

8488

No. _____


Supreme Court of Illinois

Merkel

vs.



Wehrheim

71641  7

State of Illinois
Marion County  Pleas and Proceedings had
in the Circuit Court in and for
the County of Marion and State of
Illinois cause heretofore pending in
said Court between Peter Wehrheim
Complainant and Edward Merkel Defen-
-dant.

Be it Remembered that on the 2^d day of March A.D.
1861 The above named Complainant filed in the office
of the Clerk of the Circuit Court of said County
his Bill in Chancery for specific performance against
said defendant which is in words and figures following
To wit

"Of the March term of the Marion
Circuit Court A.D. 1861

State of Illinois 
Marion County  To the Honorable H. H.
S. O'Melowny Judge of the Second
Judicial Circuit of the State of Illinois in Chancery
sitting in and for the County of Marion Your Orator
Peter Wehrheim a citizen of the County of Marion State
aforesaid would represent and shew unto your honour
that heretofore To wit on the 28th day of January in the
Year of our Lord One thousand Eight hundred and sixty
one one Edward Merkel sold to your Orator the
North half of Lot Number Two in Block No twenty eight
with all the improvements & appurtenances thereon situate
in the City of Centralia County and State aforesaid as

2
laid out by the Illinois Central Rail Road Com-
pany, for the sum of twelve Hundred Dollars
to be paid according to the terms of said Contract
five Hundred Dollars cash down and the bal-
ance in equal payments in one, Two & Three Years
with ten per cent Interest per annum untill paid
Subject however to a certain lease for said proper-
ty held by one M Cord & Blackburn. And your
Orator further shows that said Contract was then
and there reduced to writing & signed by the said
E Merkel and delivered to your Orator on the day
and year last aforesaid and which writing is now here
to the Court shown and prayed to be made a part
of this Bill (marked exhibit A) And your Orator
shows that on the day and year aforesaid your Orator
paid to the said Merkel the sum of fifty Dollars
on said Contract for which the said Merkel then
gave a Receipt & which Receipt is now here to the
Court shown marked Exhibit (B) & prayed to be
made a part of this Bill And your Orator would
further Represent and shew that at the time of
making the Contract aforesaid the said Merkel had
not the Legal Title to said North Half of said
Lot No 2 in Block No 28 aforesaid but was to
acquire the same from one John Yick who was then
the owner in fee simple of the Lot aforesaid. And your
Orator was to make payment of the balance of the
said five Hundred Dollars and to execute said

Notes in said Contract mentioned, when he the said Merkel should obtain the deed in fee simple from the said Zick & make & execute a deed to the said North Half of said Lot to your Orator on delivery thereof.

And your Orator further shews that the said Merkel obtained a deed from the said Zick Joint on or about the 13th day of February A.D. 1861 for the said Lot No 2 in Block No 28 aforesaid including the said North half of the Lot aforesaid. And your Orator would further shew unto your Honor that said Lot No 2 in Block No 28 aforesaid in size is forty feet in front & running 160 feet back making the North half 20 feet front & 160 feet back. Said front being fronting East on the Rail Road and of great value Joint of the value of \$75- per foot front, for which your Orator was to pay the said Merkel the sum of \$60 per foot front. And your Orator would further shew unto your Honor that in pursuance of said Contract on his part you did on the fifteenth day of February A.D. 1861 at the City of Centralia make a tender of said balance of the said first payment on said Lot as described in said Contract aforesaid and did then and there demand the execution of the said deed & compliance on the part of the said Merkel with said Contract and did then and there offer to execute the notes for the \$700 payable in one, two, & three years from date with interest according to the terms of the Contract aforesaid and then there offered to execute to the said Merkel a

4 Mortgage on said North half of the Lot aforesaid as soon as the Deed was executed by the said Merkel to be delivered at the delivery of the said Deed by the said Merkel to your Orator. And your Orator is still ready & willing & ever has been on his parts to comply with said Contracts. And your Orator here charges ^{and} alleges ~~that~~ facts to be that the said Merkel ~~there~~ wholly refused & positively declared that he would not execute or deliver the said Deed according to the tenor & effect of the said Contract aforesaid & still refuses to comply with said Contracts in manner & according to the tenor & effect thereof.

And now may it please your Honor your Orator having complied in every material part on his own part & having paid thereon the sum of fifty Dollars and as the property is of great value & worth of the value of \$1500 to your Orator as your Orator has no adequate remedy at Common Law and as such matters are especially Connisable in Courts of equity. Your Orator prays that the said Edward Merkel may be made Defendant to this Bill ^{and} that he be commanded to answer every material allegation therein contained particularly & as specifically as if specifically interrogated thereunto (both thereunto being expressly waived) That the Peoples most gracious writ of Summons in Chancery may issue returnable to the March Term of the Marion Circuit Court A.D. 1861 directed to the Sheriff of the County of Marion aforesaid. And your Orator would further

5 pray that upon a final hearing of this Bill your Honour will grant order and decree a specific performance of the said Contract. That the said Merkel be ordered and decreed to make execute & deliver according to the tenor and effect of the said Contract a deed in fee simple for the North half of Lot No 2 in Block No 28 in the City or Town of Centralia aforesaid Your Orator executing & delivering the note & mortgage as heretofore he has offered & now is ready & willing to do And that your Honour will grant order & decree such other further Relief to your Orator in the premises and as justice & equity may require & as to your Honour seemeth meet & just for which as in duty bound your Orator will ever pray &c

Stoker & Bates Solicy
per Couplet

Exhibit "A"

I have this day sold to P Wehrheim the North half
part of Lot Number Two, in Block Twenty eight
with all improvements ^{thereon} in Centralia Marion County
Ills now occupied by McCord & Blackburn sub-
ject to the Lease, hold by the above mentioned
party for the sum of Twelve hundred dollars to
be paid five hundred dollars down cash & the
balance in, one Two & three years equal payments
with ten per cent Interest per annum untill paid
E Merkel

Rec Centralia January 28th 1861 of P Wehheim fifty dol
 lars, as a part of payments to bind the above
 made contract

E Merkel.

Whereupon the above named defendant answers
 Complainants Bill as follows Joint

"State of Illinois, March term of Marion County Circuit
 Marion County Court A D 1861

The answer of Edward
 Merkel to the Bill of Complaints of Peter Wehheim
 filed herein against him:

The said defendant Edward
 Merkel now and hereafter reserving to himself all
 benefit and advantage of exception to the many errors
 and inconsistencies in the Bill of the said Compl't. Con-
 tained for answer therunto or to so much and such
 parts thereof as he is advised it is material for him
 to answer says; True it is that he sold to compl't.
 about the time set out in Compl'ts Bill the N^o of
 Lot 2 in Block 28 in Centralia Marion County Illinois
 Respondent also admits that the consideration to be
 paid by Compl't to Deft. for said $\frac{1}{2}$ Lot was the sum
 stated in the Bill of Compl't, and that the same was
 to have been paid as stated in said Bill to wit
 \$500 to be paid down in cash and the remainder in three
 equal annual installments; Respondent admits that

The said Contract of Sale was to be subject to the Lease described in Couplet's Bill; that said Contract was reduced to writing & signed by Respondent, Respondent also admits that Couplet paid \$500. on said Contract and that the exhibits A & B. filed by Couplet are the Contract and Receipt referred to in Couplet's Bill; Respondent further admits that at the time of the making of the said Contract the fee simple title to the said 1/2 Lot was in one John Zick as stated in the Bill of said Couplet; this Respondent admits that he agreed to execute a deed to the said Couplet for the said 1/2 of Lot 2 in Block 28 in Centralia upon his obtaining title from said Zick and upon payment of the balance of the \$500 to be paid down by Couplet and his executing notes and a mortgage as set forth in the Bill of Complaint filed herein Respondent expressly denies that the balance of the cash payment which was to be paid down by said Couplet, to wit \$480. was ever tendered to this Respondent as averred in the Bill of said Couplet On the contrary your Respondent avers the truth to be that the said Couplet never did tender to your Respondent the balance of the said first payment or any part thereof, but that about the time stated in the Bill of the said Couplet to wit the 14th day of February 1861 Couplet came to this Respondent and inquired of Respondent whether he would accept of paper money in payment of the said balance of cash payment and your Respondent then & there

8
informed Complt that inasmuch as Gick would not receive paper money from him (Respondent) he Respondt would not receive it from Complt; and Respondt avers that this was the only attempt at a tender of the said balance that was ever ^{made} by said Complt; and your Respondent further avers that in a conversation then and there had with the said Complt, this Respondent stated to said Complt that it would be a great detriment to him (Respondt) if he should have to convey to him (Complt) the whole of the said 1/2 Lot above in the Bill of Complt for the sale described as he (Respondt) had since the making of the said Contract with Complt for the sale of the said 1/2 Lot had ascertained that he (Respondt) would thereby convey to Complt a portion of his (Respondt's) house because a portion of the roof of his (Respondt's) house projected over and upon a part of the said North half of Lot No 2 in Block 28 in Complt's Bill described and Respondt does further aver that the said Complt did then and there make a new Contract with Respondent by the terms of which your Respondent agreed to convey to the Complt 19/ nineteen feet of ground off the North side of the said Lot No 2 in Block 28 in Complt's Bill described for the sum of \$1200/ Twelve Hundred Dollars; and the said Complt then there agreed to pay to the Respondt the said sum of twelve hundred Dollars, (less the sum of fifty Dollars which had been already paid by the said Complt to Respondent on their first Contract;

9 and which it was agreed should be applied upon the payment to be made on their second Contract) down in cash upon the delivery of a Deed from this Respondent to said Complt for the said 19 feet off the North side of said Lot No 2 in Block 28. Your Respondent further avers that in accordance with the said last mentioned Contract it was then and there agreed between this Respondent and the said Complt that in order to save expense a Deed to the said 19 feet off the North side of Lot 2 in Block 28 aforesaid should be made directly from the said John Zick in whom the fee simple title then & title was to the said Complt; that in accordance with said last mentioned agreement & contract your Respondent and the said Complt went together to one E. J. Condit a Justice of the Peace in & for the County of Marion & State of Illinois and then and there together jointly requested the said E. J. Condit to draw up a good and sufficient Deed of the said 19 feet off the North side of said Lot 2 in Block 28 from the said John Zick & wife to the said Complt; that the said Condit did then and there draw up a Deed in compliance with the request of the Complt and this Respondent, and that your Respondent and the said Complainant immediately proceeded to the said John Zick who then held the title to the said Lot and requested him said John Zick to execute the Deed then drawn from him to the Complt; that said Zick thereupon refused to execute the said deed

10 informing this Respondent & Comptt that he would make a deed for the whole Lot to this Respondent and that Respondent might and could then convey the said nineteen feet to the Comptt; and Respondt. further avers that they Jourt your Respondt said Comptt and John Zick then Jourt on or about the 14th day of February 1861. went to the office of the said P. S. Condit a Justice of the Peace as aforesaid and then and then the said John Zick did execute a deed to your Respondt for said Lot No 2 in Block No 28 in Centralia; and that your Respondent and the said Comptt then and then requested the said Condit to draw up a good & sufficient deed from this Respondent to said Comptt for the said 19 feet off the North side of the said Lot No 2 in Block No 28 informing said Condit at the same time that the first Contract which said Comptt then and then had and which is the same filed in this cause as Exhibit A. was entirely and wholly cancelled and that the said deed should be drawn for 19 feet off the North side of said Lot No 2 only; This Respondt also further avers that in compliance with said request of Respondt & said Comptt the said Condit drew up a deed for the nineteen feet off the North side of said Lot No 2 from this Respondent and his wife to said Comptt and ^{that} this Respondt and his wife duly executed and acknowledged the same; (which deed

11 is herewith filed and marked Exhibit A prayed to be taken as a part of this answer and here ready and tendered to the said Compt. This Respondent further avers that on the 16th day of Feb'y 1861 Compt came to this Respondent and did tender to him as he is informed & believes the sum of \$450⁰⁰ part in Gold & part in Silver Coin; the proportions being about equal of each and \$700⁰⁰ Bank paper; and thereupon demanded a Deed from this Respondent for the said 19 feet off the North side of said Lot No 2 in accordance with said last mentioned Contract whereupon this Respondent informed the said Compt that the said Deed from whom Respondent obtained the said Lot would not accept paper money from Respondent, and that therefore Respondent would not receive paper money from Compt, but that he Respondent was ready and willing to deliver the Deed to Compt for the said piece of Lot 2 in Block 28 South said 19 feet upon the Receipt of the balance of the purchase money in gold or silver or par funds — And this Respondent further avers that on the 16th day of February 1861 the said Compt having failed to tender or pay to Respondent the balance of the purchase money for the said 19 feet of North side & South, the sum of \$1150⁰⁰ in par money your Respondent went to the said Compt and demanded that the said Compt should pay the same in accordance

12 with his said last mentioned Contract, and then
and there tendered to the said Coupl't a deed duly
executed & acknowledged (the same herewith filed
as exhibit A & prayed to be taken as part of
this answer) for the north part of Lot 202 in
Block 2028 in Town of Centralia fronting on Ches-
nut Street of said Town 19 feet and running
back same width to an alley &c as described
in said deed, and Respondent further avers that
upon the refusal of the said Coupl't to pay the
balance of the purchase money aforesaid, this
Respondent then and there tendered to the said
Coupl't the said sum of Fifty Dollars in gold
which he had received from the said Coupl't and
which by the last mentioned Contract was to have
been applied in part payment of the said sum
of Twelve Hundred Dollars cash for the 19 feet of
ground aforesaid described. And this
Respondent having now fully answered all and
each material allegations in the Bill of the
said Coupl't contained prays to be discharged
with his costs &c

Edward Merkel
By Parish & others atty

Exhibit A

13

This Indenture made and entered into this fourteenth day of February in the year of our Lord One thousand Eight hundred and sixty one between Edward Muckle and Barbara his wife of the County of Marion and State of Illinois of the first part, and Peter Wehrheim of the County of Marion and State of Illinois of the second part Witnesses. That the said party of the first part, for and in consideration of the sum of Twelve Hundred Dollars and — cents, in hand paid by the said party of the second part, the Receipt whereof is hereby acknowledged, has granted, bargained and sold, and by these presents do grant, bargain and sell, unto the said party of the second part his heirs and assigns, a certain tract of Land, situate, lying and being in the County of Marion and State of Illinois known and designated as follows to-wit: The North part of Lot Number 2, ^{two}/_{two} Block number 28, Twenty eight in the Town of Centralia as laid out and recorded by the Illinois Central Rail Road Company being bounded by and described as follows Commencing at the North East Corner of said Lot thence running South along the line of Chestnut Street 19/ Nineteen feet thence running West parallel to the North line of said Lot 160/ One Hundred and sixty feet to an alley thence North on the line of said alley 19/ Nineteen feet to the North West corner of

said Lot then East on The North line of said Lot
 (160) One Hundred and sixty feet to the place of
 Beginning. Do Have and Do Hold the aforesaid
 Tracts or parcel of Land, together with all and singular
 the privileges and appurtenances therunto belonging; or in
 anywise appertaining, to the only proper use and benefit
 of him the said party of the second part his heirs and
 assigns forever. And the said party of the first part
 for his heirs, Executors and Administrators, do covenant
 with the said party of the second part, that he is law-
 fully seized, in fee of the aforesaid premises, that
 they are free from all incumbrance, that he has full
 right to convey, and will forever warrant and defend
 the said premises Tract of Land from the claim of
 him the said party of the first part his heirs and assigns
 and against the claim or claims of any person whom-
 soever.

In Testimony whereof, the said party of the first
 part have hereunto set their hand and seal the day and
 year first above written

In presence of

Edward Merkel Seal

Barbara Merkel Seal

State of Illinois

Marion County


ss Before me, the undersigned Police
 Magistrate within and for the County
 aforesaid, came Edward Merkel who is personally
 known to me as the real person by whom, and in whose
 name the above conveyance was executed, and by whom, and
 in whose name the same is proposed to be acknowledged

and who then severally acknowledged his signature thereto to be his free and voluntary act and deed for the purposes therein expressed. And the said Barbara wife of the said Edward Merkle being by me first examined ~~separately~~ and apart from her said husband, and the contents of said Conveyance being first made known to her, acknowledged that freely and voluntarily, and without any compulsion or coercion from her said husband, she executed the same, and forever relinquishes all her right to the claim of Dower in and to the Lands and tenements in the said Conveyance described

Given under my hand and seal, this fourteenth day of February in the year of our Lord One thousand eight hundred and sixty one

Edwin S. Condit Seal

Whereupon said Complainant filed herein his Replication to Defendants answer in words and figures following to-wit

" P. Wehrhain In Chancery For specific
 vs performance
 Ed Merkle 

And the said Compl for Replication to answer of Deft says that the answer of Deft is untrue so far as the same denies the allegations of Compls Bill and so far as the same

sets up a new contract for 19 feet off north side of said Lot 2 in Block No 28 is untrue as Complot avers in said Bill the contract there set forth is the only contract made between the Complot & Deft binding in Law & Equity under the statute of Frauds & perjury

And Complot now here again avers that said Bill & the allegations therein are true & he therefore prays &c

Stoker & Bates Solrs
for Complot"

Complainants Depositions filed herein as follows
Dowd.

" August term Marion Circuit Court
1861

" Peter Wehrhien

vs

Edward Merkel

Specific performance

Ferdinand Cole a witness introduced by Complainants being first duly sworn, deposed & said that I am acquainted with the parties Complot and Deft to this suit. On the 7th or 8th day of February last Complainant called on me and stated that he was going to make a payment to Defendant for some property that he had bought and desired me to accompany him which I did. We went to the house of Defendant and found him Complot then proposed to pay him the Deft four

17

Hundred and fifty Dollars tendering him the same on the Contract between them in regard to the sale of part of a Lot of Ground in Central City the Contract between Comp and Defndt being herewith filed as part of Comp Bill Defendant refused to receive the money stating that he had been disappointed in getting money and could not pay for the Lot himself and get a deed. Complainant demanded a deed according to Contract & Defendant refused to deliver same.

Jerd. Kohl

Cross examined

I cant state whether any of the money tendered to Defendant was paper, I know there was a portion of it gold and a portion silver.

he the Deft did not object to the money on account of a portion being paper.

Jerd. Kohl

Sworn to and subscribed

before me this 30th day of Aug A.D. 1861 Jas S Martin clerk

John Zick a witness introduced by Complainant being duly sworn de-posithe and saith I was present when the Contract between the Comp and Deft was drawn up. The four hundred and fifty Dollars ballanced of the five hundred Dollars named in said Contract was to be paid in thirty days, and the deed was to be made at that time. It was the understanding that Deft was to make

18

Comp a deed as soon as he received a deed from me. I made Deft a deed on the 16th day of February or March last.

Obj by Com

What kind of money did Mr Merkel pay you (objected to by Deft)

He paid me some fifteen or sixteen hundred Dollars in gold and the balance of twenty four hundred in paper and silver.

The Lot is forty feet front and one hundred and sixty feet deep.

Cross examined by Deft

Obj by Deft

Do you know whether any part of the building of Merkel projects over on the north half of the Lot

(Objected to by Comp)

I think it does —

Obj by Deft

Do you know of Comp and Deft making any other Contract since the one herewith filed as to the purchase of the Lot or part of Lot in dispute

(Objected to by Comp)

Deft Comp and Condit came to my house with a deed for nineteen feet off of the North side and wanted me to sign the same. Convey to Comp which I refused.

There was nothing said as to the reason for the deed being for nineteen feet. —

Comp had a conversation with me about the deed for nineteen feet but I cannot recollect what was

said.

Objy by Deft
(Objected to by
Comp) Did he object to the deed on account of it being
for only nineteen feet

He did not at the time that Comp. Deft and
Coudit came to my house for me to sign a deed
Comp spoke but a few words -

Objy by Comp What part of the house projected over onto the north
half of the Lot,

Ans I think the corner -

It was about three weeks after I made the first
deed until I made the second -

Objy by Comp Was you to be paid gold and silver in your con-
tract with Merkel

Ans There was nothing said

Sworn to and subscribed

before me this 30th day of

Aug A D 1861

John Beck

Jas S Martin Master in ch

Henry Stock a Witness introduced by Comp
being duly sworn deposed and saith

I was present with Mr Kole on the
7th or 8th of February when Comp tendered to Deft
four hundred and fifty or five hundred on the
Lot in dispute.

I do not recollect what kind of money it was
he offered to pay.

There was no objection made on account of the kind

of Money offered to be paid

I was present about two weeks after when Comp again tendered the money to Deft and demanded a deed

I understood that there was twelve hundred dollars tendered the last time there was gold and silver and some paper,

The money was tendered on the written contract herewith filed and Deft counted a portion of same and agreed to deliver a deed. But when produced it was only for nineteen feet, Comp refused to receive same —

Examined by Deft —

Q. Did Deft not object to receiving a portion of the money because it was paper.

A. There was something said about it by Deft. He objected to it on account of its being paper money.

Q. Did Mr Merkel at the time of the second tender state that he had received the deed from Zick for the whole Lot.

A. I think he did 26. Stock

Sworn to and subscribed

before me this 30th day of

Aug A.D. 1861

Jas Martin Master in ch

William Gatch a witness introduced by

21 Corp being duly sworn deponeth and saith. Nix -

In Chancery

Peter Wehrheim

vs

Edward Merkel

Bill for specific performance

Evidence Taken before H. W. Eagan Master in Chancery on the 26th March 1862 to be read in the above entitled cause

Jacob Erbes a witness produced and sworn on the part of the Complamant deposes as follows

I am acquainted with the parties Compl^{ant} & Def^t. to this suit I have before seen the memorandum now shown to me marked Exhibit A & B. I saw it once here on the 15th Feby. 1861 at the house of Mr Merkel - it was presented to Mr Merkel and Merkel was required fulfil the bargain according to it and at the time Mr Wehrheim offered \$400- and requested a deed from him for the Lot according to that memorandum the money offered to Merkel was gold and silver; I counted the money; at the same time Wehrheim offered notes and a Mortgage for the balance the notes were to be due in three years according to the memorandum. Merkel once agreed to take the money but afterwards refused I don't know why he refused it it was not on account of the money Mr Merkel counted the money. Mr Merkel offered to make a deed to 19 feet of ground and Wehrheim refused to take it

Mr Werheim claimed 20 feet of ground I don't know why he Merkel refused to take the money; he said he would have a Lawyer & see what he would say about it. Merkel at the same time agreed to take the Mortgage and the notes that were offered to be executed by Mr Werheim; and after he counted the money he refused to take the notes & Mortgage that was on the 15th day of July 1861 at Merkel's House in Centralia

Examined by Deft

Mr Werheim asked if I would not go up with him to Merkel's it was about 8 o'clock A.M. Henry Stock was present at Merkel's House at the time of the transactions, ^{above} spoken of the largest part of the money offered to Merkel was gold there was paper money offered at the same time to Merkel besides the \$450. gold & silver a sum sufficient to make \$1200 the amount of the price of the Lot there was some such conversation as that Merkel would not take paper money because John Gick would not take it from him

In the same conversation Merkel said that there had been a second Contract made with Werheim by which he was to deed to Werheim only 19 feet of the Lot Werheim denied having made a Contract to take the 19 feet

Reexamined by Counsel.

The paper money was offered to Merkel in addition

to the \$400. in gold & silver and it was left to him whether he would take the \$450 & the notes & mortgage or the whole \$1200.

Merkel at that time positively refused to make a deed to the 20 feet of ground

Jacob Erbes"

Defendants
Dispositions
as follows

"Edwin J Condit of lawful age produced & sworn on the part of the Defendant deposes as follows.

I am acquainted with the parties to this suit; the plaintiff and Deft were at my office in Centralia on the 14th day of February 1861 They came to my office for the purpose of having a deed made to property from John Zick to Werhman. The property to be conveyed was 19 feet off the North side of Lot 2 in B&K No 28 in Centralia the reason they gave for Mr Zick making the deed to Werhman was that it would save the making of and recording one deed ^{John} Mr Zick was in my presence requested to execute the deed at his Zicks house in the presence of the parties and he declined doing so - He stated that he had sold the property to Mr Merkel and that he would make the deed to him Merkel and Werhman. I then started back to my office for the purpose of making a deed from Zick to Merkel and one from Merkel to Werhman. I drew up those deeds on the way back from Zicks to my office I told Mr Werhman that the

2.4

Deeds could be executed without him and he then returned home Werheim and Merkel after that on the same day met together, In going to Mr Zick Mr Werheim told me that he and Merkel had made a bargain before that time about the Lot but that in consequence of the cornice of Merkel's house projecting over they had made another Contract for 19 feet of ground In the deed to be made by Zick to Werheim the description of the ground was furnished by Mr Werheim and was for 19 feet front of the Lot / Here witness was shown exhibit A & B of Compell's Bill and believes that to be the same paper shown to him by said Werheim on going back with Merkel & Werheim from Zick's to my office it was understood between all three that I should draw up a deed from Zick to Merkel and also one from Merkel to Werheim precisely like the deed I had drawn from Zick to Werheim - Merkel paid me for drawing & taking acknowledgment of one & perhaps two deeds on that day and Zick paid me for one Werheim told me at the time of making the deed from Merkel to him that the consideration was \$1200.. On the way going to Mr Zick's with the first mentioned deed Mr Werheim stated that there had been a contract for 20 feet and showed me the contract referred to in Compell's Bill, but that because the cornice of Merkel's house projected over that ^{they} had agreed that the deed should be for only 19 feet but thought that Merkel ought to allow

him the value of the other foot and asked me if I did not think so.

Cross examined by Complt

The Conversation between Zick Merkel & Werheim at Mr Zicks house was mostly in the German Language I do not understand the German Language I have no recollection of Mr Werheim saying that he had nothing to do in making the Deed, my impression is that he went back because I told him we could not need him Complt speaks broken English I think that I can understand him but I cannot understand all he says I did not understand from Mr Merkel or Werheim that Merkel gave any Consideration to Werheim for the making the change in the Contract, there was nothing said about any Consideration for the change of the Contract, that Merkel was a clever man but that he ought to allow for the other foot I saw no tender of Deed from Merkel to Werheim I could not say there was or was not

Reexamined by Defendant

The Consideration for the Deed as I understood it was 19 feet of ground to Werheim & \$1200 to Merkel
 O J Condit

I John Zick a witness produced & sworn on behalf of the Defendants deposes as follows.

I have been present and heard the testimony of O J. Condit in this cause I remember the time when Merkel Werheim & Condit came to my house

but don't remember the date. Mr Condit Werheim & Merkel came to my office and they had a deed for me to sign to Werheim for 19 feet of ground which I declined signing as I did not have the contract with Werheim but I had a contract with Merkel. I think Werheim expressed a desire that I should execute that deed to him - The parties went to Mr Condit's office for the purpose of making a deed from me to Merkel and one from Merkel to Werheim. I know that on the same day Merkel made a deed to Werheim for the 19 feet. I don't know whether there was any understanding between Merkel & Werheim but when Merkel paid me, Werheim said something to Merkel about paper money and Mr Werheim asked me if I would take paper money from Merkel. I told him that I had as much paper as I wanted.

Cross Examined by Compt

I was present at the conversation between Merkel & Werheim when they came to my house to have me sign the deed. I heard nothing between them for of a contract 19 feet but it seems to me that had made such a contract and that I was to execute the deed to Werheim and I refused to execute the deed. After I had refused to execute the deed I know of Merkel & Werheim's making no other contract but it was understood that Merkel should make the deed to Werheim.

Merkel said he would make a deed to Werheim.

27

Wahrheim did not say any thing that I recollect
John Zick

Anton Zwickler a Witness produced & sworn on the part of the Deft deposes as follows I am acquainted to this suit and have heard the testimony of O S Condit and John Zick already ^{taken} in this cause I came into Centralia on the 16th day of February 1861 and then went with Mr Merkel and he Merkel and Valen Fine Betty & myself went to ~~the~~ Wahrheim and Mr Merkel had a deed for for 19 feet of the North part of the Lot adjoining Merkels residence which he offered to Wahrheim and told him that if he wanted the property he had to give him \$1150. in cash or in hand money that he had already \$300 and that if he did not want the property he Merkel offered him Wahrheim 50. in gold which he had before received that the Wahrheim might take his choice Wahrheim said he would not have anything to do with it, and sent us to his Lawyer Mr Stoker who he said had the whole matter in hand. Merkel then said he would give him untill 6 o'clock P.M. to decide whether he would accept the deed for 19 feet or the fifty dollars and Merkel said that if he did Wahrheim did not conclude to take the property by that time he should not have the property at all I then went back to Merkels house and remained there with Merkel until 1/2 past 6 o'clock P.M. and Wahrheim did not

come Merkel when directed by Wehrheim to
Stoker said he had nothing to do with Stoker

Anton Zureiseller

Valentine Betty produced & sworn on the part of the
Deft says that he has heard the testimony of Mr
Anton Zureiseller and understands it the facts stated
by Mr Zureiseller in his testimony are true and I
know no other facts which took place at that time
concerning which to testify

Valentine Betty

State of Illinois
Marion County J. H. W. Eagan Master in
Chancery in & for said County do
certify that the foregoing testimony was taken before
me and the several witnesses testifying were duly
sworn and subscribed their names in my presence.
All objections being waived by the parties to this
suit March 26th A.D. 1862

W. H. Eagan
Master in Chancery

Afterwards at the August Term AD 1862 of
the Circuit Court of said County Judge Bryan
presiding, the following order or decree was in
said cause made To wit

Peter Wehheim

vs

Edward Merkel



Specific performance

And now at this day To wit
Friday August 29th AD 1862 this cause is called
for hearing and the parties by their solicitors come
and on their consent this cause is submitted to the
Court for hearing and decree. This cause is now
heard on Bill, answer, Replication, Exhibits and proofs
The Court hears same read, and it appearing to
the Court that the Bill herein was filed for the
specific performance of a contract made by
the Defendant Edward Merkel with the Complain-
-ant relating to certain premises particularly descri-
-bed in the exhibit A annexed to said Bill and
which premises are hereinafter described, and
the Court having duly considered the Bill, pleadings
and proofs and being fully advised in the premises
doth now find that the contract in Bill set forth
was dated 28 January 1861 whereby the said Defen-
-ant sold to complainant the Nth of Lot 2 Block
28 with all improvements thereon in Centralia Marion
County Ills (subject to a lease to McLeod & Black-
burn) for the sum of \$1200 - to be paid \$500 in

cash down and the balance in 1, 2 & 3 years equal
payments with ten per cent Interest per annum
until paid. And the Court further finds that
\$50 part of said \$500 has been paid and that
the residue of said first payment Douth \$450 -
has been tendered but not accepted and is still
unpaid The Court doth now order adjudge and
decree that the said Contract is sufficiently proved
and ought in equity to be specifically performed.
and to that end the Court doth order adjudge and
decree that the prayer of said Bill of Complaint
be granted. It is therefore ordered, adjudged
and decreed by the Court that said Complainant
Peter Wehrheim do within ninety days pay the
Defendant Edward Merkel or his legal Represent-
atives the balance due on the purchase money
of said premises Douth the sum of \$450 - for
principal but without Interest and also pay the
sum of \$233³³/₁₀₀ the amount for principal of the first
of said notes now due together with the sum of ~~\$~~
~~and~~ \$36:93 for Interest thereon to this date making the
aggregate sum of \$720:26 And that said Complain-
ant do also within 90 days make and deliver to
said Defendant 2 notes each for the sum of
\$233.33 each bearing Interest at the rate of ten per
cent per annum until paid each respectively bearing
date 28th Jan'y 1861 and payable in two and three years
pursuant to said Contract and that he said

Complainant execute and deliver to Defendant or his
Legal Representatives Mortgage on said premises se-
curing said notes on which payment on which pay-
ment being made and notes given and Mortgage
executed and delivered the Court doth order and judge
and decree that said Defendant Edward Merkel
do make execute and deliver to said Complainant
a good and sufficient Deed in fee simple for the
North half of Lot number Two $\frac{1}{2}$ in Block
Number twenty eight $\frac{1}{28}$ in the City of Centralia
in the County of Marion State of Illinois reserving
to the said Edward Merkel his heirs and assigns
so much of the said premises as may be covered
by the notes of the House of the said Defendant
Edward Merkel) And it is further ordered
adjudged and decreed that in case said Defendant
Edward Merkel does not pursuant to this decree
make payment of the said sum of \$720.26 and delivery
of said notes and Mortgage or tender thereof to him
make, execute and tender to the Complainant a Deed
for the premises aforesaid with the reservation afo-
resaid. It is in that case ordered and decreed
by this Court that H. W. Egan Master in Chancery
do make execute and deliver to Complainant
a good and sufficient Deed for the said premises
with the reservation aforesaid upon ^{payment} to him of the
said balance due for the said purchased money
and interest thereon and upon making said notes

& Mortgage & delivering same by Complainant to the
said Master in Chancery. It is further ordered
and decreed that said Lot No two be equally di-
vided between the parties. And it is further
ordered that the defendant pay the costs herein.

State of Illinois

Marion County

J. O. Chaves Clerk of the Circuit
Court of said County hereby certify the
foregoing to be a true and correct transcript of
the Records and proceedings had in our said
Court in the above entitled cause as ordered
and decreed by Defendants attorney herein

Given under my hand and official
Seal at Salem this 29th day of
January A.D. 1863

J. O. Chaves

Edward Mottel plaintiff in error

vs } error to Marion

Peter Beckwith defendant in error

November term Supreme Court

1st Judicial Division 1863 State of Illinois

at Mt Vernon AD 1863

Came this day the plaintiff in error by
Melvany & Nelson his attorneys & says that
there is error in ^{the} record & proceedings aforesaid
because they say that the Decree of the
Circuit Court of Marion County therein
set forth, was rendered in favor of the de-
fendant in error whereas by the Law of the
Land it ought to have been rendered in favor
of the plaintiff in error & this he is ready
to verify &c

and for a special assignment of error
on the record aforesaid. The plaintiff says that
the Circuit Court of Marion County erred in
not dismissing the Bill of debt filed therein in
the Court below

2nd The Court below erred not allowing plaintiff in
error interest on the cash payment of \$450 & in
ordering him to make a deed to the North half
of lot ^{2 blocks} 28 in Centralia Ill. in his default in so
doing Obeying the Master in Chancery to do so
for him, without requiring Master to report &
Continuing Cause for that purpose.

3 The said Court erred in not allowing

1st plea in answer on p 450 Cash payment on lot 2 Block
 28 Contraria etc & in deposing payment for goods
 4th The Court erred in ordering him to pay Costs
 5th The Court erred in decreeing specific performance
 of the written Contract in Defendants Bill referred
 to, & for the same was annulled & discharged by process
 6th The Court erred in requiring plea to convey the
 North half of s^d lot No 2 Block 28th Contraria etc
 7th The said Circuit Court erred in decreeing a decree
 on the facts set forth in depts Bill, which the facts
 in the case show & entirely different case from
 8th The Court below erred in not dismissing Compt^{ts} Bill
 that set forth in Bill, and for these & divers
 other errors apparent in the record & on the
 plea says that the Decree of this Circuit Court
 of Madison County aforesaid be reversed &

nullified & return
 for plea in error

5

Peter Akerheim

vs

Edward Merkel

Record

Jules March 4th
1863

A. Johnston atty

Prepaid by

McLain \$11.00

Recd \$8.00

Now come left in error by W. Stokes atty on
 Jims in error
 Nov 10th 1863

W. Stokes atty for left

The writ of Error in this case will be made a
 supersedeas on the plea in error carrying bond
 in the penalty of five hundred dollars conditioned ac-
 cording to law with John Betz or Anton Janssen security
 Feb. 20. 1863

Wm. Preece
 JUDGE

or decree may be ordered or rendered in the premises
by the said Supreme Court upon the affirm-
ance of said decree, or the dismissal of
said writ of error, then this obligation
to be void - otherwise to be and remain
in full force and effect.

In presence of
W. Nelson

E. M. Kellogg Seal

John B. Kellogg Seal

Edward M. Kellogg -
Plaintiff in error -
vs
Peter Wehrheim -
Defendant in error -

Supersedeas bonds

Filed March 4, 1863.
A. Johnston Clerk

5

Parties in Court below

Peter Wehrheim's complainant-below
v. ~~John~~ ^{John} ~~Marion~~ ^{Marion} ~~and~~ ^{and} ~~Edward~~ ^{Edward} ~~Merkle~~ ^{Merkle} defendant below

Petition in the Supreme Court

Edward Merkle plaintiff in Error

v. ~~John~~ ^{John} ~~Marion~~ ^{Marion}

Peter Wehrheim defendant in Error

The Clerk of the Supreme Court
will please issue a writ of error with superve-
dias endorsed and a circafacias endor-
sed

R. S. Nelson, att. for plaintiff
in Error

Feb. 28th 1863

California Feb 27th 1863

Major Johnson

Dr. Sir

I send you the papers in the case of Gurkle vs. Wehrheim with an order from Judge Bruce for supersedeas. I forgot to send a proceipe and I now send it to you and wish you to send on the papers as soon as possible as they are pressing me with an execution.

Yours &c

R. S. Nelson

Filed March 4. 1863.
S. Johnston City

Proceipe

Wentz
Wehrheim

5

Centurion 22 July 63

Major Lumsden

Sir

Will you please
forward the writ Board in
the enclosed Case for Kelly
& yourself to sign as soon
as possible - enclosed is \$5
fee - please forward
receipt to me so as I
can get back the money
Yours truly
A. Lumsden

Centralia
2nd March 1863

My dear Sir
I did not
know of the news
I am - it is a in
my opinion as bad
nearly as the Southern
Conspiracy. We
might as well go
the whole piece
on the military
necessity as we
are driven from the
Court yours truly
Thos Nelson

Centuria Ill -
June 8th 1864

Asah N. Johnson Esq -
Dear Sir -

Will
you please send Mr Mur-
kell a bill of the whole cuts
which you wish him to pay -
He is ready to pay it and
we find no fault with
the bill - Mr Murkell knows
little of English & Mr Nelson
for his own satisfaction
would like to have you
send such a bill and it
will be paid immediately -
Please let us hear soon -
Very Respectfully
Nelson & Sanders

Partial copy of bill sent
to them - June 10 - 64.

State of Illinois,
SUPREME COURT,
First Grand Division.

} SS

The People of the State of Illinois,
To the Clerk of the Circuit Court for the County of Marion Greeting:

Because, In the record and proceedings, as also in the rendition of the ^{due} judgment of a plea which was in the Circuit Court of Marion county, before the Judge thereof between

Peter W. Rhein

plaintiff and

Edward Merkel defendant it is said manifest error hath intervened to the injury of the aforesaid Edward Merkel

as we are informed by his complaint, and we being willing that error, if any there be, should be corrected in due form and manner, and that justice be done to the parties aforesaid, command you that if ^{due} judgment thereof be given, you distinctly and openly without delay send to our Justices of our Supreme Court the record and proceedings of the plaint aforesaid, with all things touching the same, under your seal, so that we may have the same before our Justices aforesaid at **Mount Vernon**, in the County of Jefferson, on the 1st Sunday after the 2^d Monday in November next, that the record and proceedings, being inspected, we may cause to be done therein, to correct the error, what of right ought to be done according to law.

WITNESS, the Hon. John D. Catron Chief Justice of the Supreme Court and the seal thereof, at MOUNT VERNON, this fourth day of March in the year of our Lord one thousand eight hundred and sixty three.

Noah Johnston
Clerk of the Supreme Court.

5
SUPREME COURT.
First Grand Division.

Edmond M. Keith

Plaintiff in Error,

VS.

Peter M. Kehring

Defendant in Error.

WRIT OF ERROR.

James M. ...

a Supremes

and FILED. *March*

4-1863-

N. Johnston City

This writ of error is made a Supremes,
and is to be obeyed accordingly.

Nath. Johnston City

In the Supreme Court 1st Judicial Division
State of Ills at Mt Vernon
November term 1863

Edward Muelkel plaintiff in error

Peter Wierchinski defendant in error

Error to Marisa

This affiant Richard S. Nelson being
first duly sworn according to Law deposes
and says that he is acquainted with John
Betje & Anton Zwiszellew, and that he
believes the said John Betje to be
worth at least \$10,000 - that said
Betje lives in Centuria Illinois & has
a large store & appears to be doing a
large business as a dry goods man
cleant & by common reputation is
the most extensive dealer in dry goods
and groceries in the town of Centuria
& this affiant believes he owes little or
nothing.

This affiant also knows Anton
Zwiszellew & he believes from what
he has heard that he is perfectly
sound for \$500 & that has real estate
in the neighborhood of Centuria worth
several thousand dollars, but he
is not personally acquainted with his
circumstances & only states on information
& that he does believe him to be worth
at least \$500 or more and above all

Homestead & exemption Laws
I know of no Judgment or execution
against said Garrison, and
as to said Bibb, this can with safety
say he is worth \$5000 at least clear
of all exemption Laws & that there
are no Judgments or executions
against him

Subscribed &

Richd. Shepley

I was to before
me this 19th!

February 1863

Edw. M. Mason
Judg Sup. Court.

5
Edw. M. Mason
P. Robinson

Offi. Secy

Julien March 4. 1863.
St. Johnston City

In the Supreme Court, State of Illinois.
FIRST GRAND DIVISION, AT MT. VERNON.
NOVEMBER TERM, A. D. 1863.

EDWRAD MERKLE,
vs.
PETER WEHEHEIME. } Error to Marion.

If the the vendee did, in good faith, perform the obligations which devolved on him, he is entitled to a specific performance.—Hilliard, on Vendees, Vol. 1st, 443, Sec. 39.

Parole evidence of a variation of the original contract, where part of original contract stands and the new contract is as to the same subject matter or a part of same, and the first price, or consideration is the consideration of the 2d contract, is not admisable, especially when the variations or new contract give all the advantages in favor of the Def't below, as in this case; where by terms of new contract relyed on is that Def't in this Court pays all cash down and get but 19 feet of ground and not 20, and yet pays same price agreed upon for 20 and contract in writing not surrendered, which Def't says was abandoned.—1st Hilliard on Vendors, 176, Sec. 20.

The parole agreement of Def't to accept 19 feet and pay original price, \$1200—the ground being part of original ground contracted for and paying down whole purchase money, is not a new contract but altering or changing original as to quantity of land and time of payment, and therefore is not admissable in evidence, being by parole could not alter the contract in writing as to written terms.—2d Hilliard on vendors 96.

Hardship will not prevent specific performance of contract where transaction is fair and Def't below is well acquainted with subject matter of contract as comp't below.—1st Hilliard vendur 336.

This Court may correct decree of circuit court by entering such decree as the evidence required circuit court to enter.

W. STOKER, Att'y. for Def't.

Stokes - If the first contract was abandoned
 Why was it not delivered up? It is still in
 Hechheim's possession - Nelson must explain this
 When Lick refused to execute deed to W.
 the new contract covered -

Nelson in reply says answer in fact it was a
 bona contract and not a copy of the first - (1/2 L.)
 What was to become of the \$500 - Main point relied on is
 that the old contract was abrogated - Making the vote
 left set out in the acts and what the proper

Edward Merrell
 vs
 Arthur Hechheim

Imp of Deft

Filed Nov. 11. 1863
 St. Johnston City

NOVEMBER TERM V D 1863
 FIRST BRANCH DIVISION V L ALL VERB
 in the Supreme Court State of Illinois

EDWARD MERKLE, Plaintiff in Error,
versus
PETER WEHRHEIM, Defendant in Error.

ERROR TO MARION.

ABSTRACT OF PLAINTIFF'S CASE.

1 The Deft in Error filed his bill on the Chancery side of the Marion Circuit Court at the March Term of said Court, 1861, against the Pltff in Error, for the specific performance of a contract for north half lot No. 2, Block 28, Centralia, Illinois.

2 He states in his said bill that pltff sold him said lot on the 28th day of January, 1861, for twelve hundred dollars—\$500 in cash down and \$700 in equal instalments of one, two and three years, to be secured by notes drawing 10 per cent. and a mortgage on the premises; which contract was in writing and dated the 28th Jan. 1861 aforesaid. He further states that he paid \$50, down in cash, when the contract was executed, and that he was to pay the balance of \$500,—viz. \$450—when pltff made him a deed; that pltff did not have a legal title to said half lot when the contract was made—it being in one John Zick, and that as soon as Zick conveyed to pltff, pltff was to convey to deft. \$450

3 He further states that Zick did convey to pltff on the 13th February, 1861, the whole of said lot, and that he then tendered pltff the sum of \$450 in cash and offered his notes and a mortgage for the balance according to written contract, which is marked as exhibit [A] and referred to in bill as such—but the pltff refused to accept or make a deed; and he again, on the 15th day of February, tendered the pltff \$450 in cash, and notes and mortgage for the balance, pursuant to said written contract—but pltff refused to receive the money or make the deed, pursuant to contract.

4 Deft further states that the said lot was 40 feet wide by one hundred and sixty deep, and was worth \$60 a foot. He also exhibits a receipt for the fifty dollars paid down; and asks that the Court order the said contract to be specifically performed.

5 The Plaintiff in Error filed his answer in the Court below at the same time, and admits the making of the contract for north half of lot as stated by deft in his bill, and the payment of \$50,00 and that the lot was of the size stated in bill, and was worth 7 \$60,00 per foot, and the first tender of the \$450 in paper, before he had the title.

8 He also admits that he was to convey to deft when he got the deed from Zick.— He also admits that deft offered to give his notes and a mortgage at the same time and that he refused to make a deed at that time, and to accept the money. He further admits a second tender of the money under said written contract, and a demand of a deed for north half of said lot, and a tender at the same time of \$1150, purchase money which he refused to accept and make a deed, for the reason that the said written contract, by agreement of himself and deft, was changed, and a contract made between them for 19 feet of the north part of said lot, instead of one half, for which 12 19 feet deft was to pay him the same as for the half of lot, for which he was willing to make deft a deed as soon as he got a deed from Zick, on payment of the balance of said \$1200, viz: \$1150, in specie, which he insisted on and did not waive.

But deft would not accept deed for 19 feet, although the deed was made out, executed and acknowledged by him and his wife, and although defendant not only went with pltff and in person gave instructions to have the deed executed, and actually furnished Condit with a description of the ground from which to draw the deed under the second contract. And the deed was actually drawn by Condit and acknowledged and executed by himself and his wife by the assent of defendant. He afterwards when it was tendered to him refused to accept the deed and pay the money in specie. He further says that the reason for altering the first contract was, that plaintiff's house overhung the north half of the lot, which was not known at the time the first contract was made. and that when it was discovered, the pltff and deft both agreed to do away with the old contract and made a new contract for 19 feet of the north part of the lot, instead of 20 feet or the north half; and plaintiff further answering says, that he was always willing and still is ready at any time to comply with the second contract, and to receive his money, and that the consideration for the second contract was twelve hundred dollars, fifty of which was paid on the first contract, and the balance, \$1150, was according to the second contract, to be paid when the deed was made; and pltff denies that he ever waived his right to demand specie under either contract,

15 The defendant filed a general and special replication in which he sets up the statute of frauds as to the second contract.

O'MELVENY & NELSON,

For Defendant in Error. *plaffin error*

Depositions of Complainant in Court Below.

16 FERDINAND KOHL proves a tender of \$450 on written contract for lot in dispute
17 and that plff refused to receive it, or make a deed. Don't know what kind of money
was tendered. A portion of it was gold and silver, but there was no objection made
on account of the money. Plff would not make a deed nor receive the money. He
said he was disappointed in getting money and could not pay for the lot himself. This
was on the 6th or 7th of February 1861.

19 HENRY STROCK proves the same as Kohl, but on cross-examination, he admits that
20 Merkel refused to take the money tendered by Wehrheim, because it was not hard
money. He was present at the time Kohl speaks of and was present about two weeks
afterwards, when defendant a second time tendered plff the purchase money, which
was \$1200. Plff agreed to deliver the deed for 19 feet, and defendant would not re-
ceive the same. Plff objected to receiving paper money when the second tender was
made. Nothing was said the first time, that he recollects, about the money being pa-
per. The money tendered the last time was gold and silver and some paper.

21 JACOB ERBES states that he was present on the 15th of February at plff's house
when defendant tendered to plff \$450 on contract in writing, referred to as exhibit
[A]. The money offered was gold and silver; notes and mortgage were also offered.
Merkel refused to make the deed. Don't know why. He agreed to it once. He
counted the money and offered Wehrheim a deed for 19 feet, but Wehrheim claimed
22 20. Merkel first agreed to take money, notes and mortgage, and then refused, and
said he would see a lawyer.

On *Cross Examination* says part of the money was gold and some paper. There
was enough offered to make \$1200. Merkel did not object to receiving paper.

18 JOHN ZICK was present when contract marked as exhibit [A] was made. \$50
and \$450 was to be paid in 30 days and the deed was then to be made. The deed
was to be made by Merkel to Wehrheim as soon as I made the deed to Merkel for the
whole lot. I made the deed to Merkel on the 16th of February, 1861. He paid me
twenty-four hundred dollars. Sixteen or seventeen hundred dollars of which was gold
and silver; the balance was paper. The legal title to the lot when the contract was
made was in me. The cornice of Merkle's house overhung the north half of lot.

Merkle, Wehrheim and Condit came to my house to make a deed for the 19 feet.
I refused to deed to Wehrheim but made the deed to Merkle for the whole lot. Wehr-
heim and me did have some conversation about the 19 feet of ground, but I cannot
recollect what it was. It seems to me something was said by Wehrheim about 19
feet of ground. Nothing was said about gold and silver that I recollect at that time.
19 Wehrheim did not object to the deed of 19 feet of ground being made by me.

Depositions on behalf of Defendant in Court below.

23 E. S. CONDIT—Merkle, Wehrheim and Zick came to my office on the 14th day of
February, 1861, to get a deed made by John Zick to Wehrheim for 19 feet of north
part of lot No. 2, block 28, Centralia, Illinois. Zick refused to make the deed to
Wehrheim, but did make it to Wehrheim for the whole lot; and Merkle did make a
deed to Wehrheim for 19 feet of north part of lot. I drew both the deeds. Wehr-
heim furnished me the description of the 19 feet of ground, and Merkle and him both
requested me to draw the deed, and Merkle paid for it. It was all perfectly under-
stood between them as I thought, and the consideration was twelve hundred dollars to
21 Merkle, and 19 feet of north part of said lot to Wehrheim, as I understood, in fact.
Wehrheim told me he had made another contract with Merkle for north half of the lot,
but it was found Merkle's house overhung the lot and that they then agreed that the
deed should be made for 19 feet.

Cross Examined.—I don't understand all that Merkle and Wehrheim said in my
presence. They talked German. Don't understand all Wehrheim says, but under-
stood enough to know what the contract was. He speaks broken English. Saw no
tender of any deed by Merkle. Can't say whether there was any tender of any deed
or not.

26 JOHN ZICK, former witness, says, that he recollects what took place at Condit's. It
is correct and as Condit says. I recollect Wehrheim said something to Merkle about
taking paper money, and Merkle asked me if I would take paper, and I told him I had
as much paper as I wanted. Don't recollect what was said about 19 feet of ground by
Merkel and Wehrheim at my house, but I think such a contract was made, and as I
refused to make the deed to Wehrheim, Merkle was to make the deed to the 19 feet of
ground.

ANTON ZURISSELLER.—I went on the 16th of February, 1861, with Merkel and Betz to Wehrheim's house. Merkel offered him a deed executed by himself and wife to 19 feet of ground and demanded the balance of the purchase money, eleven hundred and fifty dollars, in specie, and told Wehrheim if he did not want the property he would pay him back the fifty dollars, and offered him the fifty dollars in gold; but Wehrheim would neither take the deed nor pay the money, but said he would see a lawyer.

Merkle gave him till six o'clock in the evening to decide. This was in the morning and Merkel staid at home till six o'clock, but Wehrheim did not come. Merkel told him at the same time that if he did not take the property in that time he should not have it at all. Wehrheim told him to go to Stoker, and Merkel told him he would have nothing to do with Stoker.

General warranty deed from Merkel to Wehrheim.

O'MELVENY & NELSON, for Plaintiff in Error.

The Court at the August Term, 1862, upon a final hearing of said cause rendered the following decree:

Ordered that complainant pay defendant four hundred and fifty dollars in 90 days, two hundred and thirty three dollars and thirty three cents, amount of note now due, and twenty six dollars and ninety three cents interest thereon to date, in all, seven hundred twenty dollars and twenty six cents; to deliver his notes for balance bearing interest at 10 per cent. from date of written contract until paid, payable in 2 and 3 years, with a mortgage on the premises; and on the complainant doing so, defendant to make complainant a general warranty deed to north half of lot No. 2, Block 29, Centralia, Illinois, and pay costs.

*Reserving to Mackey & Child, Coh
as is containing by Merkel's house*

The Plaintiff in Error brings the case into this Court and seeks to reverse the judgment for the errors assigned upon the record.

O'MELVENY & NELSON, Plaintiffs in Error.

BRIEF OF PLAINTIFF IN ERROR.

The plaintiff in error contends that the decree of the Court below is erroneous for the following reasons, which are the same in substance as the errors assigned on the record.

1. The decree is erroneous and the bill ought to have been dismissed; first, because the Complainant below did not establish by proof the case alleged in the bill.

2. Because the defendant in error failed to prove any legal tender of the purchase money in coin if the first contract was not rescinded. Kohl, one witness, says he saw four hundred and fifty dollars tendered on 7th or 8th of February on written contract, and no objection made to money. Stock was present.

N. B. This was before either the purchase money tendered was due and no notes or mortgage was then offered. (See page 16 of Record.)

3. The deed was to be made in 30 days and fifty dollars was to be paid down; balance of five hundred dollars to be paid at the time deed was made. The deed made 16th February 1861. Here it appears the time of payment in written contract was changed, as testified to by John Zick [see pages 17 and 18 of Record. Then after that was there any legal tender of the purchase money, or waiver of a specific payment? It is contended there was not. Defendant's own witnesses, Stock [page 20 of record,] and Zick, pliff's vendor, both say that plaintiff objected to taking paper money.

4. The original contract set out in bill was rescinded by parol long before the deed was due, or the purchase money was to be paid, and it was agreed between plaintiff and defendant that the first contract should be rescinded, and another contract was made for 19 feet of ground, instead of 20 feet, on the north half of the lot; and defendant gave instructions for the making of the deed himself for 19 feet, and the contract was fulfilled by the pliff in error, and the defendant himself clearly in default—see Condit's evidence, pages 23 and 24; and Zick's evidence, page 26 of record—and the bill ought therefore to have been dismissed. Also, see Zuriseller's evidence, page 27.

5. The statute of frauds, could not apply in this case, even if properly pleaded, because the defendant below, did not seek affirmative relief on a parol contract. He only insisted that deft in error had no right to a specific performance, there being no such contract in existence as the one set out in the bill; and even if there was, there was no legal tender under it — that he complied with the parol contract on his part and made the deed according to that contract for 19 feet of ground, and tendered the deed and demanded the purchase money on the very day he acquired title himself, and that the default, if any, was on the part of deft — see Zick's evidence, page 26 of record.

6. The consideration for the second contract was twelve hundred dollars from Wehrheim and 19 feet from Merkle, the plff in error—see Condit's evidence, page 25 of record—fifty dollars paid on rescinded contract and eleven hundred fifty, balance.

Authorities Relied upon by Plaintiff in Error.

1. A written contract not under seal can be rescinded, or its time may be changed by parol before breach; and this may be done even when the statute of frauds expressly requires it to be in writing. 1st Phillips evidence, 545; Cuff versus Penn 1st M and S page 21, 2nd Sand. pl and Ev. page 577.

2. Courts will not decree specific performance of every contract, and will only do so when the contract set out in bill is clearly proven, and is fair and reasonable in all its parts. Lear vs Chouteau, 23 Ills page 39. A Court would not decree specific performance of the written contract for 20 feet of ground when that contract was beyond all doubt rescinded, and another contract made for 19 feet, but would leave the deft in error to his remedy at law. Adams Eq J, top page ~~218~~; 23 Ills 39. 256

3. A parol contract is valid if performed, or whilst being performed, though required to be in writing by statute of frauds. 4th Gill, 38. 1st Freeman's Digest 512 and 99.

O'MELVENY & NELSON.

For Plaintiff in Error.

Soy vs Nugent 34 3^d Banc of Ill
Robinson vs Page 3 Russ 114, 119
1 Snyder on Vendors
chap 3^d sec 9

Edward Beckle 5-3

Plaintiff in error
vs
Peter Wehheim
Defendant in error

abstract & brief
of plea in Error

Filed March 4. 1865.

N. Johnston *clerk*

Handwritten notes:
The Plaintiff in Error
vs
Peter Wehheim
Defendant in Error
Abstract & Brief
of Plea in Error
Filed March 4. 1865.
N. Johnston Clerk

Benjamin B.-
June 14th 1864

Maj Gen Johnson-

Dear Sir-

Enclosed

you will please find
\$29.80 - Amount of
fee bill in case of
Meyers vs Stricklin.

Please acknowledge
the receipt of same and
oblige yours -

R. D. Nelson
Per Banders

In the Supreme Court, State of Illinois,
FIRST GRAND DIVISION, AT MT. VERNON.

NOVEMBER TERM, A. D. 1863.

EDWRAD MERKLE,
vs.
PETER WEHEHEIME. } Error to Marion.

If the the vendee did, in good faith, perform the obligations which devolved on him, he is entitled to a specific performance.—Hilliard, on Vendors, Vol. 1st, 443, Sec. 39.

Parole evidence of a variation of the original contract, where part of original contract stands and the new contract is as to the same subject matter or a part of same, and the first price, or consideration is the consideration of the 2d contract, is not admisable, especially when the variations or new contract give all the advantages in favor of the Def't below, as in this case; where by terms of new contract relyed on is that Def't in this Court pays all cash down and get but 19 feet of ground and not 20, and yet pays same price agreed upon for 20 and contract in writing not surrendered, which Def't says was abandoned.—1st Hilliard on Vendors, 176, Sec. 20.

The parole agreement of Def't to accept 19 feet and pay original price, \$1200—the ground being part of original ground contracted for and paying down whole purchase money, is not a new contract but altering or changing original as to quantity of land and time of payment, and therefore is not admissable in evidence, being by parole could not alter the contract in writing as to written terms.—2d Hilliard on vendors 96.

Hardship will not prevent specific performance of contract where transaction is fair and Def't below is well acquainted with subject matter of contract as comp't below.—1st Hilliard vendur 336.

This Court may correct decree of circuit court by entering such decree as the evidence required circuit court to enter.

W. STOKER, Att'y. for Def't.

Edward Merke
vs
Peter Whelshime

W. STOKER, ATTORNEY FOR DEFENDANT.

deemed as the evidence required circuit court to enter.
This Court may correct decree of circuit court by entering such
matter of contract as comp'd below.—1st Hilliard vendor 336.

Handship will not prevent specific performance of contract where
Hilliard on vendors 36.

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payment, and therefore is not admissible in evidence, being by pa-
per altering or changing original as to quantity of land and time of
for and paying down whole purchase money, is not a new contract
price, \$1500—the ground being part of original ground contracted
for.

The parole agreement of Deft's to accept 10 feet and pay original
was abandoned.—1st Hilliard on Vendors, 176, Sec. 20.

for 30 and contract in writing not surrendered, which Deft's says
10 feet of ground and not 30 and yet pays same price agreed upon
held on is that Deft's in this Court pays all cash down and get part
of the Deft's below, as in this case; where by terms of new contract
when the variations or new contract give all the advantages in favor
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subject matter or a part of same, and the first price or consideration
of original contract stands and the new contract is as to the same.
These evidence of a variation of the original contract, where part
on Vendors, Vol. 1st, 443, Sec. 20.

If the the vendor did, in good faith, perform the obligations which

PETER WHELSHIME.

} Enter to Motion.

EDWARD MERKE,

NOTARIAL PUBLIC, A. D. 1863.

FIRST GRAND DIVISION, AT MT. VERNON,
In the Supreme Court, State of Illinois.

IN THE SUPREME COURT,
OF THE STATE OF ILLINOIS. } November Term, 1863.
First Grand Division, at Mt. Vernon. }

EDWARD MERKLE, Plaintiff in Error, }
versus } ERROR TO MARION.
PETER WEHRHEIM, Defendant in Error. }

ABSTRACT OF PLAINTIFF'S CASE.

1 The Deft in Error filed his bill on the Chancery side of the Marion Circuit Court, at the March Term of said Court, 1861, against the Pltff in Error, for the specific performance of a contract for north half lot No. 2, Block 28, Centralia, Illinois.

2 He states in his said bill that pltff sold him said lot on the 28th day of January, 1861, for twelve hundred dollars—\$500 in cash down and \$700 in equal instalments of one, two and three years, to be secured by notes drawing 10 per cent. ~~and a mortgage on the premises~~; which contract was in writing and dated the 28th Jan. 1861 aforesaid. He further states that he paid \$50, down in cash, when the contract was executed, and that he was to pay the balance of \$500, ~~in 30 days~~ when pltff made him a deed; that pltff did not have a legal title to said half lot when the contract was made—it being in, one John Zick, and that as soon as Zick conveyed to pltff, pltff was to convey to deft.

3 He further states that Zick did convey to pltff on the 13th February, 1861, the whole of said lot, and that he then tendered pltff the sum of \$450 in cash and offered his notes and a mortgage for the balance according to written contract, which is marked as exhibit [A] and referred to in bill as such—but the pltff refused to accept or make a deed; and he again, on the 15th day of February, tendered the pltff \$450 in cash, and notes and mortgage for the balance, pursuant to said written contract—but pltff refused to receive the money or make the deed, pursuant to contract.

4 Deft further states that the said lot was 40 feet wide by one hundred and sixty deep, and was worth \$60 a foot. He also exhibits a receipt for the fifty dollars paid down; and asks that the Court order the said contract to be specifically performed.

5 The Plaintiff in Error filed his answer in the Court below ~~at the same time~~, and admits the making of the contract for north half of lot as stated by deft in his bill, and the payment of \$50,00 and that the lot was of the size stated in bill, and was worth \$60,00 per foot, and the first tender of the \$450 in paper, before he had the title.

7 He also admits that he was to convey to deft when he got the deed from Zick.— He also admits that deft offered to give his notes and a mortgage ~~at the same time~~ and that he refused to make a deed at that time, and to accept the money. He further admits a second tender of ~~the~~ money under said written contract, and a demand of a deed for north half of said lot, and a tender at the same time of \$1150, ~~purchase money~~ which he refused to accept and make a deed, for the reason that the said written contract, by agreement of himself and deft, was changed, and a contract made between them for 19 feet of the north part of said lot, instead of one half, for which 19 feet deft was to pay him the same as for the half of lot, for which he was willing to make deft a deed as soon as he got a deed from Zick, on payment of the balance of said \$1200, viz: \$1150, in specie, which he insisted on and did not waive.

12 But deft would not accept deed for 19 feet, although the deed was made out, executed and acknowledged by him and his wife, and although defendant not only went with pltff and in person gave instructions to have the deed executed, and actually furnished Condit with a description of the ground from which to draw the deed under the second contract. And the deed was actually drawn by Condit and acknowledged and executed by himself and his wife by the assent of defendant. He afterwards when it was tendered to him refused to accept the deed and pay the money in specie. He further says that the reason for altering the first contract was, that plaintiffs house overhung the north half of the lot, which was not known at the time the first contract was made. and that when it was discovered, the pltff and deft both agreed to do away with the old contract and made a new contract for 19 feet of the north part of the lot, instead of 20 feet or the north half; and plaintiff further answering says, that he was always willing and still is ready at any time to comply with the second contract, and to receive his money, and that the consideration for the second contract was twelve hundred dollars, fifty of which was paid on the first contract, and the balance, \$1150, was according to the second contract, to be paid when the deed was made; and pltff denies that he ever waived his right to demand specie under either contract,

15 The defendant filed a general and special replication in which he sets up the statute of frauds as to the second contract.

O'MELVENY & NELSON.
For ~~plaintiff~~ in Error.

Depositions of Complainant in Court Below.

16 FERDINAND KOHL proves a tender of \$450 on written contract for lot in dispute
17 and that plff refused to receive it, or make a deed. Don't know what kind of money
was tendered. A portion of it was gold and silver, but there was no objection made
on account of the money. Plff would not make a deed nor receive the money. He
said he was disappointed in getting money and could not pay for the lot himself. This
was on the 6th or 7th of February 1861.

19 HENRY STOCK proves the same as Kohl, but on cross-examination, he admits that
20 Merkel refused to take the money tendered by Wehrheim, because it was not hard
money. He was present at the time Kohl speaks of and was present about two weeks
afterwards, when defendant a second time tendered plff the purchase money, which
was \$1200. Plff agreed to deliver the deed for 19 feet, and defendant would not re-
ceive the same. Plff objected to receiving paper money when the second tender was
made. Nothing was said the first time, that he recollects, about the money being pa-
per. The money tendered the last time was gold and silver and some paper.

21 JACOB ERBES states that he was present on the 15th of February at plff's house
when defendant tendered to plff \$450 on contract in writing, referred to as exhibit
[A]. The money offered was gold and silver; notes and mortgage were also offered.
Merkel refused to make the deed. Don't know why. He agreed to it once. He
counted the money and offered Wehrheim a deed for 19 feet, but Wehrheim claimed
22 20. Merkel first agreed to take money, notes and mortgage, and then refused, and
said he would see a lawyer.

On *Cross Examination* says part of the money was gold and some paper. There
was enough offered to make \$1200. Merkle did not object to receiving paper.

18 JOHN ZICK was present when contract marked as exhibit [A] was made. \$50
and \$450 was to be paid in 30 days and the deed was then to be made. The deed
was to be made by Merkel to Wehrheim as soon as I made the deed to Merkel for the
whole lot. I made the deed to Merkle on the 16th of February, 1861. He paid me
twenty-four hundred dollars. Sixteen or seventeen hundred dollars of which was gold
and silver; the balance was paper. The legal title to the lot when the contract was
made was in me. The cornice of Merkle's house overhung the north half of lot.

Merkle, Wehrheim and Condit came to my house to make a deed for the 19 feet.
I refused to deed to Wehrheim but made the deed to Merkle for the whole lot. Wehr-
heim and me did have some conversation about the 19 feet of ground, but I cannot
recollect what it was. It seems to me something was said by Wehrheim about 19
feet of ground. Nothing was said about gold and silver that I recollect at that time.
19 Wehrheim did not object to the deed of 19 feet of ground being made by me.

Depositions on behalf of Defendant in Court below.

23 E. S. CONDIT—Merkle, Wehrheim and Zick came to my office on the 14th day of
February, 1861, to get a deed made by John Zick to Wehrheim for 19 feet of north
part of lot No. 2, block 23, Centralia, Illinois. Zick refused to make the deed to
Wehrheim, but did make it to ~~Wehrheim~~ ^{Merkle} for the whole lot; and Merkle did make a
deed to Wehrheim for 19 feet of north part of lot. I drew both the deeds. Wehr-
heim furnished me the description of the 19 feet of ground, and Merkle and him both
requested me to draw the deed, and Merkle paid for it. It was all perfectly under-
stood between them as I thought, and the consideration was twelve hundred dollars to
21 Merkle, and 19 feet of north part of said lot to Wehrheim, as I understood, in fact.
Wehrheim told me he had made another contract with Merkle for north half of the lot,
but it was found Merkle's house overhung the lot and that they then agreed that the
deed should be made for 19 feet.

Cross Examined.—I don't understand all that Merkle and Wehrheim said in my
presence. They talked German. Don't understand all Wehrheim says, but under-
stood enough to know what the contract was. He speaks broken English. Saw no
tender of any deed by Merkel. Can't say whether there was any tender of any deed
or not.

26 JOHN ZICK, former witness, says, that he recollects what took place at Condit's. It
is correct and as Condit says. I recollect Wehrheim said something to Merkle about
taking paper money, and Merkel asked me if I would take paper, and I told him I had
as much paper as I wanted. Don't recollect what was said about 19 feet of ground by
Merkel and Wehrheim at my house, but I think such a contract was made, and as I
refused to make the deed to Wehrheim, Merkel was to make the deed to the 19 feet of
ground.

27 ANTON ZURISSELLER.—I went on the 16th of February, 1861, with Merkel and Betz to Wehrheim's house. Merkel offered him a deed executed by himself and wife to 19 feet of ground and demanded the balance of the purchase money, eleven hundred and fifty dollars, in specie, and told Wehrheim if he did not want the property he would pay him back the fifty dollars, and offered him the fifty dollars in gold; but Wehrheim would neither take the deed nor pay the money, but said he would see a lawyer.

Merkle gave him till six o'clock in the evening to decide. This was in the morning and Merkel staid at home till six o'clock, but Wehrheim did not come. Merkel told him at the same time that if he did not take the property in that time he should not have it at all. Wehrheim told him to go to Stoker, and Merkel told him he would have nothing to do with Stoker.

13 General warranty deed from Menkel to Wehrheim.

O'MELVENY & NELSON, for Plaintiff in Error.

The Court at the August Term, 1862, upon a final hearing of said cause rendered the following decree:

29 Ordered that complainant pay defendant four hundred and fifty dollars in 90 days, two hundred and thirty three dollars and thirty three cents, amount of note now due, and twenty six dollars and ninety three cents interest thereon to date, in all, seven hundred twenty dollars and twenty six cents; to deliver his notes for balance bearing interest at 10 per cent. from date of written contract until paid, payable in 2 and 3 years, with a mortgage on the premises; and on the complainant doing so, defendant to make complainant a general warranty deed to north half of lot No. 2, Block 23, Centralia, Illinois, and pay costs.

The Plaintiff in Error brings the case into this Court and seeks to reverse the judgment for the errors assigned upon the record.

O'MELVENY & NELSON, Plaintiffs in Error.

BRIEF OF PLAINTIFF IN ERROR.

The plaintiff in error contends that the decree of the Court below is erroneous for the following reasons, which are the same in substance as the errors assigned on the record.

1. The decree is erroneous and the bill ought to have been dismissed; first, because the Complainant below did not establish by proof the case alleged in the bill.

2. Because the defendant in error failed to prove any legal tender of the purchase money in coin if the first contract was not rescinded. Kohl, one witness, says he saw four hundred and fifty dollars tendered on 7th or 8th of February on written contract, and no objection made to money. Stock was present.

N. B. This was before ~~the~~ the purchase money tendered was due and no notes or mortgage was then offered. (See page 16 of Record.)

3. The deed was to be made in 30 days and fifty dollars was to be paid down; balance of five hundred dollars to be paid at the time deed was made. The deed made 16th February 1861. Here it appears the time of payment in written contract was changed, as testified to by John Zick [see pages 17 and 18 of Record. Then after that was there any legal tender of the purchase money, or waiver of a specific payment? It is contended there was not. Defendant's own witnesses, Stock [page 20 of record,] and Zick, pliffs vendor, both say that plaintiff objected to taking paper money.

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5. The statute of frauds could not apply in this case, even if properly pleaded, because the defendant below, did not seek affirmative relief on a parol contract. He only insisted that deft in error had no right to a specific performance, there being no such contract in existence as the one set out in the bill; and even if there was, there was no legal tender under it — that he complied with the parol contract on his part and made the deed according to that contract for 19 feet of ground, and tendered the deed and demanded the purchase money on the very day he acquired title himself, and that the default, if any, was on the part of deft — see Zick's evidence, page 26 of record.

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3. A parol contract is valid if performed, or whilst being performed, though required to be in writing by statute of frauds. 4th Gill, 33. 1st Freeman's Digest 512 and 22.

O'MELVENY & NELSON.

For Plaintiff in Error.

*Superior argument 34-3 Bam & Ed
Robinson vs Page 3 Rep 114, 119
1 Judge on vendors Chap 3 sec 9*

5
Edward Meekle
vs
Peter Wobasheim

Abstract & Brief

Accepted for 11

Filed Sept. 15. 1863.
N. Johnston Clk

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