

Dorsey Vs. Packwood

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Appellant : Dorsey

Respondent : Packwood

Judgement :

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Dorsey v. Packwood

53 U.S. (12 How.) 126

APPEAL FROM THE CIRCUIT COURT OF THE UNITED

STATES FOR THE EASTERN DISTRICT OF LOUISIANA

SYLLABUS

An agreement whereby the purchaser of a plantation

"bound himself to transfer to his son-in-law one-half of the plantation, slaves, cattle, and stock as soon as the son-in-law should pay for one-half of the cost of said property, either with his own private means, or with one-half of the profits of the plantation"

was deficient in mutuality. The son-in-law was not bound to render any services nor pay any money. It was a *nude pact*.

It was not in alternative obligation upon the son-in-law, because the election to pay his half out of the profits would have been merely paying with another man's money.

Even if the agreement possessed mutuality, there was no performance, or offer of performance by the son-in-law for twenty-seven years.

Moreover, fifteen years after the agreement, when the plantation was likely to prove a ruinous purchase, the son-in-law abandoned and released all his claim.

This was an appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

The leading facts in the case are stated in the opinion of the Court, to which the reader is referred.

Upon the hearing in the circuit court, the bill was dismissed, and Dorsey appealed to this Court.

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MR. JUSTICE GRIER delivered the opinion of the Court.

The record of this case covers 840 pages, and the abstracts and briefs of counsel nearly three hundred. But as the merits of the case, when extricated from the mass of matter with which it is enveloped, depend on the application of undisputed principles and axioms of the law to a few leading facts, it will not be necessary that our statement of it should be proportionally voluminous.

Dorsey, the complainant and appellant, filed his bill in the Circuit Court of Louisiana in March, 1848, claiming the specific execution of a contract in writing executed on 16 April, 1821, which is as follows:

"Samuel Packwood, now in the City of New Orleans, having lately purchased the plantation heretofore belonging to John La Farge, situated below town on the right bank of the river about eleven leagues, binds himself, his heirs, and executors to transfer unto G. Dorsey, his heirs and executors one-half of the plantation above mentioned, also one-half of the slaves, cattle, and stock, farming utensils &c.;, as soon as said G. Dorsey shall pay for one-half of the cost of said property, either with his own private means or with one-half of the profits of the plantation, but it is agreed upon and well understood by said G. Dorsey, that Samuel Packwood, until said transfer is made, has the right and privilege of selling and disposing and transferring of said plantation to any person or persons that he may think proper to sell to, without consulting or asking the consent of said G. Dorsey, and the consent of said G. Dorsey shall not be necessary to make the sale good, and it is further agreed upon that Samuel Packwood is to have the entire and complete control of said plantation and everything that appertains to it until said transfer

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is made to G. Dorsey; but if said Packwood should sell at any time previous to said transfer to G. Dorsey, he shall be answerable for and shall account to said G. Dorsey for one-half of the net profits of said sale."

At the time this paper was executed, Packwood resided in New York, but was owner of valuable property in New Orleans, from which he derived his principal income. Dorsey was his son-in-law, and a member of the mercantile firm of Morgan, Dorsey & Co. This firm was in good credit, and acted as the financial agent of Packwood, lending him their acceptances and advancing money for him to enable him to complete his purchases up to the time of their failure and bankruptcy in 1825. At this time, the firm was largely in advance to Packwood, but the balance due was afterwards paid by him, with interest. Dorsey had been chiefly instrumental in persuading Packwood to make this purchase, and owing to

his expectation of a share in the speculation in case it should turn out to be profitable, the commissions charged for these financial accommodations were probably not so great as they otherwise might have been, and for the same reasons also, Dorsey took an interest in the management of the plantation, made additional purchases, gave advice and superintendence without at first making such additional charges as might have been made for similar services rendered to a stranger.

When this purchase was made, the parties seem to have expected that after the first payment of \$25,000 was made by Packwood, the profits of the plantation might in a great measure be depended on to liquidate the balance of its cost. But they were greatly deceived in this expectation. For many years the crops did not equal the expenses, so that, at the time of the failure of the firm of Morgan, Dorsey & Co. in 1825, Packwood was in debt for the plantation and the additional purchases of land and negroes a sum exceeding one hundred and fifty thousand dollars, \$150,000. Dorsey had paid nothing and was then unable to pay anything. The speculation seeming likely to turn out disastrous, he ceased to expect any advantage from it or claim any interest in it, and accordingly he advised Packwood to sell the greater part if not all of it "with the hope that he [Packwood] might get out of the scrape in four or five years." Indeed, for some years after this it appeared doubtful whether Packwood would be able to extricate himself from his pecuniary embarrassments consequent on this purchase. He finally succeeded, however, after a further struggle of some twelve or fifteen years, by sales of his other property and the profits of the plantation, to rescue himself from impending ruin and pay the debts in which he had been involved. During all

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this time Dorsey was unable to help Packwood out of his difficulties, and ceasing to consider his expectations from Packwood's contract with him to be of any value, and as it might be considered a cloud upon the title, at the request of Packwood, he voluntarily executed and sent to him the following release, witnessed by his wife:

"This is to certify that I hereby abandon and release unto Mr. Samuel Packwood any claim I have or might have to any interest in or to his plantation in the Parish of Plaquemines or profits of the same by virtue of any written documents he may have given, or verbal promises made upon the subject."

"New Orleans, 28 January, 1836 G. DORSEY"

"Witness: E. H. Dorsey"

From this time till 1838, Dorsey had the agency of the plantation under a power of attorney from Packwood. In that year, Packwood cancelled his power of attorney and appointed another agent, alleging that Dorsey had misused his power by endorsing his principal's name to sustain his private credit. This was the beginning of a coldness between the parties which, after the refusal of Packwood to incur liabilities for Dorsey in 1840 and after the death of Mrs. Alice Packwood, the mother of Mrs. Dorsey, and the marriage of Packwood to a second wife, became a bitter family quarrel, followed by much litigation between the present parties. The nature and result of these suits it is not necessary, for the purposes of the present case, to specify. Suffice to say that Dorsey now revived his claim to a share in the Myrtle Grove property on the ground that his half of the purchase money had been paid by the rents and profits of the estate, and finally instituted this suit in March, 1848.

In the original bill, the complainant founds his title to relief on an alleged lost agreement dated 12 April, 1823. But after the production by the respondent of this instrument, dated 16 April, 1821, he amended his bill and made his claim under it. The respondent, in his answer, denies the existence of any other agreement either written or parol, and there is no proof to show the existence of either. The right of the complainant to relief will therefore depend on this instrument of writing, in connection with the facts, a brief outline of which we have endeavored to give so far as we think them material to the decision of the cause.

There is no allegation in the bill or proof that any clause was omitted from this instrument, either through mistake or inadvertence. It is signed by both parties in

presence of attesting witnesses, and is expressed in clear and precise terms. But there is one characteristic necessary to give it validity as a binding contract in which it is entirely deficient. It wants mutuality.

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It imposes no obligation on Dorsey whatever. He is not bound either to render services or pay money as a consideration for one-half the land. Packwood could not support a suit upon it to compel Dorsey to do anything. It is not an alternative obligation, because Dorsey is not bound to perform either alternative. The allegation that "Dorsey elected the alternative of paying for the land out of the profits," or, in other words, with Packwood's money, amounts only to this: that he was willing to accept one-half of the plantation as a gift, but would pay no part of the purchase money out of his own pocket. Nor is there any evidence that Dorsey ever notified Packwood of his election to do anything. On the contrary, in January, 1825, before the failure of the firm of Morgan, Dorsey & Co., when the speculation appeared likely to be a ruinous one, he *elects* to have Packwood "get out of the scrape" the best way he could, and his release, given in 1836, shows his election to claim no interest in the property whatever. But even assuming that Dorsey was bound by this contract, it cannot come within the category of alternative obligations where one of the alternatives was to pay with Packwood's money and give nothing of his own.

"An obligation," says Pothier,

"is not alternative where one of the things is not susceptible of the obligation intended to be contracted, but in this case the obligation is a determinate obligation of the other. Therefore it was decided, in l. 72, § 4, ff. *de sol*, that if a person promised me in the alternative two things, whereof one belonged to me already, that he had not the liberty of paying that in lieu of the other -- not even although it might afterwards cease to belong to me; because this not being, at the time of the contract, susceptible of the obligation contracted in my favor, the other only was due; *cum re sua nemo deberi possit*. "

Evans' Pothier, Part 2d., C. 3, Art. 6, No. 249. Assuming the obligation to be mutual, Dorsey was bound to "pay with his own private means one-half of the cost" of the property, or offered to do it within a reasonable time, before he could claim the interference of a court of equity to enforce a specific execution of this contract. Equity will not decree the specific execution of mere nude pacts, or voluntary agreements not founded on some valuable or meritorious consideration. The same rule is applied to imperfect gifts, *inter vivos*, to imperfect voluntary assignments of debts or other property, to voluntary executive trusts, and to voluntary defective conveyances.

When the obligation is mutual, the party asking a specific performance must show that he has been in no default in not having performed the agreement on his part, and that he has taken all proper steps towards the performance. He must show himself desirous, prompt and eager to perform the contract. If

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he has been guilty of gross laches, or if he applies for relief after a long lapse of time, unexplained by equitable circumstances, his bill will be dismissed.

It is clear, then, from this statement of the facts and law as they affect this case, that the complainant has not shown a case which will entitle him to a decree in his favor.

For 1st. If he was bound at all, he has shown no performance, or offer of performance, after an interval of twenty-seven years.

2dly. The agreement by Packwood to convey one-half of the land purchased and paid for by himself, in consideration of a payment "from the profits of the plantation," which equally belonged to himself, was but the promise of a gift, a nude pact which equity will not enforce.

3dly. The release of the complainant in 1836, fifteen years after the agreement, when he had paid nothing for the land, either out of his own pocket or even "by the profits of the plantation," if such could be called a payment was a voluntary

abandonment of all claim under it. Whether, if he had paid one-half the purchase money, and had a good equitable title to the land, a release without a consideration would operate as an equitable bar to his claim, we need not inquire. But as cumulative evidence of a total abandonment of all claim under an executory agreement of which he had performed no part, it furnishes an additional reason for refusing him a decree, to which he would not be entitled even if such release had never been given.

The decree of the circuit court is therefore

Affirmed with costs.

ORDER

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Louisiana, and was argued by counsel. On consideration whereof it is now here ordered, adjudged, and decreed by this Court that the decree of the said circuit court in this cause be and the same is hereby affirmed with costs.