendant cannot enforce the payment of the purchase money without averring and proving the payment of interest due on the Mortgage — it being an incumbrance which he was bound to remove — and constituted a Condition precedent

Brown v Cannon 5th Hill 174

The plaintiff has no remedy at law — for he must show a ~~literal~~ ^{literal} fulfillment of the contract, but while a defect in the literal fulfillment of a contract, will deprive a party of all remedy at law, it will not have that effect in equity when the injury can be compensated.

1 Dev. & Bot. Eq. 237.

White & Tudor Lead Cases in Eq. V. 2 p. 20

Wherever the injury inflicted by a breach
of Contract is susceptible of being compen-
sated, equity will restrain the injured
party from recovering more than a fair
compensation and will prevent him from
enforcing a penalty legally incurred.

Walker v Wheeler 2 Conn. 299

Baven v Baven 20 Conn. 127.

Equity regards interest, as a compensation
for delay in the payment of money.

A failure to comply with the terms of a
contract on the day fixed, will not pre-
clude the right to fulfil them afterwards
and apply to equity to compel a cor-
responding fulfilment by the other party.

Pratt v Canoll. 8 Branch 471

Pratt v Lowe 9th Branch 456 & 493

Brasier v — 6 Weston 528.

Largeworth v Taylor 1st McLean 375-

14th Petes 372

J. C. Moore
att'y for Capt. Tullum

H. M. Bishop
v
Levi Newton
Brief

Filed April 20, 1858
S. Leland Clk

J. C. Moore
Atty

William H Bishop } Supreme Court.
 ✓ }
 Levi Newton et al } Appeal from
 Kane County.

It is hereby agreed, that the word "and"
 when it occurs, in the bond or agreement
 set out in the Record on file in the above
 entitled cause, next after the words
 "for the year 1855" and next before the
 words "to be made on the second payment"
 should be "and", so as to read as
 follows, "and to be made on the
 second payment" J. H. Moore, ^{for Comptroller} Counsel.

Given Under
 May 11th 1857.

J. H. Maybourn
 Solicitor for Deft.

⁴¹
Supreme Court

W W Bishop

Sen Newton ch. ac

Stipulation

Filed April 20. 1858
L. Leland
clerk

Supreme Court of the State of Illinois,

IN THE THIRD GRAND DIVISION.

WILLIAM W. BISHOP,
Plaintiff in Error,

vs.

LEVI NEWTON,
W. A. GOWDY, et al.,
Defendants in Error.

April Term for A. D. 1858.

POINTS AND BRIEF OF DEFENDANTS IN ERROR.

This Plaintiff in Error purchased of the Defendant in Error, Levi Newton, about 400 acres of Land, situated in Kane County for which he was to pay \$12,000 as follows: One Thousand Dollars down, Two Thousand on the first day of January, 1856, and a Mortgage of \$9,000, given by said Newton to one Leonidas Doty of Buffalo, N. Y., which had some time to run. The sale was made and completed on the 29th day of September, 1855, by the Plaintiff in Error, paying to the Defendant Newton, the first instalment of \$1,000, and Newton executing a Bond for a Deed, which Bond was filed for Record by Bishop—Deed to be executed on the payment of the \$2,000, and subject to the said Mortgage of \$9,000, to Doty, which said Bishop assumed. Newton was to pay the interest on the Mortgage for 1855—interest payable annually, at seven per cent., and due January, 1856. The penal sum mentioned in said Bond was \$18,000. In the Conditional part of the Bond the following Condition among others was made, viz., "It is also agreed that if said Bishop fails to make payment within fifteen days after the first day of January, 1856, he forfeits what he has paid, and all rights, under this Bond." Bishop failed to make the payment of the \$2,000, on the first and also on the fifteenth of January, 1856. And the defendant Newton, after waiting on the Plaintiff in Error till the fifth day of February, 1856, re-sold said Land to the Defendants in Error, William A. and Franklin J. Gowdy, for some \$12,700, and conveyed the same by Warranty Deed. The Plaintiff in Error insists that Defendant Newton agreed to extend the time of payment of the \$2,000. This is denied by defendant Newton. Case stands mainly on Bill and Answer, neither of which are sworn to.

Before the May Term of the Kane County Circuit Court for 1856, the Plaintiff in Error by T. C. Moore, Esq., his Attorney, commenced a suit against said defendant Newton, in an action of Assumpsit, to recover back the \$1,000 paid at the time of the sale of Land from said Newton to Plaintiff, and the case was continued over till next Term of the Court at the Plaintiff's costs, he failing to file with his Declaration a copy of the account sued on. That suit was not dismissed till November Term, 1856. The Defendants insist upon and plead the pendency of this suit in Bar in their answer. This suit is a Bill filed for specific performance, and was filed July 17, 1856. Answer filed in December, 1856, and at the February Term of the Kane County Circuit Court for 1857, a final hearing had and decree made, dismissing it. The Plaintiff in Error prays an Appeal, and was continued at the last Term of this Court, because the Plaintiff in Error had not printed abstracts.

There was no error committed by the Circuit Court in dismissing the Plaintiff in Error's Bill, for the following reasons:

First. By the terms and conditions of the bond, it was made an express condition therein that the payment of the \$2,000, should be made before any Deed of Conveyance was to be made and delivered by the defendant Newton to the Plaintiff in Error, and time was also made one of the conditions of the contract, and a failure on the part of the plaintiff to pay the \$2,000 by the 15th January, 1856, operated as a forfeiture, and cut him off, and extinguished all his rights under it, and the re-payment of the \$1,000 paid thereon to the Defendant at the time of the sale. And this payment the Plaintiff in error failed to make, not only without any excuse, but it would seem by the Bill, Answer, and proof in the case intentionally; he has therefore by his own showing, placed himself in such a position that he has no claims upon or right to ask the aid of a Court of Equity to relieve him from the natural consequences of his own acts—time in the performance of this contract being made by the parties thereto, material, is manifest and clear by the terms of it, and the conduct of the parties; and there is not the slightest proof in the case, showing, or even tending to show, that the defendant Newton ever assented, or agreed to extend the time of payment of the \$2,000 beyond the time fixed in the Contract. *Vide* answer as set out

in Record Page and his forbearing to do so at once, is no excuse to the Plaintiff in Error, and shows conclusively, that he did not wish to wrong him in any way; and this Court has repeatedly decided, that they cannot make new contracts for parties, and where time is made by the parties themselves the essence of the contract, they can only enforce the one made.—*Vide Kemp vs. Humphrey*, 13 Ill. R., page 573; also, *Smith vs. Brown*, 5 Gilm. R., Page 314, also, *Andrews et al. vs. Sullivan*, 2 Gilm. Page 334.

Second. There has been no performance on the part of the Plaintiff in Error—the payment of \$2,000, being a condition precedent. *Vide Ishmael et al. vs. Parke*, 13 Ill. R., Page 328.

Third. The fact that the interest to Doty was not paid by Newton for 1855, is no excuse for the Plaintiff in Error, in neglecting to make his payment. *Vide Foster vs. Jared*, 12 Ill. R., Page 454 & 455.

Fourth. That the said Plaintiff in Error by his neglect to make the second payment of \$2,000, and by his prosecuting his action at law for a supposed breach of Contract—and to recover back the money advanced, or paid on it, (to wit, the \$1,000,) abandoned the contract, or at least so far as to forfeit all rights to the aid of a Court of Equity to enforce a specific performance thereof, for thereby he made his election, and elected to rescind the Contract, and it is to be regarded as an express disaffirmance of it. *Vide Herrington vs. Hubbard*, 1 Scammon R., Page 572.

Fifth. The Court in determining the question whether the Plaintiff in error had any satisfactory and sufficient excuse for not making the payment of the second instalment of \$2,000 when due, and the agreement to extend the time of payment as alleged by Plaintiff in Error, must look at the conduct and motives of both the parties. In doing this they cannot fail to see that there is nothing in the Bill or Answer, (and this is all the proof there is on this branch of the case,) to show that the delay in payment, originated in a design on the part of the defendant Newton, but on the contrary thereof he pressed the Plaintiff to make it at once, and he showed a disposition to put him off, and did not act in good faith. Respecting it *Vide Record Page* And this Court has already decided in the Case of *Selby vs. Grimes*, 12 Ill. Reports, Page 69, that “Relief will not be granted upon a Bill, when the Answer denies the obligations of the “Bill, if the proof is loose and unsatisfactory.”

Sixth. When a case is set for hearing upon Bill, Answer, and Replication, the Answer must be taken as true. *Vide Reece vs. Darby*, 4 Scammon R., 162.

Seventh. The party must sustain the allegations in his Bill by proof, even if the oath of the Defendant is dispensed with. *Vide Harris vs. Reece*, 5 Gilm. R., 212, and this the Plaintiff in Error has entirely failed in doing.

Eighth. The suit instituted by the Plaintiff in Error in Assumpsit in the Kane County Circuit Court, to recover back the \$1,000, paid on the Contract of purchase, and that suit being still pending in said Court at the time and long after the filing of the Bill in this for specific performance, is of itself and alone a sufficient defence for the Defendants in this Case; for while it may be true that he could have maintained an action on the Bond to recover damages for the breach of its covenants, (if any there had been by the defendant Newton,) and also at the same time filed his Bill for specific performance, yet by his seeking to recover back the money paid, he thereby showed his disaffirmance of the Contract, and having once done so, he could not retrace his steps. *Vide 1 Scammon R., Page 572 & 3 Gilm. R., Page 636.*

J. H. MAYBORNE,

Solicitor and Counsel for Defendant.

D. Leland
Albany

for thereby he made his election, and elected to leaving the Contract, and it is to be regarded as far as to forfeit all rights to the aid of a Court of Equity to enforce a specific performance thereof, the money advanced, or paid on it (to wit, the \$1,000) abandoned, the contract, or at least so much of it as is necessary to the action at law for a recovery of the balance of Contract, and to recover back money. That the said Plaintiff in Error by his neglect to make the second payment of \$2,000

Supreme Court
vs
Mr. A. Bishop

April Term for 1837

vs
Sri Norton et al

Bill of Specific Performance

1st The Plaintiff by the commencement of this action in assumpsit to recover back the one thousand dollars paid by him to Defendant Norton made his election and by so doing placed himself in a position that he cannot now avail himself of any right that he may have had in this form of action (if he ever had any right to relief or remedy in this Court.

2^d Time in this instance was the essence of the contract & where the Court is satisfied that such was the case this Court will not interfere or make a new contract for the parties.

3^d The payment of the two thousand dollars to the defendant Norton by the Plaintiff was a condition precedent to his failing to do this forfeited all rights under it and the payments made.

4th The Plaintiff has no right to complain of the non payment of the \$600. interest because he had been requested to pay it himself but refused or neglected so to do.

5th Nor was the neglect of the Defendant Norton to pay the interest such a failure on his part of the contract as to afford any sufficient excuse (if any) to the Plaintiffs for not making payment to him of the \$2000.

6th

There was no time fixed by the contract when the interest was to be paid by defendant Norton & the Plaintiff not requiring it to be done by the terms of the contract as he might have done shows that it was not so regarded by the parties nor does he assign in his Bill of complaint that this was the reason why he withheld payment but he there assigns a different reason for not paying the money which was that he could not get it & asserts that Defendant extended the time of payment.

7th

There is no allegation of tender or offer of the two thousand dollars by the Plaintiff either before or after the commencement of this suit & this he should do for he who sues equity must himself do equity; and a party suing the specific performance of a contract for the sale & conveyance of a tract of land cannot excuse himself for not tendering the purchase money due upon the ground that the grantor has no title or has conveyed it to third persons.

8th

The party who sues the specific performance must show that he has performed or offered to perform all the acts which formed the consideration for the alleged undertaking on the part of the Defendant & this the Bill does not show nor has he done.

9th The final judgement of the Circuit Court was just & right & this Court will affirm the same

⁴¹
Supreme Court

Wm. H. Bishop

vs

Levi Newton et al

Def's Brief
Faint

Filed March 16, 1858

L. Leland

Clk

SUPREME COURT.

WILLIAM W. BISHOP, } BILL FOR RELIEF.
vs. }
LEVI NEWTON, et als. } *Appeal from Kane.*

ABSTRACT OF THE BILL.

On the 29th day of September, A. D. 1855, the Complainant and Defendant Newton, entered into the following agreement :

"KNOW ALL MEN BY THESE PRESENTS, that LEVI NEWTON, of the County of Kane, and State of Illinois, is held and firmly bound unto WILLIAM W. BISHOP, of the County of Worcester, and State of Massachusetts, party of the second part, in the penal sum of eighteen thousand dollars, to be paid unto the said party of the second part, his heirs, executors, and administrators and assigns, to which payment well and truly to be made, I bind myself, my heirs, executors and administrators and every of them, firmly by these presents: Sealed with my seal, this 29th day of September, A. D. 1855.

"The condition of the above obligation is such, that whereas, the above bounden Levi Newton has this day sold to the said party of the second part, his heirs and assigns, for the sum of twelve thousand dollars, payable as follows: One thousand down, and two thousand on the first day of January, A. D. 1856, and the other nine thousand to be paid to one Leonidas Doty, according to a Mortgage made on the 14th day of October, 1854, which he is to assume and pay, *except the interest on said Mortgage for the year 1855*—Deed to be made on the second payment being made, subject to said Mortgage—all his right, title, and interest to the following described lot or parcel of land, to wit: The land conveyed to said Levi Newton, by deed from Leonidas Doty and wife, on the 14th day of October, 1854, and acknowledged the 4th day of December, 1854; the description of lands which is fully set out in said Deed, and which said description is made by agreement a part of this bond. It is also agreed that said Newton is to get it surveyed within one year, and is not to cut or sell any standing timber on said land, and have only the right to take firewood for one fire from that which is down; also then give possession of the premises fully. It is also agreed that if said Bishop fails to make payment within fifteen days after the first day of January, 1856, he forfeits what he has paid, and all rights under this bond. Upon the payment of the said sum being made at the time and in the manner aforesaid, the said Levi Newton, his heirs, executors and assigns, covenant and agree to and with the said party of the second part, his heirs, executors, administrators and assigns, to execute a good and sufficient deed of conveyance, in fee simple, free from all incumbrance, with full and proper covenants of warranty, for the above described premises, except said mortgage above mentioned. Now upon payment being made as aforesaid, if the said Levi Newton shall well and truly keep, observe and perform the said covenants and agreements herein contained on his part, then this obligation to be void, otherwise to remain in full force and virtue."

Signed, LEVI NEWTON,

WM. W. BISHOP.



The above bond was recorded in the Recorder's Office, in Kane County, on the 29th day of September, 1855.

On the day the bond was executed, complainant paid defendant Newton \$1,000, which was endorsed on the bond. That schedule "A" attached to the Bill contains a correct description of the Land referred to in the bond.

Between the first and fifteenth of January, 1856, complainant told defendant that he would not receive funds from the East as he expected, in time to make payment by the 15th of January, 1856, but if defendant required payment by that time, he would borrow the necessary amount and pay him; defendant replied "a few days will make no difference."

On the 5th day of February, 1856, being twenty days after the time mentioned in the bond when the payment should be made, complainant called on defendant and told him he was then ready to make payment and receive his deed, when defendant informed complainant that he was too late as he had sold said premises—defendant refused to accept payment and make a deed to complainant.

Defendant Newton, on the 5th day of February, 1856, conveyed the land in question to defendants Goudy, for \$12,750, being \$750 more than the same was sold to complainant for.

That defendant Newton refused to refund the sum of \$1,000, which he had received on said bond. That complainant was in Batavia where defendant Newton resided, from the 15th of January till the 5th of February, 1856, which fact was known to defendant Newton. That the sale to defendants Goudy was purposely concealed from complainant for the purpose of defrauding him.

That by the terms of the bond, defendant Newton was to pay the interest on the Mortgage, mentioned therein, for the year 1855, which he had not done at the time he sold to the Goudys. That the interest aforesaid amounted to the sum of \$1,000, which was a lien on said premises by virtue of the Mortgage.

That complainant repeatedly offered to make payment, and upon refusal by Newton to accept the same, has repeatedly demanded a return of the said sum of \$1,000.

Prayer—That the Court will vacate the Deed from Newton to defendants Goudy—decree a specific performance against Newton, and for such further relief, or such other relief as to the Court shall seem equitable and just.

ABSTRACT OF THE ANSWER.

The answer admits the execution and recording of the bond, and the payment of \$1,000, as charged in the bill. That schedule "A" attached to the Bill, contains a true description of the land referred to in the bond. That defendant Newton knew complainant was in Batavia from the 15th day of January to the 5th of February, 1856—denies that he agreed to extend the time of payment beyond the 15th day of January, 1856. Admits that complainant told him, Newton, on the 5th of February, 1856, that he was then ready to make payment and receive a deed according to the agreement, that he then told complainant he was too late as he had sold the premises. Admits he sold to defendants Goudy for \$12,750 00. Admits that the interest due on the Mortgage to Doty for the year 1855, amounted to \$630 00, and that the same had not been paid on the 5th of February, 1856, the date of the sale to the Goudys, but avers as an excuse, that early in December, 1855, he wrote to complainant asking him to stop at Buffalo, N. Y., and pay said Doty \$1,000, or deposite that sum in a Bank to his credit. That he received an answer to said letter, declining to comply with his request. Admits he told complainant, after the sale to the Goudys, that he should keep the \$1,000 he had received, and that complainant told him he would have it or sink another thousand with it.

The defendants plead that on the 18th day of March, 1856, complainant commenced an action at law for the recovery of the sum of \$1,000 paid on the bond.

To which there is a general Replication

J. L. Moore
Selling & Leasing
Council for
Appellant

No 41
W. W. Bishop

v

See Newton

Abstracts of Records

Filed April 21. 1838

L. Ireland
Clerk

Supreme Court of the State of Illinois,

IN THE THIRD GRAND DIVISION.

WILLIAM W. BISHOP,
Plaintiff in Error,

vs.

LEVI NEWTON,
W. A. GOWDY, et al.,
Defendants in Error.

April Term for A. D. 1858.

POINTS AND BRIEF OF DEFENDANTS IN ERROR.

This Plaintiff in Error purchased of the Defendant in Error, Levi Newton, about 400 acres of Land, situated in Kane County for which he was to pay \$12,000 as follows: One Thousand Dollars down, Two Thousand on the first day of January, 1856, and a Mortgage of \$9,000, given by said Newton to one Leonidas Doty of Buffalo, N. Y., which had some time to run. The sale was made and completed on the 29th day of September, 1855, by the Plaintiff in Error, paying to the Defendant Newton, the first instalment of \$1,000, and Newton executing a Bond for a Deed, which Bond was filed for Record by Bishop—Deed to be executed on the payment of the \$2,000, and subject to the said Mortgage of \$9,000, to Doty, which said Bishop assumed. Newton was to pay the interest on the Mortgage for 1855—interest payable annually, at seven per cent., and due January, 1856. The penal sum mentioned in said Bond was \$18,000. In the Conditional part of the Bond the following Condition among others was made, viz., “It is also agreed that if said Bishop fails to make payment within fifteen days after the first day of January, 1856, he forfeits what he has paid, and all rights, under this Bond.” Bishop failed to make the payment of the \$2,000, on the first and also on the fifteenth of January, 1856. And the defendant Newton, after waiting on the Plaintiff in Error till the fifth day of February, 1856, re-sold said Land to the Defendants in Error, William A. and Franklin J. Gowdy, for some \$12,700, and conveyed the same by Warranty Deed. The Plaintiff in Error insists that Defendant Newton agreed to extend the time of payment of the \$2,000. This is denied by defendant Newton. Case stands mainly on Bill and Answer, neither of which are sworn to.

Before the May Term of the Kane County Circuit Court for 1856, the Plaintiff in Error by T. C. Moore, Esq., his Attorney, commenced a suit against said defendant Newton, in an action of Assumpsit, to recover back the \$1,000 paid at the time of the sale of Land from said Newton to Plaintiff, and the case was continued over till next Term of the Court at the Plaintiff's costs, he failing to file with his Declaration a copy of the account sued on. That suit was not dismissed till November Term, 1856. The Defendants insist upon and plead the pendency of this suit in Bar in their answer. This suit is a Bill filed for specific performance, and was filed July 17, 1856. Answer filed in December, 1856, and at the February Term of the Kane County Circuit Court for 1857, a final hearing had and decree made, dismissing it. The Plaintiff in Error prays an Appeal, and was continued at the last Term of this Court, because the Plaintiff in Error had not printed abstracts.

There was no error committed by the Circuit Court in dismissing the Plaintiff in Error's Bill, for the following reasons:

First. By the terms and conditions of the bond, it was made an express condition therein that the payment of the \$2,000, should be made before any Deed of Conveyance was to be made and delivered by the defendant Newton to the Plaintiff in Error, and time was also made one of the conditions of the contract, and a failure on the part of the plaintiff to pay the \$2,000 by the 15th January, 1856, operated as a forfeiture, and cut him off, and extinguished all his rights under it, and the re-payment of the \$1,000 paid thereon to the Defendant at the time of the sale. And this payment the Plaintiff in error failed to make, not only without any excuse, but it would seem by the Bill, Answer, and proof in the case intentionally; he has therefore by his own showing, placed himself in such a position that he has no claims upon or right to ask the aid of a Court of Equity to relieve him from the natural consequences of his own acts—time in the performance of this contract being made by the parties thereto, material, is manifest and clear by the terms of it, and the conduct of the parties; and there is not the slightest proof in the case, showing, or even tending to show, that the defendant Newton ever assented, or agreed to extend the time of payment of the \$2,000 beyond the time fixed in the Contract. *Vide* answer as set out

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Second. There has been no performance on the part of the Plaintiff in Error—the payment of \$2,000, being a condition precedent. *Vide Ishmael et al. vs. Parke*, 13 Ill. R., Page 328.

Third. The fact that the interest to Doty was not paid by Newton for 1855, is no excuse for the Plaintiff in Error, in neglecting to make his payment. *Vide Foster vs. Jared*, 12 Ill. R., Page 454 & 455.

Fourth. That the said Plaintiff in Error by his neglect to make the second payment of \$2,000, and by his prosecuting his action at law for a supposed breach of Contract—and to recover back the money advanced, or paid on it, (to wit, the \$1,000,) abandoned the contract, or at least so far as to forfeit all rights to the aid of a Court of Equity to enforce a specific performance thereof, for thereby he made his election, and elected to rescind the Contract, and it is to be regarded as an express disaffirmance of it. *Vide Herrington vs. Hubbard*, 1 Scammon R., Page 572.

Fifth. The Court in determining the question whether the Plaintiff in error had any satisfactory and sufficient excuse for not making the payment of the second instalment of \$2,000 when due, and the agreement to extend the time of payment as alleged by Plaintiff in Error, must look at the conduct and motives of both the parties. In doing this they cannot fail to see that there is nothing in the Bill or Answer, (and this is all the proof there is on this branch of the case,) to show that the delay in payment, originated in a design on the part of the defendant Newton, but on the contrary thereof he pressed the Plaintiff to make it at once, and he showed a disposition to put him off, and did not act in good faith. Respecting it *Vide Record Page* And this Court has already decided in the Case of *Selby vs. Grimes*, 12 Ill. Reports, Page 69, that “Relief will not be granted upon a Bill, when the Answer denies the obligations of the “Bill, if the proof is loose and unsatisfactory.”

Sixth. When a case is set for hearing upon Bill, Answer, and Replication, the Answer must be taken as true. *Vide Reece vs. Darby*, 4 Scammon R., 162.

Seventh. The party must sustain the allegations in his Bill by proof, even if the oath of the Defendant is dispensed with. *Vide Harris vs. Reece*, 5 Gilm. R., 212, and this the Plaintiff in Error has entirely failed in doing.

Eighth. The suit instituted by the Plaintiff in Error in Assumpsit in the Kane County Circuit Court, to recover back the \$1,000, paid on the Contract of purchase, and that suit being still pending in said Court at the time and long after the filing of the Bill in this for specific performance, is of itself and alone a sufficient defence for the Defendants in this Case; for while it may be true that he could have maintained an action on the Bond to recover damages for the breach of its covenants, (if any there had been by the defendant Newton,) and also at the same time filed his Bill for specific performance, yet by his seeking to recover back the money paid, he thereby showed his disaffirmance of the Contract, and having once done so, he could not retrace his steps. *Vide 1 Scammon R., Page 572 & 3 Gilm. R., Page 636.*

J. H. MAYBORNE,

Solicitor and Counsel for Defendant.

Supreme Court

41 Bishop

Newton

Briggs & Ponds of
Defendants in
Error

Filed Apr. 27 1848

L. Ireland
Clerk

Supreme Court
Wm. C. Bishop

vs

Levi Newton et al

April Term for 1857

Bill for Specific Performance

1st The Plaintiff by the commencement of his action in assumpsit to recover back the one thousand dollars paid by him to Defendant Newton made his election and by so doing placed himself in a position that cannot now avail himself of any right that he may have had in this form of action (if he ever had any remedy or right to relief in this Court.

2^d Time in this instance was made the essence of the contract and when the Court is satisfied that such was the case this Court will not interfere or make a new contract for the parties

3^d The payment of the two thousand dollars to the Defendant Newton by the Plaintiff was a condition precedent and he failing to do this forfeited all rights under it & the payment made

4th The Plaintiff has no right to complain of the non payment of the \$600. interest because he had been requested to pay it himself but refused or neglected to do so.

5th

Nor was the neglect of the defendant Norton to pay the interest such a failure on his part of the contract as to afford any sufficient excuse (if any) to the Plaintiff for not making payment to him of the \$2000.

6th

There was no time fixed by the contract when the interest was to be paid by Defendant Norton and the Plaintiff not requiring it to be done by the terms of the contract as he might have done shows that it was not so regarded by the parties nor does he assign in his Bill of Complaint that this was the reason why he withheld payment - but he there assigns a different reason for not paying the money - which was that he could not get it and asserts that Defendant extended the time of payment.

7th

There is no allegation of tender or offer of the two thousand dollars by the Plaintiff either before or since the commencement of this suit & this he should do for he who seeks equity must do equity; and a party seeking the specific performance of a contract for the sale & conveyance of a tract of land cannot excuse himself for not tendering the purchase money due upon the ground that the grant or has no title or possession has conveyed it to third persons.

8th

The party who seeks the specific performance must show that he has performed or offered to perform all the acts which formed the consideration for the alleged undertaking on the part of the defendant & this the Bill does not show nor has he done.

9th

The final judgment of the Cir. Court was just & right & this Court will affirm the same.

⁴¹
Supreme Court

Wm H. Bishop

Levi Newton et al

Deft. B. H.
Points

Filed March 16, 1858

L. Leland
Clerk

SUPREME COURT.

WILLIAM W. BISHOP,)
vs.)
LEVI NEWTON, et als.)

BILL FOR RELIEF.

Appeal from Kane.

ABSTRACT OF THE BILL.

On the 29th day of September, A. D. 1855, the Complainant and Defendant Newton, entered into the following agreement :

“KNOW ALL MEN BY THESE PRESENTS, that LEVI NEWTON, of the County of Kane, and State of Illinois, is held and firmly bound unto WILLIAM W. BISHOP, of the County of Worcester, and State of Massachusetts, party of the second part, in the penal sum of eighteen thousand dollars, to be paid unto the said party of the second part, his heirs, executors, and administrators and assigns, to which payment well and truly to be made, I bind myself, my heirs, executors and administrators and every of them, firmly by these presents: Sealed with my seal, this 29th day of September, A. D. 1855.

“The condition of the above obligation is such, that whereas, the above bounden Levi Newton has this day sold to the said party of the second part, his heirs and assigns, for the sum of twelve thousand dollars, payable as follows: One thousand down, and two thousand on the first day of January, A. D. 1856, and the other nine thousand to be paid to one Leonidas Doty, according to a Mortgage made on the 14th day of October, 1854, which he is to assume and pay, *except the interest on said Mortgage for the year 1855*—Deed to be made on the second payment being made, subject to said Mortgage—all his right, title, and interest to the following described lot or parcel of land, to wit: The land conveyed to said Levi Newton, by deed from Leonidas Doty and wife, on the 14th day of October, 1854, and acknowledged the 4th day of December, 1854; the description of lands which is fully set out in said Deed, and which said description is made by agreement a part of this bond. It is also agreed that said Newton is to get it surveyed within one year, and is not to cut or sell any standing timber on said land, and have only the right to take firewood for one fire from that which is down; also then give possession of the premises fully. It is also agreed that if said Bishop fails to make payment within fifteen days after the first day of January, 1856, he forfeits what he has paid, and all rights under this bond. Upon the payment of the said sum being made at the time and in the manner aforesaid, the said Levi Newton, his heirs, executors and assigns, covenant and agree to and with the said party of the second part, his heirs, executors, administrators and assigns, to execute a good and sufficient deed of conveyance, in fee simple, free from all incumbrance, with full and proper covenants of warranty, for the above described premises, except said mortgage above mentioned. Now upon payment being made as aforesaid, if the said Levi Newton shall well and truly keep, observe and perform the said covenants and agreements herein contained on his part, then this obligation to be void, otherwise to remain in full force and virtue.”

Signed, LEVI NEWTON,



WM. W. BISHOP.



The above bond was recorded in the Recorder's Office, in Kane County, on the 29th day of September, 1855.

On the day the bond was executed, complainant paid defendant Newton \$1,000, which was endorsed on the bond. That schedule "A" attached to the Bill contains a correct description of the Land referred to in the bond.

Between the first and fifteenth of January, 1856, complainant told defendant that he would not receive funds from the East as he expected, in time to make payment by the 15th of January, 1856, but if defendant required payment by that time, he would borrow the necessary amount and pay him; defendant replied "a few days will make no difference."

On the 5th day of February, 1856, being twenty days after the time mentioned in the bond when the payment should be made, complainant called on defendant and told him he was then ready to make payment and receive his deed, when defendant informed complainant that he was too late as he had sold said premises—defendant refused to accept payment and make a deed to complainant.

Defendant Newton, on the 5th day of February, 1856, conveyed the land in question to defendants Goudy, for \$12,750, being \$750 more than the same was sold to complainant for.

That defendant Newton refused to refund the sum of \$1,000, which he had received on said bond. That complainant was in Batavia where defendant Newton resided, from the 15th of January till the 5th of February, 1856, which fact was known to defendant Newton. That the sale to defendants Goudy was purposely concealed from complainant for the purpose of defrauding him.

That by the terms of the bond, defendant Newton was to pay the interest on the Mortgage, mentioned therein, for the year 1855, which he had not done at the time he sold to the Goudys. That the interest aforesaid amounted to the sum of \$1,000, which was a lien on said premises by virtue of the Mortgage.

That complainant repeatedly offered to make payment, and upon refusal by Newton to accept the same, has repeatedly demanded a return of the said sum of \$1,000.

Prayer—That the Court will vacate the Deed from Newton to defendants Goudy—decree a specific performance against Newton, and for such further relief, or such other relief as to the Court shall seem equitable and just.

ABSTRACT OF THE ANSWER.

The answer admits the execution and recording of the bond, and the payment of \$1,000, as charged in the bill. That schedule "A" attached to the Bill, contains a true description of the land referred to in the bond. That defendant Newton knew complainant was in Batavia from the 15th day of January to the 5th of February, 1856—denies that he agreed to extend the time of payment beyond the 15th day of January, 1856. Admits that complainant told him, Newton, on the 5th of February, 1856, that he was then ready to make payment and receive a deed according to the agreement, that he then told complainant he was too late as he had sold the premises. Admits he sold to defendants Goudy for \$12,750 00. Admits that the interest due on the Mortgage to Doty for the year 1855, amounted to \$630 00, and that the same had not been paid on the 5th of February, 1856, the date of the sale to the Goudys, but avers as an excuse, that early in December, 1855, he wrote to complainant asking him to stop at Buffalo, N. Y., and pay said Doty \$1,000, or deposite that sum in a Bank to his credit. That he received an answer to said letter, declining to comply with his request. Admits he told complainant, after the sale to the Goudys, that he should keep the \$1,000 he had received, and that complainant told him he would have it or sink another thousand with it.

The defendants plead that on the 18th day of March, 1856, complainant commenced an action at law for the recovery of the sum of \$1,000 paid on the bond.

To which there is a general Replication

*J. C. Moore
Counsel for
Appellant*

W. W. Bishop
✓
Levi Newton
Abstract of Record

Filed April 20th 1888
S. L. Clark
Clerk

~~99~~ 41

William W. Bishop

vs

Levi Newton et al

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Prepared