

STATE OF ALABAMA,  
COUNTY OF BALDWIN.

1601  
\* IN THE CIRCUIT COURT OF SAID COUNTY, IN EQUITY  
No. \_\_\_\_\_

TO THE HONORABLE F. W. HARE, JUDGE:-

Humbly complaining your orator, R. H. Oswell, as complainant, brings this, his bill of complaint against H. H. Wefel, Jr., and Blanche E. Wefel as respondents and respectfully shows:

FIRST.

Complainant and respondents are over the age of twenty-one years and reside in Mobile County, Alabama.

SECOND.

On to-wit; March 11th, 1931, the respondent, H. H. Wefel, Jr., was the owner of the land described in contract bearing that date, a copy of which is attached to this bill of complaint as exhibit "A", which land was located in Baldwin County, Alabama, and on to-wit; the said 11th day of March, 1931, the respondents entered into a contract for the sale of said land to the complainant, a copy of which contract is attached to this bill of complaint and marked Exhibit "A".

THIRD.

Complainant further shows that upon the execution and delivery of the said contract he paid to the respondent, H. H. Wefel, Jr., \$3,500.00 in cash and executed and delivered to him the three <sup>negotiable</sup> notes for \$3,500.00 each all as provided for in paragraph numbered "1" of said contract and complainant further avers that the land described in said contract is valuable mainly for the timber thereon and the value of said contract to the complainant was the right to cut and market the said timber which rights were the inducing cause of complainant's entering into the contract with the respondents, all of which was well known to the respondents.

FOURTH.

Complainant further avers that on to-wit; September 19th, 1931 the respondent, H. H. Wefel, Jr., who was the owner of said land, denied

the complainant the right to cut and market the timber on said land and prohibited complainant from cutting said timber, which notice was in writing and a copy of which is attached to this bill of complaint and marked "Exhibit B." Complainant further avers that upon being so prohibited from cutting the said timber he tendered the respondents back the land and the contract in writing as shown by written instrument, copy of which is attached to this bill of complainant and marked Exhibit "C"

FIFTH.

Complainant therefore shows that in prohibiting complainant the right to cut the said timber, the respondents have violated the said contract entitling complainant to a rescission thereof and of a return to him of the cash paid therefor and to a return to him of the notes executed by complainant and now in the possession of respondent, H. H. Wefel, Jr., but the said respondent declines to refund the said money or return the said notes.

The premises considered, complainant prays that your Honor will take jurisdiction of the cause made by this bill of complaint; that by proper process issuing to him from this court the respondents, H. H. Wefel, Jr., and Blanche E. Wefel, be made parties respondent hereto and be required to answer the charges herein made within the time and in all things as required by the rules and practices of this court.

Complainant further prays that upon the hearing of this cause your Honor will order, adjudge and decree that the respondents have violated the terms of the said contract; that complainant has a right to have the same cancelled and to have refunded to him the cash money paid and the notes executed and delivered as described in paragraph Third hereof, and complainant prays that the court enter an order holding the contract cancelled, null and void; that the respondent, H. H. Wefel, Jr., be required to refund the \$3,500.00 cash paid with legal interest from to-wit; September 19th, 1931, the date of respondents refusal to permit complainant to cut such timber, and will fix a lien on the aforesaid land to secure complainant for the money so paid him and that he be required to surrender and cancell the said promissory notes executed and delivered to him by complainant.

Complainant further prays for such other, further and different relief as in equity and good conscience may be due him in the premises.

H. E. Smith

B. J. Williamson  
SOLICITORS FOR COMPLAINANT

FOOT NOTE: The respondents are required to answer every allegation and paragraph of the foregoing bill of complaint but oath thereto is hereby expressly waived.

H. E. Smith

B. J. Williamson  
SOLICITORS FOR COMPLAINANT

THIS AGREEMENT, made and entered into on this the 11 day of March, 1931, by and between the undersigned, H. H. Wefel, Jr., and his wife, Blanche E. Wefel, hereinafter called the parties of the first part, and R. H. Oswell and R. A. Smith, hereinafter called the parties of the second part, WITNESSETH:

That the parties of the first have and do hereby bargain and agree to sell to the parties of the second part, and the parties of the second part do hereby bargain and agree to purchase from the parties of the first part, for the consideration and upon the terms hereinafter set out, all that real estate situate, lying and being in the County of Baldwin, State of Alabama, described as follows, to-wit;

All of the Harris Place, more particularly described as follows: southwest fractional quarter and the southeast quarter of Section Twenty-three (23); northwest quarter of section twenty-six (26); northeast fractional quarter of fractional Section Twenty-two (22); north half of fractional Section Twenty-three (23); west half of the northwest fractional quarter of Section Twenty-four (24); southeast quarter of northwest quarter of fractional Section Twenty-four (24); ALL BEING IN TOWNSHIP THREE NORTH, OF RANGE TWO EAST: being 1,000 acres, more or less; excepting therefrom, however, that certain piece or parcel of land belonging to said tract lying west of Frank Johnson's slough in the fractional southwest quarter of Section 23 and northwest of Jim's Lake in the northwest quarter of said Section 26;

And, ALSO, that certain tract of land known as the Mim's Plantation being the southeast fractional quarter north, and middle subdivision; the east half of the northeast quarter of Section Fifteen (15); the southwest quarter, northwest subdivision of fractional section Fourteen (14); southeast quarter of Fractional Section Ten (10); southwest quarter of fractional section Eleven (11); ALL IN TOWNSHIP THREE NORTH, OF RANGE TWO EAST, and containing in all eight hundred (800) acres, more or less; and, also, Boatyard and Lake Lumber Landing and one (1) acre in connection therewith and contained in land known as the Wilkins' Plantation; and, ALSO, the tract of land situated on the Alabama River in said County of Baldwin known as the Thompson or George Weakley Tract, being Section Thirty-nine, in TOWNSHIP THREE NORTH, OR RANGE TWO EAST, and containing one hundred and sixty (160) acres.

Exh. 6, 7 A

It is mutually understood and agreed by and between the parties hereto as follows:

1. That the total consideration or purchase price to be paid for the above described lands is the sum of Fourteen Thousand (\$14,000.00) dollars , of which sum Three Thousand and Five Hundred (\$3,500.00) Dollars has this day been paid incash by the parties of the second part to the parties of the first part, the receipt whereof the parties of the second part do hereby acknowledge, and the balance of Ten Thousand and Five Hundred (\$10,500.00) Dollars, together with the interest thereon at the rate of six per cent per annum from date payable semi-annually, is to be paid in three installments of Three Thousand and Five Hundred (\$3,500.00 each, the first one of said installments shall be payable on or before six months from the date hereof, the second twelve months from date, and the third eighteen months from the date hereof, said installments are represented by notes executed by the parties of the second part to the order of the said H. H. Wefel, Jr., one of the parties of the first part, which said notes are payable in the amounts and at the times above stated, and each of said notes bearing its own interest at the rate of six per cent per annum from date payable semi-annually.

2. That the parties of the second part may, at their option, have, at their own expense, an abstract or abstracts of title of said property prepared or made, and the title thereof examined by any attorney or attorneys of their selection. If, on such examination, it is found that any portion or all of same does not show a merchantable title, but that such title can be made merchantable by extrinsic evidence in the form of affidavits or otherwise, then the parties of the first part are to furnish at their expense such evidence. If, in the opinion of the attorney or attorneys for the party of the second part, such title

cannot thus be made merchantable, or should any disagreement arise between the parties hereto as to the condition of the title to said lands, then the parties of the first part and the parties of the second part agree that such question or disagreement as might arise as to such title, may be referred by either or both of the parties hereto to Norville R. Leigh, Jr., whose opinion as to whether or not such title is merchantable shall be binding on both parties hereto. If, in the opinion of the said Norville R. Leigh, Jr., legal proceedings are necessary to perfect said title to all or any portion of such lands, then the parties of the second part are hereby granted the option of taking or rejecting hereunder such lands or any portion thereof, and if the parties of the second part agree to take such lands upon completion of legal proceedings, then the parties of the first part agree to immediately institute such proceedings as may be necessary or proper and to proceed to final judgment without delay. If it is found that a merchantable title cannot be obtained, or should such legal proceedings by the parties of the first part be unsuccessful, then it is understood and agreed that such portions or all of said land shall not be included in making conveyance by warranty deed upon completion of this contract, and a proportionate reduction in price of seven (\$7.00) dollars per acre for such lands shall be allowed from the contract price of fourteen thousand (\$14,000.00) dollars and credited proportionately on the notes falling due thereafter. It is understood, however, that this agreement does not include the northeast fractional quarter of Section Fourteen in said Township and Range, which the parties of the first part propose to convey by quit-claim deed.

3. That the parties of the second part may, at their option, pay any one or all of the above described notes at any time before maturity, in which event interest to be abated to the date of payment.

4. That the taxes for the tax year of 1931 are to be prorated between the parties hereto as of the date of this contract, the parties of the first part paying the proportion of taxes due from October 1, 1930, to the date hereof, and the parties of the second part paying the proportion thereof to be due from the date hereof to September 30, 1931.

5. That if the parties of the second part shall well and truly pay said notes, then the parties of the first part shall execute and deliver to the parties of the second part, their heirs or assigns, a warranty deed conveying to them, their heirs or assigns, said land free and clear of all encumbrances suffered by the parties of the first part. It is also agreed that parties of the first part further agree to convey to the parties of the second part, their heirs or assigns, by quit-claim deed the said northeast quarter of fractional Section Fourteen (14), in township Three(3) North, of Range Two (2) East, containing eighty-seven (87) acres, more or less.

6. That if default be made in the payment of any of the above stated notes or interest thereon when the same shall mature under this contract, as far as it relates to purchase and sale of said land, and should said default remain uncorrected for a period of ninety (90) days after maturity, then this contract shall be void at the option of the parties of the first part, of which option notice in writing shall be given to the parties of the second part, and also the parties of the second part shall be deemed and taken to be the tenants of the parties of the first part and any amount paid on account up to date of default or termination of this contract shall be deemed and is reasonable rental for such land, and it is also understood and agreed that if any timber is cut before payments have been made in full as stated above, then said timber is to be

paid for at a price of eight (\$8.00) dollars per thousand superficial feet stumpage delivered in Mobile, Alabama, or at mill, said amount to apply on or take up the note next falling due, permission, together with all rights of ingress and egress, being hereby given and granted to the parties of the second part, in accordance with the terms herewith, to cut and remove timber on said land or any part thereof.

IN WITNESS WHEREOF, the parties of the first part and the parties of the second part have hereunto set their hands and seals this the day and year first above written.  
IN DUPLICATE.

H. H. WEFEL, JR., (SEAL)

BLANCHE E. WEFEL (SEAL)

R. H. OSWELL (SEAL)

STATE OF ALABAMA, )  
COUNTY OF MOBILE. )

(SEAL)

I, Myrtle Gay, a Notary Public in and for said State and County, hereby certify that H. H. Wefel, Jr., and Blanche E. Wefel, whose names are signed to the foregoing instrument, and who are known to me, acknowledged before me on this day, that, being informed of the contents of the instrument, they executed the same voluntarily on the day the same bears date. Given under my hand and official seal this the 11th day of March, 1931.

~~Myrtle Gay~~ Myrtle Gay  
Notary Public, Mobile County, Alabama.

STATE OF ALABAMA, )  
COUNTY OF MOBILE. )

I, Myrtle Gay, a Notary Public in and for said State and County, hereby certify that R. H. Oswell, whose name is signed to the foregoing instrument and who is known to me, acknowledged before me on this day, that, being informed of the contents of the instrument, he executed the same voluntarily on the day the same bears date. Given under my hand and official seal this the 11th day of March, 1931.

Myrtle Gay  
Notary Public, Mobile County, Alabama.

STATE OF ALABAMA, )  
BALDWIN COUNTY. )

I, \_\_\_\_\_, a Notary Public in and for said State and County hereby certify that R. A. Smith, whose name is signed to the foregoing instrument, and who is known to me, acknowledged before me on this day, that, being informed of the contents of the instrument, he executed the same voluntarily on the day the same bears date. Given under my hand and official seal this the \_\_\_\_\_ day of March, 1931.

Notary Public, Baldwin County



"EXHIBIT B"

H. H. WEFEL, JR., & CO.  
Southern Investments.  
203-4-5 First National Bank Building,  
MOBILE, ALA.

September 19th, 1931.

Mr. R. H. Oswell,  
St. Michael Street,  
Mobile, Alabama.

Dear Sir:-

Your notes amounting to \$3,500.00 given us in payment of land you purchased from myself and Mr. Maschmeyer, under date of March 11th, 1931, and was due under date of September 11th., 1931, remained unpaid up to September 17th, 1931, and we had discounted this paper at the bank and was, of course, called upon to make payment of same which we did yesterday.

Our laywer informs us that you now stand in default of this payment, consequently you are not in position to cut any timber on this tract of land until you pay to us in full the amount now past due, and to put you on proper notice we hereby positively prohibit you from cutting any timber whatsoever on this tract until the above provisions have been fully complied with.

Yours respectfully,

H. H. WEFEL, JR.,

hhw-mrg.

Exhibit B

"EXHIBIT C"

Sept. 21 st. 1931.

Mr H.H.Wefel, Jr.,  
C/O H.H.WEFEL & Company,  
203-205 First National Bank Bldg.,  
Mobile, Alabama.

Dear Mr. Wefel:-

I have your letter of September 19 th, in which you prohibit my cutting timber on the land covered by contract between us under date of March 11 th. 1931.

I am advised that in prohibiting my cutting this timber you have breached your contract with me and are liable to me for the initial payment which I made to you. I therefore demand that you return to me the cash paid you on March 11 th, 1931, amounting to \$ 3500.00 with interest since the date of payment, together with the notes delivered to you under the contract. I am further advised that in view of your letter and in view of the fact that I cannot now operate on the land, I should, and I now do advise you that I will not cut the timber thereon. Up to the present time I have cut no timber on the land and I hereby release and surrender all rights I may have to the said land and all timber thereon and do hereby rescind and cancel the contract.

Kindly let me have your check for \$ 3500.00, together with interest from March 11 th of this year and the notes delivered to you under said contract.

Yours very truly,

R. H. OSWELL

Exhibit C

IN THE CIRCUIT COURT OF BALDWIN  
COUNTY, ALABAMA, IN EQUITY.

No. \_\_\_\_\_

**RECORDED**

R. H. OSWELL,

Complainant,

vs

H. H. WEFEL, JR., et al.,

Respondents.

ORIGINAL BILL

*Filed Sept 30/53  
J. H. McCune  
Register*

ROBT. E. GORDON  
DAVID H. EDINGTON  
NORVELLE R. LEIGH, JR.

GORDON, EDINGTON & LEIGH  
ATTORNEYS AT LAW  
1011-15 MERCHANTS NATIONAL BANK BUILDING  
MOBILE, ALABAMA

November 4, 1931

Hon. T. W. Richerson,  
Bay Minette, Ala.

Dear Sir:

Re: Oswell vs. Wefel

Enclosed herewith find our demurrer to bill of complaint in this cause, which please file. We ~~have~~ sent Mr. B. F. Mc Millan, Jr. and Mr. H. Embree Smith each a copy of the demurrer.

Thanking you in advance for your usual courteous prompt attention, we are,

Yours truly,

GORDON, EDINGTON & LEIGH

By *Norvelle R. Leigh*

NRL/D  
Encl.

R. H. OSWELL,

Complainant,

- versus -

H.H. WEFEL, JR. and  
BLANCHE E. WEFEL,

Respondents.

IN THE CIRCUIT COURT OF BALDWIN COUNTY,  
ALABAMA

NO. \_\_\_\_\_

IN EQUITY.

SUBMITTED ON DEMURRER TO THE BILL OF  
COMPLAINT AS AMENDED

BRIEF AND ARGUMENT  
OF

GORDON, EDINGTON & LEIGH  
Solicitors for Respondents.

A few days prior to the day on which this cause was to be heard on demurrer to the original bill we furnished Solicitor for complainant with a copy of the brief and argument on which we were relying to support our contention that the demurrer was well taken.

On reaching Bay Minette on the day set for hearing we were informed by opposing counsel that he had prepared ready for filing an amendment to the bill, and consequently no hearing was had upon the demurrer and later we were furnished with a copy of the amendment.

The cause is now submitted on demurrer to the bill of complaint as amended. As we view the situation, all that was said in our original brief is applicable for the reason that the amendment did not meet the objection raised to the original bill. One of the questions raised by the original demurrer was that it appeared from the allegations of the bill that complainant, himself, was in default, and for that reason could not successfully claim a rescission of the contract by reason of any alleged breach on the part of the respondents. Quotations set out in our original brief sustain our contention in this regard.

Complainant undertakes to overcome the above mentioned weakness by adding paragraph 4 $\frac{1}{2}$  as one of the amendments to his bill of complaint. The substance of this paragraph

is that before September 11, 1931, the day on which the first note matured, it was mutually agreed between the parties that time of payment would be extended without payment thereof on the date of its maturity, and the complainant should have the right under the contract to cut the timber.

This paragraph at best shows a mere gratuitous promise voluntarily made and without any valuable consideration.

Such an agreement, if made, is without any force or effect.

A binding agreement to extend the time for the performance of a contract or for the payment of a debt evidenced by a note must be supported by a valuable consideration. This point has been decided in quite a number of cases in which sureties on negotiable notes have sought to be discharged because of alleged extensions granted by the payee to the maker of the note, and each time the question has been raised the Court has held that the surety was not discharged unless the extension was supported by a valuable consideration, holding that such an agreement was not binding contract even as between the maker and the payee.

"It is well settled that a surety on a contract for the payment of money is discharged from liability by any extension of time of payment granted to the principal by the creditor on a valuable consideration, without the consent of the surety, whereby the creditor's right to sue is disabled for any period of time however short.- Mo. & Montg. R'way Co. v. Brewer, 76 Ala. 135. Merely giving further time gratuitously without consent of the surety will not discharge the latter. There must be a valid agreement to extend, precluding the creditor from suing as soon as he had the right to sue according to the terms of the original contract; and there can be no valid agreement, unless supported by a legal and valuable consideration."

Howle vs. Edwards,  
97 Ala. 649-655

"Special plea numbered four (4) was subject to the demurrer interposed to it. It contains no averment that the agreement between plaintiff and Lewey to extend the time of payment was supported by a valuable consideration.- M. & M. R. R. Co. v. Brewer, 76 Ala. 135; Scott v. Scruggs, 95 Ala. 383; Howle v. Edwards, 97 Ala. 649."

Lehnert vs. Lewey, et al.,  
142 Ala. 149-151

One of the grounds of demurrer to the bill as amended is that it does not appear that there was any valuable consideration to support the alleged agreement for the extension of time. Another ground is that the minds of the parties never met as to any extension, the mere indefinite statement that an extension would be granted without any agreement as to the length of time would be void for indefiniteness.

The above discussed amendment having failed to accomplish the purpose intended by complainant's solicitor, the case stands just as though no amendment had been made, and we therefore content ourselves by attaching hereto our original brief, and rest our case on what is there said.



The complainant in his bill seeks rescission of a certain contract entered into by himself on the one part and the respondents on the other, and a return of certain monies paid the respondent H. H. Wefel, Jr., under the contract.

It appears from the bill of complaint and the exhibits thereto that the complainant and the respondents entered into a written agreement on March 11, 1931, in which respondents agreed to sell and complainant to buy for a consideration of Fourteen Thousand Dollars, certain lands described in the contract. The complainant paid Three Thousand Five Hundred Dollars of the purchase money in cash, and agreed to pay the balance of Ten Thousand Five Hundred Dollars, together with interest at the rate of six percent per annum from date of contract, in installments of Three Thousand Five Hundred Dollars each, the first ~~one~~ of said installments was made payable on or before six months from the date of contract, the second in twelve, and the third in eighteen months. To evidence said deferred payments complainant executed his three promissory notes to the respondent H. H. Wefel, Jr., made payable respectively on or before six, twelve and eighteen months after date. It thus appears that the first installment, together with the interest thereon at six percent matured on the 11th day of September, 1931.

The bill of complaint alleges that the chief value of the lands was the timber thereon, and alleges of that fact the respondents had notice. The only mention of timber in the con-

tract is in Paragraph 6, wherein it is stated, "----it is also understood and agreed that if any timber is cut before payments have been made in full as stated above, then said timber is to be paid for at the rate of Eight (\$8.00) Dollars per thousand superficial feet stumpage delivered in Mobile, Alabama, or at the mill, said amount to apply on or take up the next note falling due, permission, together with the rights of ingress and egress being hereby given and granted to the parties of the second part, in accordance with the terms herewith, to cut and remove the timber on said land or any part thereof."

The complainant failed to pay the installment which fell due September 11, 1931. On September 19, 1931, the respondent, H. E. Wefel, Jr., addressed a letter to the complainant, which is an exhibit to the bill of complaint, calling his attention to the fact that he had failed to pay the installment which fell due on the 11th of the same month, and stating further, using his own words, - "Our lawyer informs us that you now stand in default of this payment, consequently you are not in a position to cut any timber on this tract of land until you pay us in full the amount past due, and to put you on proper notice we hereby positively prohibit you from cutting any timber whatsoever on this tract until the above provisions have been fully complied with."

In his reply dated September 21, 1931, complainant claimed that by reason of the letter from Mr. Wefel to him he had a right to rescind the contract and requested that the

Three Thousand Five Hundred Dollar cash payment on the purchase price be returned to him. He admits in the letter that "up to the present time (date of letter) I have cut no timber on the land."

Complainant prays a rescission of the contract and that respondent H. H. Wefel Jr. be required to return him the Three Thousand Five Hundred Dollars cash payment on the agreed purchase price of the land.

The only question submitted for the court's decision is whether the complainant has a right to rescind the contract and a return of his money because of the letter written him by the respondent H. H. Wefel, Jr. on September 19, 1931, copy of said letter being made Exhibit B to the bill of complaint.

It appears and is indisputable that under the contract complainant agreed to pay respondent H. H. Wefel, Jr. on September 11, 1931, the sum of Three Thousand Five Hundred Dollars, together with interest thereon at the rate of six percent per annum from March 11, 1931, and that he made default in such payment and that such default still continued at the time of Wefel's letter of September 19, 1931. Indeed, the default continued at the time of the filing of this bill of complaint. No pretence is made by the complainant that he paid or offered to pay this installment. Mr. Wefel, by his letter, simply told complainant not to cut any more timber until he had paid the past due installment.

It is stipulated in the contract that if any timber was sold before the payment of the purchase money in full, the complainant was to pay the respondent H. H. Wefel, Jr. Eight Dollars per thousand superficial feet for the same and that "said amount to apply on or take up the note next falling due." If Wefel had permitted the complainant to cut any timber after September 11th, maturity date of first installment, respondent could have insisted that the payment for such timber under the terms of the contract should be applied towards the payment of the note falling due twelve months after the date of contract, the contract stipulating, as we have stated, that payments should be applied on the note next falling due and not on any note that was past due. It was never contemplated that complainant would make default in the payment of installments as they fell due and the very language "to apply on or take up the next maturing note" shows it was contemplated by the parties ~~and it was never intended~~ that complainant should <sup>not</sup> cut any timber while he was in default in the payment of an installment.

The maxim that "He who comes into a Court of equity must come with clean hands," is applicable to the present case, and if we had no other law touching the question, it of itself could bar the complainant from a decree of this court dissolving the contract and requiring the respondent to return to him the money which he had paid the respondent as the cash installment on the purchase price. The complainant's own default was the sole cause of Mr. Wefel writing the letter of September 19th. If

the complainant had complied with his part of the contract and paid the installment that fell due September 11th, there would have been no reason for writing the letter, and doubtless it would have never been written.

"A contract is made by the joint will of two parties, and can only be rescinded by the joint will of the two parties; but one party may so wrongfully repudiate the contract as to authorize the other to renounce it and refuse to be longer bound thereby. This happens when the acts and conduct of one of the parties evinces an intention to no longer be bound by the contract. Merely because a given act or course of conduct of one party to a contract is inconsistent with the contract is not sufficient; it must be inconsistent with the intention to be longer bound by it. Every breach of a contract is, of course, inconsistent with the contract; but every breach by one party does not authorize the other to renounce it in toto."

McAllister-Coman Co. vs.  
Matthews, et al.,  
167 Ala. 364

J. M. Ackley & Co., vs.  
Hunter-Benn & Co.,  
166 Ala. 295.

There is absolutely nothing in the letter from respondent H. H. Wefel, Jr. to the complainant which shows or tends to show that there was any intention on his part to abandon the contract, nor is there anything that evidences or even intimates an intention on his part to no longer be bound by the contract.

The respondent Wefel did nothing more than to forbid the complainant cutting any timber until he paid the past due note, and this, as we will attempt to show by authorities, did not authorize a rescission of the contract, it being well established that one who is in default of the performance

of his part of the contract cannot claim a rescission by an alleged breach by the other party to the contract. The party who seeks a rescission must be without default. In support of our contention we quote and cite the following authorities:

"As has been stated, the verdict establishes the fact that at the time the defendant attempted to terminate the contract, and when it declared that it would proceed no further thereunder, it was itself in default of performance of an essential covenant of the contract, because it had failed to deliver the agreed amount of coal the plaintiff was to receive in August, September, and October. The right to repudiate a contract for the default of the other party thereto cannot be exercised by a party who is himself in unexcused default of the performance of an essential covenant thereof. Chitty on Contracts (15th Ed.) 722; Walds Paper Bag Co., 185 Fed. 454, 107 C.C.A. 524; Fairchild-Gilmore-Wilton Co. v. Southern Refining Co., 158 Cal. 264, 110 Pac. 951; Mason v. Edward Thompson Co. 94 Minn. 472, 103 N.W. 507; Central Lumber Co. v. Arkansas Valley Lumber Co., 86 Kan. 131, 119 Pac. 322; Griffin v. Griffin, 163 Ill. 216, 45 N.E. 241; Reddish v. Smith, 10 Wash. 178, 38 Pac. 1003, 45 Am. St. Rep. 781; John A. Gauger Co. v. Sawyer & Austin Lumber Co., 88 Ark. 422, 115 S.W. 157; Norris v. Letchworth, 167 Mo. App. 553, 152 S.W. 421; 2 Black on Rescission, Sec. 553; 13 Corpus Juris, 614."

White Oak Fuel Co. vs. Carter, et al,  
(Circuit Court of Appeals, Eighth Circuit)  
257 Fed. 54-56

"Party rescinding must not be in default. A party who is himself in default of performance cannot rescind. The party seeking rescission must be willing and in a position to perform his part of the agreement. So where the contract is entire and performance by one party is a condition precedent to recovery on his part, he cannot rescind because payment for part performance is refused, although it would seem that where both parties are in default at the time for performance the contract is ipso facto dissolved. Where both parties are in default and each seeks to assert the contract as against the other, it will not be regarded as terminated, and one party will not be permitted by his breach to create a condition which will tend to bring the other party into default and then assert that such party's rights are forfeited by a default so caused. Where one party has waived full performance by the other, such other is not entitled to assert such fact as a ground for rescission."

13 C. J. p. 614  
Section 662

"The vendor is not entitled to rescind if he is himself in default, especially where such default makes it impossible for the vendor to perform.

"Performance or tender of performance by vendor.

(a) The General Rule. Accordingly the general rule is that, in order to enable the purchaser to rescind for a breach of the contract by the vendor, he must have performed or tendered performance of precedent covenants on his part, and tendered performance of concurrent covenants, and demanded performance by the vendor.

39 Cyc. 1422

"Party in default cannot rescind. The right to rescind a contract on the ground of failure of performance by the other party, delay in performance, want or failure of title, insufficient or incomplete performance, breach of conditions or of warranties, or for other such causes, cannot be claimed by a party who is himself in default in the performance of any of the obligations imposed upon him by contract. Where a complainant, seeking the rescission of a contract, has not done all that he stipulated to do, or has not placed himself in a situation to be ready to do so, upon compliance of the other party, the court will not interpose in his behalf. Thus, a vendor who is in default for failing to furnish a good title may not terminate the rights of the purchaser, and a seller of personalty who is in default in respect to making deliveries of the goods cannot rescind on account of the failure of the purchaser to make payments as agreed. So, where a contract to convey land bound the purchaser to pay interest on deferred payments after a certain date, and also bound the vendor to pay a specified rent for a portion of the land, it was held that the vendor, not having paid such rent, was not entitled to a cancellation of the contract because of the failure of the vendee to pay interest installments. And conversely, a purchaser of land who is in default of his payments cannot claim a rescission of the contract for the vendor's failure to make a good title. Even if the vendor of land by his own act has put it out of his power to comply with the contract, or has been guilty of such breach of it that he could not enforce it, the purchaser cannot rescind if he was first in default. And so the right to annul a building contract for non-performance of its own terms by the contractor is lost where the employer is in default by failure to estimate and pay for work done and materials furnished by the contractor."

To paraphrase from the last quotation, the complainant (purchaser) of the land was in default in his payments of the purchase money at the time complainant H. H. Wefel, Jr. wrote the letter of September 19th, 1931, and cannot claim a rescission of the contract because the respondent required him to do what he promised to do and forbid him to cut any timber until he had paid the installment which was past due. It seems to us that under the rules of law quoted above, the complainant is the only one who has done anything on which a right of rescission might be based. He, and only he, has breached the contract. The respondent has not breached the contract, has done absolutely nothing that is contrary to the terms of the contract, and we respectfully submit without more ado that the demurrer should be sustained.

Respectfully submitted,

*Samuel Edington Lutz*  
SOLICITORS FOR RESPONDENTS

If it be taken for granted that Complainant was not in default at time Respondent gave him notice not to cut timber until note was paid, this would not give Complainant a right to ignore such notice and proceed with his cutting.



R. H. OSWELL,  
Complainant,

vs.

H. H. WEFEL, JR. and  
BLANCHE E. WEFEL,  
Defendants.

:  
:  
: IN THE CIRCUIT COURT OF  
:  
: BALDWIN COUNTY, ALABAMA  
:  
: No.  
: IN EQUITY

Come the defendants in the above styled cause, each for himself and herself severally and separately, and demur to the bill of complaint as amended on the following several and separate grounds, each ground of demurrer being interposed as a several and separate ground of demurrer to said bill of complaint as amended by each of the defendants, severally and separately.

1. There is no equity in said bill of complaint as amended. *1 1/2 Complainant has a plain, complete and adequate remedy at law*  
2. It does not appear from the facts alleged in the bill of complaint as amended that complainant was not in default in the performance of his part of said contract at the time he wrote the defendant H. H. Wefel, Jr. the letter (of which Exhibit "C" is a copy) claiming the right to rescind said contract, copy of which marked Exhibit "A" is attached to the bill of complaint.

3. It appears from the bill of complaint as amended and Exhibit "A" thereto attached that the contract between the parties is in writing and said bill of complaint as amended undertakes to set up a prior or contemporaneous parole agreement to alter or vary the terms of said written contract.

4. No sufficient facts are averred in said bill of complaint as amended to show that at the time complainant undertook or claimed the right to rescind said contract he was not in default in the performance of his part of said contract.

6. Said bill of complaint as amended fails to aver for what length of time the payment of the note that matured September 11th, 1931, was extended.

7. It does not appear from the facts alleged in said bill of complaint as amended that there was any definite or fixed agreement for the extension for any particular length of time of the said note maturing September 11th, 1931.

8. The allegation to the effect in said bill of complaint as amended that complainant had a reasonable time after September 11th, 1931, within which to cut and remove said timber is the conclusion of the pleader, and no sufficient facts are averred to sustain such conclusion.

9. It does not appear that there was any consideration to support said alleged agreement for the extension of time for the payment of said note maturing September 11th, 1931.

10. It ~~does not~~ appear<sup>s</sup> from the facts alleged that the notice given by defendant Wefel to the complainant, copy of which is made Exhibit "B" to bill of complaint as amended, is wholly insufficient to justify the complainant in repudiating his contract or claiming a rescission thereof.

11. The acts and conduct alleged against the defendant, H. H. Wefel, Jr. are insufficient to evidence the intention on his part to no longer be bound by the contract.

12. The acts and conduct alleged against the defendant, H. H. Wefel, Jr., are insufficient to evidence an intention of his part to no longer be bound by the contract, or that complainant had any right to rescind the same.

13. It appears from the facts alleged that at the time the complainant wrote the defendant, H. H. Wefel, Jr., the letter, of which Exhibit "C" is a copy, the complainant was in default in the payment of one of the installments due under the contract of which Exhibit "A" is a copy, and therefore had no right to claim a rescission of said contract.

14. The allegation to the effect that the defendant H. H. Wefel, Jr. "denied the complainant the right to cut and

market the timber on said lands and prohibited complainant from cutting said timber" is the conclusion of the pleader, it definitely appearing from said notice given by the said respondent to complainant Exhibit "B" to the bill of complaint, that the said respondent undertook only to prohibit the complainant from cutting timber so long and only so long as he, the complainant, remained in default in the payment of said installment in said notice mentioned.

15. No sufficient facts are alleged to show that the defendants, or either of them, have so wrongfully repudiated said contract "Exhibit "A", as to authorize the complainant to renounce it.

16. The facts alleged are wholly insufficient to show that complainant has any just cause or reason for repudiating the written contract between him and the defendants.

*Gordon Edington Long*  
SOLICITORS FOR DEFENDANTS.

R. H. OSWELL,  
Complainant

vs.

H. H. WEFEL, JR. and  
BLANCHE E. WEFEL,  
Defendants

Defendants demurrer to  
bill of complaint as amended.

*Filed May 12, 1934*  
*J. W. Richmond*  
*Clerk*

GORDON, EDINGTON & LEIGH  
Attorneys for Defendants

*Copy only. Read Copy*  
*from page 10*

IN THE CIRCUIT COURT OF BALDWIN COUNTY,  
ALABAMA. IN EQUITY. No. \_\_\_\_\_

R. H. OSWELL,

COMPLAINANT,

-VS-

H. H. WEFEL, et al,

RESPONDENTS,

COMPLAINANT'S ARGUMENT ON RESPONDENTS' DEMURRERS.

B. F. McMillan, Jr.,

and

H. Embree Smith

Attorneys for Complainant

R. H. OSWELL,

Complainant,

vs

H. H. WEFEL, et al,

Respondents,

IN THE CIRCUIT COURT OF BALDWIN  
COUNTY, ALABAMA. IN EQUITY.

No. \_\_\_\_\_

COMPLAINANT'S ARGUMENT ON RESPONDENTS' DEMURRERS.

The bill as amended shows that on March 11th, 1931, respondents contracted to sell the land to complainant for part cash which was paid and the balance in installments, the first of which was to accrue within six months or on September 11th, 1931; That the land was valuable only for the timber and it was contemplated by the parties that the installments would be paid from the proceeds of sale of the timber. If payments were not made as provided for in the note, that note should be in default and if default continued for ninety days the contract was in default and respondents had the right to rescind. It is further shown that before the first note matured under the original contract, the parties agreed upon an extension but when the note was not paid as provided for by its terms and on September 19th, 1931, practically three months before the contract was in default, respondents prohibited complainant from cutting any of the timber and we submit when they did that respondents violated the contract

both as originally made and as modified, by their own act rescinded it and further that their act entitled complainant to rescind and recover what he had expended. We submit the following authorities in support of our contentions:

1. If respondents gave complainant the right to cut the timber they cannot, without rescinding the contract, lawfully stop complainant from cutting.

Mauli vs Eiland, 83 Ala. 314.

2. Respondents' notice to complainant to quit operating on the land was in legal contemplation prevention of complainant's continuing his timber operations.

Tennessee & Coosa R.R. Co. Cs. 112 Ala.  
page 80.

(See Page 92-3)

6 R. C. L. 1029, Sec. 388.

3. One who prevents performance of contract by another excuses such performance.

6 R. C. L. 1020, Sec. 380.

13 C. J. 647.

13 C. J. 614, Sec. 663.

Wager Timber Co. cs 120 Ala. 558.

Moundville Lbr. Co. cs 203-Ala. 488.

Georgia Pine Lbr. Co. cs. 6 App. 211.

Bradshaw vs Gentry, 135 Ala. 240.

4. Actual prevention is not necessary.

Wager Timber Co. cs 120 Ala. 558.

5. Repudiation of the contract is prevention within meaning of the law.

Peck-Hammond Co. cs 136 Ala. 473.

6. If respondents breached their contract (in this case the breach consisted in defendant's ordering plaintiff to quit) complainant can recover what he has expended.

Danforth vs Armstrong, 93 Ala. 614.-(p. 620)

7. Respondents could waive strict performance by complainant and such waiver may be by express agreement or by promise not to claim an advantage. No new consideration is necessary.

40 Cyc. 265

May vs Robinson, 221 Ala. 570.

8. Where one contracting party wrongfully or prematurely repudiates or renounces his obligation in an executed or partially executed contract, the promisee may himself renounce the contract, treat the contract as ended and recover damages.

Pierce vs Hubbard, 135 So. 179,  
McAllister-Coman Co. cs, 167 Ala. 361,  
Oden-Elliott Lbr. Co. cs 98 So. 730.  
Dominey, et al, ca, 219 Ala. 666.

9. In this submission it must be assumed as true that the respondents agreed with complainant to extend the time for payment of the note. The contract was still executory and whether a modification or a waiver, it bound the respondents.

Hunter-Benn & Co. vs Bassett Lbr. Co.  
139 So. 348.

10. A party wronged may rescind the contract at any time before superior rights intervene.

13 C. J. 616.

11. Refusal by one of the contracting parties to perform entitled the other party to treat such refusal as a total breach for which full damages may be recovered.

Trustees Howard Collage Cs, 71 Ala. 429.  
M & M. Ry Co. cs. 85 Ala. 422.

#### ARGUMENT.

It seems to us that whether the contract be treated in its original form or as modified by a subsequent agreement, counsel for respondents have entirely misinterpreted the meaning of Paragraph 6 thereof, and we respectfully submit that under that paragraph of the contract, the complainant had ninety days from September 11th, the due date of the note, within which to cut the timber and secure therefrom the proceeds with which to pay the note; This would fix the date of respondents' right to prohibit complainant's cutting the timber at December 11th and when on Sept-



ember 19th respondents denied to complainant that right by absolutely prohibiting him from cutting the timber and thereby secure the proceeds for the payment of the note in the only way he could secure them and in the way it was always contemplated by both parties that complainant would secure them, respondents thereby themselves broke and renounced their obligations under the contract and even if their act did not amount to a rescission such act occurring while the complainant still had the right to operate on the land entitled the complainant to himself rescind the contract and recover back whatever money he had already paid. In other words eliminating all question of a modification of the contract Mr. Wefel might have declared the note in default and sued thereon but he could not declare the contract in default and stop the complainant from operating on the land. We submit that the authorities above cited amply sustain our contention in this regard.

We further submit that the letter of Mr. Wefel to Oswell in which he said, "We hereby positively prohibit you from cutting any timber whatsoever," sufficiently evidenced Wefel's renunciation of his obligation under the contract. Perhaps Oswell would have been within his strictly legal rights if he had ignored this letter; in other words he could have used force against force but the law doesn't require him to do this and under the authorities which we have cited Mr. Wefel's letter was sufficient prevention of Oswell's further performance of the contract. Oswell had a right when Wefel told him in substance that he repudiated the ninety days grace provided for in Paragraph 6 of the contract

to observe strictly the requirements of such notification and hold Wefel for his damages, viz; the expenses he had paid under and by virtue of the contract.

However, we contend that the agreement for an extension of the note bound Wefel. It doesn't matter whether it be treated as a modification or a waiver, the parties had the right to treat either as part of the contract and Wefel did not have the right to stop further cutting, certainly not until he had notified Oswell that he would not be further bound by the agreement. We respectfully submit that the demurrers should be overruled.

Respectfully submitted,

H. Eubank Smith, Bayreuth, Ala

B. J. McCormick, Bayreuth, Ala  
ATTORNEYS FOR COMPLAINANT

R. H. OSWELL,  
Complainant,

vs.

H. H. WEFEL, JR. and  
BLANCHE E. WEFEL,  
Respondents.

IN THE CIRCUIT COURT OF  
BALDWIN COUNTY, ALABAMA

No. \_\_\_\_\_

IN EQUITY

Come the respondents in the above styled cause,  
each for himself and herself, severally and separately,  
and demur to the bill of complaint on the following several  
and separate grounds, each ground of demurrer being inter-  
posed as a several and separate ground of demurrer to said bill  
of complaint by each of the respondents severally and separately.

1. There is no equity in said bill of complaint.

2. It does not appear from the facts alleged in the  
bill of complaint that complainant was not in default in the  
performance of his part of said contract at the time he wrote  
the respondent H. H. Wefel, Jr. the letter (of which Exhibit  
"C" of a copy) claiming the right to rescind said contract,  
copy of which marked Exhibit "A" is attached to the bill of  
complaint.

3. It appears from the bill of complaint and Exhibit  
"A" thereto attached that an installment of Three Thousand Five  
Hundred (\$3,500.00) Dollars, together with interest at the rate  
of six percent per annum from March 11, 1931, <sup>is past due</sup> and no facts are  
alleged to show that complainant paid or tendered payment of said  
installment before he claimed a right to rescind said contract.

4. It appears from said bill of complaint and the  
Exhibits thereto that at the time complainant undertook to  
claim rescission or any right to rescind said contract, he  
himself was in default in the performance on his part of said  
agreement, and therefore could not rescind the contract.

5. No sufficient facts are averred in said bill of complaint to show that at the time complainant undertook or claimed the right to rescind said contract ~~that~~ he was not in default in the performance of his part of said contract.

6. The acts and conduct alleged against the respondent, H. H. Wefel, Jr. are insufficient to evidence an intention on his part to no longer be bound by the contract.

7. The acts and conduct alleged against the respondent, H. H. Wefel, Jr., are insufficient to evidence an intention on his part to no longer be bound by the contract, or that complainant had any right to rescind the same.

8. It appears from the facts alleged that at the time the complainant wrote the respondent, H. H. Wefel, Jr., the letter, of which Exhibit "C" is a copy, the complainant was in default in the payment of one of the installments due under the contract of which Exhibit "A" is a copy, and therefore had no right to claim a rescission of said contract.

9. The allegation to the effect that the respondent H. H. Wefel, Jr. "denied the complainant the right to cut and market the timber on said lands and prohibited complainant from cutting said timber" is the conclusion of the pleader, it definitely appearing from said notice given by the said respondent to complainant, Exhibit "B" to the bill of complaint, that the said respondent undertook only to prohibit the complainant from cutting timber so long and only so long as he, the complainant, remained in default in the payment of said installment in said notice mentioned.

10. No sufficient facts are alleged to show that the respondents, or either of them, have so wrongfully repudiated said contract, Exhibit "A", as to authorize the complainant to renounce it.

11. The facts alleged are wholly insufficient to show that complainant has any just cause or reason for

repudiating the written contract between him and the respondents.

*Gordon Edgerton Long*  
SOLICITORS FOR RESPONDENTS

3  
RECORDED

R. H. OSWELL,  
Complainant

vs.

H. H. WEFEL, JR. and  
BLANCHE E. WEFEL,  
Respondents.

IN THE CIRCUIT COURT OF  
BALDWIN COUNTY, ALABAMA  
NO.  
IN EQUITY

DEMURRER TO BILL OF COMPLAINT

Filed Nov 5th 1931,  
D. W. Rice  
Register

The State of Alabama, }  
Baldwin County

CIRCUIT COURT OF BALDWIN COUNTY,  
IN EQUITY

To Any Sheriff of the State of Alabama--GREETING:

WE COMMAND YOU, That you summon H.H.Wefel, Jr., and  
Blanche E.Wefel , Mobile, Ala.

of Mobile County, to be and appear before the Judge of the Circuit Court  
of Baldwin County, exercising Chancery jurisdiction, within thirty days after the service of Sum-  
mons, and there to answer, plead or demur, without oath, to a Bill of Complaint lately exhibited by  
R.H.Uswell

against said H.H.Wefel, Jr., and Blanche E.Wefel

and further to do and perform what said Judge shall order and direct in that behalf. And this the  
said Defendant shall in no wise omit, under penalty, etc. And we further command that you return  
this writ with your endorsement thereon, to our said Court immediately upon the execution thereof.

WITNESS, T. W. Richerson, Register of said Circuit Court, this 29<sup>th</sup> day of

September 1931

Register.

N. B.—Any party defendant is entitled to a copy of the bill upon application to the Register.

15/-  
S/1-  
Served

Original

Serve on \_\_\_\_\_

Circuit Court of Baldwin County  
In Equity.

No. \_\_\_\_\_

SUMMONS

R.H. OSWELL

vs.

H.H. WEEFEL, JR.,

BLANCHE E. WEEFEL,

(Mobile, Ala)

H.E. Smith, B.F. McMillan, Jr.

Solicitor for Complainant.

Recorded in Vol. \_\_\_\_\_ Page \_\_\_\_\_

~~The Recorder~~  
Alabama,  
BALDWIN COUNTY.

Received in office this 3

day of Oct. 1931

W. H. Galleside, Jr.  
Sheriff.

Executed this 7-10 day of

Oct. 1931

by leaving a copy of the within Summons with

Bl. H. Weefel, Jr.

Blanche E. Weefel

Defendant.

W. H. Galleside, Jr.

Sheriff.

By Mrs. Benetson  
Deputy Sheriff.



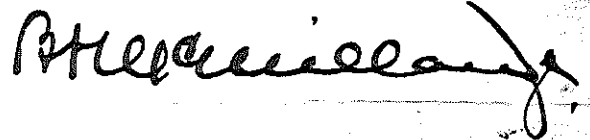
B. F. McMILLAN, JR.  
ATTORNEY AT LAW  
803-806 VAN ANTWERP BLDG. June 15th, 1932.  
MOBILE, ALABAMA

Hon. F. W. Hare, Judge,  
Monroeville, Alabama.

Dear Judge Hare:- RE: R. H. Oswell vs H. H. Wefel.

This case is pending in Equity at Bay Minette. It was submitted at the last term of court and as I understand it you have the papers for consideration of defendant's demurrers. I send herewith complainant's answer to the brief filed by respondents.

Yours very truly,



Mc/M  
Encl.

R. H. OSWELL,

Complainant,

vs

H. H. WEFEL, JR., and  
BLANCHE E. WEFEL,

Respondents.

IN THE CIRCUIT COURT OF BALDWIN  
COUNTY, ALABAMA. IN EQUITY.

No. \_\_\_\_\_

Comes the complainant and amends his original bill  
of complaint filed in this cause as follows:

1st. Complainant adds to the second paragraph of the bill  
of complaint the following:

"Complainant further alleges that the agreed purchase  
price of said land was ~~two~~ <sup>fourteen</sup> thousand dollars at price of seven  
dollars per acre and that the respondent, H. H. Wefel, Jr., rep-  
resented the land to contain 2000 acres and complainant alleges  
that the land did not in fact contain more than 1750 acres and  
upon ascertaining this fact the complainant requested the said res-  
pondent to abate the purchase price to the extent of the shortage  
calculated at the agreed purchase price per acre which the said  
respondent refused to do."

2nd. By adding to the complaint paragraph numbered 4<sup>1</sup>/<sub>2</sub> next  
after Paragraph Fourth as follows:

"Complainant alleges that before September 11th, 1931,  
it was mutually agreed between plaintiff and defendant that the  
time for payment of the note maturing September 11th, 1931, would  
be extended without payment thereof on the date of its maturity  
and that complainant should have full rights under the contract  
to cut, remove and sell the timber from said lands. Complainant  
therefore alleges that it had a reasonable time after September  
11th, 1931, within which to cut and remove said timber and that  
such reasonable time had <sup>not</sup> elapsed before complainant was prohibited  
from going upon said land by the respondent."

*H. G. Smith*

*W. H. W. W. W. W.*

SOLICITORS FOR COMPLAINANT.

R. H. Currell  
D. S.  
H. H. Wepfer  
& Charles Wepfer

Amended Complaint

Filed Feb 27th 1932  
D. H. Wepfer  
Register