

DARLAND v. GREENWOOD.

*Circuit Court, D. Iowa.*

May, 1880.

PLEADING—CONTRACT CONTAINING MUTUAL CONDITIONS.—In an action for the breach of a contract containing mutual conditions, performance or readiness to perform must be averred by the plaintiff.

Demurrer to petition.

*J. E. Owens*, for plaintiff.

*Starr, Harrison & Danforth*, for defendant.

MCCRARY, C. J., (*orally*.) This is a suit brought to recover damages for the breach of a contract. The plaintiff avers in his petition a contract between himself and defendant as follows: Plaintiff held against defendant five promissory notes for \$500 each, and was also the owner of 80 acres of land in the state of Illinois. Defendant owned a house and two lots in the town of Marble Rock, Iowa, in which house he owned and kept a stock of merchandise.

It was agreed between plaintiff and defendant that defendant 661 should sell and convey to plaintiff said house and lots, and the merchandise aforesaid, and that the plaintiff should pay for the same as follows: *First*, to deliver up and cancel said five promissory notes; *second*, to deed to defendant said 80 acres of land, and free the same from encumbrance; *third*, to pay him \$850 in cash; *fourth*, to assume the liabilities against said store, amounting to some \$800 or \$900.

After averring these facts, the petition alleges that “defendant has failed and refused to carry out his bargain with the plaintiff, and complete said bargain so entered into on said July 11, 1879, although requested to do so.

To this petition the defendant demurs, on the ground that the same does not show that the plaintiff has performed, or offered to perform, the said contract on his part. The covenants in the contract, as set out in the petition, are mutual covenants, and go to the whole consideration on both sides. They are mutual conditions, and neither party can recover against the other for their breach, except upon averring performance, or readiness to perform, on his own part. The defendant agreed to convey to plaintiff a house and lot, and the merchandise mentioned in the petition, and the plaintiff agreed in consideration thereof, and at the time of such conveyance, to make the payments named.

In such a case I am clear that the plaintiff cannot maintain an action without showing performance on his part or an offer to perform. 2 Parsons on Contracts, 532, note *r*.

The demurrer to petition is sustained.

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