

Gregg Vs. Von Phul

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Court : US Supreme Court

Decided On : 1863

Appeal No. : 68 U.S. 274

Appellant : Gregg

Respondent : Von Phul

Judgement :

Gregg v. Von Phul - 68 U.S. 274 (1863)

U.S. Supreme Court Gregg v. Von Phul, 68 U.S. 1 Wall. 274 274 (1863)

Gregg v. Von Phul

68 U.S. (1 Wall.) 274

ERROR TO THE CIRCUIT COURT FOR

THE NORTHERN DISTRICT OF ILLINOIS

SYLLABUS

1. Whether a contract to give a deed with "full covenants of seizure and warranty" is answered by a deed containing a covenant that the grantor is "lawfully seized in fee simple, and that he will warrant and defend the title conveyed against the claim

or claims of every person whatsoever" -- there not being a further covenant against *encumbrance*, and that the vendor has *a right to sell* -- need not be decided in a case where the vendee, under such circumstances, made no objection to the deed offered on the ground of insufficient covenants, but only stated that he was not prepared to pay the money for which he had agreed to give notes, handing the deed at the same time, and without any further remark back to the vendor's agent who had tendered it to him.

2. Where a vendor agrees to give a deed on a day named, and the vendee to give his notes for the purchase money at a fixed term from the day when the deed was thus meant to be given, and the vendor does not give the deed as agreed, but waits till the term that the notes had to run expires, and then tenders it -- the purchaser being and having always been in possession -- such purchaser will be presumed, in the absence of testimony, to have acquiesced in the delay, or, at any rate, if when the deed is tendered he makes no objection to the delay, stating only that he is not prepared to pay the money for which he had agreed to give the notes, and handing back the deed offered -- he will be considered, on ejectment brought by the vendor to recover his land, to have waived objections to the vendor's noncompliance with exact time.

3. While it is true that in an executory contract of purchase of land, the possession is originally rightful, and it may be that until the party in possession is called upon to restore possession, he cannot be ejected without demand for the property or notice to quit, it is also true that by a failure to comply with the terms of sale, the vendee's possession becomes tortious, and a right of immediate action arises to the vendor.

Page 68 U. S. 275

A noncompliance with a request to pay money on the ground that the party is not prepared to do so, and a return to the vendor without promise to pay at a future time and without further remark of any sort of a deed offered is a failure to comply with such terms. And ejectment lies at once, without demand or notice, even though the vendor may not himself have been perfectly exact in the discharge of

parts, merely formal, of his duty-such want of formality on his part having been waived by the vendee-and, though the vendee may have made valuable improvements on the land.

Von Phul and Gregg entered into articles of agreement on the 6th of December, 1856, by which Von Phul agreed to sell and convey to Gregg certain premises in Peoria, which Gregg agreed to purchase, paying Von Phul for them \$8,550 as follows, to-wit: \$2,800 on the 1st of March, 1857 (which was paid), and the residue in three payments of \$1,900 each in twelve, eighteen, and twenty-four months from the same day. Von Phul covenanted that he would convey the premises by deed in fee simple, *"with full covenants of seizure and warranty, on or before the first day of March, 1857,"* and Gregg agreed to execute his three promissory notes (dated on that day), each for \$1,960, payable in twelve, eighteen, and twenty-four months, and secured by a deed of trust on the land sold and conveyed. On the 4th of May, 1860, one Purple, acting by the request and as the agent of Von Phul, tendered a deed to Gregg and demanded, not the *notes*, but the money due on the contract of purchase. The deed which was tendered covenanted

"That the said Von Phul is *lawfully seized of a fee simple in the premises* aforesaid, and that he *will warrant and defend the title &c.*;; hereby conveyed, against the claim or claims of every person."

Gregg looked at the deed and *made no objection to it*, but stated that he was not prepared to pay the money, and handed it back to Purple. Gregg, who was in possession, had gone into it under the contract of purchase, and had no other right of possession. Previous to the tender and demand, he had improved the property and built houses on it worth from \$6,000 to \$7,000. Von Phul was in Peoria while the improvements were being made. His residence, however, was in St. Louis.

On ejectment brought by Von Phul against Gregg in the

Circuit Court for the Northern District of Illinois to recover possession of the property, the court, upon the above facts, decided the law to be for the plaintiff, and the defendants excepted. The question in this Court on error was whether the court below had decided rightly.

Page 68 U. S. 280

MR. JUSTICE DAVIS, after stating the case, delivered the opinion of the Court:

In the view we take of this case, it is not important to determine whether the deed tendered was such a one as Von Phul was bound to make or Gregg obliged to receive. If the deed was justly liable to objections, they should have been stated. Gregg is estopped now on the most obvious principles of justice from interposing objections which he did not even name when the deed was tendered and the money due on the contract demanded. If the deed was defective and the defects pointed out, *non constat* but they could have been obviated. There is nothing in the evidence even tending to show that Von Phul did not act in good faith. The very silence of Gregg was well calculated to influence the conduct of Von Phul and to convince him that the want of money was the only reason Gregg had for declining to perform the contract. And it would be against good conscience to permit Gregg now to avail himself of objections which his failure to make when the deed was tendered must have induced Von Phul to suppose did not exist.

But it is said that Von Phul covenanted to make the deed on the *first day of March*, eighteen hundred and *fifty-seven*, when in fact it was not until *April*, eighteen hundred and *sixty*. If this is so, it does not appear how the delay has harmed Gregg. He was not asked for payment until long after the contract had matured, and it is fair to presume, in

Page 68 U. S. 281

the absence of testimony, that he acquiesced in the delay. At any rate, as he made no complaint that the deed was not tendered in season, he has waived his right to object to the irregularity. The doctrine of estoppels *in pais*, or by the act of

the party, is founded in natural justice, "and is a principle of good morals as well as law."

"The primary ground of the doctrine is that it would be a fraud in a party to assert what his previous conduct had denied when on the faith of that denial others have acted. [[Footnote 1](#)]"

No one is permitted to keep silent when he should speak, and thereby mislead another to his injury. If one has a claim against an estate and does not disclose it, but stands by and suffers the estate sold and improved, with knowledge that the title has been mistaken, he will not be allowed afterwards to assert his claim against the purchaser. [[Footnote 2](#)] And justly so, because the effect of his silence has actually misled and worked harm to the purchaser. And in this case, the silence of Gregg concludes him. He cannot now take exceptions to a deed which he failed to perceive when it was tendered to him, or if he knew them, failed to disclose.

But it is contended that Gregg was entitled to notice to quit.

How far a notice to quit is necessary before an action of ejectment can be brought has been much discussed in England. In this country, the authorities are not uniform. In some of the states, the subject is regulated by statute law, or by rules of court. In New York, the question has been fully considered. The courts of that state hold that where there is a contract of purchase and the vendee enters into possession with the consent of the vendor, that ejectment will lie at the suit of the vendor without a previous notice to quit. [[Footnote 3](#)]

Notice to quit is generally necessary where the relation of

Page 68 U. S. 282

landlord and tenant exists and no definite period is fixed for the termination of the estate, but where a lease is to expire at a certain time, a notice to quit is not necessary in order to recover in ejectment, because to hold over would be wrong after the duration of the estate was fixed and well known to lessor and lessee. In

an executory contract of purchase, the possession is originally rightful, and it may be that, until the party in possession is called upon to restore it, he cannot be ejected without a demand or notice to quit. But the vendee can forfeit his right of possession, and if he fails to comply with the terms of sale, his possession afterwards is tortious and there is an immediate right of action against him. [[Footnote 4](#)] It would be an idle ceremony to demand possession when to a previous demand for the money due on the contract of purchase the vendee refused to respond. This refusal, unaccompanied by any promise to pay the money at a future day, was equivalent to a direct notice to Von Phul that Gregg declined to execute the contract.

This action is a possessory one, and it settles nothing but the right of possession. The equities between the parties must be determined in another proceeding.

Judgment affirmed with costs.

[[Footnote 1](#)]

Hill v. Epley, 31 Pa.St. 334; *Simons v. Steele*, 36 N.H. 73; *Todd v. Haggart*, 22 English Common Law 268.

[[Footnote 2](#)]

Hill v. Epley, 31 Pa.St. 334; *Breeding v. Stamper*, 18 B.Monroe 175.

[[Footnote 3](#)]

Smith v. Stewart, 6 Johnson 46; *Jackson v. Miller*, 7 Cowen 747; *Whiteside v. Jackson*, 1 Wendell 418; *Jackson v. Moncrief*, 5 *id.* 26.

[[Footnote 4](#)]

Prentice v. Wilson, 14 Ill. 92; *Baker v. Lessee of Gittings*, 16 Ohio 489.