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JAN. TERM, 1857. UNDERHILL V. ALLEN. \

UNDERHILL ET AL. ADM'RS

v.

ALLEN.

A bill for the specific performance of a contract for the sale of land, where the contract is not alleged to be in writing, must show a part performance—the allegation of the payment of the purchase money is not sufficient to take the case out of the statute of frauds.

*Appeal from the Circuit Court of Crittenden County in Chancery.*

HON. GEORGE W. BEAZLEY, Circuit Judge.

*Cummins & Garland, for the appellants.*

\*ENGLISH, C. J. This was a [\*467 bill for specific performance, brought by Wm. D. Allen, in the Crittenden circuit court, against the administrators of George W. Underhill.

The bill alleges that on the 21st of December, 1853, complainant purchased of George W. Underhill, through one John Martin, an agent of said Underhill, the S.  $\frac{1}{4}$  of the S. E.  $\frac{1}{4}$  of Sec. 33, T. 6. N., R. 4 E., situate in the county of Crittenden. That at the time he purchased said land, complainant paid to Martin, as such agent, the purchase money therefor, being \$100. That Underhill had entered the land with swamp land scrip, and it was understood and agreed by and between complainant and said Underhill that the said Underhill should make to complainant a deed of the land, or should transfer to him his certificate of entry for the same. That Underhill, afterwards, and before making complainant a deed to the land, or transferring to him the certificate of purchase and entry thereof, departed this life intestate; and that letters of administration upon his estate had been granted to his widow, Amia L. Underhill and John L. Bernard, etc. That Underhill, at his death, left him surviving his said widow, and the three children, George W., Frank and Virginia, his sole heirs at law, who were infants and without guardians.

The administratrix and administrator of Underhill are made defendants. Prayer for specific performance of the contract, and that they be compelled by decree to convey the land to complainant, and for general relief, etc.

The defendants demurred to the bill generally for want of equity; the court overruled the demurrer, and the defendants declined to answer over, a decree was rendered against them, in accordance with the prayer of the bill, that they convey the land to complainant by deed in due form, etc., or assign to him in legal form the certificate of entry, etc.

Defendants appealed from the decree to this court.

468\*] \*The bill being against the

administrators of Underhill only, and not making his heirs parties, was perhaps filed under the provisions of sec. 166-7-8, ch. 4, Dig., p. 140, but it is, nevertheless, in the nature of a bill for specific performance of a contract for the sale of land.

The bill neither alleges or exhibits any contract in writing between Underhill, or his agent and complainant, for the sale and conveyance of the land, nor does it aver any such part performance as will take the case out of the statute of frauds. It alleges no part performance of the contract whatever but the payment of the purchase money, which is not sufficient to take the case out of the statute. *Keatts v. Rector*, 1 Ark. 421, note thereto; 2 *Story's Eq.*, sec. 760-1. *Adam's Eq.*, Marg. p. 86, note 1, top p. 263; *Hatcher et al. v. Hatcher et al.*, 1 *McMullen's Eq. R.* 317. *Smith v. Smith*, 1 *Rich. Eq. R.* 131; *Jackson v. Cutright*, 5 *Munf.* 308; *Johnson v. Glancey et al.*, 4 *Blackf.* 94. Had the bill alleged that the contract was in writing, or that complainant took possession of the land under and by virtue of his purchase, etc., the defendants would have been put upon plea or answer to the bill, etc. See *authorities cited above.*

The court erred in overruling the demurrer to the bill, and for this cause the decree must be reversed, and the cause remanded with instructions to the court below to sustain the demurrer, and permit the complainant to amend his bill if he desires to do so, otherwise to dismiss it for want of equity.

Absent, the Hon. Thomas B. Hanly.