HANSBROUGH *v.* PECK.

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 fulfil 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 per cent., 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 fulfilment 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.

ERROR to the Circuit Court for the Northern District of Illinois.

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 instalments, each being for $4300, except the last, payable April 28th, 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

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 per cent. 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*—

"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

* 1 Purple's Statutes, p. 633.

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 31st 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 incumbrance or charge in respect to the contract of sale; and that the purchasers, or any one 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 wilful 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:

Argument in support of the decree.

"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 29th, 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. Thomas Hoyne, for the appellee and in support of the decree:

I. The bill is not maintainable as a bill to recover back money paid or laid out in part performance of a contract,

because the appellants are themselves in default, and refused to perform their contract with the appellee.*

II. The court will not entertain jurisdiction of the bill, because it seeks compensation in the nature of damages only.†

III. The bill shows, on its face, that the same matters have before been litigated between the same parties in a court of competent jurisdiction, and that a *former decree* was rendered thereon forever determining the rights of the parties, and in which the appellants might have litigated, if they did not, and have had decided all matters put in controversy by them in this cause.‡

IV. Irrespective of all other questions in this cause, the appellants being in default, and not only so, but refusing to perform the contract, in fact *repudiating* its terms, without any pretence of fraud, mistake, or accident, to excuse them, they are entitled to no relief whatever.§

Mr. Arrington, contra:

I. As to the return of the money, more than $28,000, paid by the appellants to the vendor.

That the vendor should be allowed to keep this large sum, and the land too, is revolting to conscience.

The equity of the appellants rests upon the definite rule of law and justice, which prescribes that the parties, upon the rescission of a contract, shall be replaced in *statu quo ante.*‖

The vendor seeks to escape from this legal and equitable

* Haynes *v.* Hart, 42 Barbour, 58.

† Kempshall *v.* Stone, 5 Johnson's Chancery, 193; Hatch *v.* Cobb, 4 Id. 559; Morss *v.* Elmendorf, 11 Paige, 277; Mayne *v.* Griswold, 3 Sandford, 463.

‡ Le Guer *v.* Gouverneur & Kemble, 1 Johnson's Cases, 491, 2d ed., published in 1846; Marriot *v.* Hampton, 7 Term, 269; Hopkins *v.* Lee, 6 Wheaton, 110; Gray *v.* Gillilan, 15 Illinois, 456; Dalton *v.* Bentley, Id. 421.

§ Stinson *v.* Dousman, 20 Howard, 466; Kemp *v.* Humphreys, 13 Illinois, 573; Anderson *v.* Frye, 18 Id. 94; Chrisman *v.* Miller, 21 Id. 236; Wynkoop *v.* Cowing, Id. 571; Milnor *v.* Willard, 34 Id. 41; Sanford *v.* Emory, Id. 468.

‖ Hunt *v.* Silk, 5 East, 449; Norton *v.* Young, 3 Greenleaf, 30; Buchenau *v.* Horney, 12 Illinois, 338; Jennings *v.* Gage, 13 Id. 613.

rule by interposing that monstrous provision of the contract which authorized him, upon declaring a forfeiture of the agreement, "to retain the money previously paid."

To this objection we answer—

1. The provision for the retention of the payments made previously to the forfeiture is strictly a penalty.* In fact, even if the provision in question had specified that the money should be retained as liquidated damages, it would be, in contemplation of law, a penalty, and nothing more.†

The rule of law and equity has ever been compensation, and not forfeiture. And parties cannot be permitted to annul a principle of such eternal justice by a mere stroke of the pen.

That equity will relieve against penalties is an axiom as old as the Court of Chancery.‡ And it exists now in the State from which this appeal comes. In *Glover* v. *Fisher*,§ the Supreme Court of Illinois say:

"It would be unconscionable to let the defendant keep the land as well as the money already advanced."

2. The entire contract has been cancelled—first, by the election of the appellee; and secondly, by a judicial sentence, passed at his own instance.

Therefore, he cannot plead an agreement as a defence, which he himself has caused to be declared void. He cannot treat the contract as dead, to the prejudice of the appellants, and yet as alive, to his own advantage.‖

Hence, as the case stands, the vendor received this money upon a consideration which has failed, and he must restore it. The law of every civilized nation would compel him to do so.¶

* Sloman *v.* Walter, 2 Leading Cases in Equity, 907; Tayloe *v.* Sandiford, 7 Wheaton, 17.

† Kemble *v.* Farren, 6 Bingham, 141

‡ 2 Leading Cases in Equity, 907; Clark *v.* Lyons, 25 Illinois, 107; Hackett *v.* Alcock, 1 Call, 535.

§ 11 Illinois, 677.

‖ Ford *v.* Smith, 25 Georgia, 679.

¶ 2 Pothier, by Evans, 349.

II. As to the money which the vendor obtained from the appellants by promises of forbearance.

He received the money, in fact, under a new agreement, resting in *parol;* one, therefore, void by the statute of frauds. And hence, according to all the authorities, he must refund.*

III. As to the claim of the appellants to recover the value of the improvements made by them, while in legal possession of the premises.

The appellants may be considered as *bonâ fide* purchasers, having made valuable improvements, while in lawful occupancy of the land; and as such, they have an equitable right to compensation for the additional value conferred upon the premises by their money and labor, the rents and profits being at the same time deducted.†

But the claim stands on a stronger ground than that of an ordinary *bonâ fide* purchaser. For here, of course, the improvements were erected with the appellee's knowledge and consent, and under an agreement which he himself has since rescinded. Hence, according to all the cases, since he has chosen to rescind the contract, he must restore whatever benefit he received under it.

Nor does the agreement itself contain any provision, that upon forfeiture, the appellee may keep the improvements without payment of their value.

The decree of the State court merely adjudged that the improvements had become annexed to the freehold as "fixtures," and therefore could not be removed. It said nothing as to the right of the appellants to claim the value of the improvements. That question was not in issue; and hence, could not be determined by the decree.‡

As to the claim of payment for the improvements, it is clear that no remedy could be had at law.§

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* Rice *v.* Peet, 15 Johnson, 503; Burlingame *v.* Burlingame, 7 Cowen, 92; King *v.* Brown, 2 Hill, 485; Hellman *v.* Strauss, 2 Hilton, 11 and 12.

† Bright *v.* Boyd, 1 Story, 478; Inst. Lib. ii, Tit. 1, Law 30; Dig. Lib vi, Tit. 1, Laws 38, 48.

‡ 2 Smith's Leading Cases, 504.

§ Anthony *v.* Leftwich, 3 Randolph, 265.

IV. As to usury; a question which we raise:

It is obvious, on its face, that the limitation imposed by the statute of Illinois, applies to suits for the threefold penalty, and to nothing else. But we are not seeking to recover the penalty. We seek merely the money wrongfully exacted.

Reply:

I. The doctrine that courts can relieve against penalties or forfeitures does not apply in this case. Here there is nothing to be relieved against. The rights of the parties are fixed and determined by law; and no compensation in damages can be made by this court now to the appellee, in lieu of benefits and rights which he has surrendered by releasing the appellants on their liability under the contract, and relinquishing the advantages of his sale, upon finding that the appellants were *obstinate in their default* and refusal to perform the contract and pay up the purchase-money.*

II. As to the alleged promise to grant further delay or forbearance. Confessedly the promise was never reduced to any writing. The money was justly due and in arrear at the time it was paid. It had no new consideration; it was based solely upon the obligations of the contract. Surely no citation of authority before this tribunal can be necessary to show that a promise so made was never of any binding force or effect.

III. As to usury; the question being raised. It is not alleged that the contract was a contrivance to cover the usury on *any loan or discount of money.* Besides which, the statutes of Illinois provide that any action brought by bill in chancery to recover back more than the lawful amount of interest paid on any loan or forbearance of money, shall be brought or filed *within two years from the time when the right thereto accrued.*†

If no other objection were raised in bar of the claim made

* Sanders *v.* Pope, 12 Vesey, 290; Skinner *v.* Dayton, 2 Johnson's Chancery, 535; Robinson *v.* Cropsey, 2 Edwards, 148.

† Revise l Statutes, chap. liv.

to recover back the usurious interest, the lapse of time of itself is sufficient.

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 non-payment 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 reserved 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 fulfil all his stipulations according to the contract, will not be permitted to recover back what has thus been advanced or done.*

The same doctrine has been repeatedly applied by the courts of Illinois, the State in which this case arose.†

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 per cent. interest for the forbearance of the purchase-money unpaid, when, at the time, as is admitted, it was only six per centum. 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 31st 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*,‡ 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

* 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.

† Chrisman *v.* Miller, 21 Illinois, 236, and other cases referred to in the argument.

‡ 7 Barnwell & Cresswell, 453.

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 fulfilment 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

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.

INSURANCE COMPANY *v.* CHASE.

One of five trustees of a church edifice, being the agent of an Insurance Company, accepted a risk in it from another of the trustees to whom the church was indebted, the policy being in the individual name of the insuring trustee, with a proviso that in case of loss the amount should be paid to a creditor of him the insuring trustee, to whom, however, the church was not indebted. The insuring trustee paid the premiums out of his own funds but on account of the parish, and with the assent of the trustees; and the fact of two previous insurances in other companies, where the insurance was made in the name of the proprietors of the church generally, was recited in this policy made in the individual name of the one trustee. A loss having occurred—

Held, that the creditor of the insuring trustee was entitled to recover on the policy; the case showing that the insurance in the form in which it was made, was made with the assent of all the trustees, and it being a matter immaterial to the company (supposing the risk to be the same) whether the person appointed by the insuring trustee to receive the money retained it to his own use or paid it to the trustees.

ERROR to the Circuit Court for the District of Maine.

This controversy arose on a policy of insurance. The underwriter admitted the loss by fire, but denied the obligation to pay, chiefly because the party insured, had not an insurable interest in the property which was destroyed.

The case was this: William Chase, Sewall Chase, J. F. Day, John Yeaton, and J. W. Munger were the trustees of the Congregational Church on Congress Street, in Portland, and held the legal title to it, in trust for the society. Munger, one of the trustees, was also the agent at Portland of two insurance companies created by the laws of Massachusetts,—the Howard and the Springfield. On the 25th of November, 1859, he took fire risks for each company to the