Hansbrough Vs. Peck

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Court : US Supreme Court

Decided On : 1866

Appeal No. : 72 U.S. 497

Appellant : Hansbrough

Respondent : Peck

Judgement :

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Hansbrough v. Peck

72 U.S. (5 Wall.) 497

ERROR TO THE CIRCUIT COURT FOR

THE NORTHERN DISTRICT OF ILLINOIS

SYLLABUS

1. Where in part performance of an agreement a party has advanced money, or done an act, and then stops short and refuses to proceed to its conclusion, the other party being ready and willing to proceed and fulfill all his stipulations

according to the contract, such first-named party will not be permitted to recover back for what has thus been advanced or done.

2. By the statutes of Illinois as existing in January, 1857, a contract for a rate of interest exceeding six percent, did not invalidate the contract.

3. Where a parol promise is in substance but the same with a written one which the party is already bound to perform, and where all that is done on the former is in fact but in fulfillment of the latter, no new consideration passing between the parties, the existence or enforcement of the parol contract cannot be set up as a rescission of the written one.

In January, 1857, Hansbrough and Hardin agreed with one Peck to buy certain lots in Chicago for $134,000. The purchase money was made payable in nine installments, each being for $4,300 except the last, payable April 28, 1861, which was for $90,000. The lots had on them at the time two wooden houses and a barn.

By the contract it was agreed

" *that the prompt performance of the covenants, and payment of the money shall be a condition precedent, and that TIME IS OF THE ESSENCE OF THE CONDITION.* "

And also

"that in case default shall be made in the payment of any or either of said notes or any part thereof at the *time* or any of the *times* above specified for the payment thereof, for thirty days thereafter, the agreement, and all the preceding provisions thereof, shall be null and void, and no longer binding, at the option of said vendor. And all the payments which shall have been made absolutely and forever forfeited to said vendor, or at his election the covenants and liability of the purchasers shall continue and remain obligatory."

And also

"That in case of default in the payments promptly on the days named by the purchasers, that it is also the right

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of said vendor to declare the contract ended and prior payments forfeited, and to consider all parties in the possession of the premises at the time of such default *tenants at will of said vendor at a rent equal to ten percent on the whole amount of said purchase money.* And the vendor from that time is declared to be restored, with the possession and right of possession in the premises, to the exercise of all powers, rights, and remedies provided by law or equity to collect such rent, or remove such tenants, the same as if the relation of landlord and tenant were created by an original, absolute lease for that purpose on a special rent payable quarterly on a tenure at will, and that the said tenants will not *commit or suffer any waste or damage* to said premises or the appurtenances, but, on the termination of such tenancy will deliver the premises in as good order and repair as they were at the commencement of such tenancy."

By a statute of Illinois: [Footnote 1]

"The rate of interest upon the loan or forbearance of any money, goods, or things in action, shall continue to be six dollars upon one hundred dollars for one year."

"Any person who, for any such loan, discount, or forbearance, shall pay or deliver any greater sum or value than is above allowed to be received may recover in an action against the person who shall have taken or received the same threefold the amount of money so paid, or value delivered above the rate aforesaid, either by an action of debt in any court having jurisdiction thereof, or by bill in chancery in the circuit court, which court is hereby authorized to try the same, *provided* said action shall be brought or bill filed within two years from when the right thereto accrued."

Under this contract and in the state of the law above stated, the purchasers went into possession and laid out $18,000 in improving the property by building on it. They paid $10,000 also on account of the notes, and about two years' interest.

After erecting these improvements, and

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paying the two years' interest, the purchasers, becoming embarrassed or dissatisfied with their contract, were desirous of surrendering it, but were persuaded by the vendor to remain, and they paid the interest for another year, 1859, making in all about $28,000 of interest paid. The last payment of interest was made 31 January, 1860. After that, no further payments were made, and on the 1st April, 1861, the vendor filed a bill in chancery in one of the state courts to prevent the threatened removal of the buildings from the premises and to get possession of the property. On the 23d August, 1862, a decree was entered to this effect and the vendor put into the possession. The decree restrained the purchasers from removing the buildings, declaring them to be fixtures, and for the default in the payment of the purchase money the plaintiff, the vendor, was put in possession and all the tenants were required to attorn to him. It declared further that he was entitled to the estate and interest in the lots the same as before the contract. And to remove any doubt in the title by reason of the contract and the default in the payments, it declared that the premises should be discharged from any encumbrance or charge in respect to the contract of sale and that the purchasers or anyone claiming through them should be forever debarred from having any estate or interest or right of possession in the premises, having lost the same by willful default, and that the articles of agreement were to be held, in relation to the title and possession, as of no effect and void as it respected the vendor and all claiming under or through him.

In this state of facts, the purchasers filed, August 23, 1862, a bill in the Circuit Court for the Northern District of Illinois to recover back the moneys paid upon the contract and also for the value of improvements made on the premises, the ground of the bill being that the contract had been rescinded by the defendant.

In regard to the matter before mentioned of the purchasers' having been desirous of surrendering, and of being persuaded by the vendor to stay, the bill alleged:

"That the contract became and was so intolerably oppressive that in November, 1859, they proposed a relinquishment of the same unless it should be modified or made less rigorous and exacting. That the vendor thereupon proposed to them that if they would not abandon the same, but would pay certain taxes, assessments, and charges, and interest then accrued, the whole amounting to ten thousand dollars, within sixty days from the first day of December, 1859, he would thereafter so accommodate and indulge them that they could carry on said contract, and to this end he would, until there should be a revival of trade and business in Chicago, take the net income from the property over and above taxes and insurance in lieu of interest on the purchase money until such revival of trade and business. That your orators accepted said proposition, and in accordance with his request, in order to comply with the proposition, sent an agent from Kentucky to reside in Chicago aforesaid, to take charge of the property and collect and get in the rents and pay the same to said vendor, less the taxes and insurance. And also your orators, on or about the 31st day of January, A.D. 1860, paid said taxes, assessments, and other charges and accrued interest, the whole amounting to ten thousand dollars as aforesaid, in compliance with his said proposition, and thereafter were ready and willing and, from time to time offered to pay the vendor the net income from the premises after deducting the taxes and insurance as aforesaid; but he declined to abide by his said proposition, and thereafter continued to enforce the said contract of January 29, 1857, and all its provisions, with the most exacting rigor, notwithstanding there was no considerable increase of income from the property nor a revival of trade and business in Chicago."

Upon this case, which in substance was the one set forth, the defendant in the case, the original vendor, demurred, and the court below dismissed the bill.

MR. JUSTICE NELSON delivered the opinion of the Court.

It will be seen from the facts in this case that the plaintiffs were in default on account of the nonpayment of the interest for more than a year, and also that the principal fell due a few days after the filing of the bill in chancery in the state court on account of this default in the payments. The contract was a very stringent one. Time was, in terms, made the essence of it in respect to the payments, and further, in case of a default in any one payment for thirty days, the agreement was to be null and void and no longer binding, at the option of the vendor, and all payments that had been made were to be forfeited to him, and also in case of default in any of the payments it was agreed that the contract, at the election of the vendor, was to be at an end, and the purchasers deemed to be in possession as tenants at will, liable for a rent equal to the amount of interest of the purchase money.

The decree in chancery in the state court is relied on as having rescinded the contract at the instance of the defendant, by reason of which the plaintiffs have become entitled to recover back the purchase money paid, together with the value of the improvements. The position is that there is no longer a subsisting contract, as an end has been put to it by the vendor, and he has in consequence resumed the possession, and claims to hold the estate the same as if no contract had ever existed, and that in such case the purchaser, upon settled principles of law and equity, is at liberty to recover back the consideration paid and the value of the improvements. But the difficulty is that the vendor has only availed himself of a provision of the contract which entitled him to proceed in a court of chancery, by reason of the default of the purchaser in making his payments, to put an end to it and be restored to the possession. It is a proceeding in affirmance, not in rescission of it, by enforcing a remedy expressly reversed in it. Indeed, without such clause or

reservation, the remedy would have been equally available to him. It is a right growing out of the default of the purchaser, as the law will not permit him both to withhold the purchase money and keep possession and enjoy the rents and profits of the estate, nor will it subject the vendor to the return of the purchase money if

he is obliged to go into a court of equity to be restored to the possession.

In case of a default in the payments, there are several remedies open to the vendor. He may sue on the contract and recover judgment for the purchase money and take out execution against the property of the defendant, and among other property, the lands sold, or he may bring ejectment and recover back the possession; but in that case, the purchaser, by going into a court of equity within a reasonable time and offering payment of the purchase money, together with costs, is entitled to a performance of the contract; or the vendor may go in the first instance into a court of equity, as in the present case, and call on the purchaser to come forward and pay the money due or be forever thereafter foreclosed from setting up any claim against the estate. In these contracts for the sale of real estate, the vendor holds the legal title as a security for the payment of the purchase money, and in case of a persistent default, his better remedy, and under some circumstances his only safe remedy, is to institute proceedings in the proper court to foreclose the equity of the purchaser where partial payments or valuable improvements have been made. The court will usually give him a day, if he desires it, to raise the money, longer or shorter, depending on the particular circumstances of the case, and to perform his part of the agreement.

This mode of selling real estate in the United States is a very common and favorite one, and the principles governing the contract both in law and equity are more fully and perfectly settled than in England or any other country. The books of reports are full of cases arising out of it, and every phase of the litigation repeatedly considered and adjudged. And no rule in respect to the contract is better settled than this: that the party who has advanced money, or done an

act in part performance of the agreement, and then stops short and refuses to proceed to its ultimate conclusion, the other party being ready and willing to proceed and fulfill all his stipulations according to the contract, will not be permitted to recover back what has thus been advanced or done. [Footnote 2]

The same doctrine has been repeatedly applied by the courts of Illinois, the state in which this case arose. [Footnote 3]

This principle would of itself have defeated the plaintiffs in this suit independently of the decree foreclosing their equity in the contract.

It appears in the case that the parties agreed upon the rate of ten percent interest for the forbearance of the purchase money unpaid when, at the time, as is admitted, it was only six percentum. But this law did not invalidate the contract. It authorized the party to recover of the party taking usury threefold the amount above the legal rate at any time within two years after the right of action accrued. This bill was filed the 23d August, 1862. The last payment of interest was made 31 January, 1860. More than two years, therefore, had elapsed before the suit was brought.

We should add it is not admitted by the defendant that this arrangement had the effect to make the contract usurious, and would not, according to the case of *Beete v. Bidgood,* [Footnote 4] if the excess of interest stipulated for was in fact a part of the purchase money.

After the default of the purchasers, and when they were disposed to surrender the contract, the vendor proposed to them, if they would abandon the idea and pay up the taxes in arrears and interest that had accrued, he would indulge them, and to that end, and until a revival of business in Chicago, he would be satisfied with the net income from the property over and above the taxes and insurance, and it is

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averred that they agreed to the propositions and paid the taxes and interest, but that the vendor declined to carry out the agreement and enforced the contract, though there had not been any considerable increase of income from the property or revival of trade and business in Chicago. This provisional arrangement is very loosely stated in the bill, but is, of course, admitted by the demurrer. It admits the revival of business, to some extent before the enforcement of the contract. There is great difficulty, however, in determining the extent of increase contemplated by

the arrangement from the statement in the bill. It was entered into in November, 1859, and this suit was not instituted till August, 1862, some two years and nine months afterwards.

But the true answer to this part of the case is that the arrangement was not in writing, nor any consideration passing between the parties that could give validity to it. The promise by the purchasers was but in affirmation of what they were bound to perform by their written agreement, and all that was done was but in fulfillment of it.

We have thus gone carefully over the case as presented and considered every ground set up on the part of the plaintiffs for the relief prayed for, but with every disposition to temper the sternness of the law as applicable to them, we are compelled to say that according to the settled principles both of law and equity, a case for relief has not been established.

The truth of the case is that these plaintiffs improvidently entered into a purchase beyond their means, and doubtless relied very much upon the rise of the value of the estate and of the income to meet the payments and expenditures laid out upon it. Their anticipations failed them, and a heavy debt was the consequence, beyond their ability to meet. Of the $93,000 purchase money, they have paid only $10,000. Of interest, some $28,000. They expended for improvements $18,000. There still remained due against them $83,000 purchase money and over $20,000 interest, at the time the vendor went into possession. The plaintiffs

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themselves had been in the possession and enjoyment of the premises for a period exceeding that for which the interest on the purchase money had been paid, which at least must be regarded as an equivalent for the money thus paid.

Decree affirmed.

[Footnote 1]

1 Furple's Statutes, p. 633.

[Footnote 2]

Green v. Green, 9 Cowen 46; *Ketchum v. Evertson,* 13 Johnson 364, Spencer, J.; *Leonard v. Morgan,* 6 Gray 412; *Haynes v. Hart,* 42 Barbour 58.

[Footnote 3]

Chrisman v. Miller, 21 Ill. 236, and other cases referred to in the argument.

[Footnote 4]

7 Barnwall & Cresswell 453.