Mr. Knox, for Seybert, submitted the case by brief.

Mr. Justice GRIER delivered, in a few words, the opinion of the court. He stated the case, quoted the language of the Pennsylvania decision as just given, and announced that "as this court fully concur in the construction of the act made by the highest tribunal of the State of Pennsylvania, it was unnecessary to make further remark." That the judgment of the Circuit Court was therefore to be reversed, and judgment entered for the plaintiff on the special verdict.

JUDGMENT ACCORDINGLY.

GREGG *v.* VON PHUL.

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 *incumbrance*, 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 non-compliance 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.

Statement of the case.

A non-compliance 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 $8550 as follows, to wit: $2800 on the 1st of March, 1857 (which was paid), and the residue in three payments of $1900 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 $1960, 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 $6000 to $7000. 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.

Mr. Ballance, for Gregg, plaintiff in error:

1. To answer its requisitions of a deed "with full covenants of seisin and warranty," the document ought to have warranted against *incumbrances, and that the vendor had a right to sell.* The covenants in this deed would not have been broken, had it turned out that, by reason of judgments, mortgages or other incumbrances, the title conveyed by the deed had wholly failed: nor, if it should turn out that although he was seized of the premises, yet for any reason, he could not convey it to the vendee. Suppose, for instance, an order of a court of law or injunction in chancery had prohibited him from conveying, it is no answer to say that he covenants "that he will warrant and defend the title to said premises against the claim of every person whatsoever." This covenant is not equivalent to a covenant of a right to sell, or that the premises were free from incumbrances, because, in this case, although the vendor may have no title, there is no cause of action until there is an eviction; but in the other two cases there is a present cause of action, provided it be known that there are incumbrances, or that there is no power to sell.

2. The covenant was, that the said Von Phul should, "on or before the *first day of March next*, make said deed," whereas, it was not done until *May* 4, 1860. This was material; Gregg had paid part of the purchase-money, and had Von Phul made such a deed on that day, as he had agreed to make, Gregg could, on that day, have mortgaged the premises to raise the money, especially as he had expended several thousand dollars in building stores on the ground. But Gregg had not agreed to pay any *money* at this time. He was only bound, in case the deed with proper covenants had been made, "to execute his *three promis-*

sory notes, dated on said first day of March, 1857," "secured by a deed of trust on the premises." This he was not bound to do until the deed was executed. What, then, was Gregg's duty when the deed was tendered him (provided it had been a proper one)? Certainly not to surrender the ground on which he had paid $2850, and expended $6000 or $7000 in building houses. This was not pretended nor demanded; yet the effect of the decision of the court is to take the land and all the houses from the vendee, and give them to the vendor.

3. A tenant having gone into possession with the consent of the landlord, must be put in the wrong, by having a notice served on him to quit, and a refusal or failure on his part to do so. Here the possession was obtained under a contract of purchase, $2850 paid, and costly stores built on the premises by the vendee, with the knowledge of the vendor, and then comes a suit in ejectment, without any formal notice to quit! Had formal notice been given, perhaps the defendant would have surrendered. What right had plaintiff to mulct him with a heavy bill of costs without giving him an opportunity to do so if he liked? That all who have come into the possession of real estate rightfully, are entitled to notice to quit, before they are liable to be sued in ejectment, is well established. There is no English decision, nor decision of this court to the contrary. In England, *Doe* v. *Jackson** is like the present, except that no payment appears to have been made, and the court decided a notice to quit indispensable. *Right* v. *Beard*† was similar, except that a part of the purchase-money had been paid. The defendant contended, "that until demand and refusal of the possession, he was not a trespasser, as the declaration supposed him to be." In answer to which it was said that "the defendant had taken possession under a supposed title, and had not been let in under any tenancy, and therefore not as a tenant at will." "The learned judge concurred in thinking that the defendant's possession being lawful, required to be determined by notice to deliver it up." In the Court of King's Bench,

* 1 Barnewell & Cresswell, 448. † 13 East, 210.

Lord Ellenborough said, "that after the lessor had put the tenant into possession, he would not, without a demand of the possession, and a refusal by the defendant, or some wrongful act by him to determine his lawful possession, treat the defendant as a wrong-doer and trespasser, as he assumes to do by his declaration in ejectment."*

In the New York case of *Jackson* v. *Rowan*,† which was one of purchase, one payment was made, and possession taken, pursuant to an agreement between the parties. The residue not being paid, ejectment was brought for the premises. The court say, "At the date of the demise, the possession of defendant was lawful, and not tortious. He entered on the premises under an agreement with the lessor to sell. That agreement purported that possession was to be delivered on the payment of $100, and the defendant paid that sum on taking possession, under the agreement. He was consequently entitled to notice to quit, or a demand for possession, before suit was brought." Sugden says:‡ "As the possession is in these cases lawful, being with the assent of the seller, an ejectment will not lie against the purchaser without a demand for possession, and a refusal to quit." And authorities are quoted. The English decisions are as stated, and there is not one decision of the Supreme Court of either the State of Illinois, or the United States, annulling them. Certain New York cases, especially *Jackson* v. *Miller*,§ may be cited as establishing a contrary doctrine; but this case should have no weight with this court: Because 1st, the New York courts are not consistent on this subject. A number of New York cases, it may be true, lay down the law differently. In *Jackson* v. *Miller*, Savage, J., pretends to collect all the authorities on this subject, whereas, he omits those that would show his position to be fallacious. 2d. In this

* See also Jackson *v.* Niven, 10 Johnson, 335; Jackson *v.* Wisley, 9 Id., 267; Taylor *v.* McCrackin, 2 Blackford, 264; Maynard *v.* Cable, Wright's Ohio, 18.

† 9 Johnson, 330.

‡ Vendors and Purchasers, 249, bottom paging, 9 Lond. ed.

§ 7 Cowen, 751.

same decision he admits the English authorities to be against him. 3d. The English decisions are law in Illinois, and binding on this court, which, in this case, is to administer the law of Illinois; whereas, New York decisions have no efficacy in Illinois, only as they tend to show what the common law is.*

Mr. Noell, for Von Phul, defendant in error:

1. The deed tendered by Von Phul was such a deed as was stipulated for in the contract which preceded it. It contained all the covenants of warranty required by the agreement.

2. The covenants in the agreement are independent covenants. Von Phul covenants for himself to convey, and Gregg covenants to pay and execute his notes. The time for the tender of the deed was immaterial, as to the rights of Von Phul under the agreement. If Gregg desired it earlier, he had but to offer to comply with his part of the contract, and thereby protect himself against the enforcement of Von Phul's legal title. There is no evidence of any such offer.

3. The covenants in the agreement being independent, the remedy of Gregg is upon the covenants for damages, in case Von Phul has failed to comply. He cannot hold possession against the legal title after the time for the performance of the covenants on both sides has elapsed.

4. The plaintiff in error having refused to receive the deed and comply with the agreement, has thereby abandoned and waived, by his own act, any right of possession he may have had, and at the same time rendered a notice to quit unnecessary. He, by the act of refusing the deed, and refusing to perform the agreement, disavowed his tenancy under a

* The first legislature that sat in Illinois, enacted (*Revised Statutes of* 1845, p. 337), that "the common law of England and all statutes or acts of the British Parliament, made in aid of, or to supply the defects of the common law, prior to the fourth year of James I, shall be the rule of decision, and shall be considered of full force until repealed by legislative authority."

contract for purchase, and can claim no benefits from such a tenancy.*

5. A tenancy may be determined in three ways: 1st. By efflux of time, or the happening of a particular event. 2d. By notice to quit. 3d. *By a breach on the part of the tenant of any of the conditions of his tenancy, as non-payment of rent, or non-performance of covenants.* This latter mode meets the case at bar, and in such cases no notice to quit is necessary.†

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

* Lane's Lessee *v.* Osment, 9 Yerger, 86; Jackson *v.* Miller, 7 Cowen, 751: Den *v.* McShane, 1 Green, 35.

† Doe *v.* Sayer, 3 Campbell, 8; Doe *v.* Lawder, 1 Starkie, 246.

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."* 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.† 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.‡

Notice to quit is generally necessary where the relation of

* Hill *v.* Epley, 31 Pennsylvania State, 334; Simons *v.* Steele, 36 New Hampshire, 73; Todd *v.* Haggart, 22 English Common Law, 268.

† Hill *v.* Epley, 31 Pennsylvania State, 334; Breeding *v.* Stamper, 18 B. Monroe, 175.

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

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.* 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.

MALARIN v. UNITED STATES.

When the validity of a Mexican grant has been affirmed by a decree of the District Court, and an appeal is taken by the claimant seeking a modification of the decree as to the extent of land embraced by the grant, but no appeal from such decree is taken by the United States, the validity of the grant is not open to consideration upon the appeal.

When a grant of land, issued and delivered, is subsequently altered in the quantity granted by direction of the grantor, on the application of the grantee, and is then redelivered to the grantee, such redelivery is in legal effect a re-execution of the grant.

When a Mexican grant issued to the claimant is alleged to have been fraudulently altered after it was issued in the designation of the quan-

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