

OUTLAW v. MORRIS.

Nashville, December, 1846.

Rescission—Liability of Vendee in Possession and His Surety. Upon a bill filed by the vendee of land and his surety for the purchase-money, to enjoin a judgment recovered against them on the purchase-note, and for a rescission of the contract of sale, it was held that, upon a decree of rescission, the judgment at law was properly allowed to remain in full force, both against the vendee and the surety, to the extent of the rent of the land while the vendee was in possession.

Cited in: 6 Lea, 655.

[262] This is a bill filed by W. W. Outlaw, and his surety, W. Outlaw, against Morris, for the rescission of a contract for the purchase of land. It was filed in the chancery court at Clarksville, and at the hearing on bill, answer, replication, and proof, a decree was entered rescinding the contract, and ordering that the defendant recover the value of the premises during the time they were possessed by the complainant. From this decree the complainants appealed.

Johnson, for complainants.

Shackleford, for defendant.

REESE, J., delivered the opinion of the court.

Judgments at law were obtained against the vendor or purchaser of a tract of land, and his surety, for the price of the land. The vendee and his surety file a bill to enjoin the collection of such price, and to rescind the contract of sale. This was done by the decree of the chancellor, but the vendee having been let into the possession of the land, the chancellor, upon taking an account, decreed that the value of the rent should not be enjoined, but so much of the judgment at law should be enforced against the vendee and his surety. The surety here objects that there ought to have been no decree against him.

As between him and the vendor, the objection was groundless; he was not, indeed, surety for the rent, *eo nomine*, but he was surety for the whole price of the land. So much of that price as was just, under the circumstances, the chancellor had a right to enforce, not only against the principal, but his surety. Of course the surety has his remedy if he should pay anything for his principal.

Let the decree be affirmed.

DICK v. MARTIN.

Nashville, December, 1846.

Parol Evidence to Prove Waiver of Demand and Notice. Parol evidence is admissible to prove an agreement, at the time of the endorsement of negotiable paper, although the endorsement is in full and dated, to waive demand and notice. [Citing *Kimbrow v. Lamb*, 3 Humph. 17, and cited in *Cobb v. Wallace*, 5 Coldw. 545.] Cited in: 3 Shannon's Cases, 404; 2 Lea, 260; 12 Pickle, 154.

[263] This case was tried in the circuit court of Overton county by Judge Caruthers and a jury, and a verdict and judgment rendered for the defendant, from which the plaintiff appealed.

Turney and Minnis, for plaintiff in error.

Cullom, for defendant in error.

TURLEY, J., delivered the opinion of the court.

This is an action, commenced by the plaintiff against the defendant, removed by appeal into the circuit court of Overton county, where it was tried at the October term, 1846.

Upon the trial, as appears from the bill of exceptions, the plaintiff read a note in evidence, in the words and figures following, to wit:

"One day after date I promise to pay Joel Martin thirty dollars, for value received, this 9th of March, 1840.

"WM. MAY. [Seal.]"

On the back of which was the following endorsement:

"I assign the within note to A. Dick, for value received, this 2d day of May, 1843.

"J. C. MARTIN."

The plaintiff then introduced James Dick, by whom he proposed to prove that, at the time the note was transferred by Martin to him, he promised and agreed that he would pay the note and money advanced to him for the note without any demand or notice; that he only wanted the money a few days, and would pay it and take up the note. This evidence was rejected by the court, and there was a verdict and judgment for the plaintiff.

In the rejection of this testimony we think the court erred.

We presume the court in rejecting the testimony did so upon the belief that the assignment was a written contract, which could not be waived by parol proof. The defendant's right to