

8747

No. _____

Supreme Court of Illinois

Joseph Frazee

vs.

Frederick Miller

71641  7

Pleas

Before the Hon Wm H. Brough Judge of the Circuit Court
for the Twelfth Judicial Circuit of the State of Illinois,
sitting in and for the County of Wabash, on the Chancery
side thereof.

Be it remembered that heretofore to-wit: on the 10th
day of August A.D. 1854, the Complainant Frederick
Phillips, by his solicitors filed in the Clerk's office of
said Court his amended bill of Complaint, which
is in the words and figures following to-wit:

"To the Hon the Judge of said Court in Chancery sitting
Your orator Frederick Phillips would represent in this
his amended bill filed by leave of said Court, that by
deed bearing date 15th July 1850 executed by your
orator & wife he conveyed to one Joseph Hrazier (who
is prayed to made deft hereto) the following lands
in Wabash County to-wit: the NW quarter of fraction
section No 1 Township 1 South of Range 16 West,
so much of sd qr section as lies South of the Freeman
line in sd qr section supposed to contain 75 acres &
(a copy of which said deed is herewith filed marked
A, and prayed to be made a part of this bill)

That while said deed purports to have been made
for a valuable consideration in money paid by
said defendant it was in truth made and
executed upon the condition that said defendant
should from and after that date to the end of the
natural lives of your orator & his wife, provide
for them all necessary food, raiment and at-
tention medical & otherwise, and should furn-
ish to them lodging and in all respects provide
for the comfort and happiness of your orator & his wife

Your orator charges expressly that said deed was made upon some other consideration, that the said defendant also rec^d of & from your orator a large amount of personal property, horses, cattle, hogs, farming implements and household & kitchen furniture, provisions & groceries in the aggregate of value to the amount of \$1000.

Your orator further charges said defendant executed to him a bond bearing equal date with said deed and forming a part of said transaction obliging himself to the performance of the conditions above set forth, and delivered said bond to your orator, but that subsequently thereto the said defendant contrived to said bond into his own possession, and since refuses to surrender the same to your orator.

Your orator charges, that the said defendant wholly failed and neglected to keep & perform the conditions above set forth in this that he neither provided sufficient food, lodging or clothing for your orator & wife nor did he in any sufficient manner provide for their comfort, but on the contrary said defendant was guilty of continued neglect of the foregoing conditions, and in addition thereto, repeatedly treated your orator & his wife with such unkindness & harshness, proceeding to blows and also using towards them the most violent and abusive language, so much so as to render and habitations or living with said Frazier impossible. Your orator has repeatedly solicited said defendant either to keep and perform his agreement with your orator or recovery to him his lands aforesaid, and return the said articles of personal

property aforesaid. Your orator further that the
forgoing lands & personal estate embraced all
the estate which he owned, and that he has nothing
left wherewith to sustain himself & wife,
and therefore in consideration of the premises &
inasmuch as your orator is without adequate
or full remedy at law, he prays your Honor
will take cognizance of his grievances as set
forth, and on final hearing thereof, make such
order and decree in the premises as shall be
just and equitable.

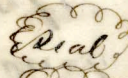
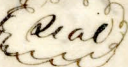
To this end he prays Chancery process to said
defendant directed &c That sd defendant
answer this bill but not under oath, that he
be compelled to produce the bond referred to
herein &c. As in duty bound he will ever pray &c
J. Miller, Compt.



Exhibit A referred to in the foregoing Bill, is in
the words and figures following to wit:

"This Indenture made and entered into this
fifteenth day of February in the year of our Lord
one thousand eight hundred and fifty, between
Frederick Miller and Nestor his wife of the County
of Wabash and State of Illinois of the first part,
and Joseph Frazer of the County and State aforesaid
Michigan, that the said Frederick Miller and
Nestor his wife party of the first part, for and
in consideration of the sum of Two hundred
dollars in hand paid, the receipt whereof is
hereby acknowledged, do hereby grant, bargain,
sell, convey and confirm unto the said party of
the second part his heirs and assigns forever,

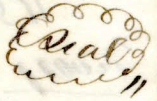
The following described tract or parcel of land situa-
ted lying and being in the County and State aforesaid
and known and designated on the plat of the Uni-
ted States Survey as being all of the North West
quarter of fraction section No one (1) in Township
No 1 South of Range No fourth west, so much of
said quarter section as lies South of the Freeman
line in said quarter section supposed to contain
seventy three (73) acres more or less. Together with
all and singular the appurtenances thereto
belonging or in anywise appertaining. To Have
and To Hold the above described premises unto the
said party of the second part his heirs and assigns
forever. And the said party of the first part for them-
selves, their heirs, executors and administrators
the aforesaid premises unto the said party of the
second part his heirs and assigns against the
claim or claims of all and any person whatsoever
do and will warrant and forever defend by these
present. In testimony whereof the said par-
ties of the first part have hereunto set
their hands and seals the day and year first
above written.

In presence of
A. W. Cary
Simpson A. Fuller

Fredrick Miller 
Mertis Miller 

State of Illinois  I A. W. Cary a Justice of the
Wabash County  Place in and for said County
do certify that Fredrick Miller and Mertis Miller
his wife whose signatures appear to the foregoing
deed of conveyance, and who are personally known

to me to be the identical persons who signed the same this day personally appeared before me and acknowledged, that they had signed, sealed and delivered the same as their free act and deed for the use and purposes therein expressed. And Weston Miller wife of said Frederick Miller, having been by me made acquainted with the contents of said deed and being by me examined separately and apart from her husband, acknowledged that she had executed the same and relinquished her dower to the premises therein conveyed voluntarily freely and with compulsion of her said husband. Given under my hand and seal this the twenty sixth day of February in the year of our Lord one thousand eight hundred and fifty. —

A. W. Cory J. P. 

In which said bill of Complaint the said defendant by his solicitor, filed his demurrer, in the words and figures following to wit:

"Joseph Brazier } August Term of the N. York Circuit
 vs } In Chancery Court A.D. 1854
Frederick Miller }

And the said defendant comes and says that the matters and things contained in Complainant's amended bill, in manner and form as the same are therein set forth and alleged are not sufficient to entitle the said Complainant to the relief prayed for in and by his said bill of Complaint; and that this defendant is not bound by the law of the land to answer the same. Wherefore the defendant doth demur in law &c, and now here sheweth to the Court

These grounds of demurrer.

1st Said Complainant shows by his bill that if he is entitled to any relief whatever, it is in Law and not in a Court of Equity.

2nd The relief prayed for by Complainant's bill is not warranted by the facts alleged in the same, the prayer being for a general relief without reference to the charges or objections in said bill.

3rd Said Complainant's bill is in other respects informal, uncertain and defective.

4th The prayer of this bill is not such a character that this Court can grant any decree thereon.

Bill & Montgomery for Plaintiff

And the said Court on the fifth day of said term, term; on Friday the 1st day of September 1854, made the following order and decree in this cause namely,

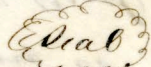
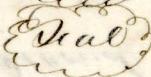
"Now at this day comes the said complainant by his solicitor and the said defendant by his solicitor who files his demurrer to the bill filed herein, and after argument had it is considered and adjudged by said Court that said demurrer be overruled, and said defendant take nothing therefor. It is also further ordered that said defendant have leave to make further answer to said bill, and said defendant having declined to make other and further answer in the premises, and this cause coming on for final hearing, it is considered, adjudged and decreed by the Court that the said bill be taken for confessed

and that ~~the~~ said deed from the said Complainant to
said defendant referred to in said bill tenor: "This
Indenture made and entered into this fifteenth day
of February in the year of our Lord one thousand eight
hundred and fifty, between Frederick Miller and Mes-
srs his wife of the County of Wabash and State of Illinois
of the first part; and Joseph Frazier of the County and
State aforesaid, Vermont, that the said Frederick Miller
and Messrs his wife party of the first part for and in
consideration of the sum of Two hundred dollars in
hand paid, the receipt whereof is hereby acknowledged,
do hereby grant, bargain, sell, convey and confirm
unto the said party of the second part his heirs and
assigns forever, the following described tract or parcel
of land situated lying and being in the County and
State aforesaid, and known and designated on the
plat of the United States Survey as being all of the
North west quarter of fraction section No One (1)
in Township No 1 South of Range No Fourteen west,
so much of the said quarter section as lies South
of the Freeman line, in said quarter section supposed
to contain Seventy three (73) acres more or less.

Together with all and singular the appurtenances
thereunto belonging or in anywise appertaining. Do
Have and Do Hold the above described premises unto
the said party of the second part his heirs and assigns
forever. And the said party of the first part their
heirs, their heirs, executors and administrators the
aforesaid premises unto the said party of the second
part his heirs and assigns against the claims or
claims of all and every person whatsoever, do and
will warrant and firm defend by their persons
In testimony whereof the said parties of the first part

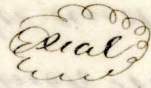
have herunto set their hands and seals the day
and year first above written.

Witness of
A. W. Gray
Simpson A. Fuller

Fredricks Miller 
Mester Miller 

State of Illinois, Natash County ss;

I, A. W. Gray, a justice of the peace in and for said County
do certify that Fredricks Miller and Mester Miller his
wife whose signatures appear to the foregoing deed of
conveyance, and who are personally known to me
to be the identical persons who signed the same, this
day personally appeared before me, and acknowledged
that they had signed, sealed and delivered the same
as their free act and deed for the use and purposes
therein expressed. And Mester Miller wife of said
Fredricks Miller having been by me made acquainted
with the contents of said deed, and being by me exam-
ined separate and apart from her husband, acknowl-
edged that she had executed the same, and relinquished
her dower to the premises therein conveyed, voluntarily,
freely and without compulsion of her said husband
Given under my hand and seal this the twenty sixth
day of February in the year of our Lord one thousand
eight hundred and fifty.

A. W. Gray J. P. 

be declared inoperative, annulled and made wholly
void and of no effect. It is also further ordered
and adjudged by said Court that said complainant
do further recover of and from the said defendant
the sum of one thousand dollars lawful money
confessed in said bill, and that said defendant
pay said sum to said complainant within sixty

days, and in default thereof that a special execution
be issued against the lands and tenements, goods
and chattels of said defendant for said sum.

It is further ordered and decreed that said defen-
dant pay the costs and charges of complainant
in this behalf laid out and expended &c.

Whereupon the defendant by his counsel, prayed
an Appeal to the Supreme Court of Illinois, hol-
ding its sessions at Mount Vernon, which is allowed
upon the defendant's entering into bond in the
sum of Fifteen hundred dollars, with good and
sufficient security to be approved by the Clerk
of this Court, within sixty days from the date
thereof.

Whereupon the Defendant executed & filed
an Appeal Bond in the words & figures following viz

"Knows all men by these presents, that
we Joseph Strayer and John A. Dops, Carltons W.
Root, James A. Stewart and Richard Fuller of
the County of Wabash and State of Illinois are
held and firmly bound unto Frederick Nields also
of the same County and State in the penal
sum of One thousand five hundred Dollars
for the payment of which well and truly to
be made we bind ourselves our heirs, executors
and administrators jointly severally & firmly
by these presents. Witness our hands and seals
this 15th day of September AD 1854

The condition of the above obligation is such
that whereas the said Frederick Nields did on the
30th day of August AD 1854 in the Circuit Court
in and for the County of Wabash and State of
Illinois on the charging side thereof obtain

a decree against the said Joseph Drayser, directing him to convey to said Fredt Miller that portion of the North West quarter of fractional Section No One (1) in Township No One (1) South of Range No Fourteen (14) West which lies South of Greenman's line, containing seventy three (73) acres more or less situate in Mahan County Illinois, and also to pay to the said Frederick Miller One thousand Dollars from which said decree of the said Circuit Court the said Joseph Drayser has prayed for and obtained an appeal to the Supreme Court of the State of Illinois for the Division holding Sessions at Mount Vernon in said State - And if the said Joseph Drayser shall duly prosecute his said appeal with effect and shall nevertheless pay the amount of the judgment, costs, interest and damages rendered and to be rendered against him in case the said decree shall be affirmed in the said Supreme Court then the above obligation to be void otherwise to remain in full force and virtue

The words "entered in Mahan County Illinois" underlined before signing
 I have approved before me
 at my office in Mount
 Carmel this 15th day of September
 AD 1854
 Howard Bell Clerk

Joseph Drayser	Deed
Wm B Topp	Deed
Carlton B. Root	Deed
James A Stewart	Deed
Chas Miller	Deed

State of Illinois
Wabash County ~~of~~ P. I. Miriam Bell Clerk of the
Circuit Court in and for said County and State,
do hereby certify that the foregoing few pages
contains a full, true and complete transcript of
the Record in the Cause wherein Frederick Miller
is Complainant and Joseph Frazier is defendant
In testimony whereof I have here
unto set my hand and affixed
the seal of said Court at Mount
Carmel this 10th day of November
Anno Domini 1854.

Miriam Bell Clerk

And the said Joseph Frazier comes and says
that in the Record and proceedings aforesaid, and
in the rendition of the Decree aforesaid, there is
manifest Error, in this;

- 1st The Court Erred in overruling Defendants
Demurrer to Complainants Bill of Complaint.
- 2nd The Court Erred in rendering a Decree in this
Case for the Complainant against the Defen-
-dant.
- 3rd It was Error in the Court to render a
Decree in this Case without any testimony.
Wherefore &c.

Hugh B. Montgomery
Atty. for Pff. in Error.

(Walash)

No. 36

Frederick Miller

vs.

J. Sept. Frazer

Manuscript

Filed 15. Nov. 1854

F. D. Preston clk

By A. Schuster & Co.

Prepaid \$5.00

Prepaid

Frazier & Miller }

States of. Miller filed this bill against Frazier, praying the rescission of a contract entered into between the parties on the 15th of February 1850, and the cancellation of a conveyance from him and wife ~~from~~^{to} Frazier of that date, and the restoration of certain personal property of the value of one thousand dollars.

The Court overruled a demurrer to the bill, and upon Frazier's declining to answer further, enter a decree cancelling the deed, and for one thousand dollars.

The case made by the bill shows that the deed made in fee was made of about seventy-three ~~acre~~ acres, and at the same time personal property of the value of one thousand dollars, consisting of horses, cattle, hogs, farming implements, and household and kitchen furniture, provisions groceries &c, comprising the entire property and fortune of Miller, were delivered to Frazier, upon a contract with him for the support and maintenance of Miller and his wife during their natural lives - and to secure which Frazier executed a bond to Miller conditioned for a faithful performance of that agreement.

The bill further shows that Frazier contrived to get the bond into his own possession, and refuses to surrender it; that he wholly neglects and fails to keep and perform the contract, neither providing sufficient food, clothing and lodging, nor providing for the

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comfort of Miller and wife. But on the contrary continually neglected to do so, and treated them with unkindness harshness, using violent and abusive language towards them, and inflicting blows upon them, and so rendering it impossible for them to live with him.

Was the court authorized, upon confession of these facts, to enter the decree in this case?

The objections to the bill on the demurrer are again urged here and deserve due consideration.

It is objected that the party has a remedy at law upon the bond for the recovery of damages for breaches, and therefore upon a common familiar principle, equity will not entertain jurisdiction or grant relief. Proceeding upon this view, it is supposed the bill is presented to the Court of equity upon the ground that the party cannot sue at law, because of the loss of the bond, or its possession by defendant - and therefore it is objected that there is no affidavit of the loss accompanying the bill - as required in *Taliaferro & Foote v Leigh*, R. 58 - *Findley et al v Hindle and wife* 1 Pet. R. 244, *Mitford Eq. Pl.* 135 - 146 -

Another objection is to the final decree being entered without proof of the allegations of the Bill. This objection is without foundation as has been repeatedly held by this court.

The most important question in the case arises upon the objection to relief in this Court, because it is in the power of the party to sue upon the bond: and if he comes into equity upon the ground of its loss, or its custody and withholding it by defendant he should accompany the bill with an affidavit of that fact.

A want of it entitles defendant to demur. Mitf. Eq. Pl. 135. 146.

This ground of demurrer must depend upon the fact, whether this bill presents that ground of relief only, for the Plaintiff below is entitled to a ~~rescission~~ rescission of the contract, and a cancellation of the deed, and a reconveyance, no affidavit is necessary to the bill on this ground of relief, and so that objection falls - and we therefore address ourselves to the consideration of that question -

The general rule that equity will not grant relief in cases in which the party has a complete remedy at law, has its exceptions in cases of concurrent jurisdiction, as in fraud and some others, and its qualifications -

The remedy at law must not only appear clear and not doubtful or difficult (Mitford Eq. Pl. 146) but the remedy there must be as complete and effectual as in equity. Mitf. Pl. 146 -

Damages only could be recovered at law upon this bond; which would in effect amount to a sale of the property and its conversion into money. Would that be an effectual and complete remedy in this

case? We clearly think not - The party
 disposed of all the property he had
 except only his and his wife's wearing
 apparel for the consideration, purpose,
 and object of securing their maintenance,
 lodging, clothing and comfort, free from
 the cares of managing, providing and
 labor for life - So far from damages at
 law affording him a remedy, he would thereby
 be made to part with his home farm, home,
 and the necessary means of livelihood, and
 thrown again homeless upon the world, to eare
 labor and toil in producing another and different
 home, with all the necessaries of life. At an
 advanced age in life this would become doubly
 onerous, inconvenient and oppressive. The bill
 is silent as to the ages of Miller and wife, and
 their constitutional vigor. But we might
 indulge a presumption, without violence, of their
 age and feebleness, from the nature and character
 of the transaction - Few, except the aged and
 feeble, ever give over the toils and cares of life
 by such disposition as this, of all they possess -
 Instead therefore of relieving the party from care
 toil and ~~trouble~~ labour, as was manifestly his
 intention, and providing a comfortable home and
 an easy old age, a simple money compensation
 at law, would make him, involuntarily, by sale,
 strip himself of all he had provided to the same
 end, and with the same view and motive, and
 turn again to accumulated toil and ~~trouble~~
 labour. We cannot believe from the contract,
 Miller would ever have consented to such a
 disposition of his property as this would amount
 to. This Court can give a more specific and
 effectual remedy, by restoring to him his

~~land~~ land and home, with compensation for
the personal property, which Frazier refuses to
accede.

I admit the case is new, almost of
first impression - The only case I have been
able to find is Jenkins & Jenkins & Mon-
roe R. 329 - Jenkins and his wife being old,
and having lost a favorite son who with his
wife resided with him, executed a deed of
his farm and homestead, together with all his
household and kitchen furniture to his son's
wife and her daughter, to take effect at his
death - The consideration was expressed and
shown to be the natural love and affection he
bore them, and also upon the consideration of her
agreeing to remain in his family during his life
and to render such superintendence over his
domestic affairs, as she might deem proper
and necessary, and for the benefit of her compa-
ny and society - as also of one dollar.
The daughter-in-law becoming dissatisfied, abandon-
ed his house as her home, and returned to her
father - Jenkins thereupon filed a bill to
cancel the deed, which was sustained by the
Court - The case before us is stronger than
that - For here, Miller has surrendered all, home,
and property at once, and become wholly dependent
upon Frazier for a subsistence and shelter,
as well as a home and domestic comforts and
enjoyments of society - To be treated with
subtleties, harshness and blows under these
circumstances as a fulfillment of the obligation
for a home, shelter, food, raiment, and social
and domestic happiness, is more than human
nature can bear, or a court equity toller all

These circumstances, in connection with the act of taking the bond, and refusing to supply Miller and wife with necessaries may well justify the inference of an abandonment of the contract by Frazier and a presumption of a fraudulent intent in entering into it.

The case is unlike one of ordinary transactions for gain, and I feel constrained to draw a distinction between them. When admonished by age, feebleness, and decline, of an incapacity for business - and for the end aim and object of forever renouncing the care, toil and labor of life, we come to dispose of, and give up, our all of earthly goods, for the consideration of maintenance we feel that as far as equity and justice permits, we should take the same supervision and care of the vendor, if we cannot put him again upon the footing of his first infancy. There is occasionally a new case arising out of the ordinary beaten tracks of equity, yet the Courts have not hesitated to give the proper specific relief, because there was no precedent. Such was *Norton v Rely* 2 Eden. R. 286. Where fanaticism was used as a means of procuring money and a deed, Lord Chancellor Northington decreed an account of the money and a ~~deed~~ delivery up of the deed. He remarked that it was the "first of the kind that ever came before this Court, and I may add before any court of judicature in this Kingdom" - and shall it be said that the Court cannot relieve against the glaring impositions of these men? That it cannot relieve the weak and unwary, and especially when the impositions are exercised

upon those of the weaker sex. It is by no means arguing agreeably to the practice and equity of this Court to insist upon it. This Court is the guardian & protector of the weak and helpless of every denomination, and the purrisher of fraud and imposition in every degree. Yes this Court can extend its hands of protection, it has a conscience to relieve, and the constitution itself would be in danger if it did not."

In *Huguenin & Basely* 14 Ves. Jr. R 273, deeds were canceled upon the ground of ignorance and undue influence, and the same ground was the base in the decree in *Purcell & McKinnon* 16 Ves. Jr. R 118.

This contract on the part of Frazier was executory continuing as on his part during the natural life of Miller and wife. What might be the cost of a support now or this year, might with varying prices, be totally inadequate another year. No assessment of damages can be made to meet the estimate of the cost of their support.

Lord Hardwicke in *Taylor & Neville* cited in *Buxton & Lister* 3 Atk. R 385 ~~decree~~ specific performance of a contract for the sale of 800 tons of iron to be delivered and paid for in instalments in a certain number of years - putting it upon a distinction between executed and executory contracts. and this is cited and approved in *Adderly & Dixon* Sim. and Str. R 610 by the Vice Chancellor who says they differ in this respect, "that the profit upon the contract being to depend upon future

events, cannot be correctly estimated in damages, where the calculation must proceed upon conjecture. In such a case to compel a party to accept damages for the non-performance of his contract, is to compel him to sell the actual profit which may arise from it, at a conjectural price. In Bull of Eggs 1 Bro. P C 140 specific performance was decreed in the House of Lords of a contract to pay the plaintiff a certain annual sum for his life, and also a certain other sum for every hundred weight of Brass Wire manufactured by the defendant during the life of the plaintiff. The same principle is to be applied to this case. Damages might be no complete remedy, having to be calculated merely by conjecture; and to compel the plaintiff in such a case to take damages, would be to compel him to sell the annual provision during his life for which he had contracted, at a conjectural price" and so he decreed a specific performance of the sale of debts proved under a commission of Bankruptcy. So must a jury and witnesses in this case assess the damages upon two conjectural estimates, first upon the annual cost of ~~upon~~ their maintenance for years to come, and secondly upon a conjecture as to the number of years they might live. The value of the land and personality transferred is not the criterion of damages, and is not a safe reliance. The case made by the bill would undoubtedly entitle Miller to a decree for a specific performance, if the nature of the contract was such as could be enforced by a decree. So far as providing

means is concerned it can be. But the personal amenity of defendant towards plaintiff, and that social kindness, indispensable to his happiness in his family, cannot be enforced - defenses to the specific execution of contracts may be sustained upon evidence, which would be insufficient to warrant a decree either to enforce or rescind. But the proof that would authorize its enforcement may be also sufficient to its rescission in a proper case. It is in this light we regard the case before us - and as Miller may be restored in statu quo in relation to the land, and adequately compensated in money for the value of the personality - and nothing appearing to show that Frazier has done any act in fulfillment which will render such a decree ~~unjust~~ ^{unjust} to him, we think the decree should be affirmed, as damages at law upon the bond do not appear, for the reasons stated, to be a full complete and effectual remedy to him under the circumstances of this case.

Decree affirmed

Treat J. did not express any opinion in this case.

Thayer & Miller

Division

Seates of

No 36

Novembre 1854

Joseph Frazer

v

Frederick Miller

Envois to Wabash

Operation by J. State

8747

Deser Affirma