No. 13458

Supreme Court of Illinois

Reeves.

vs.

Forman.

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IN THE

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION.

April Term, A. D. 1861.

ABNER REEVES,
Appellant,

vs.

JOHN S. FORMAN,
Appellee.

BRIEF FOR APPELLEE.

I.

On 8th August, 1856, Reves sold Forman a lot in the city of Chicago for $6000 cash, and executed a conveyance of the title.

On the same day they signed an agreement as follows:

"In consideration of said $6000, and as an inducement to said purchase, said Reeves hereby binds himself and guaran-

tees that said Forman shall be fully reimbursed out of the sale of said land in the amount so paid, and with twelve per cent. per annum advance in value thereon, exclusive of expenses, &c., within two years from the date hereof."

And Forman in consideration of said premises, "agrees and binds himself" to "share equally with said Reeves any and all" the nett profits on the sale of said land over twenty per cent. advance per annum, after deducting expenses.

"Said Reeves shall have the power to sell said land at any time within said two years, and if not sold within twelve months from date hereof, then said Forman shall have the privilege of selling, and said Reeves of purchasing at said Forman's price."

II.

This transaction was simply, that in consideration of the lot, and Reeves' obligation to reimburse the purchase money and twelve per cent. per annum out of the sale of the lot in two years, with the chance of additional profits on such re-sale, Forman paid Reeves $6000 in cash and agreed to share equally any excess over 20 per cent. of nett profits resulting from the sale.

The benefits to Reeves, contemplated by this arrangement, were the use of $6000 for two years, coupled with the right to sell the lot and share equally the excess over 20 per cent. of nett profits.

The benefits to Forman were the return of his money and 12 per cent. per annum, certainly at the end of two years, and the chance of additional profits from the sale of the lot within that time.

The contract was fair, and the benefits mutual. It was the interest of both parties that the lot should be sold within the two years for a sum as much greater than the original price and expenses as possible, but at least equal to that price and 12 per cent. per annum, &c.

The interests of the respective parties were carefully guarded. As Reeves had bound himself to reimburse Forman 'out of the sale of the land,' the absolute power of selling during that time was given him, and during the first twelve months his power to sell was exclusive. During the second year Forman had the privilege also of selling; but still further to protect Reeves, that privilege was limited by Reeves' right of purchasing at Forman's price.

During the whole two years Reeves had the power of taking advantage of the market, at any time, and at his own discretion, without the possibility of beiag injured by Forman.

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Reeves' obligation is in these words: "said Reeves hereby binds himself and guarantees that said Forman shall be fully reimbursed out of the sale of said land in the amount so paid, [$6000] and twelve per cent." &c. The word "guarantees" is improper and inappliable in this connection, gives no force or qualification to the contract, and is therefore surplusage.

The term "reimbursed" signifies — paid back or returned to the purse whence the money was taken. And an obligation that a person "shall be fully reimbursed," is simply that the sum received from him shall be fully repaid; in other words, it is a direct obligation to pay money. The fact that Reeves designates the source from which he will derive

this sum, does not make his obligation conditional. The instrument does not read—"the said Forman shall be fully reimbursed" in the amount so paid, *if said Reeves or said Forman shall be able to sell said lot in two years.* There is no condition or contingency named in the contract. The obligation is positive and absolute "that said Forman shall be fully reimbursed out of the sale of said land." If no sale was made within the two years, it was no default of Forman, as he had not bound himself to sell. But it was the default of Reeves, who had covenanted that Forman should be reimbursed the amount out of the sale of the land. If therefore he was in default and did not sell, this could not lessen his obligation to reimburse Forman, or deprive Forman of his right to the full repayment of his money and twelve per cent., within the two years.

Although Reeves looked to the proceeds of the sale of the land as the primary fund out of which to pay Forman, yet it is evident from the last clause of the agreement, that he contemplated the contingency of not being able to sell satisfactorily within the two years, and of finding it to his interest during the last year of "*purchasing at Forman's price.*" Had he so purchased, how would have stood his obligation to reimburse Forman? He would then have held the land and the money. Would he not be obliged to pay the $6000 and the twelve per cent., although nothing had been realized from the land? If so, then the payment of the money was not conditioned on the sale of the land.

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The only obligation assumed by Forman is in these words: "said Forman in consideration of the premises, hereby agrees and binds himself to divide and share equally with said Reeves

any and all profits there may be made on the sale of said land over twenty per cent. per annum, after payment of expenses, &c." The matter of selling the land, so far as Forman was concerned, was merely a "*privilege*" reserved for his own benefit, not a *duty* or *obligation* to Reeves.

In case the land was not sold during the two years, clearly there was no obligation whatever upon Forman. The obligation of sharing the profits could only accrue *after* the sale of the land, and hence in no aspect whatever can this covenant be regarded as a *condition precedent*.

V.

Reeves covenanted, absolutely and without condition or qualification, to reimburse Forman out of the sale of the land, within two years. To enable him so far as the land was available, to comply with his covenant, he was given full power during the entire period to sell the land; every facility was thus afforded; Forman had nothiug further to do to enable Reeves to comply with his contract. His power was complete and his obligations clear to go forward and sell the land. He did not do it; nor has he shown any excuse for his failure. But a mere excuse for not selling would not avail him. He was bound to pay the money, as before shown whether he sold or not. There was no condition or proviso in the covenant.

This, then, is not a case of *dependent covenants*, or *conditions precedent;* and all authorities on these points relied on by opposite counsel, elementary or reported, are totally inapplicable.

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Neither is it a case where the Court is asked to *rescind* a

contract. It is on the contrary a suit to enforce the specific performance of a contract for the payment of a certain sum of money.

Neither is it a case involving, in any sense, a trial of the title to land; nor the recovery of consideration money on a failure of title to land.

Nor is it a case upon a covenant that the land should be worth a certain sum at a certain time; or that such sum should equal the price paid for the land. Nor is is a case where payment is to be made in land, or in any other article than money.

All authorities bearing upon such cases are, therefore, inap plicable to this.

The case of *Webster vs. Ford*, 7. Cranch, relied on by the opposite counsel, was that of a sale of land at auction, where by the terms of sale, if the vendee did not give his note for the amount bid at the end of thirty days, *the property was to be re-sold on account of the first purchaser*. This re-sale was a *duty incumbent on the party for whom the sale was made*; and therefore the Court decided that a re-sale must be made before the vendee was liable. The re-sale was therefore a condition precedent to be performed by the vendor. Not so in this case.

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There is no difficuly as to the measure of damages. The money agreed to be paid, including the twelve per cent. per annum, is the thing to be recovered, and the interest thereon is the damages.

"In the case of an action brought for the breach of a contract for the payment of money only, a suit for damages does indeed, as Lord Mansfield has observed, become a suit for specific performance. But this is almost the only instance where a suit at law compels the very thing to be done which the defendant agreed to do." *Sedgwick on Damages, p.* 9; 2 *Burr,* 1077, 1086; *Lord Loughborough in Rudder vs. Price,* 1, *H. Bl.* 547; *Sedg. on Dam. pp.* 24, 33, 34, 247.

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Reuss

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appellees Brief

Filed May 1st 1861

L. Leland

Clerk

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Brief and Points of Counsel for Plaintiff in Error.

The contract sued upon in this case has been treated by the Court below as if it had been an absolute promise to pay money at all events; or a guarantee to pay money at all events.

Upon reading the contract no opinion can be more erroneous. It is upon its face a contract of *dependent conditions* in relation to the *sale* and *re-sale* of land.

The first question arises is:

1st. Did not the right of the plaintiff to recover in the case depend upon a sale of the land? as a *condition precedent.*

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3d Grand Division, April Term 1861.

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Abner Reeves

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vs.

John A. Forman

Brief of

Points & authorities

Supreme Court of Illinois, Third Grand Division,

April Term, A. D. 1861.

ABNER REEVES, *Appellant*,

vs.

JOHN S. FORMAN, *Appellee*.

} Appeal from the Circuit Court of Cook County.

Action of Covenant, commenced on the 18th day of October, 1858, by Appellee *vs.* the Appellant, on a contract of writing, of which the following is a copy:

COPY OF THE CONTRACT SUED ON.

This article of agreement, made and entered into this eighth (8th) day of August, 1856, between Abner Reeves and J. S. Forman, witnesseth: That said Reeves has this day sold Lot Sixteen (16) in the Subdivision of B. S. Morris and others of the South-East Quarter of Section Eighteen (18), Township Thirty-nine (39), Range Fourteen (14) East of the Third Principal Meridian, to said Forman for the sum of Six Thousand ($6,000) Dollars cash, as evidenced by the deed thereof of even date herewith, by said Reeves to said Forman, said land being in the City of Chicago and State of Illinois; and that also, in consideration of said six thousand dollars, and as an inducement to said purchase, said Reeves hereby binds himself and guarantees that said Forman shall be fully reimbursed *out of the sale of said land* in the amount so paid, and with twelve (12) per cent. per annum advance in value thereon, after payment of and exclusive of all expenses, taxes and assessments thereto, within two years from the date hereof, and said Forman, in consideration of the premises hereby agrees and binds himself to divide and share equally with said Reeves any and all profits there may be made on the sale of said land over and above twenty per cent. advance per annum, after payment of all expenses incident to the sale thereof, including taxes and necessary improvements. Said Reeves shall have the power to sell said land at any time within said two years, and if not sold within twelve months from the date hereof, then said Forman shall have the privilege of selling, and said Reeves of purchasing, at said Forman's price.

In testimony whereof, we have hereunto set our hands and seals, at the City of Chicago, the day and year first above written.

ABNER REEVES, [SEAL.]

J. S. FORMAN, [SEAL.]

Witness, B. G. Caulfield.

* not italicised in the original, or in record.

The breach of the covenant alleged in the declaration is, that the plaintiff was *not fully reimbursed out of the sale of the said lands* $6,000 *with* 12 *per cent. interest per annum advance on value of the land, after payment of and exclusive of all expense, taxes and assessments, within two years from date of said agreement.*

But there is no allegation that *any* "*sale of said land was ever made within said two years*, nor any allegation that any cause existed for the failure to make such sale by said Forman, nor is there any offer or readiness to sell alleged on the part of said Forman within said two years from the date of said contract, or any excuse shown for the neglect or failure thereof; nor is there any allegation that said *Reeves refused to purchase* said "*land* within said two years at said Forman's price."

But the declaration alleges, that after two years had fully expired that the said Forman, *plaintiff below*, made, executed and tendered to said Reeves, the defendant, a deed for said land, and demanded of said Reeves that he *reimburse him* the whole amount of the purchase money, pursuant to said agreement; but that the said Reeves failed and made default,

Record, p. 4. &c., &c., and claims as his damages the whole amount of said consideration or purchase money, with 12 per cent. interest per annum added, and all taxes, &c., &c.

Record p. 5. The defendant below filed his demurrer to this declaration, which was overruled by the Court.

Record, p. 7. The defendant below then filed 1*st plea of general issue*, that the writing was not his deed, &c.

2*nd special plea*, That the defendant was *ready and willing within two years* from the making of said contract, to wit: from the 8th day of August, 1856, to 8th day of August, 1858, to keep his said guaranty that said plaintiff should reimburse himself "*out of a sale of said land*" within said two years, in manner and form and to the sum of money in said writing specified; but that the said plaintiff did *not sell said premises*, or cause the same to be *sold* within the said two years, nor was the same sold by the defendant within said two years, or at any time afterwards, by reason whereof, &c., &c.

3*rd plea*, That *no damage* has been shown by any act, or failure, or breach of contract committed by the defendant.

4*th plea*, That no damage has been caused or done under the covenant.

5*th plea*, That at the expiration of said two years *the plaintiff below had conveyed his*

Record, p. 10. *title to the premises*, and that he, at the said time when, &c., *had become divested of all his title* and interest in and to said premises, so that said plaintiff was prevented from making sale of said premises, &c.

And at March Term, 1860, replication was filed to 1*st plea*.

To 3*d plea* there was also replication and issue to the country.

To 4*th plea*, replication and issue to the country.

To 5*th plea*, replication and joinder and issue.

To 2*nd plea*, plaintiff filed a *demurrer*, in which defendant joined.

Record, p. 14. May 23d, 1860, defendant filed, by leave of Court, an additional, or 6th plea, "that although it was true, as alleged in the said declaration, that plaintiff did, after the expiration of the two years, tender to the defendant a deed of the premises, yet that, prior to such tender, the said plaintiff had neglected to pay certain taxes and assessments, and that the premises had been legally sold therefor, and had not been redeemed, and that in consequence thereof the defendant had been discharged and excused of and from receiving such conveyance of the land back again, after said time when, &c.

P. To this 6th plea the plaintiff also filed his demurrer, in which defendant joined.

At the April Term of the Court, 25th of May, 1860, the Court sustained the plaintiff's demurrer to the defendant's 2nd and 6th pleas, and overruled the said defendant's demurrer to the plaintiff's replication to said 5th plea.

P. 16. And by consent of parties, a jury was then waived, and the cause was submitted to the Court for trial upon the issues joined therein, and the Court then, after argument, took the same under advisement.

And afterwards, on the 25th day of February, A.D. 1861, the Court found a verdict for plaintiffs for damages assessed at the sum of $9,346.46, and the defendant moved for a new trial, which the Court overruled, when the defendant, by his counsel, excepted, whereupon judgment was rendered on the verdict.

Page 26. An appeal was then prayed, and granted upon bond being filed in the sum of $18,000, conditioned, &c., within 20 days, with sureties, &c., which has been done, and the defendant was allowed 20 days to file his "*Bill of Exceptions.*"

P. 18. By the Bill of Exceptions afterwards filed in said cause, it appears that the article of agreement above copied was introduced in evidence by the plaintiff below, together with a warrantee deed of the premises in question, executed by the defendant, of same date with the contract, to plaintiff, and also a quit claim deed of same premises, executed back again by plaintiff to the defendant, dated 12th October, 1858, which defendant refused to accept, more than two years after the sale and conveyance by the defendant to the plaintiff, as referred to in said contract, as declared upon. And also that on the 13th day of October, 1858, said last named deed was tendered to the said defendant below. All which evidence was allowed by the Court, and to which defendant, by his counsel, expressly excepted.

The defendant below then, on his part, offered to prove the following facts,—as well to sustain the issues on his part as to *reduce the damages*,—viz:

1st. That the premises in question had been, since said sale and conveyance to the plaintiff, been sold by the City of Chicago for a special assessment, legally levied thereon after the said sale by defendant to plaintiff, and that said premises had never been redeemed by said plaintiff below, nor by any one for him, but that the said premises, at the time of said trial below, was incumbered by said sale, and that the plaintiff below had suffered his title to pass and become incumbered under said sale into the hands of third persons, as purchasers under said sale.

2nd. The defendant offered to prove that during all said two years from the date of said contract, and at the expiration of said two years, that is to say from the 8th day of August, 1856, to 8th day of August, 1858, that the said premises were worth "*six thousand dollars, together with 12 per cent. per annum advance in value thereon*" from said 8th day of August, 1856, and exclusive of all expenses, taxes and assessments accruing or chargeable thereon within the said two years, in said plaintiff's declaration and in said contract mentioned, &c.

To all which proof the plaintiff below having objected, the Court sustained the objection and excluded all the said proof so offered on the part of said defendant below.

The defendant below, the Appellant in this Court, assigns as errors upon the record the following points:

1st. The Court erred in finding the issues for the plaintiff below, without proof that a sale of the land in question had been *first* made, so as to arrive at the true measure of damages or difference under the contract—*i. e.*, the difference between the proceeds which were to be realized by the plaintiff below, *out of a sale* of the premises and "the $6,000 consideration or purchase money which he had paid, together with 12 per cent. per annum added thereon as advance in value of the land, with expenses, taxes and assessments," the sale having been made a *condition precedent* to any recovery under the covenant within two years.

2nd. The Court erred in overruling the motion for a *new trial*, because the plaintiff's declaration and the record failed *to show any breach* of covenant or cause of action which accrued to the plaintiff, there being no allegation that *any sale of the land* had taken place *within two years* from the date of said contract, or that within "*said two years, the said Forman was not fully reimbursed out of the sale of said land,*" nor any cause alleged why the sale to re-imburse the said plaintiff had not taken place.

3d. Because there is no cause of action appearing on the face of the plaintiff's own pleadings in the cause.

4th. Because no *damages* or *breach of covenant* were proven to have occurred under the contract offered in evidence and declared upon, and the Court erred in finding his assessment of said damages.

5th. The Court erred in finding a verdict against the evidence, there being no breach of the contract shown, No sale of the land having taken place, the defendant below had *no difference to pay between the amount realized upon a sale of the land*, and the orignal consideration money, $6,000, with interest, expenses, taxes and assessments added, and there was no measure of damages.

6th. The Court erred in admitting the proof of the plaintiff under the declaration

that a deed of the premises conveyed by defendant below was tendered back to the defendant *after two years had elapsed*, without also proof having been offered to show that the defendant had refused to purchase said land within the said two years at plaintiff's price, or prevented a sale of it by plaintiff.

7th. The Court erred in excluding the proof the defence offered, showing that the plaintiff had lost the title to the land by a sale of the premises for non-payment of taxes since the land had been conveyed to him by the defendant.

8th. The Court excluded the testimony of the defendant below showing that the land itself was worth all the defendant guaranteed it would reimburse said plaintiff within two years from the date of the contract, viz: "$6,000, *with* 12 *per cent. per annum advance added, and taxes, assessments and expenses.*"

9th. To rescind the contract, it was not only necessary that the plaintiff should have tendered back a conveyance of the premises within the two years, but that he should have been in a condition to restore what he had received of the defendant, and put him in statu quo, and the Court erred in refusing evidence to show any change in the condition of the title since it had been sold by the defendant.

10th. The Court erred in sustaining the demurrer of the plaintiff below to the 2nd and the 6th pleas of said defendant.

11th. And the verdict was against the law and the evidence.

SHERMAN & KALES.

HOYNE, MILLER & LEWIS, of Counsel.

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Supreme Court Ills

Abner Reeves

vs.

John S. Forman

Transcript of the Record to be filed

Filed April 17, 1861

C. Kilmer

Clerk

13458

Supreme Court of Illinois, Third Grand Division,

April Term, A. D. 1861.

ABNER REEVES, *Appellant*,

vs.

JOHN S. FORMAN, *Appellee*.

APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY.

Action of Covenant, commenced on the 18th day of October, 1858, by Appellee *vs.* the Appellant, on a contract of writing, of which the following is a copy:

COPY OF THE CONTRACT SUED ON.

This article of agreement, made and entered into this eighth (8th) day of August, 1856, between Abner Reeves and J. S. Forman, witnesseth: That said Reeves has this day sold Lot Sixteen (16) in the Subdivision of B. S. Morris and others of the South-East Quarter of Section Eighteen (18), Township Thirty-nine (39), Range Fourteen (14) East of the Third Principal Meridian, to said Forman for the sum of Six Thousand ($6,000) Dollars cash, as evidenced by the deed thereof of even date herewith, by said Reeves to said Forman, said land being in the City of Chicago and State of Illinois; and that also, in consideration of said six thousand dollars, and as an inducement to said purchase, said Reeves hereby binds himself and guarantees that said Forman shall be fully reimbursed *out of the sale of said land* in the amount so paid, and with twelve (12) per cent. per annum advance in value thereon, after payment of and exclusive of all expenses, taxes and assessments thereto, within two years from the date hereof, and said Forman, in consideration of the premises hereby agrees and binds himself to divide and share equally with said Reeves any and all profits there may be made on the sale of said land over and above twenty per cent. advance per annum, after payment of all expenses incident to the sale thereof, including taxes and necessary improvements. Said Reeves shall have the power to sell said land at any time within said two years, and if not sold within twelve months from the date hereof, then said Forman shall have the privilege of selling, and said Reeves of purchasing, at said Forman's price.

In testimony whereof, we have hereunto set our hands and seals, at the City of Chicago, the day and year first above written.

ABNER REEVES, [SEAL.]

J. S. FORMAN, [SEAL.]

Witness, B. G. CAULFIELD.

× not italicised in the original, or in record.

The breach of the covenant alleged in the declaration is, that the plaintiff was *not fully reimbursed out of the sale of the said lands* $6,000 *with* 12 *per cent. interest per annum advance on value of the land, after payment of and exclusive of all expense, taxes and assessments, within two years from date of said agreement.*

But there is no allegation that *any* "*sale of said land was ever made within said two years,* nor any allegation that any cause existed for the failure to make such sale by said Forman, nor is there any offer or readiness to sell alleged on the part of said Forman within said two years from the date of said contract, or any excuse shown for the neglect or failure thereof; nor is there any allegation that said *Reeves refused to purchase* said "*land* within said two years at said Forman's price."

But the declaration alleges, that after two years had fully expired that the said Forman, *plaintiff below,* made, executed and tendered to said Reeves, the defendant, a deed for said land, and demanded of said Reeves that he *reimburse him* the whole amount of the purchase money, pursuant to said agreement; but that the said Reeves failed and made default,

Record, p. 4. &c., &c., and claims as his damages the whole amount of said consideration or purchase money, with 12 per cent. interest per annum added, and all taxes, &c., &c.

Record p. 5. The defendant below filed his demurrer to this declaration, which was overruled by the Court.

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2*nd special plea,* That the defendant was *ready and willing within two years* from the making of said contract, to wit: from the 8th day of August, 1856, to 8th day of August, 1858, to keep his said guaranty that said plaintiff should reimburse himself "*out of a sale of said land*" within said two years, in manner and form and to the sum of money in said writing specified; but that the said plaintiff did *not sell said premises,* or cause the same to be *sold* within the said two years, nor was the same sold by the defendant within said two years, or at any time afterwards, by reason whereof, &c., &c.

3*rd plea,* That *no damage* has been shown by any act, or failure, or breach of contract committed by the defendant.

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2nd. The defendant offered to prove that during all said two years from the date of said contract, and at the expiration of said two years, that is to say from the 8th day of August, 1856, to 8th day of August, 1858, that the said premises were worth "*six thousand dollars, together with 12 per cent. per annum advance in value thereon*", from said 8th day of August, 1856, and exclusive of all expenses, taxes and assessments accruing or chargeable thereon within the said two years, in said plaintiff's declaration and in said contract mentioned, &c.

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3d. Because there is no cause of action appearing on the face of the plaintiff's own pleadings in the cause.

4th. Because no *damages* or *breach of covenant* were proven to have occurred under the contract offered in evidence and declared upon, and the Court erred in finding his assessment of said damages.

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10th. The Court erred in sustaining the demurrer of the plaintiff below to the 2nd and the 6th pleas of said defendant.

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SHERMAN & KALES.

HOYNE, MILLER & LEWIS, of Counsel.

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Abner Reeves

v

John S. Forman

Abstract

Filed Apr 17. 1861
A. Roland
Clerk