

Curtis Vs. Innerarity

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Appellant : Curtis

Respondent : innerarity

Judgement :

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Curtis v. Innerarity

47 U.S. (6 How.) 146

APPEAL FROM THE COURT OF APPEALS

FOR THE TERRITORY OF FLORIDA

SYLLABUS

Where there was a sale of wild lands in Florida, occupied by Indians, and the purchasers gave a mortgage to secure the payment of some outstanding installments of the purchase money, the fact that the purchasers had not complete

possession of the lands is not a sufficient objection to their being charged with interest from the time when the money was due.

They had paid a large part of the purchase money before the execution of the mortgage, without raising this objection, and the parties to the contract of sale knew that the Indians had possession of the lands as hunting grounds.

The purchasers in a former suit averred that they had peaceable possession, and the vendors cannot be held responsible for a subsequent disturbance.

The doctrine of the civil law, *viz.*, "that the vendee is not liable for interest where he received no profits from the thing purchased," applies only to executory contracts where the price is contracted to be paid at some future day, and the contract is silent as to interest.

Nor is it an objection to the allowance of interest, that the purchaser was put to much trouble and expense to obtain a recognition of his title.

The claim to be released from interest, upon the ground that there was no person legally authorized to receive it, is not supported by the facts in this case.

Where the vendor gave a power of attorney to an agent to receive a payment from the purchasers on account, and the agent gave a receipt in full for certain balances by way of adjustment and compromise, and the vendor disapproved of the acts of the agent, the payment is not good, even on account, against the vendor.

The purchasers, by making a payment in this way, upon certain terms which were not within the power of attorney, constitute the agent their agent. For two years afterwards, they insisted upon the binding force of the acts of the agent to the extent to which he had given releases, and only claimed the payment to be on account when the agent became insolvent. It was then too late.

All the material facts in the case are set forth in the opinion of the court.

MR. JUSTICE GRIER delivered the opinion of the Court.

It would contribute nothing to a clear apprehension of the merits of this case to enumerate the various bills, answers, cross-bills &c.;, constituting the very voluminous and confused

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mass of pleadings and documents spread upon our paper books. The pleadings have been consolidated, by agreement of the parties. We may therefore consider the case before us as a bill by John Innerarity, administrator of the estate of John Forbes, deceased, against the trustees of the Appalachicola Land Company for the foreclosure of a mortgage given under the following circumstances.

On 4 December, 1818, John Forbes, acting as the executor of William Panton and Thomas Forbes, and as agent of their respective heirs, covenanted to sell to Colin Mitchell

"two undivided thirds of a certain tract of land ceded by the Creek Indians unto the house of trade of which said Forbes was the principal partner, lying upon and between the Rivers Appalachicola and Appalachee, and containing about one million two hundred thousand acres, for the consideration of \$66,666.66, to be paid in the following manner: one-fourth, or \$16,666, on 1 May next, in the City of London, valuing the same at four shillings and six pence sterling each dollar; the remainder, or \$50,000, in four equal yearly installments, reckoning from the date,"

&c.;

This agreement was made and executed in the Island of Cuba, where John Forbes then resided. Colin Mitchell purchased for himself, Carnochan, and others, and subsequently took the title in his own name, and continued to hold it till 1820, when he transferred it to Octavius Mitchell, who held it as trustee for the company then or afterwards known as the Appalachicola Land Company. On 9 October, 1820, Octavius Mitchell executed a mortgage to John Forbes for the last two installments of \$12,500 each, due, by the agreement, on 8 December, 1820, and 8

December, 1821, but further time appears to have been given in the mortgage for these two payments, as they are made payable on 9 March, 1821, and 9 March, 1822. This mortgage is on the undivided half of the land conveyed to Mitchell, and is the subject of the present suit.

John Forbes, the mortgagee, died in Cuba in May, 1822, having made a will and appointed executors, who qualified and acted as such in that place, but never proved the will nor obtained letters testamentary in Florida.

John Innerarity first obtained letters of administration in Florida, on the estate of John Forbes, on 5 July, 1836.

That there is a balance due and unpaid on this mortgage seems to be admitted, but the parties differ widely in their estimates of its amount. The Superior Court for the County of Escambia, where this case originated, adjudged the balance

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due on the mortgage to be \$50,159.60. On appeal to the court of errors of the territory, that court decreed the balance due to be \$28,500. From that decree both parties have appealed. At present, we can notice only the exceptions taken by the mortgagors, whose appeal is now under consideration.

They have insisted on three several exceptions to the decree of the court of appeals, which will be noticed in their order.

1. Because interest was allowed from the time the money secured by the mortgage became payable, when it should have been allowed only from the time of filing the bill for foreclosure.
2. Because the court refused to allow a credit of 375, which John Forbes admitted should be deducted from the amount claimed.
3. Because a payment of \$13,357.73, made to Thomas M. Blount, was not allowed as a credit.

We shall consider these exceptions in their order, stating the facts of the case bearing on each of them so far as may be necessary to their elucidation.

I. As to the interest.

As the contract for the purchase of these lands, and the mortgage given to secure the balance of the purchase money, were executed in the island of Cuba, the court below allowed the current and legal rate of interest of that place (five percent) from the time the respective payments became due.

It is a dictate of natural justice, and the law of every civilized country, that a man is bound in equity, not only to perform his engagements, but also to repair all the damages that accrue naturally from their breach. Hence, every nation, whether governed by the civil or common law, has established a certain common measure of reparation for the detention of money not paid according to contract, which is usually calculated at a certain and legal rate of interest. Everyone who contracts to pay money on a certain day knows that if he fails to fulfill his contract, he must pay the established rate of interest as damages for his nonperformance. Hence it may correctly be said, that such is the implied contract of the parties. See 2 Fonblanque, Eq. 423. 1 Domat, book 3, tit. 5. The appellants themselves seem to have been fully aware of the justice of this rule, as in all their communications with the mortgagees they have admitted their liability to pay interest, and in their bill, filed in 1837, to have satisfaction entered on the mortgage (which makes a part of the record of this case), they offer "to pay interest at five percent from 8 December, 1821." This may not of itself be a sufficient reason

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for disallowing their present exception, if founded in justice, but it affords a strong presumption that it has no such foundation.

The reasons alleged in support of this exception are first that the mortgagors had not possession of the land, or at least received no profits from it, and that in either case, by the civil law, the purchaser is not bound to pay interest. But we are of opinion that this objection is founded on a mistake both of the law and the fact.

The mortgage was given more than two years after the sale to the mortgagors and title executed to them. A large portion of the purchase money had been paid, and on objection made, that the purchasers had not all the possession of which the land was capable. Both parties knew that although the Indians had ceded their title, they still continued a transient occupancy of the lands for hunting grounds. They may have infested the lands, and rendered it dangerous for the owner to occupy them in time of war; but their possession was not what the law would term adverse, not being with claim of title. There was no covenant by the vendor to expel or exterminate the Indians; the purchasers received such possession of the land as could be given them, *cum onere*. It was not expected that the Indians should atton to them or pay them rent. The purchasers of over a million of acres of wild lands did not expect to make profits by actual cultivation or reception of rents. Their expectation of profit was from the increase in value of the lands from efflux of time and the progress of improvement. These profits they have realized, doubtless to the amount of more than a thousand percent on their original investment. Moreover, the record of the *Forbes* case, decided in this Court (and read in evidence in this case, by consent), shows that in 1828, eleven years after the purchase, the appellants, or those under whom they claim, declared under oath that they had had "peaceable possession" of the land ever since their purchase. If, since that time, or before it, an actual *pedis possessio* of these lands may have proved difficult or dangerous, owing to Indian wars, it surely cannot be seriously argued, that any warranty, expressed or implied, either by the civil or the common law, makes the vendor liable for the acts of a public enemy, or for a detention or disturbance of the possession by the act of the sovereign power. The purchasers have received full seizin and possession of these lands in the year 1819, under a title proved to be good and indefeasible; the execution of this mortgage is an assertion of the fact; they have neglected to comply with their contract to pay the money secured by the mortgage for ten years, at least, without any apology; and it would be a strange doctrine indeed, and one

equally unknown to the civil as to the common law, that an accidental disturbance of the possession by the public enemy, happening so many years after such default of payment, could retroact to justify its previous detention, or operate as a defense to the payment either of principal or interest.

Besides, if it were true that, during all this time, the vendee was unable to have such a possession of his land as to receive profits from it, the doctrine of the civil law, as quoted by the learned counsel for the appellant -- "that the vendee is not liable for interest where he received no profits from the thing purchased" -- has no application to the present case. It applies only to executory contracts, where the price is contracted to be paid at some future day, and the contract is silent as to interest. In such a case, the civil law will allow interest from the date of the contract of sale, if the vendee has had possession and received profits from the thing purchased. In this it differs from the common law, which would not allow interest before the day fixed for payment, unless specially contracted for. But where the purchaser has contracted to pay on a given day, and neglects or refuses so to do, both law and equity subject him to interest as the measure of damages for the breach of his contract.

A second objection made to the payment of interest is that the purchasers incurred much trouble and expense in obtaining any acknowledgment of their title from the United States, and although it was finally decided by the Supreme Court of the United States that their title was valid, yet that the courts of Florida had declared it invalid, and thus caused a cloud to hang over it for two or three years, which hindered the settlement, improvement, and sale of the lands.

It is hard to conceive on what grounds these facts should constitute a defense to the payment of interest. The vendor *did* not, and no sane vendor *would*, covenant that his vendee should enjoy the property in all future time, free from unjust interruption or oppression either by the sovereign power of the state, the public enemy, or individual trespassers. At the time this company purchased this claim from *Forbes*, the United States and Spain were in treaty for the cession of Florida, and doubtless it was the prospect of this change of sovereign, and the anticipated increase in value in consequence thereof, that moved them to

purchase this large claim on speculation, and to covenant to pay the money for it, without waiting to see whether the United States would confirm the title, or without exacting from the vendors any covenant for the payment of any expenses to be incurred in obtaining the confirmation of their title by the new sovereign.

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It may be admitted, also, that a court of equity would have enjoined the vendor from enforcing the collection of the purchase money while the decree of the Florida court as to the title remained unreversed, from an apprehension of a total failure of consideration; yet as that judgment was reversed, and as the vendee was never evicted or put out of possession, he could have no claim to be released from paying interest, even during the time his title was thus unjustly subject to a cloud, much less for any term preceding its existence, or since its removal. As we have already said, there was no covenant in this sale, nor is there in this or in any sale, either of real or personal property, any implied warranty by the vendor that his vendee shall enjoy it forever free from all unjust or illegal interference either by the sovereign, or the citizen, or the public enemy.

If the money secured by this mortgage had been paid when it became due, the mortgagee could have retained it with good conscience, and the mortgagor could have shown no right to recover it back on the ground of failure of consideration; for the consideration has not failed, and the title to the lands sold is indefeasible. And such being the case, it is hard to perceive any reason why the mortgagor should not be liable to the legal damages for detaining money which he was bound to pay.

Another reason urged against the allowance of interest in this case is founded on the allegation that, from the death of Forbes in 1822 till 1836, when John Innerarity took out letters of administration in Florida, there was no person to whom the mortgagors could legally make payment. But this argument is founded on a mistake of facts, as it appears clearly by the record that whenever the mortgagors were ready or willing to pay, they found persons ready to receive and give them a

good and sufficient acquittance.

John Forbes was a trustee, as to this money, for the heirs of Panton and Thomas Forbes. When the mortgagors called on the executors of John Forbes to make a partial payment on the mortgage, they declined to receive it, but directed the payment to be made to the *cestui que trusts*, which was accordingly done. In October, 1823, one-half of the first installment was paid to William H. Forbes, acting for himself and the other heirs of Thomas Forbes. In the same year, also, the mortgagors paid to James Innerarity, who represented the heirs of Panton, the sum of \$2,680.81, and in February, 1825, the further sum of \$2,080.87. There is no evidence of any tender of the balance, either to the executors of Forbes or to the *cestui que trusts*.

This objection is therefore without foundation, and this

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exception to the decree of the court of Appeals is overruled.

II. The second exception is to the refusal of the court to allow a credit of 375, claimed by the mortgagors.

After three of the five installments into which the price of the lands was divided had been paid, but before the execution of the mortgage to secure the last two, it was discovered that John and James Innerarity, who were owners of one-fifth of the Panton interest (or one tenth of the two-thirds sold), would not assent to the sale made by John Forbes. Whereupon, as appears by all the testimony and the admissions of the parties, it was agreed to refund to the purchasers a proportional amount (being one-tenth) of the purchase money. Accordingly, three several sums of 375 were refunded to John Carnochan, who then represented the purchasers. "Besides which," says Forbes, in his letter of 10 December, 1819, "you will have to deduct from the acceptances due in 1820 and 1821 two similar sums at these distinct periods." On the trial below, the mortgagees insisted, that, as the mortgage was given for the balance due on the purchase nearly a year after the above-stated letter of Forbes, the fair presumption would be, that all the deductions for

the defect of title in the Panton share had been already made, as the parties were fully aware of the difficulty, and had already refunded large sums on account of it; and, as further time was given in the mortgage for the payment of the last two installments, it would not be probable that the parties had inadvertently given a security for a larger sum than was due. On the contrary, the mortgagors contended that they were entitled to a credit for two sums of 375, according to the admission in Forbes' letter. The court of appeals allowed them a credit for one sum of 375, but refused to allow the other, which constitutes the ground of the second exception to the decree.

As the correctness of the position taken by either party, on this point, can be subjected to the test of mathematical calculation based on admitted facts, we are of opinion that this exception has not been sustained. The whole amount of purchase money for the two-thirds conveyed was 15,000 sterling. The deduction for the Innerarity interest was one tenth, or 1,500, which would make four installments of 375 each. As the mortgage is given for the last two installments without any deduction, and as it is admitted that three installments of 375 each were refunded, it is plain that the fourth sum of 375 was not deducted from the mortgage, and equally plain that John Forbes was mistaken when he said that two sums of 375 remained yet to be deducted. The origin of this

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mistake can easily be discerned. The first payment was one-fourth of the whole purchase money, or 3,750; the one tenth refunded was 375; but as the remaining three-fourths were divided into four installments, each of 2,812 10s, the deduction from each would be but 281 5s. He overlooked the fact, that the last four installments, being each one-fourth less than the first, the amount to be deducted would be diminished in the same ratio. The oversight or mistake of Forbes in 1819 is not greater than that of both parties in 1820, when they included in the mortgage 375 which they knew was not due. But as the fact is fully established, that the only subject of deduction was one tenth of the whole, and that three sums of 375 had been refunded, and no more, the admission of Forbes, on the one side, and the presumptions of fact drawn from the execution of the mortgage, on the other, must

both yield to the certainty of arithmetic.

III. The third and last ground of exception urged by the appellants is the refusal of the court to allow them a credit for the sum of \$13,357.75, paid to Thomas M. Blount, the agent and attorney of John Innerarity.

Some two years after the commencement of the litigation between these parties, the appellants made a payment to Thomas M. Blount of \$13,357.75, under the following circumstances.

It was admitted by both parties that a large sum was due on the mortgage, but they differed widely as to the amount. Innerarity, being willing to receive any amount which the mortgagors were willing to pay, and give them a general credit for so much paid on account, without compromising his right to recover the whole amount claimed by him, gave a power of attorney to Thomas M. Blount, who was going to New York, where the appellants resided,

"to receive from the trustees of the Appalachicola Land Company, in the City of New York, any sum or sums of money on account of and in part payment of the mortgage &c.;, and to give such receipt or receipts, release or releases, therefor, as may be deemed requisite to exonerate the said trustees from so much of the said mortgage as may be paid by them on account and in part payment,"

&c.;

With this power of attorney, Blount proceeded to New York, and, instead of receiving such sums as the mortgagees might choose to pay on account, and giving such receipts or releases as he was authorized to give, he assumed to adjust and settle with the company the whole balance due on the mortgage, and to act as if he had been authorized to arbitrate and decide all the matters in variance between the parties, in the controversies then pending in the courts of Florida. For the sum of \$4,832.35, he gave the mortgagors a discharge for the balance

of the first installment, including the disputed item of damages on the bill of exchange, claims &c.; And for a further sum of \$8,525.38 he gave a discharge of one-half the last installment. Both Blount and the appellants well knew that Innerarity had uniformly and tenaciously claimed a much larger amount as due on each of these items; and they ought to have known that even if no more was justly due on them than the amounts paid, Blount had no authority to compromise or adjudicate on the justice of Innerarity's claim. Besides these sums of money which are stated in Blount's release to be the whole consideration thereof, he received also a written contract of Messrs. Curtis and Griswold, to pay a further sum of \$5,000, on certain conditions, but to whom, or how, or on what contingency, it is difficult to discover from anything that appears on the face of the paper, or the evidence in the cause.

Soon after this transaction (on 20 January, 1840), Innerarity gave notice by letter to the appellants, that he repudiated the act of Blount, and says:

"So soon after his return as I saw Mr. Blount, *he informed me of the provisional arrangement that he had made with you, subject to my approval.* But this involved the suspension of the sum of \$5,000, with the corresponding interest &c.;, for which your contingent bond was proposed &c.;, with the preliminary, however, of the cancellation of the moiety of the mortgage. This proposition, I confess, startled me,"

&c.;

The appellants, though thus informed by Innerarity that he considered "Blount as placed in the position of their agent," and that he was unwilling to ratify "this provisional arrangement," nevertheless proceeded to put on record in Florida the release given them by Blount. When this came to the knowledge of Innerarity, he again addressed them, by letter of 19 May, 1840, as follows:

"I addressed you a letter on the 20 January last, and subsequently on 25 February, by original and duplicate, in which I advised you, that, having learned from T. M. Blount that he had an arrangement with you subject to my approval, as

he stated to me and others, in relation to a discharge of one moiety of the mortgage &c.;, I did not feel at liberty, as the representative of the interest of others, for the reasons stated in my said letter of 20 January, to sanction the provisional contract which he made. To these letters I have received no answer, but to my great astonishment have just seen the deed of release given to you on 19 September by Mr. Blount, in which he proposes to act as my attorney, and which deed professes to discharge the trustees from one moiety secured by the abovementioned

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mortgage. In so doing, Mr. Blount has transcended his authority as my attorney, as will appear by reference to my letter of attorney &c.; Feeling it to be my duty to disavow this unauthorized assumption of my attorney, and not less my duty to give you timely warning to protect yourselves from injury, I hereby notify you that I disavow and repudiate the deed of release &c.; I have not received, nor will not receive, any part of the money paid by you to Mr. Blount; but will look to you and the original security for the debt due under the said mortgage."

The receipt of these letters is admitted by the appellants in their answer to a supplemental bill filed by Innerarity (June 12, 1840), for the purpose of having Blount's release delivered up, and the whole transaction between him and the trustees declared fraudulent and void. On 6 July, 1840, Carnochan, one of the trustees, filed his cross-bill to make Blount a party, and praying that, inasmuch as the money paid to him by the trustees had not been applied to the purpose for which it was designed, it may be paid into court and held under their control. On 9 April, 1841, the appellants filed another cross-bill, insisting on the full power of Blount in the transaction, and praying the court to confirm and establish the release, and to order satisfaction to be entered on the mortgage accordingly.

And finally, on 27 June, 1841, after it was ascertained that Blount and the Bank of Pensacola (of which he was president, and in which he had deposited the money) were both insolvent, and that the money paid to him was lost, the appellants, in their answer to the cross-bill, *for the first time*, offer

"to waive the said release,' and 'be satisfied that payment shall be held and regarded as on account of the mortgage generally, and be credited *pro tanto*. "

On these facts, the appellants contend that they are entitled to a credit for the money paid to Blount, because he was authorized to receive it; and although the settlement he made and the release he gave may be void for want of authority, yet his acts, so far as they were authorized, were valid and binding on his principal.

"Regularly it is true," says Lord Coke

"that when a man doth less than the commandment or authority committed unto him, then, the commandment or authority being not pursued, the act is void. And when a man doth that which he is authorized to do, and more, then it is good for that which is warranted, and void for the rest. Yet both these rules have divers exceptions and limitations."

Co.Lit. 258 a . And "Lord Coke is well warranted," says Mr. Justice Story. Story

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on Agency, § 166,

"in suggesting that there are exceptions and limitations. Where there is a complete execution of the authority, and something *ex abundantia* is added which is improper, then the execution is good and the excess only is void. But when there is not the complete execution of the power, or when the boundaries between the excess and the rightful execution are not distinguishable, then the whole would be void."

It is contended in the present case that the excess and the rightful execution are easily distinguishable and that the receipt of the money was a valid act and binding on his principal, though the settlement and release were void. But we are of opinion, that the appellants have not put themselves in a condition to have the benefit of this principle. Blount's power of attorney was a bare authority to receive money on account of the mortgage then in litigation, if the appellants chose to pay him any, leaving all the questions in dispute between the parties open to future

adjustment. But the mortgagors refuse to pay him money on the conditions on which he was authorized to receive it, and give a valid acquittance. On the contrary, the money given to Blount is on their own terms, and in consideration of a settlement, arrangement, and release, which they knew, or ought to have known, Blount had no authority to make. The money paid, the bond given, the receipt taken, discharging them from the balance claimed on the bill of exchange and from one-half of the last installment, constitute one transaction. Having advanced the money on their own terms and conditions, and not on those tendered by Innerarity, they put him into a situation in which he must either affirm or repudiate the whole transaction. For if he accepted the money, they might insist that he could not reject the consideration on which it was given, on the familiar principle of the law, "that the principal cannot ratify a transaction of his agent in part, and repudiate it as to the rest." Story on Agency, § 250. Besides, by thus undertaking to enter into a treaty with Blount which they knew could not be binding without the assent of Innerarity, they in fact constituted Blount their ambassador or agent to obtain its confirmation. They had a perfect right to refuse to pay money on the terms dictated by Innerarity in his letter of attorney; and Innerarity had an equal right to refuse it on their terms. And when informed by him, soon after the transaction, that he considers Blount as their agent, and that he had proposed this transaction as a provisional arrangement subject to the approval of Innerarity, they keep silence till he again repudiates the transaction and files a bill to set it aside, and never intimate a willingness

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that Innerarity shall receive the money on the terms he offered, till near two years afterwards, when the money was lost by the insolvency of Blount and the bank. This assent of the appellants to the terms of Innerarity came too late, after the money had been lost by their obstinate pertinacity in endeavors to compel him to accept it on their own terms.

We are of opinion, therefore, that the court of Appeals have not erred in refusing to credit the appellants with this sum as a payment on the mortgage.

The decree of the court of Appeals of Florida is therefore

Affirmed.

ORDER

This cause came on to be heard on the transcript of the record from the Court of Appeals for the Territory of Florida, and was argued by counsel. On consideration whereof, it is now here considered and decreed by this Court that the decree of the said Court of Appeals in this cause be and the same is hereby affirmed, with costs and damages at the rate of six percentum per annum, and that the time of redemption be extended to six months from and after the filing of the mandate of this Court in this case in the court below.

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