

As the witness was properly allowed to testify, the whole amount of credits claimed should be allowed. This result makes it unnecessary to examine the other questions raised at the hearing.

Case discharged.

CLARK, J., did not sit: the others concurred.

HILL v. GROSSER & a.

Money paid on a contract for the purchase of land cannot be recovered by one who refuses to complete the contract and take a deed, the other party being in no fault.

BILL IN EQUITY, for keeping on foot a discharged mortgage, and for foreclosure.

C. U. Bell, for the plaintiff.

G. C. Bartlett, *Cross*, and *Morrison & Bartlett*, for the defendants.

ALLEN, J. The plaintiff bargained with the defendant Anna Grosser for the purchase of the premises, and she signed an agreement to convey, it being understood that he was to assume and pay a mortgage upon the land made by her husband, now deceased, to the defendant Foster. The plaintiff paid one of the mortgage notes and the interest due upon them all, entered into possession of the land, and made improvements. He refused to take a deed when tendered, and abandoned the premises, which were afterwards sold to the defendant Emil Grosser, who gave new mortgages,—one to Foster, who had discharged his previous mortgage, and one to the defendant Anna Grosser. Emil Grosser conveyed the land, subject to the Foster mortgage, to the defendant Theodore Grosser, who now holds the title. The plaintiff, making all those who have been mortgagees or owners of the land parties, seeks to be reimbursed for the amount he paid on the Foster mortgage notes, claims an equitable assignment of that mortgage to that extent, and prays for a foreclosure.

It was understood that the plaintiff was to assume the mortgage as a part of the purchase-money, and that the money paid to the mortgagee was in part payment for the land. The contract having failed through the plaintiff's own fault, and by no fault of the defendants, the plaintiff could not recover the amount paid in part performance. *Lane v. Shackford*, 5 N. H. 133; *Ayer v. Hawkes*,

11 N. H. 148, 152, 153; *Ketchum v. Evertson*, 13 Johns. 365; *Green v. Green*, 9 Cow. 46; *Rounds v. Baxter*, 4 Greenl. 454. Having abandoned the contract and refused to perform, and not being entitled to recover the money which he has paid, he has no interest to protect, and equity will not uphold the mortgage for that purpose.

Refusing to perform the contract on his part, and standing by and seeing the property sold without claiming title or interest, he is estopped from setting up or making claim under a mortgage, which, to the extent of his claim at least, was understood by the defendants and himself to have been paid. *Thompson v. Sanborn*, 11 N. H. 201; *Parker v. Brown*, 15 N. H. 184.

Bill dismissed.

CLARK, J., did not sit: the others concurred.

HILLS, *Ex'r, Apt.*, v. BAKER.

Where an executor appealed from a decree of the probate court directing him to pay over the balance found in his hands on settlement of his administration account to the residuary legatee, who desired no further administration, and no other person was interested in the estate, the appeal was dismissed with costs.

APPEAL, from the decree of the probate court by the executor of the will of Charles I. Baker, directing him to pay to the defendant, who is the residuary legatee, the sum of \$95.29, the balance in the hands of the executor upon settlement of his account of administering the estate of the deceased. The reasons of appeal assigned are, that the decree was made without notice to the executor, and that the estate has not been fully administered. The defendant moved to dismiss, and upon this motion evidence was taken from which the following facts were found:

The plaintiff was appointed executor in August, 1875, and settled his account in September, 1879, after being cited in for that purpose by the defendant. The only estate not administered upon consists of a few small debts due to the estate, including a judgment for \$53.36 obtained by the executor, upon which a second suit has been brought by him since this appeal was taken. The defendant, in November, 1879, requested the plaintiff to resign, and allow her to complete the administration. In the settlement of his account the plaintiff was credited with having paid all the debts allowed by the commissioner of insolvency, whether paid or not, except the claim of one Bartlett of \$37. All the legacies have been paid (except the balance due the defendant), and credited to