

By the finding of the court, it is apparent that the allegations in the bill concerning the fraudulent contrivance of the defendant to prevent the property from being redeemed are made out, and the plaintiff is entitled to his further remedy, unless he is barred from it by his failure to make a tender, and bring into court the amount due on that sale. I cannot see anything in the authorities cited to this effect. In fact, no case is cited at all like this; and it seems to me that it was enough for the plaintiff to show his willingness to pay when the proper decree was made.

It is said in the argument, and in some of the cases, that the plaintiff ought to show by his bill enough to entitle him to a decree if the allegations of the bill are admitted. I cannot see any occasion for the plaintiff's tendering the amount due on the first execution sale in preference to having it included in the general decree on the mortgages.

The second execution sale is so connected with the other matters, and, in fact, so enters into a part of the defendant's contrivance to circumvent the plaintiff, that I think the foreclosure on that ought to be opened, and the plaintiff allowed to redeem from that, also.

My opinion, therefore, is, that the court below ought to determine the amount due to the plaintiff, and make a decree that, on payment by him of that sum within some reasonable time to be fixed by the court, the defendant should release the premises to the plaintiff.

LADD and SMITH, JJ., concurred.

*Exception sustained.*

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TAYLOR v. SAYLES.

{ Aug. 11,  
1876.

*Statute of Frauds.*

It appearing that certain land had been conveyed by plaintiff to one of the defendants by deed without any declaration of trust—*Held*, that a trust could not be shown by parol testimony.

FROM CHESHIRE CIRCUIT COURT.

This is a bill in equity, brought by the plaintiffs Orson S. Taylor and Semantha Taylor against Lenzie B. Sayles, Keziah Sayles, and Smith H. Brockway, to compel the defendants Sayles to convey to the plaintiff, said Semantha, a certain farm in Marlow, in this county. It appeared that in 1866 the plaintiff, said Orson, purchased the farm in question for the sum of twenty-five hundred dollars, one thousand dollars of which was paid in money by said Semantha, and the balance was secured by a mortgage upon the same, duly executed by the plaintiffs; that of the mortgage notes the sum of one thousand dollars has been paid.

The plaintiffs offered evidence tending to prove that on March 25, 1869, the plaintiffs, for the purpose of conveying the same premises to the said Semantha, mortgaged the same premises to the defendant, said Lenzie, to secure a note of fifteen hundred dollars signed by him, said Orson, and payable to said Lenzie, or order; and that on March 2, 1872, for the same purpose, they made, executed, and delivered to the said Lenzie a quitclaim deed of said premises, upon the agreement that he should convey said premises to the said Semantha, which he neglected to do at the time, and that he occasionally afterwards promised to make such conveyance. The evidence offered to prove the agreement to reconvey, on the part of said Lenzie, was not in writing, and the defendants contended that the agreement set up by the plaintiffs constituted a trust concerning lands which did not result to the plaintiffs by implication of law, and objected that it could not be proved by parol; and the court sustained the objection, and the plaintiffs excepted.

The questions of law arising on the foregoing case were transferred to this court for determination by STANLEY, J., C. C.

*Lane and Lovell*, for the plaintiffs.

*Wheeler & Faulkner*, for the defendants.

CUSHING, C. J. The case states that in 1866, when the farm was purchased, the plaintiff, Semantha, paid one thousand dollars of the purchase-money, but does not allege that any trust then resulted to her, the deed having, as it appears, been taken in the name of the husband. In fact, the case states that the plaintiff Orson purchased the farm,—from which it would appear that the money contributed by Semantha was either a loan or a gift to the husband.

However that may be, the next transaction, which appears to have taken place about three years afterwards, was a mortgage by the plaintiffs to the defendant, to secure a note for fifteen hundred dollars, signed by the plaintiff Orson. This is stated to have been for the purpose of conveying the premises to Semantha. And then the case finds that in 1872, three years afterwards, the property was quitclaimed by the plaintiffs to the defendant for the same purpose, and that he agreed to convey it to Semantha.

If the mortgage and note were made, as stated in the bill, for the purpose of conveying the property to Semantha, we must understand that the note was fictitious; and we cannot easily see what the object of such an arrangement could be, unless it were to blind creditors and other persons who might have an interest in knowing the state of the title,—in other words, for the purpose of defrauding the creditors of the plaintiffs. If this were so, the question would immediately arise how far the court could go towards relieving them from the consequences of their attempted fraud, and whether it could do anything more than to leave them where it finds them.

Neither is it necessary to consider how far the general doctrine, that there can be no dower in the trust estate which ordinarily would prevent the defendant Keziah from having any interest of that kind, would be modified by the fact that this trust is not disclosed on the face of the deeds, so that she might perhaps be considered as a purchaser without notice.

The deeds being, as we suppose they are, in the absence of any suggestion to the contrary, in the usual form, no trust would arise upon them; and the only question would be, whether this agreement, contradicting the effect of the deed, could be proved by parol testimony.

The cases of *Graves v. Graves*, 29 N. H. 129, and *Farrington v. Barr*, 36 N. H. 86, are directly in point to show that this bill cannot be maintained; and the plaintiffs' exception must be overruled.

LADD and SMITH, JJ., concurred.

*Exception overruled.*

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HOWARD v. HUNT.

{ Aug. 11,  
1876

*Pleading—Notice—Evidence.*

In general, a party cannot put in evidence his own statements not made in the presence of the other party.

The rule in pleading, that all the material facts must be properly alleged, applies to the averment of notice, which is only necessary when the notice is of the *gist* of the action.

When the defendant agreed that his daughter, an infant, should not revoke a certain contract—*Held*, that notice to the defendant of such revocation need not be averred.

The party, on revoking, tendered to the plaintiff the money paid her as the consideration for her promise, which he did not accept. *Held*, that the sum so tendered was not to be deducted in awarding damages.

FROM CHESHIRE CIRCUIT COURT.

ASSUMPSIT. The declaration alleged, in substance, that the defendant, in consideration that the plaintiff would buy of the defendant's minor daughter, Eliza, her interest and share in the estate of one Abel Hunt, deceased, by virtue of the will of said Abel, and pay her therefor the sum of \$150, promised that the said Eliza should not revoke any contract for the sale of her said interest which she might make with the plaintiff; that he would guarantee such sale, &c., alleging a revocation by said Eliza, and breach by the defendant, &c.

Records from the probate court were introduced, showing that the