1875

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N. J. Court of Errors and Appeals.

WILLIAM G. LORD,
Plaintiff in Error,
vs.
MOSES A. BROOKFIELD,
Defendant in Error.
} *State of the Case.*

For the Plaintiff in Error, LEONARD & COULT.

For the Defendant in Error, GEO. W. FORSYTH.

This was an action on a bond made by the plaintiff in error, William G. Lord, and held by the defendant in error, Moses A. Brookfield, as assignee of Benjamin Sire, the obligee named in the bond. The action was brought in the Supreme Court. 10

The issue joined was raised by demurrer to the second replication to the second plea.

IN THE NEW JERSEY COURT OF ERRORS AND APPEALS.

WILLIAM G. LORD,
Plaintiff in Error
vs.
MOSES A. BROOKFIELD,
Defendant in Error.
} *Assignment of Errors.* 20

Afterwards and on the thirteenth day of November, eighteen hundred and seventy-three, before our said Court of Errors and Appeals, at Trenton, in said State, comes the said William G. Lord, by Leonard & Coult, his attorneys, and says that in the record and proceedings aforesaid there

is manifest error in this, that the demurrer filed by the said plaintiff in error to the replication of the said defendant in error was overruled, and judgment therein given for the said defendant in error; whereas, the said demurrer should have been sustained, and judgment thereon should have been given for the said plaintiff in error, the said William G. Lord; and also, there is error in this, that the judgment aforesaid, by the record aforesaid, appears to have been given for the said Moses A. Brookfield against the
10 said William G. Lord, whereas, by the law of the land, the said judgment ought to have been given for the said William G. Lord. And the said William G. Lord prays that the judgment aforesaid for the errors aforesaid, and for other errors in the said record and proceedings, may be reversed, annulled, and altogether holden for naught, and that he may be restored to all things which he hath lost by occasion of the said judgment, &c.

LEONARD & COULT,
Attorneys of the Plaintiff in Error.

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20 IN THE COURT OF ERRORS AND APPEALS.

MOSES A. BROOKFIELD,
Defendant in Error,
adsm.
WILLIAM G. LORD.
} *Joinder in Error.*

And hereupon the said Moses A. Brookfield, by George W. Forsyth, his attorney, comes and says that there is no error either in the record and proceedings aforesaid, or in giving the judgment aforesaid. And he prays that the said Court of Errors and Appeals may here proceed to examine,
30 as well the record and proceedings aforesaid, as the matters aforesaid assigned for error, and that the judgment aforesaid, in manner aforesaid given, may in all things be confirmed.

GEO. W. FORSYTH,
Attorney of Defendant.

RETURN, PLEADINGS, ETC.

New Jersey Supreme Court.

MOSES A. BROOKFIELD
vs.
WILLIAM G LORD.
} *Judgment on Demurrer.*

GEORGE W. FORSYTH, *Attorney.*

As yet at the seventeenth day of June, A.D., eighteen hundred and seventy-one. Witness MERCER BEASLEY, Esquire, Chief Justice. 10

BENJ. F. LEE, Clerk.

Morris County, ss.:

William G. Lord, the defendant in this suit, was summoned to answer unto Moses A. Brookfield, the plaintiff therein, of a plea, that he render unto him a certain debt of three thousand one hundred dollars, which to him he owes, and from him unjustly detain, and thereupon the said plaintiff, by George Forsyth, his attorney, complains for that, whereas, the said defendant, heretofore, to wit, on the fourteenth day of March, in the year of our Lord one thous- 20 and eight hundred and seventy, to wit: at Morristown in the said County of Morris, by his certain writing obligatory, sealed with the seal of him, the said defendant, and now shown to the court here, the date whereof is a certain day and year therein mentioned, to wit: the day and year aforesaid, acknowledged himself to be held and firmly bound unto one Benjamin Sire, in the sum of thirty-one hundred dollars, lawful money of the United States of America, to be paid to the said Benjamin Sire, his certain attorney, executors, administrators, 30

or assigns, which said writing obligatory was and is subject to a certain condition thereunder written, wherein and whereby it was conditioned that, if the said defendant, his heirs, executors, administrators, or any of them, should and did well and truly pay or cause to be paid unto the said Benjamin Sire, or to his certain attorney, executors, administrators, or assigns, the just and full sum of fifteen hundred and fifty dollars, lawful money aforesaid, in one year from the date of said writing obligatory, with interest therefor
10 at the rate of seven per cent. per annum payable annually, without any fraud or other delay, that then the said obligation should be void, otherwise be and remain in full force and virtue, as in and by the said writing obligatory, and the condition thereof will more fully and at large appear.

And the said plaintiff avers that afterwards and before the payment of the said sum of money in the said obligation mentioned or any part thereof, to wit: on the eleventh day of March, eighteen hundred and seventy-one, to wit, at Morristown aforesaid, the said Benjamin Sire, by a certain
20 deed commonly called an assignment, executed under the hand and seal of him, the said Benjamin Sire, and now shown to the court here, the date whereof is the day and year last aforesaid, for the consideration of the sum of sixteen hundred and fifty-seven dollars and fifty-nine cents, lawful money of the United States of America, to him paid by the said plaintiff, the receipt whereof was in and by the said deed acknowledged, granted, bargained, sold, assigned, transferred, and set over unto the said plaintiff, his executors, administrators and assigns, among other things the said
30 writing obligatory, and the money due and to grow due thereon, with the interest, to have and to hold the same unto the said plaintiff, his executors, administrators or assigns for his and their sole use, benefit and behoof for ever, and then and there delivered the said obligation to the said plaintiff.

By means whereof the said defendant then and there became liable to pay to the said plaintiff, the said sum of money in the said writing obligatory mentioned, according to the tenor and effect, true intent and meaning thereof,
40 and for breach of the condition of the said writing obliga-

tory, the said plaintiff, according to the form of the statute in such case made and provided, avers and says that, on the fourteenth day of March, eighteen hundred and seventy-one, the whole principal sum of fifteen hundred and fifty dollars, mentioned in the condition of the said writing obligatory, together with the interest thereon, from the fourteenth day of March, eighteen hundred and seventy, became due and payable according to the tenor and effect, true intent and meaning of said condition. Yet the plaintiff in fact says, that the said defendant, though often re- 10 quested so to do, did not pay the said sum of money mentioned in the condition of the said obligation, to the said Benjamin Sire before the making of said allegation, nor any of said money nor any part thereof; nor has the said defendant, since the making of said assignment paid the said money mentioned in the condition of said obligation, or any part thereof, to the said plaintiff, but hath hitherto wholly neglected and refused, and still doth wholly neglect and refuse so to do. By reason of which said breach of the condition of said writing obligatory, the said writing obligatory has be- 20 come forfeited, and thereby an action hath accrued to the said plaintiff to have and demand of and from the said defendant the said sum of three thousand and one hundred dollars above demanded.

Yet the said defendant, though often requested so to do, has not, as yet, paid the said sum of money above demanded, or any part thereof, either to the said Benjamin Sire before the said assignment, or to the said plaintiff since the said assignment of said writing obligatory, according to the condition of said writing obligatory, but to pay the same 30 has hitherto wholly neglected and refused, and still doth neglect and refuse, to the damage of the plaintiff two hundred dollars, and therefore he brings his suit, &c.

And the said defendant, by Runyon & Leonard, his attorneys, comes and defends the wrong and injury, when, &c., and says that the said supposed writing obligatory is not his deed, and of this he puts himself upon the country, &c.

And the said defendant, for a further plea in this behalf, by leave of the Court here, for this purpose first had and obtained, according to the form of the statute in such case 40

made and provided, says that said plaintiff ought not to have or maintain his aforesaid action thereof against him, the said defendant, because he says that the said writing obligatory in the said declaration mentioned, was obtained from the said defendant by the said Benjamin Sire, in the said declaration mentioned, by fraud, covin and misrepresentation; that is to say, heretofore, to-wit: On the fourteenth day of March, in the year of our Lord eighteen hundred and seventy, at Morristown, in the county of Morris aforesaid, 10 the said Benjamin Sire, then being the owner of a certain tract of land containing a large number of acres, to-wit: forty acres, situate in the said county of Morris, then and there requested the said defendant to purchase the said land of and from him, the said Benjamin Sire, for the sum of six thousand dollars, to be therefor paid, or secured to be paid by the said defendant to said Benjamin Sire, and to give to him, the said Benjamin Sire, to secure the payment to him, the said Benjamin Sire, by and from the said defendant, of part, to-wit: the sum of fifteen hundred and fifty dollars of 20 the said sum of six thousand dollars, with interest thereon, his, the said defendant's writing obligatory; that in order to induce the said defendant so to purchase the said land, and to give said writing obligatory, the said Benjamin Sire then and there falsely and fraudulently represented and told the said defendant that the said land was then actually worth the sum of six thousand dollars, and that he had, but a short time before then, been offered four thousand dollars in cash for said land, but had refused to take it; and that the said land was all good, dry ground, covered with a large 30 quantity of timber; and the said defendant, confiding in and relying on said representations and statement, and all and every of them, and believing them to be true, then and there, as otherwise, and but for his said confidence and reliance upon the same, and his belief that the same were true, he would not have done, agreed to and did, at the request of said Benjamin Sire, as aforesaid (said defendant being thereunto induced by the said representations and statements), purchase the said land of and from the said Benjamin Sire for the said sum of six thousand dollars; and the 40 said defendant, in part payment of said land, and to secure

said Benjamin Sire the payment of part, to-wit: fifteen hundred and fifty dollars of said sum of six thousand dollars, then and there gave to said Benjamin Sire the said writing obligatory in the said declaration mentioned. And the said defendant in fact says that all the said statements and representations so as aforesaid, made by said Benjamin Sire to the said defendant, and upon which he relied, as aforesaid, and which he believed as aforesaid, and which induced him, as aforesaid, to purchase said land and give said writing obligatory to said Benjamin Sire, were 10 false and fraudulent, and were, by said Benjamin Sire, falsely and fraudulently made to said defendant, in the intent thereby to do fraud and deceive said defendant, and to obtain from him said writing obligatory; that the said land was not, at the time of the making said statements and reprasentations, or at the time of the making a delivery of said writing obligatory, worth six thousand dollars, nor any such sum, but was worth less than one thousand dollars; that the said land was not then all good, dry ground, covered with a large quantity of timber, but, on the contrary, was, 20 all but five acres thereof, wet and marshy ground, and had no timber whatever on it.

And the said defendant further says: that the said writing obligatory, if the same has been assigned by said Benjamin Sire to the plaintiff, was so assigned without any consideration for such assignment, and to the end and intent that said plaintiff should, as in fact he now does, hold said writing obligatory in trust for the said Benjamin Sire, and not otherwise, for whom and for whose benefit alone this suit is brought accordingly; Wherefore the said defendant saith 30 that the said writing obligatory is void, and this the said defendant is ready to verify, wherefore he prays judgment, if the said plaintiff, his aforesaid action thereof against him ought to have or maintain, &c.

And the said plaintiff, as to the plea of the said defendant by him first above pleaded, and whereof the said defendant hath put himself upon the said country, doth the like.

And the said plaintiff, as to the plea of the said defendant, by him secondly above pleaded, saith that the said plaintiff, by reason of any thing by the said defendant in that plea 40

alleged, ought not to be barred from having and maintaining his aforesaid action thereof against the said defendant, because he saith that the said writing obligatory in the said declaration mentioned, was obtained fairly and honestly by the said Benjamin Sire, in said plea, in that behalf mentioned, and not by fraud, covin, or misrepresentation, in manner and form as the said defendant hath in this said second plea in that behalf alleged, and because the said plaintiff saith, that he is the holder and
10 owner of the said writing obligatory, by deed of assignment, duly executed and delivered by said Benjamin Sire to the said plaintiff, for and upon a full and valuable consideration therefore paid, for the sole use and benefit of the said plaintiff, and not for the use and benefit the said Benjamin Sire, in manner and form as the said defendant hath in his said second plea in that behalf alleged, and this the said plaintiff prays may be inquired of by the country, &c.

And the said plaintiff, for further answer, in replying to
20 the said plea of the said defendant, by him secondly above pleaded, by leave of the Court here for this purpose, first had and obtained, according to the form of the statute in such case made and provided, saith that the said plaintiff, by reason of anything by the said defendant in his said second plea alleged, ought not be barred from having and maintaining his action aforesaid against the said defendant, because he saith that after the said writing obligatory had been assigned to the said plaintiff by the said Benjamin Sire, and after the said sum of money therein mentioned had
30 become due and payable according to the tenor and effect thereof, to wit, on the twenty-fifth day of March, eighteen hundred and seventy-one, to wit, at Morristown, in the said County of Morris, the said defendant, in consideration that the said plaintiff would forbear to demand payment of the said sum of money in the said writing obligatory mentioned, until the first day of May, eighteen hundred and seventy-one, agreed with the said plaintiff to pay him the said sum of money in the said writing obligatory mentioned, on the first day of May: But that the said defendant did not on
40 the said first day of May, or at any time or before after that

day, pay to the said plaintiff the said sum of money in the said writing obligatory mentioned, according to the tenor and effect, true intent, and meaning thereof, and of this said agreement in that behalf, but wholly neglected and refused so to do. And this the said plaintiff is ready to verify, wherefore he prays judgment, and his debt aforesaid, together with his damages by him sustained on occasion of the detention thereof, to be adjudged to him, &c.

And the said defendant as to the first replication of the
said plaintiff to the said second plea of the said defendant, 10
and which the said plaintiff hath prayed may be inquired of by the country, doth the like.

And the said defendant saith that the second replication of the said plaintiff to the second plea of the said defendant, and the matter therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law for the said plaintiff to have or maintain his aforesaid action thereof against the said defendant, and that the said defendant is not bound by law to answer the same ; and
this the said defendant is ready to verify. Wherefore by 20
reason of the insufficiency of the said replication in this behalf, the said defendant prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him, &c.

And the said plaintiff saith that the said second replication to the second plea by the defendant above pleaded, and the matters therein contained, in manner and form as the same are above stated and set forth, are sufficient in law for him, the said plaintiff, to have and maintain his aforesaid
action thereof against the said defendant, and the said 30
plaintiff is ready to verify and prove the same as the Court here shall direct and award, wherefore, inasmuch as the said defendant hath not answered the said second replication, nor hitherto in any manner denied the same, the said plaintiff prays judgment, and his debt aforesaid, together with his damages by him sustained on occasion of the detention thereof, to be adjudged to him, &c.

And now, at this day, to-wit: the first Tuesday of November, A.D. eighteen hundred and seventy-two, before
our said Supreme Court, at Trenton, came the parties afore- 40

said, by their respective attorneys aforesaid, and but because our said Court now here are not yet advised what judgment to give of and upon the premises, a day is further given to the parties aforesaid before our said Court, at Trenton, aforesaid, to-wit: until the nineteenth day of March, A.D. eighteen hundred and seventy-three, to hear judgment thereupon. At which day, before our said Court at Trenton, aforesaid, come the parties aforesaid, by their respective attorneys aforesaid.

10 Whereupon all and singular, the premises aforesaid being seen, and by the said Court nowhere fully understood, and mature deliberation being thereupon had, it appears to the said Court here, that the said second replication by the said plaintiff, pleaded to the said second plea by the said defendant above pleaded, and the matters therein contained, in manner and form as the same are above stated and set forth, are sufficient in law for him, the said plaintiff, to have and maintain his aforesaid action thereof against him, the said defendant.

20 Therefore, it is considered that the said Moses A. Brookfield do recover against the said William G. Lord, the sum of for his costs and charges by him about his suit in this behalf expended, by the Court now here adjudged to the said Moses A. Brookfield, and with his assent, according to the form of the statute in such case made and provided, and that he have execution thereof, &c.

M. BEASLEY, *Ch. J.*

I, Benjamin F. Lee, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true
30 copy of the judgment in the above stated case, as the same remains on record in my office.

In testimony whereof, I have hereto set my hand [SEAL.] and the seal of said Court, at Trenton, this first day of December, A.D., eighteen hundred and seventy-three.

BENJ. F. LEE, *Clerk.*

N. J. Court of Errors and Appeals.

WILLIAM G. LORD		
vs.	}	*In Error to The Supreme Court.*
MOSES A. BROOKFIELD.		

Argument of George W. Forsyth, Attorney of the Defendant in Error:

The writ of error in this case brings up for review in this Court the Judgment of the Supreme Court in a case therein depending, wherein Moses A. Brookfield, the defendant in error is Plaintiff, and William G. Lord, the plaintiff in error is Defendant.

The action is founded upon a bond made and given by William G. Lord, the plaintiff in error, to Benjamin Sire, bearing date March 14th, 1870, conditioned for the payment of $1,550, and interest in one year from date, and which bond was assigned to Moses A. Brookfield, the defendant in error, by said Benjamin Sire, by assignment bearing date March 11th, 1871.

(See state of the case, page 3 to page 5, line 33.)

To the declaration of the defendant in error the plaintiff in error pleaded that the bond was obtained from him by Sire, as part of the consideration money of the sale of certain real estate sold and conveyed to him by Sire, that in such sale Sire made to him certain false and fraudulent representations, and that the defendant in error is not a bona fide owner of the bond, but merely the trustee of Sire.

(See plea, state of case, line 33, page 5 to line 34, page 7.)

In the replication the defendant in error replies to the plea of the plaintiff in error :

1. That the bond was fairly and honestly obtained from the plaintiff in error by Sire and that he, the defendant in error, is bona fide the holder thereof for his own use and not in trust for Sire.

   (State of the case, page 7, line 35 to page 8, line 19.)

2. That the plaintiff in error in consideration of an extension of the time for the payment of the money mentioned in and secured by said bond, to the first day of May, 1871, agreed to pay the defendant in error the money secured by said bond on the first day of May, 1871.

   (State of the case, page 8, line 18, to page 9, line 9.)

The plaintiff in error joined issue on the first replication pleaded by the defendant in error and demurred to his second replication, and the defendant in error joined in demurrer.

The demurrer was argued before the Supreme Court and judgment rendered for the defendant in error, the plaintiff below.

By the demurrer of the plaintiff in error, the sufficiency, not only of the said second replication, but also of the pleadings antecedent thereto is brought in question, and the judgment of the Court must be against the party who first peads defectively.

I.

As to the sufficiency of the second replication :

It advances new matter in reply to the allegations set up in the plea by way of defence, and operating by way of estoppel against the matters set up in the plea.

The plaintiff in error solicited of the defendant in error an extension of time in which to pay the bond, and in consideration of such extension agreed to pay the bond, when the extended time expired.

He obtained for himself a substantial benefit, viz. : time to pay the bond. The defendant in error subjected himself to inconvenience and risk. Inconvenience by reason of delay in the receipt of the money. Risk of the ability of the plaintiff in error to pay when the time extended had arrived, or of his being without the jurisdiction of the Court.

At all events, until the time extended to had elapsed Brookfield could not have brought suit against the plaintiff in error. A plea of the extension of the time for payment would have been a good bar to the action.

Stryker vs. Vanderbilt, 1 Dutcher 482, sec. 495.
Cox vs. Bennet, 1 Green, 165.
Fleming vs. Gilbert, 3 John., 528.
Langworthy vs. Smith, 2 Wendell, 587.
Mead vs. Degolyer, 16 Ib., 632.

Now the law requires mutuality in agreements. To establish that mutuality in this case, if by reason of the extension of time of payment of the bond Brookfield was prevented from bringing suit until the time agreed upon for payment had expired. Then when suit is brought the agreement of the plaintiff in error to pay should operate as an estoppel to any defence he might have to the bond prior to the agreement, otherwise there would be no mutuality to the agreement.

By asking an extension and agreeing to pay the defendant in error at the expiration of the time extended the plaintiff in error admitted the bond was all right, and to allow him now to set up the contrary, would be in effect permitting him to receive an indulgence upon an admission of one state of facts and then set up a contrary statement to defeat an action when commenced after he had availed himself of the indulgence.

The defendant in error is bound by his admissions made for the purpose of obtaining an extension of time.

In the following cases, where the defendant, at the time of the assignment disclosed nothing to the prejudice of the instrument, he was held estopped :

Watson vs. McLaren, 19 Wend., 557.
Petrie vs. Felter, 21 Ib., 172.
Foster vs. Newland, 21 Ib., 95.
Holbrook vs. Burt, 22 Pick, 546.
McMullen vs. Werner, 15 Sergt & Rawle, 18.
Smith's Leading Cases, 534.

And the same rule should prevail, where after the assignment the obligor obtains an extension of the time for payment without disclosing any defence, and in fact admitting he had none.

The matters set up in the said second replication are such as in law and justice should estop the plaintiff in error from setting up fraud in the consideration of the bond.

II.

Is not the plea of the plaintiff in error defective?

1. The plea is argumentative.

All pleas are required to be direct and positive in the matters stated.

1 Chitty on Pleading, 539.

The plea should deny the making of the assignment, or confess and avoid it.

The allegation in the plea, "that if the said writing obliga-"tory has been assigned," &c. (State of the case, page 7, line 23, &c.), is argumentative, and not direct and positive statement of facts, which the law requires.

3. It is also ambiguous and double. Ambigous in that it leaves the defendant in Error in doubt as to whether the assignment is admitted or denied. Double, in that it raises two issues.

First. Respecting fraud in the consideration of the bond.

Second. Whether or not the defendant in Error is a *bona fide* holder of the bond.

III.

Does the plea set up mattter which would be a bar to the suit ?

At common law a seal imported a consideration, and that consideration could not be inquired into in a suit at law on the specialty.

Rogers vs. Colt, 1 Zab. 18.
Rogers vs. Colt, 1 Zab. 704.
Stryker vs. Vanderbilt, 1 Dutch. 482. See 495.
Vrooman vs. Phelps, 2 John, 177.
Dorr vs. Munsell, 13 John, 430.

But by the laws of this State, Pamphlet Laws, 1871, page 8, approved January 31, 1871, it is provided that fraud in the consideration of the contract may be pleaded and set up as a defence.

1st. Do the allegations contained in the plea set up such fraudulent conduct as will avoid the instrument?

These allegations are :

1. That Sire represented that he had been offered $4,000 cash for the property, and that it was worth $6,000.

2. That Sire represented the land dry land, covered with a large quantity of timber.

It is a rule of law, too familiar to require cases to be cited to prove it, that fraud does not follow, nor will it be presumed from a payment for property of more than it was worth.

The plea alleges that Sire's statement respecting the value of the property was false and fraudulent because the land was not worth $6,000, nor more than $1,000. It does not deny, except in a general charge of false and fraudulent representations, that Sire had been offered $4,000 for the property.

Besides, Sire's allegation that it was worth $6,000 is only matter of opinion, and matters of opinion upon which men's minds may vary cannot be set up to avoid a contract for fraud. And Sire's opinion is at any rate worth as much as that of the plaintiff in error.

The allegation at best was only in commendation of the property, and the plaintiff in error, before purchasing, should have informed himself of its value.

2 Kent's Com. Star pages 485 and 486, and cases referred to in Note A, Star page 486, Kent's Com.

Mere commendation or praise will not furnish ground for an action.

Arnott vs. Hughes, cited in note to Chitty on Contracts, page 452.

And in Chanelor vs. Lopus, 1 Smith's Leading Cases, page 72, a representation by the seller that a jewel sold to the plaintiff was a Bezoar stone when it was not, was held to be no ground for action.

2. The other allegation of fraud was in the quality of the soil, and the growth of timber thereon.

Whether land be wet or dry, well timbered, or destitute of trees, is an object of the senses, and the plaintiff in error, as a prudent man, before purchasing the land should have examined the quality, and it does not appear from his plea that he did not, or that Sire used any artifice, or in any way prevented him from doing so.

The quality of the soil, whether dry or marshy and whether timbered or destitute of trees, was patent, and could be discovered by inspection, and the alleged reresentations in these respects is no fraud, and would furnish no ground for an action.

1 ~~Suydam's~~ Sugdens Vendors and purchasers, 10 Ed., page 541. § 16, and note R, referring to Grant vs. Mount, Coop. 173.

And to permit every one who is dissatisfied with a transaction to ground a defence, or sustain an action for matters within the reach of his own observation, would tend to unsettle all business transactions.

The policy of the law has been to give relief to parties respecting representations made where there are latent defects in quality, and not respecting such as are apparent; and in representations of quality, ~~where the quality,~~ where the quality of the subject matter of the sale must be apparent, the maxims

Caveat Eruptor and de vigilantibus non dormientibus have been applied.

There is no legal fraud alleged in any of the allegations contained in the plea.

3. Even if fraud had been alleged sufficient to avoid the contract, before it can be set up in defence of this action, the plaintiff in error must rescind his contract and recovery, or tender himself willing and ready to reconvey the land, and set up such tender or reconveyance in his pleadings.

The plaintiff in error holds the land. He does not allege that he ever paid anything for it, excepting the bond in suit. And now if he be permitted to set up fraud to avoid the bond, he will then hold the land without paying anything for it.

What the law contemplates in refusing to allow a recovery where fraud has been practiced is to restore both parties to their original condition; and that cannot be done in this instance. For if the plaintiff in error avoids the bond for the alleged fraud, he will hold the land, and at the same time pay nothing for it.

I further insist that the laws of 1871, allowing fraud in the consideration to be set up in actions on specialties, so far as it applies to this case, is unconstitutional. The Constitution of this State, section 8, paragraph 3, says:

"The Legislature shall not pass any bill of attainder, *ex post*
"*facto* law, or law impairing the obligation of contracts, or depriving
"a party of any remedy for enforcing a contract which existed
"when the contract was made."

The bond, the subject matter of this suit; was made March 14, 1870. At the time it was made, and from that time to January 31, 1871 (Laws 1871, page 8), the matters set up in the defendant's plea would have constituted no defence to an action on the bond in any court of law in this State. The law was as declared in

Rogers vs. Colt, 1 Zab., 18 and 704.
Stryker vs. Vanderbilt, 1 Dutch., 482 and 495.

By the law of 1871 a defence was allowed to a specialty thereto-fore unknown to the laws of this State.

And that defence has a direct tendency to "impair," to "dimin-"ish in excellence," to "weaken" the obligation imposed upon the bond in this suit, and cannot be allowed in this case, because it is in violation of the Constitution of this State and the laws of this State existing at the time the contract was made.

The judgment of the Supreme Court overruling the demurrer of the plaintiff in error should be affirmed.

GEO. W. FORSYTH,
Att'y of Def't in Error.