THOMAS ALLISON AND OTHERS, Appellants, *v.* THOMAS P. CLARK, Appellee.

APPEAL FROM MORGAN.

Upon principles of natural justice, a person ought not to be compelled to part with his title to land, until he has received the amount which he had contracted to take for it, nor should a person receive a title until he has paid what he agreed to pay for it. (1)

CLARK exhibited his bill in chancery in the Morgan circuit court, at the April term of 1829, against the appellants, to compel the specific performance of a contract to convey a tract of land in the county aforesaid. The bill charges that the Allisons, on the 16th of February, 1826, executed their bond to the complainant, to convey to him a tract of land, upon the condition that the complainant paid them 207 dollars on or before the last day of February, 1827, the conveyance to be made on the day the money was stipulated to be paid. The complainant, in his bill, stated that on the last day of February, 1827, he was ready and willing to pay the purchase money, and that on the 27th of May, of that year, he did pay the money to Adam Allison for the defendants, but that the defendants refused to make the conveyance, and sold and conveyed the land to another person, (who was made defendant,) who had notice of the claim. The bill prays for a decree against the defendants for a conveyance to complainant.

The Allisons severally answered the bill, denying the payment of the purchase money, and set up a new and different contract in avoidance thereof, which was evidenced by the note of said Clark to the Allisons, executed since the 27th of May, 1827, and which, the Allisons contended, was part of the purchase money originally contracted to be paid, but which remained unpaid. The depositions taken by com-

Between the sale of goods and of land, there is a marked distinction. In the former, the law implies a warranty of title, but not in the latter. Ibid.

An action will not lie to recover back a sum of money paid in consideration of the assignment of a mortgage, although it turned out to be a forgery. *Bree* v. *Holbeck*, Doug., 655.

(1) The true rule, in cases of dependent covenants, such as agreements to pay at a certain time, and thereupon the lands to be conveyed, is undoubtedly this: that the vendor can not sue for the consideration money until he has tendered a deed, nor can the vendee claim a deed until he shows himself ready to pay. The vendor can not be compelled to part with the deed, but he must have it ready to be delivered as soon as the money is paid; both are concurrent acts. *Murphy* v. *Lockwood*, 21 Ill., 617, and cases there cited.

plainant, together with the receipts of the Allisons, proved the payment of the notes first executed by Clark to the Allisons. The Allisons contended that the note subsequently executed by Clark to them, which they produced and proved, was evidence of a new contract yet unperformed on the part of Clark, the complainant. The circuit court, on a final hearing of the cause, rendered a decree in favor of the complainant for a conveyance of the land, as prayed for in the bill, from which decree the Allisons appealed to this court.

Opinion of the Court by Justice SMITH. From a consideration of the facts disclosed by the bill, answers and testimony, in this cause, it is in some degree questionable, whether the decree ought to be disturbed. Taking the whole facts, however, in favor of the appellants, as disclosed, they can not amount to more than substantiating the belief that the note remaining unpaid, and which, it was contended, was substituted for the original, is still due, and that before the land was to be conveyed, that note, amounting to 179 dollars, was to have been paid on the first of January, 1828. The question of the justice of the decree in the circuit court will turn then on the single point, whether that court should have required the payment of that note before it decreed a conveyance of the land in question. The court below must have considered this point of the appellants' answers, as matters in avoidance of the allegations of the bill, and as such, requiring proof, before it could adopt the conclusion that this note was substituted for so much of the original consideration. It is really questionable, whether it ought not to be so considered. If it be right so to understand it, the decree ought to stand untouched; but the better construction would seem to be, that this note was given for a part of the original consideration for the lands; and that upon its payment, the lands were to be conveyed to Clark. The principles of natural justice would seem to require that the appellants ought not to part with their title to the land until they had received the amount for which they had contracted, and that equally so, the appellee ought not to receive a title until he had paid for the same the amount agreed on. The transaction between the parties is by no means free from obscurity and doubt. Upon the whole, it is the opinion of the court, that equal justice to the parties requires a modification of the decree, so that each shall obtain his rights. The decree is to be modified in this court, so as to require the complainant in the bill to pay the note of 179 dollars, with the interest due thereon to this time, and upon which, the defendants in

equity are to convey the lands in the manner stated in the decree of the circuit court, and the costs in this court, and in the court below, are to be divided between the parties, each paying in those courts, his own costs.

Thomas, for appellants.

Mc Connel, for appellee.

HYPOLITE ROLETTE, Appellant, *v.* LEMON PARKER, Appellee.

APPEAL FROM JO DAVIESS.

A tenant in common of a chattel who sues for a conversion of the same, is entitled to recover damages for his share or interest only.

Opinion of the Court by Justice BROWNE. This was an action of *trover* and conversion brought by Lemon Parker against H. Rolette. The plaintiff below derived his title from the following bill of sale, viz.:

KNOW all men by these presents, that I, William Kelly, in consideration of four hundred dollars to me paid by Parker and Tilton, do hereby sell, alien and convey to Lemon Parker, four yoke of oxen, with the yokes and chains belonging thereto. The condition of the above sale is such that I, the said William Kelly, stand indebted to the above named Parker and Tilton in the above named sum; now, if the above debt is canceled within one year, then the above sale to be null and void, otherwise to remain in full force and virtue; and it is further agreed between the parties, that the said Parker and Tilton are to loan me the said team without charge, and to furnish hauling for the said team to the amount of said debt.

Signed, WM. KELLY. [SEAL.]

July 11, 1829.

The defendant, by his counsel, moved the court to instruct the jury, that if they believed that William P. Tilton was interested in the contract between Kelly and Parker for the oxen, &c., they should find a verdict for the plaintiff for his share or interest only. Other instructions were prayed for, which will not now be noticed. I am of opinion, that the