

No. 14567

Supreme Court of Illinois

Stow

vs.

Russell

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283-1

240

SUPREME COURT,

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1863.

Filed May 5. 1863

See also

ABSTRACT OF RECORD.

[Handwritten scribbles]

WILLIAM H. STOW,
Complainant in Error,

vs.

FRANCES ANN RUSSELL, *et al.*
Defendants in Error.

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PLACITA.

- 1 Bill in Chancery filed, Cook Circuit Court, December 24, 1862. The bill states, that, some time in 1846 or '47, complainant bargained and agreed in writing, under seal, with one
- 2 Samuel Russell, of Middletown, deceased, for the purchase of lot nine, in block twenty-eight, in the old town of Chicago, for the sum of six or seven thousand dollars, complainant not being able to say the precise amount, of which one thousand dollars was paid down in cash; and the rest was to be paid in equal annual installments, with interest at six per cent.; said contract being executed for Russell by William B. Ogden, his agent, and by complainant; and being a printed blank form of contract then in common use of Ogden, Jones & Co., Russell's agents, so as to make it conform to the terms agreed upon by

14567

1863

Russell and complainant. Refers to contract in defendant's possession, when produced, and makes it a part of the bill.

3

That, under and in faith of said contract, complainant took possession of the premises named, made valuable buildings and improvements thereon, at a cost of several thousand dollars, and for many years carried on the business of a foundryman thereon, with the consent and approbation of said Russell and his agents, until the time hereinafter set forth.

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That he paid the yearly installments of 1847 and 1848 in full, with interest on the balance due; and in November and December, 1849, he paid \$450 on account of that year's payment. That, March 1, 1850, complainant owed, on account of the installment of 1849, including interest, \$1,296.91, and no more; and that in the course of that year complainant paid, on account of said purchase-money, the further sum of \$600.

5

That, in the years 1849, 1850 and 1851, complainant had become involved, through making large improvements upon property belonging to him on the opposite corner to the lot in question, and in consequence of losses in business and failure to receive payments due, on which he had depended, he was unable temporarily to make his yearly payments promptly; which remained overdue until the summer of 1852, when Russell, by his agents, began to press for payment, threatening suit, or proceedings to terminate the contract, thereby causing a forfeiture and a loss of complainant's rights under it.

That, being desirous to complete the contract, and save the purchase, complainant, early in the summer of 1852, applied to said Russell for indulgence and an extension of time to enable him to perform his obligations; which application was favorably received by Russell; and in consideration of complainant's circumstances, and of the large payments already made, and of complainant's undoubted ability to complete his purchase if time were given, said Russell agreed, in writing, with complainant, to extend the time of payment of the whole balance of the unpaid purchase-money for the length of time desired by complainant, and in substance as follows, according to complainant's proposition, viz.:

6 “ Complainant was first to pay to Ogden & Jones, Russell’s
“ agents, one thousand dollars, money in hand; that there-
“ upon Ogden & Jones should ascertain, and make a state-
“ ment to complainant of, the account of payments already
“ made, and of what then remained to be paid under the con-
“ tract, both principal and interest, or otherwise, if any; that,
“ upon the amount so ascertained, complainant should pay
“ interest at ten per cent. until it should be paid. That
“ complainant might begin four months thereafter, by paying
“ two hundred dollars of the unpaid balance, and so on, \$200
“ a month, until all should be paid.”

7 That Russell at once directed Ogden & Jones to arrange
the matter with complainant in accordance with the agreement
so made with complainant; that complainant immediately
waited upon them, in Chicago, to have said arrangement and
agreement with Russell carried out: paid them the sum of
\$1,000, as agreed upon, on account of the unpaid balance due
on the original contract; asked of them a statement of the
account, and to have the arrangement concluded with Russell
carried out as agreed upon.

8 The bill states, that Ogden & Jones received payment of
said \$1000; professed readiness to carry out the agreement
and arrangement made with Russell; said that they examined
complainant’s account on their books, and produced, already
made out and signed on Russell’s part, a paper or contract, a
copy whereof is made Exhibit “A” to the bill, and to which as
a part thereof reference is made; which they required and in-
sisted complainant to accept and sign, stating, and so causing
him to believe, “ The same was in all respects fair and correct,
“ and contained a true statement of what then remained to be
“ paid under the original contract, as extended in the manner
“ agreed upon between Russell and complainant. That the
“ amount then remaining to be paid, with interest in advance
“ added, at 10 per cent. for the time which by the extension
“ agreed upon would have to elapse before the whole would
“ be paid, amounted to \$7,279.50.” But without giving him

x No, time demanded?

o Has it asked?

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time to examine the account, and without having furnished him with a statement in detail of the account, Ogden & Jones required complainant to give up to him his part of the original contract containing endorsed thereon memoranda and receipts of the money already paid, and of the times of payment, stating to complainant that his arrangement with Russell could be carried out in no other way; that they had not then the time to make out a full statement of the account; but that at a future time they would furnish it to complainant, if he desired it; that if any error existed in the amount inserted on the new arrangement, in reckoning the interest, omission of credit of payments, or otherwise, the same should be corrected, without prejudice to complainant in any respect.

9 That complainant had no other receipts of what he had paid than brief notes or memoranda on said original contract; that he had made his payments from time to time without taking formal receipts, trusting to the correctness of Ogden & Jones' accounts thereof.

10 That complainant, from fear of losing the benefit of his purchase and the payments already made thereon, under the pressure of his embarrassed circumstances at the time, was induced and prevailed upon, by the statements and assurances of said Russell's agents, to leave with them the original agreement of 1846; and to sign and receive said agreement of August 2, 1852. That without having the time to add up the previous payments made, or to compute the interest already accrued on what remained unpaid, and which would accrue thereon for the time as extended, he did not then know the amount, but on seeing the sum of \$7,279.50 expressed in said agreement of August 2, 1852, he expressed to said Russell's agents his surprise at the amount being so large, and that he did not believe it to be so large a sum; but they assured him that they had allowed all due credits for payments made, and had carefully computed all accrued and future interest, agreeably to the terms of complainant's understanding and agreement in that behalf with said Russell; that \$7,279.50 was the

11 exact and true sum which would have to be paid on the original contract as modified and extended; assuring complainant that if any error therein should be at any time discovered, it should be rectified, and complainant should be in no way prejudiced thereby. In implicit faith in said assurances and promises, solely, complainant accepted and executed said agreement of August 2, 1852. That upon complainant's afterwards pointing out to said Ogden & Jones great errors in said amount, they did not deny the same, but expressly promised him that, on a final settlement of the whole business, all proper corrections, credits, allowances, and abatements, should be made; declining to make any alterations at that time. That on complainant's addressing said Russell on the same subject, and showing to him the errors and mistakes in said statement, he also did not deny the truth of complainant's representations, but promised and expressly assured complainant that the same should be allowed for in a final settlement of the whole matter and of the account, and that in no respect should any advantage be taken of complainant, nor any injustice done to him.

12 That in good faith, with the purpose and desire of completing said purchase contract as originally and subsequently as above stated, agreed upon, complainant paid, December 4, 1852, to Russell, by the hand of his said agents, \$200, the first of the extended payments; subsequently at divers times, in separate sums of \$200 each, up to and including June 11, '53, \$1,000. On June 13, '53, \$200 more; and afterwards, at different times up to and including January 16, '54, in sums of \$200 each, \$1,400 more, being all that up to that date had become due under the contract of August 2, 1852. On February 11, '54, \$200; March 15, '54, \$200; April 14, '54, \$200; May 15, '54, \$200. September, '54, \$400, being all that was due up to that time, except a single installment of \$200; all of which payments were made on account of what remained due and unpaid on the original contract as modified and extended as set forth; in all amounting to \$4,200, and making, with what had been previously paid on the original contract prior

13 to December 1, 1852, \$9,250, or thereabouts, as nearly as complainant can state without examining the books of said Russell's agents and the receipts of payments on said original contract of 1846, in their hands.

The bill states, that the occasional delays which for short periods had occurred in making the payments were involuntary on complainant's part, and were caused by unlooked-for disappointments in receiving payment of his rents, and moneys due to him in his business, on which he had depended for the means of making his said payments; that Ogden & Jones had always received payments from him as he was able to make them, waiving the want of strict punctuality, and never finding fault or expressing dissatisfaction with him on that account, or giving him any intimation that they would require a strict performance of said contract according to the letter of it in that respect; or that they should rigorously enforce the stringent provisions which are contained in said contract of August 2, 1852.

14 Complainant states, that he made his said payments to the best of his ability, with the real desire of fulfilling his obligations to said Russell, as well as to secure beyond caprice or accident his rights under said contract of purchase in said valuable property, which had then greatly risen in value, and was constantly appreciating.

That said Ogden & Jones had, from the first settlement of the city, and for upwards of twenty years, been engaged as land agents in selling and managing the lands of non-resident proprietors; that it was their general practice to sell vacant and unimproved lands, as was the case with the lot in question before it was occupied by complainant, on long time and credit, at low interest, to encourage the sale and improvement thereof; and give opportunity for payment thereof; in all cases giving liberal extensions of time, and showing indulgence to purchasers who might require it, who made their payments with reasonable endeavors and in good faith. That it was never their practice to take advantage of accidental delays in

15 order to declare forfeiture, when such delays were not unreasonable or perversely incurred; that until within a few years they had never done otherwise; and not a single instance had occurred, when complainant was making his payments, of said Ogden & Jones declaring an arbitrary forfeiture of a contract for mere delay in payment, except as against persons acting in willful disregard of their obligations, or in apparent bad faith.

16 In further explanation of complainant's want of strict punctuality in 1854 and '55, and as a ground of relief, complainant states, that in April, '54, he lost by fire his extensive buildings before mentioned, and his income from the rents thereof, about \$3,000 a year, on which he had relied when making his arrangements for an extension of time with Russell for the means to make the payments as agreed upon. That on January 18, '55, while he was absent at the East on business temporarily, complainant's wife on his behalf offered to pay to Ogden, Jones & Co., on account of said contract, and money, the sum of \$400, which sum they refused to receive, declaring they would receive no more partial payments on the contract; and supposing complainant to be dead, they notified complainant's wife that they claimed the whole unpaid balance of said purchase money to be at once due, demanded instant payment thereof, being near \$4,000, as they falsely pretended, and also pretending, but untruly, that they were directed by said Russell to act in that manner. That said refusal to receive said payment, and said notice, and declaration, and pretense of instructions from said Russell, were wholly unexpected, and a surprise to complainant; contrary to their whole previous conduct, particularly that of said Russell towards complainant.

17 And from all that has since transpired, complainant charges that Ogden & Jones acted in the way they did without any instruction from Russell; or if by his direction or suggestion, said Russell acted from misapprehension or wrong information as to the truth of the case, and wholly of their prompting.

The bill charges, that from that time Ogden, Jones & Co.

18 changed their conduct towards complainant; and ever since, by all means in their power, they have endeavored to baffle and defeat complainant in completing said contract; and that, erroneously supposing complainant to be dead, they formed the plan of refusing to receive partial payments from complainant's wife, of taking advantage of a few months arrears to declare the whole balance due at once, pretending that it was near \$4,000, when in fact it was much less, as they well knew; but which fact they supposed was unknown to complainant's wife, or any one but themselves. That they supposed complainant's wife or representatives would be unable to pay the amount in time to save a forfeiture under the agreement of Aug. 2, 1852, intending, if the strict terms of said agreement were not complied with by complainant's wife, to enforce it rigorously. And thereby designed, by paying a small amount of money beside the \$3,250 already paid to said Russell by complainant, to procure from Russell a deed of said premises to themselves, to some one whom they could control, to their use.

19 The bill states, that in consequence of Russell's refusing through his said agents to receive any more partial payments, and said offered payment of \$400 from complainant, and of their declared purpose to receive no more partial payments on said contract, complainant forbore, and was prevented from making any further payments thereon until December 1, '55, when the last payment, of \$79.50, named in said contract, became due, by the express terms of said agreement. And that, on said December 1, '55, complainant made tender and offer of payment to said Ogden, Jones & Co., as Russell's agents, at their office, in the usual hours of business, \$3,951.35, in gold coin of the United States, in full of all money due and unpaid on said contract of August 2, '52, which sum, in gold coin, complainant caused to be produced and exhibited to said agents of Russell, and offered to them for payment as aforesaid; and for which complainant demanded a deed of said lot nine, etc. That said Ogden, Jones & Co., acting for Russell, absolutely refused the tender, and to give a deed of ~~usury~~, in

wrongfully and

20 violation of said contract and of complainant's rights, and, as bill charges, without orders from Russell, without his knowledge, and against his wishes. Secondly: at same time and place, complainant made tender of payment to said Ogden, Jones & Co., as Russell's agents, of \$4,426.01, in gold coin of the United States, shown to them, and ready to be paid to them in full of all that was due and unpaid on contract, and any wise in respect thereof, which said complainant demanded them to accept and receive in payment of said balance, and to give him a deed; refused to accept the tender and give the deed. That in refusing said tender they acted in violation of contract, without authority from Russell.

21 That the whole money tendered was the money of complainant, specially provided for that purpose. That he did not admit so much to be due as was tendered; charges, that much less than the smaller sum tendered was due and unpaid, upon due credit being given for all that should be allowed, and proper corrections are made in the sum contained in contract of August 2, 1852. That complainant offered and was willing to pay whole sum tendered, to obviate objection or claim that might be made, and to fulfill his obligations to the letter and thereby save his purchase, trusting that on a final adjustment to be made Russell and his agents, as they had promised, would correct all errors and mistakes shown in contract of August 2, 1852, and in the computations on which it was based, and give complainant due credit on the settlement of the whole account.

22 That immediately upon the refusal, he deposited the money tendered in specie to his credit in the Commercial Bank of Chicago, then in good credit, to be in readiness for use in making said payment whenever called on—where it remained until and as hereafter will be shown.

That more than three months afterwards, on or about March, 1856, he was casually met in the street by E. H. Sheldon, of Ogden, Fleetwood & Co., who had succeeded Ogden & Jones in the agency for Russell, who stated to complainant that they

23 were directed by Russell to receive complainant's money on the contract, and to give him a deed, which Sheldon said they were ready to do. This was the only intimation complainant received from Russell or his agents since the refusal of complainant's tender, December 1, '55, that complainant would be allowed to complete the purchase and receive a deed. The bill charges, that he was not bound to regard or act upon said notice given in an unbusiness-like way, and on a day when business could not be done. The bill charges, as a fact, that Russell had long before that Sunday directed his agents to notify complainant, to receive his payment, and give a deed of the land, waiving all forfeitures, claims and pretenses thereof; that Ogden, Fleetwood & Co. improperly neglected and refused to obey as directed by Russell; charges, that it was their duty, when they received said instructions from Russell, to obey them at once, or within a reasonable time. That complainant then lived in Chicago, as they knew; that there needed not to be any delay in giving complainant said notice; charges, and insists, that said agents, and Russell as their principal, were answerable for the consequences of such delay and wrongful neglect which befel complainant, and which he could not avoid.

24

That the money which had been tendered December 1, 1855, was then, March, 1856, still lying on deposit in said bank to complainant's credit, when complainant met said Sheldon, March, 1856. That the next day, Monday, complainant went to the bank to draw his money, and make said payment, as early as possible; was told by the cashier, that the bank had that morning temporarily stopped payment, and failed that day. For that reason the bank refused to complainant, in specie or currency, his money on deposit. Bank turned out utterly insolvent. Complainant could not get his payment for several years, then only by receiving notes of persons indebted to the bank, on account, upwards of \$700 of which deposit being to this day unpaid. In consequence whereof, complainant was for several years wholly disabled and prevented from

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making payment of the sum claimed by Russell on the contract.

The bill charges, that when the tenders were made, December 1, 1855, the contract was still in full force and obligation on Russell as well as on complainant. That upon paying up all that was due and unpaid on the original agreement, principal and interest, as agreed on July 1852, between complainant and Russell, as stated, he was entitled to a deed. That the refusal by Russell and agents to receive payment when tendered, etc., was contrary to the agreement and wrongful; and that complainant is in equity entitled to be relieved from all losses and consequences thereby caused to him. Charges, that Russell, by directing his agents after their refusal of complainant's said tender to receive payment and to give a deed, waived all previous delays and the right to insist thereon by way of forfeiture or arbitrary termination of said contract, at his election, and of complainant's rights in equity under it.

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The bill further states, that no lawful or actual demand of payment of the aforesaid balance of purchase money at any time was ever made after the refusal of the tender and before the bank failed and loss of complainant's money; nor did Russell ever tender a deed of said premises for complainant's acceptance under the agreement, as he was bound to do. Bill expressly charges, that Russell's agents, by refusing to receive payment of the \$400 tendered in January, 1855, by preventing complainant from making any more partial payments, by their all at once demanding immediate payment of whole unpaid balance in advance of the time when it was to be paid by the contract, said amount being claimed by them to amount to near \$4,000, and more than remained to be paid on the contract, and by refusing, December 1, 1855, to receive payment of the sums then tendered, thought and designed to hinder and baffle complainant, and to prevent him from completing his said contract of purchase, to entangle him in embarrassments, involve him in pretended forfeitures and defaults, in such a manner that he should be entirely at their mercy, in order to take an undue advantage of him.

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Complainant insists, it was the duty of Russell and his said agents to receive his tender of purchase-money; that by refusing to receive partial payments, and returning said \$400, and tender of the whole balance on December 1, 1855, they prevented and hindered complainant from performance on his part of said contract, and from his payments; further insists, that Russell and his agents were thereby precluded and estopped from setting up or claiming a forfeiture of said contract, and from determining it for non-payment of the purchase money.

28 That without having demanded payment of the unpaid balance, and without having tendered him a deed, as they were bound to do, said Ogden, Fleetwood & Co. assuming to act for Russell, on or about March 25, '56, shortly after the failure of said bank and loss thereby of said money, gave to complainant a certain paper writing, insisting that complainant having failed to make certain payments called for by agreement of August 2, 1852, but not specifying which payments, when due, and for sixty days thereafter; and also default being made in paying the whole sum unpaid thereon, which had become due by non-payment of the nine installments, and for fifteen days thereafter, purporting that such were the express terms and provisions of said contract, but incorrectly, as complainant charges, and will appear by reference to terms of said contract; and also purporting, that default having been made in the keeping of certain other covenants in said contract, but not specifying which ones, nor by what acts, or how, broken, Russell had elected to forfeit said contract, and payments thereon already made; to declare said contract null and void; assuming to do so, and assuming thereby to notify complainant thereof.

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Complainant states, that said paper, marked Exhibit "B" to the bill, and referred to as such, and as part of the bill, was not signed by Russell, but only by Mr. Sheldon; nor had said Russell made any election, nor declared any such pretended election in person. Bill charges, that in no event could such

election or determination have been made by any other person than Russell himself as his personal act; and not by any one for him, as agent, deputy, or otherwise, even if it had been competent for Russell himself to do so in this case, which is altogether denied. Complainant expressly charges, that under the circumstances, and agreements affecting complainant's relation to said Russell in respect to said property, and said original contract of 1846, and its modification and extension in 1852, as aforesaid, it was not competent for said Russell to declare any such arbitrary or peremptory forfeiture and determination of it, and of complainant's rights under it. Charges, that Russell and his agents were precluded and estopped from exercising or asserting any such arbitrary power by their repeated refusals to receive complainant's successive tenders and offers, first of partial, afterwards of total payment. Charges, that for Russell or his agents to attempt the exercise of any such a power, even if it had existed, in March, 1856, just after complainant's loss of said tendered money, as stated, was grossly inequitable, contrary to good faith, and was solely attempted to complete complainant's ruin. Charges, beside, that the language and terms of said pretended notice were in direct conflict with the express terms of contract of August 2, 1852, and in fact imported the existence of a different contract from what existed, and were, besides, so inconsistent, confused and contradictory, as to be unintelligible and unmeaning, and could have, and had, no effect on complainant's rights in the premises.

That soon afterwards, in 1856, in pursuance of their design to deprive complainant of his said contract and purchase, to take from him the possession of said property, the said Ogden, Fleetwood & Co., in Russell's name, instituted a suit of ejectment against complainant in the Circuit Court of the United States, in this District; to defend him in which suit, and to protect his just rights, legal and equitable, complainant employed A. C. Coventry defendant, who accepted his retainer, entered his appearance in said suit on complainant's behalf;

whereby it became said Coventry's duty to advise complainant with all fidelity in relation to said trial and property. That upon trial of the suit in ejectment, Russell recovered judgment against complainant, under the ruling of Judge Drummond, subject, however, to complainant's right in equity to complete his payments and receive a deed, the judge holding, that if complainant would then pay into court the unpaid balance of the money, he would require said Russell to receive it, and to give a deed; but that, complainant, by reason of the matters aforesaid, was wholly unable to do so.

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That afterwards, in July, 1861, Russell received possession of the premises from the marshal, etc., took, and has since had, the same, and the rents, issues, etc., till now; which amount to \$3,000 to date of filing bill, and which, complainant claims he is in equity entitled to have applied in reduction of the balance of purchase money unpaid under said contract and agreement with said Russell.

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That, in 1858, he settled with Coventry for his services by giving his note for \$250; that at August Term of Superior Court of Chicago, defendant suffered judgment by default on said note in Coventry's favor; on which, execution was at once taken out, delivered to John Gray, defendant, Sheriff of Cook county, who, by express directions from Coventry, forthwith, without any notice or intimation thereof to complainant, and without any demand either for payment or for property to be levied on and sold, and without any opportunity being given him to pay said execution, which he could then have been abundantly able to do in its lifetime, and without opportunity to turn out other property to be levied on, complainant then owning several tracts of land in Cook county, unincumbered, more than sufficient to satisfy said execution in full, without loss or sacrifice; that it was the duty of said sheriff, by the laws of this State, to give complainant such reasonable notice and opportunity before levying and selling: said Coventry directed and caused said sheriff to make a secret, concealed, and fraudulent levy of said execution on the 11th Aug.,

1859, to be made, as the return shows, as follows: "Upon a
 35 "contract of August 2d, 1852, with one Samuel Russell, for
 "the conveyance of said lot nine." And that on the first day
 of September, 1857, at 5 P. M., the sheriff struck off the prop-
 erty so levied on, to John M. Rountree, a defendant, for the
 nominal price of two hundred and seventy-seven dollars and
 ninety cents, the amount of judgment and costs. Bill charges
 that Rountree neither bid, nor paid any money for said land
 at said sale, except sheriff's costs; that he acted in the affair
 as the partner and lawyer of said Coventry, and under his
 directions, with no interest of his own. That said levy and
 sale were conducted, effected, and made without any notice to
 complainant in any way, and wholly without his knowledge.
 36 That he was then able, if notified in the usual manner by said
 sheriff, of said proceedings, and, if an opportunity had been
 given him, or demand for payment of the execution, or surren-
 der of property for levy and sale on it, had been made by the
 sheriff, to pay it in full, and could have saved his property
 from levy and sale; and to have turned out other property of
 good title, and ample value, unencumbered, for it to be levied
 on and satisfied from the sale of, and without great sacrifice to
 complainant—as was well known to Coventry, and Rountree,
 and to said Ogden, Fleetwood & Co., and to Russell himself.

That at the time of said levy and sale, and making of the
 sheriff's deed, as hereinafter shown, said Coventry and Roun-
 tree were the regular attorneys of said Ogden, Fleetwood &
 Co.; said Coventry was, besides, a relation and intimate
 friend of said Ogdens and Sheldon, and wholly within their
 influence and control; and was procured and instigated by
 them to make use of said execution, and to cause said surrep-
 38 titious levy and sale to be made, as aforesaid, by reason of
 his intimate knowledge of complainants affairs, and particularly
 with reference to said lot, acquired by him in the capacity of
 complainant's attorney and confidential adviser, as before
 stated.

Charges that said levy and sale were, throughout, fraudulent,

irregular, and illegal; and were contrived to be made by said Russell and his agents, in order that, by an improper and unwarrantable abuse of legal process, unknown to complainant, they might strip and deprive him of his said property, and of his remedies in equity against said Russell for its redemption, and for the completion of his said purchase.

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The bill further states, that he never had any knowledge, notice, or intimation of said pretended levy and sale, until he was told by said Gray, December 3, 1861. That he had just made a deed of said lot, to one of the Ogdens, as the holder of the sheriff's certificate of sale, by assignment. Charges that all knowledge of said pretended levy and sale was artfully kept concealed from him by said parties, by cunning practices, to prevent him from redeeming his land from sacrifice and loss.

That before, and when said levy and sale was made, said lot was divided into eight sub-lots, covered with separate buildings—which could have been separately levied on and sold—each of which was then worth, and could have been sold for ten times the gross amount of said judgment and execution, as said defendants then well knew—the said premises standing on and being one of the principal corners in the city of Chicago, on a principal thoroughfare, and being then worth \$40,000 and upwards.

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Complainant charges that said sale was made, and was designed by said parties to be made, at an enormous under value, and, if allowed to stand, would cause the most wanton and malicious destruction and sacrifice of complainant's property and interests, and would be of evil public example.

Said sheriff made a deed of said lot nine to William B., or M. D. Ogden, early in December, 1860, (both made defendants)—which complainant does not know; that Russell supplied the money for the purchase of the sheriff's certificate of sale; or that it was advanced, on his account, by said Ogden, or his agent, and that the title, so attempted to be created, is held by them for the use of Russell.

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The bill charges that complainant has frequently applied to Russell and defendants, to receive from him full payment of what may be due on account of unpaid balance of purchase money of said land, and for a deed of said lot; and also to receive payment of the amount for which said pretended sheriff's sale was made, interest, and costs, and to have said sale set aside, or the nominal title thereby sought to be made, conveyed to complainant, he offering to pay all money, that, upon a true account taken, shall be found payable or unpaid on the the several premises: all of which defendants, collectively and severally, refuse to do.

That, lately, Russell decesed — leaving a will — and defendants, Frances Ann and Cullord Russell, executors thereof; and also defendant, Samuel W. Russell, his son, heir at law, and full devisee of real estate, and of said premises: who also are made defendants to the bill.

That complainant, hoping that defendants would be minded to act towards him in the premises in good faith, and with equity and justice, had applied to them, &c., but that, contriving how to aggrieve and wrong him, they refused compliance with his requests, and pretended:

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That the original contract was forfeited and determined for defaults on part of complainant — and was so declared and treated by Russell while alive, with complainant's acquiescence; that no agreement for extension of time was made by Russell with complainant, prior to contract of August 2d, 1852. That the contract of August 2d, 1852, was an original and independent transaction for a separate consideration, unconnected with the original contract of 1842; that complainant's right in the premises solely depended on the terms of said contract of August 2d, 1852 — and upon a strict performance thereof by complainant, in all things as therein expressed. Pretending that no computation was to be made of all that was due on the old contract, principal or interest; denying that the amount fixed in the contract of August 2d, 1852, was to be ascertained by reference to the old contract; and pretending that the

43 sum named in the contract of August 2d, 1852, was the then present value, and was therefore fixed upon as the sum to be paid. At other, pretending that the sum of \$7,279.50 was all that was then due on the old contract of 1846, interest added for the time same had remained overdue; and for the time yet to elapse under the terms of the extension agreed on before August 2d, 1852; further pretending, that complainant's rights, under the last agreement, were forfeited by reason of non-payment of sums therein called for; and by Russell's election under it. That Russell never waived any delays to defendants, and that he, when alive, and his representatives after his death, were not precluded from declaring a forfeiture; pretending, that complainant had no right to make a tender on December 1st, 1855, and that a rejection thereof was lawful.

44 At other times pretending that the levy and sale by the sheriff were legal, and valid; in good faith, divested complainant's rights, which, until then, he might have had, and vested them in grantee of the sheriff's deed—and thereby complainant's rights in equity, against Russell for relief, were cut off and ended; admitting that, in causing said levy and sale, they acted for Russell, to complete his title to the property. Charges, that all and each of said pretences are contrary to the truth. Charges, that it was expressly agreed and understood, between Russell and complainant, that the original contract should remain in full force, and only be modified as to the time of payment; and should remain on the basis of the new arrangement, which, it was agreed, should be made; and that all past delays, &c., should be waived.

45 Charges further, that, by the effect of said several agreements, the new arrangement agreed on and consummated, was in equity in the nature of an equitable mortgage for additional and mutual security—to Russell for his purchase money, and to complainant for his equity of performing said contract, and complete redemption of said property from the charge of the unpaid purchase money. That Russell's agents did not perform his understanding with complainant, as agreed upon between them. They did not correctly state complainant's ac-

count, nor give complainant credit for all he had paid ; nor did they insert the correct amount in the contract of August 2, 1852. But added a sum for interest on the balance of purchase money unpaid — exceeding six per cent per annum for the time it had remained due and unpaid, and for which it was extended. Charges, that no such sum as \$7,279.50 was then due on the old contract, or could become due on it, as modified by the agreement with Russell ; that the contract of August 2d, 1852, was usurious, and contained a large amount of illegal and usurious interest ; by computing interest on the purchase money then unpaid, at the rate of ten per cent. per annum from the time it become due on the original agreement of 1846, till the time when it would become due, as extended ; that rate of interest was usurious — complainant not bound to pay it.

The bill further charges, that the original agreement was in full force when the new agreement was made—was so regarded and treated by the parties ; that Russell waived all right and power to determine for default by complainant, if any. Charges that complainant was only induced to leave his part of the original contract with said Ogden and Jones, by their promises, as aforesaid, and that it should be always open for his inspection and use ; by their assurances that they were dealing fairly with him—would continue to do so at all times ; and would take no unfair or undue advantage of him.

The bill charges, that complainant never acquiesced in, or consented to, any forfeiture of the original contract ; nor did he ever relinquish, or give up, his right to a specific performance of it. Denies that the agreement of August 2d, 1852, was an original or independent contract, or purchase. Charges, that he had, and still has, the right to a full and true account of all payments made from the date of first contract ; and of what was due thereon, in August, 1852, and that, upon paying what was then unpaid, with lawful interest from that time, he is entitled to a deed of said lot.

Charges, that said agreement of August 2, 1852, is to be treated and regarded simply as a modification of, and subor-

dinate to, said original contract, and not an abrogation of it: that said agreement of August 2, 1852, was not an independent contract or transaction; nor was the price or consideration thereof, distinct from that of the old contract: on the contrary, bill charges that the consideration of it was to be the amount of what remained unpaid on said old contract, as before stated; and no other.

49 Complainant further states, that he was making his payments in good faith, as agreed on, when he was prevented from continuing them, and from making any further partial payments, in January, 1855. Charges that said refusal to receive said payments, was a surprise upon complainant; was contrary to the contract; that said demand for the instant payment of near \$4,000 was unreasonable, and was for a larger sum than was, in fact, due, on a just settlement of the account; and had not, and could not have, any effect on complainant's rights, or liabilities, under said contract. Further charges, that he was again wrongfully prevented by said Russell's agents from performing his said contract, by their refusal of his tenders of payment, in full, on December 1st, 1855. That it was owing to their said wrongful conduct that complainant lost the money tendered, by the failure of the bank; and that their conduct and acting, were in violation of their duty in the premises, and of complainant's just rights.

50 The bill further charges, that said levy and sale were irregular, fraudulent and void. And that said Russell, by directing and causing the same, and his representatives, defendants, are estopped from disputing or denying complainant's rights under said contract. That said Russell and his said Agents, acted towards complainant in bad faith: first, in framing the agreement of August 2d, 1852, and inserting in it a larger sum than should have been put in it; and in stating to complainant that it was correct, when it was not; in their promises to make all proper corrections, and take no unfair advantage, and, afterwards, refusing ~~to~~ any correction, by attempting to take advantage of him in, capriciously, refusing complainant's tendered payment, and then calling for the whole amount, and for

51 more than was really owing; in refusing the final tender when made twice over in gold, and of more than they had ever claimed, on December 1st, 1855; in delaying, for an unreasonable length of time, to notify complainant that they would take his payment, and give him a deed; whereby complainant was caused to lose his money; lastly, by attempting to declare a forfeiture at a moment when, through sudden and unlooked for misfortune, complainant had, without fault, lost the means of paying at that time; by directing and causing the secret and fraudulent levy on, and sale of, complainant's interest in said premises, as above stated. And that, by means of said deceitful and fraudulent practices, they have designed and continue now to oppress and baffle complainant, in his endeavors to perform said contract with Russell — thereby to deprive him of said property, and improvements thereon made by him, and of \$9,200 which he had paid on the contract. Charging that said actings were contrary to equity and good conscience.

The bill waives answer under oath.

52 *pay* Requires defendants to state, whether complainant did not make said judgments as set forth in the bill, on account of the purchase; to state an account of all monies whatever and whenever paid by complainant, from the first to last; whether complainant did not leave his part of the original contract with said Russell's agents, August 2d, 1852; calling for a true and perfect copy thereof, and of all entries, receipts, and memoranda therein, and for an exhibition of the contract itself. That a true copy of the account, as kept in the books of said agents, may be given; and the original books themselves may be open to complainant's inspection. State whether said Russell did not agree for an extension of time, as stated in the bill; if not so, when, and how otherwise; whether complainant did not offer to pay, in gold, the two sums, as stated, on December 1st, 1855. Whether said tenders were not refused; whether they did not also refuse payment of \$40 in January, 1855. Whether Russell did not direct his said agents to re-

53 *contract*

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55

ceive payment from complainant, and give a deed—when said instructions were dated and given; asking for copies thereof in writing; whether said bank did not fail on or about March 9th, 1856, and complainant thereby lose his said money; whether Russell did not advance the money to Coventry for which said sheriff's sale was made; if not he, who did make the advance; who received the sheriff's deed, and for whose use. How much money had been received for rent of said premises since Russell took possession thereof; and that an account of all the matters in the bill stated, may be come to; that it may be declared how much is, in equity, payable from complainant to defendants, under the agreement; that the contract of August 2d, 1852, may be reformed in respect of any money improperly inserted therein, as usurious interest; and other matters, mistakes, or errors therein; that said contract may be made to conform to the original instrument, as modified by the said agreement for its extension; that all just credits and deductions being made, complainant may be entitled to a specific performance of it—that he may be relieved from all pretended forfeitures and defaults. And that, upon paying what shall be due, and balance being struck, offering and hereby tendering to pay when and as shall be directed by the court, a deed may be given, executed by all proper parties. That the fraudulent levy and sale may be set aside, and cancelled; also the sheriff's deed—or that the title sought thereby to be created, may be conveyed to complainant—he offering thereby to pay the full amount of sale, interest and costs. And for further relief, as the circumstances of the case may require.

Signed,

ARTHUR W. WINDETT,
Of Counsel.

WILLIAM H. STOW,
By Solicitor.

December 22, 1862.

EXHIBIT "A."

57

ARTICLES OF AGREEMENT, made and concluded the second day of August, in the year One Thousand Eight hundred and Fifty-two, between Samuel Russell, of Middletown, Connecticut, by E. H. Sheldon, his attorney, of the first part, and William H. Stow, of Chicago, of the second part, Witnesseth, that the party of the first part, at the request of the party of the second part, and in consideration of the money to be paid, and the covenants as herein expressed to be performed by the party of the second part, (the prompt performance of which payments and covenants being a condition precedent, and time being the essence of said condition,) hereby agree to sell to the said party of the second part, all that certain lot and parcel of land, situate in the County of Cook, and State of Illinois, known and designated as lot number nine (9), in block number twenty-eight (28), in the original town of Chicago, with the privileges and appurtenances thereto belonging.

58

And the said party of the second part, in consideration of the premises, hereby agrees to pay the party of the first part, his or their executors, administrators or assigns, at the office of Ogden, Jones & Co., in Chicago, the sum of seven thousand two hundred and seventy-seven dollars, and fifty cents, as follows, viz: Two hundred dollars on the first day of December, 1852, and two hundred dollars (\$200) on the first day of each and every month thereafter, up to and including the first day of November, 1855, and seventy-seven dollars and fifty cents, on the first day of December, 1856. And also, that he will well and faithfully, in due season, pay, or cause to be paid, all ordinary taxes assessed for revenue purposes upon said premises, or any part thereof, subsequent to the year 1846. And also, all other assessments which now are, or may be hereafter charged or assessed upon or against said premises or any part thereof. But, in case the said party of the second part fail to pay any or all such taxes, or assessments, upon said premises

*See reference to the
old contract*

or appurtenances, or any part thereof, whenever and as soon as the same shall become due and payable; and the party of the first part shall pay from time to time, or at any time, any or all such taxes or assessments, or cause the same to be paid, the amount of any and all such payments so made by the party of the first part, shall immediately thereupon become an additional consideration, and payment to be made by the party of the second part hereto, for the premises herein agreed to be conveyed.

59

And the said party of the first part, further covenants and agrees with the said party of the second part, that upon the faithful performance, by the said party of the second part, of his undertaking in his behalf, and of the payment of principal and interest of the sum above mentioned, in the manner specified, he, the said party of the first part, shall and will, without delay, well and faithfully execute, acknowledge and deliver in person or by attorney, duly authorized, to the party of the party of the second part, his heirs or assigns, a deed of conveyance of all the right, title and interest, of the party of the first part, of, in and to the above described premises, with the appurtenances, with full covenants of warranty.

60

And it is mutually covenanted and agreed, by and between the parties hereto, that in case of default shall be made in any of the payments of principal or interest, at the time, or any of the times above specified, for the payment thereof, and for sixty days thereafter, this agreement, and all the preceeding provisions hereof, shall be null and void, and no longer binding, at the option of said party of the first part, his representatives or assigns; and all the payments which shall then have been made thereon, or in pursuance hereof, absolutely and forever forfeited to the said party of the first part; or at the election of the said party of the first part, his representatives and assigns, the covenants and liability of said party of the second part shall continue and remain obligatory upon the said party of the second part, and may be enforced, and the said consideration money, and every part thereof, with the annual inter-

est, as above specified, be collected by proper proceedings in law or equity, from the said party of the second part, his heirs, executors, administrators or assigns.

61 And it is further mutually covenanted and agreed, by and between the parties hereto, that in case of default in the payments stipulated to be made by the said party of the second part, or any part thereof, and the election of the party of the first part, his representatives or assigns, to consider the foregoing contract of sale at an end, and prior payments forfeited, the said party of the second part, his heirs, representatives or assigns, who may have possession, or the right of possession of said premises at the time of such default, or any time thereafter, shall be considered, and are hereby agreed and declared to be, in law and equity, the tenant or tenants at will of said party of the first part, his representatives and assigns, on a rent equal to an interest of ten per cent. per annum, on the whole amount of the purchase money above specified, payable quarter yearly from the day of such default in payment of principal or interest. And after such default in payment, and election to consider the above contract of sale as void, the said party of the first part, his representatives and assigns, shall and may have and exercise all the powers, rights and remedies provided by law or equity, to collect such rent, or to remove such tenant or tenants, the same as if the relation of

63 landlord and tenant, hereby declared, were created by an original absolute lease for that purpose, on a special rent, payable quarterly on a tenure at will. And that in such case the said tenant or tenants shall and will pay, or cause to be paid, all taxes, assessments, ordinary and extraordinary, which may be laid or assessed on such premises, or any part thereof, during the continuance of such tenancy; and will not commit or suffer any waste or damage to said premises, or the appurtenances, but will keep and deliver up, on the termination of such tenancy, the said premises and appurtenances, in as good order and repair (ordinary wear and decay, and unavoidable injury by the elements, excepted,) as they were at the commencement of such tenancy.

In witness whereof, the party of the first part, by his said attorney, and the party of the second part, in his own proper person, have hereunto respectively set their their hands and seals, on the eay and year first above mritten.

SIGNED, SEALED AND }
DELIVERED IN PRES- } Signed, SAMUEL RUSSELL, [SEAL.]
ENCE OF By E. H. SHELDON,
ATTORNEY.
WM. H. STOW, [SEAL.]

63

It is expressly understood and agreed by and between the said parties hereto, that in case either of the installments falling due on the first day of December, 1852, and on the first day of each month thereafter, or any part of any such installment or installments, shall remain due and unpaid for the space of fifteen days next after the same is due and payable, as above specified, thereupon the whole sum remaining unpaid

*Person, shall become due and payable
any thing herein contained to the Contra-
ry notwithstanding. See Record p. 63*

EXHIBIT "B."

To WILLIAM H. STOW:

64

Default having been made by you in several of the payments stipulated for in a certain contract or agreement between Samuel Russell, of Middletown, Connecticut, of the first part, and William H. Stow, of Chicago, of the second part, bearing date the second day of August, in the year of our Lord one thousand eight hundred and fifty-two, at the time said payments became due, and for sixty days thereafter, and default having also been made in the payment of the whole sum remaining unpaid on said contract, which became due and payable by the default in the payment of the said several install-

ments above mentioned, and for fifteen days thereafter, all of which is provided for and stipulated in said contract; and default having also been made in the performance of other covenants contained in said contract or agreement; I do hereby elect to forfeit the said contract and the payments which have been made thereon, and to declare said contract null and void, and do hereby declare said contract and said payments forfeited, and said contract null and void, and do hereby notify you of my said election.

Given under my hand this 25th day of March, A. D. 1856.

SAMUEL RUSSELL,

By EDWIN H. SHELDON,

His Attorney in fact.

The defendants, Frances Ann Russell, Hubbard Russell, Samuel W. Russell, William B. and Mahlon D. Ogden, and A. C. Coventry, entered their appearance, and filed a general demurrer to the bill for want of equity.

Joinder in demurrer by complainant.

Decree was found sustaining demurrer, and dismissing the bill without prejudice.

Errors assigned :

Sustaining demurrer to bill, denying relief, and dismissing the bill.

Joinder in Error.

ARTHUR W. WINDETT,
Of Counsel with Complainant in Error.

April 10, 1863.