CASES ON EQUITY JURISDICTION

IN TWO VOLUMES

EDITED WITH SUNDRY NOTES AND REFERENCES

BY

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Not of the letter, but of the spirit: for the letter killeth, but the spirit giveth life. 2 Cor. 2:6.

VOLUME II.

NEW YORK
BAKER, VOORHIS & COMPANY
1906

PREFATORY NOTE

It will be observed that the subjects of Interpleader, Bills to Remove Cloud for Title, Bills Quia Timet, Bills of Peace, and Bills of Account have been omitted from the present collection. The reason for the omission is that these various subjects are technical in their nature, and to understand them a familiarity with equity pleading is either presumed or acquired. As the substantive law necessarily involved in these subjects depends largely upon the requirements of pleading, it has been thought advisable to reserve these topics for a collection of cases on Equity Pleading. Duplication will thus be avoided.

Inasmuch as the present editor will shortly publish a collection of cases on Equity Pleading these subjects are reserved, for the reasons stated, for the future volume.

CONTENTS OF VOLUME II.

PART II.

REMEDIES 1

CHAPTER II.

SPECIFIC PERFORMANCE 1
SEC. 1. EXTENT OF JURISDICTION 1
(*a*) Development and General Principles 1
(*b*) Affirmative Contracts 37
(*c*) Negative Contracts 87
SEC. 2. MATTERS OF DEFENCE 129
(*a*) Mutuality 129
(*b*) Want or Inadequacy of Consideration 154
(*c*) Statute of Frauds 160
(*d*) Fraud, Misrepresentation, Concealment 224
(*e*) Mistake 253
(*f*) Hardship 285
(*g*) Plaintiff in Default 308
(*h*) Lapse of Time and Laches 327
(*i*) Defects in the Title, the Quantity, or the Quality of the Estate 360
SEC. 3. INCIDENTS OF THE RIGHT TO SPECIFIC PERFORMANCE 400
SEC. 4. RIGHTS FOR AND AGAINST THIRD PERSONS 465

CHAPTER III.

RESCISSION, REFORMATION, AND CANCELLATION OF INSTRUMENTS 539
SEC. 1. MISTAKE 539
(*a*) Mistake of Law 539
(*b*) Mistake of Fact 578
(*c*) Statute of Frauds 616
(*d*) Negligence as a Defence 627
(*e*) Lapse of Time 635
(*f*) Against Whom Relief will be Given 640
(*g*) Election of Remedies 644
(*h*) Amount of Proof Required 646

Sec. 2. Fraud, Misrepresentation, Concealment 650
(*a*) Nature and Essentials of Fraud 650
(*b*) Presumption of Fraud from Subject of Contract.. 663
(*c*) Presumption of Fraud from Situation of Parties. 670
(*d*) Fiduciary Relations and Undue Influence 690
(*e*) Duress 706
(*f*) Misrepresentation and Misconduct of Defendant.. 718
(*g*) Fraud on Third Parties 732
(*h*) Necessity of Restitution 744
(*i*) Laches, Acquiescence, Ratification 754
Sec. 3. Illegality 773

TABLE OF CASES, VOLUME II

Acland *v.* Gaisford 430
Adams *v.* Messinger 48
Adams *v.* Weare 286
Adderley *v.* Dixon 14
Alden *v.* Gregory 756
Allen *v.* Hammond 582
Allen *v.* Harding 65
Alsopp *v.* Patten 180
Anderson & Tilley *v.* Moncrieff 785
Angier *v.* Webber 126
Anonymous 179
American Asso., etc., *v.* Pickett 119
Ardglasse, Earl of, *v.* Muschamp 673
Armiger *v.* Clarke 131
Ashton *v.* Thompson 703
Atwood *v.* Currant 793
Ayerst *v.* Jenkins 780

Badger *v.* Badger 766
Bailey *v.* Duncan 417
Bailey *v.* Ogdens 177
Baker *v.* Paine 580
Banta *v.* Vreeland 632
Barker *v.* Barker 54
Barkworth *v.* Young 167
Barnes *v.* Wood 395
Barrow *v.* Richard 521
Bates *v.* Delavan 597
Batty *v.* Lloyd 672
Beaumont *v.* Dukes 315
Beck *v.* Allison 79
Bell *v.* Cundall 640
Bellamy *v.* Debenham 352
Benyon *v.* Nettlefold 776
Bingham *v.* Bingham 543
Blakeman *v.* Blakeman 569
Bleverhassett *v.* Fuller 578
Blower *v.* Luke 53
Bosanquet *v.* Dashwood 667
Brewer *v.* Herbert 454
Bromley *v.* Jeffries 130
Brooks *v.* Martin 790
Brown *v.* Norman 747
Brown *v.* Pierce 708
Bruce *v.* Tilson 355
Bryson *v.* Whitihead 124
Buckland *v.* Hall 311
Bulli Coal Mining Co. *v.* Osborne 762
Butcher *v.* Stapely & Butcher 188
Butler *v.* Haskell 674
Buxton *v.* Lister and Cooper 21

Cadman *v.* Horner 236
Calhoun *v.* Millard 773
Calverley *v.* Williams 259
Canedy *v.* Marcy 552
Carrodus *v.* Sharp 421
Cass *v.* Ruddle 448
Castle *v.* Wilkinson 395
Catt *v.* Tousle 493
Cheeke *v.* Lord Lisle 308
Chicago Railway Co. *v.* Wilcox 609
Chubb *v.* Peckham 298
Clark *v.* Price 89
Clark *v.* Railroad Co. 294
Clarke *v.* Ramuz 424
Clayton *v.* Ashdown 133
Clermont *v.* Tasburgh 242
Clinan *v.* Cooke 182
Cogent *v.* Gibson 147
Cokayn *v.* Hurst 13
Coke *v.* Bishop 285
Combs *v.* Fisher 453
Combs *v.* Scott 357
Comstock *v.* Hitt 482
Conger *v.* Railroad Co. 304
Cooper *v.* Phibbs 559
Copis *v.* Middleton 738
Corbin *v.* Tracy 46
Corbus *v.* Tweed 481
Cossart & Dutrie *v.* Sothon 707
Crosbie *v.* Tooke 473
Crowe *v.* Ballard 759
Cud *v.* Rutter 44
Currier *v.* Howard 476

Dakin *v.* Cope 431
Daniels *v.* Davison 472
Davoue *v.* Fanning 690
Day *v.* Newman 227
Deane *v.* Izard 160
Debenham *v.* Ox 666

De Brampton *v.* Seymour 650
De Gray *v.* Club House Co. 534
De York *v.* De Crop 706
Dietrichsen *v.* Cabburn 92
Dounell *v.* Bennett 114
Dowling *v.* Betjimann 41
Drewe *v.* Corp 374
Duncuft *v.* Albrecht 44
Durham *v.* Legard 385

Edgerton *v.* Peckham 337
Edwards *v.* McLeay 718
Ellard *v.* Llandaff 246
Ellison *v.* Moffatt 758
Empire Realty Corp. *v.* Sayre 365

Faine *v.* Brown 285
Fairchild *v.* McMahon 725
Fells *v.* Read 37
Fennelly *v.* Anderson 137
Fenton *v.* Browne 234
Ferry *v.* Stephens 155
Filley *v.* Hopkins 462
Flight *v.* Bolland 136
Flint *v.* Brandon 70
Flood *v.* Finlay 468
Floyd *v.* Buckland 200
Fothergill *v.* Rowland 111
Fowler *v.* Black 555
Frame *v.* Dawson 202
Freeman *v.* Freeman 205
Friend *v.* Lamb 306

Gale *v.* Lindo 732
Gee *v.* Spencer 568
Gibson *v.* Patterson 327
Gimblin *v.* Harrison 232
Glass *v.* Hulbert 619
Goilmere *v.* Battison 483
Green *v.* Low 320
Gregson *v.* Riddle 327
Guernsey *v.* Rodbridges 162

Hall *v.* Hardy 54
Hall *v.* Otterson 635
Hall *v.* Potter 663
Hall *v.* Whittier 323
Halsey *v.* Grant 379
Hampson *v.* Edelen 461
Hanna *v.* Wilson 479
Hardy *v.* Martin 123
Harrell *v.* Hill 396
Harrington *v.* Wheeler 331
Hatch *v.* Cobb 343
Hatton *v.* Gray 129
Hawkes *v.* Eastern Cos. Ry. Co. 290
Hawralty *v.* Warren 140
Haywood *v.* Building Society 515
Hepburn *v.* Leather 82
Hermann *v.* Hodges 58
Herron *v.* Mullen 614
Hick *v.* Phillips 310
Hill *v.* Buckley 383
Hill *v.* Spencer 774
Hills *v.* Croll 90
Hipwell *v.* Knight 336
Hitchins *v.* Pettingill 627
Hoddel *v.* Pugh 412
Hodge *v.* Sloan 508
Hodges *v.* Kowing & Wife 62
Hollis *v.* Edwards 160
Holt *v.* Holt 64
Hood *v.* North Eastern Ry. Co. 76
House *v.* Dexter 414
Howland *v.* Norris 371
Hubbell *v.* Pauline von Schoening 350
Hunt *v.* Rousmaniere 544

In re Isaacs 402
Irnham *v.* Child 256
Isaacs, *In re* 402

Jackson's Case 471
Jefferys *v.* Jefferys 154
Johnston *v.* Glancy 190
Jones *v.* Grover 83
Jones *v.* Newhall 148
Jones *v.* Noble 348
Jones *v.* Parker 83
Joynes *v.* Statham 253

Kay *v.* Johnson 65
Keisselbrack *v.* Livingston 616
Kelly *v.* Railroad Co. 228
Kettle River R.R. Co. *v.* Eastern Ry. Co 489
Kine *v.* Balfe 189
King *v.* Bardean 387
King *v.* Dickeson 537
King *v.* Ruckman 444
Kinney *v.* Ensminger 633
Kirby *v.* Harrison 341

Knollys *v.* Shepherd 409
Kowalke *v.* Railway Co. 603
Kymberley *v.* Goldsmyth 12

Lacon *v.* Briggs 754
Lacon *v.* Mertins 162
Ladd *v.* City of Boston 484
Lane *v.* Newdigate 73
Langford *v.* Pitt 405
Lansdown *v.* Lansdown 540
Lawrence *v.* Beaubien 562
Lawrence *v.* Staigg 594
Lawrenson *v.* Butler 133
Lee *v.* Kirby 300
Leonard *v.* Poole 787
Lesley *v.* Morris 377
Lester *v.* Foxcraft 198
Lewis *v.* Bond 29
Lewis *v.* Gollner 496
Liles *v.* Terry 733
Lloyd *v.* Collett 329
Lumley *v.* Wagner 96

McCaull *v.* Braham 116
McClure *v.* Leaycraft 308, 517
McDonald *v.* Yungbluth 624
Mackreth *v.* Marlar 328
Maddison *v.* Alderson 210
Malins *v.* Freeman 272
Maneright *v.* Roberts 707
Manser *v.* Back 274
Mansfield *v.* Hodgdon 157
Mansfield *v.* Sherman 281
Mason *v.* Armitage 270
Mathews *v.* Terwilliger 255
Mayer *v.* Gowland 408
Meaux *v.* Helm's Heirs 246
Merrick *v.* Harvey 540
Miller *v.* Ball 196
Miller *v.* Whittier 477
Montague *v.* Flockton 107
Morris *v.* Colman 87
Murphy *v.* Press Association 500

Naylor *v.* Winch 576
Nelson *v.* Nelson 579
Newberry *v.* James 26
Norcross *v.* James 504
Nott *v.* Hill 673
Nottingham Brick & Tile Co. *v.* Butler 530

Okill *v.* Whittaker 592
Oldfield *v.* Round 231

Page *v.* Young 525
Paget *v.* Marshall 610
Paine *v.* Meller 450
Paine *v.* Upton 586
Palmer *v.* Graham 18
Parke *v.* Peake 539
Parkhurst *v.* Van Cortlandt 172
Peacock *v.* Penson 288
Peck *v.* Conway 527
Peers *v.* Lambert 375
Pengall *v.* Ross 180
Perkins *v.* Ede 376
Phillips *v.* Duke of Bucks 465
Pincke *v.* Curteis 428
Placer Co. Bank *v.* Freeman & Bell 628
Poland *v.* O'Connor 194
Poorman *v.* Kilgore 217
Porter *v.* Dougherty 296
Potter *v.* Ellice 415
Preston *v.* Wasey 224
Price *v.* Dyer 266
Prince *v.* Green 539
Pulsford *v.* Richards 661
Purcell *v.* Miner 206
Pyrke *v.* Waddingham 361

Rayner *v.* Preston 458
Reed *v.* Lukens 455
Reignolds *v.* Latham 54
Renals *v.* Cowlishaw 501
Reynolds *v.* Walker's Heir 745
Richmond *v.* Railroad Co. 17
Roberts *v.* Marchant 411
Rogers *v.* Challis 60
Rogers *v.* Ingham 572
Ross *v.* Union Pacific Ry. Co. 65
Ruckman *v.* Cory 770
Rust *v.* Conrad 144

Sanger *v.* Wood 644
Sanquirico *v.* Benedetti 85
Scott *v.* Hanson 240
Seagood *v.* Meale & Leonard 181
Secombe *v.* Steele 321
Seton *v.* Slade 332
Shahan *v.* Swan 219
Sharon, Town of, *v.* Gager 713

Shirley *v.* Stratton 244
Simpson *v.* Vaughan 542
Slaughter's Adm'r *v.* Gerson 721
Smith *v.* Clay 757
Smith *v.* Richards 652
Southard *v.* Curley 646
Stapylton *v.* Scott 360
Stone *v.* Pratt 293
Stonehouse *v.* Stanshawe 670
Sullivan *v.* Jennings 268

Talmash *v.* Muggleston 353
Tamplin *v.* James 277
Tayloe *v.* Merchants' Fire Ins. Co. 31
Taylor *v.* Beech 170
Ten Brock *v.* Livingston 313
Thackerah *v.* Haas 746
Thin *v.* Thin 579
Tilley *v.* Thomas 345
Town of Sharon *v.* Gager 713
Townley *v.* Bedell 400
Townsend *v.* Champernowne 409
Townsend *v.* Houston 184
Trower *v.* Newcombe 238
Tulk *v.* Moxhay 486
Twyford *v.* Warenp 370

Ungley *v.* Ungley 193

Wack *v.* Sorber 204
Wadsworth *v.* Wendell 640
Wainscott *v.* Occidental Loan Ass'n 729
Wall *v.* Stubbs 239
Walters *v.* Morgan 248
Webster *v.* Cecil 279
Weed *v.* Terry 164
Wells *v.* Smith 317
Western *v.* MacDermott 511
Whaley *v.* Norton 773
Wheatley *v.* Slade 386
Wheeler *v.* Newton 161
White *v.* Nutt 450
Whitewood Chem. Co. *v.* Hardman 110
Whittemore *v.* Farrington 600
Whittingham *v.* Thornburgh 652
Wilford *v.* Beaseley 166
Wilks *v.* Davis 56
Willard *v.* Tayloe 33
William by the Brook *v.* Giles 11
Wills *v.* Stradling 201
Wilson *v.* Williams 392
Wood *v.* Roweliffe 40
Woodward *v.* Gyles 121
Woollam *v.* Hearn 262
Woollums *v.* Horsley 251
Worrall *v.* Munn 434

Young *v.* Clerk 225

CASES ON EQUITY JURISDICTION

PART II.

REMEDIES (CONTINUED)

CHAPTER II.

SPECIFIC PERFORMANCE.[1]

SECTION 1.—EXTENT OF THE JURISDICTION.

A. DEVELOPMENT AND GENERAL PRINCIPLES.

[2] It is on the principle above referred to, namely, the inadequacy and insufficiency of the remedy which might be obtained at law, that the Court of Chancery entertained jurisdiction to enforce the specific performance of contracts and duties.

The necessity for such a jurisdiction, as regards sales of land, as to which it is now in constant use, can hardly be shown in a stronger light than by recalling to the reader's attention the following expressions of Bracton: "*Cum quis rem suam vendiderit alicui mobilem vel immobilem, emptor tenetur venditori ad pretium, et venditor e converso ad ipsam rem tradendam;*" adding almost in the words of Diocletian, "*sine traditione non transferuntur rerum dominia.*" But notwithstanding this admitted obligation, there was not then, nor is there now, any mode of proceeding at law for compelling such delivery, or enforcing a completion of the sale; and if a man sold his land, and took a security for the price, though he refused to convey, he might still, it seems, bring an action of debt for the money, leaving the purchaser to bring his counter-action on the case.

[1] In this chapter no attempt has been made to compile the authorities in footnotes. The student will find them collected in the following standard works: Batten, Law of Specific Performance, 1849; Waterman, Specific Performance of Contracts, 1881; Pomeroy, Contracts, Specific Performance (2d ed.) 1897; Fry, Specific Performance (4th ed.) 1903. For a discriminating selection from the mass of material collected by these authors, to which are added many new cases, reference may be made to Mr. Ames Collection of Cases on Specific Performance.

[2] Only a few of the authors' authorities have been included in the following extracts. They may be easily obtained by consulting the works themselves.

Bills for specific performance of contracts for sale of land (for which, it may be observed, damages were not a substitute), are amongst the earliest that are recorded in the Court of Chancery. [Cal. ii. 2, temp. Rich. II. and Lord Scales *v.* Felbridge, ibid, ii. p. 26 temp. Hen. VI.; a decree, by the name of an award, was made in this case for specific performance, with an abatement, ib. p. 27; the defendant had insisted that the matter was determinable at common law; et *v.* ib. p. 35 and 40. In the case, temp. Rich. II., the plaintiff seeks relief generally on the ground that the agreement not being by specialty, he had no relief at law—no decree, vol. ii., p. 2; and see instances temp. Hen. VI., C. P. Cooper, Append. 381. Bill against feoffee in trust to complete the contract made by the *cestui que trust*, temp. Edw. IV., ib. 382.] This jurisdiction would be the more readily entertained, as it was analogous to that by which a person who entered into a contract by bargain and sale was held to be a trustee for the bargainee.

Chief Justice Fineux insisted that there was then no necessity for a subpœna in such cases, as an action on the case would lie. [Y. B. 21 Hen. p. 41; et *v.* 22 Hen. VI. 43; Fulbeck, ii. 24 b.] But Brooke, in his abridgement of this case, adds, "But by this remedy he would get nothing but damages; but by subpœna, as it is said, the Chancellor may compel him to convey the estate, or imprison him. [Brooke, Abr. Trespass on the Case, 72. The jurisdiction is recognized Dr. and Student, i. Ch. 21, p. 63, on the ground of conscience.] There was this additional reason for sustaining the jurisdiction before the Statute of Frauds, that where the agreement was by word of mouth, a discovery of the exact terms could only be obtained by the Court of Chancery; that statute, as will be presently noticed, put an end to the jurisdiction to enforce mere parol agreements.

There are many instances of the exercise of this jurisdiction from Elizabeth to the Commonwealth, and some by the advice of the judges. It was exercised where specific performance was considered to be essential to the ends of justice, on any promise on which an action for damages would lie, particularly if earnest had been paid; and in some cases, where an action would not lie at law, as in the instance of a marriage agreement so ill worded that no action could be sustained, and where the time had elapsed within which a demand was to be made for the performance of the act. It was not confined to agreements relating to estates in land; specific performance was decreed of an agreement to execute a deed granting a deputation for the use of a patent during the life of the plaintiff. The court would not decree the specific performance of an agreement on the evidence of a single witness, but the ascertainment of the fact was referred to a trial at law, and the equity, that is, whether a specific performance should be decreed, was reserved.

Lord K. Egerton, for avoiding perjuries, put bounds to the practice of applying to the court on parol evidence only. This was afterwards effectually accomplished by the Statute of Frauds; and then the doctrine of part performance, as taking the case out of the statute, arose, which will be considered in the subsequent volume of this work; the principle of which doctrine is, that where there has been a substantial part performance of the agreement, it would be a fraud to take advantage of the statute. A covenant was equally enforced by an agreement. A covenant to settle lands to which the covenantor was entitled in possibility, was specifically enforced when the covenantor, by coming into possession of the lands, was enabled to perform his covenant.

An agreement for further assurance was enforced, though not demanded

within the time fixed for the completion. The heir was liable to perform his ancestor's contract; but the court would not enforce the performance of any agreement unless there were a sufficient consideration.

At one time the court hesitated to decree performance of an agreement relating to copyhold lands, in respect of the rights of the lord; but about 1680, "the distinction was laughed out of court."

There are obvious reasons, besides those before mentioned, why in later times, when the powers of the court became more completely developed, this court should have sustained its jurisdiction; the peculiar powers which it has, as before noticed, by reference to its officers, to ascertain whether the vendor has a good title to the estate sold, is one; and there is no branch of its jurisdiction which has been more universally approved.

In some cases, the specific performance of contracts for the delivery of chattles, and the performance of specific acts were enforced. In one case the defendant was compelled to deliver a quantity of wool to the plaintiff according to the tenor of a recognizance he had entered into; in another, the defendant was decreed to procure for the plaintiff a license to export certain corn; on that being done the plaintiff was to deliver to him so much wheat according to the condition of a bond he had entered into: but the plaintiff was in all cases left to his remedy at law, where that would answer the ends of justice. The principle still remains the same; but now it is considered that compensation in damages is all that justice requires, in many cases where specific performance was formerly decreed, and they are accordingly left to the common law. So a contract for building a house, and a covenant to repair, might there be enforced in specie; in the latter case viewers were appointed to see to the proper completion of the work. There is an instance of a person being restrained from preventing another from specifically performing his own part of the contract.

A person who had entered into a valid contract for the purchase of an estate was considered by the Court of Chancery as the beneficial owner, so that he might devise the estate in the same manner as if it had been conveyed to him. Then, as now, the estate was considered, in substance, as the land of the purchaser, the price the money of the vendor, on the principle, that what is agreed to be done is to be considered as done, which is an acknowledged maxim of the court. That the bargain had by accident become a very disadvantageous one to the vendor, did not prevent his being compelled to complete it.

The court, it may be observed, also exercised the very beneficial jurisdiction of rescinding agreement improperly obtained, so that a party might not be harrassed by such an agreement being put in suit against him.

The specific performance of awards was enforced on the ground of carrying into effect the original agreement to perform the award. In a case where it was proved by the arbitrators that they had made a mistake in their award, by omitting the word "heirs" in the estate given to one of the parties, the award was rectified.

Analogous to the doctrine of specific performance is the jurisdiction which the court has entertained from an early period, of compelling the lord to admit a copyholder. The ground of the jurisdiction is, that when a party entitled to a copyhold surrenders it, and the lord will not admit, he is then neglecting to perform a duty, for the admittance is merely a form of conveyance. The Court of King's Bench now also exercises this jurisdiction by mandamus. The jurisdiction to compel the performance of duties was carried

to the extent of directing a priest to preach in a particular chapel.—1 Spence Jurisdiction of the Court of Chancery, Bk. 3, c. xviii. sec. 2.

. . . . . .

Mr. Spence, in his Equitable Jurisdiction, vol. i. p. 645, and Lord Justice Fry, in his Specific Performance, 2d ed. p. 8; 3d ed. p. 15, have regarded specific performance as one of the most ancient heads of jurisdiction. The cases cited by these eminent authors seem hardly to justify their opinion, being either cases of uses—Scales *v.* Feltbrigge, 1884, 2 Cal. Ch. xxvi.; Jonesse *v.* Penely, Hen. VI., 2 Cal. Ch. xxxv. Furby *v.* Martyn, 1460-1465, 2 Cal. Ch. x.; see also Monye *v.* Hendrys, no date; Sel. Cas. Ch., 10 Seld. Soc'y, No. 127, or cases in which the relief sought was probably reimbursement for the expenses incurred rather than specific performance—Wheler *v.* Huchynden, Rich. II., 2 Cal. Ch. ii.; Anon. Y. B. 8 Ed. IV. 4-11 (see also Wace *v.* Brasse (after 1398), Sel. Cas. Ch. 10 Seld. Soc'y No. 40; Kymberly *v.* Goldsmith, 1421-1426, 1 Cal. Ch. xx.; Tyrgelden *v.* Wareham, 1467-1473, 2 Cal. Ch. liv. Accordingly, the writer of this note, in an article in 1 Green Bag, 26, advanced the view that specific performance was a comparatively modern doctrine, not older, so far as appeared from reported cases, than the middle of the sixteenth century. The subsequent publication, in 1896, by the Selden Society, of Select Cases in Chancery, in which the case of Cokayn *v.* Hurst is brought to light, compels the writer so far to modify his opinion as to admit that equity decreed specific performance of an agreement in one case in the middle of the fifteenth century. In a still earlier case, William *v.* Gile 1396-1403, Sel. Cas. in Ch., 10 Seld. Soc'y, No. 83, a plaintiff who had released his right to land to the defendant upon the latter's agreement to convey the same to the plaintiff for life, prayed for specific performance. But we are not told what relief, if any, the court gave. Even if he obtained a decree for a life estate, he got less than he was entitled to, for on the principle of *restitutio in integrum* and by analogy to the cases of reimbursement for expenses, he might well have prayed for a reconveyance of the fee simple. Bradwell *v.* Clopton, 1413-1417, Sel. Cas. in Ch., 10 Seld. Soc'y, No. 114, cited by Mr. Baildon as an instance of specific performance, contains no illusion to this form of relief.

It still remains true, therefore, that for nearly a century, Cokayn *v.* Hurst is the solitary reported instance of a decree for the specific performance of a contract. In 1547, in Carrington *v.* Humphrey, Toth. 14, "it is ordered that the defendant and his wife shall make an absolute assurance for the extinguishment of her right of land." This may have been specific performance of an agreement. Brooke, who died in 1558, drawing the distinction between law and equity, says, in his Abridgment, that the promisee "shall have only damages by this [action on the case], but by subpœna the chancellor may compel him to execute the estate or imprison him, *ut dicitur*." Bro. Ab. Act on Case, pl. 72. The words *ut dicitur* are suggestive of novelty. This suggestion is reinforced by the statement of DYER, J., in 1557, Wingfield *v.* Littleton, Dy. 162 a: "And no subpœna will lie for her [the covenantee], as for a *cestui que use*, to compel Sir A. [the covenantor] to execute the estate, . . . because she has her remedy at law, by action of covenant."

In the reign of Elizabeth, however, there are several reported cases in which specific performance of contracts was decreed; Pope *v.* Mason, 1569, Toth.

3; Hungerford *v.* Hutton, 1569, Toth. 62; Onely's Case, 1578, Dy. 355, 356 a; Benther *v.* Denton, 1582, Toth. 4; Foster *v.* Eltonhead, 1582, Toth. 4; Kempe *v.* Palmer, 1594, Toth. 14; King *v.* Reynolds, 1597, Ch. Cas. Ch. 42; Beeston *v.* Langford, 1598, Toth. 14.

There are many similar decrees in the reign of James I., one of which, according to Tothill, was "by the judge's advice." Throckmorton *v.* Throckmorton, 1609, Toth. 4. This is, possibly, an error of the reporter. At all events, the hostility of the common-law judges to the jurisdiction of equity over contracts was very plainly expressed, two years later, by Fleming, C. J., in Gollen *v.* Bacon, 1 Bulst. 112: "If one doth promise for to give me a horse for twenty shillings, afterwards he doth not perform this; I am not in this case to go and sue in Chancery for my remedy, but at the common law, by an action on the case for a breach of promise and so to recover damages; and this is the proper remedy, and the common law warrants only a remedy at the common law; and if the law be so in the case of a horse, *a multo fortiori*, it shall be so in case of a promise to make an assurance of his land upon good consideration, and doth not perform it, he is not to sue in chancery for this, but at the common law, which is most proper." CROKE, J., and YELVERTON, J., agreed herein with the chief justice, who added: "There are too many causes drawn into chancery to be relieved there, which are more fit to be determined by trial at the common law, the same being the most indifferent trial, by a jury of twelve men." As might be supposed, the most determined opponent of this new encroachment of equity upon the common law was Lord COKE. In Bromage *v.* Genning, 1 Roll. R. 368, the plaintiff applied to the King's Bench for a prohibition against a suit for specific performance of a lease brought against him in the marches of Wales, on the ground that Genning's proper remedy was an action at law. Serjeant Harris, in reply, urged that the object of the suit was not the recovery of damages, but the execution of the lease, and that this was regularly done in chancery. COKE, C.J., DODDRIDGE and HOUGHTON, JJ.: "Without a doubt a court of equity ought not to do so, for then to what purpose is the action on the case and covenant; and COKE said that this would subvert the intent of the covenantor, since he intended to have his election to pay damages or to make the lease, and they would compel him to make the lease against his will; and so it is if a man binds himself in an obligation to enfeoff another, he cannot be compelled to make the feoffment." Serjeant Harris then confessed that he acted in the matter against his conscience, and the court accordingly granted the prohibition.

This was in 1616, the year of the memorable contest between Lord Coke and Lord Ellesmere as to the power of equity to restrain the execution of a common law judgment obtained by fraud. Lord Coke's defeat in that contest is matched by his failure to check the jurisdiction of the chancellor in matters of contract. The right of equity to enforce specific performance, where damages at law would be an inadequate remedy, has never since been questioned.—Mr. Ames' note to Cokayn *v.* Hurst in 1 Ames' Cases in Equity Jurisdiction 37.

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Though the Courts of Common Law never enforced the specific performance of contracts, there were certain cases in which they made near approaches to it, and these it will be well to briefly consider. They were cases—

(i.) Where a public duty arose from a private contract:

(ii.) Where the contract was for the delivery of a chattel:

(iii.) Where the contract was for the payment of a sum of money:

(iv.) Arising on covenants real.

(i.) The object of the prerogative writ of mandamus is the enforcing of public duties. Before the Judicature Acts, see now Jud. Act, 1873, s. 25 (8); if A. had by the deed of settlement of a company entered into contract with that company, or with trustees for it, or with his fellow shareholders, that a company should be formed and conducted in a specified manner, including, for instance, provisions for the registration or transfers of shares, and if this deed of settlement had been confirmed by royal charter, and the company had made default in registering a transfer, whereby A. was injured, in such a case the prerogative writ of mandamus would have lain in the Court of Queen's Bench, and the public duty of the company which resulted from the contract contained in the deed of settlement would have been enforced at the suit of A., Norris *v.* Irish Land Co., 8 El. Here the contract would not have been specially enforced: but a public duty flowing in part from the contract would have been performed.

In addition to the old prerogative writ of mandamus there was a statutory writ under the 68th section of the Common Law Procedure Act, 1854 (now repealed by statute 46 & 47 Vict. c. 49, s. 3), which provided for the issue of "a writ of mandamus compelling the defendant to fulfil any duty in the fulfilment of which the plaintiff is personally interested." It was naturally suggested that this power authorized the Courts of Common Law to grant specific performance of contracts by means of the statutory writ; but by the cases of Benson *v.* Paull, 6 El. & Bl. 273, and of Norris *v.* The Irish Land Co., 8 El. & Bl. 512, it was determined that the Courts of Common Law could not by means of the writ of mandamus enforce the actual execution of contracts which resulted in private rights only and not in duties in which the public were interested.

(ii.) Before the passing of the Common Law Procedure Act, 1854, it was a matter of question whether the delivery of the specific chattel could be obtained if the defendant chose to pay the damages assessed instead of delivering up the chattel; but all such doubts were removed by the 78th section of that Act, which has in its turn been subsequently repealed. But Ord. XLVIII. r. 1, of the rules of the Supreme Court, which has taken the place of the repealed statute, enables the plaintiff to obtain execution for the delivery of the property, without giving the defendant the option of retaining such chattel upon paying the value assessed.

If a contract were entered into between A. and B. for the delivery by B. of a certain sum by A., and A. made the payment, but B. refused to deliver the chattel, an action for its detention would lie in a Court of Common Law at the suit of A., and at his election execution might issue for the return of the chattel. This looks very like a specific performance of the contract, but was not such in fact. The complaint of A., in the case supposed, was not that the contract had been broken, but that the chattel had been detained. He did not aver that the contract ought to be performed and that the chattel ought to be made his; but he alleged that the contract had been performed, and that therefore the chattel was his, and the defendant's detention wrongful. In short, the contract came into controversy, if at all, only as the title of the plaintiff.

(iii.) Lord MANSFIELD, C.J., has remarked that "pecuniary damages upon a contract for payment of money are, from the nature of the thing, a specific performance." In Johnson *v.* Bland, Burr. at p. 1086. But the remark seems hardly strictly accurate. No doubt the sum agreed to be paid will be the measure of damages, and the amount paid will be the same whether the contract be performed or broken. But in the former case the money is paid in performance of the contract: in the latter case it is paid as satisfaction for its non-performance. It is evident that the consequences of the two payments would therefore be different.

(iv.) According to the old common law, a covenant by A. to convey lands to B. (which was called a covenant real) could be enforced by a special writ of covenant, which was in the nature of a specific performance of that covenant. The writ was to the sheriff to command A. that he keeps his covenant with B.; and the relief for non-performance was not in damages, but by means of a *præcipe quod reddat* of the land in question. This writ of covenant was the commencement of proceedings in fines before their abolition. Fitzh. *Natura Brevium* "Covenant to Levy a Fine;" 3 Bla. Com. 156.

In one case the Ecclesiastical Courts exercised a jurisdiction in the nature of specific performance. When man and woman had entered into a marriage contract *per verba de præsenti*, one refusing might be sentenced by the Ecclesiastical Court to celebrate the marriage *in facie ecclesiæ* accordingly, and for refusal to obey might be excommunicated and imprisoned on a writ *de excommunicato capiendo* until he or she submitted to obey the ordinary: and a like jurisdiction was exercised in the case of contracts *per verba de futuro*, though the process for contumacy was in certain cases different. 2 Burns. Eccl. Law, 1st ed., Marriage, ii. 5. In the "*Maid of Honour*" Masinger makes his heroine sue the King for the specific performance of a written contract to marry her. But by the statute 26 Geo. II. c. 33, s. 13, and afterwards by statute 4 Geo. IV. c. 76, s. 27, this jurisdiction of the Ecclesiastical Courts was abolished.

From what has been already said, it appears that the origin of this branch of equitable jurisdiction is not to be sought in the Roman Law. Perhaps it is rather to be found in the Ecclesiastical Law.

When St. Paul in writing his first letter to the Christians at Corinth, insisted that they should settle their own disputes by reference to a domestic forum and abstain from going to law before the heathen, he was helping to lay the foundations of a great system of jurisprudence. If we follow the authorized version and Dean Stanley, St. Paul thought that the least esteemed members of the Church were fit for such business. But when we think of some episcopal chancellors whom we have known, we feel great relief in the revised version; for this makes the setting of the least valued members of the Church to this business an additional matter of reproach in St. Paul's mouth. However this may be, we here for the first time, it is believed, catch a glimpse of the internal jurisdiction of the Church which was destined to grow into the great system ruled over by the *Corpus juris canonici*.

In the second Book of the Apostolical Constitutions, § 47, (whatever its date and authorship) we get another glimpse of the Church Courts as then existing. From this we can to some extent figure to ourselves the manner of conducting business, which was half hortatory and half judicial; we can gather some light on the penalties by which the judgments were enforced; but we find little or nothing definite with regard to the subjects of jurisdiction.

In Pliny's celebrated letter to Trojan, we have perhaps the first trace of the subject-matters of which the Church Courts took cognizance. The Christians, according to the report of those who had abjured their faith bound themselves by an oath not to commit theft, robbery, or adultery; not to break their word "*ne fidem fallerent*," and not to deny the existence of a deposit when called upon by the depositor, Plin. Spist. lib. x. ep. 97. These words "*ne fidem fallerent*" cover a wide area of moral obligation, and the jurisdiction of the Court of the Christians if it undertook to enforce it would be ample. In these few words we may perhaps find the germ of many things with which we are more or less familiar: of the troth which man and woman pledge to one another in the marriage service; of the form of declaration *Do fidem* still used in the University of Oxford; of shaking hands over a bargain; of the oath on the faith of a Christian—so much discussed on the admission of Jews to Parliament; of the affidavit; of "*ma foi*" as a common exclamation of our French neighbours; and of the whole jurisdiction asserted by the Ecclesiastical Courts based on *fidei laesio*. This applied to contracts is, perhaps, the origin of the jurisdiction in specific performance.

If every breach of faith was cognizable in the Church, it would follow that to pledge the faith was to create an obligation cognizable in the spiritual Courts and enforceable by penitence or excommunication; and accordingly we find in the middle ages that the pledge of faith (*fidei interpositio—fides facti*) was a common sanction to engagements of various descriptions. It was used in the contract of marriage, where it still survives; it was used in private bargains such as partnerships, in the matter of essoins, in certain proceedings in the Exchequer, and in obligations of a more public or political character.

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In Bracton's note-book, so admirably edited by Prof. Maitland, two cases illustrative of the claim of jurisdiction on the ground of *fidei laesio* are particularly instructive.

The first (No. 50) occured in the year 1219. A prohibition had issued to restrain Alice Hathemus from drawing Roger the son of Ade into the Court Christian in regard to a lay fee. Alice replied that the matter between her and Roger in the Court Christian was *fide suâ lesâ et non de laico feodo;* that after her husband's death she had pledged part of her dower to Roger for a term of ten years, and that he had pledged his faith (*affidavit*) to return the land to her at the end of ten years: that the term had passed but he had not returned the land, and therefore she sued him *de lesione fidei*. But Alice was restrained, and the marginal note runs "*Nota quod prohibicio locum tenet de fidei lesione propter laicum feodum.*"

The second case (No. 1893) occurred in the year 1227. It was an assize to determine whether William the son of Godwin unjustly disseized Richard the son of Maria de Brom of a tenement in Acle.

The jurors found that Alured Rowe demised the land to Richard the son of Maria for a term: meanwhile William (*in feodum*) for a certain sum of money and the execution of the charter, and they pledged their faith to this contract *et ad convencionem istam tenendam hinc inde fuit affidatum.* When the day came William broke his bargain, and thereupon Alured demised the land to Richard. Subsequently, William impleaded Alured in the Court Christian for breach of faith (*de fidei lesione*). Ultimately, Alured was compelled to execute the deed and to demise the land to William *ita quod*

oportuit eundem Alurcdum ce necessitate facere ei cartam suam et terram illiam ei concedere. Thereupon Richard (as was just) was held entitled to recover seizin of the land and William was in mercy.

This entry is of the last importance for the present enquiry. It appears to be a clear case of a judgment for specific performance by the Ecclesiastical Court.

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There is therefore clear evidence of the activity of the Courts Christian in matters of contract. But there is another point to be noted: they proceeded by admonishing the delinquent party to do the very thing undertaken,—the man who had married a woman and refused her the rights of matrimony, to take her home,—the man who refused to execute the deed according to his promise, to execute the deed. A prineiple of the Canon Law was expressed in the heading of a chapter, *Judex debet studiose agere ut promissa adimpleantur*, and in the sentence therein contained, *Studiose agendum est ut ea quae promittuntur opere compleantul*, Decr. Greg. IV. lib. i. ti. 36, cap. 3.

These materials make it probable that from early times the Courts Christian enforced the specific execution of contraets in which there was an oath or *fidei interpositio*: that this jurisdiction was narrowed and perhaps almost extinguished by the pressure of the writ of prohibition from the King's Court: and that the ecclesiastical Chancellors found in the Chancery a means of reviving a like jurisdiction, the writ of subpœna taking the place of excommunication.

For in the records of the Court of Chancery there are early traces of the jurisdiction. A case in the reign of Richard II. has been thought to be one of specific performance: cases more distinctly in point occur in the reigns of Henry VI. and Edward IV.

In the reigns of Edward VI., Elizabeth, and James I. several cases occur, and the advantages of the jurisdiction in Chancery were perhaps becoming more known. Brooke, in his Abridgment, Action sur le case, pl. 72, had pointedly shown the superiority of the proceedings by subpœna over an action on the case. "Note," he says, "that by this he will get nothing but damages, but by subpœna the Chancellor can compel him to convey the estate or imprison him *ut dicitur*."

The jurisdiction was thus established, though not without much jealousy on the part of the Common Law Courts, and a strenuous effort to set forward the action on the case as an adequate remedy in the case of contracts. In an Additional Note (C), at the end of this volume, will be found a reference to several cases, illustrative of the earlier history of this jurisdiction of the Court of Chancery.

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CASES ILLUSTRATIVE OF THE EARLY JURISDICTION OF CHANCERY IN SPECIFIC PERFORMANCE.

(i) RICHARD II.—Wheler *v.* Huehynden, 2 Calendar of Proceedings in Chaneery 2. The plaintiff averred an agreement between the plaintiff and defendant that the defendant should grant to the plaintiff the reversion of certain lands; that the defendant lent to the plaintiff the deeds to enable him to obtain advice as to the conveyance; that the plaintiff came to London for such advice, and incurred expenses, and then the defendant refused to

convey, and the plaintiff accordingly sought the Chancellor's aid, alleging that, as he had no specialty or writing of the covenant, he could not sue at common law. He asked for judgment according to that which loyalty, good faith and conscience demanded in all parts for the love of God and in the work of charity. It has been suggested [by Professor Ames in "The Green Bag," Vol. I., No. 1, p. 26] that the relief sought was not specific performance of the covenant or contract, but repayment of the plaintiff's expenses. But it may be doubted whether the plaintiff did not seek a wider relief. Whether he obtained any or what relief does not appear.

(ii) Henry VI. (no year).—John Jonesse *v.* John Penely and Wm. Penely, 2 Calendar 35, is a suit on a contract entered into between William Penely and the plaintiff for the sale of a house and garden at Berkhampstead, of which John Penely was feoffee to the use of William Penely, in which the plaintiff alleged that the purchase money had been partly paid.

(iii) Henry VI. (no year).—Furby *v.* Martin and Bamme, 2 Calendar 40. A very similar case to Jonesse *v.* Penely, but in this case the sale was of a manor, and the time for completion at the place fixed, viz., the parish church, had passed, and no deed had been executed.

(iv) 27th Henry VI.—Lord Scales *v.* Dame Catherine Felbrigge and John Dame, 2 Calendar 26, was a suit brought to compel the defendants to make an estate to the plaintiff in reversion, in accordance with a purchase on which the plaintiff alleged that he had paid the purchase money. A decree was made.

(v) Year Book, 8th Edw. IV. 11, pl. 4 B.—The defendant had promised the plaintiff *per fidem* to indemnify him in his occupation of the defendant's benefice, as proctor for the defendant; the defendant made default, and thereupon the paintiff sued out a subpœna in chancery. Genney, who appeared for the defendant, raised various objections, as that by reason of the pledge of faith the proceeding ought to have been in the Court Christian, and not in Chancery, and that it was the plaintiff's own folly that the promise was not in a deed on which an action at law might have been maintained. But the Chancellor overruled all these objections, and said that the plaintiff should have relief in Chancery. Genney, in the course of the argument, admitted that if I promise you to build you a house or to make over a house to you (*de faire a vous un meason*), and break the promise, you shall have remedy by subpœna. [This is, I believe, a fair statement of the case, but in points I feel some uncertainty.] The case is interesting as showing the connection of the jurisdiction in specific performance with the old jurisdiction of the ecclesiastical courts in cases of *Læsio fidei*.

(vi) Year Book, 21st Henry VII. 41, pl. 66.—In this case Fineux, C.J., in discussing the extent of the action on the case, observed that if one bargains with me that I shall have his land to me and my heirs for £20, and that he will make the estate over to me, and I pay the £20, but he will not make over the estate to me according to the covenant, I may have an action on the case, and am not bound to sue out a subpœna.

(vii) 1 Edw. VI.—Carrington *v.* Humphrey, Tothill 14.

(viii) 11 & 12 Eliz.—Pope *v.* Mason, Tothill 3.

(ix) 12 Eliz.—Hungerford *v.* Hutton, Tothill 62.

(x) 25 Eliz.—Benther *v.* Denlon, Tothill 3.

(xi) 29 Eliz.—King *v.* Roydon (the Practice of the High Court of Chancery, 1672, p. 42b).

(xii) 41 Eliz.—Beeston *v.* Langford, Tothill 14.

(xiii) 7th James I.—Throckmorton *v.* Throckmorton, Tothill 4. This case is interesting, as the decree is said to have been made by the judges' advice.

(xiv) 11th James I.—Bates *v.* Heard, Tothill 4.

(xv) (Undated).—Foster *v.* Eltonhead, Tothill 4.

(xvi) 14th James I.—Bromage *v.* Gennings, Rolle, 354, 368. Bromage sued Gennings in the Court of the Marches of Wales for not executing a lease according to his bargain, and from the statement of the plaintiff's counsel it appears to have been a suit for specific performance, and not to recover damages, and this, he added, is usually done in Chancery. Thereupon the defendant moved for a prohibition and obtained it, COKE, DODDRIDGE and HAUGHTON saying that Chancery ought not to do so, for then to what purpose are the actions on the case and covenant? And COKE added that this would subvert the interest of the covenantor, who understands that it is at his election either to lose the damages or to make the lease. DODDRIDGE observed that if a decree was made for the execution of the lease, and he did not choose to execute it, there would be no other remedy than imprisonment. So complete was the unanimity of feeling in the court that Serjeant Harris, the plaintiff's counsel, said that the part he took in the matter was against his conscience.

It may be added that the tenth volume of the publications of the Selden Society, intitled "Select Cases in Chancery," contains (see especially pp. xxxv.-xxxvi.) particulars of several interesting cases illustrative of the early jurisdiction in specific performance. Some of these appear to be mixed cases of specific performance and trust, or specific performance and fraud. They are worthy of attention.—Fry, Specific Performance, 4th ed., pp. 5-15; 683-685.

WILLIAM BY THE BROOK *v.* GILES.

IN CHANCERY, BEFORE LORD CHANCELLOR, BISHOP OF EXETER,[1] 1396-1403.

[*Select Cases in Chancery,* 10 *Selden Society, No.* 83.[2]]

To the most gracious Lord and most reverend Father in God, the Bishop of Exeter, Chancellor of England,

Showeth William by the Brook, and complaineth of John Giles of Longdon, near Lichfield, co. Staffs., that whereas the said William and John made an agreement before Sir Thomas Daston, James Arblaster and others, last year at Lichfield in manner following, that is to say, the said John should sue at common law for certain lands and tenements, formerly Thomas Colman's, in the fee of Elmhurst, which the said William purchased of Richard Colman, son and heir

[1] Edmund de Stafford.

[2] Early Chancery Proceedings, Bundle 3, No. 103.

of the said Thomas in exchange for half a virgate of bondland in Longdon, at their joint costs, and thereupon the said William should release to the said John his right in the same, on this condition, that after the said lands were recovered from William Bird, his adversary, the said John should have enfeoffed the said William therein for the term of his life; and the said John will not now fulfil his covenant with the said William touching the said lands and tenements so recovered at their joint costs, but hath entered into the said lands and tenements and keepeth [William] out of them, against right: May it please your most gracious Lordship to command the said John Giles to come before you, and to compel him to fulfil his said covenant with the said William; For God and in way of charity.

KYMBURLEY *v.* GOLDSMYTH.

IN CHANCERY, BEFORE LORD CHANCELLOR BEAUFORT, 1424-1426.

[1 *Calendars of the Proceedings in Chancery* xx.]

To the high and mighty Prince, ryght dredd and gracieux Lord of Wynchestre Chancellor of Englond,

Considerying if it like youre Highnes howe youre poer beedman Johan Kymburley, of Derby, kynnesman to sometyme youre servant Sir William Hikeling, bargayned in Derby in Lenten was twelf moneth with oon Johan Goldsmyth the Elder of Melton in Leycestershire, merchant: and the parties fully accorded bitwixt hem as it appereth by an evidence seled therupon and writen of the said Johan Goldsmyth owen hand, that he sholde by a moneth after the said Ester have delivered hym a tonn of wood[1] price of xiij li xs for the which soume the said Johan Goldsmyth receyved the verray value marchantlich in Wolles of the same Johan Kymburleys; and the said wood that he boughte yet never delivered hym, to his importable losse and hindryng, which nys but a poor man and feref of sufficeant remedie for lack of other laweful seuerte; like it youre noble grace through consideracion of rightwisnes and justice, the which releeveth many a poer man, uppon this mater, by writt sub pena to sende for the seid Johan Goldsmyth to appere afore youe in the Chauncellarie, at such day as youe list comaund: and hereuppon right to be doon un to the said beedman, which evermor shal prai God for youre high and noble estat.

Pleg' de ps { Johes Stodley de London. / Rog'us Wolley de Derby.

[1] Woad, a species of herb used for dying cloth and worsted of a blue colour.

COKAYN *v.* HURST.

IN CHANCERY, BEFORE LORD CHANCELLOR WAYNFLETE, BISHOP OF WINCHESTER, 1458.[1]

[*Select Cases in Chancery*, 10 *Selden Society*, *No.* 142.]

Besechith you ful mekely your trewe seruaunt and contynuel oratour, William Cokayn, that for asmoch as of late tyme communicacion of a mariage was had and riceved bitwene your seyd suppliant, one that one partie, and Amy, the doughter of Thomas Hurst, otherwyse named Thomas Barbour, of Asshwell in the Counte of Hertford, near Royston, one that other partie, and accorde made of the said mariage bitwene the said [parties] in the presence of John Enderby, Squyer, Thomas Boulasse, Thomas Barbour, of Asshwell in the Counte of Hertford; near Royston, fourme as here sueth; First, that your seyd suppliant shuld take to wyfe the seyd Amy, and immediately after th'espouselx bytwene theym halowed, he shuld and ordeigne that of such londys and tenements as he was seised of in the toun of Kinebauton in the shire of Huntyngdon (Kimbolton), a sufficiant and laufull estate of the seyd londes and tenementes to the yerly value of xl s. and above, shuld be made to your seyd suppliaunt and the seyd Amy ioyntly, to haue and to hold to theym and to theyr heyrs of their bothe bodyes lauffully commyng; For the which mariage and ioynture the seyd Thomas Hurst, fadre to the seyd Amy, shuld make a sufficient and laufull estat of a mesuage with appurtenaunces in the seyd toun of Asshwell to the yerly value of xx s. and in xxx acres of land in Stepulmordon (Co. Cambridge, near Royston), to the yerly value of xxv s., above all reprises, to have and to hold the seyd mesuage and xxx acres with their appurtenaunces to your seyd suppliant and Amy and to the heyrs of theyr bothe bodyes laufully commyng. And howe be it that your seyd suppliant hath well and truly performed almaner thynges aboue seyd touchyng his partie, and ofte tymes hath requyred the seyd Thomas Hurst to perfourme the premysses touchyng his partie, and that to doo he hath refused and yet refuseth ageyns all right and conscience: Please your highnesse the premysses tenderly to considre, and for asmoch as the seyd Thomas Hurst is visited with suche sikenes that he may not travayle, to graunt a writ of *dedimus potestatem* direct to John Leek clerk, William Seintgeorge, knyght, and William Hasilden, Squyer, that they and euery of them may ioyntly and seuerally have power to examyn the seyd Thomas Hurst and all other persones which shall seme to theyr discrecions most necessarie to be examyned in the premysses and suche as shall be found by that examynacion to certefye they kynge's highnesse in his high Court of the Chaunserye: and your sayd suppliant shale pray god for you.

[1] At the time this bill was filed, 1456, Thomas Bourchier, Archbishop of Canterbury, was Chancellor.

[A writ of *dedimus potestatem,* (No. 110), dated May 8, 34 Henry (VI., 1456), and addressed to John Leek and Walter Tayllard, is annexed, directing them to examine witnesses in the matter and to return the result into the Chancery without delay. Their certificate, (No. 112), a lengthy document in bad condition, is also preserved.]

[*Indorsed on the Bill.* (*Translation.*)—Be it remembered that on the 15th day of February, 36 Henry VI., 1458, this petition (exhibited) before the King in his Chancery and the examinations (of witnesses) taken in this behalf being read, heard and fully understood in the said Chancery, it seemed to the Court of the Chancery aforesaid, that the matter specified in the aforesaid petition was true and just, and since Amy, in the petition mentioned, is dead, leaving issue of her body and of the body of the within-written William lawfully begotten still surviving. It was considered in the same Chancery that the within-written Thomas Hurst should make a sufficient estate of a messuage and 30 acres of land with the appurtenances in Ashwell and Steeple Morden, in the aforesaid petition mentioned, to the aforesaid William and the heirs of his body and of the body of the aforesaid Amy lawfully begotten, according to the tenor, form, and effect of the aforesaid petition.]

ADDERLEY *v.* DIXON.

IN CHANCERY, BEFORE SIR JOHN LEACH, V. C.,[1] 1823-1824.

[1 *Simons and Stuart* 607.]

The plaintiffs having purchased and taken assignments of certain debts which had been proved under two Commissions of Bankrupt, agreed to sell them to the defendant for 2*s.* 6*d.* in the pound.

The defendant's solicitor accordingly gave notice of the sale to the assignees, and prepared an assignment of the debts, and the plaintiffs,

[1] "According to Romilly, Leach had 'great facility of apprehension, considerable power of argumentation, and remarkably clear and perspicuous elocution,' but was extremely wanting in knowledge as a lawyer, and in judgment was 'more deficient than any man possessed of so clear an understanding that I ever met with' (Memoirs, iii. 216-17). Leach got through his cases with remarkable speed. The chancery court under Lord Eldon was called the Court of Oyer sans Terminer, and the Vice-Chancellor's, the Court of Terminer sans Oyer. Leach's decisions were lucid and brief, but as he often decided on his own judgment in preference to that of his predecessors, they were not infrequently overruled." Article Leach, in Dictionary Nat. Biography.

The speed of the Vice-Chancellor was a by-word with the lay public, and a flying coach was named the Vice-Chancellor. Notwithstanding jest and partisan criticism, Leach was an able judge, as appears from his opinions, which are still frequently cited and relied on.

notwithstanding the purchase money had not been paid, executed it, and signed the receipt for the consideration money, and left it in the solicitor's hands. The bill was filed to compel the defendant specifically to perform the agreement and to pay the purchase money to the plaintiffs.

The defendant, by his answer, submitted that the matter of the agreement was not the proper subject of a bill in equity for a specific performance, and claimed the same benefit as if he had demurred to the bill.

The VICE-CHANCELLOR. Courts of equity decree the specific performance of contracts, not upon any distinction between realty and personalty, but because damages at law may not in the particular case afford a complete remedy.[1] Thus a court of equity decrees performance of a contract for land, not because of the real nature of the land, but because damages at law, which must be calculated upon the general money value of land, may not be a complete remedy to the purchaser, to whom the land may have a peculiar and special value. So a court of equity will not generally decree performance of a contract for the sale of stock or goods, not because of their personal nature, but because of damages at law, calculated upon the market price of the stock or goods, are as complete a remedy to the purchaser as the delivery of the stock or goods contracted for, inasmuch as, with the damages, he may purchase the same quantity of the like stock or goods.

In Taylor *v.* Neville, cited in Buxton *v.* Lister, specific performance was decreed of a contract for sale of 800 tons of iron, to be delivered and paid for in a certain number of years and by installments; and the

[1] The two extracts immediately following, are taken from other decisions by Vice-Chancellor LEACH:

"I apprehend, that where an agreement is made, the direct substance of which can be had in this Court, it is not necessarily an answer to a bill for the performance of such an agreement, to say that the parties may have compensation in damages, equivalent in value to what this Court can give by its decree. A Court of Law, in this case, cannot give the parties the direct benefit of the agreement, because it cannot give Ford the benefit of his claim against William Beech without depriving him of it altogether. But if this Court can preserve to all the parties the benefit of the agreement the case may be proper for its interposition." Beech *v.* Ford, 1848, 7 Hare 208, 214.

"I am of opinion that, inasmuch as this Bill prays a delivery of the Certificates which would constitute the Plaintiff the Proprietor of a certain quantity of Stock, the Bill in Equity will hold; because a Court of Law could not give the Property, but could only give a remedy in Damages, the beneficial effect of which must depend upon the personal responsibility of the Party." Doloret *v.* Rothschild, 1824, 1 S. & S. 590, 598.

In Parker *v.* Garrison, 1871, 61 Ill. 250, 253, SHELDON, J., said:

"What had the complainant in the way of any adequate remedy at law? Garrison was insolvent. Any recovery of damages against him would have been worse than bootless, as it would only have entailed upon the complainant an additional loss in the form of a bill of costs. And although this view of the personal responsibility of a defendant seldom seems to enter into the consideration of courts of equity, they taking it for granted that what a

reason given by Lord HARDWICKE is that such sort of contracts differ from those that are immediately to be executed. And they do differ in this respect, that the profit upon the contract, being to depend upon future events, cannot be correctly estimated in damages where the calculation must proceed upon conjecture. In such a case, to compel a party to accept damages for the non-performance of his contract, is to compel him to sell the actual profit which may arise from it at a conjectural price. In Ball *v.* Coggs, 1 Bro. P. C. 140, specific performance was decreed in the House of Lords of a contract to pay the plaintiff a certain annual sum for his life, and also a certain other sum for every hundredweight of brass wire manufactured by the defendant during the life of the plaintiff. The same principle is to be applied to this case. Damages might be no complete remedy, being to be calculated merely by conjecture; and to compel the plaintiff in such a case to take damages would be to compel him to sell the annual provision during his life for which he had contracted, at a conjectural price. In Buxton *v.* Lister, Lord HARDWICKE puts the case of a ship-carpenter purchasing timber which was peculiarly convenient to him by reason of its vicinity; and also the case of an owner of land covered with timber contracting to sell his timber in order to clear his land, and assumes that as, in both those cases, damages would not, by reason of the special circumstances, be a complete remedy, equity would decree specific performance.

The present case being a contract for the sale of the uncertain dividends which may become payable from the estates of the two bankrupts,

party is bound by law to do, he can do and will do, this consideration of personal responsibility is not always disregarded."

In Knott *v.* Manufacturing Co., 1888, 30 W. Va. 790, 796, SNYDER, J., said:

"In regard to personal covenants of this character, [promise to convey property as security] the universal test of equity jurisdiction, admitted alike by the courts of England and of the United States, is the inadequacy of the legal remedy of damages in the class of contracts to which the particular instance belongs. 3 Pom. Eq. Jur. § 1341. The covenant not to incumber the property, it seems to me, is clearly one for the breach of which the remedy at law is not only adequate, but peculiarly appropriate. The damages, if any, must be the loss of the plaintiff's debt or some part of it, and to fix these damages is the peculiar province of a jury. It may be said that this remedy is inadequate by reason of the insolvency of the company, but the reply to this objection is that courts do not provide the means to pay debts, but only the means of enforcing their payment. Whether the debtor is solvent or insolvent is immaterial. The rules of law are the same in either case."

ANDREWS, C.J., in Dills *v.* Doebler, 1892, 62 Conn. 366, 370, said:

"The brief of the plaintiff's counsel suggests that the defendant is insolvent, and that the plaintiff could not collect the damages if he should obtain a judgment therefor. There is no finding to that effect. And if it were so, that fact could not give to a court of equity the right to issue an injunction. It is the contract itself which gives to or takes away from the court its jurisdiction; not the wealth or poverty of the party defendant."

See also the cases under Hardship, Section 2, F., *infra*, for other cases.

it appears to me that, upon the principle established by the cases of Ball *v.* Coggs and Taylor *v.* Neville, a court of equity will decree specific performance, because damages at law cannot accurately represent the value of the future dividends; and to compel this purchaser to take such damages would be to compel him to sell these dividends at a conjectural price.

It is true that the present bill is not filed by the purchaser, but by the vendor, who seeks, not the uncertain dividends, but the certain sum to be paid for them. It has, however, been settled, by repeated decision, that the remedy in equity must be mutual; and that, where a bill will lie for the purchaser, it will also lie for the vendor.

RICHMOND *v.* RAILROAD CO., 1871, 33 Iowa 422, 480.—BECK, Ch. J. . . . It is impossible to state a general rule, drawn either from principle or precedents, as to the power of equity to enforce a specific performance of contracts, respecting personal property, choses in action, and personal services. It is often said that in such cases equity will not entertain jurisdiction. But this doctrine is subject to an exception, or is rather limited in its application to cases where compensation in damages does not furnish a complete and satisfactory remedy. The rule is stated in other words, namely: When the contracting party is entitled to the subject-matter of the contract and cannot be fully compensated therefor, equity will afford relief. And it is often expressed in another form as follows: Equity will not interfere when the injured party has an adequate remedy at law. Now in the application of the rule, as it is variously announced, the important inquiry always is, what constitutes a complete and adequate remedy, and when will this be afforded by the allowance of damages? It is sometimes said that equity will not interfere, because the law will award damages, and in other cases, that equity will interfere in cases where the law will give damages, on the ground that the party is not fully compensated thereby. The fact that a court of law will award damages, in a given case, does not deprive equity of jurisdiction. To deprive the party of an equitable remedy, the damages, recoverable at law, must be a full compensation and constitute adequate relief. Equity determines this question. We must apply its doctrines in order to pronounce the relief adequate or inadequate.

But here we find no fixed rule to guide us, other than this one, which is general in its language and application; the remedy sought must be indispensable to justice. But natural justice is not meant for, upon its principles, it would, indeed, appear that all men should be required to specifically perform their contracts. The conclusion is reached, that the rules are so general in their nature, that but little aid is derived there-

from in determining whether the relief afforded by the law, in a given case, will be deemed by equity adequate. Each case is determined upon its own facts and the application of equitable principles.[1]

PALMER *v.* GRAHAM, 1850, 1 Par. Sel. Cas. (Pa.) 476, 478.—The opinion of the Court was delivered by KING, President.—This case comes before us bill and answer. The facts are few and simple. The plaintiff was the owner of a horse, wagon, and the necessary appliances for supplying camphine to persons desirous of purchasing the same. He had commenced and prosecuted the business for some time, and had obtained the custom of various persons living in the southern part of the city, whom he supplied regularly with camphine at their houses. Having established this route, he sold his horse, wagon, and appliances, together with the good-will of the route so established by him, to the defendant on a credit. It was agreed between the parties, that if the terms of the contract were not complied with, and payment made according thereto, the defendant should return to the plaintiff the horse, wagon, etc., together with the list of customers on the route, with such others as he should have in the meantime acquired. The defendant not having made the stipulated payments, returned the horse, wagon, etc., together with the list of customers to the plaintiff, according to the terms of his contract. But he immediately recommenced the business and continued to supply the customers on the route originally established by the plaintiff, and who were embraced in the list furnished to him by the latter, at the time of the original contract of sale. This, the plaintiff insists, is a fraud practiced on him by the defendant; and he asks that the latter should be restrained, by injunction, from further supplying the customers on the route so unfairly obtained.

We can entertain no doubt as to what was the true intent and meaning of the contract between these parties. It was, that if the defendant should either pay the consideration money in the time and manner pre-

[1] For a criticism of this statement of the principles announced in this extract see Pomeroy 35 n. 1. However, other courts have expressed virtually the same view. In Chesterman *v.* Mann, 1851, 9 Hare 206, 212, Sir GEORGE JAMES TURNER, V.C., made the following statement: "What the legal rights of the plaintiff may be is a question that is not in any manner my intention to decide. If he has rights in a court of law, he may assert those rights in that court; but he has come here for the exercise of the equitable jurisdiction of this court in a suit for specific performance,—the exercise of that jurisdiction being always subject to the discretion of the court; which, although not an arbitrary discretion, is undoubtedly to be exercised with proper care and attention, in looking to the conduct of the parties and to the circumstances of each particular case."

scribed, or surrender the property contracted to be sold to him, which not only embraced the horse, wagon, and other mere appliances of the trade, but the good-will and custom of the plaintiff, on the route established originally by his enterprise and industry. It is true that the defendant did surrender the appliances of the trade, and the list of customers originally furnished him, but he retained the really valuable element of the business, the good-will. While he professed to return to the plaintiff his property in *statu quo,* he really abstracted from it, for his own benefit, that which constituted its permanent value. That the plaintiff could have maintained an action at law for this breach of good faith, cannot be doubted. But he has not also the more effective remedy in this Court, of compelling the specific execution of the contract, and of restraining the defendant by injunction from any further violation of it? It is true, that, as a general rule, equity will not entertain jurisdiction for the specific execution of agreements, respecting things merely personal in their nature. Yet this rule is limited to cases where a compensation in damages furnishes a complete and satisfactory remedy. But in cases where there exists an utter uncertainty in any calculation of the damages arising from the breach of a contract personal in its nature; where the measure of damages is purely conjectural, equity will intervene; because, though there may exist a remedy at law, yet that remedy is inadequate and inefficient.

The nearest analogies to a case like the present, are to be found in bills brought to prevent a vendor from setting up a trade in the vicinity of a place, where he had formerly carried on such trade, the good-will of which he had sold, under an agreement not to establish a similar trade within certain limits defined in the agreement. In such cases equity has enforced the specific execution of the contract, by enjoining the vendor against setting up such a trade within the prescribed limits, on the ground of the inadequacy of an action at law to give the party aggrieved a full and perfect remedy for such a breach of good faith. Thus, in the case of Harrison *v.* Goodman, 2 Madd. Ch. Rep. 198, the Vice-Chancellor, Sir THOMAS PLUMER, restrained a retiring partner, who had agreed on receiving a compensation for his interest in the good-will of the trade, not to commence a similar trade in the same vicinity. Again, in Williams *v.* Williams, 2 Swanst. Rep. 253, a coach-master had sold his share of the business to his partner, with an undertaking not to be concerned in any coach running from Reading to London, or prejudicial to the business which he had sold. On a bill filed by the purchaser, complaining that the defendant had lately begun to run a coach from Pangbourne, about six miles beyond Reading, to London, and from London to Pangbourne through Reading, Lord ELDON awarded an injunction restraining the defendant from running any coach from London to Reading and back, and back again from Reading to London.

In each of these cases an action at law could have been sustained for the breach of the agreements; for, being covenants restraining the exer-

cise of a trade in a particular place, and not covenants in general restraint of trade, they were valid. Still, however, equity entertained jurisdiction, because it was only by compelling a specific performance of the agreement that the plaintiffs in these cases could obtain complete and perfect justice. In principle, we can perceive no distinction between these cases and the present. In them, the vendor stipulated to leave the trade, in the places designated, in the undisturbed enjoyment of the purchaser of the good-will, and violated his contract by commencing the trade in the same place. In this case the purchaser, according to the true meaning of the contract, stipulated, on his non-compliance with the terms of payment, to surrender the appliances of the trade and the good-will to the vendor. And, instead of a *bona fide* compliance with his contract, according to its spirit, he sets up the same trade in the same place, and continues to supply the plaintiff's former customers. In effect taking away from the latter his trade as effectively as if he had possessed himself of it by a *bona fide* payment of the purchase-money, according to the terms of the contract. In such a case, although an action at law might lie, yet such an action is subject to all the objections of inadequacy and inefficiency, and the measure of damages therein would be equally uncertain and conjectural as in the cases cited, where equity has given relief, because of the want of fulness in the common-law remedies.

It is important that the principle on which the Court acts should not be misconceived. We are aware that a contract for the sale of a good-will does not involve in itself any obligation on the vendor to forbear the exercise of the same trade: Shackle *v.* Baker, 14 Vesey, 463; Crutwell *v.* Lye, 17 Ib. 335; Kennedy *v.* Lee, 3 Merivale, 441. If the vendee of a good-will desires to protect himself from such a contingency, he should do so by express covenant or agreement. The basis of our action is, that according to the true intent and meaning of the contract between these parties, the defendant bound himself to deliver back the thing sold him in *statu quo*, if he should think fit to avail himself of the *locus pœnitentiæ* reserved when he made the bargain. In continuing to supply the plaintiff's original customers, he has actually retained the most valuable element of the thing sold to him; and it is to compel the full and complete execution of the agreement according to its spirit, that the Court intervenes by its decree for specific performance.

It is ordered that an injunction be awarded to restrain the defendant, his servants and agents, from further furnishing camphine to such of the persons set forth in his answer as are, by the said answer, admitted to have been customers of the plaintiff at the time of the contract entered into between the parties for the sale of the horse, wagon, and list of customers set forth in the bill; and that the defendant pay the costs.

BUXTON *v.* LISTER AND COOPER

IN CHANCERY, BEFORE LORD CHANCELLOR HARDWICKE, 1746.

[3 *Atkyns* 383.]

The defendants entered into an agreement for the purchase of several timber trees, marked and growing at the time it was reduced into writing; and on the first of November, 1744, the following memorandum was signed by the parties:

"Matthew Lister and John Cooper have agreed with Joseph Buxton for the purchase of those several large parcels of wood, consisting of oaks, ashes, elms, and asps, which are numbered, figured, and ciphered, standing and being within the township of Kirkby, for the sum of £3,050, to be paid at six several payments, every Ladyday for the six following years; and Lister and Cooper to have eight years for disposing of the same; and that articles of agreement shall be drawn and perfected as soon as conveniently can be, with all the usual covenants therein to be inserted concerning the same."

There were two parts of the agreement.

The plaintiff signed one, and the defendants the other; one was left in the custody of the plaintiff, and the other in the custody of the defendants.

The bill was brought by the vendor for the specific performance of the agreement.

LORD CHANCELLOR, upon the opening, said he did not know any instance of a bill of this nature, where it is a mere chattel only, and nothing that affects the realty.

That a bill might as well be brought for compelling the performance of an agreement for the sale of a horse, or for the sale of stock, or any goods or merchandise.

Sir JOSEPH JEKYLL did, in Cud *v.* Rutter, 1 P. Wms. 570, decree a specific performance in the case of a chattel, but Lord MACCLESFIELD reversed it, and it has been the rule of the court ever since not to retain such a bill.

The proper remedy is an action at law, where you may recover damages for the non-performance of the agreement.

The defendants' counsel, to show the impropriety of such a bill, and that the parties ought to be left to law, cited Roll's Reports 493 and Latch's 172.

Upon hearing what the plaintiff's counsel could allege, in order to take this case out of the general rule of the court, Lord Chancellor delivered his opinion as follows:

The general question is, as to the decree for specific performance, and this divides itself into two subordinate ones.

First, whether the plaintiff is entitled to seek his remedy in a court of equity for a specific performance.

Secondly, whether, as to the merits of his case, he is entitled to such a decree.

As to the first, I am of opinion that this is such an agreement, though for a personal chattel, that the plaintiff may come here to have a specific performance.

To be sure, in general this court will not entertain a bill for a specific performance of contracts of stock, corn, hops, etc., for as those are contracts which relate to merchandise, that vary according to different times and circumstances, if a court of equity should admit such bills, it might drive on parties to the execution of a contract, to the ruin of one side, when upon an action, that party might not have paid, perhaps, above a shilling damage.

Therefore, the court have always governed themselves in this manner, and leave it to law, where the remedy is so much more expeditious.

As to the cases of contracts for purchase of lands, or things that relate to realties, those are of a permanent nature, and if a person agrees to purchase them, it is on a particular liking to the land, and is quite a different thing from matters in the way of trade.

But, however, notwithstanding this general distinction between personal contracts, and for goods, and contracts for lands, yet there are indeed some cases where persons may come into this court though merely personal, and the plaintiff's counsel have cited a case in point, Taylor *v.* Neville, *vide* Colt *v.* Netterville, 2 P. W. 504.

That was for a performance of articles for sale of eight hundred tons of iron, to be paid for in a certain number of years, and by installments, and a specific performance was decreed.

Such sort of contracts as these differ from those that are immediately to be executed.[1]

[1] "Independently of the serious difficulty in this respect, I cannot help further making the observation that, notwithstanding the case of Taylor *v.* Neville and the approbation it met with from Lord HARDWICKE in Buxton *v.* Lister, it seems to me somewhat singular, looking to the large mercantile community of this country, that we do not find in the books since the case of Taylor *v.* Neville (a case not in Peere Williams, not reported at all, and apparently only cited from manuscript,) a single case of a bill for the performance of any contract for the mere supply of goods—cotton, wool, or the like, on the ground of their being supplied by instalments; no such case can be produced at any late period: and, with the exception of Buxton *v.* Lister, the only case in which the doctrine as to a delivery by instalments has been recognized is that of Adderley *v.* Dixon, a totally different case, where the agreement was for the purchase of the unascertained dividends which might become payable from a bankrupt's estate, and specific performance was decreed at the suit of the vendor—the Court holding that the purchaser as Plaintiff had a right to the specific thing he bought, and ought not

There are several circumstances which may occur.

A man may contract for the purchase of a great quantity of timber, as a ship-carpenter, by reason of the vicinity of the timber, and this on the part of the buyer.[1]

On the part of the seller, suppose a man wants to clear his land, in

to be sent to a court of law to try what damages he had sustained." Pollard *v.* Clayton, 1855, 1 K. & J. 462, 476. Per Sir WM. PAGE WOOD, V.C.

"The agreement being for a perpetual supply of marble, no decree the court can make will end the controversy. If performance be decreed, the case must remain in court forever, and the court to the end of time may be called upon to determine, not only whether the prescribed quantity of marble has been delivered, but whether every block was from the right place, whether it was sound, whether it was of suitable size, or shape, or proportion. Meanwhile the parties may be constantly changing. The marble company are liable so long as they hold the land, and Ripley's rights exist only while he holds the mill. It is manifest that the court cannot superintend the execution of such a decree. It is quite impracticable. And it is certain that equity will not interfere to enforce part of a contract, unless that part is clearly severable from the remainder. Ogden *v.* Fossick, 9 Jurist U. S. 238. Many of the difficulties in the way of decreeing specific performance of a contract, requiring, as this does, continuous personal action, and running through an indefinite period of time, are well stated in The Port Clinton Railroad Company *v.* The Cleveland and Toledo Railroad Company; Fry on Specific Performance, § 286." Marble Company *v.* Ripley, 1870, 10 Wall. 339, 358.

[1] "Now, in the case put by Lord HARDWICKE, time must have entered most materially into the contract. The shipwright might be under a contract to build a ship by a given time, and therefore it might be an object of great importance to him to have the wood supplies from the immediate neighbourhood, that he might get it without trouble, and so be enabled to complete the contract within the given time." Pollard *v.* Clayton, 1855, 1 K. & J. 462, 477.

"Applying these principles to the facts alleged in the complaint, it must follow, we think, that this is not a case which calls for the exercise of the equitable power of the court. The trees were purchased with a view to their severance from the soil and thus being converted into personal property. It is not shown that they have any peculiar value to the plaintiff, nor does there appear any circumstances from which it may be inferred that the breach of the contract may not be readily compensated for in damages. Neither is it shown that other trees may not be purchased, but it is simply alleged that they are scarce at the contract price. The simple fact that they are near a water-course does not alter the case, for the conveniences of transportation are elements which may be considered in the estimation of the damages. Neither is the circumstance that the plaintiff purchased a 'few trees of like kind' in the vicinity sufficient to warrant the equitable intervention of the court. We can very easily conceive of cases in which contracts of this kind may be specifically enforced, but we can see nothing in this complaint which calls for such extraordinary relief. The ruling of the court as to this branch of the case is sustained." Paddock *v.* Davenport, 1890, 107 N. C. 710, 717.

order to turn it to a particular sort of husbandry, there nothing can answer the justice of the case but the performance of the contract in specie.

In the case of John, Duke of Buckinghamshire *v.* Ward, a bill was brought for a specific performance of a lease relating to alum works, and the trade thereof, which would be greatly damaged if the covenant was not performed on the part of Ward.

The covenants lay there in damages, and yet the court considered if they did not make such a decree an action afterwards would not answer the justice of the case, and therefore decreed a specific performance.

This is something of the like kind; the memorandum appears not to be the final contract, but is to be made complete by subsequent articles.

I am doubtful whether at law the plaintiff would not have been told this was an incomplete agreement.[1]

Suppose two partners should enter into an agreement by such a memorandum as is in the present case, to carry on a trade together, and that it should be specified in the memorandum that articles should be drawn pursuant to it, and before they are drawn one of the parties flies off, I should be of opinion, upon a bill brought by the other in this court for a specific performance, that nothwithstanding it is in relation to a chattel interest, yet a specific performance ought to be decreed.

On the circumstances of the present case such a bill ought to be entertained, but at the same time I will add that courts ought to weigh with great nicety cases of this kind before they determine the bill proper, where it is a mere personal chattel.

Secondly, if the plaintiff on the merits of the case is entitled to a decree.

Nothing is more established in this court than that every agreement of this kind ought to be certain, fair, and just in all its parts.[2]

[1] "The plaintiff and defendant had submitted to an arbitrament by bond, and an award was made, not binding by form of law, by which the plaintiff was to pay the defendant £900, and to seal a release to the defendant; and the defendant was to assign several securities he had from the plaintiff. The plaintiff sold some lands to raise the £900, expecting the defendant would receive it, as he gave him intimation he would, and tendered him the £900 and a release executed by the plaintiff; and though there was no other execution on the plaintiff's part of the award, and though the award was extra judicial, and not good in strictness of law, yet the Lord Chancellor decreed it should be performed in specie." Per Lord JEFFERYS, C., in Norton *v.* Mascall, 1687, 2 Vern. 24.

[2] "The contract which is sought to be specifically executed ought not only to be proved, but the terms of it should be so precise as that neither party could reasonably misunderstand them. If the contract be vague or uncertain, or the evidence to establish it be insufficient, a court of equity will not exercise its extraordinary jurisdiction to enforce it, but will leave the party to his legal remedy." Colson *v.* Thompson, 1817, 2 Wheat. 336, 341.

"The next question which presents itself, and which is, in fact, the most

If any of those ingredients are wanting in the case, this court will not decree a specific performance.

For it is in the discretion of the court whether they will decree a specific performance, because otherwise, as I said before, a decree might be made which would tend to the ruin of one party.

One objection made by the defendant's counsel to the decreeing a specific performance was misrepresentation.

This depends upon the evidence of John Cooper, son of the defendant

important one involved in the case, is, whether the contract is so clearly and unequivocally proved, established so clearly and free from doubt, as to justify a court of equity in enforcing specific performance. Formerly, it is said, the court would make a contract for the parties, *ex æquo et bono*, out of their transactions, but such is not the rule now." Blanchard *v.* McDougall, 1858, 6 Wis. 165, 169.

"It is an elementary principle governing courts of equity in the exercise of this jurisdiction, that a contract will not be specifically enforced unless it is certain in its terms, or can be made certain by reference to such extrinsic facts as may, within the rules of law, be referred to, to ascertain its meaning. Fonblanque's Eq., bk. 1, chap. 3, § 7; Adams' Eq. 184; Buxton *v.* Lister, 3 Atk. 386; Lord Walpole *v.* Lord Oxford, 3 Ves. 420; Rose *v.* Cunynghame, 11 id. 555, note. 'Nothing,' said Lord HARDWICKE in Buxton *v.* Lister, 'is more established in this court, than that any agreement, in order to be executed by this court, must be certain and defined; and although uncertainty may be caused by an obstacle interposed by the defendant or by his default, the rule is not changed if the court, in order to enforce the contract, will be required to supply a new term to the agreement. Wilkes *v.* Davis, 3 Mer. 507; Dailey *v.* Whitaker, 4 Drew 134; Blundell *v.* Brettargh, 17 Ves. 232; Morgan *v.* Milman, 3 DeG., M. & G. 24. The plaintiff in such a case will be left to his remedy in an action for damages." Stanton *v.* Miller, 1874, 58 N. Y. 192, 200.

For an elaborate note on the question of Certainty in contracts to be specifically enforced see 26 Am. Dec. 661.

"No principle can be more sacred than that a man shall be compelled to perform his contract. In all cases where a court of equity has jurisdiction to enforce the specific performance of contracts, and persons voluntarily, without any fraud, accident, or mistake, enter into contracts, the jurisdiction should be exercised." Leech *v.* Schroeder, 1874, L. R. 9 Ch. App. 463, 467, n.

"Now, my Lords, the exercise of the jurisdiction of equity as to enforcing the specific performance of agreements, is not a matter of right in the party seeking relief, but of discretion in the Court—not an arbitrary or capricious discretion, but one to be governed as far as possible by fixed rules and principles. The conduct of the party applying for relief is always an important element for consideration. Now Dixon from first to last had not performed the agreement by making the vaults fit for the occupation of a wine merchant, of this opinion, as I have already remarked, were both the Master of the Rolls and the Lord Chancellor. He has, therefore, no merit in himself to entitle him to the consideration of the Court." Lamare *v.* Dixon, 1873, L. R. 6 H. L. 414, 423, per Lord CHELMSFORD.

Cooper, that his father offered the plaintiff £2,800, but he insisted on £3,500, and said Fenwick and Clark, two timber merchants, had valued it at so much, and that this was true on his honor, and when he said a thing on his honor the defendant ought to believe it.

Afterwards the defendants agreed to give £3,050 for the wood, on the opinion they had of Fenwick and Clark's judgment.

If this be true, it is an ingredient which will induce a court of equity not to decree a specific performance, for it comes out now that Fenwick and Clark did not set any greater valuation than £2,500 upon the timber, and this misrepresentation was the ground which induced the defendants to come into the agreement.

This fact is very particularly put in issue, and yet the plaintiff, who examined Okey and his wife that were present when this discourse passed, do not ask them as to this fact.

There is nothing inconsistent, therefore, in their deposition from Cooper's.

The next point is as to the preparation of the articles.

Whether there are defects or omissions which ought to have been inserted. . . .

The plaintiff insists the articles ought to be sent to the Master to see if there are usual covenants.

In case of land the plaintiff's counsel would have been right.

But a personal contract is quite different, because, when the defendants saw that the plaintiff would not insert these covenants they had no occasion to wait the event of a Chancery suit, but might go to another market to supply themselves.

Upon the whole, I am of opinion the bill must be dismissed, and if it was to be dismissed upon the misrepresentation it ought to be with costs; but what I would propose is, that if the plaintiff will consent to give up the agreement, I will dismiss it without costs; but if he will bring an action, then with costs.

The plaintiff waving the agreement, his Lordship decreed accordingly.

NEWBERY *v.* JAMES.

IN CHANCERY, BEFORE LORD CHANCELLOR ELDON, 1817.

[2 *Merivale* 446.]

The Bill stated that Dr. Robert James deceased, "being the inventor and proprietor of certain pills for the gout, rheumatism, &c. and of a certain powder for the cure of fever, etc., and being desirous to extend the circulation and use of the said medicines, and thereby to increase the "profits to arise therefrom," applied to Newbery (the Plaintiff's late

father) to assist him in such design, which Newbery agreed to do upon the terms after-mentioned; and that thereupon certain articles of agreement were made and entered into between them, whereby James, for himself, his heirs &c. covenanted with Newbery, his executors &c. that he, James, his executors, &c. should, during the term of twenty-one years, prepare and make the aforesaid pills, and sell and deliver the same to Newbery at a certain rate therein mentioned, and should also prepare and make the aforesaid powder, and sell and deliver the same to Newbery at the rate therein mentioned, when and as often as he should have occasion to require the same respectively, to supply his customers; and should not sell or cause to be sold any of the said medicines, during the term, to any other person or persons, (except in the course of his own private practice, and then not in the same form, or under the same title, nor at a lower rate than Newbery should sell the same to his customers); and, in order to protect the secret of preparing all or any of the said medicines from being lost, he thereby further covenanted to instruct Newbery in the true art and method of making and preparing the same, and to be at an equal expense with Newbery in obtaining a patent; Newbery on his part covenanting during the term to take the medicines from James as he should have occasion, and not to make or prepare, or cause or procure to be made or prepared, by any other person or persons, nor to discover or make known to any person or persons the secret, art, or mystery of making or preparing, any of the said medicines, so long as James should continue to supply him: but to be at liberty to leave an account in writing, sealed up, how to prepare the same, to be opened by his representatives after his death, in order to instruct them therein.

The original parties died. Newbery bequeathed his interest under the agreement to the Plaintiff, who afterward entered into a separate agreement with James concerning certain "Analeptic Pills." On James's death he bequeathed all pills and powders then made, and all that his son R. H. James should make, to the Plaintiff and another as executors, upon trusts mentioned. The Plaintiff and R. H. James conducted the business as formerly until the death of James who bequeathed in trust for his minor son, R. G. G. James, during minority.

The Defendants, R. G. G. James, R. H. James's executors, and others interested, having now threatened to break the contract by betraying the secret, refusing to supply Plaintiff with pills, and powders, &c., the Plaintiff seeks an injunction and specific performance of the agreement.[1]

The LORD CHANCELLOR said, the difficulty in such a case was, how to decree the specific performance of the agreement. Either it was a secret, or it was none. If a secret, what means did the Court possess of interfering so as to enforce its own orders?—if none, there was no ground for interfering. The injunction being already granted *ex parte,* afforded no reason for its continuance, even though the answer had not materially varied the case made by the bill; it being granted without prejudice to

[1] The statement of facts has been abridged.

any question that might be made in the cause. In this case, the medicines in question were the subject of a patent which had expired; and the agreement which the bill sought to enforce was an agreement, by which, independently of the patent, the proprietors had entered into covenants not to sell that which was the subject of the patent, except to each other. But, in order to support a patent, the specification should be so clear, as to enable all the world to use the invention as soon as the term for which it has been granted is at an end. Then, with regard to the Analeptic pills, for which no patent had been procured, if the art and method of preparing them were a secret, what signified an injunction, the Court possessing no means of determining on any occasion whether it had or had not been violated? This Court could do nothing but put the parties in a way to try their legal rights by an action. That was the utmost extent to which it would go, and he would not even order the injunction to be continued in the meantime till an action should be tried. The only way by which a specific performance could be affected, would be by a perpetual injunction; but this would be of no avail, unless a disclosure were made to enable the Court to ascertain whether it was or was not infringed; for, if a party comes here to complain of a breach of injunction, it is incumbent on him first to shew that the injunction has been violated.

His Lordship concluded by saying, that he thought he ought not to continue the injunction; and that, if he did not mention the case again, his opinion must be considered to be that the injunction must be dissolved,—the Defendants to keep an account of what they sell,—and the Court to give the parties the means of trying their rights in an action, by removing out of their way the difficulty arising from the circumstance of the Plaintiff being one of Dr. James's executors.[1]

[1] "Now, the business of an attorney consists in his being employed by others, from the confidence which they repose in his skill and integrity. In what way, then, is the Court to decree the transfer of such a business? What is it that I am to direct Mr. Bozon to do towards the fulfilment of his part of the contract? The Court must be able to prescribe to both parties what it is that they are reciprocally to perform. The very ground on which the jurisdiction of a court of equity in decreeing a specific performance is founded is, that it is able to give possession of the very thing which is the subject of the agreement, and which a court of law cannot do." Per Sir WILLIAM GRANT, M.R., in Bozon *v.* Farlow, 1816, 1 Merivale, 459, 472.

". . . The Court certainly will not execute a contract for the sale of a good will, at the same time it will not enjoin against any proceeding at law under such an agreement—suppose, for instance, there is a contract for the goodwill of a shop; it cannot be conveyed, and the Court would say, go and make what you can of it at law; if you can recover, very well, we won't prevent you; if you cannot, very well again, we won't assist you." Per Lord Chancellor ELDON in Baxter *v.* Connolly, 1820, 1 Jac. & W. 576, 580.

LEWIS *v.* BOND.

IN CHANCERY, BEFORE SIR JOHN ROMILLY, M. R.,[1] 1853.

[18 *Beavan* 85.]

In 1846 the Defendant Bond obtained a building lease for ninety-nine years under the Marquis of Bute, which contained a covenant against carrying on a beer-shop or any offensive trade upon the premises, and a proviso for re-entry on breach of the covenants.

The Defendant subsequently agreed to grant a lease of the premises to the Plaintiff with the usual covenants. The Plaintiff entered into possession before any under-lease had been granted, and he opened a beer-shop; and, persisting in this course of conduct, the Defendant ejected him. The Plaintiff filed this claim for the specific performance of the agreement for a lease.

THE MASTER OF THE ROLLS [SIR JOHN ROMILLY]. What I have to consider is, whether the Plaintiff is entitled to a specific performance of the lease for fourteen years on the terms to be determined in Chambers. I am of opinion that the circumstances of the case preclude the Plaintiff from such specific performance. The Plaintiff takes the agreement, knowing that the Defendant is tenant under the Marquis of Bute. That is itself constructive notice of the lease, and he must be deemed to have known that the Defendant could only grant a lease with such restrictions as those under which he held.

The evidence is distinct that the Plaintiff was aware of the covenant in the lease in 1852, for, in that year, he applied to the trustees of the Marquis of Bute as to the question arising from the carrying on of a beer-shop. If up to that time there was a waiver as to the past, there was no promise that the objectionable trade might be carried on for the future. It was expressly said that they could make no agreement on the subject. There can be no question but that the Plaintiff continued to carry on the same business, and the continuance of the breach of covenant gave a right of re-entry.

In September the Defendant gave the Plaintiff notice to quit, with an

[1] SIR JOHN, later Lord ROMILLY, was the son of the great Sir Samuel, and as such was a legacy to the Whig party. This, more than ability, accounts for the rapid promotion and the position he ultimately held. The cases before him were numerous, and he was a great favorite with the Bar.

"The characteristic of his mind was indeed rather industry than breadth or grasp. As a judge he was unusually conscientious and painstaking. His decisions were extremely numerous, and in a very large number of cases were reported, but they were somewhat often reversed on appeal. He was prone to decide causes without sufficiently considering the principles they involved and the precedents by which they were governed." Dictionary of National Biography. Article, Romilly, Sir John.

intimation that if he relinquished the objectionable trade he might continue possession of the premises. He chose to continue it, and to commit a forfeiture.

It is true that this Court will relieve in some cases, though in others it will not, as in the case of a breach of a covenant to insure. But the Court will not compel a grant of that which, if already granted, would have been forfeited.

I am of opinion that I cannot grant a specific performance in this case. It is a trifling suit for £2 a year, and the Plaintiff must pay the costs.[1]

[1] "It is admitted, that this Court will never decree the specific performance of an agreement, if it is clear, that covenants must of necessity be introduced into the instrument, to be executed, that the party, resisting the performance, may immediately take advantage of, to deprive the other of all benefit from that instrument. But it ought to appear clearly, that such will be the case: otherwise the proper, and the safest, course would be to direct the execution; and then allow the other to avail himself, if he can, of any breach of covenant; for that question, whether a covenant has been broken, or not, if there is any doubt of the fact, is more proper for the determination of a Court of Law and a jury." Per Sir WILLIAM GRANT, M.R., in Jones *v.* Jones, 1806, 12 Ves. 186, 188.

"I think that the cases of Gregory *v.* Wilson, 9 Hare 683, and Lewis *v.* Bond, 18 Beav. 85, are well decided, and I mean entirely to be bound by the doctrine there laid down. If there has been a breach of the agreement, that is to say, if there has been what would have amounted to such a breach of any covenant, which ought to have been introduced into the lease (had it been granted) as would have worked a forfeiture, and that is clearly made out, then that is an answer to the bill, and specific performance should not be decreed. See Fry Specif. Perfm. 2d Am. ed., 382, § 640." Per Lord Chancellor CAMPBELL in Rankin *v.* Lay, 1860, 2 DeG. F. & J. 65, 72.

"With respect to the object of this covenant, no one ever heard of this Court executing an agreement for a partnership, when the parties might dissolve it immediately afterwards." Per Lord Chancellor ELDON in Hercy *v.* Birch, 1804, 9 Ves. 357, 360.

"Although a court of equity will not ordinarily decree specific performance of an agreement to form a partnership, which may be immediately dissolved by either party, it will secure to a partner the interests in property to which by the partnership agreement he is entitled." Per GRAY, C.J., in Somerby *v.* Buntin, 1875, 118 Mass. 279, 287.

"It is a rule in equity that the court will not decree a specific performance where it has no power to enforce the decree. Hence partnership articles will not be enforced, especially where no time is fixed for its continuance, as either party may dissolve it at pleasure. And even where a time is fixed it is difficult to see how the decree can be enforced. Take this case as an illustration; is the court to keep its hand on the parties for seventeen years and compel them to carry on this business?" Per CARPENTER, J., in Morris *v.* Peckham, 1883, 51 Conn. 128, 133. And see also Buck *v.* Smith, 1874, 29 Mich. 166; Meason *v.* Kaine, 1869, 63 Pa. St. 335.

In Satterthwait *v.* Marshall, 1872, 4 Del. Ch. 337, 353, Chancellor BATES said:

TAYLOE *v.* MERCHANTS' FIRE INSURANCE COMPANY.

IN THE SUPREME COURT OF THE UNITED STATES, 1850.

[9 *Howard* 390.]

This was an appeal from the Circuit Court of the United States for the District of Maryland.

A decree *pro forma* was entered upon the agreement of the parties dismissing a bill filed by Tayloe praying that the defendant be decreed to pay the plaintiff the amount of the loss suffered by him in consequence of the destruction by fire of property which the defendant had agreed to insure. The property had been burned after the making of the con-

"It will be observed, then, that the rule relied on in the argument, that a court of equity will not decree the specific performance of an agreement for a partnership at will, does not apply to this case. Upon a review of the cases under that rule, the meaning and whole extent of it will be found to be, that the Court will not undertake to compel unwilling parties *to act in the relation of partners*. In the case of a partnership at will, to do so would infringe the right of either party to terminate the partnership at pleasure; and even in the case of a partnership for a term, such a degree would seem to be impracticable of execution. But courts of equity do, in many cases, decree the specific performance of covenants entered into by partners with each other, where the thing to be done is some single specific act of the contracting partner, such as a decree can practically enforce, of which the most familiar illustration is an agreement between partners to execute some final instrument. Hence, an agreement for the future execution of formal articles of partnership will be enforced in equity, although after the articles shall be executed, the Court cannot compel the parties to act under them.

"Before leaving this topic let us observe more directly that the inability of the Court to compel these parties to become or to continue co-partners under the articles, is no objection to a decree for the specific performance of the covenant to assign shares of the patent. It is a principle, running through the cases before cited, that under a covenant for the execution of an instrument preparatory to, or in any way connected with a partnership by which the legal position of the parties would be altered, the party covenanted with ought to be placed, by the execution of the instrument, in the legal position agreed upon,—that he should be clothed with the legal rights stipulated for; and to this extent a court of equity will aid him, even though the partnership, being at will, may be immediately dissolved, or may not be formed. Collyer on Part. Sec. 206; Gow. on Part. 110; Story on Part. 189, note. It is the same principle as that upon which the Court will decree the execution of a lease even after the term for which it was to continue has expired, in order to clothe the party with such legal rights as would have attached under the lease had it been executed. Nesbitt *v.* Meyer, 1 Swans. 222; Wilkinson *v.* Torkington, 2 Y. & C. Exch. 726."

And see Burdick on Partnership, 2d ed., p. 13.

tract for insurance, but before the company had had an opportunity to issue a policy. The company refused to issue a policy.

The bill also contained a prayer for general relief.[1]

Mr. Justice NELSON delivered the opinion of the court.

III. It has also been objected, that the plaintiff had an adequate remedy at law, and was not, therefore, under the necessity of resorting to a court of equity; which may very well be admitted.[2]

But it by no means follows from this that a court of chancery will not entertain jurisdiction. Had the suit been instituted before the loss occurred, the appropriate, if not the only, remedy would have been in that court, to enforce a specific performance, and compel the company to issue a policy. And this remedy is as appropriate after as before the loss, if not as essential, in order to facilitate the proceedings at law. No doubt a count could have been framed upon the agreement to insure, so as to have maintained the action at law. But the proceedings would have been more complicated and embarrassing than upon the policy. The party, therefore, had a right to resort to a court of equity to compel the delivery of the policy, either before or after the happening of the loss; and being properly in that court after the loss happened, it is according to the established course of preceeding, in order to avoid delay and expense to the parties, to proceed and give such final relief as the circumstances of the case demand.

Such relief was given in the case of Motteux *v.* The London Assurance Company, 1 Atk. 545, and in Perkins *v.* The Washington Insurance Company, 4 Cow. 646. See also 1 Duer 66, 110, and 2 Phillips 583.

As the only real question in the case is the one which a court of equity must necessarily have to decide, in the exercise of its peculiar jurisdiction in enforcing a specific execution of the agreement, it would be an idle technicality for that court to turn the party over to his remedy at law upon the policy. And, no doubt, it was a strong sense of this injustice that led the court at an early day to establish the rule that, having properly acquired jurisdiction over the subject for a necessary purpose, it was the duty of the court to proceed and do final and complete justice between the parties, where it could as well be done in that court as in proceedings at law.

[1] The above statement of facts has been substituted for the Reporter's statement of facts.

[2] Only so much of the opinion is given as relates to this question and the prayer for relief.

WILLARD *v.* TAYLOE.

IN THE SUPREME COURT OF THE UNITED STATES, 1869.

[8 *Wallace* 557.]

Appeal from the Supreme Court of the District of Columbia.

This was a suit in equity for the specific performance of a contract for the sale of certain real property situated in the City of Washington, in the District of Columbia, and adjoining the hotel owned by the complainant Willard, and known as Willard's Hotel.

The facts out of which the case arose were as follows:[1]

In April, 1854, the defendant leased to the plaintiff certain premises, generally known in Washington as "The Mansion House," for a period of ten years, with an option of purchasing, at a stated price, at any time within the term. When the lease was made, gold and silver, or bank bills convertible on demand into it, were the ordinary money of the country, and the standard of values. Owing to conditions resulting from the war, the property during the period of the lease greatly increased in value.

Two weeks before the expiration of the lease, the plaintiff notified the defendant by letter of his election to purchase, and enclosed a check for the first payment. The defendant returned the check on the following morning with a statement that he had no time to look into the matter. During the following two weeks, the plaintiff made several further but ineffectual attempts to complete the purchase, and offered United States notes for the purchase price. On one of these occasions he tendered a deed to which no objection was made. The defendant insisted the payment should be in gold, and based his objection to performance principally on this ground.

Soon afterwards the defendant left the city of Washington, with the intention of being absent until after the 1st of May.

On the 29th of April the complainant, finding that the defendant had left the city, and perceiving that the purchase was not about to be compelled within the period prescribed by the covenant in the lease, and apprehensive that unless legal proceedings were taken by him to enforce its execution his rights thereunder might be lost, instituted the present suit.

Mr. Justice FIELD, after stating the facts of the case, delivered the opinion of the court, as follows:

The covenant in the lease giving the right of option to purchase the premises was in the nature of a continuing offer to sell. It was a proposition extending through the period of ten years, and being under seal must be regarded as made upon a sufficient consideration, and, therefore, one from which the defendant was not at liberty to recede.

[1] A statement of facts is substituted for the statement in the report.

When accepted by the complainant by his notice to the defendant a contract of sale between the parties was completed. Boston and Maine Railroad Company *v.* Bartlett, 3 Cushing 224; Welchman *v.* Spinks, 5 Law Times, N. S. 385; Warner *v.* Willington, 3 Drewry 523; Old Colony Railroad *v.* Evans, 6 Gray 25. This contract is plain and certain in its terms, and in its nature and in the circumstances attending its execution appears to be free from objection. The price stipulated for the property was a fair one. At the time its market value was under fifteen thousand dollars, and a greater increase than one-half in value during the period of ten years could not then have been reasonably anticipated.

When a contract is of this character it is the usual practice of courts of equity to enforce its specific execution upon the application of the party who has complied with its stipulations on his part, or has seasonably and in good faith offered and continues ready to comply with them. But it is not the invariable practice. This form of relief is not a matter of absolute right to either party; it is a matter resting in the discretion of the court, to be exercised upon a consideration of all the circumstances of each particular case. The jurisdiction, said Lord ERSKINE, 12 Vesey, Jr., 332, "is not compulsory upon the court, but the subject of discretion. The question is not what the court must do, but what it may do under [the] circumstances, either exercising the jurisdiction by granting the specific performance or abstaining from it."

And long previous to him Lord HARDWICKE and other eminent equity judges of England had, in a great variety of cases, asserted the same discretionary power of the court. In Joynes *v.* Statham, 3 Atkyns 388, Lord HARDWICKE said: "The constant doctrine of this court is, that it is in their discretion, whether in such a bill they will decree a specific performance or leave the plaintiff to his remedy at law." And in Underwood *v.* Hitchcox, 1 Vesey, Sen., 279, the same great judge said, in refusing to enforce a contract: "The rule of equity in carrying agreements into specific performance is well known, and the court is not obliged to decree every agreement entered into, though for valuable consideration, in strictness of law, it depending on the circumstances."

Later jurists, both in England and in the United States, have reiterated the same doctrine. Chancellor KENT, in Seymour *v.* Delaney, 6 Johnson's Chancery 222, upon an extended review of the authorities on the subject, declares it to be a settled principle that a specific performance of a contract of sale is not a matter of course, but rests entirely in the discretion of the court upon a view of all the circumstances; and Chancellor BATES, of Delaware, in Godwin *v.* Collins, recently decided, upon a very full consideration of the adjudged cases, says that a patient examination of the whole course of decisions on this subject has left with him "no doubt that, as a matter of judicial history, such a discretion has always been exercised in administering this branch of equity jurisprudence."

It is true the cases cited, in which the discretion of the court is asserted, arose upon contracts in which there existed some inequality or unfairness in the terms, by reason of which injustice would have followed a specific performance. But the same discretion is exercised where the contract is fair in its terms, if its enforcement, from subsequent events, or even from collateral circumstances, would work hardship or injustice to either of the parties.

In the case of the City of London *v.* Nash, 1 Vesey, Sen., 12, the defendant, a lessee, had covenanted to rebuild some houses, but instead of doing this he rebuilt only two of them, and repaired the others. On a bill by the city for a specific performance Lord HARDWICKE held that the covenant was one which the court could specifically enforce; but said, "the most material objection for the defendant, and which has weight with me, is that the court is not obliged to decree a specific performance, and will not when it would be a hardship, as it would be here upon the defendant to oblige him, after having very largely repaired the houses, to pull them down and rebuild them." In Faine *v.* Brown, cited in Ramsden *v.* Hylton, 2 Vesey, Sen., 306, similar hardship, flowing from the specific execution of a contract, was made the ground for refusing the decree prayed. In that case the defendant was the owner of a small estate, devised to him on condition that if he sold it within twenty-five years one-half of the purchase-money should go to his brother. Having contracted to sell the property, and refusing to carry out the contract under the pretence that he was intoxicated at the time, a bill was filed to enforce its specific execution, but Lord HARDWICKE is reported to have said that, without regard to the other circumstance, the hardship alone of losing half the purchase-money, if the contract was carried into execution, was sufficient to determine the discretion of the court not to interfere, but to leave the parties to the law.

The discretion which may be exercised in this class of cases is not an arbitrary or capricious one, depending upon the mere pleasure of the court, but one which is controlled by the established doctrines and settled principles of equity. No positive rule can be laid down by which the action of the court can be determined in all cases. In general it may be said that the specific relief will be granted when it is apparent, from a view of all the circumstances of the particular case, that it will subserve the ends of justice; and that it will be withheld when, from a like view, it appears that it will produce hardship or injustice to either of the parties. It is not sufficient, as shown by the cases cited, to call forth the equitable interposition of the court, that the legal obligation under the contract to do the specific thing desired may be perfect. It must also appear that the specific enforcement will work no hardship or injustice, for if that result would follow, the court will leave the parties to their remedies at law, unless the granting of the specific relief can be accompanied with conditions which will obviate that result. If that result can be thus obviated, a specific performance will generally in such

cases be decreed conditionally. It is the advantage of a court of equity, as observed by Lord REDESDALE in Davis *v.* Hone, 2 Schoales & Lefroy 348, that it can modify the demands of parties according to justice, and where, as in that case, it would be inequitable, from a change of circumstances, to enforce a contract specifically, it may refuse its decree unless the party will consent to a conscientious modification of the contract, or, what would generally amount to the same thing, take a decree upon condition of doing or relinquishing certain things to the other party. . . .

Upon a full consideration of the positions of the defendant we perceive none which should preclude the complainant from claiming a specific performance of the contract.

The only question remaining is, upon what terms shall the decree be made? and upon this we have no doubt.

The parties, at the time of the proposition to sell, embodied in the covenant of the lease, was made, had reference to the currency then recognized by law as a legal tender, which consisted only of gold and silver coin. It was for a specific number of dollars of that character that the offer to sell was made, and it strikes one at once as inequitable to compel a transfer of the property for notes worth, when tendered in the market, only a little more than one-half of the stipulated price. Such a substitution of notes for coin could not have been in the possible expectation of the parties. Nor is it reasonable to suppose, if it had been, that the covenant would ever have been inserted in the lease without some provision against the substitution. The complainant must, therefore, take his decree upon payment of the stipulated price in gold and silver coin. Whilst he seeks equity he must do equity.

The decree of the court below will, therefore, be reversed, and the cause remanded with directions to enter a decree for the execution, by the defendant to the complainant, of a conveyance of the premises with warranty, subject to the yearly ground-rent specified in the covenant in the lease, upon the payment by the latter of the installments past due, with legal interest thereon, in gold and silver coin of the United States, and upon the execution of a trust deed of the premises to the defendant as security for the payment of the remaining installments as they respectively become due, with legal interest thereon, in like coin; the amounts to be paid and secured to be stated, and the form of the deeds to be settled by a Master; the costs to be paid by the complainant.

The Chief Justice with NELSON, J., concurred in the conclusion as above announced—that the complainant was entitled to specific performance on payment of the price of the land in gold and silver coin—but expressed their inability to yield their assent to the argument by which, in this case, it was supported.[1]

[1] "NEWTON [J.C.P.]. If I sell twenty-four acres of land for £20, although I do not enfeoff him [the buyer], still I shall have against him good action of debt: and other remedy has he not [except] that he has action on the case

B. Affirmative Contracts.

FELLS *v.* READ.

In Chancery, before Lord Chancellor Loughborough,[1] 1796.

[3 *Vesey* 70.]

The Plaintiffs were members of a club, called "The Past Overseers of St. Margaret's Parish, Westminster," which consisted of persons, who had served the office of Overseer of the Poor of that parish. This society had been for a long period in possession of a silver tobacco-box inclosed in two large silver cases, all of which were adorned with several engravings of public transactions and heads of distinguished persons. The date of the box did not appear in the cause: but the ornaments, which had been added by different overseers during the time the box and cases remained in their custody, began in the year 1713. This box and the

against me: and it shall be adjudged his folly, that he took not better security of me to make the feoffment to him. . . . Newton. Although the sale is of land, you may wage your law. Year Book, 22 Hen. 6, 43." 1444, 1 Cooper's Rep. App. 552.

"And in like manner, if one bargains with me, that I shall have his land to me and my heirs for £20, and that he will convey to me, if I pay him the £20, if he does not choose to convey to me according to the covenant, I shall have action upon my case, and have no need to sue out a subpœna. Year Book, 221 Hen. 7, 41." 1505-6. 1 Cooper's Rep. App. 551.

In Kitchen *v.* Herring, 1851, 7 Ired. Eq. 190, 192, Pearson, J., in decreeing the specific performance of a contract to convey land said:—

"The principle in regard to land was adopted, not because it was fertile or rich in minerals, or valuable for timber, but simply because it was land—a favorite and favored subject in England, and every country of Anglo-Saxon origin. Our constitution gives to land pre-eminence over every other species of property; and our law, whether administered in courts of law or of equity, gives to it the same preference. Land, whether rich or poor, cannot be taken to pay debts until the personal property is exhausted. Contracts concerning land must be in writing. Land must be sold at the Court House, must be conveyed by deeds duly registered, and other instances 'too tedious to mention.' The principle is, that land is assumed to have a peculiar value, so as to give an equity for a specific performance, without reference to its quality or quantity."

[1] Wedderburn, later Lord Loughborough, and Earl of Rosslyn, was more of a place than a case hunter. "As an equity judge, Loughborough attained a very modest reputation. But his decrees were well considered, and were couched in clear and forcible language." So says the Dictionary of Nat. Biography. The judgment of Foss is more generous: "Though not regarded as very deep or learned in his profession, not having the credit of intro-

cases were always kept by the overseer for the time being; who, upon coming into office, received them from the churchwarden with a particular charge, in which he was enjoined, under a penalty, to produce them at all meetings of the society, and to deliver them up on going out of office to the senior churchwarden, to be by him delivered to the succeeding overseer. They were delivered in the usual form to the Defendant Read, on his coming into office as overseer. On going out of office he refused to deliver them up, unless the vestry would pass his accounts; in which they had refused to allow him certain payments. Upon this a meeting was called; and it was resolved by those members, who attended, that legal steps should be taken; and after some negotiation an action was brought; and Read was arrested. Hanley and Byfield, two of the members, in whose name the action was brought, executed a release to Read; who delivered the box and cases to Hanley. An application was made to Mr. Justice Buller at chambers to set aside the release: but that application failed. The bill was then filed against Read, Hanley, and Byfield, to have the box and cases delivered up. They were ordered to be placed in the custody of Master Leeds.

It was proved by Carteret, that the box and cases were delivered to Read under the usual injunctions and conditions: *to which he expressly consented.* The Defendants, Hanley and Byfield insisted, that the action was commenced without their authority. They did not attend the meeting: but it was regularly called.

Lord Chancellor [Loughborough]. I am sorry this cause has come into this Court: but the regret I feel is no other than that one always feels that litigation and expense should have been occasioned by the peevishness and obstinacy of the parties. The value I cannot measure. The Pusey horn, the *Patera* of the Duke of Somerset, were things of that sort of value, that a jury might not give two-pence beyond the weight. It was not to be cast to the estimation of people, who have not those feelings. In all cases, where the object of the suit is not liable to a compensation by damages, it would be strange, if the law of this country did not afford any remedy. It would be great injustice, if an individual

ducing any improvements in the practice of the Court, he had considerable reputation as an equity judge. His decrees were well considered, and were seldom overturned; they were always delivered in forcible and elegant language and were remarkable for the perspicuity of the argument by which they are enforced."

To the American student Loughborough is of more than passing interest, because it was he who examined Dr. Franklin before the Privy Council in 1774, the results of which are not inaptly summed up in the following contemporary verse:

"Sarcastic Sawney, full of spite and hate,
On modest Franklin poured his venal prate;
The calm philosopher, without reply,
Withdrew—and gave his country liberty."

cannot have his property without being liable to the estimate of people, who have not his feelings upon it. But this has very particular circumstances; for if no such cases as those cited had occurred, if this had come here originally, it is impossible, that I should not have permitted the suit to stand. In the case of the Pusey horn in Vernon it does not appear, how the Defendant got it.

In the case of the Duke of Somerset the *Patera* was in the possession of a goldsmith, who bought it in the way of trade with notice of the claim of the Duke of Somerset. But in this case the possession is by a qualified title. It was delivered upon an express trust to keep it and produce it at the meetings of the club, and at the expiration of his office to deliver it over to the senior churchwarden, in order that he might give it to the next overseer. He accepts it upon that condition. The witness Carteret states his express assent to the conditions. Had he then any right to retain this possession against the terms, upon which it was delivered to him? He was a depositary upon an express trust; and he does not perform the trust. Upon the common ground of equity there was a right in the Plaintiffs to have called upon him, in the first place during the term to have used it according to the trust. That would be a small subject of a suit in equity: but if he had not produced it at the meeting, I must have compelled it; so, if he retains it after the expiration of the term, I must compel him to use it according to the trust. There was a legal remedy; and I think, it was done very wisely not to begin in equity. There was another remedy, which did not occur to them. Upon the terms of Carteret's evidence the person, to whom Read was bound at the time to deliver it, might have been Plaintiff in *assumpsit*. The conduct of these Defendants is perfectly groundless: the idea, that by keeping possession of this ornament he would compel the vestry to allow his accounts. As to Hanley and Byfield, it is not necessary for me to determine it, but I incline to think, they would be bound to let the others make use of their names: but an indemnity as to the costs was the utmost they could have been entitled to. It is unfortunate, that the application made to the Court of Law did not succeed to set aside the release. I am then to judge of the conduct of the parties, not with regard to the ground of the decree, but upon the nature of the possession coupled with a trust. There was a proper ground as much as in any case. Where the right is not to use the thing as his own, but coupled with a trust to deliver it at a certain time, there is a clear jurisdiction upon the ordinary equity to compel the execution of the trust by the delivery of the thing at the time. But the conduct was extremely bad in Read; and not better in those, who conspired with him to frustrate the purpose of the trust and act contrary to it.

Declare the Plaintiffs entitled to the possession of this box. Let them receive it from the Master's office. Let all the Defendants pay the costs; and let the Defendant Read pay the costs at law.[1]

[1] In Pooley *v.* Budd, 1851, 14 Beav. 42, an Iron Company through their

WOOD *v.* ROWCLIFFE, 1847, 2 Phillips 382, 383.—The Lord Chancellor [COTTENHAM] said—The cases which have been referred to, are not the only class of cases in which this Court will entertain a suit for delivery up of specific chattels. For, where a fiduciary relation subsists between the parties, whether it be the case of an agent or a trustee, or a broker, or whether the subject matter be stock, or cargoes, or chattels of whatever description, the Court will interfere to prevent a sale, either by the party entrusted with the goods, or by a person claiming under him, through an alleged abuse of power. In this case there is great reason to believe that Elizabeth Wright never had any right to the goods except as the

agents sold to one Scale a certain quantity of iron, taking in exchange therefor a bill accepted by a third party. Scale then mortgaged the iron to the plaintiff. Later the bill was dishonored. The plaintiff demanded the iron under his mortgage. The defendant refused to deliver.

Sir JOHN ROMILLY, M. R. said:

"The principles affecting these cases are now well settled in courts of equity. On the one hand, it is and has long been the law of this Court, that it will not lend its assistance to enforce the specific performance of ordinary contracts for the sale and purchase of personal chattels, unless, as in the case of Buxton *v.* Lister, there be something very special in the nature of the contract. On the other hand, if a trust be created, the circumstance that the subject matter to which the trust is attached is a personal chattel, will not prevent this court from enforcing the due execution of that trust. . . .

"Trusts, however, may be constituted not merely by direct declaration of trust, but also by constructive operation of the consequence flowing from the acts of the persons themselves. Thus, equity will not merely enforce the execution of a trust against the trustees themselves, but against all persons who obtain possession of the property affected by the trust, provided they had notice of the trust. . . .

"It does not, therefore, in my apprehension, make any difference in this respect, that the property is real or personal property. It is true, that when a contract is entered into for the sale of real property, the vendor is a trustee of the estate of the purchaser, and the vendee is a trustee of the purchase-money for the seller from the moment that the contract is concluded, and it is also true, that if a contract for the sale of a personal chattel is entered into, no such relation between vendor and vendee arises. And this is, because equity has jurisdiction to enforce the specific performance of a contract for sale in one case and not in the other; and as equity treats the parties to a contract enforcible here, as being in the same situation as if they had actually done that which equity considers them bound to do, and will compel them to do so, the relation of trustee and *cestui que trust* springs from the contract only, in those cases in which equity will compel the specific performance of it.

"It is therefore important to bear in mind, in this case, that, as equity would not enforce the specific performance of the contract for the sale and delivery of the iron, the relation of trustee and *cestui que trust* cannot spring merely from the contract, and that, if it exists at all, it must be shewn to exist from something beyond the mere contract entered into between the

Plaintiff's agent, for she has disclaimed all interest in them by her answer, and there is nothing to shew how she had acquired any property in them. But, says Rowcliffe, I purchased under circumstances which give me a legal right to the goods. If that be so, the equity of the Plaintiff will be intercepted by a prior legal right. In such a case this Court begins by putting the matter into a course of investigation to ascertain that legal right. That is what the Vice-Chancellor has done. And in that respect I see no ground for impeaching the decree.

DOWLING *v.* BETJEMANN.

IN CHANCERY, BEFORE SIR W. PAGE WOOD, V. C.,[1] 1862.

[2 *Johnson and Hemming* 544.]

The plaintiff was an artist, and the defendants, H. J. and G. S. Betjemann, carried on business as upholsterers in Oxford Street, and had also had dealings in pictures. In the month of May, 1861, the plaintiff, who had painted a picture of "The Raising of Lazarus," entered into an agreement with Messrs. Betjemann, by the terms of which, the defendants were to have, for two years, the exclusive right to engrave and exhibit the picture; the defendants paying for this privilege, on or before Nov. 1, 1862, £150. It was further agreed, that upon payment of a second sum of £150, on or before Nov. 1, 1863, the defendants should become the absolute owners of the picture; that the defendants should insure the picture; and that if they failed in any part of their contract, the picture should be surrendered on demand. The Betjemanns did not have the picture engraved, and paid only £50 of the £150 due in 1862.

Company and Scale for the sale and delivery of iron. At the same time, if the contract were complete so far as the Company were concerned,—that is to say, if they had been paid every penny they were entitled to, and if they had no claim upon or interest in the iron arising from the contract, and the contract only remained unperformed to this extent, that the iron had not been delivered to the purchaser,—I should entertain no doubt, but that the Company would, then and thereby, become mere trustees of the iron sold, for the benefit of the real purchaser or the person entitled to claim it under him."

[1] Sir WM. PAGE WOOD, later Lord Chancellor HATHERLEY, was regarded as an eminently sound lawyer and judge, and a man of saintly character.

"As a lawyer, HATHERLEY was learned, sound and industrious; he was a good and efficient judge, and distinguished above most of his colleagues. His decisions were rarely appealed from, and reversed more rarely still. Outside the law he had many activities and interests." Dictionary of National Biography, article, Wood, William Page.

On March 8, 1862, they sold, for £375, the picture to the defendant Gotto, who denied any notice or suspicion that the defendants were not the sole owners. Concealing this sale from the plaintiff, the Betjemanns attempted to buy the picture for a total of £200 instead of £300. On learning of the sale, the plaintiff demanded the picture from both the Betjemanns and Gotto, who refused to return it. The plaintiff now brings his bill demanding either judgment for the £250, or in the alternative a return of the picture, he to pay back the £50 received.[1]

VICE-CHANCELLOR [Sir W. PAGE WOOD]. This case involves some points of considerable interest; but from the first it has appeared to me that the great difficulty on the part of the plaintiff was in making out the jurisdiction of this court to interpose in a case so circumstanced as the present. That the court has jurisdiction to order the delivery of a specific chattel of a peculiarly valuable kind, such as a picture, I have never entertained a doubt; but the observations in Fells *v.* Reed and cases of that class apply only to chattels of which the value cannot be properly ascertained by a jury. They would very pointedly apply to the case of an artist insisting that the value of his picture should not be left to the estimate of a jury. But the difficulty which has weighed on my mind throughout the case is, that the bill is framed, not by any slip, but advisedly and of necessity, on this principle: the plaintiff has agreed to sell his picture, at a given time and under certain circumstances, for the sum of £300; he has granted the right of engraving the picture and of exhibiting it for a fixed time for £150, at the end of which he agrees to part with the picture itself for the payment of the further sum of £150. The prayer of the bill is founded on the idea that there was some positive engagement to engrave and exhibit the picture; but, on the contrary, the actual agreement was, that the defendants, Messrs. Betjemann, should pay for the privilege of engraving and exhibiting the picture, without any undertaking on their part to do anything of the kind. It is equally clear that the plaintiff retained the property in the picture during this interval. I cannot for a moment entertain the argument that the property passed to Messrs. Betjemann immediately on the execution of the agreement. The terms of the contract are quite conclusive on that point. The rights of the parties under the agreement are plain. The plaintiff agrees to sell at a given future time, and in the meantime to allow the exhibition and engraving of the picture without parting with the property.

Then the bill is framed on this principle: it claims the property subject to the agreement. The first paragraph of the prayer asks a declaration that the picture is the property of the plaintiff until payment, and until the picture shall have been duly exhibited and engraved (this last condition being founded on a mistaken view of the agreement). Then the prayer goes on to claim a lien for the unpaid purchase-money, and that the agreement may be cancelled unless the same is paid and the

[1] The statement of facts is abridged.

picture duly exhibited and engraved. It was, moreover, admitted at the bar that the payment of the £300 would dispose of the whole question in the suit. That is the fair view of the case which is made by the bill. Upon this an insuperable difficulty arises in the way of the jurisdiction which this court exercises, to order the delivery of a specific chattel of a peculiar value, as in the Pusey Horn case. In such a case as this it appears to me that it would be an innovation on the practice of the court, to say that a jury could not adequately estimate by damages the non-payment of a price fixed, as it is here, by the agreement of the parties.

The bill might possibly have been framed on this footing. It might have said, "You have broken the agreement, and I insist that it shall be cancelled, and that my picture shall be restored." I do not say that that contention might not have prevailed. But upon the bill as it stands the plaintiff says he is quite satisfied with the agreed price of £300, and it is only in the event of that not being paid that he asks for the restoration of the picture. That reduces the contest to a mere money demand. The plaintiff has bound himself to sell for £300. He says the defendants have attempted to cheat him out of the price, and comes, not primarily to have the chattel returned on the ground of its intrinsic value, but to have the contract performed. The same considerations which dispose of the claim to have the picture returned also displace the right to have a vendor's lien on the picture enforced in this court.

The plaintiff may get the value he has himself put upon his picture from the verdict of a jury. No doubt has been suggested as to Gotto's solvency, and very strong arguments have been urged to show that Gotto would have no defense to an action of trover. According to his own arguments, the plaintiff will get at law the £300, which is all that he asks by this bill. The difficulty in this court is, that he does not found his bill on the right to have a specific chattel restored, but on his title to be paid the price of £300, with which he still professes to be content.[1]

[1] "In a bill seeking specific performance of defendant's contract to convey certain land, the plaintiff alleged the fact of the contract, the price to be paid, his contract to resell, and the price to be received. Held, bill dismissed, the plaintiff having shown an adequate remedy at law. Hazelton *v.* Miller, 1905, 33 Washington L. R. 217.

"While specific performance of contracts to convey land is granted as a matter of course, Old Col. R. R. *v.* Evans, Mass. 1856, 6 Gray 25; Bogan *v.* Daughdrill, 1874, 51 Ala. 312; Story, Equity Jur. § 751, the basis of relief is the inadequacy of the remedy at law. Willard *v.* Tayloe, 1869, 8 Wall 557; Duff *v.* Fisher, 1860, 15 Cal. 376; Pomeroy Spec. Perf. §§ 9, 11. Therefore, if the adequacy of the legal remedy appears, as in the principal case from the pleadings, equity should refuse to interfere. Blake *v.* Flatley, 1888, 44 N. J. Eq. 228." 5 Columbia Law Review, 473.

CUD *v.* RUTTER.

IN CHANCERY, BEFORE LORD CHANCELLOR PARKER, 1719.

[1 *Peere Williams* 570.]

The defendant, in consideration of two guineas paid down, did by note under hand agree to transfer £1,000 South-Sea stock at a fixed price at the end of three weeks; the plaintiff on the day demanded the stock, and offered to pay the price; but on the defendant's insisting that he would only pay the difference, and not transfer the stock, the plaintiff brings this bill for a specific performance, and to have the stock assigned.

Sir Joseph Jekyll, M. R., decreed for the plaintiff.[1]

But afterwards on an appeal the LORD CHANCELLOR PARKER reversed this decree, delivering his opinion with great clearness, that a court of equity ought not to execute any of these contracts, but to leave them to law, where the party is to recover damages, and with the money may, if he pleases, buy the quantity of stock agreed to be transferred to him; for there can be no difference between one man's stock and another's. It is true, one parcel of land may vary from, and be more commodious, pleasant, or convenient than another parcel of land, but £1,000 South-Sea stock, whether it be A, B, C, or D's, is the same thing, and in no sort variant; and therefore let the plaintiff, if he has a right, recover in damages, with which, when received, he may buy the stock himself.[2]

DUNCUFT *v.* ALBRECHT.

IN CHANCERY, BEFORE SIR LANCELOT SHADWELL, V. C., 1841.

[12 *Simons* 189.]

The bill prayed that the defendant might be decreed specifically to perform an agreement which provided for the sale to the plaintiff of the fifty shares in the London and South-western Ry. Co., and such, if any, new shares as had been or might be created since the 17th of February, 1840, and to transfer all such shares to the plaintiff, and to deliver up the

[1] The opinion of the Master of the Rolls and the argument of Counsel have been omitted.

[2] "It is now perfectly settled, that this Court will not enforce the specific performance of an agreement for a transfer of stock: but in a book I have of Mr. Brown's I see, Lord HARDWICKE did that." Per Lord Chancellor ELDON in Nuthrown *v.* Thornton, 1804, 10 Ves. 159, 160.

certificates thereof to him, and to account to him for any dividends which might accrue on such shares previous to such transfer.

The VICE-CHANCELLOR said:[1]

Then the only question is whether there has been any decision from whence you can extract a conclusion that the court will not decree a specific performance of an agreement for the sale of such shares. Now, I agree that it has been long since decided that you cannot have a bill for the specific performance of an agreement to transfer a certain quantity of stock. But, in my opinion, there is not any sort of analogy between a quantity of 3 per cents. or any other stock of that description (which is always to be had by any person who chooses to apply for it in the market) and a certain number of railway shares of a particular description, which railway shares are limited in number, and which, as has been observed, are not always to be had in the market. And, as no decision has been produced to the contrary, my opinion is that they are a subject with respect to which an agreement may be made which this court will enforce.

Then there is nothing, as I understand, either in the Statute of Frauds or in the law of this court which prevents the execution of such an agreement as is here stated; and, though it may be true that the plaintiff has asked more than this court would give or might give under certain circumstances, my opinion is that he has stated quite enough to show that he is entitled to some relief; and, therefore, the demurrer must be overruled.[2]

[1] A part of the opinion has been omitted. In it the court held that while shares of stock were personal estate, they were not "goods, wares, and merchandises within the meaning of the 17th section" of the statute of frauds.

[2] "I am of opinion that, inasmuch as this bill prays a delivery of the Certificates which would constitute the Plaintiff the Proprietor of a certain quantity of Stock, the Bill in Equity will hold; because a Court of Law could not give the Property, but could only give a remedy in Damages, the beneficial effect of which must depend upon the personal responsibility of the Party." Per Sir JOHN LEACH, V.C., in Doloret *v.* Rothschild, 1824, 1 Sim. & Stu. 590, 598.

"Now, there is no doubt that a bill will lie for a specific performance of an agreement to transfer railway shares. This was set at rest by Duncuft *v.* Albrecht, 1 Sim. 199." Per Lord Chancellor CHELMSFORD in Cheale *v.* Kenward, 1858, 3 DeG. & J. 27, 30.

"While the general rule is for courts of equity not to entertain jurisdiction for a specific performance on the sale of stock, this rule is limited to cases where a compensation in damages would furnish a complete and satisfactory remedy. Phillips *v.* Berger, 2 Barb., 608; Story Eq. Jur., § 717. Judge STORY, in section 717, states, as the reason why a contract for stock is not specifically decreed, that "it is ordinarily capable of such an exact compensation." He further says: "But cases of a peculiar stock may easily be supposed, where courts of equity might still feel themselves bound to decree a specific performance, upon the ground that, from its nature, it has a peculiar value, and is incapable of compensation by damages." He also says, in regard to the general rule as to jurisdiction, in section 718: "The rule is a

CORBIN *v.* TRACY.

IN THE SUPREME COURT OF ERRORS OF CONNECTICUT, 1867.

[34 *Connecticut* 325.]

Bill in equity, brought by the petitioners, a joint stock corporation, to the Superior Court for Hartford County, to compel the specific performance of a contract to assign a patent right. The Superior Court (Loomis, J.) passed a decree in favor of the petitioners, and the respondents filed a motion for a new trial and a motion in error. The case is sufficiently stated in the opinion.

qualified one, and subject to exceptions; or, rather, the rule is limited to cases where a compensation in damages furnishes a complete and satisfactory remedy. The case considered comes directly within the exception stated." Per MILLER, J., in Cushman *v.* Thayer M'f'g. Co., 1879, 76 N. Y. 365, 368.

"The true principle would seem to be that, as a general rule, courts of equity will not enforce specific performance of contracts for the delivery of shares of stock, but when a purchaser has bargained for such shares, or taken an option upon them, because they have for him a unique and special value, the loss of which could not be adequately compensated by damages at law, the chancellor, in the exercise of a sound discretion, may decree specific execution." Per LUCAS, President, in Bumgardner *v.* Leavitt, 1891, 35 W. Va. 194, 202.

"Lastly, the defendant contends that the plaintiff is not entitled to specific performance because the stock was greatly undervalued, and because the plaintiff has a remedy at law. It is evident that to remit the plaintiff to an action at law for damages would defeat the very purpose of the contract, and would not, we think, furnish an adequate remedy. No stock in the plaintiff company has ever been sold in the market, and all the shares that have been transferred have been transferred to the plaintiff and disposed of by the directors in the manner provided. . . . The case would stand differently, perhaps, if the shares were bought and sold in the market, like most stocks. Adams *v.* Messinger, 147 Mass. 185." Per MORTON, J., in New England Trust Co. *v.* Abbott, 1894, 162 Mass. 148, 154.

"Defendant agreed to convey to plaintiff certain shares of stock. The stock was not listed on any exchange nor purchasable in the market. The defendant refused to convey. Held as plaintiff had an adequate remedy at law, specific performance would not be granted. Butler *v.* Wright, 1905, 103 App. Div. 463. Specific performance of a contract to convey stock will generally be decreed when its value cannot readily be ascertained or where it is not procurable on the market. New England Trust Co. *v.* Abbott, 1894, 162 Mass. 148; Northern Central Ry. Co. *v.* Walworth, 1899, 193 Pa. St. 207; Krouse *v.* Woodward, 1895, 110 Cal. 638. It is even assumed that if the stock cannot be obtained elsewhere, the particular stock is wanted in specie. Marten *v.* Ray, 1894, 18 R. I. 672. The position of the court is upheld in Moulton *v.* Warren Manuf'g Co., 1900, 81 Minn. 259, but on the whole precedent would

CARPENTER, J.[1] Under the motion in error, it is objected that the petitioners have not made out a case for the interference of a court of equity; that courts of equity in this State will not interfere to enforce agreements to sell personal property unless the circumstances are such as to make a trust, because there is in such a case a remedy at law by an action for damages.

The objection assumes that there is a distinction in questions of this character between real and personal property. If any such distinction exists it does not go to the extent claimed.

The ground of the jurisdiction of a court of equity in this class of cases is that a court of law is inadequate to decree a specific performance, and can relieve the injured party only by a compensation in damages, which in many cases would fall far short of the redress which his situation might require. Whenever, therefore, the party wants the thing in specie and he cannot otherwise be fully compensated, courts of equity will grant him a specific performance. They will decree the specific performance of a contract for the sale of lands, not because of the peculiar nature of land, but because a party cannot be adequately compensated in damages. So in respect to personal estate; the general rule that courts of equity will not entertain jurisdiction for a specific performance of agreements respecting goods, chattels, stocks, choses in action, and other things of a merely personal nature, is limited to cases where a compensation in damages furnishes a complete and satisfactory remedy. 2 Story's Eq. Jur. §§ 717, 718.

The jurisdiction, therefore, of a court of equity does not proceed upon any distinction between real estate and personal estate, but upon the

seem to call for specific performance as a more adequate remedy." 5 Columbia Law Review, 617.

"A distinction must be taken between those contracts which consist in giving something which is specified and identified by the contract, and those which consist in giving something of the kind, quality, or description specified in the contract. In cases belonging to the second class, it seems that a compensation in money will always be an adequate remedy for a breach of the contract; for the thing contracted for cannot be worth more to any one than the sum of money for which it can be purchased in the market, and that sum will be the measure of the compensation which a jury will give for a breach of the contract. It cannot, therefore, be very material to the person who has contracted for the thing, whether he receive the thing itself or a sum of money with which he can purchase the thing. [The English courts have, however, made one extraordinary exception to the rule that such contracts will not be enforced in equity, namely, in the case of contracts for the purchase and sale of shares in companies. This exception was first established by the case of Duncuft *v.* Albrecht, 12 Sim. 189. That case has not generally been followed, however, in this country.]" Langdell, Brief Survey of Equity Jurisdiction, p. 48. Same article in 1 Harv. L. Rev. 355.

[1] So much of the opinion as relates to the motion for a new trial has been omitted.

ground that damages at law may not in the particular case afford a complete remedy. 1 Story's Eq. Jur. §§ 716, 717, 718, and cases there cited; Clark *v.* Flint, 22 Pick. 231. When the remedy at law is not full and complete, and when the effect of the breach cannot be known with any exactness, either because the effect will show itself only after a long time, or for any other reason, courts of equity will enforce contracts in relation to personalty. 3 Parsons on Contracts, 5th ed., 373.

An application of these principles to the case before us relieves it of all difficulty. The contract relates to a patent right, the value of which has not yet been tested by actual use. All the data by which its value can be estimated are yet future and contingent. Experience may prove it to be worthless; another and better invention may supersede it; or it may itself be an infringement of some patent already existing. On the other hand, it may be so simple in its principle and construction as to defy all competition, and give its owner a practical monopoly of all branches of business to which it is applicable. In any event its value cannot be known with any degree of exactness until after the lapse of time; and even then it is doubtful whether it can be ascertained with sufficient accuracy to do substantial justice between the parties by a compensation in damages. On the whole, we are satisfied that justice can only be done in a case like this by a specific performance of the contract.

There is, therefore, no error in the decree complained of.

In this opinion the other judges concurred.

ADAMS *v.* MESSINGER.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1888.

[147 *Massachusetts* 185.]

Bill in equity filed March 15, 1887, alleging that the defendant, who was the owner of letters patent of the United States, and the plaintiff, who was the owner of similar letters patent of the Dominion of Canada, executed an instrument under seal which provided that the defendant should furnish and deliver to the plaintiff a specified number of certain machines, working injectors of particular sizes, the patents for which were owned by the defendant; and that, for all improvements patented in the United States, the defendant should apply for letters patent in Canada, which being obtained, should be assigned to the plaintiff.

The bill sought specific performance of this agreement and that the defendant be enjoined from alienating or incumbering his title to the machines or improvements.[1]

The defendant demurred.

[1] The statement of facts has been abridged.

DEVENS, J. It is the contention of the defendant that the plaintiff has a full, complete and adequate remedy at common law by an action for damages, and that the court sitting in equity cannot grant the relief sought by the prayer of the bill.

The controversy arises from the failure to perform an executory written contract. So far as this relates to personal property, the objections arising from the Statute of Frauds, which have sometimes been found to exist when oral contracts were sought to be enforced, have, of course, no application. The general rule that contracts as to the purchase of personal property are not specifically enforced, as are those which relate to real property, does not rest on the ground of any distinction between the two classes of property other than that which arises from their character.

Contracts which relate to real property can necessarily be satisfied only by a conveyance of the particular estate or parcel contracted for, while those which relate to personal property are often fully satisfied by damages which enable the party injured to obtain elsewhere in the market property precisely similar to that which he had agreed to purchase. The distinction between real and personal property is entirely subordinate to the question whether an adequate remedy can thus be afforded. If, from the nature of the personal property, it cannot, a court of equity will entertain jurisdiction to enforce the contract. Story Eq. Jur. § 717; Clark *v.* Flint, 22 Pick. 231. A contract for bank, railway, or other corporation stock freely sold in the market, might not be thus enforced, but it would be otherwise where the stock was limited in amount, held in a few hands, and not ordinarily to be obtained. White *v.* Schuyler, 1 Abl. Pr., N. S., 300; Treasurer *v.* Commercial Mining Co., 23 Cal. 390; Poole *v.* Middleton, 29 Beav. 646; Doloret *v.* Rothschild, 1 Sim. & Stu. 590. See Chaffee *v.* Middlesex Railroad, 146 Mass. 224.

Where articles of personal property are also peculiar and individual in their character, or have an especial value on account of the associations connected with them, as pictures, curiosities, family furniture, or heirlooms, specific performance of a contract in relation to them will be decreed. Lloyd *v.* Loaring, 6 Ves. 773; Fells *v.* Read, 3 Ves. Jr. 70; Lowther *v.* Lowther, 13 Ves. 95; Williams *v.* Howard, 3 Murphey 74. An agreement to assign a patent will be specifically enforced. Binney *v.* Annan, 167 Mass. 94. Nor do we perceive any reason why an agreement to furnish articles which the vendor alone can supply, either because their manufacture is guarded by a patent or for any similar reason, should not also be thus enforced. Hapgood *v.* Rosenstock, 23 Fed. Rep. 86. As the value of a patent right cannot be ascertained by computation, so it is impossible with any approach to accuracy to ascertain how much a vendee would suffer from not being able to obtain such articles for use in his business.

The contract of the defendant was twofold, to furnish and deliver

certain described working steam injectors within a specified time to the plaintiff, and also that, if the defendant shall make improvements in injectors for steam boilers, and shall take out patents therefor in the United States, he will apply for letters patent in Canada, and on obtaining them will assign and convey the same to the plaintiff, and that he will not do any act prejudicial to these letters patent of Canada or the monopoly thus secured.

It is said that the court will not enforce a contract for personal services when such services require the exercise of peculiar skill, intellectual ability, and judgment, and therefore that the defendant cannot be ordered to make and deliver the injectors contracted for. But the principle on which it is held that a court of equity cannot decree one to perform a personal service involving peculiar talent or skill, because it cannot so mould its order and so supervise the individual executing it that it can determine whether he has honestly obeyed it or not, has no application here.

The defendant has agreed to furnish and deliver certain injectors, which the contract shows to be patented articles. It does not appear from the bill that they were yet to be made when the contract was executed. But if it be assumed that they were, there is nothing from which it can be inferred that any skill peculiar to the defendant was required to construct them. For aught that appears, they could be made by any intelligent artificer in the metals of which they are composed. The details of their manufacture are given by reference to the patents which are referred to in the agreement, so that no difficulty such as has sometimes been experienced could have been found in describing accurately, and even minutely, the articles to be furnished. Nor are there found in the case at bar any continuous duties to be done, or work to be performed, requiring any permanent supervision, which, as it could not be concluded within a definite and reasonable time, has sometimes been held an obstacle to the enforcement of a contract by the court.

Agreements to make an archway under a railway, or to construct a siding at a particular point for the convenience of the landowner, have been ordered to be specifically enforced. Although the party aggrieved might have obtained damages which would have been sufficient to have enabled him to pay for constructing them, and although the work to be done necessarily involved engineering skill as well as labor, he was not bound to assume the responsibility of the labor of doing that which the defendant had agreed to do. Storer *v.* Great Western Railway, 2 Yo. & Col. Ch. 48; Greene *v.* West Cheshire Railway, L. R. 13 Eq. 41. The case at bar is readily distinguishable from that of Wollensak *v.* Briggs, 20 Brad., Ill., 50, on which the defendant much relies. In that case the defendant was to construct for the plaintiff certain improved machinery for a particular purpose, but no details were given as to the form, structure, principle, or mode of operating the proposed machine. It was

obviously a contract too indefinite to enable the court to order its specific enforcement.

It is urged that specific performance of a part only of a contract will not be ordered when it is not in the power of the court to order the enforcement of the whole, and that it would not be possible to enforce that portion of the contract which relates to the application for letters patent in Canada and the subsequent assignment of them. But where two parts of a contract are distinctly separable, as in the case at bar, there is no reason why one should not be enforced specifically, and the plaintiff compensated in damages for the breach of the other.[1]

When a contract relates to but a single subject, and it is impossible for the defendant to perform it, except partially, the plaintiff is entitled to the benefit of such partial performance and to compensation if it be possible to compute what is just, so far as it is unperformed. It was therefore held in Davis *v.* Parker, 14 Allen 94, that where one had agreed to convey land with release of dower, and was unable to procure a release of dower, the purchaser was entitled to a conveyance without such release, with an abatement from the purchase-money of the value of the wife's interest at the time of the conveyance. See also Milkman *v.* Ordway, 106 Mass. 232, 253; Curran *v.* Holyoke Water Power Co., 116 Mass. 90.

We have assumed, in favor of the defendant's contention, that the only relief that the plaintiff could obtain for the breach of that portion of the agreement which relates to the application for a patent in Canada for the improvements which the defendant has made, would be in damages. We have not intended thus to decide. That equity, by virtue

[1] "However, it appears to me that this is one entire agreement, and I cannot decree specific performance of part of it, so as to give to the plaintiff all the benefits for which he has stipulated, while the other terms of the agreement are of such a nature that the court is unable to decree specific performance of them." Per Sir WILLIAM PAGE WOOD, V.C., in Stocker *v.* Wedderburn, 1857, 3 K. & J. 393, 407.

"The defendant urges that the whole contract must be enforced, or no part of it will be. That rule does not apply where the part which cannot be enforced is separable from the other. Where a vendor is unable to completely perform his contract, it is true that the ordinary rule is that the vendee will not be compelled to accept a part. Yet even to this rule there are exceptions, notably when one part is separable from the other. Ogden *v.* Fossick, 4 DeGex, F. J., 426; Powell *v.* Elliot, L. R., 10 Ch. 424; Wilkinson *v.* Clements, L. R., 8 Ch. App. 96. But, on the other hand, when the vendee claims performance and the vendor is unable to make complete performances, the vendee is allowed to have all he can get, with compensation for the deficiency. Morss *v.* Elmendorf, 11 Paige 277. The principle is that the party who is not in fault shall be entitled to a specific performance of as much of the contract as the other can perform. Here the plaintiffs are not in fault, and the defendant wilfully refuses to perform. There is no reason why the court should not compel a specific performance so far as this can be done. Story's Eq. 774, 779; Pomeroy's Eq., § 1407 n." Per LEARNED, P.J., in Lawrence *v.* Saratoga Lake Railway Co., 1885, 36 Hun 467, 475.

of the foreign country, and must be sent there for record. Pingree *v.* things which they may do or be able to do abroad, while they are themselves personally here, will not be controverted. One may be enjoined from prosecuting a suit abroad. He may be compelled to convey land situated abroad, although the conveyance must be according to the laws of the foreign country, and must be sent there for record. Pingree *v.* Coffin, 12 Gray 288; Dehon *v.* Foster, 4 Allen 545; Cunningham *v.* Butler, 142 Mass. 147; Newton *v.* Bronson, 13 N. Y. 587; Bailey *v.* Ryder, 10 N. Y. 363.

There is nothing to show that the defendant, in making his application in Canada for the patent, is compelled to leave the State any more than he would be compelled to do so if he was an applicant at Washington. The grant of such a patent is an act of administration only. If it were to be granted here the party would be ordered to make application. It was held in Runstetler *v.* Atkinson, MacArthur & Mackey 282, that where a formal assignment of an invention had not been made, but a valid agreement had been made to assign, equity would order the party to make the formal assignment, and also to make application for the patent which, in such case, would issue to the assignee. The laws of Canada, which we can know only as facts, are not before us by any allegations as to them. If all that is required by them is a formal application in writing by the inventor, there would seem to be, from the allegations of the bill, sufficient reason why the defendant should be required to make and forward it or place it in the hands of the plaintiff to be forwarded to the Canadian authorities.

In any event, as the application is preliminary only to obtaining letters patent for the purpose of assigning them to the plaintiff, the averments of the bill taken in connection with the terms of the agreement set forth a good reason why the plaintiff may ask an assignment of his title to the improvements in question from the defendant, so far as the Dominion of Canada is concerned, and also why the defendant should be restrained from alienating or in any way encumbering any right he may have to letters patent from Canada, if the plaintiff should decide to seek his remedy in this form rather than in damages for breach of this part of the contract.

Demurrer overruled.[1]

[1] In the Equitable Gas Light Co. *v.* Baltimore Coal Tar Co., 1884, 63 Md. 285, the parties had entered into an oral agreement providing for the exclusive sale to the plaintiff by the defendant of coal tar, during a considerable period of time, at a stipulated price. A memorandum of the agreement was made out, but the defendant never signed. The defendant raised the price. The plaintiff refused to pay the advance, and brought suit for a specific performance of the agreement to supply, and for an injunction to restrain the defendants from furnishing other parties. In his opinion granting the relief prayed for, ALVEY, C.J., said: "Mr. Pomeroy in his excellent work on Specific Performance of Contracts, § 15, p. 20, states it as a well-settled principle in

BLOWER *v.* LUKE.

IN CHANCERY, BEFORE LORD CHANCELLOR, ARCHBISHOP OF YORK, 1470-83.

[2 *Calendars of Proceedings in Chancery* li.]

To the most reverend fader in God, and full gode and gacious lord, the archbishop of York, prymat and chaunceller of England.

Besecheth mekely yor most gode and gacious lordship yor contynuell orator Geffercy Blower of London, mercer, tenderly to consider, that where as late certain maters of contoversie weren had and moved bytwene hym and on Doctor Scardeburgh, which maters afterward by their comon assent were putte in the awarde & arbitrement of Richard Luke clerk, and John Colred, indifferently chosen to determine and make and ende and accorde of all manners of maters bytwixt theym had and moved, which among other thyngs, awarded that the seid parties alternatly shuld seell acquitauncez, and so they did accordyng to the same; and so the seid awarde putte in wrytyng, and it is so that bothe the seid awarde, and also the acquitaunce which perteyned unto yor seid orator, remayned still in the handes and kepyng of the seid Richard, and yet do; and yor seid orator often tymes hath desyred the seid Richard to delyver hym the seid acquitaunce, which so to do at all tymes hath utterly refused, and yet doth, agenst all right and conscience;

the doctrine of specific performance, that a contract for the sale and delivery of chattels which are essential in specie to the plaintiff, and which the defendant can supply, while no one else can, will be specifically enforced. In such case the plaintiff could not be indemnified by any such amount of damages as he could recover at law." Judgment was given for the plaintiff.

In Gloucester Isinglass Co. *v.* Russia Cement Co., 1891, 154 Mass. 92, in a compromise of certain suits as to the validity of a patent (claimed by the plaintiffs) for the manufacture of fish glue, the parties here, to avoid competition, had agreed, among other things, that the two firms were to share in the purchase of fish skins from which the glue was manufactured, the fish skin supply being limited. The defendant learning that the patent was invalid, made new long term contracts with the suppliers of fish skins, and then refused to supply any more to the plaintiff. The plaintiff sued for specific performance. The defence was that the plaintiff had an adequate remedy at law. In the course of his opinion KNOWLTON, J., said: "It sufficiently appears that the principal market for them is in Gloucester, that most of the skin producers there are under contract with the defendant, and that fish skins are of very limited production. 'If the plaintiff is unable to obtain skins produced by firms which have contracted with the defendant,' it is found that 'it will be very difficult, if not impossible, for it to carry on its business.' This continuing injury, leading to difficulties in the management of the plaintiff's business, and possibly to its utter destruction, is one that could not be measured in damages."

whereof he hath no remedy at comen lawe, in as moche as he hath not the seid awarde to showe. Wherfor pleas it yor seid most gacious lordship, the premissez consydered, to gaunte a writte subpena to be direct unto the seid Richard, comaundyng hym by the same to oppere afore the kyng in his chauncerie at a certayn day and undre a payn by yor lordship to be lymet, there to be compelled to do accordyng to right and conscience, for the love of God and in the way of charyte.

BARKER *v.* BARKER.

IN CHANCERY, 1577.

[*Cary* 80.]

The plaintant's suit is to have an award made (by Master Tilbey, and Mr. Chambers, arbitrators indifferently chosen), performed, and both parties were bound each to other for the performance of the award; and one part of the award was, that if any question did grow between the parties, the arbitrators should end it; it is ordered, a subpœna to shew cause.

REIGNOLDS *v.* LATHAM.

IN CHANCERY, 1579.

[*Cary* 151.]

The suit was to cause the defendant to perform an award of arbitrators chosen by themselves, contrary to which award, the defendant hath put in suit an obligation of one hundred pounds; wherefore an injunction was granted for stay of the suit; and upon the defendant's shewing his readiness to perform the award, ordered, that the said award shall be duly performed by both the said parties.

HALL *v.* HARDY.

IN CHANCERY, BEFORE SIR JOSEPH JEKYLL, M. R., 1733.

[3 *Peere Williams* 186.[1]]

Upon a bill brought to compel the defendant to make a specific performance of an award, the case was thus: The plaintiff and defendant were brother and sister, between whom there was a dispute touching the fee simple of a small parcel of land under their father's will; and the

[1] A portion of the opinion has been omitted.

plaintiff and defendant entered into a bond in the penalty of £200 to stand to the award of arbitrators touching this matter. The arbitrators made an award, that the plaintiff should pay £10 to the defendant at such a day, and £30 to the defendant at another day; and that thereupon the defendant should procure his wife to join with him in a fine and deed of uses, and thereby convey the premises to the plaintiff and his heirs. The plaintiff paid the defendant the £10 which the defendant accepted upon the day on which it was awarded to be paid; afterward the plaintiff tendered the remaining £30 on the day on which that was awarded to be paid, and the defendant was willing to take the money, but would not take the fine and deed of uses. Wherefore the plaintiff brought this bill to compel the defendant to a specific performance of the award.

Upon opening the cause, the Master of the Rolls said he thought this a strange bill, for which he knew no precedent, and that the plaintiff must sue his bond.

Whereupon I urged that the plaintiff had actually paid the £10 according to the award, and the defendant accepted it, and thereby undertaken to perform the award; that if this suit were not to be allowed, the plaintiff would have no remedy to get back the money paid by her to the defendant; that in Norton *v.* Mansell, 2 Vern. 24, the court decreed a specific performance of an award, though in that case it was not executed, and in strictness of law void.

To which his Honor replied, that because the award was not good in law, therefore in the case cited there might be reason to decree a specific performance. However, the court desiring to know what the counsel for the defendant had to say as to the defendant's having accepted part of the money, it was insisted on his behalf to be sufficient, that there was (unless in very particular circumstances) no instance of a bill being brought for a specific performance of an award. Besides, that this was an unreasonable award, viz., that the husband should procure his wife to join with him in a fine, which it might not be in his power to do; and therefore the court would not oblige him to it. Also the wife's joining ought to be free, and not by the compulsion of her husband; that the plaintiff had a plain, proper, and natural remedy, which was to sue the bond, whereon the penalty would be recovered; and even as to the money which had been paid, if the defendant would not perform the award by procuring his wife to join with him in a fine, the plaintiff might recover it back, as received to the plaintiff's use.

MASTER OF THE ROLLS. There have been a hundred precedents where, if the husband for a valuable consideration covenants that the wife shall join with him in a fine, the court has decreed the husband to do it, for that he has undertaken it, and must lie by it, if he does not perform it.[1]

[1] "But the fact is, the wife now refuses to execute the deed; and it is necessary to its validity that she should sign it, and acknowledge, before the proper officer, that she signed, sealed and delivered it as her voluntary act and deed freely, without any fear, threats or compulsion of her husband.

The money paid in pursuance of the award cannot be said to have been paid by the plaintiff to the use of the plaintiff himself; and the precedent in Mr. Vernon shows that this court has decreed a specific performance of an award, which is more especially reasonable in the present case, where the plaintiff has paid and the defendant accepted part of the money awarded; for by this acceptance the defendant has undertaken to perform the award, has consented to it, and made it his own agreement for a valuable consideration, viz., the money paid him. Wherefore, take a decree for the defendant's performance of the award, upon the payment of the residue of the money awarded, and let him pay costs, it being a defense against conscience to take the money awarded, and yet refuse to perform his part of the award.

NOTE.—These decrees may not have been usual, because awards are commonly to pay money; in which cases a bill in equity to compel a performance is improper; but where the award is to do any thing in specie, as to convey an estate, etc., in such case, if the defendant has accepted the money awarded him in satisfaction of the conveyance, it is highly reasonable that he should make the conveyance; the rather, for that if the plaintiff had sued the bond at law, the defendant would have been relievable by bill in equity against the penalty of the bond, upon a *quantum damnificatus*. So that such a decree, as in the principal case, prevents a suit in equity.

WILKS *v.* DAVIS, 1817, 3 Meriv. 507, 509.—The Lord Chancellor [ELDON] said:—It has been determined in the cases referred to, that, if one party agrees to sell, and another to purchase, at a price to be settled by arbitrators named by the parties, if no award has been made, the Court cannot decree respecting it. On the other hand, there are cases which determine that, if the parties are agreed as to a valuation, but have not appointed any persons to make the valuation, the Court will

If the court decrees a specific performance according to the terms of the contract, the husband must procure his wife to sign the deed in some way, *per fas aut nefas*, or else take the consequences of disobedience to the order of the court. This then is, in effect, a decree by which the wife is forced into executing a deed. When she is brought before the proper officer, he certifies to her acknowledgement of its being her free and voluntary act, when it is notorious that it is the decree of this court, held up to her *in terrorem*, which must be either obeyed by her husband through her submission, or he be subject to punishment for disobedience. Such a decree is against the policy of the law protecting the rights of a wife in the lands of her husband."

"Upon a careful examination of all the authorities, if the alternative were presented to me of making a decree for specific performance by procuring the wife to join in the deed, or to dismiss this bill, I should accept the latter." Per Chancellor WILLIAMSON in Young *v.* Paul, 1855, 2 Stockton 401, 408.

itself interfere, so as to ascertain the value, in order to direct a specific performance. But the case now before the Court is different from either; the Court being here called upon, not to ascertain the value, but to decree a specific performance, by the defendant conveying, at such price as certain arbitrators named shall hereafter fix; no arbitration bond having been executed, and it not being certain that any award will ever be made. The strong inclination of my opinion is, that such a bill cannot be maintained, although no direct authority has been produced, either in favour of it, or on the other side. The inconvenience of such a case is such, that I do not see how the Court can in any manner interpose. This view of the case was not presented to his Honour, the Vice-Chancellor; and the order pronounced cannot, therefore, be considered as affording any evidence of his opinion on the matter.[1]

[1] "As to the more general objection I consider it to be quite settled that this Court will not entertain a Bill for the specific performance of an Agreement to refer to Arbitration; nor will it in such case, substitute the Master for the Arbitrators, which would be to bind the Parties contrary to their Agreement. The Demurrer must be allowed." Per Sir JOHN LEACH, V.C., in Agar *v.* Macklew, 1825, 2 S. & S. 418, 423.

"There is considerable weight, as evidence of what the Law is, in the circumstance, that no instance is to be found of a decree for specific performance of an agreement to name arbitrators; or that any discussion upon it has taken place in experience for the last twenty-five years. I was Counsel in Price *v.* Williams, 3 Bro. C. C. 163; ante, vol. 1, 365, a case which justifies considerable doubts, whether the eulogia upon the domestic forum of arbitrators are well founded. That was a case before Lord THURLOW upon a bill for specific performance of such an agreement, sending parties to arbitrators, who might or might not be able to come to a decision; and Lord THURLOW was of opinion, that the Court would not perform such an agreement." Per Lord Chancellor ELDON in Street *v.* Rigby, 1802, 6 Ves. 814, 818.

In Morse *v.* Merest, 1821, M. & G. 26, the Vice-Chancellor [Sir JOHN LEACH] held that in the case of a reference time was as essential in equity as at law; but that in equity a defendant was not permitted to set upon a legal defense which grew out of his own misconduct, and that this agreement was now to be acted upon as if no time were limited, or the time was not passed. That a man who agreed to sell at a price to be named by A, B, and C could not be compelled by a court of equity to sell at any other price; but it appearing that the defendant refused to permit the referees to come upon the land, the court had jurisdiction to remove that impediment, and would decree that the defendant should permit the valuation to be made according to the contract; and if it were so made, then a supplemental bill must be filed for a specific performance upon the terms of their valuation.

In Gourlay *v.* Duke of Somerset, 1815, 19 Ves. 429, the question arose as to whom reference should be made for settling the terms of a lease, whether to the Master, or to Mr. Gale, the agreement itself providing that Mr. Gale should determine what stipulation etc. should be judged reasonable and proper. The defendant, by Mr. Bell, contended that the court having taken jurisdiction would determine the whole matter by its own officer.

The Plaintiff, by Sir Samuel Romilly, replied that the Defendant by re-

HERMANN *v.* HODGES.

IN CHANCERY, BEFORE LORD CHANCELLOR SELBORNE, 1878.

[*Law Reports* 16 *Equity Cases* 18.]

This was a suit for specific performance of an agreement (entered into on the occasion of an advance being made by the plaintiff to the defendant) to execute a mortgage "with an immediate power of sale."

Mr. Townsend, for the plaintiff, asked for a decree according to the form given in Seton on Decrees, Vol. 1 p. 443. He referred to Ashton *v.* Corrigan, Law Rep. 13 Eq. 76, in which a doubt was expressed by Vice-

sisting the performance of his contract, and compelling the other party to file a Bill, would thus get rid of his agreement, that the lease should be settled by the individual named, in this instance his own steward.

"The Master of the Rolls [Sir WILLIAM GRANT].—I cannot find any case in which an agreement to submit any matter to reference has been used in any other way than as an objection by the Defendant to the interference of the Court upon the subject-matter of such agreement. There is no instance of a Plaintiff seeking the interposition of the Court, and obtaining it, who has been held entitled to have any part of his relief administered to him through the medium of a reference, compulsory on the other party. A Bill seeking that would be *pro tanto* a Bill to enforce the specific performance of an agreement to refer to arbitration: a species of bill, that has never been entertained."

"With regard to the opinions expressed in the case of Cooth in Jackson, Ante, Vol. vi. 12, followed by Milnes *v.* Gery, Ante, vol. xiv. 400, the terms of an agreement are to be ascertained by an award, being so ascertained, that agreement shall be performed in Equity, if there is anything to be done in specie; as estates to be conveyed, etc.: but I have not met with any authority, proving that where parties have contracted, that the value of their respective interests shall be ascertained by arbitrators, or an umpire, if the acts, done by those persons for the purpose of carrying that agreement into effect by an award, are not valid at Law, as to the time, manner, or other circumstances, this Court will specifically perform that agreement; unless there has been acquiescence, notwithstanding the variation of circumstances; or the agreement, evidenced by such an award, has been part-performed; and upon a review of the cases I do not find any reason to alter that notion, which I had of the general doctrine." Per Lord Chancellor ELDON in Blundell *v.* Brettargh, 1810, 17 Ves. 232, 241.

"When parties have agreed to submit their differences to the determination of a third person, and to abide by any orders or regulations which he may make, his decision, and the regulations and orders which he may prescribe, constitute the agreement of the parties, and it is for the purpose of enforcing that agreement this Court interferes to enforce and give effect to the award." Per Lord Justice TURNER in Nickels *v.* Hancock, 1855, 7 DeG. M. & G. 300, 318.

"It appears very clearly from the answer and the proofs that the arbitrators did appraise and determine according to the articles of submission the

Chancellor WICKENS whether the agreement was one of which the court would decree specific performance.

Mr. Northmore Lawrence, for the defendant, did not oppose.

Lord SELBORNE, L.C., said that he had no doubt of the propriety of making the decree asked for unless the defendant was prepared to pay off the advance at once.[1]

sum which the defendant, under all circumstances of the case, ought to pay for the fifty acres of land which he occupied and claimed. They inadvertently made a mistake in setting out in the award a description of the land; and the description takes in adjoining land, with only a small part of the fifty acres. The mistake is too palpable to be denied, but it was a mistake only of a clerical nature in drawing up the award. The judgment of the arbitrators was truly exercised and passed upon the object of the submission; and the appraisement is admitted to have been just and fair when applied to the defendant's land. There can be no doubt, therefore, that the defendant is bound, in good faith and in conscience, to fulfil the award on his part, according to the judgment and manifest intent of the arbitrators; and the mistake in the description of the boundaries of the land ought to be corrected according to the truth of the case, and the intention of the parties concerned. Had the arbitrators appraised a different tract of land instead of the fifty acres possessed by the defendant, there would have been good ground for rejecting the award as dehors the submission." Per Chancellor KENT in Bouck *v.* Wilbur, 1820, 4 Johns. Ch. 405, 407.

"The practice of submission to arbitration is very beneficial to the parties; and therefore the Court ought not to be severe upon arbitrators, but ought to make every intendment to substantiate the award. As to the facts, the arbitrators are judges chosen by the parties themselves; and whether we should have drawn the same conclusion is not the question." Per Lord Commissioner ASHHURST in Morgan *v.* Mather, 1792, 2 Ves. 15, 17.

"I have only to declare my concurrence. It would be a melancholy thing, if, because we differed from the arbitrators in points of fact we should set aside awards. The only grounds for that are, first, that the arbitrators have awarded what was out of their power; secondly, corruption, or that they have proceeded contrary to the principles of natural justice, though there is no corruption, as if, without reason, they will not hear a witness; thirdly, that

[1] "The complainants ask the court to decree that defendants specifically perform their agreement with the complainants, and execute and deliver to them said note and mortgage. . . .

"We are satisfied this decree was proper. The defendants had received the full consideration for what the complainants asked. The complainants might have had a remedy at law; but we are by no means sure it would be an adequate one. . . . The land was not within the jurisdiction of the courts in this State. It could be easily transferred to *bona fide* holders, and the perils of insolvency are not beyond the possibilities among business men, as all experience shows. All these are circumstances of more or less embarrassment when the remedy at law is resorted to. It is but equitable and just that this contract should be specifically performed upon the showing made in this bill." Per SHERWOOD, C. J., in Hicks *v.* Turck, 1888, 72 Mich. 311, 314.

ROGERS *v.* CHALLIS.

IN CHANCERY, before SIR JOHN ROMILLY, M. R., 1859.

[27 *Beavan* 175.]

The MASTER OF THE ROLLS.[1] I am clear that the court has no jurisdiction in this case.

I must first consider how the matter stands, independently of Sir Hugh Cairn's act, and next the effect of that act.[2] The case cannot be put higher than this: that the defendant applies to the plaintiff for the loan of £1,000 upon a security which he specifies, and the plaintiff assents to the proposal, but on the next day the defendant says, "I have changed my mind; I do not require your £1,000; I can get it upon better terms elsewhere." Is that a case in which a person can come to this court for a specific performance, and say, "You, the defendant, are bound to let me advance the £1,000 to you—it is true your circumstances may be altered, but you are bound to let me advance the money to you?" It is very justly said that the Statute of Frauds does not apply to such a case; therefore, if the court has jurisdiction in such a case, any conversation may be made the subject of a suit for specific performance; thus if two friends are walking together, and one says, "Will you lend me £100 at £5 per cent. for a year upon good security?" and the other says, "I will," that conversation might be made the subject of a suit for specific performance in this court, if on the next day one friend should say, "I do

they have proceeded upon mere mistake, which they themselves admit. I am of opinion, that when anything is submitted to arbitration, the arbitrators cannot award contrary to law, as that is beyond their power; for the parties intend to submit to them only the legal consequences of their transactions and engagements. Those are all the grounds for setting aside awards." Per Lord Commissioner WILSON in Morgan *v.* Mather, 1792, 2 Ves. 15, 18.

"The uniform language of the cases is, that an award cannot be impeached but for corruption, partiality, or gross misbehaviour, in the arbitrators, or for some palpable mistake of the law or the fact. The arbitrators are judges of the parties' own choosing; their proceedings and awards are treated with great liberality, and even a mistake upon a doubtful point often will not open an award. These principles have been declared and asserted in a series of decisions, all going to the same point, and containing a weight of authority not to be resisted. Earle *v.* Stocker, 2 Vern. 251, and Pitt *v.* Dawkra, cited, ibid. Cornforth *v.* Geer, 2 Vern. 705; Ives *v.* Medcalfe, 1 Atk. 63; Ridoul *v.* Pain, 3 Atk. 486; Tittenson *v.* Peal, 3 Atk. 529; Anon. 3 Atk. 644; Hawkins *v.* Colclough, 1 Burr, 274; Knox *v.* Symmonds, 1 Ves. jun. 369; Morgan *v.* Mather, 2 Ves, jun. 22; Chace *v.* Westmore, 13 East, 357." Per Chancellor KENT in Herrick *v.* Blair, 1814, 1 Johns. Ch. 101, 102.

[1] The statement of facts has been omitted.

[2] So much of the opinion as relates to this act has been omitted.

not want the money," or the other should say, "I will not lend it." Nothing would be more difficult and more dangerous than the task which this court would have to perform, if it were to investigate cases of that description. This is not an agreement to purchase or sell anything, it is not the case of a contract to buy a particular debt upon certain terms, or a contract for the purchase of a certain quantity of goods, to be paid for by installments and in a particular manner, in which case the court has held that these were circumstances which took the transaction out of the rule of this court, that an ordinary contract for the sale or purchase of goods is not the proper subject of a suit for specific performance in this court. It is nothing more than this: a proposal to borrow a certain sum of money, upon certain terms, for a certain time, which is accepted, and the borrower says two or three days afterwards, "I do not want the money, and I have got it elsewhere, upon better terms." It certainly is new to me, that this court has ever entertained jurisdiction in a case where the only personal obligation created is, that one person says, "If you will lend me the money, I will repay it and give you good security," and the terms are settled between them. The court has said that the reason for compelling a specific performance of a contract is because the remedy at law is inadequate or defective. But by what possibility can it be said that the remedy here is inadequate or defective? It is a simple money demand; the plaintiff says, "I have sustained a pecuniary loss by my money remaining idle, and by my not getting so good an investment for it as you contracted to give me." This is a mere matter of calculation, and the jury would easily assess the amount of the damage which the plaintiff has sustained. I express no opinion whether an action would, or would not, lie in such a case as this; but I am satisfied that before Sir Hugh Cairn's act this court would not have entertained jurisdiction in such cases. If I recollect right, there is a case in the books (Flint *v.* Brandon, 8 Ves. 159) which will decide that an agreement to fill up a gravel-pit is not one of which this court will decree the specific performance. I apprehend it would have startled some of the judges of this court to hear that its jurisdiction in specific performance extended to the case of agreements to lend moneys. How could it be? The case of a contract for the purchase of stock in the funds, at a particular price, is a much stronger case; for the injury arising from its non-performance might be much greater and more uncertain than in the case of an agreement to borrow a sum of money on particular terms, nevertheless specific performance in a case of stock has repeatedly been refused. Cud *v.* Rutter, 1 Peere W. 570; Nutbrown *v.* Thornton, 10 Ves. 161; Mason *v.* Armitage, 13 Ves. 37; Doreson *v.* Westbrook, 5 Vin. Ab. 540. It appears to me, therefore, to be contrary to every principle on which this court has acted to say that this is a case in which, independent of Sir Hugh Cairn's act, this court has jurisdiction to decree a specific performance, always bearing in mind that the court grants specific performance only in cases where the remedy at law is inadequate and defective, and also the obser-

vations made by Lord Eldon (White *v.* Damon, 7 Ves. 35), that though the court exercises a discretion in cases of specific performance, yet that it is to be exercised according to fixed rules and principles, and not arbitrarily.

I am of opinion that the bill must be dismissed with costs.[1]

HODGES *v.* KOWING AND WIFE.

IN THE SUPREME COURT OF ERRORS OF CONNECTICUT, 1889.

[58 *Connecticut* 12.]

Suit for the specific performance of a contract for the purchase of real estate; brought to the Superior Court in Fairfield County, and heard before FENN, J. Facts found and decree for plaintiff passed, and appeal by the defendants. The case is sufficiently stated in the opinion.

BEARDSLEY, J. On the 17th day of August, 1887, the defendants entered into the following contract with the plaintiff:

"STRATFORD, August 17, 1887.

"We agree to purchase of P. H. Hodges his place in Stratford, Conn., containing fifteen acres, more or less, for the sum of nine thousand five hundred dollars; to pay six thousand cash and three thousand five hundred on bond and mortgage for one year; to take title immediately, and possession on the first of January, 1888; and have paid him one hundred dollars on account.

"EDWIN W. KOWING.
"ELIZA KOWING."

No writing relating to the contract was signed by the plaintiff. The court below, upon the petition of the plaintiff, decreed that the defendants should specifically perform the contract, from which decree they appeal to this court.

The remaining reason of appeal is that the plaintiff had adequate remedy at law.[2] The defendants claim that the equitable jurisdiction of the courts in this State was restricted by the provision in the old statute last found in the revision of 1875, p. 413, sec. 5, that "courts of equity shall take cognizance only of matters in which relief cannot be

[1] "It would be quite new to me to hear that this court could specifically enforce a contract to lend money, and as to compelling a person to borrow money according to his agreement, that was the point which I decided in Rogers *v.* Challis, 27 Beav. 175." Per Sir JOHN ROMILLY, M.R., in Sichel *v.* Mosenthal, 1862, 30 Beav. 371, 377.

[2] Only so much of the opinion is given as relates to this question.

had in the ordinary course of law"; and that that provision is still in force.

It is unnecessary to inquire whether that provision has not, as the plaintiff claims, been since repealed by the practice act passed in 1879, because, in our view, it did not have the restrictive effect claimed for it. A similar claim was made by the defendant in the case of Munson *v.* Munson, 30 Conn. 425, and the court say the provision referred to "is simply an affirmance of a well-settled rule of equity." The rule of equity is thus stated by Judge Swift: "It is a leading principle that equity will not interpose where there is an adequate remedy at law. It is not sufficient that there is a remedy, but it must be as complete and beneficial as the relief in equity."

In the action at law for the breach of the contract the plaintiff could only recover the excess, if any, of the sum agreed to be paid for the land above its market value when the contract was to be performed. Such a remedy is manifestly inadequate, and courts of equity therefore hold, as a general rule, that when a contract for the sale of real estate has been fairly entered into, the party contracting to sell, as well as the party contracting to buy, is entitled to have it specifically performed.

In the present case the contract appears to have been fairly made, and is subject to the general rule of equity.

There is no error in the judgment complained of.

In this opinion the other judges concurred.[1]

[1] "It is not to be doubted that in many cases in England, and in some in this State, a vendor may come into equity for specific performance to compel a vendee to pay purchase money. Tiernan *et al. v.* Rowland *et al.*, 3 Harris 429; and Finley *v.* Aikin, 1 Grant 84, are examples in our own practice. But in no case in this court, so far as we have found, has a decree for specific performance been made in favor of vendor simply for the payment of money; when there has been nothing else in the case than is ordinarily set forth in a declaration in debt, covenant or assumpsit to entitle a plaintiff to a judgment at law for the purchase money. There are cases where a vendor, from a defect in his title, non-performance of covenant in time, or other cause, is unable to come up to the legal standard of performance of his contract, but is still entitled to the aid of a court of equity; or where the vendee is bound to do acts which a court of law cannot compel him specifically to perform, and where damages would be an inadequate substitute. In such cases the vendor's bill falls within the head of equity power given by the Act of 16th June, 1836, 'affording specific relief where a recovery in damages would be an inadequate remedy.' . . . But where, as in the case before us, no decree is sought but one for the payment of money, which can be as readily recovered in an action at law, the case is not one of specific relief, and consequently does not fall within the equity head of granting relief where a recovery in damages would be an inadequate remedy." Per AGNEW, J., in Kauffman's Appeal, 1867, 55 Pa. St. 383, 385.

HOLT *v.* HOLT.

IN CHANCERY, BEFORE LORD KEEPER SOMERS, 1694.

[1 *Equity Cases Abridged* 274, *placitum* 11.[1]]

If the plaintiff's father, seised in fee of lands, articles to pay J. S. £1,000 to build an house on the premises, and dies before the house is built, the heir may compel the builder to build it, and the father's executor to pay for it. Decreed.[2]

[1] 2 Vern. 322. S. C.

[2] "A writ was brought against a carpenter upon such matter [as follows]: that whereas the defendant had undertaken to make for the plaintiff a new house within a certain time, he had not made the house at all, to the wrong, &c. Til [ ]. Sir, you see well how this matter sounds in manner of covenant: of which covenant he [the plaintiff] shows nothing: we demand judgment if action [will lie in such a case] without specialty? Norton. And we [demand] judgment; Sir, if he had made my house badly, and had spoilt my timber, I should have had action on the case well enough without deed. Tir [witt] [J. C. P.] I quite grant [that he would] in your case: for that he should answer for the tort that he had done—*quia negligenter fecit.* But when a man makes a covenant [contract], and will not do anything [in respect] of that covenant, how shall you have an action against him without specialty? Hill [J. C. P.] He might have had an action on the statute of labourers in this case, suggesting him [the defendant] to have been retained in his [the plaintiff's] service to make a house: but this action is too feeble, wherefore, &c. Hill. For that it appears to the Court, that this action, which is brought at common law, [is] of a thing which is covenant in itself, of which nothing is shown, the Court awards here that you shall take nothing by your writ, but be in mercy, &c. Year Book, 11 Hen. 4, 33.

"If a man promise me to build me a house, and does not build it, I shall have a remedy by subpœna." Brooke's Abridgement, Conscience, &c., 14; Year Book, 8 Ed. 4, 4.

"*Nota.* If one makes a covenant [agree] to build me a house by such a day, and he does nothing of the kind, I shall have action upon my case upon this nonfeazance, as well as if he had done it ill [as if there were misfeazance], for I am endamaged by that." Per FINEUX, Chief Justice [K. B.]. And he says that he had adjudged accordingly: and he hold it for law. . . . Year Book, 21 Hen. 7, 41." Cooper's Rep. 550, 551.

For another early case apparently involving the specific performance of building contract, see Tyngelden *v.* Warham, 1467-73, 2 Calendars Proc. Ch. liv. Mr. Ames regards this case as well as the remark from Y. B. 8 Ed. 4, *supra*, as ambiguous. See Ames Cases in Eq. Juris. 68.

"The objection will not hold, for upon a covenant to build, the plaintiff's are clearly entitled to come into this court for a specific performance, otherwise on a covenant to repair; for to build is one entire single thing, and if not done prevents that security which the city of London has for the rent,

ALLEN *v.* HARDING.

IN CHANCERY, 1708.

[2 *Equity Cases Abridged* 17, *placitum* 6.]

A. being Curate of Newcastle, covenanted with B. to build an House upon the Glebe Land; B. brings his Bill for a Specifick Performance of this Agreement; and it was insisted for Defendant, that this covenant is so loose and incertain that B. cannot have a specifick Performance of it: Incertain both in Respect to Time and Value; for it is neither mentioned when the house is to be built, nor what sort of a House it shall be, and so sounds only in Damages. But per Lord Chan. Who can the Damages go to? Surely to B. to whom the Covenant was made. His Lordship said, the Covenant was designed for the Benefit of the Church, and therefore if possibly it can be specifically performed, it ought. *Ergo* decreed a convenient House to be built; and for that Purpose each side to choose two Commissioners, neighboring Gentlemen; and if they cannot agree, then to resort to the Ordinary of the Diocese to settle the Matter between them.

KAY *v.* JOHNSON, 1864, 2 Hem. & M. 118, 123.— . . . Mr. Kay in reply.—On the point as to specific performance of the building contract, cited City of London *v.* Nash, 3 Atk. 512; Pembroke *v.* Thorpe, 3 Sw. 437 n., and other cases there referred to.

The VICE-CHANCELLOR [Sir WILLIAM PAGE WOOD] said, he thought the later authorities were all opposed to specific performance of building contracts generally; and that as the Court had at any rate a discretion, he should deal with that by directing an inquiry as to damages.

ROSS *v.* UNION PACIFIC RAILWAY COMPANY.

IN THE CIRCUIT COURT OF THE UNITED STATES, 1863.

[1 *Woolworth* 26.]

In September, 1862, the Union Pacific Railway Company entered into a contract with Ross, Steel & Company by the terms of which the latter agreed to furnish the materials necessary and to construct, complete and equip a first-class railroad from and to certain specified points. The

by virtue of the lease." Per Lord Chancellor HARDWICKE in City of London *v.* Nash, 1747, 3 Atk. 512, 515.

". . . I think the agreement for building the house ought to be carried into execution." Per Lord Chancellor HARDWICKE in Pembroke *v.* Thorpe, 1740, 3 Swanst. 437, 443, *n.*

work of construction was to begin on November 1st, 1863, and be completed within a specified time.

The defendant company agreed to pay for the work as each section of forty miles was completed, at the following rates per mile: 1st, $16,000 in U. S. bonds; 2d, $11,500 in secured bonds of the company; 3rd, $6,000 in full paid stock of the company. These various payments were to be made as each section was accepted by the commissioners as provided for in the act of incorporation.

The plaintiff company entered upon the execution of the contract; expended some $50,000 upon gradings; employed about one hundred and fifty men, and provided material and capital for the vigorous prosecution of the work. No payments were made by the defendant company.

About January 1st, 1863, one John C. Frémont and Samuel Hallett purchased most of the stock of the company and obtained entire control of its affairs. Shortly thereafter, they notified the plaintiffs that they should ignore the contract and construct the road themselves. Negotiations were had between the parties but were finally dropped, the one side insisting upon and the other repudiating the contract.

The plaintiff company filed its bill asking *inter alia,* a specific performance of the contract and that the defendant company be enjoined from disposing of the capital of the company.[1]

Mr. JUSTICE MILLER. This is an application for an injunction, on a bill filed in the Circuit Court of the United States for the District of Kansas. . . .

This contract remains. . . . It is the settled doctrine of this court that such a contract will not be specifically enforced unless the remedy is mutual. . . .

I proceed, then, to inquire whether this contract is of such a character that, if the plaintiffs were in default, it could be specifically enforced as against them by a decree of this court.[2]

The covenant on the part of the plaintiffs, although expressed in very simple terms, is nevertheless a very grave undertaking. It is, that they will, within such time as the act of Congress requires, build about 360 miles of railroad, and equip and furnish the same complete with rolling stock, depots, etc., ready for use, furnishing all the materials necessary for this extensive work. Shall this court, in addition to, or rather before, enforcing the covenants of the defendants, undertake to enforce performance on the part of plaintiffs of this covenant of theirs?

No case is reported, I believe—at least none has been produced on the hearing—in which the court has undertaken to compel a party to build a railroad. In fact, the case of the South Wales Railway Com-

[1] A statement of the case is substituted containing merely the jurisdictional facts.

[2] Only so much of the opinion is given as relates to this question. The student is referred to the original report for the case *in extenso,* where the authorities are historically collected and discussed.

pany *v.* Wythes, 1 K. & J. 186, S. C., 5 De G. M. & G. 880, is to the contrary. In this case the court refused specific performance of an agreement for the building of a branch railway, which was entered into during the pendency of a bill before Parliament. See also The Attorney-General *v.* The Birmingham and Oxford Junction Railway Company, 3 Macnaughton & G. 453, S. C., 16 Jur. 113, affirming S. C., 15 Jur. 1024, S. C., 7 Eng. L. & Eq. 283; The People *v.* The Albany and Vermont Railroad Company, 24 New York 261.

There are several cases on the subject of building houses and bridges, which, as that subject bears an analogy to that of building railroads, I will now examine. . . .

Thus far it would seem that no case overrules the decision of Lord THURLOW against decreeing specific performance of building contracts. We are now, however, to examine a class of cases which are supposed to establish a contrary doctrine. Before we enter upon their consideration, let us remark certain circumstances which attend them.

1. In each case, the building was to be done upon the land of the person who agreed to do it.

2. The consideration for the agreement, in every instance, was the sale or conveyance of the land on which the building was to be erected; and the plaintiff had already, by such conveyance on his part, executed the contract.

3. In all of them, the building was in some way essential to the use, or contributory to the value, of adjoining land belonging to the plaintiff. . . .

I have thus attempted to analyze all the cases bearing on the subject which have been cited by counsel, or which I have been able to find in the short time I have had for examination; and I do not think that any of them overrule, or are in any manner inconsistent with, the case decided by Lord THURLOW, in 3 Brown's Ch. 166, notes, 1 Ves. Jr. 235. On the contrary, the decrees which have been granted are based on principles entirely reconcilable with that case. And when we take into consideration the length of time it has stood, during which no decree, resting on the general principle, has been rendered to enforce a building contract, I am inclined to concur fully with Judge STORY, that "in cases of contract to build a house or a bridge," or, I will venture to add, a railroad, "a specific performance would not now be decreed." 2 Story's Eq. Jr. § 716, note 2.

I have been much pressed by counsel for the plaintiffs with the argument of the distinguished jurist just named, in favor of a general enforcement of this class of contracts, 2 Story Eq. Jr., § 728. But it is evident that the author is there stating not what the rule is, but what he thinks it should be. And I cannot say that I am very strongly impressed by the reasoning with which he supports the abstract propriety of his opinion. It seems to me, that to establish the general doctrine that contracts for building may be specifically enforced in equity, would be to

invite into litigation very many matters which are now generally settled by the parties on a basis much more beneficial to both; and that it would require the constant supervision of the court, through its officers, in the conduct of affairs it is very poorly adapted to administer. The result of the court's drawing to itself such a jurisdiction would certainly be far less remedial than the ordinary action for damages.

There is another consideration to be noted in this connection. If the act to be done by the delinquent party, whether the plaintiff or the defendant here, were a single act, to compel which a single decree of the court would be sufficient, a case would be presented very unlike that before us. Years must elapse before this work can be done and paid for. At every step in its progress the interposition of the court, either by orders in this case or by decrees in successive cases, may be invoked, if we are at this time to lend the aid of chancery to either of the parties. It is not difficult to foresee the mischiefs of such a course. The rule is settled, even in the English Chancery, where the jurisdiction is greatly extended in all such cases, that it will decree specific performance only when it can dispose of the matter by an order capable of being enforced at once; that it will not decree a party to perform a continuous duty extending over a number of years, but will leave the opposite party to his remedy at law. It was on this principle that Lord HARDWICKE proceeded in the case of The City of London *v.* Nash, cited above. In answer to the objection to the plaintiffs' having specific performance of the contract, he expressly says: "The objection will not hold, for upon a covenant to build the plaintiffs are clearly entitled to come into this court for a specific performance—otherwise on a covenant to repair; for to build is one entire single thing, and if not done prevents that security which the City of London has for the rent by virtue of the lease."

And this may have been a reason, and a very strong reason, for the rule, now well settled, that a covenant to repair will not be specifically enforced. Gervais *v.* Edwards, 2 D. & War. 80; Hill *v.* Croll, 2 Phill. 60; Saunderson *v.* Cockermouth, etc., Railway Company, 11 Beavan 497; Nickels *v.* Hancock, 7 De G. M. & G. 300, 327; Ogden *v.* Fossick, 11 W. R. 128 L. J. . . .

It will be observed that the infirmity of uncertain and vague stipulations is common to that and this contract, for this line of road remains unlocated, and according to the usual course of such enterprises must be subject to changes not possible now to foresee; and in this way differences irreconcilable between the parties, and which this court cannot determine, may, and almost certainly will, arise. So, too, as to the performance of the work the same difficulties are very likely to occur. Then there is the great consideration of time. Years will be required for the execution of the contract. In the case cited twenty-two miles of a branch road was to be built. Here is a line of 360 miles stretching out into a new, unpopulated, almost unknown region. Other points of

similarity might be mentioned. In fact, where the cases differ it is against the claim of the plaintiff here.

It seems, therefore, that in granting this injunction, which would require that this railroad should be built, equipped and delivered by one party, and payments made by the other under the control and compulsion of the court, I should be going far beyond any adjudged case, or any principle established by any adjudged case. More than that, I should proceed in the very face of some of the highest authorities, and, in direct opposition thereto, inaugurate a policy without a precedent, involving interests of the greatest consequence to every-day life. The effect of the doctrine, if established, no wisdom can foresee.

Entertaining these views, I must decline to make this advance and shall overrule the motion for an injunction.

Motion for an injunction overruled.[1]

[1] "I must confess that I cannot altogether understand the principle upon which Courts of Equity have acted in sometimes granting orders for specific performance in these cases, and sometimes not. I think that possibly the explanation is that the Courts have not uniformly adhered to one principle in such cases. It looks to me as if the views of the Courts of Equity have gone through a process of development with regard to the subject. In early times they seem to have granted decrees for specific performance in such cases. Then came a period in which they would not grant such decrees on the ground that the Court could not undertake to supervise the performance of the contract. Later on again they seem to have attached less importance to this consideration, and returned to some extent to the more ancient practice, holding that they could order specific performance in certain cases in which the works were specified by the contract in a sufficiently definite manner. Whatever the exact principle of equity on the subject may be, I think it is clear on the authorities that the elements exist in this case which in previous cases of a similar kind have been held to justify the Court in making a decree for specific performance. In this case land was conveyed to the defendant by the plaintiffs, part of the consideration being the covenant by him to erect buildings on it; by the subsequent agreement the buildings to be erected were specifically defined in all particulars; and, having regard to the circumstances and the position of the plaintiffs, it appears to me that damages would not be an adequate compensation to the plaintiffs for the breach by the defendant of his contract. I think, therefore, that this is a case in which the Court has power to make an order for specific performance, and in which such an order ought to be made." Per COLLINS, L.J., in Wolverhampton Corporation *v.* Emmons, 1901, 1 K. B. 515, 523.

"There are several considerations which forbid the granting of relief prayed for in this suit. If this court would undertake the performance of such a contract as that stated in the bill, a contract for building and equipping a long line of railroad, building station, freight and engine-houses, etc. etc. (and the current and great weight of authority is decidedly against it, Story's Eq. Jur., § 726; Ross *v.* Union Pacific R. R. Co., 1 Woolw. 26; Fallon *v.* Railroad Co., 1 Dillon 121; South Wales Railw. Co. *v.* Wythes, 5 DeG. M. & G. 880), the disability of the defendants would be a sufficient reason for re-

FLINT *v.* BRANDON.

IN CHANCERY, BEFORE SIR WILLIAM GRANT, M. R., 1803

[8 *Vesey* 159.]

One Clutton was in possession of premises under a lease from one Penton. Penton assigned to Thomas [since deceased] and Samuel Brandon, who leased to the plaintiff for 21 years, term to begin at close of Clutton's tenancy. Clutton was authorized to dig and remove gravel from the land, but by covenant, he was obliged to restore the land at the end of his tenancy. The defendants had covenanted to put the plaintiff

fusing. Courts of Equity will never undertake to enforce specific performance of an agreement where the decree would be a vain or imperfect act. Tobey *v.* The County of Bristol, 2 Story 800. And the incapacity of the defendant to carry the contract into execution affords a ground of defence in a suit for specific performance. Fry on Spec. Perf. § 658." Per Chancellor RUNYON in Danforth *v.* Philadelphia & Cape May R. R. Co., 1878, 30 N. J. Eq. 12, 15. See also the reporter's valuable notes to this case, in which the authorities are collected.

In Iron Age Publishing Co. *v.* Telegraph Co. 1887, 83 Ala. 498, 511, the plaintiff sought the specific performance of a contract made with the defendants by which the defendants agreed to furnish to the plaintiff exclusively the Associated Press despatches for an indefinite period. SOMERVILLE, J., speaking for the court said:—"The second decree above suggested [continuing an injunction against the defendants as long as the plaintiff should perform its side of the contract] would also be impracticable, not only for the reason that the court can not compel the performance of the personal services assumed to be undertaken by the complainant, involving as they do the exercise of special skill, judgment and discretion, but it would be out of the question for the court to keep this case open for all time, or even for an indefinite term of years, to superintend the continuous performance of these duties by the complainant. This might involve the frequent necessity on the part of the court of hearing complaints from the defendant, charging the complainant with a breach of its duties, or from the complainant arraigning the defendant for contempt for a violation of the injunction. There would thus be no end to the number of occasions when the court might be called on, from year to year, to say whether the complainant has performed the duties in question faithfully and efficiently, so as to have kept the injunction in force or negligently and unskilfully, so as to justify its breach. For these reasons, the rule is, that 'equity will not enforce the performance of continuous duties involving personal labor and care of a particular kind which the court cannot superintend.' WATERMAN on Specific Performance, sec. 49, Richmond *v.* Dubuque etc. R.R. Co., 33 Iowa 422; Caswell *v.* Gibbs, 33 Mich. 331; Port Clinton R.R. Co. *v.* Cleveland R.R. Co., 13 Ohio St. 544; Atlanta etc. R.R. Co. *v.* Speer, 32 Ga. 550; Blanchard *v.* Detroit R.R. Co., 31 Mich. 43; Marble Co. *v.* Ripley, 10 Wall 339.

"The contract being one which cannot be specifically enforced in a court of

in possession, and to restore land to condition required by Clutton's covenant. This bill is filed for the specific performance of these last covenants.[1]

The MASTER OF THE ROLLS. This court does not, I apprehend, profess to decree a specific performance of contracts of every description. It is only where the legal remedy is inadequate or defective that it becomes necessary for courts of equity to interfere. In Errington *v.* Aynesley, 2 Bro. C. C. 341, Lord KENYON says, "a specific performance is only decreed where the party wants the thing in specie, and cannot have it any other way." I will not say courts of equity have in every instance confined themselves within this line; but this being the principle, I will not deviate from it farther than I am bound from deference to precedent and

equity against the complainant, we deem it inequitable to enforce it against the defendants."

"It is urged that equity will not enforce specifically a contract to build or repair. See Story Eq., § 726, etc.; Beck *v.* Allison, 56 N. Y. 366; Pomeroy's Eq. § 1402 n. Of course the evident reason of this rule is that usually damages are a sufficient remedy. The plaintiff can build or repair, and sue for the amount expended. But there are instances where the reason does not exist; and where the plaintiff cannot himself build or repair; and in which damages would not be sufficient. Mr. Pomeroy in his note makes four classes of exceptions; the second is where the defendant has contracted to construct some work on his own land, and the plaintiff has an interest which cannot be compensated in damages. An instance is Storer *v.* Great Western Railway Company. 2 Y. & C. 48. The third is where the defendant has contracted to construct works on land acquired from the plaintiff, and the fourth is where there has been a part performance so that the defendant is enjoying the benefits in specie. This is illustrated by the case of Stuyvesant *v.* Mayor, 11 Paige 414. Mr. Fry makes similar exceptions, Fry's Specific Perf., § 81." Per LEARNED, P.J., in Lawrence *v.* Saratoga Lake R. R. Co., 1885, 36 Hun 467, 473.

In P. P. & C. I. R. R. Co. *v.* C. I. & B. R. R. Co., 1894, 144 N. Y. 152, 156, BARTLETT, J., said:— . . .

"By the contract the plaintiff granted the defendant the right to use its tracks on Ninth avenue from Fifteenth street to the depot at Ninth avenue and Twentieth street, free of charge for twenty-one years from June 1st, 1882.

"The defendant covenanted to run during the spring, summer and fall months to plaintiff's depot cars to connect with the ferries and all plaintiff's trains to and from Coney Island. The plaintiff agreed to furnish defendant necessary terminal facilities at the depot. . . .

"As a final point the learned counsel for the defendant insists that equity will not enforce the specific performance of a contract having some years to run which requires the exercise of skill and judgment and a continuous series of acts. . . .

"A large number of other cases might be cited sustaining the power of the court to decree the specific performance of this contract, but we do not deem it necessary.

[1] The statement of facts has been abridged.

authority. In the present case complete justice can be done at law. The matter in controversy is nothing more than the sum it will cost to put the ground in the condition in which by the covenant it ought to be. The plaintiff will be entitled to recover damages in an action for breach of the contract. In some respects the legal remedy is better than any this court can give; for the plaintiff recovering, and having the disposition of the money, may perform the work in such manner as he thinks proper; whereas, if a specific performance is decreed, a question may arise, whether the work is sufficiently performed. The jury also may take into consideration any injury to him by not having performed at the commencement of the lease; but this court can only decree a performance now.

As to the cases upon building contracts, it is unnecessary to make observations upon them. If it is settled that such contracts should be specifically performed, I should think myself bound to follow that course, without inquiring whether it is strictly consonant to principle. But I am not barred from that inquiry, where a contract of another species is for the first time brought into this court for a specific performance. No instance of a specific performance of such a covenant as this has been produced. Therefore I am at liberty to do what upon principle ought to be done to dismiss this bill.[1]

"There can be no well-founded doubt as to the power of the court in the premises, and the important question is whether in the exercise of a wise discretion and in view of all the circumstances specific performance should be decreed.

"After a most careful consideration of this case we have reached the conclusion that the plaintiff is entitled to have the contract specifically performed."

"In the present case, it is urged that the court will be called upon to determine, from time to time, what are reasonable regulations to be made by the Wabash company for the running of trains upon its tracks by the Colorado company. But this is no more than a court of equity is called upon to do whenever it takes charge of the running of a railroad by means of a receiver." Per Justice BLATCHFORD in Joy *v.* St. Louis, 1890, 138 U. S., 1, 47.

"Another objection to the decree is endeavored to be rested on the doctrine that the court will not decree specific performance of a continuing contract. There is a class of special and exceptional contracts in which courts of equity refuse to exercise jurisdiction by way of specific performance. These are contracts having such terms and provisions that the court could not carry into effect its decree without some personal supervision and oversight over the work to be done, extending over a considerable period of time, such as agreements to repair or build, to construct works, to build or carry on railways, mines and the like. In such cases, the court declines to interfere, because of its inability to give relief by one decree. Pomeroy on Cont., §§ 307-312." Per DEPUE, J., in Wharton *v.* Stoutenburg, 1882, 35 N. J. Eq. 266, 277.

[1] "Consistently with the principle of the case of Flint *v.* Brandon, with which I agree, it is competent to this court to interfere to enforce the specific

LANE *v.* NEWDIGATE.

IN CHANCERY, BEFORE LORD CHANCELLOR ELDON, 1804.

[10 *Vesey* 192.]

The plaintiff was assignee of a lease, granted by the defendant, for the purpose of erecting mills and other buildings; with covenants for the supply of water from canals and reservoirs on the defendant's estates, reserving to the defendant the right of working and using his then or future collieries, either with regard to the supply of water, or other uses of the collieries, or any locks for the passage of his boats or otherwise; the liberties and privileges granted being, as expressed in the lease, intended to be subordinate to the use and enjoyment of the collieries; the defendant to have due regard to the mills, etc., and doing as little mischief as the nature of the case would admit.

The bill prayed, that the defendant may be decreed so to use and manage the waters of the canals as not to injure the plaintff in the occupation of his manufactory; and, in particular, that he may be restrained from using the locks, and thereby drawing off the waters, which would otherwise run to and supply the manufactory; and that he may be decreed to restore the cut for carrying the waste waters from the Arbury canal to Kenilworth pool, and to restore Kenilworth stop-gate

performace of a contract by a defendant to do defined work upon his property, in the performance of which the plaintiff has a material interest, and which is not capable of adequate compensation in damages." Per Sir J. L. KNIGHT BRUCE, V.C., in Storer *v.* Great Western Railway Co., 1842, 2 Y. & C. Ch. 48, 53.

"This demurrer must be overruled. With regard to the main point in question, it is entirely governed by Storer *v.* Great Western Railway Company, and in truth the agreement appears to me to be even stronger than it was in that case. In this case all that is required is that a road be made—a thing which presents the least possible amount of difficulty of all works required to be constructed—and the company have actually in this case been released with regard to making certain roadways and the like, and they not only got release from that obligation, but they have got the land conveyed to them and vested in them upon which the road is to be made, having taken it for the purposes of the road. It would be monstrous if the company, having got the whole benefit of the agreement, could turn round and say, 'This sort of thing which the court finds a difficulty in doing, and will not do.' Rather than allow such a gross piece of dishonesty to go unredressed the court would struggle with any amount of difficulties in order to perform the agreement." Per Sir W. M. JAMES, V.C., in Wilson *v.* Furness Railway Co., 1869, 9 Eq. Cas. 28, 33.

"The next objection raised it has been sought to establish on authority. It is contended that the Court cannot decree specific performance of an agreement to repair; but, even admitting that principle, it is well settled that the

and the banks of the canal to their former height; and also to repair such stop-gates, bridges, canals, and towing-paths as were made previously to granting the lease; and that he may be decreed to make compensation for the injury sustained by their having been suffered to go out of repair; and that he may be decreed to remove the locks, which have been made since the lease, and to make compensation for the injury sustained by the said locks having been made so near the manufactory, thereby injuring the machinery; and that he may be decreed to pay the plaintiff the expense he has been put to by working the steam engine to supply the want of water.

The Lord Chancellor [LORD ELDON], upon the motion for the injunction, expressed a difficulty, whether it is according to the practice of the court to decree, or order, repairs to be done.

Mr. Romilly, in support of the injunction, said the repairs to be done in this case are in effect nothing more than was done in Robinson *v.* Lord Byron, 1 Bro. C. C. 588; viz., raising the dam heads, so that the water shall not escape, as it will otherwise.

The LORD CHANCELLOR. So, as to restoring the stop-gate, the same difficulty occurs. The question is, whether the court can specifically order that to be restored. I think I can direct it in terms that will have that effect. The injunction, I shall order, will create the necessity of restoring the stop-gate; and attention will be had to the manner in which he is to use these locks; and he will find it difficult, I apprehend, to avoid completely repairing these works.

Court is in the habit of decreeing specific performance of agreements for the execution of leases containing covenants to repair; and, on looking at this agreement, I see no reason to suppose that there may not be introduced into this lease such covenants as will enable the plaintiff to obtain a proper remedy as to the repairs. I must, therefore, decree specific performance." Per Sir JOHN STUART, V. C., in Paxton *v.* Newton, 1854, 2 Sm. & G. 437, 440.

"The precedents are numerous of decrees directing the execution of mining and farming leases, containing stipulations with respect to the mode of working and cultivating, analogous to the covenants of the proposed lease with respect to the working of the mine and the payment of a royalty on the minerals raised. If the defendant shall be involved in difficulties with respect to past non-performance of his engagements, or in embarrassments in exercising his right of rescission, they will be the consequence of his own conduct in evading the due performance of his obligations." Per DEPUE, J., in Wharton *v.* Stoutenburgh, 1882, 35 N. J. Eq. 266, 278.

"It has been argued that, where persons have entered into an agreement to execute a deed containing certain provisions, the court will order the execution of such deed, without regard to the question whether or not its provisions are such as the court can decree to be specifically performed; and that it will in such cases consider it to be the substantial part of the agreement, that a deed should be executed so as to vest in the parties the legal rights which they have mutually agreed to confer. I concur in this view." Per Sir W. PAGE WOOD, V.C., in Stocker *v.* Wedderburn, 1857, 3 K. & J. 393, 403.

The order pronounced was, that the defendant, his agents, etc., be restrained until further order from further impeding, obstructing, or hindering the plaintiff from navigating the canal for the necessary purposes of the mill, or from using and enjoying the demised premises, and the mills and buildings erected thereon, or the liberties and privileges, granted by the indenture of lease, etc., contrary to the covenant, by continuing to keep the said canals, or the banks, gates, locks, or works of the same respectively, out of good repair, order, or condition; and also from further troubling, molesting, and preventing the plaintiff, contrary to the covenant, in the use and enjoyment of the said mills and buildings, or the liberty, privilege, and power of drawing for the use of the said mill from the canals, etc., a sufficient quantity of water for the use and working of the said mill, by diverting, draining, or drawing off water; or preventing the same by the use of any lock or locks, erected by the defendant, from remaining and continuing in the said canals, or by continuing the removal of the stop-gate, mentioned in the pleadings in the action, brought by the plaintiff, to have been erected; and by means of which the water could and would have been kept and retained in the said pool for the use of the mill; but nothing in this order is to extend to diminish, lessen, hinder, or prejudice the working, using, or enjoying, by the defendant or his present and future collieries, either with regard to the supply of water for his fire-engine, or other uses of the collieries, or of any locks to be erected for the passage of his boats, or otherwise; the defendant having due regard to the said mills, and doing as little damage thereto as the nature of the case will admit.[1]

[1] In an Anonymous Case, 1790, 1 Ves. Jr. 140, there was a "Motion for an injunction on bill filed upon the 4th of May. The object of the motion was to compel the party to put every thing in the same state in which it was before, by filling up a ditch he had made, as well as to prevent digging farther.

"Lord Chancellor [THURLOW]. I will not order him to fill up this ditch before answer. That would be a great deal too much to do. Here is a transaction upon the 15th of March; and you come on 4th of May, and file a bill for an injunction; and probably have served no process. The consequence is, the party hears of the injunction before he hears of the bill. I do not like granting these injunctions on motion. This ditch may be a mile long. Take an order, that he shall do nothing more till answer or further order."

". . . If this contract is one which the court will not carry into execution, the court cannot indirectly enforce it, by restraining Mr. Price from doing some other act." Per Lord Chancellor ELDON, in Clarke *v.* Price, 1819, 2 Wils. Ch. 157, 164.

"This brings us then to Lane *v.* Newdigate, 10 Ves. 192, which may be said to go to the very uttermost verge of all former cases and indirectly to order something to be done, by restraining the party from continuing to keep certain works out of repair. This case appears to have been *ex parte*, and not at all argued. Lord ELDON himself suggested the difficulty of making an order that the repairs should be done. Sir SAMUEL ROMILLY said it was no more, in effect, than Lord THURLOW had ordered in Robinson *v.* Lord Byron;

HOOD *v.* NORTH EASTERN RAILWAY COMPANY.

IN CHANCERY, BEFORE SIR W. M. JAMES, V. C., 1869.

[*Law Reports* 8 *Equity Cases* 666.]

This was a bill by the owner of the Pepper Hall estate in Yorkshire to enforce specific performance of an agreement entered into in 1838 between the Great North of England Railway Company (now vested in the defendants the North Eastern Railway Company) and the plaintiff's predecessors in title for the permanent use of certain land, then purchased by the company, as a first-class station and goods depot.

but Lord ELDON appears to have thought otherwise, and he refused the order as prayed, directing it, however, in such a manner as to produce the same result, by making it 'difficult,' his Lordship said, 'for the defendant to avoid completely repairing the works.'" Per Lord Chancellor BROUGHAM, in Blakemore *v.* Glamorganshire, 1832, 1 M. & K. 154, 183.

"I shall pursue the course which I have always taken, of not extending the power which, in cases of a peculiar nature, this Court has sometimes exercised, of ordering a thing to be done under the form of restraining parties from preventing it. Blackmore *v.* Glamorganshire, 1832, 1 M. & K. 154." Per Lord Chancellor BROUGHAM, in Milligan *v.* Mitchell, 1833, 1 M. & K. 446, 452.

"Then the judgment of Lord ELDON, in Lane *v.* Newdigate, 10 Ves. 192, was cited, in which the learned judge appears on that occasion to have deliberately held that the court ought to do indirectly that which it had no power to do directly. That is a doctrine that I, for one, must decline to follow." Per Lord ESHER, M. R., in Ryan *v.* Mutual Tontine West. Cham. Ass'n, 1893, 1 Ch. Div. 116, 124.

"The court ought not to have restrained the Defendant from discontinuing to use and keep open the demised premises as an inn, which is the same in effect, as ordering him to carry on the business of an innkeeper." Per Sir LAUNCELOT SHADWELL, V. C., in Hooper *v.* Brodrick, 1840, 11 Sim. 47, 49.

"The order which was drawn up was as follows: 'This court doth order that an injunction be awarded to restrain the defendants, their agents and workmen, from continuing the projected buildings, or commencing any other buildings whatever on the garden or plot of ground described in the pleadings in this cause, or any part thereof; and also from permitting such part of the said buildings as have been already erected on the said garden or plot of ground from remaining thereon, until the defendants shall fully answer the plaintiff's bill, or this court make order to the contrary.'" Per Sir LAUNCELOT SHADWELL, V. C., in Hooper *v.* Brodrick, 1840, 11 Sim. 47, 49.

"The power of the court to grant that species of injunction which Lord ELDON granted, namely, restraining a party from allowing a thing to continue, and which has the effect of making him take some active measures, has been since recognized and acted on, see Rankin *v.* Huskisson, 1830, 4 Sim. 13; and I don't see why, if that species of negative injunction has been adopted, it should not be adopted here, so as to prevent the parties from continuing

Sir W. M. JAMES, V. C. The plaintiff is clearly entitled to the benefit of the covenant between the railway company, now represented by the North Eastern Railway Company, and his predecessor in title, Lord Alvanley. The covenant was one by which, in consideration of Lord Alvanley giving up his land to the company and allowing them to go through his estate for about three miles, they deliberately bargained with him—it being one of the terms introduced by him in the course of the negotiation, and one on which he insisted, and to which they deliberately

the excavation in its present state, and from making the excavation greater. The injunction asked for, as far as it restrains the Defendant from widening the excavation, is quite of the common sort: but so far as it seeks to prevent its continuance, it is of a negative kind, but it has been adopted by Lord ELDON." Per Sir LAUNCELOT SHADWELL, V. C., in Spencer *v.* London & Birmingham Railway Co., 1836, 8 Sim. 193, 198.

"It has been said that the injunction now sought is wholly mandatory, and therefore proper to be refused. That injunctions in substance mandatory, though in form merely prohibitory, have been and may be granted by the Court is clear. This branch of its jurisdiction may be one not fit to be exercised without particular caution, but certainly it is not fit and necessary, under certain circumstances, to be exercised. Under what circumstances it should be exercised must be matter for judicial discretion in each several case." Per Sir J. L. KNIGHT BRUCE, V. C., in North of Eng. Junc. Railway Co. *v.* Clarence Railway Co., 1844, 1 Coll. 507, 521.

"Secondly, it has already been seen, *supra*. pp. 28-29, that the violation of negative duties could not be effectively prevented, unless the court could provisionally restrain their violation during the pendency of suits to prevent their violation; *i. e.*, unless the court could provisionally restrain defendants from doing certain acts before the court knows or can know that the acts are such as ought to be restrained. The same thing is equally true of the violation of affirmative duties (though for somewhat different reasons); for an affirmative duty is violated the moment a certain length of time elapses, or a certain event happens without its being performed; and, in the great majority of cases, the time for performance would arrive before a decree for performance could possibly be obtained. Could, then, a court of equity restrain the violation of an affirmative duty provisionally and before any trial of the right, as it does in case of a negative duty? Clearly not, for the only way of restraining the violation of an affirmative duty is by compelling performance of it; and hence any restraint of the violation of an affirmative duty is of necessity (not provisional, but) final. To impose such a restraint, therefore (*i. e.*, to compel performance of the duty), before the hearing of the cause would be to decide the cause, and decide it finally, without any trial, and thus to render a trial entirely futile; for, though a trial should be had, and should result in establishing that no performance was due to the plaintiff, yet the court could not undo what it had done." Langdell, Brief Survey of Equity Jurisdiction, 41, 1 Harv. L. R. 355.

"Courts of equity have shown little disposition, however, to try new modes of giving relief; and hence they seldom attempt to give a remedy for a tort by way of specific reparation. There is believed to be but one instance (and that an ancient one) in cases of waste, no instance in cases of trespass, and

assented—that he should have on his estate, for the convenience of himself and his tenants, "a first-class station for the purpose of taking up and setting down passengers traveling along the said railway." [1]

There being, therefore, no substantial difficulty in ascertaining the meaning, and the company not having, in my opinion, done anything of late years to keep this up as a first-class station, it remains to be considered whether I can in this suit give the plaintiff relief, or whether I am obliged to do that which is almost a scandal to our law, drive a man to what used to be called "the other side of Westminster Hall," and say I will dismiss your bill without prejudice to an action. I think I am not obliged to do that, but that I am in a position to give the plaintiff substantial relief, based upon the breach of the covenant committed by the company, without imposing any unnecessary or unreasonable burden upon the company. Upon the evidence, not only the trains which ought to have been stopped are not stopped, but the accommodation originally provided by the company (and then it seems to have been barely sufficient) has been gradually withdrawn and become worse and worse, so that it is now as bad as a third-class station.

Minute of Decree.—Declare that the company has committed a breach of its covenant in not *bona fide* using and employing the parcel of ground in the bill mentioned as and for a first-class station or place for the purposes of taking up and setting down passengers traveling along the railway in the bill mentioned.[2]

Restrain the railway company from allowing any of its ordinary or fast trains, other than mail, express, or special trains, to pass the station without staying there for the purpose of taking and setting down passengers.

Liberty to the defendants to apply to the court for a relaxation of this injunction if it should be made to appear at any future time that sufficient accommodation can be furnished for the use of the plaintiff, his heirs and assigns, without stopping all the trains aforesaid.[3]

but few instances in cases of nuisance, in which an English Court of Equity has attempted to give such a remedy. The first instance was in the case of Robinson *v.* Lord Byron, 1 Bro. c. c., Belt's ed. 588, 2 Cox, 4 Dickens, 703. Then followed Lane *v.* Newdigate, 10 Ves. 192, and Blackmore *v.* Glamorganshire Canal Co. 1 M. & K. 154. In very recent times instances of such relief has been much more common." Langdell, Brief Survey of Equity Jurisdiction, 37. S. A. 1 Harv. L. R. 111.

[1] A portion of the opinion discussing the definiteness of the contract has been omitted; as also a portion discussing the accommodations at a goods depot.

[2] A part of the minute is omitted.

[3] "The company agreed, in the first paragraph of the agreement, to erect and maintain in working order, subject to provisions, a certain wire and the telephonic apparatus relating thereto. It would be impossible for the court to supervise a complete performance of that clause of the agreement, and to see to the maintenance of the wire and telephonic apparatus during

BECK *v.* ALLISON.

IN THE COURT OF APPEALS OF NEW YORK, 1874.

[56 *New York* 366.]

This action was to enforce specific performance of certain covenants to repair contained in a lease executed by the defendant to Luke Poole & Co., of premises known as 44 Vesey Street, New York, which lease was held by plaintiffs as assignee.

The facts are sufficiently set forth in the opinion.

GROVER, J. This action was brought by the plaintiffs as assignees of a lease made by the defendant of the premises known as 44 Vesey Street, in the City of New York, for two years, containing a provision for a renewal, at the option of the lessees for a further term of three years, by giving the lessor notice as therein provided, which notice had been given as therein provided, for the specific performance of an agreement made by the lessor to repair damages caused by fire. The lease provided that all other repairs were to be made by the lessees, and the case shows that this agreement of the lessor was interlined after the preparation, but before the execution of the lease. The case shows that the premises were nearly destroyed by fire while in the occupation of the plaintiffs, under the lease, so as substantially to require rebuilding; but the trial judge found that they could be repaired, and the defendant must, after affirmance of the judgment by the General Term, be held in this court concluded by this finding. The judge further found that a reasonable time for doing the requisite repairs was four months.

The question is thus presented whether equity will enforce the specific performance of an agreement for making repairs of this character. The learned chief justice who gave the opinion of the General Term, after an elaborate and learned examination of the English authorities, arrived at the conclusion that equity would specifically enforce agreements for making repairs. In this he differs from Judge STORY, who, after an

the period of the agreement; and that, no doubt, raises a difficulty. . . .

"Here it is to be observed that there is no question of erecting the wire and telephonic apparatus; that has all been done. The only question can be about maintenance; and it seems to me that the difficulty of supervising the maintenance ought not to prevent the court from saying that the company must not cut off the wires. They may not be compellable to maintain the wires and telephonic apparatus—that is to say, damages might be the only remedy for non-compliance with that part of the agreement; but yet the essence of the agreement is that the wire and telephonic apparatus, being there, shall be open to the use of the plaintiffs; and that seems necessarily to go to the root of the whole matter." Per KEKEWICH, J., in Keith, Prouse & Co. *v.* Nat. Telephone Co., 1894, 2 Ch. 147, 153.

examination and citation of some of the leading cases relied upon by the learned judge, adopts precisely an opposite conclusion. 1 Story's Equity 726, §§ 726, 727. The accuracy of the conclusion of Judge STORY is strongly corroborated by the fact, that in this State, and so far as I am aware, in this country, no court of equity has ever attempted the exercise of any such power. The same conclusion is substantially adopted by a learned English author of a work upon this particular branch of equity jurisprudence, who refers to most of the cases relied upon by the learned judge. Fry on Specific Performance, 19, § 48. I shall refer to only a few of the cases cited by the judge, although I have examined nearly all. City of London *v.* Nash, 1 Vesey 11; more fully reported 3 Atkyns 512, decided by Lord HARDWICKE, is much relied upon in the opinion. In this case the Chancellor stated that equity would enforce the performance of a building contract, for the reason that it was an entire thing, but not a contract for repairs. While I am unable to see if the former is thus enforced, why the latter should not be, for the reason that the former would be attended by about the same difficulties as the latter, and a legal remedy would be equally applicable to both, yet the case is authority against the conclusion of the General Term in the present case, as this is an agreement for making repairs. It may be further remarked, that a specific performance of the contract to rebuild was not decreed, the Chancellor being of opinion that that would be inequitable under the circumstances, and the party injured by the breach of the contract was left to his legal remedy for the recovery of damages. The judgment given is no authority for enforcing the specific performance of contracts to build. In the subsequent case of Lucas *v.* Commerford, 3 Brown 166, it was expressly held by Chancellor THURLOW that there could not be a decree to rebuild, as the court could not more undertake the conduct of a rebuilding than of a repair. I think the soundness of the reason given a full answer to the criticism of this Chancellor contained in the opinion with a view to impair the authority of the judgment given in this case. In Rayner *v.* Stone, 2 Eden 128, a demurrer to a bill for the specific performance of covenants contained in a lease to repair hedges and the mansion house, was sustained by Lord WORTHINGTON. Among the reasons assigned for the judgment was that the court had no officer to see to the performance, which the Chancellor said was, to him, very strong. He asks how can a master judge of repairs in husbandry, etc. He adds that it is said that this is an equitable right, and that it was insisted that he should put the plaintiff in a better state than what he could be at law, but the court had no jurisdiction to strip the defendant of the right to try the supposed breach of covenant at law. Besides, how can a specific performance of things of this kind be decreed? The nature of the thing shows the absurdity of drawing these questions from their proper trial and jurisdiction. These reasons apply with all their force to an attempt to enforce the specific performance of the contract in question. The court must first adjudge what repairs are to be made and the time within

which they are to be done. When this is accomplished more serious difficulties remain. The idea that the court can appoint a receiver to take possession of the property and cause the work to be done, with money furnished by the defendant, would be, in the language of Lord WORTHINGTON, absurd. The mode, if undertaken, must be for the court first specifically to determine what shall be done, and when and how, and then to enforce performance by attachment, as for contempt in case of alleged disobedience. Then will arise, not only the question whether there has been substantial performance, and if found not, whether the defendant had any such excuse therefore as will exonerate him from the contempt charged, and in case of performance, but not in as beneficial a manner as adjudged, the compensation that should be made for the deficiency. It is obvious that the execution of contracts of this description, under the supervision and control of the court, would be found very difficult if not impracticable, while the remedy at law would, in nearly, if not in all, cases, afford full redress for the injury. It is for these reasons that such powers have never been exercised in this country. It was for these reasons that the court in the South Wales R. Co. *v.* Whythe, 5 De G. McN. & Gord, 880, refused to decree the specific performance of a contract to construct a branch railway. The case enforcing the specific performance of an agreement made by a railway company with a land owner, to construct an arch under their road for his use, does not militate against this doctrine. Damages in an action at law would not, in such a case, afford adequate redress. The same may be said of the case enforcing a contract for the construction of a wharf, etc. The want of an adequate remedy at law has always been regarded as a proper ground for sustaining a bill in equity. See Wilson *v.* Furness R. Co., 9 Equity Cases 28. What was said by Lord HARDWICKE in Rook *v.* Worth, 1 Vesey Sr. 460, was intended to apply to the particular facts of that case, which related to questions as to the rights of a tenant in tail and the reversioner, which could not well be protected in a legal action.

But I do not deem it necessary further to pursue the investigation. As I understand the English cases, the power of enforcing the specific performance of contracts for repairs is not now exercised by courts of equity there, and there is no authority for its exercise by the courts of this State. This being so, a court of equity had no jurisdiction, as such, of the action.[1]

The judgment appealed from must be reversed, and a new trial ordered.

All concurr.

Judgment reversed.

[1] A portion of the opinion discussing a question of code practice has been omitted.

HEPBURN *v.* LEATHER.

IN HIGH COURT OF JUSTICE, CHANCERY DIVISION, BEFORE SIR JAMES BACON, V. C., 1884.

[50 *Law Times Reports* 660.]

By an indenture of the 7th Nov. 1883, made between the plaintiff of the one part and the defendants of the other part, a piece of land, situated on the west side of South Bank-road, West Derby, in the county of Lancaster, was conveyed by the plaintiff to the defendants.

The said indenture contained a covenant, which was in the words and figures following:

And the said Samuel Leather and Daniel Leather do and each of them doth hereby covenant with the said George Hepburn, that they will, on or before the 1st of Jan. 1884, or as soon thereafter as the state of the weather will admit of building operations being carried on, at their own costs erect a brick wall of 11 inches thick, in a proper and workmanlike manner, to the height of 14 feet above the level of the footwalk in South Bank-road, and place thereon a stone coping, and such wall shall be such a depth in the earth and the coping shall be of the same character as that on the wall on the South Bank-road side of the said land, and of such strength and workmanship to the satisfaction of Mr. J. F. Doyle, of Liverpool, architect, or other the architect for the time being of the said George Hepburn, and such wall shall be built on the southerly side, and close up to the southerly boundary of the said land intended to be conveyed hereby, from the westerly side to the easterly side of the said land, in the position shown on the said plan.

The defendants neglected to carry out the covenant within the time specified, and the plaintiff commenced this action.

The plaintiff claimed specific performance and damages.

The action came on on motion for judgment. The defendants did not appear.

Arthur F. Leach for the plaintiff.—Where a contract for building is in its nature defined, the court will grant specific performance:

Wells *v.* Maxwell, 32 Beav. 408; Cubitt *v.* Smith, 10 Jur. N. S. 1123; Greene *v.* The West Cheshire Railway Company, 25 L. T. Rep. N. S. 409; L. Rep. 13 Eq. 44.

BACON, V.C., granted specific performance of the agreement.[1]

[1] In Wells *v.* Maxwell, 1863, 32 Beav. 408, 419, specific performance was asked of a contract providing that the defendant should build a house upon land which he purchased from the plaintiff. Sir JOHN ROMILLY, M. R., said:—

"That being my opinion upon the question of time, I think the other objection is one which it is impossible to support, namely, that this is a contract which this Court will not enforce. Without referring to any of the decided

JONES *v.* PARKER.
SAME *v.* GROVER.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1895.

[163 *Massachusetts* 564.]

HOLMES, J.[1] The case of Jones *v.* Parker is a bill in equity brought by a lessee upon a lease purporting to begin on September 1, 1893, and to demise part of a basement in a building not yet erected. The lessor "covenants to deliver possession of the same to the lessee upon completion of said building, and thereafter, during the term of this lease, reasonably to heat and light the demised premises." It is alleged that the building has been completed, but that the defendants refuse to complete the premises with apparatus sufficient to heat and light the same, and to deliver the same to the plaintiff. It also is alleged that the occupancy of the premises for the purpose contemplated in the lease was impossible without the construction in the premises of proper apparatus for heating and lighting them before delivery to the plaintiff. The prayer is for specific performance of the covenant quoted, and for damages. The defendant demurs.

It does not need argument to show that the covenant is valid. Whether it should be enforced specifically admits of more doubt, the questions being whether it is certain enough for that purpose, Fry, Spec. Perf., 3d ed., §§ 380-386, and whether a decree for specific performance would not call on the court to do more than it is in the habit of undertaking. Lucas *v.* Commerford, 3 Bro. Ch. 166, 167; Ross *v.* Union Pacific Railway, Wool. 26, 43. We are of opinion that specific performance should be decreed. With regard to the want of certainty of the covenant, if the plaintiff were left to an action at law, a jury would have to determine whether what was done amounted to a reasonable heating and lighting. A judge sitting without a jury would find no difficulty in deciding the same question. We do not doubt that an expert would find it as easy to frame a scheme for doing the work. The other question is

cases, of which there are several similar to this, Storer *v.* The Great Western Railway Company, 3 Railw. Cas. 106, and Sanderson *v.* The Cockermouth Railway Company, 11 Beav. 497, are clearly instances in which that has been done, and there is nothing more common and ordinary. . . . It is suggested that no means exist by which I could enforce it. The Court has many modes of enforcing it; but the simplest mode is this:—if the vendor refuses to perform it, I should allow the purchaser to make the road, and allow him to deduct from the purchase-money the proper amount of expenses for making it. This would be a very simple and effectual way of completing the contract on his part."

[1] The statement of facts has been omitted.

practical rather than a matter of precedent. It fairly is to be supposed, in the present case, that the difference between the plaintiff and the defendants is only with regard to the necessity of some more or less elaborate apparatus for light and heat, a difference which lies within a narrow compass and which can be adjusted by the court. There is no universal rule that courts of equity never will enforce a contract which requires some building to be done. They have enforced such contracts from the earliest day to the present time. Fry, Spec. Perf., 3d ed., §§ 88, 98, 102, 103; Story, Eq. Jur., §§ 725-728; Y. B., 8th ed., IV., pl. 11; Tyngelden *v.* Warham, 2 Cal. Ch. liv.

A further objection is taken, that the instrument is a lease and therefore there is a remedy for possession of the premises at law, and that the covenant to heat and light is not to be performed until after possession is taken. It would be a sufficient answer that performance of the covenant to heat and light was to begin at the moment of performance of the covenant to deliver possession, and that the defendant is alleged to have repudiated both of these obligations. But we may go further. According to the allegations of the bill, occupation of the premises for the contemplated purposes is impossible without the completion of them by the construction therein of proper apparatus for heating and lighting. The covenant itself affords an argument that artificial light and heat were necessary constituents of the premises, as natural light was in the Brande *v.* Grace, 154 Mass. 210, or a cistern in Cleves *v.* Willoughby, 7 Hill, N. Y. 83, 90, 91. It is "so interwoven with the original contract as to become an essential part of it." Bally *v.* Wells, Wilmot, 341, 350. If so, the plaintiff would not be bound to accept possession if offered without artificial light and heat, Cleves *v.* Willoughby, *ubi supra,* and although it has been said with truth, in a different class of cases, that the mode in which one party to a bargain shall enable himself to do what he has agreed to do is no part of the contract, Pratt *v.* American Bell Telephone Co., 141 Mass. 225, 229, the present covenant fairly may be construed to mean that, at the moment when delivery of possession is due there shall be the necessary machinery or apparatus without which it would be impossible "thereafter . . . reasonably to heat and light the demised premises." See Bullard *v.* Shirley, 153 Mass. 559, 560.

The last objection taken is based on an allegation that the lessor Parker has conveyed the reversion to Blackall. It is not alleged that Blackall had notice of Parker's covenant. But as the lease is for less than seven years, it is valid without recording or notice, Pub. Sts. c. 120, § 4, and the assignment does not entitle Blackall to prevent the performance of the covenant. We need not consider whether the covenant runs with the reversion by virtue of St. 32 Hen. VIII. c. 34, § 2, a question not to be confused with the different one as to the covenants attaching a burden or a right to land at common law irrespective of privity or the mention of assigns, after the analogy of commons or easements, or the yet different one as to the transfer of the benefit of

warranties or covenants for title to assigns, when mentioned, being privies in estate with the original covenantees. Norcross *v.* James, 140 Mass. 188; Middlefield *v.* Church Mills Knitting Co., 160 Mass. 267. This covenant is pretty near the line as it has been drawn between covenants that will and those that will not pass under the statute in respect of their nature, assigns are not mentioned, and the plaintiff has not entered; but perhaps none of these objections would be fatal. Spencer's case, 5 Co. Rep. 16, and note to S. C. in 1 Sm. Lead. Cas. 145, 150-174; Moore 159, pl. 300; Jourdain *v.* Wilson, 4 B. & Ald. 266, 268; Doughty *v.* Bowman, 11 Q. B. 444; Minshull *v.* Oakes, 2 H. & N. 793, 808; Rawle, Covenants, 5th ed., §§ 313, 318; Williams *v.* Bosanquet, 1 Brod. & Bing 238; Simonds *v.* Turner, 120 Mass. 328. However this may be, the plaintiff is entitled to his lease and to his heat and light, notwithstanding the assignment, and whether the covenant passes or not he can hold the defendant Parker on his express contract. All the cases which have come under our eye are cases of covenants by lessees, but the reasoning is equally good for covenants by lessors. Wall *v.* Hinds, 4 Gray 256, 266; Mason *v.* Smith, 131 Mass. 510, 511; Barnard *v.* Godscall, Cro. Jac. 309; Brett *v.* Cumberland, Cro. Jac. 521; Bachelour *v.* Gage, Cro. Car. 188; Pitcher *v.* Tovey, 4 Mod. 71, 76; Auriel *v.* Mills, 4 T. R. 94, 98, 99.

In the case of Jones *v.* Grover the covenant is substantially similar to that in the first case. The instrument, although in form a lease for ten years, is not to begin to run until the completion and delivery of the premises. It has been recorded, and there has been no assignment. The plaintiff's title to relief is free from some of the difficulties which have been discussed.

Demurrers overruled.

SANQUIRICO *v.* BENEDETTI.

In the Supreme Court of New York, 1847.

[1 *Barbour* 315.]

In Equity. The bill of complaint alleged that the defendant had agreed with the complainant to perform and sing in concerts, operas, etc. throughout the United States and Canada, and that he would not make engagements with any other person. That he was about to make other engagements, and was about to leave the State. The bill prayed for a decree for specific performance, and also for an injunction, and a *ne exeat*. The defendant moved to dissolve the injunction, and discharge the *ne exeat*.

Edwards, J. Although there may be cases in which a court of equity will decree specific performance of a contract for personal services, still,

this is not one of that character. The difficulty, if not the utter impracticability, of compelling a specific performance of the contract set forth in the bill, is a conclusive reason why this court should refuse its interference. The complainant should be left to his remedy at law. If, however, there were any doubt, upon principle, yet, I consider it abundantly settled upon authority, that the complainant can have no relief upon the equity side of the court. The cases of Kembel *v.* Kean, 6 Sim. R. 333, and Hamblin *v.* Dinneford, 2 Edw. 529, are strictly analagous to this case. In each of those cases an injunction, which had been granted *ex parte* was dissolved, on the grounds which I have above stated. And it was decided that the court would not only not interfere positively by a decree for specific performance, but that, on the other hand, it would not interfere negatively by the writ of injunction. In the case of Corsetti *v.* De Rivafinoli, 4 Paige 264, the chancellor clearly did not intend to lay down any different rule.

As this case is not one in which the court will grant relief, of course there is nothing to sustain the writ of *ne exeat*. The injunction must therefore be dissolved, and the writ of *ne exeat* discharged.[1]

[1] In Clark's Case, 1821, 1 Blackf. 122, one Mary Clark, "a woman of color," had indentured herself to one Johnston for twenty years. Becoming dissatisfied with her employer and employment she desired to quit his service, but was forcibly detained. At the hearing on a writ of *habeas corpus*, the court said: "Consequently, if all other contracts were specifically enforced by law, it would be impolitic to extend the principle to contracts for personal service. . . . Deplorable indeed would be the state of society, if the obligee in every contract had a right to seize the person of the obligor, and force him to comply with his undertaking. In contracts for personal service, the exercise of such a right would be most alarming in its consequences. If a man, contracting to labor for another a day, a month, a year, or a series of years, were liable to be taken by his adversary, and compelled to perform the labor, it would either put a stop to all such contracts, or produce in their performance a state of domination in the one party, and abject humiliation in the other. We may, therefore, unhesitatingly conclude, that when the law will not directly coerce a specific performance, it will not leave a party to exercise the law of the strong, and coerce it in his own behalf. A state of servitude thus produced, either by direct or permissive coercion, would not be considered voluntary either in fact or in law. It presents a case where legal intendment can have no operation." See note to this case in 12 Am. Dec. 216.

In De Rivafinoli *v.* Corsetti, 1833, 4 Paige Ch. 264, the "case came before the Chancellor [WALWORTH] on an order for the complainant to show cause why a *ne excat* granted against the defendant should not be discharged, or the amount for which the defendant was held to bail reduced. The bill, which was filed in September, 1833, stated that the defendant, in the March preceding, had agreed with the complainant, as manager of the Italian theatre in the City of New York, to sing, gesticulate and recite, in the capacity of *primo basso*, in all the operas, serious, semi-serious, and comic, farces, oratorios, concerts, cantatas, and benefits, which should be ordered by the complainant or his authorized agents, in any city of the United States, for a term of

C. Negative Contracts.

MORRIS *v.* COLMAN.

In Chancery, before Lord Chancellor Eldon, 1812.

[18 *Vesey* 436.]

Various disputes having arisen among the proprietors of the theatre in the Haymarket, a bill was filed, praying an execution of the articles of agreement, an injunction to restrain Mr. Colman from acting as manager, and a reference to the Master for the appointment of a manager.

An injunction was granted, and a reference directed to the Master to inquire whether the defendant, Mr. Colman, had performed the duties of manager, and what he was doing and could do in the discharge of those

eight months beginning with the following November"; the bill also set forth that the defendant had since contracted with a third party to go to Havana as an opera singer during the same period, and was about to leave the State for Cuba. The prayer of the bill asked specific performance of the contract; that he be restrained from leaving the State; and for general relief. The lower Court granted a writ *ne exeat*, and the defendant being unable to find bail was committed to jail. Chancellor Walworth said:—

"The material facts alleged in the complainant's bill are not denied; and for the purpose of this application, they must be taken to be true. There is an affidavit, annexed to the bill, that the defendant has declared his intention of going to the Havana; and the defendant has not denied such intention, although he swears he has not made any engagement to go there. Upon the merits of the case, I suppose it must be conceded that the complainant is entitled to a specific performance of this contract; as the law appears to have been long since settled that a bird that can sing and will not sing must be made to sing. (Old adage.) In this case it is charged in the bill, not only that the defendant can sing, but also that he has expressly agreed to sing, and to accompany that singing with such appropriate gestures as may be necessary and proper to give an interest to his performance. And from the facts disclosed, I think it is very evident also that he does not intend to gratify the citizens of New York, who may resort to the Italian opera, either by his singing or by his gesticulations. Although the authority before cited shows the law to be in favor of the complainant, so far at least as to entitle him to a decree for the singing, I am not aware that any officer of this court has that perfect knowledge of the Italian language, or possesses that exquisite sensibility in the auricular nerve which is necessary to understand, and to enjoy with a proper zest, the peculiar beauties of the Italian opera, so fascinating to the fashionable world. There might be some difficulty, therefore, even if the defendant was compelled to sing under the direction and in the presence of a master of chancery, in ascertaining whether he performed his engagement according to its spirit and intent. It would also be very difficult for

duties. Upon a motion to dissolve the injunction a question arose upon the validity of a clause in the articles restraining Mr. Colman from writing dramatic pieces for any other theatre, or, as the construction was represented for the plaintiff, giving the Haymarket Theatre a right of pre-emption.

The LORD CHANCELLOR. I cannot perceive any violation of public policy in this provision. The case of trade, to which it has been compared, is perfectly distinct. It is well settled upon that principle, that notwithstanding such a covenant restraining trade in general, a man shall be at liberty to engage in commerce; but that has been broken in upon to the extent of giving effect to covenants restraining trade within particular limits; and in partnership engagements a covenant that the partners shall not carry on for their private benefit that particular commercial concern in which they are jointly engaged is not only permitted but is the constant course.

If that is so with regard to trade, it is impossible to maintain that theatrical performers, who act only under a license, and are treated as vagrants if not licensed, may not enter into such engagements. The contract is not unreasonable upon either construction; whether it is that Mr. Colman shall not write for any other theatre without the license of the proprietors of the Haymarket Theatre; or whether it gives to those proprietors merely a right of pre-emption. If Mr. Garrick was now living would it be unreasonable that he should contract with Mr. Colman to perform only at the Haymarket Theatre, and Mr. Colman with him to write for that theatre alone? Why should they not thus engage for the

the master to determine what effect coercion might produce upon the defendant's singing, especially in the livelier airs; although the fear of imprisonment would unquestionably deepen his seriousness in the graver parts of the drama. But one thing at least is certain: his songs will be neither comic, nor even semi-serious, while he remains confined in that dismal cage, the debtor's prison of New York. I will therefore proceed to inquire whether the complainant had any legal right thus to change the character of his native warblings by such a confinement, before the appointed season for the dramatic singing had arrived." The court held he had not and discharged the defendant.

In Wakeham *v.* Barker, 1889, 82 Calif. 46, the plaintiff had agreed to purchase land of the defendant, the purchase price to be paid partly in labor. Before the labor was wholly performed, the plaintiff sued for a specific performance of the contract. The court said:—"It is a well settled rule of law that specific performance will not be enforced against either party if it cannot be so enforced against the other. It is also well settled that specific performance for personal service cannot be enforced. It follows that the moment this . . . agreement was made, specific performance could not be enforced against the plaintiff, and consequently so long as the contract was not fully performed on his part, he could not enforce it against the other. Nevertheless, whenever he shows that without default he has fully performed on his own part, he may compel the other to convey as he has agreed to, or if conveyance cannot be had, may recover in damages for the breach."

talents of each other? The ground might be supposed that nothing could be made of the theatre without exhibiting the talents of such a man; and in this instance that he may get more to himself and the other proprietors by this contract than he could by hard bargains at other theatres.

I cannot therefore see anything unreasonable in this: on the contrary, it is a contract, which all parties may consider as affording the most eligible, if not the only, means of making this theatre profitable to them all, as proprietors, authors, or in any other character which they are by the contract to hold.

CLARK *v.* PRICE.

IN CHANCERY, BEFORE LORD CHANCELLOR ELDON, 1819.

[2 *Wilson Chancery* 157.]

The bill, filed the 15th of June, 1819, stated that in 1814 the defendant, George Price, Esq., proposed to compose and write reports of cases argued and determined in the Court of Exchequer; and the plaintiffs entered into a treaty with him as to the terms upon which the same should be printed and published; and that on the 27th of April, 1814, an agreement was signed by him which provided under terms set out that he should report for the plaintiff the cases in the Court of Exchequer beginning with Easter Term, 1814. The plaintiffs were to have the right of relinquishing the undertaking if they thought advisable. Subsequently other agreements were entered into providing for continued and further publication of reports, and they contained no stipulation that Price would report for the plaintiffs only. During the preparation of the fourth volume for the plaintiffs, Price agreed with another firm, Brooks and Sweet, to report cases for another series. Thereupon the plaintiffs filed this bill praying that the defendant might be decreed to perform specifically his agreement with the plaintiff to report Exchequer cases; that an injunction be granted to restrain him from delivering copy to Brooks and Sweet; and to restrain the latter firm from printing the reports.

An injunction having been obtained *ex parte,* on the filing of the bill, and on affidavit, a motion was now made to dissolve it.

The LORD CHANCELLOR. The case of Morris *v.* Colman is essentially different from the present. In that case, Morris, Colman, and other persons were engaged in a partnership in the Haymarket Theatre, which was to have continuance for a very long period, as long indeed as the theatre should exist. Colman had entered into an agreement which I was very unwilling to enforce; not that he would write for the Haymarket

Theatre, but that he would not write for any other theatre. It appeared to me that the court could enforce that agreement by restraining him from writing for any other theatre. The court could not compel him to write for the Haymarket Theatre; but it did the only thing in its power; it induced him indirectly to do one thing, by prohibiting him from doing another. There was an express covenant on his part contained in the articles of partnership. But the terms of the prayer of this bill do not solve the difficulty; for if this contract is one which the court will not carry into execution, the court cannot indirectly enforce it, by restraining Mr. Price from doing some other act. This is an agreement which expressly provides that Mr. Price shall write and compose reports of cases to be published by the plaintiffs. In Morris *v.* Colman, there was a decree directing the partnership to be carried on; it could not be put an end to; and it was the duty of the parties to interfere. But I have no jurisdiction to compel Mr. Price to write reports for the plaintiffs. I cannot, as in the other case, say that I will induce him to write for the plaintiffs by preventing him from writing for any other person, for that is not the nature of the agreement. The only means of enforcing the execution of this agreement would be to make an order compelling Mr. Price to write reports for the plaintiffs; which I have not the means of doing. If there be any remedy in this case, it is at law. If I cannot compel Mr. Price to remain in the Court of Exchequer for the purpose of taking notes, I can do nothing. I cannot indirectly, and for the purpose of compelling him to perform the agreement, compel him to do something which is merely incidental to the agreement. It is also quite clear, that there is no mutuality in this agreement. I am of opinion that I have no jurisdiction in this case.

Injunction dissolved.

The bill was afterwards dismissed, with costs, for want of prosecution.

HILLS *v.* CROLL.

IN CHANCERY, BEFORE LORD CHANCELLOR LYNDHURST,[1] 1845.

[2 *Phillips* 60.]

The defendant being the patentee of certain inventions for manufacturing and purifying gas, an agreement was entered into on the 22d of March, 1841, between him and the plaintiff, whereby, in consideration of £200 paid by the plaintiff to the defendant, it was agreed that the defendant should, for the term of fourteen years, purchase of the plain-

[1] LYNDHURST, whose family name was Copley, and who was the son of the Boston artist, is peculiarly interesting as the only full-blooded American who

tiff and of no other person, without the plaintiff's consent in writing, all the acids that he should require for the manufacture of muriate or sulphate of ammonia, paying for the same according to the regular course of trade, at the average price of the day, to be ascertained as therein mentioned; and that he should, during the same period, sell to the plaintiff (unless the plaintiff should refuse to purchase the same) all the muriate or sulphate of ammonia which he should manufacture by his said patent processes at the average price of the day, to be ascertained as therein mentioned. Then followed an express covenant on the part of the plaintiff to deliver to the defendant all the acids he might require for his said manufacture, he paying the plaintiff for the same at the average price of the day, to be ascertained as aforesaid, and to pay the defendant for the said muriate and sulphate of ammonia at the rates aforesaid; and a like covenant on the part of the defendant that he would not during the said term use in his manufacture, or purchase of any other persons to be used therein, any acid except acid to be purchased of the plaintiff without his consent in writing.

After this agreement had been acted on for a considerable time the defendant refused to abide by it any longer, and proceeded to purchase acids for his manufacture from other persons than the plaintiff; whereupon this bill was filed praying a specific performance of the agreement, and an injunction to restrain the defendant from purchasing acids elsewhere than from the plaintiff.

A motion for an injunction having been refused by the Vice-Chancellor of England, it was renewed by way of appeal before the Lord Chancellor (Lyndhurst).

All the authorities cited in Dietrichsen *v.* Cabburn were referred to in the argument.

The Lord Chancellor, in giving judgment, said: There is a stipulation on the part of Hills that he will supply the acids, and there is a stipulation on the part of Croll that he will purchase acids from Hills and from no other person. Has the court any power to compel Hills to fulfill his part of the agreement? Can the court order him to continue the manufacture of acids, or to purchase them elsewhere for the purpose of supplying the defendant? It is clear, I apprehend, that the court has no such power. In the case of Colman *v.* Morris, Mr. Colman was restrained from writing for any other theatre, the court inferring that that would compel him, or have a tendency to compel him, to

has occupied the Woolsack. Able and successful as a lawyer, his chief interest lay in politics, and it was in Parliament and in the Cabinet, rather than on the bench, that he displayed in maturity and perfection a talent bordering on genius.

There is an admirable article on him in the Dictionary of National Biography from the pen of the venerable Sir Theodore Martin. Should the student desire fuller information, he is referred to the one volume life from the same competent hand.

write for the Haymarket Theatre; but in this case the court has no power to compel the plaintiff to supply the defendant with acids by ordering him not to supply any other person; that is not the agreement, nor was it ever intended that it should be the agreement; therefore it is clear that the court cannot either directly or indirectly compel him to perform his part of the agreement. And it has been laid down again and again, and very recently in a case before Sir Edward Sugden, in Ireland (Gervais *v.* Edwards, 2 Dr. & W. 80), that unless the court can decree specific performance of the whole of a contract, it will not interfere to enforce any part of it. When, therefore, this cause comes to a hearing the court will not have jurisdiction to restrain the defendant from purchasing acids elsewhere, because it will not be able to compel the plaintiff to furnish all the acids that may be necessary for the manufacture carried on by the defendant. If it cannot do this at the hearing, it follows of course that it will not do it in the meantime upon an interlocutory application. The decision of the Vice-Chancellor must therefore be affirmed.[1]

DIETRICHSEN *v.* CABBURN.

IN CHANCERY, BEFORE LORD CHANCELLOR COTTENHAM, 1846.

[2 *Phillips* 52.]

This was an appeal from an order of the Vice-Chancellor of England allowing a general demurrer to the bill.

The bill stated that the plaintiff was an extensive vendor of patent medicines, and that from the extent of his business he had, at the date of the agreement after mentioned, great facilities by advertisement on his wrappers, etc., of giving publicity to the medicines sold by him. That the defendant having, in 1840, discovered a receipt for a particu-

[1] See the reporter's valuable note to this case.

"It is very difficult to reconcile that case [Hills *v.* Croll] with Lumley *v.* Wagner, 1 D. M. & G. 604, which has been repeatedly followed, and if Hills *v.* Croll is to stand with that case at all it can only be upon its particular circumstances." Per Sir C. J. SELWYN, L.J. in Catt *v.* Tourle, 1869, L. R. 4 Ch. 654, 660.

"With respect to Hills *v.* Croll, 2 Ph. 60, that case, as was said by Lord St. Leonards, in his judgment in Lumley *v.* Wagner, was decided according to its particular circumstances. Unless it is to be taken as laying down that the court is to refuse to act on a negative covenant wherever there is a correlative obligation which it cannot enforce, it does not apply; if it is taken as going that length, it is contrary to Lumley *v.* Wagner, and must be considered as overruled." Per Sir G. M. GIFFARD, L.J., in Catt *v.* Tourle, 1869, L. R. 4 Ch. 654, 662.

lar medicine called Cabburn's Antidoloric Oil, he applied to the plaintiff to be his wholesale agent for the sale of it, and that thereupon an agreement in writing was entered into between them, dated 1st October, 1840, whereby the defendant agreed for twenty-one years to employ the plaintiff as his wholesale agent for the sale of the oil, and to supply him with such quantities as he should order at £40 per cent. discount upon the current retail price, and that he would not during that period supply or sell any of the oil to any other person for the purpose of selling it again at a larger discount than £25 per cent. upon such retail price. And in consideration of that agreement on the part of the defendant the plaintiff agreed to continue to act as the wholesale agent of the defendant, and to pay for the oil supplied to him every three months at the price aforesaid.

The bill then stated that after the plaintiff had incurred considerable expense in advertising the oil, whereby it had attained great celebrity and an extensive sale, and though he had in all respects performed the agreement on his part, the defendant became desirous of evading the performance of it as regarded himself, and had, accordingly, supplied divers medicine dealers in various parts of the country with large quantities of the oil at a higher rate of discount than £25 per cent.

The bill charged that the defendant was a wine and spirit merchant, and that he had not at the date of the agreement, or since, any means of bringing the oil to the notice of the public except through the agency of some person in the plaintiff's line of business. And it prayed an injunction and an account of the profits realized by the defendant from the sales already made by him in violation of the agreement.

The LORD CHANCELLOR.[1] The question is, does the bill state a case coming within the jurisdiction of the court? The allowance of the demurrer assumes that it does not; and the ground stated (for I have not had the benefit of seeing a note of the Vice-Chancellor's judgment) is that the court will not prohibit the violation of a negative term in an agreement, unless it has the power of enforcing the positive part of the same agreement.

I cannot but think that there has been some misapprehension of the meaning of the Vice-Chancellor, as applied to this supposed rule; for in the case of Kimberley *v.* Jennings, 6 Sim. 340, His Honor, in stating that a violation of a negative term in an agreement will not be restrained in cases in which the positive part of the agreement cannot be enforced, exemplifies it by saying that if the agreement cannot be performed in the whole the court cannot perform any part of it. To the proposition so explained I entirely assent; for it is only applying a well-known rule in cases of specific performance, of which an injunction is in many cases the instrument, and amounts only to this, that if there be such an infirmity in the agreement that it cannot be performed in all its parts, the court will not by an injunction compel the defendant to perform his

[1] A part of the opinion has been omitted.

part of it; and this view of His Honor's opinion is confirmed by the case he put of a consideration actually p id for a negat've agreement. in which case he says that an injunction wo.ld be granted. I cannot see any difference between a consideration actually paid, and a performance alleged by the plaintiff of all that he had undertaken to do.

The equitable jurisdiction to restrain by injunction an act which the defendant by contract or duty was bound to abstain from, cannot be confined to cases in which the court has jurisdiction over the acts of the plaintiff; for if that were so it could not interfere to restrain the violation of contracts by tenants, or of duty by agents, as in the case of Yovatt *v.* Winyard, 1 J. & W. 394, and Green *v.* Folgham, 1 Sim. & St. 338, or by an attorney, as in Cholmondeley *v.* Clinton, 19 Ves. 261, in none of which cases was there anything to be done by the plaintiff which equity could enforce. Such, also, are cases of injunctions sought by tenants against their landlords, as Rankin *v.* Huskisson, 4 Sim. 13, where there was a negative agreement, and Squire *v.* Cambell, 1 My. & Cr. 459, where one was attempted to be raised by the exhibition of a plan. In none of these was there any equity to be administered against the plaintiffs, and yet the jurisdiction was assumed; for although in the latter case the injunction was dissolved, that was because I thought no equity was raised by the alleged exhibition of plans, which I was of opinion could not be used for that purpose. The objection now suggested was not raised, or certainly was not the ground of the decision.

Similar to these are cases of injunction to protect legal rights, as patents, copyright, services to mills and others. There is no branch of the equitable jurisdiction requiring more discretion in the exercise of it, but certainly none more beneficial than that of injunction; and I think that the doctrine contended for by the respondent would tend greatly to limit its sphere of action, and deprive many of the benefit of it whose interests require it as much as others.

If the bill states a right or title in the plaintiff to the benefit of the negative agreement of the defendant, or of his abstaining from the contemplated act, it is not, as I conceive, material whether the right be at law or under an agreement which cannot be otherwise brought under the jurisdiction of a court of equity. In Martin *v.* Nutkin, 2 P. W. 266, an injunction was granted to restrain the ringing of a church bell, the plaintiff having put a clock in the church in consideration that the bell should not be rung at five in the morning. In Barrett *v.* Blagrave, 5 Ves. 555, the proprietor of Vauxhall Gardens obtained an injunction to restrain the lessee of a public house in the neighborhood from selling liquors during the time the gardens were open in violation of his covenant; and, although the injunction was dissolved (6 Ves. 104) upon the ground of acquiescence, no objection was made to the exercise of the jurisdiction for want of mutuality.

But I consider the doctrine promulgated by Lord Eldon in Morris *v.* Colman, 18 Ves. 437, and in Clark *v.* Price, 2 Wils. 157, as conclusive

upon this point. In the former case the defendant was restrained from writing for any other but the Haymarket Theatre, he having entered into an agreement to that effect; but in Clarke v. Price there was not any such negative agreement, and that Lord Eldon states to be the ground of his refusing to interfere; if there had been there cannot be a doubt that he would have granted the injunction. It has been said that Morris v. Colman was a case of partnership; Lord Eldon does not appear from the report to have proceeded upon any such ground. The present and other cases of the kind are in the nature of partnership, being a joint undertaking for the benefit of the plaintiff and the defendant; and it does not appear why cases of actual partnership should be more favored in the exercise of the jurisdiction by injunction than others.

It being clear that the court will interfere to restrain a departure from the contract of partnership, cases of partnership afford additional instances of the fact that the court is not confined to cases in which it has jurisdiction over the whole contract, the interposition of the court in cases of continuing partnerships having been in many cases considered as very limited.

Looking, therefore, to the whole range of cases in which the court interferes to prevent the breach of a negative agreement, I cannot find any ground for the argument contended for by the respondent; and seeing that the bill alleges sufficient to show that the plaintiff is entitled to the benefit of the negative agreement on the part of the defendant, and that the defendant has violated the agreement, and will, if not restrained, continue to do so, I am of opinion that a case is stated for the interposition of a court of equity and that the demurrer ought to be overruled.[1]

[1] "It is impossible to read Lord Cottenham's judgment, in the case of Dietrichsen v. Cabburn, 2 Ph. 52, and to suppose he intended to throw any doubt on what was considered the settled law of the Court. The Court does not give relief to a plaintiff, although he be otherwise entitled to it, unless he will, on his part, do all that the defendant may be entitled to ask from him; and if that which the defendant is entitled to, be something which the Court cannot give him, it certainly has been the generally understod rule, that that is a case in which the Court will not interfere. . . . It is, however, contended, that, according to the allegations in the bill, the plaintiffs, up to the time of complaining, had performed all they were bound to do; but, if this be so, still there remains behind something to be done by the plaintiffs; and if that which remains to be done by them hereafter be something the Court cannot secure to the defendants, I cannot help thinking the case may fall within the observations of the Vice-Chancellor in Ranger v. The Great Western Railway Company, 1 Railw. Cas. 50." Per Sir LANCELOT SHADWELL, V.C., in Waring v. Railway Co., 1849, 7 Hare 482, 492.

In Kimberley v. Jennings, 1836, 6 Sim. 340, it was agreed between the parties that the defendant should work for the plaintiffs (partners) for six years at a specified salary, with the stipulation that at the end of that time the defendant might enter the partnership at terms to be fixed. During this

LUMLEY *v.* WAGNER.

IN CHANCERY, BEFORE LORD CHANCELLOR ST. LEONARDS,[1] 1852.

[1 *De Gex, Macnaghten and Gordon* 604.]

The LORD CHANCELLOR. The question which I have to decide in the present case arises out of a very simple contract, the effect of which is that the defendant Johanna Wagner should sing at Her Majesty's Theater for a certain number of nights, and that she should not sing elsewhere (for that is the true construction) during that period. As I understand the points taken by the defendants' counsel in support of this appeal, they

six years the defendant agreed to work for the plaintiffs only, though they were not bound to retain him for the full period. At the end of a year, trouble arising between the parties, the defendant threatened to get employment elsewhere. This suit was for a decree of specific performance of the contract.

"Then it was said that the Court might execute a negative contract. I admit it. I remember a case in which a nephew wished to go on the stage, and his uncle gave him a large sum of money in consideration of his covenanting not to perform within a particular district; the Court would execute such a covenant, on the ground that a valuable consideration had been given for it. But here the negative covenant does not stand by itself; it is coupled with the agreement for service for a certain number of years, and then for taking the defendant into partnership.

"In the first place, this agreement cannot be performed in the whole, and, therefore, this court cannot perform any part of it; in the next place, it is not to be construed as the plaintiffs contend for; and, lastly, it is a hard bargain, and, therefore, this Court will not interfere." Per Sir LANCELOT SHADWELL, V.C.

"With respect to the observations that have been made upon the cases in which injunctions have been granted to restrain the breach of a negative term in an agreement, that this amounts in fact to specific performance of a part of those agreements, upon the plaintiff in the cause agreeing to do all that is requisite on his part as in Dietrichsen *v.* Cabburn, 2 Ph. 52, the distinction in those cases is, that where a person is ordered by injunction to perform a negative covenant of that kind, the whole benefit of the injunction is conditional upon the plaintiff's performing his part of the agreement, and the moment he fails to do any of the acts which he has engaged to do, and which were the consideration for the negative covenant, the injunction would be dissolved." Per Sir WM. PAGE WOOD, V.C., in Stocker *v.* Wedderburn, 1857, 3 K. & J. 393, 404.

[1] Sir EDWARD SUGDEN, later Lord Chancellor ST. LEONARDS, occupies a unique place, both as a writer and maker of the law.

"Within his limits he as nearly as possible realized the ideal of an infallible oracle of law. His judgments, always delivered with remarkable readiness, were very rarely reversed, and the opinions expressed in his text-books were hardly less authoritative." Dictionary of National Biography, article, Sugden, Edward Burtenshaw.

in effect come to this, namely, that a court of equity ought not to grant an injunction except in cases connected with specific performance, or where the injunction being to compel a party to forbear from committing an act (and not to perform an act), that injunction will complete the whole of the agreement remaining unexecuted.

I have then to consider how the question stands on principle and on authority, and in so doing I shall observe upon some of the cases which have been referred to and commented upon by the defendants in support of their contention. The first was that of Martin *v.* Nutkin, 2 P. W. 266, in which the court issued an injunction restraining an act from being done where it clearly could not have been granted any specific performance; but then it was said that that case fell within one of the exceptions which the defendants admit are proper cases for the interference of the court, because there the ringing of the bells, sought to be restrained, had been agreed to be suspended by the defendant in consideration of the erection by the plaintiffs of a cupola and clock, the agreement being in effect the price stipulated for the defendant's relinquishing bell-ringing at stated periods, the defendant having accepted the benefit, but rejected the corresponding obligation, Lord MACCLESFIELD first granted the injunction which the Lords Commissioners at the hearing of the cause continued for the lives of the plaintiffs. That case, therefore, however it may be explained as one of the exceptional cases, is nevertheless a clear authority showing that this court has granted an injunction prohibiting the commission of an act in respect of which the court could never have interfered by way of specific performance.

The next case referred to was that of Barret *v.* Blagrave, 5 Ves. 555, which came first before Lord LOUGHBOROUGH and afterwards before Lord ELDON, 6 Ves. 104. There a lease had originally been granted by the plaintiffs, the proprietors of Vauxhall Gardens, of an adjoining house, under an express covenant that the lessee would not carry on the trade of a victualler or retailer of wines, or generally any employment that would be to the damage of the proprietors of Vauxhall Gardens; an underlease having been made to the defendants, who were violating the covenant by the sale of liquors, the proprietors of Vauxhall Gardens filed a bill for an injunction, which was granted by Lord LOUGHBOROUGH. It has been observed in the argument here that in granting the injunction Lord LOUGHBOROUGH said, "It is in the nature of specific performance," and that therefore that case also falls under one of the exceptional cases. When that case came before Lord ELDON he dissolved the injunction, but upon a different ground, namely, on that of acquiescence for many years, and in a sense he treated it as a case of specific performance. As far as the words go, the observations of those two eminent judges would seem to justify the argument which has been addressed to me; in effect, however, it was only specific performance, because a prohibition preventing the commission of an act may as effectually perform an agreement as an

order for the performance of the act agreed to be done. The agreement in that case being that the house should not be opened for the purposes of entertainment to the detriment of Vauxhall Gardens, the court granted the injunction; that was a performance of the agreement in substance, and the term "specific performance" is aptly applied in such a case, but not in the cases in which it has been used before me.

It was also contended that the plaintiff's remedy, if any, was at law; but it is no objection to the exercise of the jurisdiction by injunction that the plaintiff may have a legal remedy. The case of Robinson *v.* Lord Byron, 1 Bro. C. C. 588, before Lord THURLOW, so very often commented upon by succeeding judges, is a clear illustration of that proposition, because in that case the defendant, Lord Byron, who had large pieces of water in his park which supplied the plaintiff's mills, was abusing his right by preventing a regular supply to the plaintiff's mill, and although the plaintiff had a remedy at law, yet this court felt no difficulty in restraining Lord Byron by injunction from preventing the regular flow of the water. Undoubtedly there are cases such as that cited for the defendants of Collins *v.* Plumb, 16 Ves. 454, before Lord ELDON, in which this court has declined to exercise the power (which in that instance it was assumed to have had) of preventing the commission of an act, because such power could not be properly and beneficially exercised. In that case the negative covenant, not to sell water to the prejudice of the plaintiffs, was not enforced by Lord ELDON, not because he had any doubt about the jurisdiction of the court (for upon that point he had no doubt), but because it was impossible to ascertain every time the water was supplied by the defendants whether it was or not to the damage of the plaintiffs; but whether right or wrong, that learned judge, in refusing to exercise the jurisdiction on very sufficient grounds, meant in no respect to break in on the general rules deducible from the previous authorities.

At an early stage of the argument I adverted to the familiar cases of attorneys' clerks and surgeons' and apothecaries' apprentices and the like, in which this court has constantly interfered, simply to prevent the violation of negative covenants; but it was said that in such cases the court only acted on the principle that the clerk or apprentice had received all the benefit, and that the prohibition operated upon a concluded contract, and that therefore the injunction fell within one of the exceptional cases. I do not, however, apprehend that the jurisdiction of the court depends upon any such principle; it is obvious that in those cases the negative covenant does not come into operation until the servitude is ended, and therefore that the injunction cannot be required or applied for before that period.

The familiar case of a tenant covenanting not to do a particular act was also put during the argument, but it was said that in such a case the jurisdiction springs out of the relation of landlord and tenant, and that the tenant having received the benefit of an executed lease, the injunc-

tion operates only so as to give effect to the whole contract; that, however, cannot be the principle on which this court interferes, for, beyond all doubt, where a lease is executed containing affirmative and negative covenants, this court will not attempt to enforce the execution of the affirmative covenants, either on the part of landlord or the tenant, but will leave it entirely to a court of law to measure the damages; though with respect to the negative covenants, if the tenant, for example, has stipulated not to cut or lop timber, or any other given act of forbearance, the court does not ask how many of the affirmative covenants on either side remain to be performed under the lease, but acts at once by giving effect to the negative covenant, specifically executing it by prohibiting the commission of acts which have been stipulated not to be done. So far, then, each of the cases to which I have referred appears to me to be in direct contravention of the rules which have been so elaborately pressed upon me by the defendants' counsel.

The present is a mixed case, consisting not of two correlative acts to be done, one by the plaintiff and the other by the defendants, which state of facts may have and in some cases has introduced a very important difference, but of an act to be done by J. Wagner alone, to which is superadded a negative stipulation on her part to abstain from the commission of any act which will break in upon her affirmative covenant—the one being ancillary to, concurrent, and operating together with the other. The agreement to sing for the plaintiff during three months at his theater, and during that time not to sing for anybody else, is not a correlative contract, it is in effect one contract; and though beyond all doubt this court could not interfere to enforce the specific performance of the whole of this contract, yet in all sound construction, and according to the true spirit of the agreement, the engagement to perform for three months at one theater must necessarily exclude the right to perform at the same time at another theater. It was clearly intended that J. Wagner was to exert her vocal abilities to the utmost to aid the theater to which she agreed to attach herself. I am of opinion that if she had attempted even in the absence of any negative stipulation to perform at another theater, she would have broken the spirit and true meaning of the contract as much as she would now do with reference to the contract into which she has actually entered.

Wherever this court has not proper jurisdiction to enforce specific performance, it operates to bind men's consciences, as far as they can be bound, to a true and literal performance of their agreements; and it will not suffer them to depart from their contracts at their pleasure, leaving the party with whom they have contracted to the mere chance of any damages which a jury may give. The exercise of this jurisdiction has, I believe, had a wholesome tendency towards the maintenance of that good faith which exists in this country to a much greater degree perhaps than in any other; and although the jurisdiction is not to be extended, yet a judge would desert his duty who did not act up to what his predecessors

have handed down as the rule for his guidance in the administration of such an equity.

It was objected that the operation of the injunction in the present case was mischievous, excluding the defendant J. Wagner from performing at any other theater while this court had no power to compel her to perform at Her Majesty's Theater. It is true that I have not the means of compelling her to sing, but she has no cause of complaint, if I compel her to abstain from the commission of an act which she has bound herself not to do, and thus possibly cause her to fulfil her engagement. The jurisdiction which I now exercise is wholly within the power of the court, and being of opinion that it is a proper case for interfering, I shall leave nothing unsatisfied by the judgment I pronounce. The effect, too, of the injunction in restraining J. Wagner for singing elsewhere may, in the event of an action being brought against her by the plaintiff, prevent any such amount of vindictive damages being given against her as a jury might probably be inclined to give if she had carried her talents and exercised them at the rival theater; the injunction may also, as I have said, tend to the fulfilment of her engagement; though, in continuing the injunction, I disclaim doing indirectly what I cannot do directly.

Referring again to the authorities, I am well aware that they have not been uniform, and that there undoubtedly has been a difference of decision on the question now revived before me; but, after the best consideration which I have been enabled to give to the subject, the conclusion at which I arrived is, I conceive, supported by the greatest weight of authority. The earliest case most directly bearing on the point is that of Morris *v.* Colman, 18 Ves. 437. There Mr. Colman was a part proprietor with Mr. Morris of the Haymarket Theater, and they were partners in that concern, and by the deed of partnership Mr. Colman agreed that he would not exercise his dramatic abilities for any other theater than the Haymarket. He did not, however, covenant that he would write for the Haymarket, but it was merely a negative covenant that he would not write for any other theater than the Haymarket. Lord ELDON granted an injunction against Mr. Colman writing for any other theater than the Haymarket; and the ground on which Lord ELDON assumed that jurisdiction was the subject of some discussion at the bar. It was truly said for the defendants that that was a case of partnership; and it was said, moreover, that Lord COTTENHAM was mistaken in the case of Dietrichsen *v.* Cabburn, 2 Phil. 52, when he said that Lord ELDON had not decided Morris *v.* Colman on the ground of there being a partnership. I agree that the observations which fell from Lord ELDON in the subsequent case of Clarke *v.* Price, 2 Wils. 157, show that he did mainly decide it on the ground of partnership; but he did not decide it exclusively on that ground. In the argument of Morris *v.* Colman, 18 Ves. 437, Sir SAMUEL ROMILLY suggested a case almost identical with the present. He contended that the clause restraining Mr. Colman from writing for any other theater was no more against public policy than a stipulation that Mr.

Garrick should not perform at any other theater than that at which he was engaged would have been. Lord ELDON, adverting in his judgment to the case put at the bar, said, "If Mr. Garrick was now living, would it be unreasonable that he should contract with Mr. Colman to perform only at the Haymarket Theater, and Mr. Colman with him to write for the theater alone? Why should they not thus engage for the talents of each other?" He gives the clearest enunciation of his opinion, that that would be an agreement which this court would enforce by way of injunction.

The late Vice-Chancellor SHADWELL, of whom I always wish to be understood to speak with the greatest respect, decided in a different way in the cases of Kemble *v.* Kean, 6 Sim. 333, and Kimberley *v.* Jennings, 6 Sim. 340, on which I shall presently make a few observations. In the former case he observed that Lord ELDON must be understood in the case of Morris *v.* Colman, 18 Ves. 437, to have spoken according to the subject-matter before him, and must there be considered to be addressing himself to a case in which Colman and Garrick would both have had a partnership interest in the theater. I must, however, entirely dissent from that interpretation. Lord ELDON'S words are perfectly plain; they want no comment upon them; they speak for themselves. He was alluding to a case in which Garrick, as a performer, would have had nothing to do with the theater beyond the implied engagement that he would not perform anywhere else; and I have come to a very clear conclusion that Lord ELDON would have granted the injunction in that case, although there had been no partnership.

The authority of Clarke *v.* Price, 2 Wils. 157, was much pressed upon me by the learned counsel for the defendants; but that is a case which does not properly belong to their argument, because there there was no negative stipulation, and I quite admit that this court cannot enforce the performance of such an affirmative stipulation as is to be found in that case; there the defendant having agreed to take notes of cases in the Court of Exchequer and compose reports for the plaintiff, and having failed to do so, the plaintiff, Mr. Clarke, filed a bill for an injunction, and Lord ELDON, when refusing the injunction, in effect said, "I cannot compel Mr. Price to sit in the Court of Exchequer and take notes and compose reports"; and the whole of his judgment shows that he proceeded (and so it has been considered in later cases) on the ground that there was no covenant on the part of the defendant that he would not compose reports for any other person. The expressions in the judgment are: "I cannot, as in the other case" [referring to Mossis *v.* Colman, 18 Ves. 437], "say that I will induce him to write for the plaintiff by preventing him from writing for any other person"; and then come these important words: "for that is not the nature of the agreement." Lord ELDON, therefore, was of opinion, upon the construction of that agreement, that it would be against its meaning to affix to it a negative quality and import a covenant into it by implication, and he, there-

fore, very properly, as I conceive, refused that injunction. That case, therefore, in no respect touches the question now before me, and I may at once declare that if I had only to deal with the affirmative covenant of the defendant J. Wagner that she would perform at Her Majesty's Theater, I should not have granted any injunction.

Thus far, I think, the authorities are very strong against the defendants' contention; but the case of Kemble *v.* Kean, 6 Sim. 333, to which I have already alluded, is the first case which has in point of fact introduced all the difficulties on this part of the law. There Mr. Kean entered into an agreement precisely similar to the present. He agreed that he would perform for Mr. Kemble at Drury Lane, and that he would not perform anywhere else during the time that he had stipulated to perform for Mr. Kemble. Mr. Kean broke his engagement, a bill was filed, and the Vice-Chancellor, SHADWELL, was of opinion that he could not grant an injunction to restrain Mr. Kean from performing elsewhere, which he was either about to do or actually doing, because the court could not enforce the performance of the affirmative covenant that he would perform at Drury Lane for Mr. Kemble. Being pressed by that passage which I have read from in the Lord Chancellor's judgment in Morris *v.* Colman, 18 Ves, 437, he put that pharaphrase or commentary upon it which I have referred to—that is, he says, "Lord ELDON is speaking of a case where the parties are in partnership together." I have come to a different conclusion, and I am bound to say that, in my apprehension, the case of Kemble *v.* Kean was wrongly decided and cannot be maintained. See 2 Story Eq. Jur. § 958 a.

The same learned judge followed up his decision in that case in the subsequent one of Kimberley *v.* Jennings, 6 Sim. 340. That was a case of hiring and service, and the Vice-Chancellor there virtually admitted that a negative covenant might be enforced in this court, and quoted an instance to that effect within his own knowledge. He said, "I remember a case in which a nephew wished to go on the stage, and his uncle gave him a large sum of money in consideration of his covenanting not to perform within a particular district. The court would execute such a covenant on the ground that a valuable consideration had been given for it." He admits, therefore, the jurisdiction of the court if nothing but that covenant remained to be executed. The learned judge, however, adds, "but here the negative covenant does not stand by itself. It is coupled with the agreement for service for a certain number of years, and then for taking the defendant into partnership. . . . This agreement cannot be performed in the whole, and therefore this court cannot perform any part of it." Whatever may have been the mutual obligations in that case which prevented the court from giving effect to the negative covenant, I am not embarrassed with any such difficulties here, because, as I have already shown, both the covenants are on the part of the defendants.

The case of Hooper *v.* Brodrick, 11 Sim. 47, was cited as an instance in

which the court had refused an injunction under circumstances like the present; but in that case the lessee of an inn had covenanted to use and keep it open as an inn during a certain time, and not to do any act whereby the license might become forfeited. In point of fact the application was that he might be compelled to keep it open, and the Vice-Chancellor makes this observation: "The court ought not to have restrained the defendant from discontinuing to use and keep open the demised premises as an inn, which is the same in effect as ordering him to carry on the business of an innkeeper; but it might have restrained him from doing, or causing or permitting to be done, any act which would have put it out of his power or the power of any other person to carry on that business in the premises. It is not, however, shown that the defendant has threatened or intends to do or to cause or permit to be done any act whereby the licenses may become forfeited or be refused, and therefore the injunction must be dissolved." That, therefore, is an authority directly against the defendants, because it shows that if there had been an intention to break the negative covenant this court would have granted the injunction.

The case of Smith *v.* Fromont, 2 Swanst. 330, was also relied upon by the defendants as an instance where the injunction had been refused, but there there was no negative covenant. It was an attempt to restrain by injunction a man from supplying horses to a coach for a part of a road where the party who was applying for the injunction was himself incapable of performing his obligation to horse his part of the road. Lord ELDON, in refusing the injunction and deprecating the interference of the court in such cases, there said, "The only instance I recollect of an application to this court to restrain the driving of coaches occurred in the case of a person who, having sold the business of a coach proprietor from Reading to London, and undertaking to drive no coach on that road, afterwards established one. With some doubt whether I was not degrading the dignity of this court by interfering, I saw my way in that case, because one party had there covenanted absolutely against interfering with the business which he had sold to the other." That again is a direct authority, therefore, against the defendants, as Lord ELDON expressly says he had interferred in the case of a negative covenant, although he could not interfere on that occasion because there was no such covenant.

Some observations have been made upon a decision of my own in Ireland in the case of Gervais *v.* Edwards, 2 Dru. & War. 80. That decision I believe to be right, but it is quoted to show that I was of opinion that this court cannot interfere to enforce specific performance unless it can execute the whole of an agreement. I abide by the opinion I there expressed, and I mean to do nothing in this case which shall in any manner interfere with that opinion. That was properly a case for specific performance, but from the nature of the contract itself there was a portion of it which could not be executed. I said in effect, "I cannot

execute this contract which is intended to be binding on both parties; I cannot execute a portion of this contract for one and leave the other portion of the contract unexecuted for the other, and, therefore, as I cannot execute the whole of the contract, I am bound to execute no part of it."

That, however, has no bearing on the present case, for here I leave nothing unperformed which the court can ever be called upon to perform.

In Hills *v.* Croll, 2 Phil. 60, Lord LYNDHURST refused to enforce an injunction to restrain the violation of a negative covenant. It was a case in which A had given to B a sum of money, and B covenanted that he would buy all the acids he wanted for the manufactory of A, who covenanted that he would supply the acids, and B also covenanted that he would buy his acids from no other person. Lord LYNDHURST refused to prohibit B from obtaining acids from any other quarter, both because the covenants were correlative and because he could not compel A to supply B with acids; and if, therefore, he had restrained B from taking acids from any other quarter, he might have ruined him in the event of A breaking his affirmative covenant to supply the acids. That case has never been rightly understood. It is supposed that Lord LYNDHURST's decision was based upon a wrong principle; that he followed the authority of Gervais *v.* Edwards and such cases, and that he improperly applied the rule, which was in that class of cases properly applied, but under the circumstances of the case before him I think the rule was not improperly applied.

The next case which has been so much observed upon was that, before Lord COTTENHAM, of Dietrichsen *v.* Cabburn, 2 Phil. 52. That was a very simple case, and the question upon what principle it was decided formed the subject of discussion before me. A man, in order to obtain a great circulation of his patent medicine, entered into a contract with a vendor of such articles, giving him a general agency for the sale of the medicine, with 40 per cent. discount, and stipulating that he would not supply anybody else at a larger discount than 25 per cent. He violated his contract and was proceeding to employ other agents with a larger discount than 25 per cent. An injunction was applied for and was granted. It was said that it was properly granted, because it was a case of partnership. This, however, was not the fact; it was not a case of partnership, but was strictly one of principal and agent; and it was only because there was the negative covenant that the court gave effect to it. It is impossible to read Lord COTTENHAM's judgment without being satisfied that he did not consider it to be a partnership, though he said it was in the nature of a partnership; and in a popular sense it might be so called, because the parties were there both dealing with respect to the same subject, from which each was to have a benefit, but in no legal sense was it a partnership.

Up to the period when Dietrichsen *v.* Cabburn, 2 Phil. 52, was decided I apprehend that there could have been no doubt on the law as applicable to this case, except for the authority of Vice-Chancellor SHADWELL; but

with great submission it appears to me that the whole of that learned judge's authority is removed by himself by his decision in the later case of Rolfe *v.* Rolfe, 15 Sim. 88. In that case A, B, and C were partners as tailors. A and B went out of the trade on consideration of receiving £1,000 each, and C was to continue the business on his own account. A entered into a covenant that he would not carry on the trade of a tailor, which he had just sold, within certain limits, and C entered into a covenant that he would employ A as cutter at a certain allowance. The bill was filed simply for an injunction to prevent A from setting up as a tailor within the prescribed limits, and the Vice-Chancellor granted that injunction. It was objected that this court could not grant the injunction when there was something remaining to be performed, for that A had a right to be employed as a cutter, which right this court would not even attempt to deal with or enforce as against C. That case, therefore, was open to a difficulty which does not occur here—in fact, the same difficulty which might have arisen in Hills *v.* Croll, 2 Phil. 60, before Lord LYNDHURST. But the Vice-Chancellor held that to be no difficulty at all, observing that the bill simply asked for an injunction which he would grant, although he could not give effect to the affirmative covenant to do the act in respect of which no specific performance was asked. His own decisions in Kemble *v.* Kean, 6 Sim. 333, and in Kimberley *v.* Jennings, 6 Sim. 340, were pressed upon him, but he observed, "that the bills in the cases cited asked for specific performance of the agreement, and that the injunctions were sought as only ancillary to that relief, but the bill in the present case asked merely for an injunction." He no longer put it on the inability of the court to enforce a negative covenant, but he put it on the form of the pleadings. Whether that form was sufficient to justify his opinion is a question with which I need not deal; but I am very clearly of opinion that the case of Rolfe *v.* Rolfe, 15 Sim. 88, does remove the whole weight of that learned judge's authority on this subject.

It was said in argument that the injunction prayed in Rolfe *v.* Rolfe, 15 Sim. 88, was merely ancillary to the relief; but it will be seen that that was not so, and that the prayer extended only to the injunction, and had nothing to do with relief in the shape of specific performance; and the learned judge himself stated that, if it had gone to that extent, he, following his former decisions, would not have granted the injunction.

From a careful examination of all these authorities I am of opinion that the principles and rules deducible from them are in direct contravention of those principles and rules which were so elaborately pressed upon me during the argument; and I wish it to be distinctly understood that I entertain no doubt whatever that the point of law has been properly decided in the court below. It was, nevertheless, and with some reason, said that although the point of law should be decided in the plaintiff's favor, still he might be excluded from having the benefit of it on the merits of the case.. . . .

His Lordship concluded by saying that, looking at the merits and circumstances of the case, as well as at the point of law raised, he must refuse this motion with costs.[1]

[1] S. C., 5 De G. & S. 485; 16 Jur. 871.

"The authority of this decision was recognized in the South Wales Railway Co. *v.* Wythes, 5 De G., M & G. 880; and the principle of it was carried out in Taunton Copper Manuf. Co. *v.* Cook, 24 Law Rep. (Boston, July, 1862), 547. The case is said to have 'been repeatedly followed' in Catt *v.* Tourle, L. R. 4 Ch. Ap. 654, 660. It is cited as an authority in Peabody *v.* Norfolk, 98 Mass. 452, 461. See Stevens *v.* Benning, 6 De G., M. & G. 223; Johnson *v.* The Shrewsbury and Birmingham Railway Co., 3 De G., M. & G. 914; Turner *v.* Evans, 2 De G., M. & G. 740; Great Northern Railway *v.* Manchester, Sheffield, and Lincolnshire Railway, 5 De G. & S. 138; Webster *v.* Dillon, 3 Jur. N. S. 432, V. C. W.; Ogden *v.* Fossick, 11 W. R. 128, L. J.J.; 2 Dan. Ch. Pr., 4th Am. ed., 1656, 1657; Lumley *v.* Gye, 2 El. & Bl. 216; Fechter *v.* Montgomery, 33 Beav. 22; Ainsworth *v.* Bentley, 14 W. R. 630, V. C. W.; 2 Story Eq. Jur. § 958a; Hood *v.* North-Eastern Railway Co., L. R. 8 Eq. 666; Catt *v.* Tourle, L. R. 4 Ch. Ap. 654. But see Mair *v.* Himalaya Tea Co., L. R. 1 Eq. 411; 11 Jur. N. S. 1013, V. C. W.; Brett *v.* East India and London Shipping Co., 2 H. & M. 404; Sanquirico *v.* Benedetti, 1 Barb. 315; Hope *v.* Hope, 22 Beav. 351; Sanders *v.* Rodway, 16 Beav. 207; Paxton *v.* Newton, 2 Sm. & Gif. 437."—Perkins's note.

To the cases thus collected by Mr. Perkins there may be added the following English cases: The principal case was referred to in Merchants Trading Co. *v.* Banner, 1871, L. R. 12 Eq. 18; Warner *v.* Routledge, 1874, L. R. 18 Eq. 497; Bowen *v.* Hall, 1881, L. R. 6 Q. B. Div. 333; Ryan *v.* Mutual Tontine, etc. Co., 1893, 1 Ch. 116; Keith Prowse Co. *v.* Nat. Telephone Co., 1894, 2 Ch. 147; Ehrman *v.* Bartholomew, 1898, 1 Ch. 671; William Robinson & Co. *v.* Heuer, 1898, 2 Ch. 451; Metropolitan Electric Supply Co. *v.* Ginder, 1901, 2 Ch. 799; Formby *v.* Barker, 1902, 2 Ch. 539. It was considered in Wolverhampton etc. R'y Co. *v.* R'y Co., 1873, L. R. 16 Eq. 433. It was distinguished in Davis *v.* Foreman, 1894, 3 Ch. 654. It was followed in Manchester Ship Canal Co. *v.* Manchester Race Course Co., 1901, 2 Ch. 37.

The American doctrines are set forth in the following extracts:

"The case of Lumley *v.* Wagner, 6 Jurist, 871, has been cited as an authority for the relief desired, but the fact that amidst the multitude of quarrels that have distracted the green room or disturbed the stage there has been but one instance of such interference, may be thought to indicate that it should be regarded as a warning rather than followed as a precedent. I prefer to rely on the cases of Kemple *v.* Kean, 6 Simons, 333; Corsetti *v.* Rivafinoli, 4 Paige 464; Sanquirico *v.* Benedetti, 1 Barbour 316, and Hamblin *v.* Dwineford, 2 Edwards, 529, which show conclusively, that the objections to enforcing contracts for personal services specifically, apply with peculiar force in the case of those whose business is to amuse as well as instruct, and whose labors are worth nothing if given grudgingly, without the spirit that should pervade and give life to art. We therefore dismiss this bill as without our province, and belonging to a sphere more likely to be marred than improved, by the most formal decree that counsel could devise or the court award." Per HARE, J. in Ford *v.* Jerman, 1865, 6 Phila. 6, 7.

MONTAGUE *v.* FLOCKTON.

IN CHANCERY, BEFORE SIR R. MALINS, V. C., 1873.

[*Law Reports* 16 *Equity Cases* 189.]

This was a motion on behalf of the plaintiff, Henry James Montague, the lessee and manager of the Globe Theatre in London, for an injunction to restrain the defendant, Charles Poston Flockton, from acting or causing his name to be advertised as about to act at any place other than the plaintiff's theatre, or otherwise than for the plaintiff's benefit,

"Injunctions of this character, especially under the American rulings, are granted with great caution by the courts. We cite the following authorities on the subject, all of which we have examined, with many more: Singer Sewing Machine Co. *v.* Union etc. Co., 1 Holmes, 1873, U. S. C. Ct. 253; Hayes *v.* Willis, 11 Abb. Pr. N. S., 1871, 167; Western Union Tel. Co. *v.* Union Pac. Railway Co., 1880, 1 McCrary U. S. C. Ct. 558; Daly *v.* Smith, 49 How. Pr. 150; Fredericks *v.* Mayer, 13 How. Pr. 566; Clark's Case, 12 Amer. Dec. 213, note, 217; Casey *v.* Holmes, 10 Ala. 776; Hamblin *v.* Dinneford, 2 Edw. Ch. 529; Sanquirico *v.* Benedetti, 1 Barb. N. Y. 315; Butler *v.* Galletto, 21 How. 465; De Pol *v.* Sohlke, 7 Rob. 280; De Rivafinoli *v.* Corsetti, 4 Paige, 270; Ford *v.* Jermon, 6 Phila. 6; Port Clinton R. R. Co. *v.* Cleveland etc. R. R. Co., 13 Ohio St. 544; 3 Poin. Eq. Jur. § 1344; Pom. on Contr. §§ 24, 25, 310, 311; Anson on Contr. p. 413; Hahn *v.* Concordia Society, 42 Md. 460; Waterman on Spec. Perf., § 117, and notes; Caswell *v.* Gibbs, 33 Mich. 331; Kerr on Inj. 503; Hilliard on Inj. pp. 485-6; Manhattan etc. Co. *v.* New Jersey etc. Co. 23 N. J. Eq. 161." Per SOMERVILLE, J., in the Iron Age Pub. Co. *v.* Western Un. Tel. Co., 1887, 83 Ala. 498, 508.

A very complete collection of American authorities will be found in the following notes:—71 Am. Dec. 746; 16 Fed. 37; 90 Am. St. Rep. 646, and see an article on "Specific Performance by Injunction," by Clarence D. Ashley in 6 Columbia Law Review, 82.

"It does not appear from the allegations of the petition, or from the evidence, that Burney, as an insurance agent, was in any way remarkable, or that he had shown himself to be such a specially skilful, successful or expert person in this business that it would be difficult or impracticable to supply his place by another agent equally competent to render such services as his contract required of him. For this reason the injunction, in our opinion, should have been denied. No doubt there are cases in which a court of equity will enjoin the breach of a contract, and compel one to abstain from performing personal services for other persons which he was bound to render exclusively to the plaintiff. 'But the services to be performed must be individual and peculiar because of their special merit or unique character; for, otherwise, the remedy at law would be adequate. But where the services involve the exercise of powers of mind, as of writers or performers, which are peculiarly and largely intellectual, they may form the class in which the court would interfere upon the ground that they are individual and peculiar. Damages for a breach of such contracts are not only difficult to ascertain, but cannot, with any certainty, be estimated; nor could the plaintiff procure, by means of any damages, the same services in the labor market as in case of an ordinary contract of employment between an artisan, a laborer or a

for a period of nine months from the 2d of October, 1872, and in particular from acting at an intended dramatic performance at the Crystal Palace. The contract relied on contained no negative clause.[1]

Sir R. MALINS, V. C.[2] My opinion is that if an actor engages himself for the season he leaves himself at the mercy (within reasonable limits of construction) of the proprietor of the theatre to fix what the season is. But that is not the meaning of this contract; because, while the proprietor, Mr. Montague, engages Mr. Flockton for the season, there is a stipulation which is for the protection of the performer, that that season is not to be one month, two months, or three months as the proprietor may think proper, but that whenever he may choose to terminate his season, that season, for the purpose of paying the actor, is not to be less than nine months. In my opinion it was absolutely impossible, provided Mr. Flockton performed his part of the contract, for Mr. Montague to evade performing his part of it by paying the stipulated salary for a period of not less than nine months. . . .

Now that being the effect of the agreement between the parties, that is, that Mr. Flockton has bound himself for the whole of the season which commenced in October last for nine months, which, on the one hand, obliges Mr. Montague to pay him his salary for nine months, and obliges Mr. Flockton, on the other hand, to perform for Mr. Montague for the same period, it is said, in order to avoid this, that he is not bound, because there is no negative stipulation in the contract. I certainly am under the impression that in the case of Lumley *v.* Wagner, 1 D. M. & G. 604, if there had been no negative stipulation the court would have interfered; and I gather this particularly from the passage in Lord St. Leonard's judgment (1 D. M. & G. 618), where he says: "The agreement to sing for the plaintiff during three months at his theatre, and

clerk, and their employer.' 2 Beach on Mod. Equity Jur. § 772." Per LUMPKIN, Justice, in Burney *v.* Ryle & Co., 1893, 91 Ga. 701, 703.

"There is a clause in the agreement that the employer will not, except in the case of misconduct or a breach of the agreement, require the manager to leave his employ—in other words, give him notice to quit. That is, to my mind, distinctly equivalent to a stipulation by the employer that he will retain the manager in his employ. It is only the form that is negative. If the court comes to the conclusion that that is really the substance of the agreement (which, being an agreement of service, cannot be specifically enforced), is it right, having regard to the line the authorities have taken, to say that merely because the agreement is negative in form an injunction ought to be granted? To my mind, I should be going distinctly against the last decision in the Court of Appeal if I were to apply the doctrine of Lumley *v.* Wagner, which is not to be extended, to a case of this character. The motion must therefore be refused; the costs to be the defendant's in any event." Per KEKEWICH, J., in Davis *v.* Foreman, 1894, 3 Ch. 654, 658.

[1] A part of the statement of facts is omitted. They sufficiently appear in the opinion.

[2] Portions of the opinion are omitted.

during that time not to sing for anybody else, is not a correlative contract; it is, in effect, one contract, and though beyond all doubt this court could not interfere to enforce the specific performance of the whole of this contract, yet in all sound construction and according to the true spirit of the agreement the engagement to perform for three months at one theatre must necessarily exclude the right to perform at the same time at another theatre." It happened that that contract did contain a negative stipulation, and, finding it there, Lord St. Leonards relied upon it; but I am satisfied that if it had not been there he would have come to the same conclusion and granted the injunction on the ground that Mdlle. Wagner, having agreed to perform at Mr. Lumley's theatre, could not at the same time be permitted to perform at Mr. Gye's. But however that may be, it is comparatively unimportant, because the subsequent authorities have completely settled this point. It appears to me, on the plainest ground, that an engagement to perform for nine months at Theatre A is a contract not to perform at Theatre B or at any other theatre whatever. How is a man to perform his duty to the proprietor of a theatre if, when he has engaged himself to perform for him, he is to go away any night that he may be wanted to another theatre? I must treat Mr. Flockton as if he were the greatest actor in the world, and as if wherever he went the public would run after him; and according to this, if a proprietor engages an actor to perform for him, he is not, because he is only wanted for three nights in the week, to be at liberty to go and perform at any other theatre during the other three nights, and thereby take away the advantage of the contract which he has entered into with his employer. That, in my opinion, is utterly inconsistent with the proper construction of the contract. There is no doubt whatever that the proper construction of these contracts is that where a man or woman engages to perform or sing at a particular theatre for a particular period, that involves the necessity of his or her not performing or singing at any other during that time. . . .

I think, therefore, that it is decidedly established, and I should decide, as far as my opinion is of value on the subject, that it should be considered my opinion that a man agreeing to act in one particular theatre during the season is party to a contract that he will act there and not anywhere else. A negative contract is as necessarily implied as if it had been plainly expressed. Then the result is: here is a contract entered into for value. It is said by Mr. Flockton that the plaintiff has refused to perform his part of the contract, and has also refused to allow him to perform. That is explained in the affidavits. It is not attempted to be answered. It is perfectly clear that in consequence of Flockton having absented himself and given the notice of the 2d of October, when this new piece was about to be brought out, Mr. Montague was obliged to apply to another actor, a Mr. Palmer, to act in the place of Mr. Flockton, and that in consequence of the default of Mr. Flockton to perform his contract he has brought this trouble

upon himself. Mr. Montague very properly said: "I have engaged Mr. Palmer; I cannot turn him out. You have brought this upon yourself, and while this piece lasts I cannot employ you to perform in it." But if he had not done that I am perfectly clear that he would have continued to employ him there, and that the circumstance of his not being employed is entirely in consequence of his attempting to repudiate his own contract.

Under these circumstances, I am clearly of opinion that Mr. Montague has established that Mr. Flockton is under an engagement to perform for him, and, being under that engagement, is not at liberty to perform at any other theatre whatever without his permission. I think it is a matter of very great importance for actors to understand that entering into a contract to perform at Theatre A obliges them to perform there alone, and that they cannot be permitted to perform anywhere else so long as the other party performs his part of the agreement.

I am, therefore, of opinion that Mr. Montague is entitled to the injunction.

Mr. Hemming asked that the injunction might not be extended to prevent Mr. Flockton from fulfilling the engagement he had already entered into to perform once more at the Crystal Palace.

The VICE-CHANCELLOR recommended Mr. Montague to concede this request as a favor.

Mr. Glasse said that Mr. Montague would not object to the defendant's performing once more at the Crystal Palace.

The VICE-CHANCELLOR thereupon granted the injunction in the terms of the prayer, but so as not to interfere with Mr. Flockton's playing one more day at the Crystal Palace.

WHITEWOOD CHEMICAL CO. *v.* HARDMAN, 1891, 2 Ch. 416.—[The manager of a manufacturing company had agreed to give during a specified term "the whole of his time to the company's business." He now contemplated giving part of his time to a rival company.] KAY, L. J.[1] However, what strikes me in this case is that if the court could possibly interfere in the way in which the learned judge has interfered, by injunction, I do not see any contract of hiring and service in which it ought not also to interfere. To take the most simple and ordinary case, of a man's domestic servant, his butler (which was one of the cases put by way of illustration in one of the judgments referred to), who has contracted to give the whole of his time to his master's service. Could it possibly be argued that an injunction could be obtained to prevent

[1] In speaking of KAY, a writer in the Dictionary of National Biography (supplement, vol. iii.) says that "he proved a strong judge, a sworn foe to lucrative abuses and dilatory proceeding, and as competent on circuit as in chambers."

his serving some one else during that engagement? Yet if a negative is to be implied, I do not see any case whatever in which it could be more clearly implied than in a case of that kind. We must tread with very great caution such a path as that which this application invites us to pursue; and, as I think this case goes very far beyond any case which has been decided with consideration up to this time, I certainly am very strongly disinclined to support this decision; I am all the more disinclined to support it, because one cannot help seeing that the mode in which this injunction is granted is really the only mode in which the court could possibly have granted such an injunction. The court has implied a negative in the contract to give the whole of his time, and has therefore granted an injunction to prevent his giving any of his time to any other purpose. It is not really wanted, *bona fide,* for that purpose, but it is wanted to prevent him from setting up a rival business which he has contracted not to do.

I therefore think that this decision must be reversed, and the appeal allowed.

FOTHERGILL *v.* ROWLAND.

IN CHANCERY, BEFORE SIR GEORGE JESSEL, M. R., 1873.

[*Law Reports* 17 *Equity Cases* 132.]

DEMURRER. The plaintiffs in this case, Richard Fothergill and Ernest Thomas Hankey, were ironmasters, carrying on the Aberdare Ironworks. The defendant, Richard Rowland, was lessee of the Newbridge Colliery.

The bill alleged an agreement that Rowland should sell to the plaintiffs and that the plaintiffs should buy the whole of the get of coal of the No. 3 seam of the said colliery for five years, the quantity not to be less than an amount specified. The plaintiffs, learning that the defendant, in violation of his agreement, was supplying coal to others, and that (as was alleged) he contemplated selling to third parties the colliery for the purpose of evading performance of his agreement, prayed an injunction as to both points. The defendants demurred to the bill.[1]

Sir G. JESSEL, M. R.[2] . . . The question is one which I am sorry to have to decide against the plaintiffs. No honest man, whether on the bench or off it, can approve of the conduct of the defendants. The first defendant, Rowland, has entered into a contract *bonâ fide* for valuable considerations to sell a quantity of coal to be raised from his mine to the plaintiffs. He has received the advantages of the contract, and because coal has risen in value and he can get a better price elsewhere, he does not choose to perform his contract. Such conduct ought not to meet with the approval of anybody. Then the question I have to deter-

[1] This statement of facts is abridged.

[2] A part of the opinion is omitted.

mine is, whether the plaintiffs have come to the right court to obtain that which the law will undoubtedly give them, namely, compensation in some shape or other for the loss they have sustained by this breach of contract. It appears to me, as the law now stands, a court of equity cannot give them any relief.

The first question is, what is the contract for? In my view of the contract it is one for the sale of coals—that is, coals gotten, the get of coal, the several chattel, and it has no relation whatever to a contract for real estate. That point really was not argued by Mr. Fry, although Mr. Marten did touch upon it. I think it must be assumed, therefore, to be a simple contract for the sale of a chattel of a very ordinary description not alleged to be a peculiar coal or coal that cannot be got elsewhere. On the contrary, as I read the bill, there is coal that can be got elsewhere of the same description, only at a higher price. The result is that the plaintiffs will incur an amount of damage to be measured by the market price which they may have to pay for the coal of the same description as the coal agreed to be supplied by the defendant Rowland.

It is said, however, that, although you can ascertain the market price as regards all the past non-delivery, you cannot ascertain exactly the market price as to future deliveries. To say that you cannot ascertain the damage in a case of breach of contract for the sale of goods, say in monthly deliveries extending over three years (which is the case here, for there are three years unexpired of the contract) is to limit the power of ascertaining damages in a way which would rather astonish gentlemen who practice on what is called the other side of Westminster Hall. There is never considered to be any difficulty in ascertaining such a thing, therefore I do not think it is a case in which damages could not be ascertained at law.

That being so, what is there to distinguish this from any ordinary contract for the sale of goods? We have been told it has some connection with the colliery. I suppose coals must necessarily have connection with a colliery, and it happens that the person who sold the coal to be produced from a given colliery was also at that time the owner of the colliery. I apprehend there is no difficulty about entering into a contract for the sale of coal coming from a particular colliery by persons not owners of that colliery. That is the common practice. The coals not being delivered, and there being no means of obtaining their delivery, without compelling the defendant Rowland to raise them, it has been admitted before me that this is a contract of which you cannot obtain a specific performance in a court of equity.

Therefore, any relief to be obtained by the plaintiffs in the shape of compensation must be obtained at law, and I do not understand that the plaintiffs, coming here for an injunction which they ask, are willing to abandon their claim to compensation at law in the shape of damages.

Then it is said, assuming this contract to be one which the court can-

not specifically perform, it is yet a case in which the court will restrain the defendants from breaking the contract. But I have always felt, when at the Bar, a very considerable difficulty in understanding the court on the one hand professing to refuse specific performance because it is difficult to enforce it, and yet on the other hand attempting to do the same thing by a roundabout method. If it is right to prevent the defendant Rowland from selling coal at all—he not having stipulated not to sell coal, but having stipulated to sell all the coal he can raise to somebody who has promised valuable consideration—why is it not right to compel him to raise it and deliver it? It is difficult to follow the distinction, but I cannot find any distinct line laid down or any distinct limit which I could seize upon and define as being the line dividing the two classes of cases—that is, the class of cases in which the court, feeling that it has not the power to compel specific performance, grants an injunction to restrain the breach by the contracting party of one or more of the stipulations of the contract, and the class of cases in which it refuses to interfere. I have asked (and I am sure I should have obtained from one or more of the learned counsel engaged in the case every assistance) for a definition. I have not only not been able to obtain the answer, but I have obtained that which altogether commands my assent, namely, that there is no such distinct line to be found in the authorities. I am referred to vague and general propositions—that the rule is that the court is to find out what it considers convenient, or what will be a case of sufficient importance to authorize the interference of the court at all, or something of that kind.

That being so, and not being able to discover any definite principle on which the court can act, I must follow what Lord St. Leonards says, in Lumley *v.* Wagner, D. M. & G. 604, is the proper conduct for a judge in not extending this jurisdiction. I am not, however, entirely without assistance from authority, because it appears to me that this very case has been put, though only by way of illustration, by a very great judge, Lord Cottenham, in Heathcote *v.* North Staffordshire Railway Company, 2 Mac. & G. 112, where he says, "If A contract with B to deliver goods at a certain time and place, will equity interfere to prevent A from doing anything which may or can prevent him from so delivering the goods?" That is the exact case I have to deal with, because I have decided that the contract is a contract for the delivery of goods. Finding the *dictum* of Lord Cottenham express on the subject, and the plaintiffs' counsel not having been able to produce to me any authority in which there has been such an injunction granted on the sale of goods or any chattel, in a case in which specific performance could not be granted, I think I shall do right in following that authority; and I say, although I say it with much regret, that it is a case in which equity can afford no relief. . . .

A petition of appeal was presented against this decision, but the case was compromised before it came to a hearing.

DONNELL *v.* BENNETT.

IN THE SUPREME COURT OF JUDICATURE, CHANCERY DIVISION, 1883.

[*Law Reports* 22 *Chancery Division* 835.]

By an agreement dated the 15th of December, 1882, and made between the plaintiff, J. Donnell, a manure manufacturer, of the one part, and Cormack, a fish curer and fish smoker, of the other part, it was agreed that Cormack should sell and that the plaintiff should buy all parts of fish not used by Cormack in his business of a fish curer and fish smoker at the price of 23s. per ton for the space of two years from the 31st of December, 1882, and in consideration thereof Cormack further agreed that he would not sell during the said space of two years any fish or parts of fish to any other manufacturer whatever, and the plaintiff further agreed that he would take and pay for all fish or parts of fish which Cormack should deliver to him at the said price of 23s. per ton delivered at the plaintiff's works.

It was admitted that the defendant never delivered any fish or parts of fish under the contract to the plaintiff, but that he entered into a contract with the defendant, Bennett, to deliver all the parts of fish which he did not require in his business to Bennett; it was also admitted that the plaintiff had suffered damage by this breach of contract, and that the defendant, Bennett, had paid Cormack considerable sums of money to induce him to break his contract with the plaintiff, in order that Bennett might obtain the substantial monopoly of all the refuse of fish in Grimsby or the neighborhood.

This was an action by the plaintiff against Bennett and Cormack as co-defendants asking for an injunction to restrain Cormack from selling any fish to Bennett or any other manufacturers except the plaintiff, and to restrain Bennett from buying any such fish from Cormack.

FRY, J. The question which arises is by no means an easy one. It is difficult because of the state of the authorities upon the point. It appears to me that the tendency of recent decisions, and especially the cases of Fothergill *v.* Rowland, Law Rep. 17 Eq. 132, and of the Wolverhampton and Walsall Railway Company *v.* London and North Western Railway Company, Ibid. 16 Eq. 433, is toward this view—that the court ought to look at what is the nature of the contract between the parties; that if the contract as a whole is the subject of equitable jurisdiction, then an injunction may be granted in support of the contract whether it contain or does not contain a negative stipulation; but that if, on the other hand, the breach of the contract is properly satisfied by damages, then that the court ought not to interfere whether there be or be not the negative stipulation. That, I say, appears to me to be the point towards which the authorities are tending, and I cannot help saying that in my judgment that would furnish a proper line by which to divide the

cases. But the question which I have to determine is not whether that ought to be the way in which the line should be laid down, but whether it has been so laid down by the authorities which are binding on me.

Now several cases have been cited by the plaintiff as authorities in favor of his contention. In the first place there is the case of Dietrichsen *v.* Cabburn, 2 Ph. 52, in which undoubtedly the court enforced by way of injunction a stipulation not to sell except in a particular manner, and there the whole contract was one which could not have been performed specifically by the court. Still more, in Lumley *v.* Wagner, 1 D. M. & G. 604, the court enforced by way of injunction a portion of a contract the whole of which could not have been enforced by way of specific performance; and Lord ST. LEONARDS in considering that case discussed the question whether an injunction ought to be granted in some cases in which specific performance cannot be granted, and he determined that question plainly in the affirmative. He made these observations (1 D. M. & G. 619); "Wherever this court has not proper jurisdiction to enforce specific performance it operates to bind men's consciences, as far as they can be bound, to a true and literal performance of their agreements; and it will not suffer them to depart from their contracts at their pleasure, leaving the party with whom they have contracted to the mere chance of any damages which a jury may give. The exercise of this jurisdiction has, I believe, had a wholesome tendency towards the maintenance of that good faith which exists in this country to a much greater degree perhaps than in any other; and although the jurisdiction is not to be extended, yet a judge would desert his duty who did not act up to what his predecessors have handed down as the rule for his guidance in the administration of such an equity." It is plain, therefore, that Lord ST. LEONARDS did not adopt the view which has occurred to me as that towards which the more recent cases have been tending.

That is the way in which the direct authorities stand in cases in which there is a negative clause, and they appear to me to show that in cases of this description where a negative clause is found, the court has enforced it without regard to the question whether specific performance could be granted of the entire contract.

Then it is said by Mr. Cozens-Hardy that in all those cases the negative contract enforced was but a part of a larger contract, and that it was a separable part of that larger contract, and that those cases do not apply to a case like the present, in which, as he suggests, the negative contract is co-extensive with the positive contract.

Upon that argument two inquiries arise. In the first place, is it true to say that the negative contract is in the present instance co-extensive with the positive? In my judgment it is not. The affirmative contract is that the vendor will sell all his fish refuse for two years to the purchaser. The negative contract is that during two years he will not sell any refuse fish to any other manufacturer whomsoever; leaving it open

to him so far as regards the negative contract, either not to sell at all, or to sell to some person other than a manufacturer. But in the next place one must inquire whether the authorities support any such distinction as that which has been urged by Mr. Cozens-Hardy. It appears to me that they do not. . . .

It appears to me, therefore, that that point which has been urged upon me, does not receive any sanction from the earlier authorities.

I have come to the conclusion, therefore, upon the authorities, which are binding upon me, that I ought to grant this injunction. I do so with considerable difficulty, because I find it hard to draw any substantial or tangible distinction between a contract containing an express negative stipulation and a contract containing an affirmative stipulation which implies a negative. I find it exceedingly difficult to draw any rational distinction between the case of Fothergill *v.* Rowland, Law Rep. 17 Eq. 132, and the case now before me. But, at the same time, the courts have laid down that, so far as the decisions have already gone in favor of granting injunctions, the injunction is to go.

It appears to me that this case is within the earlier decisions, and although I should be far from sorry if the Court of Appeal were to take a different view, I think I am bound here by the authorities, and therefore I grant the injunction till the hearing of the cause.

M'CAULL *v.* BRAHAM.

IN THE CIRCUIT COURT OF THE UNITED STATES, 1883.

[16 *Federal Reporter* 37.]

BROWN, J. This action was brought in the State court to restrain the defendant, Helen Braham, otherwise known as Lilian Russell, from violating her agreement with the plaintiff by singing during the current season in any other employment than at the plaintiff's theatre, which the complainant alleges she is about to do. A preliminary injunction having been obtained at the time of the commencement of the action, the cause was removed by the plaintiff to this court before answer; and the defendant now moves upon affidavits to dissolve the injunction. By the agreement in writing between the parties, the defendant agreed to sing in comic opera in the employment of the plaintiff whenever required during the season of 1882 to 1883, commencing on or about September 1, 1882, at a stipulated weekly salary. By article 1 the agreement provides that "the artist is engaged exclusively for Mr. John McCaull, and during the continuance of this engagement will not perform, sing, dance, or otherwise exercise her talent in theatre, concert halls, churches, or else-

where, either gratuitously or for her remuneration or advantage, or for that of any other person or other theatre or establishment (although not thereby prevented from fulfilling her engagement with Mr. McCaull) without having first obtained permission in writing of Mr. McCaull; and for each and every breach of this rule the artist shall forfeit one week's salary, or her engagement, at the option of Mr. McCaull; but such forfeiture of one week's salary shall not be held to debar Mr. McCaull from enforcing the fulfillment of this contract in such a manner as he may think fit."

By article 3 it is provided that "no salaries will be paid for any night or days on which the artist may not be able to perform through illness or other unavoidable cause; and the artist absenting herself, except from illness or other unavoidable cause, will forfeit one week's salary, or her engagement, at the option of Mr. McCaull, and will also be held liable for any loss that may be sustained by Mr. McCaull owing to such absence. Illness, to be accepted as an excuse, must be attested by a medical certificate, which must be delivered to Mr. McCaull or his representative as early as possible, and before the commencement of the performance. Should such absence exceed two weeks, the engagement may be canceled at the option of Mr. McCaull."

The defendant entered upon the performance of her engagement at the Bijou Opera House in this city in September, 1882, with great success, which was continued until prevented from further performance by protracted illness. Having partially recovered, she attempted to renew her appearances, but after three nights' performances, in December, she suffered a relapse from which she did not recover until about the middle of February, 1883.

By the written contract the plaintiff was to furnish all costumes. This was modified, prior to September, by an oral agreement by which the plaintiff was to pay a larger salary and the defendant to furnish her own costumes. Both parties agree as to the modification of the contract to this extent. The defendant contends that in addition to the above the oral contract was further modified by the plaintiff agreeing to pay her weekly salary as at first fixed during the continuance of any illness; that the sum of about $350, paid to her by the plaintiff during her illness, was paid in pursuance of this modification of the contract; and that since the middle of December the plaintiff has refused to continue such payment during that part of her illness, in violation of the agreement as modified.

The plaintiff denies that the modification of the contract included any agreement to pay her during illness, and asserts that the moneys actually paid her while ill were merely advances on account of future salary to be earned, and so expressly stated at the time. Each party sustains its respective claims in this respect by several witnesses. They leave this branch of the subject in so much doubt that I feel obliged to reject it from consideration, without prejudice to either in

regard to their mutual claims in respect to it, since neither party made it a ground of terminating the contract.

Up to the time this action was commenced the defendant had given no notice to the plaintiff terminating the agreement; nor had the plaintiff, as he might have done according to the express provision of the agreement, notified the defendant that it was canceled, owing to her absence beyond two weeks. I must, therefore, hold the agreement as still in force. Contracts for the services of artists or authors of special merit are personal and peculiar; and when they contain negative covenants which are essential parts of the agreement, as in this case, that the artists will not perform elsewhere, and the damages, in case of violation, are incapable of definite measurement, they are such as ought to be observed in good faith and specifically enforced in equity. That violation of such covenants will be restrained by injunction, is now the settled law of England. Lumley *v.* Wagner, 1 De G., M. & G. 604; Montague *v.* Flockton, L. R. 16 Eq. 189, 190.

The subject was exhaustively considered by FREEDMAN, J., in the case of Daly *v.* Smith, 49 How. Pr. 150, in whose conclusions, in accordance with the English cases above cited, I fully concur. In the present case it is, however, urged that the remedy by injunction should not be allowed on the ground that the plaintiff's damages have been liquidated by the first article of the contract above quoted; namely, that "for each and every breach of this rule the artist shall forfeit one week's salary;" and the cases of Barnes *v.* McAllister, 18 How. Pr. 534; Nessle *v.* Reese, 29 How. Pr. 382; Mott *v.* Mott, 11 Barb. 127, 134; and Trenor *v.* Jackson, 46 How. Pr. 389, are cited in support of this view.

There is no doubt of the general principle that where the damages for the violation of a covenant are either liquidated by the agreement, or may be easily and definitely ascertained, the parties will be left to their remedy at law. But it is clear that in cases of contract like the present, the damages are not capable of being definitely ascertained or measured; and in the cases first above cited, injunctions were for that reason allowed. The only question in this case, therefore, which distinguishes the present agreement from those, is whether the provision for the forfeiture of a week's wages for every violation of article 1 is such a liquidation of the damages as bars the remedy by injunction.[1] . . .

The injunction of this court must not be used directly or indirectly to enforce the collection by the plaintiff of his alleged but disputed claim for previous advances, through the non-payment of salary hereafter earned, at least until his right is legally adjudicated. (2) Considering the short period remaining, the defendant must not be sent to California, where by the contract she might have been taken without salary *en route* going and returning; nor, having respect to her precarious health, should she be sent to any very distant point; (3)

[1] After examining the question, the court concluded it did not.

the plaintiff should furnish satisfactory security for the prompt payment weekly for the defendant's services at the rate of $150 per week, the contract price, from the time the defendant gives notice in writing of her readiness to sing under the contract, so long as she shall continue in readiness to perform her duties.

In case of failure to pay any future salary earned, the defendant may apply, on two days' notice, to the plaintiff's attorneys for the dissolution of this injunction.

An order may be entered continuing the injunction subject to the above provisions and conditions.[1]

AMERICAN ASSOCIATION BASE-BALL CLUB OF KANSAS CITY, MISSOURI, *v.* PICKETT AND THE PLAYERS' NATIONAL LEAGUE BASE-BALL CLUB OF PHILADELPHIA.

IN THE PHILADELPHIA COUNTY COURT, 1890.

[8 *Pa. C. C. R.* 232.]

ARNOLD, J., May 5, 1890.—All the disputed questions of law in this case were considered and decided adversely to the defendant, in the case of the Philadelphia Ball Club, Limited *v.* Hallman *et al.*, 8 Pa. C. C. R. 57; 47 Leg. Int. 130, and we are thereby saved from the necessity of repeating much of what was so well said in that case by the learned president of this court. The rule there laid down is that where a person enters into a contract to render services as a base-ball player for a reasonable length of time, a court of equity, although it cannot compel him to perform those services, will, nevertheless, enjoin him from giving to a third person the services he has bound himself to render to another.

It was argued in this case that the decision above cited does not apply where the contract of service does not contain a negative clause that the player will not perform like services for any other person during the time covered by the contract; that is, that he will not break his contract. But this contention is wholly untenable. Every express promise to do an act embraces within its scope an implied promise not to do anything which will prevent the promissor from doing the act he has engaged to do. In the leading case of Lumley *v.* Wagner, 1 De Gex, Macnaghten & Gordon, 604, this was expressly ruled. It was there said that "an engagement to perform for three months at one theatre, must necessarily exclude the right to perform at the same time at another theatre." This was followed by the case of Montague *v.* Flockton, Law Rep. 16th Equity, 189.

[1] In a valuable note to this case, the Reporter has collected the more important American authorities. See also a note in 71 Am. Dec. 746, 750.

in which an actor was restrained from breaking his contract to play for one manager, by playing for another. There are no negative words in the contract sued upon in that case. There is no reason why ball players should be treated differently from other persons when they seek to evade their engagements, nor why managers should be left entirely at the mercy of their players. Daly *v.* Smith, 49 Howard's Prac. 150. As the manager is bound by his contract, so should the player be bound.

Persons who knowingly take and continue in their service one who has broken his contract to play for another, subject themselves to legal penalties therefor, and may be compelled to respond in damages. Lumley *v.* Gye, 2 Ellis & Blackburn, 216.

Upon the facts in the present case, the rights of the plaintiff are vastly superior to those of the defendants. The defendant Pickett agreed on Oct. 28, 1889, to play base-ball and perform any and all services that may be required of him, during the term of seven months from April 1, 1890, to Oct. 31, 1890, for $2,200, to be paid semi-monthly, the first payment to be made on April 15, 1890. In Dec., 1889, he applied for and received from the plaintiff $100 on account of his salary in advance, and in Jan., 1890, he received another sum of $100. On Feb. 19, 1890, he notified the plaintiff that he intended to break his engagement, and subsequently he agreed to play base-ball for the other defendant, the Players' League of Philadelphia. When we consider the fact that the plaintiff, the Kansas City Club, paid for the release of Pickett from the St. Paul Base-Ball Club, in May, 1889, $3,300, of which the sum of $800 was paid to Pickett, and a salary of $340 a month, which was regularly and fully paid to him, although he was sick and unable to play nearly half of the season of 1888, his ingratitude is shown to be equal to his bad faith. While we cannot punish him for his ingratitude, we can restrain him from deriving any benefit from his breach of contract. He will not be condemned to idleness, but he will be prevented from playing base-ball as a business, unless he plays for the plaintiff.

His excuse that the Kansas City Club has transferred its membership from the American Association to the Western Association, will avail him nothing in this suit, for he has estopped himself from complaining, as he knew of the transfer and approved and acquiesced in it.

Nor will his complaint that the Kansas City Club released some of its players help him out of his difficulty. It was not a part of the contract that he should select or retain the players to play with him. The right of selection and employment is one of the exclusive rights of the employer, unless the rule which requires servants to obey their masters, is to be disregarded in base-ball matters. But in this particular, as in the other, the defendant has estopped himself by acquiescing in the release of those players.

His fear that the plaintiff will not be able to pay his salary, is a matter he should have thought of when he was making his engagement. It will

not excuse him from keeping his part of the contract, until default in payment shall occur. His experience with the plaintiff as a paymaster does not justify his fear, but it does lead to the belief that this is a mere subterfuge.

An injunction will be issued as prayed for.[1]

WOODWARD *v.* GYLES.

IN CHANCERY, BEFORE THE LORDS COMMISSIONERS, 1690.

[2 *Vernon* 119.]

Mr. Hellier moved for an injunction to stay waste in plowing. The case was, that the plaintiff let a farm to the defendant at an annual rent, and part of it being pasture land, the defendant covenants amongst other things, not to break up or plow any part of it, and if he did plow any part of it, that he would pay after the rate of twenty shillings per acre per ann.

Per Cur. The parties themselves have here agreed the damage, and have set a price for plowing, and therefore will not grant any injunc-

[1] "If an injunction will lie to restrain a physician from breaking his contract not to practice medicine within a certain region, as in McClurg's Ap., 58 Pa. 51; Palmer *v.* Graham, 1 Parsons, 476; Reece *v.* Hendricks, 1 Leg. Gaz. 79; Betts' Ap., 10 W. N. C. 431, and Paxon's Ap., 106 Pa. 429, if a confectioner may be enjoined from carrying on his trade for a certain period within certain limits, contrary to his contract: Harkinson's Ap., 78 Pa. 96, or a manufacturer from carrying on his business in a certain county: Smith's Ap., 113 Pa. 580, or a baker, as was done in this court in Eckert *v.* Gerlach, 12 Phila. R. 530, or a blacksmith, as in Carroll *v.* Hicks, 10 Phila. 308, or an attorney, as in Bunn *v.* Guy, 4 East. 190, or a milkman, as in Proctor *v.* Sargent, 2 M. & G. 20, or a tailor, as in Rolfe *v.* Rolfe, 15 Sim. 88, can any good reason be assigned why an actor, an athlete, a singer, or a base-ball player should be exempt from the application of the same remedy in order to prevent an injury which will not admit of compensation in damages, and for the redress of which no other adequate remedy exists? We think not. I may say, in the language of Lord St. Leonards, that, as judges, we feel that we should desert our duty if, when such a case arises, we did not afford a party all the remedies to which under such a state of circumstances he is entitled, agreeably to the settled principles and well established methods of procedure of courts of equity." Per THAYER, P.J., in Philadelphia Ball Club, Ltd. *v.* Hallman, 1890, 8 Pa. C. C. R. 57, 58.

For other base-ball cases see, Allegheny Base-Ball Club *v.* Bennett, 1882, 14 Fed. 257; Harrisburg Base-Ball Club *v.* Athletic Asso., 1890, 8 Pa. C. C. R. 337; Philadelphia Ball Club *v.* Lajoie, 1902, 202 Pa. St. 210, S. C. 90 Am. St. Rep. 627 and note, 6 L. R. A. 653 note.

tion, and declared if the defendant was plaintiff against paying twenty shillings per acre for plowing, they would not relieve him.[1]

[1] "But in respect to his liberty to resume business on his own account there is no distinction. In either case the contract stipulates for damages and not for the removal of competition. The contract presents an alternative. It virtually says to the defendant, 'If you enter into the business of dentistry in Hartford after the termination of this agreement, you must pay to the plaintiff the damages named.'

"The language used indicates this thought; and there is nothing in the relation of the parties, or in the business of dentistry, nor in the surrounding circumstances, to indicate otherwise. Presumably there are many dentists in the city of Hartford. Lessening their number by one could not benefit the plaintiff in any perceptible degree. Nor would the defendant, by practicing there, be likely to injure the plaintiff at all seriously. The plaintiff, having contracted to take damages, must seek his remedy in a court of law." Per ANDREWS, C.J., in Dills *v.* Doebler, 1892, 62 Conn. 366, 369.

"Secondly, I am of opinion that the £10 a year additional rent is a penalty, and not liquidated damages. The covenant says so; but that certainly is not conclusive, if, upon the whole, it appears to have been otherwise intended. The inquiry always is, whether the parties intended to prevent the act being done, or to permit it to be done, on payment of a stipulated price for the permission. . . . The authorities upon this subject are not easy to be reconciled; but the rule on the subject seems now to be settled, that it does not depend on the particular expressions used whether a covenant is to be deemed to impose a penalty, or to provide for payment of liquidated damages, but upon the intention of the parties as I have above stated." Per Vice-Chancellor CHATTERTON, in Bray *v.* Fogarty, 1870, Ir. R. 4 Eq. 544, 547.

"There is nothing in the peculiar nature of this covenant to induce me to think that a penalty was meant; it is true that it speaks of 'penalty', but this, though perhaps a circumstance entitled to some weight, is certainly not conclusive." Per Lord Chancellor SUGDEN in Gerrard *v.* O'Reilly, 1843, 3 Dr. & War. 414, 430.

"The decisions, both in England and in this country, in which efforts have been made to lay down rules which should determine when the exaction of the payment of a fixed sum from breach of contract is to be treated as a penalty and when it is to be regarded as a liquidation of damages, are numerous and difficult to reconcile. The latest in this State, however, declare that it is a question of intention to be ascertained upon a consideration of the contract as a whole in the light of surrounding circumstances, and that the particular words used in describing the fixed sum are not controlling. It may be styled 'liquidated damages' and yet be held to be a penalty, or it may be termed 'a penalty' or 'a forfeit,' and notwithstanding, be construed as a provision for liquidated damages. A tendency towards a liberality of construction for the purpose of sustaining the agreement which the parties have made is manifest. Cotheal *v.* Talmage, 9 N. Y. 551; Kemp *v.* Knickerbocker Ice Co., 69 id. 45; Ward *v.* H. R. B. Co., 125 id. 230; Tode *v.* Gross, 127 id. 480." Per BEEKMAN, P.J., in Pastor *v.* Solomon, 1899, 26 Misc., N. Y., 125, 126.

"While at common law a contract was enforceable in its strict terms, I

HARDY *v.* MARTIN.

IN CHANCERY, BEFORE THE LORDS COMMISSIONERS, 1783.

[1 *Cox Chancery* 26.]

The plaintiff and defendant had been co-partners in the business of brandy merchants. On the plaintiff's quitting the business, he sold the lease and the good will of the shop to the defendant for 300*l.*, and entered into a bond to the defendant in the penalty of 600*l.*; the condition of which was, that if the plaintiff should not during the term of 19 years sell any quantity of brandy less than six gallons, within the cities of London or Westminster, or within five miles thereof, or permit any person or persons so to do in his name, or let any house which he might thereafter have within those limits to any other person carrying on such trade, &c. then the bond to be void.

The plaintiff's nephew afterwards carried on that trade within the limits aforesaid, and the plaintiff himself had served a customer with some small quantity of brandy. The defendant brought an action on the bond, and had a verdict for the penalty. The present bill prayed that an account might be taken of the damage actually sustained by the defendant, and that an issue at law might be directed for that purpose, and that on payment of such damage, the defendant might be restrained by injunction.

And the question was, whether, under these circumstances, the court would relieve against the penalty. The cases mentioned were Cro. Ja. 596. 1 Sid. 442. Mitchell *v.* Reynolds, 1 P. W. 181; Tall *v.* Ryland, 1 Cha. Ca. 183; Roy *v.* Duke of Bedford, 2 Atk. 190; Rolfe *v.* Peterson, 6 Bro. P. C. 470.

Wms. Saunders 58 n. (1), the statute of 8 and 9 Wm. III., c. 11, § 8, 7 Sts. of Realm 202, following equity, provided for the assessment by the jury of actual damages, and penalties became generally unenforceable, Betts *v.* Burch, 1859, 4 H. & N. 506, though there are exceptions. I Wms. Saunders 58 n. (1), (a). In determining what is a penalty, some courts hold the language of the parties is not decisive, Bousall *v.* Byrne, 1867, Ir. R. 1 C. L. 573; Chatterton *v.* Crothers, 1885, 9 Ont. 683; contra Smith *v.* Dickenson, 1804, 3 Bos. & P. 630, and treat a sum called a penalty as liquidated damages where the damages are speculative and conjectural, Pastor *v.* Solomon, 1899, 26 Misc. 125, or the sum is payable on one event and not as to one of several. Sparrow *v.* Paris, 1862, 7 H. & N. 594. Other courts, considering the word penalty much stronger than the phrase liquidated damages, and all but conclusive, refuse, except on very strong evidence, to consider as damages a sum denominated a penalty. Taylor *v.* Sandiford, 1822, 7 Wheat. 13; Smith's Adm.'s *v.* Wainwright's Adm.'s, 1852, 24 Vt. 197; Davis *v.* Gillett, 1872, 52 N. H. 126; Kelley *v.* Fejervary, 1900, 111 Iowa 693, 699." 5 Columbia Law Review, 398.

Lord LOUGHBOROUGH.—The penalty is never considered in this court as the price for doing what a man has expressly agreed not to do. The court will restrain him from setting up a trade in opposition to his own agreement, although he has paid the penalty. The case from 1 Cha. Ca. is expressly in point, that the court will moderate the damages to the real injury. As to the case of Rolfe *v.* Peterson, that was a case of a demise of land to a lessee to do with the land as he thought proper, but if he used it one way, he was to pay one rent, and if another way, another rent. That is a different case from an agreement not to do a thing, with a penalty for doing it. The former is a case in which this court will not interfere; but this is the case of an agreement not to sell brandy, with a penalty for selling it. I do not say that under all the circumstances these are excessive damages; but the court will not on motion reject an application for an injunction, while there is a jurisdiction in a court of equity to direct an issue to try *quantum damnificatus*.

Lord Commissioners ASHURST and HOTHAM agreed.[1]

BRYSON *v.* WHITEHEAD.

IN CHANCERY, BEFORE SIR JOHN LEACH, VICE-CHANCELLOR, 1822.

[1 *Simons & Stuarts* 74.]

This was a Bill for the specific Performance of an Agreement, for the sale of the Good Will of a Trade, and of a Secret in Dying.

The Plaintiff had for many years carried on the trade of a Dyer in Spitalfields, and had a particular mode of dying Bombazeens and Stuffs. None but himself and his Son-in-law, one Portlock, knew the secret of dying Stuffs in that mode; and this secret was esteemed of great value.

[1] "Sir ROBERT RAYMOND cited 1 Chan. Cases 89, and the case of Bertie and Falkland, 3 Chan. Cases 129. That it was laid down as a rule by my Lord SOMERS that where the party might be put in as good plight as where the condition itself was literally performed, that this court would relieve, though the letter of it were not strictly performed, as payment of money, etc., but when the condition was collateral, as in the principle case there, and no recompence or value could be put on the breach of it, there no relief could be had for the breach of it." Marks *v.* Marks, 1718, Prec. Ch. 486, 487.

"With respect to the case of Hardy *v.* Martin, I do not understand why one brandy merchant who purchases the lease and good will of a shop from another may not make it matter of agreement, that if the vendor trade in brandy within a certain distance, he shall pay 600 *l.*; and why the party violating such agreement should not be bound to pay the sum agreed for,

In December 1820, Bryson being about to retire from Business, agreed to sell the Good Will of his trade, together with the Plant and Fixtures, to the Defendant for 1,500 *l.*, and the exclusive benefit of the Secret for 1,000 *l.* . . .

Whitehead forthwith paid the 1,000 *l.* and was put into Possession of the Trade, and had the Secret communicated to him.

Bryson and his Son-in-law soon afterwards executed a Bond to Whitehead in the common form, with a Penalty of 2,000 *l.* reciting the Agreement, and with the condition, that they or either of them would not, for Twenty years, in any manner exercise the trade of Dyers within the distance of Fifty miles from Spitalfields, and would not, at any time, disclose the Secret.

Whitehead, however, thought that this Bond (which was prepared by Bryson's Solicitor) was not sufficiently restrictive, and that Bryson and his Son might, at any time, without incurring any Penalty, resume their trade at any place beyond the distance of Fifty miles from London; as at Kidderminster, Norwich, or in Yorkshire, where Bombazeens and Stuffs are principally manufactured. For this reason he insisted on a Deed of Covenant more restrictive in its terms, and with Clauses for liquidated Damages in case of breach of the Agreement.

Disputes arose in consequence, as to the terms of the Deeds to be executed under the Agreement, and Bryson filed this Bill for a specific Performance, and for payment of the 1,500 *l.* . . .

The VICE-CHANCELLOR:—

Although the policy of the Law will not permit a general restraint of trade, yet the Trader may sell a Secret of Business, and restrain himself generally from using that Secret. Let the Master, in settling the Deed which is to give effect to this Agreement, introduce a general Covenant to restrain the use of the Secret for Twenty years, and a limited

though of such agreement be entered into in the form of a bond with a penalty, it may perhaps make a difference. I much wish that the principle laid down by Lord SOMERS in Prec. in Chan. had been adhered to." Per Lord ELDON, Ch. J. in Astley *v.* Weldon, 1801, 2 Bos. & Pul., 346, 352.

"The rule, that where a penalty is inserted merely to secure the enjoyment of a collateral object, the enjoyment of the object is considered as the principal intent of the deed, and the penalty only as accessional, and, therefore, only to secure the damage really incurred, is too strongly established in equity to be shaken." Per Lord Chancellor THURLOW in Sloman *v.* Walter, 1784, 1 Brown C. C. 418, 419.

"It is objected, however, that the penal sum of the bond affords ample remedy at law. But compensation in damages in such a case is not regarded as adequate relief, Jones *v.* Robbins, 29 Maine, 351; Foss *v.* Haynes, 31 Maine, 81; Snowman *v.* Harford, 55 Maine, 199; hence courts of equity act upon such a bond as an agreement and will not suffer the party thereto to escape from a specific performance by offering to pay the penalty. Fisher *v.* Shaw, 42 Maine, 32, 40." Per VIRGIN, J., in Hubbard *v.* Johnson, 1885, 77 Me. 139, 141.

Covenant, in point of locality, as to carrying on the ordinary business of a Dyer, both Parties being willing that the Agreement should be so modified.

The Decree therefore referred it to the Master to settle a proper Deed.[1]

ANGIER *v.* WEBBER.

IN SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1867.

[14 *Allen* 211.][1]

Bills in equity by Amos Angier against Orin N. Webber and Gilbert Wakefield, to restrain the defendants "from soliciting for, doing, or obtaining any work, trade, custom, or teaming business for or from any of the customers or persons" who had formerly been customers of the firm of Angier & Co., "and from doing anything to impair or injure the interest and good will in the teaming business" conveyed by the defendants to the plaintiff. The facts are stated in the opinion.

By Court, BIGELOW, C. J. The rights of the parties to this controversy can be readily ascertained by having in mind a clear idea of the nature of the right or interest which the plaintiff purchased under the name of the "good will of the business" prosecuted by the defendants, and which they expressly covenanted not to impair or injure in any manner. The plaintiff and defendants, prior to the execution of the agreements between them, had been copartners in carrying on the business of wagoners between the city of Boston and the town of Somerville,

[1] "First, I am of opinion that when a person has discovered a valuable invention, and has not patented it, any one who has discovered the ingredients (I am not talking of the case of a breach of trust, or of fraud, or the like) may sell those ingredients, and may use the name of the person who has discovered them after his death, but not in his lifetime, so as to suggest they are made by him." Per Lord ROMILLY, M.R., in James *v.* James, 1872, L. R. 13 Eq. 421, 424.

"Mr. Justice STORY states the doctrine in the broadest terms, that 'courts of equity will restrain a party from making a disclosure of secrets communicated to him in the course of a confidential employment; and it matters not, in such cases, whether the secrets be secrets of trade or secrets of title, or any other secrets of the party important to his interests.' 2 Story Eq., § 952. In this court, it is settled that a secret art is a legal subject of property; and that a bond for a conveyance of the exclusive right to it is not open to the objection of being in restraint of trade, but may be enforced by action at law, and requires the obligor not to divulge the secret

[1] The case is printed from 92 Am. Dec. 748, where a valuable note is appended.

occupying stands in certain streets in the city with wagons and horses, where they, or persons in their employment, waited to receive orders for the transportation of merchandise and chattels to and from the places above named. The defendants, at different times, retired from this copartnership, and each sold to the plaintiff his title and rights in the personal property of the firm, together with his "interest and good will in and to the teaming business" which was at the time of the sale carried on by the firm. That this good will was a valuable existing interest in the outgoing partner, capable of valuation and assignment to the remaining partners, and which the law will recognize and protect, does not admit of any doubt: Collyer on Partnership, sec. 161; Kennedy *v.* Lee, 3 Mer. 441; Bryson *v.* Whitehead, 1 Sim. & St. 74. Nor can any serious question be made as to the nature of this interest. It was the benefit or advantage which had accrued to the firm, in addition to the value of their property, derived from their reputation for promptness, fidelity, and integrity in their transactions, from their mode of doing business, and other incidental circumstances, in consequence of which they had acquired general patronage from constant and habitual customers. By the transfer of this interest to him, the plaintiff acquired a right, to the exclusion to the outgoing copartners,—the defendants,—to the enjoyment of the business which had heretofore been intrusted to the firm, and to the favor and patronage of the customers, and to such increase and addition thereto as would necessarily and naturally have accrued if the copartnership had not been dissolved: Collyer on Partnership, sec. 161. It was this right thus acquired which each of the defendants expressly stipulated that he would do nothing in any way to injure or impair.

Turning now to the acts and doings of the defendants proved at the hearing in support of the allegations of the bill, we find that it is

to any other person. Vickery *v.* Welch, 19 Pick. 523; Taylor *v.* Blanchard, 13 Allen 373, 374. In Jarvis *v.* Peck, 10 Paige 118, such a bond was held valid in equity.

"The plaintiffs do not ask for specific performance of Norfolk's promise to serve as engineer. It is therefore unnecessary to consider whether that promise is limited in point of time or determinable at pleasure, or is capable of being specifically enforced. Whatever may be the limit or effect of his obligation to serve, he is bound by his contract never to disclose the secret confidentially imparted to him during the term of his actual service. And this part of his agreement may be specifically enforced in equity, even if the other part could not. Lumley *v.* Wagner, 1 De Gex, Macn. & Gord. 604." Per GRAY, J., in Peabody *v.* Norfolk, 1868, 98 Mass. 452, 457.

"That he could maintain an action at law in the recovery of damages, we think is entirely clear. An employee getting the secrets of a business or trade under such circumstances, and especially under such an agreement carried out as this was, has no right to use the secrets so obtained for his own private use, or reveal them to others." Per EWING, P.J., in Fralich *v.* Despar, 1894, 165 Pa. St. 24, 25.

abundantly shown that both of them have violated this stipulation. They have entered into a copartnership for the transaction of the same kind of business between the same places of arrival and departure as was formerly carried on by the old firm; they have procured and occupied stands with their wagons and horses in the immediate vicinity of those occupied by the plaintiff, which they had by their agreement relinquished and transferred to him; they have actually engaged in transporting merchandise between Boston and Somerville for many of the customers and friends of the old firm; and have even gone so far as to transact their business at a lesser rate than was charged for such service by the old firm, and than that for which the plaintiff was willing to perform it. These facts show that the defendants have done acts which tend directly to deprive the plaintiff of the benefit of the reputation of the old firm, to take away from him the patronage which appertained to it, and to draw away the business of its habitual customers, to which he had acquired a right by the purchase of the good will.

For this violation of their covenant the plaintiff is entitled to relief in equity. An action at law will furnish no adequate remedy. The damages are in their nature such as not to be susceptible of proof or exact computation; and the injury caused by the acts of the defendants is a constantly recurring one, for which multiplied suits at law would afford but an imperfect remedy: 2 Story's Eq. Jur., sec. 925; 2 Daniell's Ch. Pr. 1760; Williams *v.* Williams, 2 Swanst. 253.

It was suggested that this stipulation in relation to the good will of the firm was invalid, as being in undue restraint of trade. But the doctrine is now too well settled to be called in question that a partial restriction on carrying on a trade or business in a particular locality is not open to any objection on the ground of illegality, as violating the rules of sound public policy.

Injunction granted.[1]

[1] "The case more nearly resembles Angier *v.* Webber, 14 Allen 211, where the interest and good will of a teamster's business between Boston and Somerville was sold. As in this case, certain limits were designated. There was no express covenant that the defendant would not enter into the same business on the same route, but simply a covenant that he would not do anything to impare or injure the business he had sold. But such covenant only expressed what otherwise would have been implied." Per ENDICOTT, J., in Dwight *v.* Hamilton, 1873, 113 Mass. 175, 178.

In Steward *v.* Winters, 1847, 4 Sandf. 587, the defendant had leased from the plaintiff part of certain premises with a covenant against using the premises for anything else than a dry-goods jobbing business. He began an auctioneer's business. The plaintiff's other tenants complaining, the plaintiff sought an injunction against the defendant. In the course of his opinion, Vice-Chancellor SANDFORD said:

"I think that in a case where the parties, by an express stipulation, have themselves determined that a particular trade or business conducted by the one will be injurious or offensive to the other, and there is a continuing breach

Section 2. Matters of Defence.

A. Mutuality.

HATTON *v.* GRAY.

In Chancery, 1684.

[2 *Cases in Chancery* 164.]

Hatton sold houses to Gray for 2,000 *l.* Note was made by Hatton of the agreement, signed by Gray, but not by Hatton.

Mr. Solicitor. The note binds not him who signed it not, for the

of the stipulation by the one, which this court can preceive may be highly detrimental to the other, although on the facts presented it is not clear that there is a serious injury, and it is manifest that the extent of the injury is difficult to be ascertained or measured in damages; it is the duty of the court by injunction to restrain further infractions of the covenant, thereby preventing a multiplicity of petty suits at law, and at the same time protecting the rights of the complainant. The motion to dissolve the injunction must be denied, with costs."

"It is therefore, in my opinion, a matter of no moment in this case, that the plaintiffs have given no evidence of any actual damage done to them, or of any actual diminution of water at their mills. Having established that the acts of the defendants are a violation of the contract entered into between them and the plaintiffs, and a violation of the act of Parliament passed to carry such contract into effect, the plaintiffs are entitled to call upon this court to protect them in the enjoyment of that right which they have so purchased, and this court is bound to preserve it from being broken in upon.

"I am of opinion, therefore, that I must grant a perpetual injunction to restrain the company from further excavating, etc., etc., and that the defendants must pay the costs of this suit." Per Sir John Romilly, M.R., in Dickenson *v.* Grand Junc. Canal Co., 1852, 15 Beav. 260, 271.

[1] "A contract to be specifically enforced by the Court must, as a general rule, be mutual—that is to say, such that might, at the time it was entered into, have been enforced by either of the parties against the other of them. Whenever, therefore, whether from personal incapacity to contract, or the nature of the contract, or any other cause, the contract is incapable of being enforced against one party, that party is equally incapable of enforcing against the other, though its execution in the latter way might in itself be free from the difficulty attending its execution in the former."—Fry, Specific Performance, 4th ed. 203.

"The requisite of mutuality, taken in its most general sense, includes both a mutuality of legal right and a mutuality in the equitable remedy. . . . That is, the contract must be of such a nature that both a right arises from

statute of frauds and perjuries, etc. and therefore in equity cannot bind the other party, for both must be bound, or neither of them in equity.

But decreed contrary.[1]

BROMLEY *v.* JEFFERIES.

IN CHANCERY, BEFORE LORD KEEPER WRIGHT, 1700.

[2 *Vernon* 415.][2]

Sir Rowland Berkley on the Marriage of his Daughter to Bromley covenanted that Bromley should have his lands called Cotheridge at his Death cheaper by £1500 than any other Person, and lives twenty years

its terms in favor of either party against the other, while the corresponding obligation rests upon each towards the other: and also that either party is entitled to the equitable remedy of a specific execution of such obligation against the other contracting party." Pomeroy Specific Performance, §§ 162, 163.

"It is to be hoped, too, that the preceding discussion of the cases will have proved the need of revising the common form of stating the principle of mutuality, and the propriety of adopting the form here suggested. Equity will not compel specific performance by a defendant, if after performance the common law remedy of damages would be his sole security for the performance of the plaintiff's side of the contract." Mr. Ames, "Mutuality in Specific Performance," 3 Columbia Law Review 1.

See also the well considered articles on "Defense of Lack of Mutuality," by Mr. William Draper Lewis, in 49 American Law Register 271, 384, 447, 507, 559; 50 American Law Register 251. See also his article "Vendor's Right to Specific Performance," 50 American Law Register 66.

[1] "The better opinion is . . . that it is sufficient if the agreement be signed by the party to be charged.

"It appears to me, that this is the result of the weight of authority both in the Courts of law and equity. . . .

"I have thought, and have often intimated, that the weight of argument was in favor of the construction that the agreement concerning lands, to be enforced in equity, should be mutually binding, and that the one party ought not to be at liberty to enforce, at his pleasure, an agreement which the other was not entitled to claim. It appears to be settled, Hawkins *v.* Holmes, 1 P. Wms. 770, that though the plaintiff had signed the agreement, he never can enforce it against the party who has not signed it. The remedy, therefore, in such case, is not mutual. But, notwithstanding this objection, it appears from the review of the cases, that the point is too well settled to be now questioned." Per Chancellor KENT in Clason *v.* Bailey, 1817, 14 Johns. 484, 487-490.

For an exhaustive collection of cases in accord with the principal case, see 1 Ames' Cases in Equity Jurisdiction, 421 note.

[2] S. C. nom. Bromley *v.* Fettiplace, 2 Freem. 245; nom. Bromley *v.* Jeffreys, Prec. in Ch. 138.

after, and devises to Bromley, and to his Daughter, Bromley's wife, £500 and devises the Lands to his Grandson.[1]

The court upon the hearing refused to decree a specific execution of this agreement from the uncertainty of it, because if the estate was not to be sold, but the plaintiff was to have it, it was not practicable to know what a purchaser would give for it.

Secondly, that the agreement was not mutual, the plaintiff was not bound to take it at any price; and it was observed, that as the covenant was worded, if the plaintiff had died in the life time of Sir Rowland, the covenant was of no effect; and it was said if Sir Rowland after this had a son that should have discharged the covenant, like as in the case of Fitzherbert, fol. 23, cited in Shelley's case, where the father lying sick, directs his trustees to convey to his only daughter, and afterwards he recovered and has a son who was relievable even by the opinion of the judges.

ARMIGER *v.* CLARKE.

In the Exchequer, 1722.

[*Bunbury* 111.]

Bill for the specific performance of articles for the purchase of lands at thirty years value, whereupon five hundred pounds had been paid by the defendant in part; there was a memorandum indorsed on the articles, that the five hundred pounds should be repaid, in case the plaintiff did not make out a good title by the time agreed upon and fixed for that purpose. It appeared in the proofs, that the plaintiff's father, who was the person contracting for the sale of the lands, had written the defendant a letter, intimating that he could not make out any title, the same being in settlement upon his wife, &c. And so it appeared in the proofs that the plaintiff's father was only tenant for life, and consequently the son, who was now plaintiff, would not be concluded by his father's covenant; and since the lien is not reciprocal, it ought not to conclude in a court of equity, where also a writing under hand has the same consideration as a writing under hand and seal, and therefore the letter shall be taken to be a waiver of the articles: it was also insisted upon the defendant, that this was an hard bargain, and a court of equity will relieve not only against fraud and circumvention in an agreement, but also against an hardship; in the first case they will set the agreement aside; in the second, they will only not carry it into execution. The bill was dismissed *per totam curiam,* chiefly upon this principle, that

[1] The statement of the case is taken from 1 Eq. Cas. Abr. 18, pl. 11.

the remedy was not mutual. The Lord Chief Baron [MONTAGUE] took this difference, if a man comes for a specific performance as to the land itself, a court of equity ought to carry it into execution, because there is no remedy at law; but if it is to have a performance in payment of the money, they may have remedy for that at law. Sir Constantine Phipps for the plaintiff; Serjeant Chesshyre and Mr. Ward for the defendant.[1]

[1] "Another objection has been made to this agreement, that the benefit on Henry and Philip's side was not mutual and equal.

"During both their lives, the benefit and obligation was mutual, and Henry would have been equally compellable to suffer a recovery with Philip.

"But it is said, that an alteration as to their mutual benefit has happened by the death of Henry, and it is said that if Henry had been legitimate the plaintiff would not have been compellable to suffer a recovery, because the issue in tail is not compellable to perform the covenants of his ancestor the tenant in tail.

"But here the chance was at first equal, and it is hard to say, that the act of God should hinder the agreement from being carried into execution; the chance was equal, who died first, Henry or Philip. If Henry had been legitimate, and Philip had died in Henry's life, leaving children, I am of opinion Philip's son would have been entitled to have come against Henry for an execution of the agreement; and therefore the chance was at first equal on both sides, and we are not to consider how the event happened." Per Lord HARDWICKE in Stapilton *v.* Stapilton, 1739, 1 Atk. 2, 10.

In Stocker *v.* Wedderburn, 1857, 3 K. & J. 393, the plaintiff, owner of certain patents, entered into an agreement with the defendant and others by the terms of which he was to sell his patents to a company they were to form, the plaintiff to secure foreign patents on his inventions, to give his services to the company for two years, and to do his best to improve the invention and impart such improvements to the company. The plaintiff brought suit to compel the promoters to form the company.

The court refused so to decree, saying (at page 407):

"The plaintiff in this case has not agreed to execute a deed containing covenants to do certain acts, but he has agreed to do certain things. He now seeks to compel the defendants to form the company, and then they would be left to their remedy against him at law if he should fail in his part of the agreement. On those grounds alone I think that I could not decree specific performance as prayed by this bill." Per Sir W. PAGE-WOOD, V.C.

In Barnes *v.* Wood, 1869, L. R. 8 Eq. 424, the plaintiff contracted to purchase from one John Stringer, an estate in fee simple. The fact was that Stringer owned only an estate *per autre vie* (with a possibility of a tenancy by curtesy), the remainder being vested in his wife, who knew nothing of the contract. The plaintiff, ignorant of the true situation, relied upon Stringer's statement as to ownership. Afterwards Stringer and wife joined in a conveyance of the entire estate to the defendant who had knowledge at the time of the plaintiff's contract. The plaintiff brought suit for specific performance. The court said (at page 429): "In Nelthorpe *v.* Holgate, 1 Cole 203, however (in which Thomas *v.* Dering was cited), relief was given under circumstances which appear to be exactly the same as here, except in this one

CLAYTON *v.* ASHDOWN.

In Chancery, before Lord Chancellor Harcourt.

[9 *Viner's Abridgment* 393.]

Bill to have a specific performance of an agreement, &c., upon this case. Mr. Fuller during his minority by himself and guardian enters into articles with the defendant to let him a farm at a certain rent, &c. The defendant enters upon the farm, and continues the possession, and pays the rent after Mr. Fuller came of full age. After that Mr. Fuller conveys the inheritance to the plaintiff, and then the defendant quits the farm, insisting that he was only tenant at will, and refuses to accept a lease, or execute a counterpart, because Mr. Fuller being an infant at the time of making the agreement, was not bound by it, and therefore the defendant ought not to be bound by it. It was insisted, that the defendant was bound by the articles, though Mr. Fuller had his election at his full age to perform or not perform the articles; for though in such cases the infant has his election at his full age, the other party has not his election, but is bound by such agreement with an infant. It was insisted by the defendant, that this bill is brought by a purchaser of the inheritance, and this covenant does not run with the land, nor is transferred by the statute. H. 8. But Harcourt, C., decreed that the plaintiff should execute a lease to the defendant, and the defendant execute a counterpart of such lease to the plaintiff in pursuance of the articles, and the defendant to pay costs. MS. Rep. Trin. 13 Ann. in Cane.

LAWRENSON *v.* BUTLER.

In Chancery, before Lord Chancellor Redesdale, 1802.

[1 *Schoales & Lefroy* 13.]

One Edward Butler, being seized of certain lands by virtue of a lease for life with a perpetual renewal clause, by deeds conveyed the lands to trustees to the use of himself for life, and after his death subject to a jointure, to the defendant, Edmund Butler, his heirs and assigns forever. Later Edmund Butler, before his own marriage, his father and the trustees of the first settlement joining, made a settlement, by deeds

respect, that there the person making the contract had the remainder subject to a life interest, and here a life interest only, which makes no difference in the case." Per Sir W. M. James, V.C.

of lease and release of the same kind by which they were conveyed, to trustees in trust to permit Edmund and his assigns to receive the rents and profits for his natural life, remainder to issue male of the marriage, ultimate reversion to Edmund, with a proviso for a lawful leasing by Edmund for thirty-one years or three lives, "and by and with the consent of the trustees, under their hands and seals, to make leases for any term of years or lives, with or without covenant for perpetual renewal," provided this lease should be on the best possible terms "without fine or other compensation."

After the marriage, Edmund, representing himself as empowered with the consent of the trustees which would be obtained, agreed to let the settled lands to the plaintiff for three lives with a perpetual renewal clause.

The plaintiff had knowledge of the terms of the settlement. The trustees refused to consent, whereupon the plaintiff filed his bill for specific performance. As it appeared at the opening of the case that the failure of the trustees to consent rendered specific performance impossible, the plaintiff prayed such lease as the defendant was able to give.[1]

LORD CHANCELLOR [REDESDALE]. I confess I have no conception that a court of equity ought to decree a specific performance in a case where nothing has been done in pursuance of the agreement, except where both parties had by the agreement a right to compel a specific performance according to the advantage which it might be supposed that they were to derive from it; because otherwise it would follow that the court would decree a specific performance where the party called upon to perform might be in this situation, that if the agreement was disadvantageous to him he would be liable to the performance, and yet if advantageous to him he could not compel a performance. This is not equity, as it seems to me. If indeed there was a concealment, or an ignorance of the facts on the one part, and that thereby the other party was led into a situation from whence he could not be extricated, then he would have a right to have the agreement executed *cy pres;* that is, a new agreement is to be made between the parties. Now, it is not, and could not be contended in this case, that Mr. Butler could have a right to enforce this agreement, for he could enforce it only according to the terms of the agreement, and these he cannot perform on his part for want of the trustees' consent, and the court could not say to Mr. Lawrenson, "you shall forego a part of the agreement."

If Mr. Lawrenson, on the faith of this agreement, had put himself into a situation from which he could not extricate himself, and was therefore willing to forego a part of his agreement, that would be a circumstance to induce a court of equity to give relief: but here, there is an agreement entered into with the perfect knowledge of both parties that the lease promised was contrary to the provisions in the settlement under which Mr. Butler holds: the parties entered in a scheme for the purpose

[1] The statement of the case is abbridged and the question of a fine omitted.

of defeating the provisions of that settlement, and Mr. Lawrenson makes himself privy to the transaction. It is manifest that a fine was talked of, and then a contrivance for a fine, and a very awkward one, was resorted to: it is also manifest that for the purpose of making a lease under the power, the consent of other persons was known to be necessary: therefore here is an agreement which was executed by these parties under the supposition that it was mutually binding: it is impossible to read the evidence in the cause without perceiving that Mr. Butler considered Mr. Lawrenson as much bound as he himself was.

It is conceded now that Lawrenson was not bound, but it is contended that Butler was; now, was that the intention of the parties in the transaction? I think clearly not; and therefore it is an agreement founded on a mistake; an agreement entered into by Mr. Butler under a supposition that he was capable of enforcing it as much as Mr. Lawrenson was. It is said that courts of equity have decreed performance in cases where one party only was bound by the agreement: I believe it would be difficult to find a case where that has been done, particularly a late case. In the case of Hatton *v.* Gray, 2 Ch. Cas. it was considered as sufficient that the agreement should be signed by the party against whom the performance was sought, because such are the words of the statute of frauds: now, such certainly is the import, that no agreement shall be in force but when it is signed by the party to be charged; but the statute does not say that every agreement so signed shall be enforced; the statute is in the negative. To give it this construction would, as I have heard it urged, make the statute really a statute of frauds, for it would enable any person who had procured another to sign an agreement to make it depend on his own will and pleasure whether it should be an agreement or not.

No man signs an agreement but under a supposition that the other party is bound as well as himself; and therefore if the other party is not bound, he signs it under a mistake: that mistake might be a ground for relief in equity, but is surely not ground for a specific performance. Under these circumstances, the impression upon my mind is, that I must dismiss this bill. This agreement was signed in mistake: it is manifest that Butler could not have executed a lease in compliance with it, and as he could not, it is manifest that this is not the agreement which he meant to sign.[1]

[1] "But then it is said, unless the plaintiff signs there is a want of mutuality. Whose fault is that? The defendant might have required the vendor's signature to the contract; but the object of the statute was to secure the defendant's. The preamble runs, 'For prevention of many fraudulent practices, which are commonly endeavoured to be upheld by perjury and subornation of perjury.' And the whole object of the legislature is answered when we put this construction on the statute. Here, when this party who has signed is the party to be charged, he cannot be subject to any fraud. And there has been a little confusion in the argument between the *consideration* of the

FLIGHT *v.* BOLLAND.

IN CHANCERY, BEFORE SIR JOHN LEACH, M.R., 1828.

[4 *Russell* 298.]

The bill was filed by the plaintiff, as an adult, for the specific performance of a contract. After the suit was ready for hearing, the defendant, having discovered that the plaintiff was, at the time of the filing of the bill, and still continued, an infant, moved the court that the bill might be dismissed, with costs to be paid by the plaintiff's solicitor. Upon that occasion the Vice-Chancellor made an order that the plaintiff should be at liberty to amend his bill by inserting a next friend for the plaintiff, and the bill was amended accordingly.

Upon the opening of the case a preliminary objection was taken that

agreement and *mutuality* of claims. It is true the consideration must appear on the face of the agreement. Wain *v.* Warlters, 5 East. 10, was decided on the express ground that an agreement under the fourth section imports more than a bargain under the seventeenth. But I find no case, nor any reason for saying that the signature of both parties is that which makes the agreement. The agreement, in truth, is made before any signature. . . .

"As to the decisions in courts of equity I can only say that in the greater number of them, there has not been a signature by both parties, and not withstanding the *dicta* of Lord REDESDALE and Sir T. PLUMER—no doubt great authorities—courts of equity have continued the same stream of decisions as before." Per TINDAL, C.J., in Laythoarp *v.* Bryant, 1836, 2 Bing. n.s. 735, 743, 745.

"It has been seriously questioned whether the specific performance of a contract would be enforced, where both the parties were not bound to the performance of it by having signed the agreement, on the ground of a want of mutuality in the remedy. Lawrenson *v.* Butler, 1 Sch. and Lef., 13. The doubt, however, has been abandoned, and the Courts have, by numerous decisions, settled the doctrine that a contract signed by the party to be charged, according to the statute of frauds and perjuries, may be enforced by the other. Flight *v.* Boland, 4 Russ., 298; Palmer *v.* Scott, 1 Russ. & Mylne, 391; Martin *v.* Mitchell, 2 Jac. & Walk., 419; Ld. Ormond *v.* Anderson, 2 Ball & Beat. 363." Shirley *v.* Shirley, 1845, 7 Blackf. 452, 454.

"The right of each party depends upon his conduct; and the conduct of one may give him the right to apply to the Court, while the conduct of the other may debar him from that right." Per TURNER, V.C., in South Eastern Ry. Co. *v.* Knott, 1852, 10 Hare 122, 125.

In Hawkes *v.* Railway Co., 1852, 1 De G. M. & G. 737, the company had agreed to purchase the plaintiff's lands. Later they attempted to repudiate the contract. Lord ST. LEONARD said (pp. 752, 755): "It seems to me preposterous to hold that a company capable of entering into a contract with reference to a subject before Parliament, and entering into that contract and receiving parliamentary powers enabling them to enforce the contract, can, by neglect-

a bill on the part of an infant for the specific performance of a contract made by him could not be sustained.

The MASTER OF THE ROLLS. No case of a bill filed by an infant for the specific performance of a contract made by him has been found in the books. It is not disputed that it is a general principle of courts of equity to interpose only where the remedy is mutual. The plaintiff's counsel principally rely upon a supposed analogy afforded by cases under the Statute of Frauds, where the plaintiff may obtain a decree for specific performance of a contract signed by the defendant, although not signed by the plaintiff. It must be admitted that such now is the settled rule of the court, although seriously questioned by Lord REDESDALE upon the ground of want of mutuality. But these cases are supported, first, because the Statute of Frauds only requires the agreement to be signed by the party to be charged; and next, it is said that the plaintiff, by the act of filing the bill, has made the remedy mutual. Neither of these reasons apply to the case of an infant. The act of filing the bill by his next friend cannot bind him; and my opinion, therefore, is that the bill must be dismissed with costs, to be paid by the next friend.[1]

FENNELLY AND OTHERS *v.* ANDERSON.

IN CHANCERY, IRELAND, BEFORE LORD CHANCELLOR BRADY, 1851.

[1 *Irish Equity* 706.]

The LORD CHANCELLOR.[2] The contract, being one for the sale of the real estate of married women, has been entered into by them and their husbands, and is specific in its terms, and not alleged to be in any respect unreasonable or improper. The objection raised on behalf of the respondent is that this contract cannot be enforced against him, inasmuch as he

ing to exercise their powers, decline to perform the agreement, because either they have allowed their powers to lapse and can no longer exercise them, or because the exercise of such powers is, according to their own notion, illegal. . . .

"The company might have enforced the contract as soon as the Act passed; and they cannot be permitted to avail themselves of impediments of their own creation. The whole fault here lies upon the part of the Company. The Plaintiff has never been guilty of any neglect—he has never swerved from his readiness to perform his contract; but this Company from the beginning to the end of the transaction, have acted with as much bad faith as I ever witnessed upon the part of any public body."

[1] See Pomeroy's Specific Performance of Contracts, § 120; 49 Am. Law Reg. 272.

[2] Only a part of the opinion is given.

could not enforce it against the married women. It is conceded that there is not any case deciding that such an agreement could not be enforced at the suit of the husband and wife. Formerly it was the doctrine of Courts of Equity that such a contract might be enforced against the husband. Decrees have more than once required the husband to procure the wife to levy a fine, or that he should stand by the consequences if she refused. So long as that was the rule of the Court, I apprehend that such an objection as the present would have been unsustainable, because it rests upon the absence of mutuality of remedies for enforcement of the contract, viz., that as the petitioners could not have been compelled to perform it, the respondent cannot be so compelled.

But it is said that according to the modern authorities, the rule appears to have been changed, and that the Court will not compel the husband to procure the concurrence of his wife if she refuse to join him. And that I apprehend is now well settled, notwithstanding any fluctuation of opinion which may have taken place on the point. But still the question remains, whether the change of the doctrine of the Court in that particular involves a change in another; whether although the Court will not enforce the contract against the husband, it will do so against the other party to the agreement, he being competent to perform it, and being aware of the position of the vendors. The only case which by analogy bears upon the point in Flight *v.* Bolland, 4 Russ. 298, where Sir John Leach, M. R., held that an infant cannot sustain a suit for the specific performance of a contract, because the remedy is not mutual. Such undoubtedly was the decision; but it is worthy of note, that counsel for the plaintiff there said:—"If a husband seised *jure uxoris* were to contract for the sale of his wife's estate, the husband and wife could enforce the contract against the purchaser; yet if the purchaser were to file a bill against the husband and wife for specific performance, and the husband were to swear in his answer that the wife would not consent, a Court of Equity would not now interfere; it would neither decree the wife to join in the conveyance, nor would it order the husband to procure her concurrence, and send him to prison until that concurrence was obtained." This tends to show that the opinion of the Profession is, that the contract might be enforced by the husband and wife, notwithstanding the want of mutuality. The only answer attempted there by Counsel for the defendant was:—"No case has occurred, or at least none has occurred since the time when it was settled that the Court will not decree a husband, who has contracted for the sale of his wife's estate, to procure her to join in making a good conveyance, in which such a contract has been enforced against the purchaser." The question does not appear to have been adverted to in the judgment of the Court.

The next case in which this point appears to have been alluded to is Salisbury *v.* Hatcher, 2 Y. & C., C. C. 54, where Knight BRUCE, V. C., in the progress of the argument, puts this question:—"Suppose husband and wife, seised in fee in the wife's right, to contract to sell; is there any case

which decides that they cannot by bill enforce the contract?" Counsel for the defendant did not venture to say that there was such a decision, but assuming the position to be incontrovertible, replies:—"In that case the purchaser buys the estate subject to the chance of the wife repudiating the contract. But if the contract of sale states the property to be the husband's, and in the course of the negotiation it turns out to be the wife's, the vendors cannot compel a sale." The Vice-Chancellor did not again mention the point, but he decreed specific performance of the contract, which was one for the sale of an estate in fee-simple, in favour of a vendor who at the time of entering into the contract was tenant for life only, the purchaser not having rejected the purchase as soon as he had ascertained the real interest of the vendor, and the latter being able, by the consent of parties interested in remainder, to make a good *prima facie* title to the fee-simple at the hearing. So far, therefore, as regards the modern authorities, since the change in the rule as to enforcing the contract against the husband, no decision has occurred; but to the extent to which the opinion of the Profession at Westminster Hall has been expressed in reference to it, when casually mentioned, that opinion would appear to be in support of the suit in such a case as the present.

Returning to the earlier authorities, I find that in Daniel *v.* Adams, Ambler, 495, 497, which was a suit by a purchaser for the specific performance of an agreement for the sale of real estate by a husband and wife, Counsel for the plaintiff, of whom Mr. Ambler, the reporter, was one, *arguendo,* said, that if a bill had been brought by the husband and wife for performance of the agreement, the purchaser could not have made the objection, and therefore the husband and wife ought not to be permitted to do it on the bill brought by the purchaser. Sir THOMAS SEWELL, M. R., dismissed the bill, but said that "the argument that both or neither should be bound does not hold in all cases." At all events Mr. Ambler's position was not denied by the Court.

That the objection of want of mutuality of remedy to enforce the contract does not in all cases prevail, is manifested by cases decided under the Statute of Frauds, where it has been held that the plaintiff may obtain a decree for specific performance of a contract signed by the defendant, but not signed by the plaintiff. The reason of this doctrine is, that the plaintiff by filing his bill submits to perform his part of the contract; and of the plaintiff's non-signature the other party is not allowed to avail himself, because although he could not have compelled the plaintiff to complete the contract, yet he (the defendant) has, by signing, thought proper to run the chance of the plaintiff performing his part, which, if he do not rely upon the Statute of Frauds, the Court will decree him to perform. True it may be, however, that these decisions rest upon the particular language of that statute.

But in the present case the married women are willing to join in the conveyance, and I am not aware of any precedent for holding that the Court will not enforce a contract against a husband and wife where it

appears that the wife is willing to concur in performing her part of the contract, if the Court be of opinion that it is a proper contract and one to the benefit of which the plaintiff would irrespectively of the question of the wife's competency be entitled. Nor will the Court, as I am yet aware, on the other hand decline to entertain a suit by the husband and wife, merely on the ground of the wife's incompetency to contract. Pending the negotiation these married women might have validated the contract by acknowledging it under the statute 4 & 5 W. 4, c. 92. The success of every suit for specific performance of contracts with regard to real estate is contingent upon the ability of the plaintiffs to make cut title (unless the contract be a qualified one), and upon this question I must deem that this suit is so contingent; therefore if the petitioners cannot or will not convey, there cannot be any relief: but in this respect the case of the parties here is not in my opinion in any greater infirmity than any other case. I can easily imagine instances in which it would be very beneficial to married women that contracts entered into by them and their husbands should be carried out. On the whole, there are difficulties in coming to the conclusion that they cannot; and I should not feel justified in introducing a restriction which may not be a wise one, and which I nowhere find already established. I therefore shall not, upon the ground of non-mutuality, dismiss this petition.[1]

HAWRALTY *v.* WARREN.

IN THE COURT OF CHANCERY OF NEW JERSEY, 1866.

[18 *New Jersey Equity* 124.]

The Chancellor [ZABRISKIE]. This suit is to compel the specific performance of a contract to convey a house and lot in Paterson.

The defendant, on the first of August, 1856, leased the premises to the complainant for seven years and six months, at the yearly rent of three hundred dollars; this lease was under seal. By a written agreement, not sealed, but endorsed on the lease, and signed by both parties at the time of executing the lease, it was agreed, "that at the expiration of the said term, Hawralty shall have the privilege of purchasing the whole of said premises, paying therefor, as purchase money, the sum of four thousand dollars." The complainant, on January 19th, 1864, offered the

[1] Sir Edward Fry thus comments on the principal case: "It has been decided in Ireland that a contract by a purchaser with a husband and wife is not bad for want of mutuality, and may be enforced by them. Fennelly *v.* Anderson, 1 Ir. Ch. R. 706. The grounds of this decision do not appear very conclusive. Cf. Avery *v.* Griffin, L. R. 6 Eq. 606." Specific Performance, 4th ed., 205, note.

defendant to pay him the consideration money, without tendering it to him, and requested him to have the deed ready for him on the first day of February. The premises, at the date of the lease and contract, were subject to three mortgages, previously given by the defendant and his wife, amounting to the sum of fifteen hundred and twenty dollars, or thereabouts, and in the year 1861, another mortgage was given by them on the same to the complainant; all of which mortgages are unpaid.

The complainant alleges that he has been always ready, upon receiving a good title, free from encumbrances, to pay the purchase money, or to receive it subject to the encumbrances paying the excess of the purchase money above the encumbrances; and prays that the defendant may be compelled to perform his contract, offering, on his part, to perform the same, by paying four thousand dollars for a good marketable title, free from encumbrances, or by paying the excess of said four thousand dollars above the encumbrances, if the defendant shall be unable to remove them.

The defendant in his answer sets up that the contract is not under seal, and is without consideration, and without mutual obligation, on part of the complainant; that it contains no legal covenant or agreement on his part to convey; that it was made by him under a misapprehension of its nature, and that he is unable to make a good marketable title, because his wife is unwilling to join in the conveyance.

The contract is not under seal, and is not mutual. The complainant is not under any obligation to purchase, either at law or in equity, and the defendant can have no remedy on it. These unilateral or optional contracts are not favored in equity, and it has been held, both in Great Britain and this country, that want of mutuality of obligation and remedy is a bar to specific performance. Lawrenson *v.* Butler, 1 Sch. & Lef. 13; Parkhurst *v.* Van Cortlandt, 1 Johns. C. R. 282; Benedict *v.* Lynch, ibid. 370; Smith *v.* McVeigh, 3 Stockt. 239.

But modern authorities have narrowed this doctrine down to cases in which there is no other consideration. And it is now well settled that an optional agreement to convey, or renew a lease, without any covenant or obligation to purchase or accept, and without any mutuality of remedy, will be enforced in equity, if it is made upon proper consideration, or forms part of a lease or other contract between the parties that may be the true consideration for it. Hatton *v.* Gray, 2 Chan. Cases 164; Backhouse *v.* Crosby, 2 Eq. Cas. Abr. 32, par. 44; Backhouse *v.* Mohun and Crosby, 3 Johns. R. 434, etc.; Seton *v.* Slade, 7 Ves. 265; Fowle *v.* Freeman, 9 Ves. 351; Western *v.* Russell, 3 Ves. & B. 192; Ormond *v.* Anderson, 2 Ball. & B. 370; Clason *v.* Bailey, 14 Johns. R. 484; *In re* Hunter, 1 Edw. C. R. 1; Woodward *v.* Aspinwall, 4 Sandf. S. C. R. 272.

In this case the agreement was executed at the same time with the lease, and was part of the same transaction, and must, for this purpose, be treated as if part of the lease.

In taking a lease, a tenant may be willing to pay a high rent for a number of years, provided the landlord will give him an optional right to purchase at a fixed price. And it is to be presumed that the landlord would not agree to such a boon, unless he had a consideration in the lease. Any sufficient consideration would make such unilateral contract binding in equity.

The answer alleges that the contract was made under a mistake, or misapprehension of its effect. A mistake on the part of the defendant as to a contract, would be a defence here in a suit for specific performance, although it would not effect it at law, or be ground for setting it aside in equity. Fry on Spec. Perf. § 478. But a mistake as to the legal effect of the agreement by the defendant will not relieve him, unless led into it by fraud, or the representations of the complainant. Fry on Spec. Perf. § 508; Beaufort *v.* Neeld, 12 Clark & Fin. 248.

The whole evidence of the mistake or misapprehension, is in the testimony of the defendant himself. He understood the words of the contract, and supposed they bound him to convey. The scrivener employed by both parties told him it would not bind him. The testimony is not supported by any of the witnesses who were present, and it is very difficult to believe that the defendant supposed that a contract to sell, which complainant had for years been endeavoring to get signed by him, was, when signed, to have no binding effect. This defence is neither sufficient in law, nor sufficiently proved, to affect the written contract.

The objection that the agreement contains no covenant or agreement on the part of defendant to convey, is literally true. The words are, the complainant "shall have the privilege of purchasing," and although not so comprehensive as a positive agreement to convey, which is settled to mean, when not qualified by words or circumstances, to convey the fee, yet are sufficient in equity to entitle the complainant to a conveyance of all the estate of the defendant at the time of the contract. It is not necessary to settle here, whether these words would be sufficient at law or in equity, to compel the defendant to procure a good title, or make compensation for encumbrances, as the inability of the defendant to procure the conveyance of the right of dower of his wife must be a bar to the decree of specific performance.

The complainant, in his bill, requires a marketable title, and offers to take that only; a title subject to the dower of a wife is not marketable.

The defendant, in his answer, says that he cannot give a marketable title, that his wife will not release her dower. This is responsive to the interrogatory in the bill, whether he cannot make a marketable title, and why; and must be taken as true; it is not contradicted or shown to be by procurement of the defendant.

This court will not order a defendant to procure a conveyance or release by his wife, or require him to furnish indemnity against her right of dower, unless in cases of clear fraud. The doctrine of indemnity, in such cases, is no where carried further than in Young *v.* Paul, 2 Stockt.

401, and the opinions of the Chancellor and Court of Appeals would exclude a case like this.

In case of a mere optional contract, it is much better to leave the party to his remedy at law.[1]

The bill must be dismissed with costs.

[1] "It is first contended that inasmuch as the principal contract counted on by defendants was entered into by plaintiff solely in consideration of the personal services of Meves to be thereafter rendered, which services could not have been compelled by plaintiff, there was presented at the time the contract was entered into such a lack of mutuality as to take the contract out of this class which is susceptible of specific performance by either party. While it is a general and well-established rule that mutuality of remedy is essential to authorize the specific performance of a contract, this rule does not require that such mutuality shall exist in all cases at the inception of the transaction. . . .

"In Howard *v.* Throckmorton, *supra*, which, like Ballard *v.* Carr, *supra*, was an action to enforce an obligation to convey land in consideration of personal services as an attorney, it is said: 'While it is true as a general proposition that a party who has contracted to perform services of the character mentioned in the contract in this case cannot maintain an action for specific performance while the contract remains unperformed on his part, yet, if he can show a substantial performance on his part, he is as fully entitled to maintain such action as he would be if the agreement on his part had been for the payment of money.'" Thurber *v.* Meves, 1897, 119 Cal. 35, 37-38.

"The contract to build the house being thus fully executed by Pool, and that part of the price that was to be paid in money having been paid, or nearly so, there remained to be done only the conveyance to Pool of the lot of land which the contract bound the respondent to convey to him upon the completion of the house. The contract for this conveyance having been duly assigned by Pool to the complainants, they are entitled to have it specifically enforced in accordance with the prayer of their bill." Lane *v.* Hardware Co., 1898, 121 Ala. 296, 300.

"The objection for want of mutuality is not of any force when part of the contract difficult of enforcement has been actually fulfilled. As no legal remedy would be at all adequate, the remedy in equity must prevail, unless there is some other obstacle." Welch *v.* Whelpby, 1886, 62 Mich. 15, 21.

In Wilkinson *v.* Clements, 1872, L. R. 8 Ch. 96, Sir G. MELLISH, L.J., said: "The cases decide that where an agreement is entire the Court cannot grant any specific performance unless it is in a position to grant specific performance on the whole, but I do not find any case which says that an agreement cannot be so worded that a party may have specific performance of a particular part of it, although he has not performed, and possibly never will perform, the rest of it; nor do I find any case which says that an assignee may not be in the same position."

In Green *v.* Low, 1856, 22 Beav. 625, the defendant had entered into an agreement to lease to the plaintiff certain premises, with an option to buy at any time within two years. The agreement contained a provision as to insuring. The plaintiff failed to insure within the proper time, and so lost

RUST *v.* CONRAD.

IN THE SUPREME COURT OF MICHIGAN, 1882.

[47 *Michigan* 449.]

COOLEY, J. This is a bill for the specific performance of what is called in the mining districts a contract of option.

David W. Rust, one of the contracting parties, died intestate October 4, 1880, and when administrators were appointed they united with the heirs-at-law in transferring the interest of the estate to John F. Rust, Ezra Rust, and George M. Stevens, and the assignees join with John J. McTavish, Myron E. David and Orrin J. David in filing the bill. The complainants allege the full performance on their part of all that was required to entitle them to exercise their option and demand a lease, and they also aver that they elected to take a lease, and demanded it December 3, 1880.

The defendants admit the making of the contract and the demand of the lease, but they deny the performance by complainants of the conditions precedent. They also rely upon two principles of law as constituting a complete bar to the relief claimed. These principles may be stated as follows:

1. The contract of option was a mere license to David W. Rust and his

his rights under the lease. Whereupon the defendant commenced proceedings at law to recover possession, and the plaintiff then, having given notice of his election to purchase, filed this bill for the specific performance of the contract as to the purchase. The defendant insisted that, as the insurance clause was broken, the whole contract was wiped out. Sir JOHN ROMILLY, M. R., held, "upon the construction of the contract, that the right to purchase was independent of the right to a lease, and he decreed a specific performance with costs, and awarded a perpetual injunction to restrain the defendants' proceedings at law."

In Dressel *v.* Jordan, 1870, 104 Mass. 407, 414, it was said by WELLS, J.: "This consideration leads to another objection urged by the defendant, namely, that there is a want of mutuality as is requisite for an agreement entitled to specific enforcement. So far as the objection rests upon the ground that there was no legal and sufficient agreement on the part of the sellers . . . no further discussion is necessary. Beyond that, the point of the objection is that the seller must have, at the time the agreement is made, such title and capacity to convey, or such means and rights to acquire them, as will enable him to fulfil the contract on his part; otherwise the court will not hold the purchaser to a specific performance. But we do not so understand the rule. On the contrary, if the obligation of the contract be mutual, and the seller is able in season to comply with its requirements on his part, to make good the title which he has undertaken to convey, we see no ground on which the purchaser ought to be permitted to excuse himself from its acceptance.

associates, and as such was personal and not assignable, and when David W. Rust deceased, the license was by implication of law revoked.

2. The contract was not such an one as a court of equity will specifically enforce. By its terms the lease to be given under it might at any time be terminated by the lessees, as to the whole land or any part of it not less than eighty acres, on their giving thirty days' notice of intention so to do. The continuance of the lease, if one should be given, would therefore depend on the will of the lessees, who might immediately elect to terminate it. The contract therefore lacks mutuality and equality; and not being mutual or equal, lacks equity; and for that reason should not be enforced.

The first of these, as a general principle, is no doubt sound. Its application to this case might perhaps be disputed by complainants upon the ground that although the contract was with David W. Rust and his associates only, yet it provided for a lease that should be assignable. Whether they would be correct in this we shall not inquire, for the reason that it is unnecessary in this case, which must be governed by other considerations.

When a party to a contract appeals to a court for its specific performance, he addresses himself to the judicial discretion. The relief he asks is altogether exceptional, for the general rule is that the party who complains that another has failed to fulfil his engagements, is supposed to have adequate redress at law in recovery of damages. The court may therefore refuse to grant specific performance in any case where in its judgment equity does not require it. McMurtrie *v.* Bennette, Har. Ch. 124; Smith *v.* Lawrence, 15 Mich. 499; Blanchard *v.* Detroit etc. R. R.

The suggestion of such a rule in Hurley *v.* Brown, 98 Mass. 545, was foreign to the case there decided, and is not borne out by the authorities cited for it, namely, Tendring *v.* London, 2 Eq. Cas. Ad. 680; Mortlock *v.* Buller, 10 Ves. 292, 315, and Pipkin *v.* James, 1 Humph. 325."

In Langford *v.* Pitt, 1731, 2 P. Wms. 629, 630, Sir JOSEPH JEKYLL, M.R., said: "It is sufficient if the party entering into articles to sell has a good title at the time of the decree, the direction of the Court being in all these cases to inquire whether the seller can, not whether he could, make a title at the time of executing the agreement."

And in Forrer *v.* Nash, 1865, 35 Beav. 167, 170, Sir JOHN ROMILLY, M.R., said: "Besides this, it is to be observed that there was no mutuality, for the defendant could not have had a decree against the plaintiff to perform the contract, because the Court does not attempt to compel a person to do what is impossible. The plaintiff had no power to grant a lease, and neither the Court nor the defendant could have compelled him to do so.

"I am of opinion that when a person sells property which he is neither able to convey himself nor has the power to compel a conveyance of it from any other person, the purchaser, as soon as he finds that to be the case, may say, 'I will have nothing to do with it.' The purchaser is not bound to wait to see whether the vendor can induce some third person (who has the power) to join in making a good title to the property sold."

Co., 31 Mich. 43; Berry v. Whitney, 40 Mich. 65; Willard v. Tayloe, 8 Wall. 557; Williams v. Williams, 50 Wis. 311; Mather v. Simonton, 73 Ind. 595. In a few cases a party is suffered to invoke this extraordinary jurisdiction of a court of equity, when it is manifest that the remedy at law is inadequate.

But when a party comes into equity it should be very plain that his claim is an equitable one. If the contract is unequal; if he has bought land at a price which is wholly inadequate; if he has obtained the assent of the other party to unreasonable provisions; if there are any indications of overreaching or unfairness on his part, the court will refuse to entertain his case, and turn him over to the usual remedies. Chambers v. Livermore, 15 Mich. 381; Munch v. Shabel, 37 Mich. 166; Mississippi etc. R. R. Co. v. Cromwell, 91 U. S. 643; Burton v. Le Roy, 5 Sawy. 510. If, for example, the contract is so drawn that the vendor has the option to retain the property or to convey it, performance in his behalf will be refused. Maynard v. Brown, 41 Mich. 298. And in each case the court will consider "whether, in view of all the facts and those doctrines which are interwoven with the very texture of equity jurisprudence, and in view of the specific peculiarities presented, and the settled principles and maxims of the court, it is right and proper to entertain the case and administer relief." Buck v. Smith, 29 Mich. 166, 170. These are familiar principles.

But the court will also refuse to interfere in any case where, if it were to do so, one of the parties might nullify its action through the exercise of a discretion which the contract or the law invests him with. The refusal in such a case does not depend of necessity upon any illegality, inequality, or unfairness, but it is sufficiently based upon the impropriety of imposing on the judge the labor, and on the public the expense of an investigation of disputes when the circumstances are such as to preclude any judgment that may be rendered from being final. No court can with reason be called upon to do a vain thing. A familiar instance is that of a contract for the formation of a partnership, which, though it is within the power of the court to enforce it, and it may be done under special circumstances when by its terms the partnership is to continue for a definite period, yet in the absence of a provision to that effect the performance will invariably be refused, though the terms be in all respects equal, fair and legal. The reason is that the partnership which the court might establish by its decree, the parties or either of them might immediately dissolve; and Lord ELDON says "no one ever heard" of the court executing an agreement under such circumstances. Hercy v. Birch, 9 Ves. 357. See also Scott v. Rayment, L. R. 7 Eq. Cas. 112; Meason v. Kaine, 63 Penn. St. 335; Coll. on Part. 19, 385; Story on Part. § 189; Pars. on Part. 298; Fry on Spec. Perf. 64, 504; Story Eq. Jur. § 666.

All contracts where the party has reserved to himself, or where the law gives him the authority to render nugatory any decree that ought to be rendered in their enforcement, rest upon the same principle. This was

recognized in Marble Co. *v.* Ripley, 10 Wall. 339, 359; and more distinctly asserted and decided in Express Co. *v.* Railroad Co., 99 U. S. 191. In this last case the very strong assertion is made that "a court of equity never interferes where the power of revocation exists."

It is also assigned as a reason why specific performance should not be decreed in this case, that the terms of the contract as respects the manner of working, the extent to which operations should be carried on, and the consequent royalty, are such that they cannot be enforced so as to do justice to the defendants after lease given, without the constant supervision of the court so long as the lease shall continue, to compel the lessees to proceed with their operations and to prosecute mining to such an extent as shall be reasonable and just. There are undoubtedly some difficulties in the case, of much the same nature with those encountered in Blanchard *v.* Detroit etc. R. R. Co., 31 Mich. 43; but as we refuse relief on other grounds, their consideration is not important here.

It is urged on the part of the complainants that the recognition and enforcement of these contracts of option is absolutely essential to the development of the mineral resources of the State; and it may be and probably is the fact that they perform a convenient and useful function. But it does not follow from that fact that the party must have this specific remedy. He is supposed to rely upon his right to an action for the recovery of damages in all cases where it is not consistent with the principles of equity that he should have other redress. Denying specific performance does not deny the legality or obligation of the contract: it denies merely that the case is one of equitable cognizance.

The decree must be reversed and the bill dismissed with costs of both courts.

The other Justices concurred.[1]

COGENT *v.* GIBSON.

IN CHANCERY, BEFORE SIR JOHN ROMILLY, M.R., 1864.

[33 *Beavan* 557.]

The plaintiff Cogent was entitled to a French patent for improvements in the manufacture of saddles. In 1863 the defendant agreed to purchase from the plaintiff the patent right to manufacture and sell these saddles in England for £125, and Cogent was, at the expense of the defendant, to obtain the English patent.

[1] "The case of Rust *v.* Conrad, 47 Mich. 449, 11 N. W. Rep. 265, is relied upon to support those objections. But the legislature of 1883, doubtless with the intention of meeting the decision of this Court in that case, provided by

The patent was obtained, and this was a bill by the vendor against the purchaser for the specific performance of the agreement.

It was argued for the defendant, first, that this was not a proper case for the interference of this court, for all the plaintiff required was the purchase money, which he might obtain by action at law; secondly, that the patent right was of no value.

The MASTER OF THE ROLLS. I think the plaintiff is entitled to a decree for specific performance.

I am of opinion that in all of these cases the rights of the vendor and purchaser are mutual and correlative. I had to consider the point lately, in a case where the plaintiff, the vendor of land at Harrogate, had nothing to do but to receive a sum of money, and I held that he could come to this court for specific performance.

It is true that the vendor may bring an action to recover the damages, but he is also entitled to come here for a specific performance.

I am of opinion that where there is a valid contract for the sale of a patent, this court will specifically enforce it in a suit by the purchaser against the vendor, and will make the latter execute a conveyance. I am also of opinion that the opposite is equally true, and that the vendor may come into equity for the purchase money.

The plaintiff is entitled to the usual decree for specific performance.

JONES *v.* NEWHALL.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1874.

[115 *Massachusetts* 244.]

This was a bill in equity to compel the specific performance of a sealed agreement entered into by the parties to the suit.

The agreement was for the purchase by the defendant of all the plaintiffs' right, title and interest in two land companies, together with a note and two mortgages connected therewith, payments to be made in instalments, with a delivery of stock proportioned to the amount of each instalment.

The bill alleged the execution of the agreement; the transfer of the plaintiff's interest in one company, and payment therefore; a partial transfer and payment for the interest in the second company; that the

statute for the specific enforcement of options and mining agreements in a Court of Chancery." Grummelt *v.* Gingross, 1889, 77 Mich. 369, 388.

On the question of public policy involved no opinion is expressed; but the legislature was clearly right in considering that the only safe way to overrule Mr. Justice Cooley was by statute.

plaintiff was ready and willing to perform (performance being tendered); and that the defendant refused.

The defendant demurred on the ground that plaintiff's remedy at law was plain, adequate, and complete. The demurrer was overruled and defendant appealed.[1]

WELLS, J. Jurisdiction in equity is conferred upon this court by the Gen. Sts., c. 113, § 2, to hear and determine "suits for the specific performance of written contracts, by and against either party to the contract, and his heirs, devisees, executors, administrators and assigns." The power extends alike to written contracts of all descriptions; but its exercise is restricted by the proviso, "when the parties have not a plain, adequate and complete remedy at the common law." This proviso has always been so construed and applied as to make it a test, in each particular case, by which to determine whether jurisdiction in equity shall be entertained. If the only relief to which plaintiff would be entitled in equity is the same in measure and kind as that which he might obtain in a suit at law, he can have no standing upon the equity side of the court; unless his remedy at law is doubtful, circuitous, or complicated by multiplicity of parties having different interests. Charles River Bridge *v.* Warren Bridge, 6 Pick. 376, 396; Sears *v.* Boston, 16 Pick. 357; Wilson *v.* Leishman, 12 Met. 316, 321; Hilliard *v.* Allen, 4 Cush. 532, 535; Pratt *v.* Pond, 5 Allen 59; Glass *v.* Hulbert, 102 Mass. 24, 27; Ward *v.* Peck, 114 Mass.

In contracts for the sale of personal property jurisdiction in equity is rarely entertained, although the only remedy at law may be the recovery of damages, the measure of which is the difference between the market value of the property at the time of the breach, and the price as fixed by the contract. The reason is, that, in regard to most articles of personal property, the commodity and its market value are supposed to be substantially equivalent, each to the other, so that they may be readily interchanged. The seller may convert his rejected goods into money; the purchaser, with his money, may obtain similar goods; each presumably at the market price; and the difference between that and the contract price, recoverable at law, will be full indemnity. Jones *v.* Boston Mill Corporation, 4 Pick. 507, 511; Adderley *v.* Dixon, 1 Sim. & Stu. 607; Harnett *v.* Yeilding, 2 Sch. & Lef. 548, 553; Adams Eq. 83; Fry Spec. Perf. §§ 12, 29.

It is otherwise with fixed property like real estate. Compensation in damages, measured by the difference in price as ascertained by the market value, and by the contract, has never been regarded in equity as such adequate indemnity for non-fulfilment of a contract for the sale or purchase of land, and to justify the refusal of relief in equity. When that is the extent of the right to recover at law, a bill in equity is maintainable, even in favor of the vendor, to enforce fulfilment of the contract and payment of the full amount of the price agreed on. Old Colony Railroad *v.* Evans, 6 Gray 25.

[1] Statement substituted for that of the original report.

Although the general subject is within the chancery jurisdiction of the court, yet inadequacy of the damages recoverable at law is essential to the right to invoke its action as a court of chancery in any particular case. The rule is the same whether applied to contracts for the sale of real or of personal estate. The difference in the application arises from the difference in the character of the subject matter of the contracts in respect to the question whether damages at law will afford full and adequate indemnity to the party seeking relief. If the character of the property be such that the loss of the contract will not be fairly compensated in damages based upon an estimate of its market value, relief may be had in equity, whether it relates to real or personal estate. Adderley *v.* Dixon, 1 Sim. & Stu. 607; Duncuft *v.* Albrecht, 12 Sim. 189, 199; Clark *v.* Flint, 22 Pick. 231; Story Eq. Jur. § 717; Adams Eq. 83; Fry Spec. Perf. §§ 11, 23, 30, 37.

The property in question in this case appears to be of such a character. It is not material, therefore, whether the interest of the plaintiff is in the nature of realty or personalty. But the relief he seeks is not such as to require the aid of a court of equity. At the time this bill was filed the only obligation, on the part of the defendant, to be enforced either at law or in equity, was his express promise to pay a definite sum of money as an instalment towards the purchase of certain property from the plaintiff. That promise is supported by the executory agreement of the plaintiff to convey the property, contained in the same instrument, as its consideration; but in respect of performance the several promises of the defendant are separable from the entirety of the contract, and each one may be enforced by itself as an assumpsit. The plaintiff is not obliged to sue in damages upon his contract as for a general breach. He may recover at law the full amount of the instalment due. In equity he can have no decree beyond that. He cannot come into equity to obtain precisely what he can have at law. Howe *v.* Nickerson, 14 Allen 400, 406; Jacobs *v.* Peterborough & Shirley Railroad, 8 Cush. 223; Gill *v.* Bicknell, 2 Cush. 355; Russell *v.* Clark, 7 Cranch 69.

The plaintiff has no occasion for any order of the court in regard to performance by himself. At most, all that is necessary for him to do in order to recover his judgment at law, is to offer a conveyance of a portion of his interest corresponding to the amount of the instalment due.

We do not regard the fact, stated in the report, that the defendant "also refused to pay an assessment then due, or about to become due," for which he was bound by the contract to provide, and hold the plaintiff harmless; because that is immaterial upon demurrer, there being no allegation in the bill in reference to it. And besides, there would be sufficient remedy at law for such a breach, if it were sufficiently alleged and proved.

If the plaintiff will be compelled to bring several actions for his full remedy at law, it is because he has a contract payable in instalments;

that is, he may have several causes of action. But he may sue them severally, or he may join them all in one suit, when all shall have fallen due, at his own election. He is not driven into equity to escape the necessity of many suits at law.

It is true, as the plaintiff insists, that a different rule exists in the English courts of chancery; and that in numerous cases, not unlike the present, relief in equity has there been granted by decree for payment of a sum of money due by contract, although equally recoverable at law. The maxim which, as we apply it, makes the want of adequate remedy at law essential to the right to have relief in equity in each case, has always been attached to chancery jurisdiction. But in the English courts it has been rather by way of indicating the nature and origin of the jurisdiction, and defining the class of rights or subjects to which it attaches, than as a constant limit upon its exercise. Courts of chancery were created to supply defects in proceedings at common law, Story Eq. Jur. §§ 49, 54. Their jurisdiction grew out of the exigencies of the earlier periods in the judicial history of the country, and was from time to time enlarged to meet those exigencies. Its limits, having become defined and fixed by usage, have not contracted as the jurisdiction of the common law courts was extended. It has always been held that jurisdiction once acquired in chancery, over any subject or class of rights, is not taken away by any subsequent enlargement of the powers of the courts of common law, nor by reason of any new modes of remedy that may be afforded by those courts. Story Eq. Jur. § 64 *i*; Snell Eq. 355; Slim *v.* Croucher, 1 De G., F. & J. 518.

Hence arose a wide range of concurrent jurisdiction, within which chancery proceeded to administer appropriate remedies, without regard to the question whether a like remedy could be had in the courts of law. Colt *v.* Woollaston, 2 P. Wms. 154; Green *v.* Barrett, 1 Sim. 45; Blain *v.* Agar, 2 Sim. 289; Cridland *v.* De Mauley, 1 De G. & S. 459; Evans *v.* Bicknell, 6 Ves. 174; Burrowes *v.* Lock, 10 Ves. 470. One of its maxims was that there must be mutuality of right to avail of that jurisdiction. Accordingly, if the contract or cause of complaint was such that one of the parties might require the peculiar relief which chancery alone could afford, it was frequently held that the principle of mutuality required that jurisdiction should be equally maintained in favor of the other party, who sought and could have no other relief than recovery of the same amount of money due or measure of damages as would have been awarded by judgment in a court of law, Hall *v.* Warren, 9 Ves. 605; Walker *v.* Eastern Counties Railway, 6 Hare 594; Kenney *v.* Wexham, 6 Mad. 355.

In contracts respecting land there is an additional consideration for maintaining jurisdiction in equity in favor of the vendor as well as the vendee, which is doubtless much more influential with the English courts than it can be here; and that is the doctrine of equitable conversion. It is referred to as a reason for the exercise of jurisdiction at the suit of the

vendor, in Cave *v.* Cave, 2 Eden 139; Eastern Counties Railway *v.* Hawkes, 5 H. L. Cas. 331; Fry Spec. Perf. § 23.

In Massachusetts, instead of a distinct and independent court of chancery, with a jurisdiction derived from, and defined and fixed by, long usage, we have certain chancery powers conferred upon a court of common law, whose jurisdiction and modes of remedy, as a court of law, had already become extended much beyond those of the English courts of common law, partly by statutes and partly by its own adaptation of its remedies to the necessities which arose from the absence of a court of chancery. This difference in the relations of the two jurisdictions would alone give occasion for different rules governing their exercise, Black *v.* Black, 4 Pick. 234, 238; Tirrell *v.* Merrill, 17 Mass. 117, 121; Baker *v.* Biddle, Baldw. 394.

The successive statutes by which the equity powers of this court have been conferred or enlarged have always affixed to their exercise the condition that "the parties have not a plain, adequate and complete remedy at the common law." This has been construed as referring "to remedies at law as they exist under our statutes and according to our course of practice." Pratt *v.* Pond, 5 Allen 59. It has also been repeatedly held that, in reference to the range of jurisdiction conferred, the several statutes were to be construed strictly. Black *v.* Black, and Charles River Bridge *v.* Warren Bridge, *ubi supra*.

No reason or necessity remains for the maintenance of concurrent jurisdiction, except for the sake of a more perfect remedy in equity when the plaintiff shall establish his right to it. And such we understand to be the purport and intent of our statutes upon the subject. Milkman *v.* Ordway, 106 Mass. 232; Angell *v.* Stone, 110 Mass. 54.

A similar restriction upon the equity jurisdiction of the federal courts is so construed with great strictness. Oelrichs *v.* Spain, 15 Wall. 211, 228; Grand Chute *v.* Winegar, Ib. 373; Insurance Co. *v.* Bailey, 13 Ib. 616; Parker *v.* Winnipiseogee Lake Cotton and Woollen Co., 2 Black 545; Baker *v.* Biddle, Baldw. 394; see also Woodman *v.* Freeman, 25 Maine, 531; Piscataqua Ins. Co. *v.* Hill, 60 Maine 178.

Even in courts of general chancery powers and of independent organization, while the power to entertain bills relating to all matters which, in their nature, are within their concurrent jurisdiction, is maintained, yet the usual course of practice is to remit parties to their remedy at law, provided that be plain and adequate, unless for some reason of peculiar advantage which equity is supposed to possess, or some other cause influencing the discretion of the court. Kerr on Fraud and Mistake, 45; Bispham Eq. § 200, also § 37; Snell Eq. 334; Clifford *v.* Brooke, 13 Ves. 131; Whitmore *v.* Mackeson, 16 Beav. 126; Hammond *v.* Messenger, 9 Sim. 327; Hoare *v.* Bremridge, L. R. 14 Eq. 522; S. C. L. R., 8 Ch. 22.

The doctrine of Colt *v.* Woollaston, 2 P. Wms. 154, and Green *v.* Barrett, 1 Sim. 45, though not expressly overruled, has been questioned,

Thompson v. Barclay, 9 Law J. Ch. 215, 219, and does not seem to govern the usual practice of the courts. See cases above cited, and Newham v. May, 13 Price 749.

But, independently of statute restrictions, the objection that the plaintiff may have a sufficient remedy or defence at law in the particular case is a matter of equitable discretion rather than of jurisdictional right; and is therefore not always available on demurrer. Colt v. Nettervill, 2 P. Wms. 304; Ramshire v. Bolton, L. R. 8 Eq. 294; Hill v. Lane, L. R. 11 Eq. 215; Barry v. Croskey, 2 Johns. & Hem. 1.

According to the practice in this commonwealth, on the other hand, under the statutes relating to the exercise of jurisdiction in equity, a bill is demurrable, not only if it show that the plaintiff has a remedy at law, equally sufficient and available, but also if it fail to show that he is without such remedy. Pool v. Lloyd, 5 Met. 529; Woodman v. Saltonstall, 7 Cush. 181; Pratt v. Pond, 5 Allen 59; Clark v. Jones, 5 Allen 379; Metcalf v. Cady, 8 Allen 587; Mill River Loan Fund Association v. Claflin, 9 Allen 101; Commonwealth v. Smith, 10 Allen 448; Bassett v. Brown, 100 Mass. 355; Same v. Same, 105 Mass. 551, 560.

The demurrer therefore must be sustained, and the bill dismissed.[1]

[1] "How, then, is the question of equity jurisdiction to be dealt with in case of a bilateral contract, one side of which is of such a nature as to give a court of equity jurisdiction over the contract, but the other is not? It must first be ascertained whether the two sides of the contract are or are not mutually dependent upon each other. If they are not, they are to be regarded, for the purposes of the question now under consideration, as two separate unilateral contracts; for in such a case the two sides of the contract can never be the subject of any one suit (unless, indeed, a suit and a cross-suit be regarded as one suit), and therefore the question whether equity has jurisdiction over one side of the contract is always independent of the question whether it has jurisdiction over the other side of the contract. It is upon this ground that the decision rests in the important case of Jones v. Newhall, 115 Mass. 244; for, though performance by the plaintiff was there dependent upon performance by the defendant, yet the converse was not true; on the contrary, performance by the defendant was a condition precedent to performance by the plaintiff. Consequently, though the defendant, on paying or tendering the purchase money, could have maintained a bill in equity for a conveyance of the land, yet the plaintiff could not maintain a bill to recover the purchase money, his remedy at law being perfectly adequate; nor could he, it seems, even though performance by him had been a condition precedent to performance by the defendant; for though he could not in that case have recovered the purchase money at law until he had conveyed the land, even though he were prevented from conveying the land by defendant's refusing to accept it, and could only recover special damages for the breach of the contract by the defendant by which he was prevented from conveying the land, yet it seems that special damages are always an adequate remedy for a breach of contract by a vendee which prevents performance by the vendor." Langdell's Survey of Equity, 50, 51.

B. Want of or Inadequacy of Consideration.

JEFFERYS *v.* JEFFERYS.

In Chancery, before Lord Chancellor Cottenham, 1841.

[*Craig & Phillips* 138.]

A father, by a voluntary settlement, "in consideration of the natural love and affection which he had for his three daughters," with indentures of lease and release, conveyed certain freehold and covenanted to convey certain copyhold estates to trustees in trust for the benefit of his daughters. He died without having surrendered the copyholds, and devised part of the same estates to his widow who after his death was admitted to some of the copyholds. The daughters now bring suit to compel the carrying out of the trust and pray that the widow may be compelled to surrender the copyholds to which she has been admitted.

The Lord Chancellor. The title of the plaintiffs to the freehold is complete; and they may have a decree for carrying the settlement into effect so far as the freeholds are concerned. With respect to the copyholds, I have no doubt that the court will not execute a voluntary contract; and my impression is, that the principle of the court to withhold its assistance from a volunteer applies equally, whether he seeks to have the benefit of a contract, a covenant, or a settlement. As, however, the decision in Ellis *v.* Nimmo is entitled to the highest consideration, I will not dispose of this case absolutely, without looking at a former case, Dillon *v.* Coppin, in which I had occasion to refer to that decision. Unless I alter the opinion I have expressed, the bill must be dismissed with costs, so far as the copyholds are concerned.

Feb. 1. On this day his Lordship said he had looked at the case alluded to, and that he saw no reason for altering the opinion he had before expressed.[1]

[1]For cases showing the development of the doctrine as to volunteers, see volume 1, p. —, *et seq.*

FERRY, RESPONDENT, *v.* STEPHENS, ET AL., APPELLANTS.

IN THE COURT OF APPEALS OF NEW YORK, 1876.

[66 *New York* 321.]

On March 10th, 1862, one Vincent Stephen, brother of the plaintiff, and the plaintiff entered into a written agreement for the sale and purchase of certain land, for a specified price to be paid in annual instalments. The land was to be conveyed upon payment being completed. The object of the transaction was to make gift to the plaintiff. April 18th, 1862, the brother endorsed on the contract a receipt in full for the purchase price, no part of which had been paid. In June 1862, Vincent died, leaving a will in which he devised the property to the defendant. The plaintiff brought suit to compel the specific performance of the agreement.

ANDREWS, J. The judgment of the Special Term cannot be sustained on the ground upon which it was placed, that the action is brought to enforce the specific performance of a voluntary agreement for the conveyance of land. There was no want of consideration for the promise of Vincent Stephens to convey the land. The promise of the plaintiff to pay the purchase price was a valid consideration for the promise of the other party. The agreement was in writing, signed by both parties, and was mutually obligatory. It is quite immaterial, in the absence of fraud or mistake, neither of which is claimed, what object or intention the parties may have had at variance with the terms of the agreement, or that both understood that the vendor would not exact the payment of the purchase money, or that he intended to give the land to his sister. The contract did not operate as a gift of the land, and the intention to give the land could only be consummated by an actual conveyance, and the intention to make a present gift is conclusively rebutted by the covenant which the vendor took for the payment of the consideration. The parol understanding between the parties would be no answer to a suit brought by the vendor to enforce the performance of the plaintiff's promise to pay the purchase money. The suit was not, therefore, as the learned judge of the Special Term seemed to suppose, brought to enforce a voluntary executory promise to give the land to the plaintiff. The payment of the purchase money by the plaintiff was made by the agreement a condition precedent to the obligation of the vendor to convey the land, and the plaintiff, in order to entitle herself to a specific performance of the contract, was bound to show that payment, in fact, had been made, or that her promise to pay the purchase money had, in some way, been satisfied. It is conceded that there was no actual payment of any part of the consideration. The plaintiff, to maintain her right of action, relies upon the fact that her brother, about a month after the contract was made, indorsed upon it a

receipt in full of the purchase price. The judge also found that the plaintiff's brother, when the contract was made, intended to give her the land, and that the consideration was inserted to conceal this intention from other relatives, and in connection with the finding that the receipt was subsequently indorsed on the contract, he finds that it was never intended that any payment should be made thereon. These findings, taken together, are equivalent to finding that the vendor, to accomplish his purpose to give the land to his sister, gave her the debt which represented his interest in the land. He became, on the execution of the contract of sale, a trustee for the plaintiff of the land, having a lien for the purchase money, and she became his debtor for the consideration.

That the receipt was intended as a gift of the debt is clearly inferable from the facts found. His primary intention was to give her the land. The gift of the debt would not give her the legal title, but it gave her the whole beneficial interest, provided it operated as a legal satisfaction of her promise. The position of the General Term, that when the lien of the vendor, under a contract for the sale of land, for the purchase money, is extinguished by payment or by what, as respects the vendor, was equivalent to payment, he becomes a naked trustee, and is bound to convey to the vendee the legal title, admits of no controversy. There was no intention in giving the receipt that the vendor should be discharged from his promise. It states that the money expressed therein was received to apply on the contract. Whether the giving of a receipt for the debt was effectual to confer the benefit intended, is a question of law, but it is clear, from the facts found, that the receipt was intended to operate as a forgiving and satisfaction of the plaintiff's obligation under the contract, so as to leave the right of the plaintiff to a conveyance in force as if the debt had been paid. The case, therefore, comes to this single question, viz., was there a valid gift of the debt to the plaintiff by her brother. The case of Gray *v.* Barton, 55 N. Y. 68, is a decisive authority for the plaintiff on this question. The plaintiff does not, in this case, seek the aid of the court to perfect an incomplete gift. The gift of the debt was complete upon the execution of the receipt. The vendor's purpose of giving the land has never been executed only so far as it results from his giving the plaintiff the debt for the purchase money. The plaintiff's obligation under the contract having been satisfied, the only unperformed stipulation remaining, is that of the vendor to convey the land, and this action is brought to enforce that stipulation.

The language of GROVER, J., in Gray *v.* Barton, answers the objection founded on want of consideration. He says, "the proof of want of consideration for the receipt was annulled and avoided by the proof that it was given to consummate a gift of the debt."

The judgment of the General Term should be affirmed, and judgment absolute for the plaintiff ordered on the stipulation.

All concur.

Order affirmed and judgment accordingly.

MANSFIELD *v.* HODGDON AND OTHERS.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1888.

[147 *Massachusetts* 304.]

HOLMES, J. This is a bill specifically to enforce a covenant to sell to the plaintiff "the farm situated in that part of Mount Desert Island called Pretty Marsh, and consisting of between two hundred and sixty and two hundred and seventy acres, and standing in the name of Benjamin Hodgdon, for the sum of fifteen hundred dollars cash, at any time within thirty days from the date hereof." The instrument is dated January 15, 1887, and is signed by the defendant Hodgdon, but not by his wife. The defendant Clara E. Allen is a subsequent grantee of the premises, and the remaining defendant, William H. Allen, is her husband. The judge who heard the witnesses made a decree for the plaintiff, and, the evidence having been reported, the defendants appealed.

Giving to the finding of the judge the weight which it must have, we think the evidence must be taken to establish the following facts. The instrument was sealed by Hodgdon, and has not been altered. The plaintiff expressed his election to purchase within the thirty days allowed. There was evidence of a message to that effect having been left at Hodgdon's house within ten days. It appears that a blank deed to the plaintiff and another was left there about the same time, and there was evidence that a message was sent to Hodgdon to execute it if he found it correct. There was also evidence that the deed was returned unexecuted, with the message that Mrs. Hodgdon refused to sign it, and with no other objection in the first instance. These facts warranted a finding that sending the deed implied, and was understood to imply, notice that the plaintiff intended to buy, at least if the deed corresponded to the contract, see Warner *v.* Willington, 3 Drew. 523, 533, and perhaps whether it corresponded or not, as the message even as testified to by Hodgdon imported a willingness to correct mistakes.

The plaintiff, although he signified his election to take the land within thirty days, did not pay or tender the money within that time. But there is evidence that Hodgdon was responsible for this. At or soon after the time when word was sent that Mrs. Hodgdon refused to sign, a demand or request was made that Mrs. Hodgdon should have three acres out of one of the other lots as a consideration for her signing the deed. Of course, under the contract the plaintiff had a right to call upon Mr. Hodgdon to give a good title to the whole, but he was disposed to yield something. A discussion ensued, of course on the footing that the plaintiff was desirous of making the purchase, which of itself was evidence that the defendant Hodgdon had notice of the fact, and this was prolonged beyond the thirty days. When the parties came to terms, a

new deed was prepared and tendered, was executed by the Hodgdons, and was handed to a Mr. Chapin, who had acted as go-between. But later in the same day Chapin was ordered not to deliver the deed, and the bargain with the plaintiff was repudiated. There is no dispute that the plaintiff was ready to pay for the land at any time when he could get a conveyance.

Afterwards Hodgdon conveyed to Mrs. Allen, Mrs. Hodgdon releasing dower. But Mrs. Allen had full notice of the agreement with the plaintiff before the conveyance to her, and before any agreement was made with her and her husband, and, although informed that the thirty days had gone by, she had notice that the plaintiff was expecting a conveyance, and that Hodgdon might have trouble by reason of his refusal to convey to the plaintiff. Connihan *v.* Thompson, 111 Mass. 270; Hansard *v.* Hardy, 18 Ves. 455, 462. Mr. Allen was asked whether he knew that the plaintiff had sued Hodgdon for damages before the purchase. This must have meant before the final conveyance to Mrs. Allen, as Mrs. Allen was party to getting the deed back from Mr. Chapin, and had notice of the plaintiff's rights at that time, before any suit was begun. But the evidence was excluded, and Mr. Allen's answer is not properly before us. He did not suggest that he was led by his knowledge to assume that the plaintiff would not seek specific performance, and must be taken to have known that the plaintiff still had the right to do so. Connihan *v.* Thompson, *ubi supra.*

The defendant Hodgdon's undertaking not having been a mere offer, but a conditional covenant to sell, bound him irrevocably to sell in case the plaintiff should elect to buy, and should pay the price within thirty days. The usual doctrine as to conditions applies to such a covenant, and as the covenantor by his own conduct caused a failure to comply with the condition in respect of time, he waived it to that extent. And upon the same principle he exonerated the plaintiff from making any tender when the new terms had been agreed upon, by wholly repudiating the contract. Carpenter *v.* Holcomb, 105 Mass. 280, 282; Ballou *v.* Billings, 136 Mass. 307; Gormley *v.* Kyle, 137 Mass. 189; Lowe *v.* Harwood, 139 Mass. 133, 136. If it be true, as testified for the defendant, that he also objected to signing a deed conveying the mountain lot, this was a further excuse for the delay. Galvin *v.* Collins, 128 Mass. 525, 527.

A covenant to sell is not voluntary in such a sense that equity will refuse specific performance. If the defendant conveys, he will get *quid pro quo.* Western Railroad *v.* Babcock, 6 Met. 346; Irwin *v.* Gregory, 13 Gray 215; Eastman *v.* Simpson, 139 Mass. 348, 349. The description in the contract embracing all the land owned by the defendant at Mount Desert was sufficient. Bacon *v.* Leonard, 4 Pick. 277; Hurley *v.* Brown, 98 Mass. 545; Rankin *v.* Wood, 12 Gray 34; Mead *v.* Parker, 115 Mass. 413; Doherty *v.* Hill, 144 Mass. 465.

It is objected, that the decree gives the plaintiff a title free from Mrs. Hodgdon's right of dower, and that, as Mrs. Hodgdon was not

bound to release her dower to him, he ought not to profit by her release to Mrs. Allen. But who suffers injustice, or has a right to complain? Not Mrs. Hodgdon, who is not a party to or interested in these proceedings. she has released and extinguished her dower, and she retains the consideration which she received for it, as the three acres demanded by her are excepted from the conveyance ordered by the decree. Mr. Hodgdon cannot complain, as he contracted to convey a clear title. And the defendant Mrs. Allen, having taken Hodgdon's title with notice of the plaintiff's rights, and therefore charged with a trust in his favor, of course is bound to convey that title. The release of dower extinguished Mrs. Hodgdon's inchoate right, and did not convey a distinct interest to Mrs. Allen. Learned *v.* Cutler, 18 Pick. 9, 11; Tirrel *v.* Kenney, 137 Mass. 30, 32.

Without considering whether, if justice required it, the defendant Allen might not be protected by treating the incumbrance as if it still existed, there is no ground for doing so in this case. Mrs. Allen, through her husband, actively promoted Hodgdon's breach of agreement. If she receives back from him the consideration which she paid in excess of that ordered to be paid to her by the plaintiff, she will be *in statu quo,* and the loss will fall on Hodgdon, as it ought to do, unless there was some arrangement by which the Allens were to indemnify him. In any event, no wrong will be suffered by any one, and the plaintiff gets what he contracted for.[1]

Decree affirmed.

[1] A portion of the opinion has been omitted.

For a valuable discussion of the question of inadequacy of price, in which the early authorities are collected and analyzed, see Chancellor KENT'S opinion in Seymour *v.* Delaney, 1822, 6 Johns. Ch. 222, and the opinion of SAVAGE, C.J., in the same case on appeal, 3 Cow. 445.

See same case in 15 Am. Dec. 270, with an extended note collecting the authorities.

Mr. Pomeroy, Equity Jurisdiction, p. 272, citing this case, said: "Chancellor KENT, after a very elaborate and exhaustive review of all the then existing authorities, English and American, including those opposed to his conclusion, held that mere inadequacy of price would be a defense, since it rendered the contract unreasonable, unequal and hard. His decree was reversed by a bare majority of the court of errors, in Seymour *v.* De Lancey, 3 Cow. 445, notwithstanding a most able opinion, concurred in by all the supreme court judges, which maintained Chancellor KENT'S views."

"The New York courts have repeatedly refused to regard the decision of their court of errors as evidence of the law, in that State even, except as to the particular case; and it has never been regarded elsewhere as much evidence of the law in any case." Per REDFIELD, J., in Buck *v.* Squiers, 1850, 22 Ver. 484, 496.

"Inadequacy of price is quite out of the question. The cases of reversions, and interests of that sort, go upon very different principles. In some, the whole duty of making good the bargain, upon the principles of this court, is upon the vendee; as in the instance of heirs expectant. Inadequacy of

C. The Statute of Frauds.

HOLLIS *v.* EDWARDS.
DEANE *v.* IZARD.

In Chancery, before Lord Keeper North, 1683.

[1 *Vernon* 159.]

In these cases, bills were exhibited to have an execution of parol agreements touching leases of houses, and set forth, that in confidence of these agreements the plaintiffs had expended great sums of money in and about the premises, and had laid the agreement to be, that it was agreed, the agreements should be reduced into writing. The defendants pleaded the statute of frauds and perjuries.

For the plaintiffs it was insisted on the saying in the act of parliament,

price does not depend upon a person giving *pretium affectionis*, from any peculiar motive, beyond what any other man would give, the reasonable price. But, further, unless the inadequacy of price is such as shocks the conscience, and amounts in itself to conclusive and decisive evidence of fraud in the transaction, it is not itself a sufficient ground for refusing a specific performance. How, upon these circumstances, is there such inadequacy of price, as to cut down the bargain, or authorize the court not to complete it? Accidental subsequent advantage made of a bargain is nothing. It has been held, upon true principles, that if a man contracts to sell an estate for a life annuity, if the contract is signed, and the party to have the annuity died before the end of the first half year, the court must execute the contract. Jackson *v.* Lever, 3 Bro. C. C. 605. I am therefore clearly of opinion, that the court must execute this contract, if duly signed; unless there is infused into it some other character belonging to one of the parties, in respect of the principles, duties, and obligations, arising out of which, I am bound to withhold that equitable relief." Per Lord Chancellor Eldon, in Coles *v.* Trecothick, 1804, 9 Ves. 235, 246.

"As to the merits, I do not know, if fraud is out of the case, that I can set aside this contract, or refuse to act upon it, merely on the ground of inadequacy of price. See Mortlock *v.* Buller, *ante*, 292; Livingston *v.* Byrne, 11 Johns. Rep. 566. But it is not quite so inadequate as it has been represented. The difference is not to be taken to be merely between the two sums. But after all the allowances that can be made, I have no difficulty in believing, this was an inadequate bargain as to the price; that the defendant did not get the price the property assigned was fairly worth. But, taking that to be so, the contract cannot be set aside within any principle this court has ever acted upon; not even within the principle of the Roman law, requiring that the price should exceed half the value." Sir William Grant, M.R., in Burrowes *v.* Lock, 10 Ves. 471, 474.

viz. Unless the agreement were to be performed within the space of a year: but it was answered, that clause did not extend to any agreement concerning lands or tenements. Then it was insisted for the plaintiffs, that undoubtedly they had a clear equity to be restored to the consideration they had paid, and the money which they in confidence of the agreement had expended on the premises.

As touching that matter, it was said by the LORD KEEPER, that there was a difference to be taken, where the money was laid out for necessary repairs or lasting improvements, and where it was laid out for fancy or humour; and that he thought clearly the bill would hold so far, as to be restored to the consideration; but he said, the difficulty that arose upon the act of parliament in this case was, that the act makes void the estate, but does not say the agreement itself shall be void; and therefore, though the estate itself is void, yet possibly the agreement may subsist; so that a man may recover damages at law for the non-performance of it; and if so, he should not doubt to decree it in equity: and therefore directed, that the plaintiffs should declare at law upon the agreement, and the defendants were to admit it, so as to bring that point for judgment at law; and then he would consider, what was further to be done in this case.[1]

WHEELER *v.* NEWTON.

IN CHANCERY, BEFORE LORD COMMISSIONER RAWLINSON, 1690.

[*Precedents in Chancery* 16.]

The plaintiff had articled with the defendant for the purchase of some lands of his wife's, and the articles were in writing, and signed by the parties, but not sealed; but the plaintiff was put into possession of some part of the land; and therefore the court decreed an execution of the agreement, tho' it were not under seal. And my Lord Commissioner RAWLINSON said, that agreements in writing, tho' not sealed, have some better countenance since the Statutes of Frauds and Perjuries than they had before.[2]

[1] For a collection of the early authorities on the question of this case, see Raithby's note (2) to the case.

[2] 2 Eq. Cases 44, c. 5 S. C. more fully reported. Gilb. Can. 245 S. C.

LORD GUERNSEY *v.* RODBRIDGES.

IN CHANCERY, BEFORE LORD CHANCELLOR COWPER, 1707.

[5 *Viner's Abridgment* 528, *placitum* 18.]

Wherever a parol agreement is begun to be put in execution, and intended to be continued, there though there be no writing, yet this court will enforce the execution thereof, notwithstanding the Statute of Frauds and Perjuries.

LACON *v.* MERTINS.

IN CHANCERY, BEFORE LORD CHANCELLOR HARDWICKE, 1743.

[3 *Atkyns* 1.]

John Hayes and his wife Elizabeth, seised in the right of his wife of certain life estates and a fee expectant, mortgaged the same for various sums. The husband died, and Elizabeth, desiring to pay off the old mortgages and to raise money for paying other debts, entered into an agreement with the defendant for a new loan, with a mortgage on these same estates as securities. This agreement was not put in writing but the defendant, Mertins, made several advancements on the loan, taking therefor notes of Elizabeth. Before the transaction was completed, Elizabeth died, leaving the defendant Degge her heir-at-law. The plaintiff, a creditor of Elizabeth, having procured letters of administration in trust for himself and the rest of the creditors, brought this bill praying an account of the estate, "and that the agreement entered into with the defendant, Mertins, may be specifically carried into execution." Mertins expressed his willingness to perform if he were allowed credit for the payments made to Elizabeth. The heir resisted on the ground that, being a stranger, he was in no way bound by the agreement; and moreover that he could not be bound or in any way affected thereby because the agreement was not "reduced into writing, nor in any sort performed by Elizabeth Hayes in her lifetime."[1]

LORD CHANCELLOR. The first question is, Whether the agreement insisted on by the bill, and admitted by the answer of the defendant Mertins, ought, upon these circumstances, to be carried into execution? what makes this particular is, if the bill had been brought by Mrs. Hayes in her lifetime, and the defendant Mertins had admitted the agreement, tho' he had insisted on not performing it, the court would have

[1]The statement of facts has been abridged.

decreed it; because the admission takes it out of the statute of frauds and perjuries.

The second question is, Whether as between the representative of Mrs. Hayes' personal estate, and the defendant Mertins and Mrs. Hayes' heir-at-law, it ought to be performed? It has been objected by the counsel for the heir-at-law, that the agreement is not in writing, nor concluded; and if it was reduced to a certainty, yet there has not been a sufficient part performance. Now it is clear to me that there was a certain agreement, with a variation afterwards from an accident, by which the estate became more valuable; for it does not appear that Mrs. Hayes had the least intention of breaking off the agreement, but insisted only on an advanced price, as it was natural and reasonable for her to do: and it is likewise in evidence, that the defendant Mertins agreed to give more, and that Mrs. Hayes desired him to pay the third sum. There are several ways of part executing an agreement. If possession is delivered, that is a strong evidence of the part execution of an agreement. The statute of frauds and perjuries goes equally against making a mortgage of real estate without being in writing, as against a purchase if not in writing, for as the last can be no lien, neither can the other be a security. Paying of money has been always held in this court as a part performance. It is sworn positively in this case that the money was applied for, and paid absolutely upon the foot of the agreement. As to Mrs. Hayes taking notes of the defendant Mertins instead of the money, the evidence being, that they were given on account of the purchase money, will take off the force of the objection. It is said it must be such an act done as appears to the court would not have been done, unless on account of the agreement; and to be sure this is right. But as to the other objection, that it must be certain at all events that the agreement should be performed even independant of the title, whether it can be made out or not, is carrying it too far, and would hold equally had the agreement been in writing, for whatever the title may be, still Mr. Mertins would have had a lien upon the estate by virtue of the agreement.

If there is a leasehold estate that is mortgaged, and no covenant on the part of the mortgagor that he will procure the lives to be filled up, the mortgagee cannot compel him to do it, but must pay the expence of renewing, and then reimburse himself by adding it to the principal of the mortgage, and it shall carry interest.

Upon the whole I am of opinion that, upon all the circumstances appearing in this case, the agreement entered into between Elizabeth Hayes in her lifetime, and the defendant Mertins for the purchase of the reversion of her estate in Lincolnshire, for the sum of 2,400l. 10s. and for the mortgage of the leasehold estate for lives in Derbyshire, for the sum of 1,600l. ought to be performed, and carried into execution, and do order the same accordingly.[1]

[1] ". . . The question was, whether any decree could be made by reason of the statute; and it was said for the plaintiff that this court had in

WEED *v.* TERRY, 1846, 2 Douglass, Mich., 344, 351.—WHIPPLE, J., said: What acts in part performance of a parol agreement for the sale of lands, will take it out of the operation of the statute of frauds, has been a fruitful source of discussion, both in England and in this country. The adjudged cases on the subject are very numerous, and it has been asserted by eminent persons who have practiced much in courts of equity, that the decisions of some of the courts have tended to defeat the object and purpose for which the statute was passed; that a new door had been opened to fraud and perjury. It is not my purpose to review these decisions, or to vindicate their policy or impolicy. It may be that a rigid adherence to the provisions of the statute would have led to fewer evils than have been entailed upon us, by so great a departure from its terms. The rule as established by the great majority of cases, is, that the delivery of possession, pursuant to an agreement, is such an act of part performance as will avoid the statute. Willis *v.* Stradling, 3 Ves. 378; Boardman *v.* Mostyn, 6 Ves. 467; Gregory *v.* Mighell, 18 Ves. 328; 1 Sudg. on Vend. 116. Per MARCY, in Harris *v.* Knickerbocker,

several cases, where there was no writing, caused the execution of an agreement, as where an agreement was in part executed, as where a tenant had taken a lease, but no writing signed, and possession had been delivered, and the tenant had laid out his money in stock, or where he had laid out money in building, the court hath compelled the making of the lease; and so in the Lord NOTTINGHAM'S time, where the purchase money was paid, and the deeds refused to be sealed, he decreed the sealing of them; and so, if a mortgage refuse to seal a defeazance, he hath been decreed to do it.

"The reason in the first two cases is, because the agreement was in part executed, and in the two last cases there was apparent fraud; but in this case, though the Lord Keeper declared he was fully satisfied that it was intended a trust, yet, there being no writing to declare it, he was not satisfied to do it in opposition to the very letter of the statute unless they could show him some precedents, and so took time to consider." Per Lord Keeper WRIGHT, in Skett *v.* Wetmore, 1705, Freeman 281.

In Gunter *v.* Halsey, 1739, Ambler 586, "a bill was brought for a specific performance of an agreement for sale of lands and houses, which was by parol, but reduced into writing by a person present, but never signed by the parties.

"The defendant insisted on the Statute of Frauds; and there was evidence of facts to prove a part performance.

"Lord Chancellor [HARDWICKE] in this case said the rule for agreements by the statute was very plain, but that since the statute this court has, by construction, laid down some rules by way of exception to it; and will in some cases decree a performance, though the requisites of the statute are not observed.

"As where the agreement is parol, and admitted by the answer, because here it is out of the mischief of the statute, so when there has been material acts done in part performance.

"But the general rule of those cases has been, where the acts have been such as would be a prejudice to the party who has done them, if after that the agreement was to be void.

5 Wend. 693. The general rule, says Fonblanque, is, that the acts must be such as could be done with no other view or design than to perform the agreement, and not such as are merely introductory and ancillary to it. The giving of possession is, therefore, to be considered as an act of part performance. In this case, possession was not only given, but other acts are shown to have been done by the defendants in pursuance of the agreement; such as the selection of an individual to make division of the property, and being present and agreeing to the division when it was actually made. These acts of part performance, taken in connection with the other circumstances, such as expending money upon the premises; the payment of taxes; the subsequent express promise to and execute a deed of that portion of the premises allotted to the complainants, bring the present case clearly within the principles of the English and American decisions on this subject. Under this state of facts, it would operate as a fraud upon the complainants, if the relief prayed for can be successfully resisted. We do not wish to be understood as affirming that part performance of a parol agreement for the sale of land, will, in all cases, entitle a party to appeal to a court of equity to enforce its specific

"And in all those cases where the ground of the decree has been part performance, the terms of the agreement must be certainly proved.

"Then he went into the particular circumstances of this case, and as to certainty of agreement he thought it was not certainly proved, by reason there were queries in the margin, though no proof who made them.

"As to the acts done in performance, they must be such as could be done with no other view or design than to perform the agreement, and said in this case it did not appear but that the acts done by defendant might be done with other views."

"In this case the agreement stands confessed in the answer. The rule seems to carry a necessary conclusion with it, that whatever in conscience affords a title to the plaintiff, it is impossible to exempt the defendant from disclosing in order to enable the plaintiff to obtain relief; but the cases have been uniform in that point only. Where the defendant has pleaded the Statute of Frauds, and has not confessed a written agreement, the court has in no case compelled the defendant to execute it." Per Lord Chancellor THURLOW, in Whitchurch *v.* Bevis, 1789, 2 Bro. C. C. 559, 567.

"It is well settled that if a party sets up part performance to take a parol agreement out of the statute he must show acts equivocally referring to, and resulting from that agreement, such as the party would not have done unless on account of that very agreement, and with a direct view to its performance; and the agreement set up must appear to be the same with the one partly performed. There must be no equivocation or uncertainty in the case. The ground of the interference of the court is not simply that there is proof of the existence of a parol agreement, but that there is fraud in resisting the completion of an agreement partly performed." Per Chancellor KENT, in Phillips *v.* Thompson, 1814, 1 Johns. Ch. 131, 149.

For a learned note, with an elaborate collection of authorities, on the question of exemption of contracts from the operation of the Statute of Frauds, see note (2) to Pym *v.* Blackburn, 1796, 3 Ves. 28, 38.

execution. It must not only appear by unequivocal proof that an agreement was made, such as is stated in the bill, but the acts of part performance must refer to, and result from the agreement so stated. If from the whole case a doubt could exist in respect to either of these facts, a court of equity will refuse to interfere; or, if it should appear that it would be inequitable or unjust to enforce an agreement, a court of equity will withhold its aid, and leave the party to his redress at law. In other words, courts of equity will exercise a sound discretion in granting or refusing a decree for a specific performance; they will apply, with great caution, the principles which have been long established, to the circumstances of each particular case that may come before them; and, while on the one hand, they will sustain the true spirit and object of the statute, they will also see that it is not made the instrument of fraud and perjury.[1]

WILFORD *v.* BEASELEY.

IN CHANCERY, BEFORE LORD CHANCELLOR HARDWICKE, 1747.

[3 *Atkyns* 503.]

A question arose upon the Statute of Frauds and Perjuries, whether a person subscribing a deed as a witness only, which she knew the contents of, could be said to have signed it within the meaning of that statute.

LORD CHANCELLOR. The meaning of the statute is to reduce contracts

[1] See same case with notes in 45 Am. Dec. 257.

"I am not at all clear whether, if the defendant had brought his cross bill to have this argument established, the court would not have done it upon considering this in the light of those cases, where one part of the agreement being performed by one side, it is but common justice it be carried into execution on the other, and the defendant would have had the benefit of it as an agreement.

"The allowing any other construction upon the Statute of Frauds and Perjuries would be to make it a guard and protection to fraud instead of a security against it, as was the design and intention of it." Per Lord Chancellor HARDWICKE in Walker *v.* Walker, 1740, 2 Atk. 98, 100.

"Upon these facts, in our opinion, it was the duty of the court below to enter the decree it did requiring a completion of the performance of the contract by Bigelow. Whether, in view of the requirements of the Statute of Frauds, the memorandum signed by both parties was of itself sufficient to support the bill, is a question we do not think it important to discuss, because, if the memorandum is not enough, the terms of the contract have been otherwise clearly established by the evidence, and there has been full performance by Armes and substantial part performance by Bigelow." Bigelow *v.* Armes, 1882, 108 U. S. 10, 12.

to a certainty, in order to avoid perjury on the one hand, and fraud on the other, and therefore, both in this court and in the courts of common law, where an agreement has been reduced to such a certainty, and the substance of the statute has been complied with in the material part, the forms have never been insisted upon.

The word party in the statute is not to be construed party as to a deed, but person in general, or else what would become of those decrees where signing of letters, by which the party never intended to bind himself, has been held to be a signing within the statute.

There have been cases where a letter written to a man's own agent, and setting forth the terms of an agreement as concluded by him, has been deemed to be a signing within the statute, and agreeable to the provision of it.

Lord Chancellor denied the general doctrine as laid down in Prec. in Chan. 402, Bawdes *v.* Amhurst, though true as applied to that case by Lord COWPER, and said the difference betwixt the two cases was, that the writing there, though all in the father's hand, was only a sketch of an agreement not settled or confirmed by the parties; but here the defendant signed it as a complete agreement, and, as she knew the contents, is to be bound by it in the present case.

BARKWORTH *v.* YOUNG, 1856, 4 Drew. 1, 11. Sir R. T. KINDERSLEY, V. C., said: Upon this several questions arise. First, the defendant objects, that supposing this was in every other respect a sufficient note to memorandum in writing, it was not made till after the marriage, and therefore is not good within the intent of the statute. And the opinion expressed by Sir. W. GRANT in Randall *v.* Morgan, 12 Ves. 67, is relied upon. Sir W. GRANT'S opinion is expressed in the form of a strong doubt, and unquestionably even the doubts of such a judge are entitled to the utmost consideration and deference. But, notwithstanding that doubt, it has been since held by Lord LANGDALE in DeBeil *v.* Thomson, 3 Beav. 469, and by Lord COTTENHAM in the same case on appeal, reported in a note to Hammersley *v.* DeBeil in 12 Cl. & Fin. p. 64, that a written memorandum or note made after the marriage of a parol agreement made before the marriage would be sufficient within the statute; the former referring to Lord HARCOURT'S opinion in Hodgson *v.* Hutchinson, 5 Vin. Abr. 522, pl. 34, and the latter referring not only to that case, but also to Lord HARDWICKE'S decision in Taylor *v.* Beeck, 1 Ves. sen. 297, and to that of Lord MACCLESFIELD in Montacute *v.* Maxwell, 1 Stra. 236. All these opinions must, I think, outweigh Sir W. GRANT'S doubt.

The defendant next objects that, assuming that a proper memorandum or note in writing made after the marriage would be sufficient, this affidavit of the testator is in no sense a note or memorandum of the alleged agreement; that it was not made with any such intent, but only

to rectify a statement made by the present plaintiff as to what the testator had said on the occasion of the marriage; that it was made in the course of a litigation between the testator and the plaintiff, totally unconnected with the contract or promise now alleged by the plaintiff; and that it was merely put upon the files of the Court without having been delivered or sent to the plaintiff or to any other person.

Now to determine this point it is necessary to consider what was the object of the Statute of Frauds, at least of the fourth section. Its object was to prevent the mischief arising from resorting to oral evidence to prove the existence and the terms of an alleged verbal agreement in certain specified cases, and among the rest an agreement made in consideration of marriage, it having been found that in actions and suits to enforce such agreements they were (in the language of the preamble) "commonly endeavoured to be upheld by perjury and subornation of perjury." It is obvious that there can be no ground to apprehend any such mischief in any case in which you have, under the hand of the party sought to be charged, a written statement of the agreement which he made and of all its terms, and for this purpose it can signify nothing what is the nature or character of the document containing such written statement, provided it be signed by the party sought to be charged; whether it was a letter written by that party to the person with whom he contracted or to any other person, or a deed or other legal instrument, or an answer to a bill, or an affidavit in chancery or in bankruptcy or in lunacy. Thus where a verbal agreement was made for the sale of land, a letter written by the vendor or purchaser to his own solicitor or agent stating the terms of the agreement, and not intended for the inspection of the other party, has been held to be a sufficient note or memorandum within the intent of the statute: Rose *v.* Cunningham, 11 Ves. 550; Wilford *v.* Beaseley, 3 Atk. 503, per Lord HARDWICKE. So a letter written by the vendor to his mortgagee: Seagood *v.* Meale, Pre. Cha. 560. In Wilford *v.* Beaseley, 3 Atk. 503, the defendant, previously to the marriage of plaintiff with her daughter, had verbally agreed to give her a marriage portion of £1,000. Articles were executed settling the £1,000. Defendant was not a party to the articles, but signed them as a witness knowing their contents. This was held a sufficient note or memorandum within the intent of the statute. Now in that case the defendant, in attesting the articles, had no intention of giving a note or memorandum in writing. But Lord HARDWICKE said: "The meaning of the statute is to reduce contracts to a certainty, in order to avoid perjury on the one hand and fraud on the other, and, therefore, both in this court and in the courts of common law, where an agreement has been reduced to such a certainty, and the substance of the statute has been complied with in the material part, the forms have never been insisted upon." I may here add, that it is no doubt on the same principle, that if a bill is filed to enforce a verbal agreement, and the defendant by his answer simply admits it without insisting on

the statute by the answer, the court will decree performance, notwithstanding that the defendant, at the hearing, insists on the benefit of the statute, because you have here all that it was the design of the statute to require—a statement of the terms of the agreement in writing signed by the defendants. Indeed, formerly, this court went so far as to hold (though the decisions have been since properly overruled), that if the answer contained an admission of the parol agreement, though accompanied by a protest insisting on the statute, the plaintiffs should have a decree. I think the principle of all these cases is applicable to the present. We have a writing signed by the testator, stating the fact and the terms of the prior parol agreement or promise; and that is what is required by the intent of the statute. Indeed it is impossible not to feel, that there seems even more justice in binding a person by such a statement of the agreement as is contained in this affidavit, which is prepared with all caution and deliberation, and which, in addition to the party's signature, is stamped with the solemnity of his oath, and which was intended to be perused by the party with whom the contract was made, than by a mere letter addressed to her own solicitor or mortgagee, written perhaps hastily and carelessly, and never intended to come to the knowledge of the other party.

I am of opinion that the statement in the affidavit of the testator, set out in paragraph seven of the bill, is a sufficient note or memorandum in writing within the intent of the statute.[1]

[1] For a criticism of this case see *In re* Holland, 1901, 2 Ch. 145; but it was approved in the same case on appeal, 1902, 2 Ch. 360.

"The defendant's letters amount to a clear admission that Rookes did make on his behalf the contract which is described in that correspondence. But the objection relied on is that the note or memorandum of that contract was a note passing between the defendant, the party sought to be charged, and his own agent, and not between the one contracting party and the other. The object of the Statute of Frauds was the prevention of perjury in the setting up of contracts by parol evidence, which is easily fabricated. With this view, it requires the contract to be proved by the production of some note or memorandum in writing. Now, a note or memorandum is equally corroborative, whether it passes between the parties to the contract themselves or between one of them and his own agent. Indeed, one would incline to think that a statement made by the party to his own agent would be the more satisfactory evidence of the two. Then how stand the authorities on the subject? In Leroux *v.* Brown, 12 C. B. 818, E. C. L. R., Vol. 74, 22 L. J., C. P., 1, in support of the position that a letter addressed by the defendant to a third person, containing an admission of a contract with the plaintiff, will be enough to charge the former, Sir G. Honyman refers to Sugden's V. & P., 11th edit., 122, where it is said that 'a note or letter written by the vendor to any third person, containing directions to carry the agreement into execution, will be a sufficient agreement to take a case out of the statute;' and for this the learned author vouches Lord Hardwicke, who, in Welford *v.* Beazely, 3 Atk. 503, says: 'The meaning of the statute is, to reduce contracts

TAYLOR *v.* BEECH.

IN CHANCERY, BEFORE LORD CHANCELLOR HARDWICKE, 1749.

[1 *Vesey Senior* 297.]

Previous to the defendant's marriage, £500, the property of the wife by a former marriage, was agreed to be assigned to trustees for her separate use during coverture: and to be applied after her death, to such uses as she should appoint: and for want of appointment, to her executors and administrators: to carry which agreement into execution, they sent to an agent to prepare the writing; but he being then out of the way they were married before the agent could carry it finally into execution. A proper draft of assignment was afterwards prepared: in which alterations were made by the husband's own hand-writing, who on delivering it to the wife told her he had made no other alteration, than was for her benefit; and suffered her to receive it to her separate use during coverture.

The wife by will gave the £500 to the plaintiffs, who brought this bill for it.

The defendant pleaded the statute of frauds on foundation of the agreement not being reduced into writing, as a good bar to the discovery

to a certainty, in order to avoid perjury on the one hand and fraud on the other; and, therefore, both in this court and the courts of common law, where an agreement has been reduced to such a certainty, and the substance of the statute has been complied with in the material part, the forms have never been insisted on. Hawkins *v.* Holmes, 1 P. Wms. 770. There have been cases where a letter written to a man's own agent, and setting forth the terms of an agreement as concluded by him, has been deemed to be a signing within the statute, and agreeable to the provisions of it.' See Clerk *v.* Wright, 1 Atk. 12. Sir E. SUGDEN goes on to say that 'the point was expressly determined in the year 1719, in the Court of Exchequer. Upon an agreement for an assignment of a lease, the owner sent a letter, specifying the agreement, to a scrivener, with directions to draw an assignment pursuant to the agreement; and Chief Baron BURY, Baron PRICE and Baron PAGE were of opinion that the letter was a writing within the Statute of Frauds.' Smith *v.* Watson, Bunb. 55. These cases, it is true, arose upon the fourth section of the statute, but the analogy holds equally good as to the seventeenth section. In the case referred to by my Brother WILLES, of Bailey *v.* Sweeting, 9 C. B. N. S. 843, E. C. L. R., Vol. 99, 30 L. J., C. P., 150, this court went very fully into the general doctrine, and came to the conclusion that a letter which contained an admission of the bargain, and of all the substantial terms of it, was a sufficient note or memorandum of the contract to satisfy the seventeenth section, notwithstanding the writer repudiated his liability. To satisfy the statute you must have the oral statement of the contract corroborated by an acceptance of part of the goods or a part payment of the price, or you must have some note or

of any parol agreement, as well as to the relief; averring that neither he, nor any one for him, upon or previous to the marriage, reduced it into writing.

LORD CHANCELLOR. There is no color for this plea; which is informal: upon or previous to is no denial; for it is a good agreement, if afterward signed by him. Although the statute of frauds is a protection against the defendant's making a discovery of a parol agreement, and therefore it may be pleaded as well to the discovery as relief, yet that rule extends not to facts subsequent, viz. shewing a part performance; in which the statute cannot be pleaded. See, however, the distinction, Cooth *v.* Jackson, 6 Ves. 39. Although it is true, that in the case of marriage agreements it is otherwise: though it is not mere marriage occasions that, without something else. But here are strong circumstances subsequent to the agreement, which go a great way to take it out of the statute; and if the statute is suffered to be pleaded to the discovery even of a parol agreement in such a case, it would be very mischievous. Let the plea therefore be overruled: but without prejudice to the defendant's insisting on the statute by answer.

But Lord Chancellor afterward ordered that clause without prejudice, etc., to be struck out: saying he did not know that it had been so directed upon a plea of the statute of frauds; although it had on a plea of the statute of limitations.[1]

memorandum in writing of the bargain. If so, the danger of perjury, which the statute was designed to exclude, is abundantly guarded against if there be a written statement of the terms of the contract, signed by the party to be charged, made to an agent. For these reasons I feel bound to hold that the requirements of the statute have been complied with in this case, and consequently that there should be no rule." Per ERLE, C.J., in Gibson *v.* Holland, 1865, L. R. 1 C. P. 1, 5.

"But, assuming the agreement to be within the statute, the appellants say that the acknowledgment of the promise in the testator's will is a sufficient note or memorandum in writing signed by the testator. The respondents say that a will is not a memorandum such as is required by the statute. . . . This is a memorandum amply sufficient to take the case out of the Statute of Frauds if apart from the memorandum it is within it, which I am disposed to think it is not. The appellants, therefore, in my judgment, are entitled to the benefit of the guarantee and to rank as creditors." Per LINDLEY, L.J., in *In re* Hoyle, 1892-1893, 1 Ch. 84, 98.

"Against the authorities which I have been discussing there is the positive decision of KINDERSLEY, V.C., in Barkworth *v.* Young, 4 Drew. 1; also this dictum of TURNER, L. J., in Surcome *v.* Pinniger, 3 D. M. & G. 575: 'But it has been held, in many cases, that if there be a written agreement after marriage in pursuance of a parol agreement before marriage, this takes the case out of the statute.'

"Moreover, there is the opinion of Lord COTTENHAM in his judgment in De Beil *v.* Thomson, when that case was before him as Lord Chancellor, which judgment is set out in the note to Hammersley *v.* De Biel, 12 Cl. & F.

PARKHURST *v.* VAN CORTLANDT.

IN THE COURT OF CHANCERY OF NEW YORK, BEFORE CHANCELLOR KENT, 1814.

[1 *Johnson's Chancery* 273.]

THE CHANCELLOR. This is a suit for specific performance of a contract to sell land.

The defendant, in his answer, denies any such agreement as is charged in the bill, and likewise insists upon the statute of frauds, as a defence against any parol agreement which might be made out.

The plaintiffs rely partly upon a parol agreement, and partly upon an agreement in writing, which is admitted to have been signed by the defendant. It is an agreement, or memorandum, dated the 7th of April, 1797, in which the defendant states that the plaintiffs had applied to him for leave to possess lot No. 4, in the second allotment of the Oriskany patent, and that he had, accordingly, given them leave, and promised them, as soon as he could obtain a release from the heirs of Clark, of their interest in the lot, he would give the plaintiffs the preference, either to purchase or to take a lease for the lot.

1. The first question that properly arises in this case is, whether this memorandum contains, within itself, sufficient evidence of a valid agreement to take the case out of the statute, and to justify a decree for a specific performance.

The memorandum appears to be utterly defective. It ought to have stated the terms of the contract with reasonable certainty, so that the substance of it could be made to appear, and be understood from the writing itself, without having recourse to parol proof. This is the meaning of the statute, and without such the beneficial ends of it would be entirely defeated.

If the memorandum is to be understood as promising to sell or lease to the plaintiffs at their election, yet the terms of such sale, or leasing, are omitted, and it is altogether uncertain to what extent, on what condi-

45. Lord COTTENHAM says: 'I am aware that in Randall *v.* Morgan, 12 Ves. 67, 8 R. R. 289, Sir W. GRANT suggests a doubt, whether a written promise after marriage to perform a parol agreement made before could be enforced; but in Hodgson *v.* Hutcheson, 5 Vin. Abr. 522, pl. 34; Taylor *v.* Beech, 1 Ves. Sen. 297, and Montacute *v.* Maxwell, 1 Eq. C. Abr. 19, pl. 4; Prec. Ch. 526; 1 Str. 236; 1 P. Wms. 618, it was held that such a subsequent written promise would be binding within the statute.'" Per VAUGHAN WILLIAMS, L.J., in *In re* Holland, 1902, 2 Ch. 360, 378.

For cases discussing the application of the statute to antenuptial agreements, see vol. i., p. —

tion, or for what price, the parties meant to contract. Unless the essential terms of the bargain and sale can be ascertained from the writing itself, or by a reference contained in it, to something else, the writing is not a compliance with the statute. The cases to this point are decisive. . . .

It appears to be equally well settled, that, when the agreement is thus defective, it cannot be supplied by parol proof, for that would be at once to open the door to perjury, and to introduce all the mischiefs which the statute of frauds and perjuries was intended to prevent. . . .

I consider, then, that the agreement of April, 1797, is too uncertain and too defective, as to the essential terms of the purchase, to authorize a decree for a specific performance. The court cannot, and ought not, to make bargains for parties, or to determine, in the case of a purchase, what one party ought to give and the other to take; and, in the case of a lease, whether it ought to be for years, or for life or lives, or in fee, and the amount of the rent, and whether payable in money or in produce, and in what periods. All this I must determine, if I undertake to carry this agreement into effect. It is not necessary, here, to insist on another material defect in the agreement, and that is, the want of mutuality; for if the defendant were bound to sell or lease, at the election of the plaintiffs, the plaintiffs were not bound to elect or to take either. It would be difficult to deduce any such obligation from the memorandum; and it seems to be very generally, and very properly, laid down in the books, that a court of equity will never decree performance where the remedy is not mutual, or one party only is bound by the agreement. Armiger *v.* Clark, Bunb. 111; Troughton *v.* Troughton, 1 Ves. 86; Lawrenson *v.* Butler, 1 Schoales & Lefroy 13; Bromley *v.* Jefferies, 2 Vern. 415.

The plaintiffs have gone into parol proof of negotiations and conversations prior to, and at the time of, the date of the agreement, to remove the ambiguity on the face of it, as to the meaning of the preference which was to be given, and also to ascertain, with some convenient certainty, the sense of the parties as to the terms of the purchase or lease. But I apprehend the rule to be too reasonable, and too well settled, to be now disturbed, that when an agreement is reduced to writing, all previous negotiations are resolved into the writing, as being the best evidence of the certainty of the agreement. Every thing before resting in parol, becomes thereby extinguished or discharged. Pasch. 22 Car. I. K. B. cited in 5 Viner, 515 pl. 18; Christmass *v.* Christmass, Trin. 11 G. I. in Ch. cited in 5 Viner, 517, pl. 26; Vandervoort *v.* Col. Ins. Com., 2 Caines, 155; Mumford *v.* McPherson, 1 Johns. Rep. 414. It has been already observed, that parol proof cannot be resorted to, to supply what may be uncertain and defective in the writing. The note or memorandum, of April, 1797, is then to be laid out of the case, as being no compliance with the statute, and as forming, of itself, no ground for a specific performance.

2. But the plaintiffs set up part performance to take the case out of the statute, and allege that this part performance consisted in delivery of possession, and in the beneficial improvements which the defendant encouraged the plaintiffs to make.

In the first place, it is very questionable whether the plaintiffs are to be permitted, even in the case of part performance, to resort to parol proof, in explanation of, or as a substitute for, an existing written agreement. It would be against the principle which has just been stated. A contract cannot rest partly in writing, and partly in parol. The writing is the highest evidence of the agreement, and does away the necessity and the effect of parol evidence. To this purpose it was observed by Lord THURLOW, in Irnham *v.* Child, 1 Bro. 92, that the rule was perfectly clear, that, where there was a deed in writing, it will admit of no contract that is not part of the deed; and that, whether it adds to, or deducts from the deed, it is impossible to introduce it on parol evidence. The point appeared to Lord REDESDALE so repugnant to general principles, that he declared, in Clinan *v.* Cook, that, if there were part performance, he should have had great difficulty in letting in parol proof in aid of a written agreement.

But if the parol proof is to be let in, the same difficulty occurs that arose upon the memorandum, as to the uncertainty of the essential terms of the contract. There is no evidence of any price agreed on in the case of a sale, or of any certain term, or rent, if a lease was to be preferred. And, if the court cannot execute the agreement even when in writing, if the terms of it be uncertain, the same reason and the same authorities apply, when the agreement, resting on parol evidence, is likewise uncertain. It is impossible to decree a specific performance in this case, whether we take the agreement from the writing, or from the parol proof, or from a combined view of both, without determining for the parties, if the plaintiffs elect to buy, the price, the credit, and the times of payment; and, if the plaintiffs elect to lease, the duration of the lease, the amount of rent, and when, where, and in what, payable. This would be going further than any of the cases will warrant. It would be taking from the parties their inherent and valuable right to make their own bargains, and we should appear to have forgotten the express words of the statute, that no contract or sale of lands, or any interest therein, shall be valid, unless the agreement, or some note or memorandum thereof, be in writing, and signed by the party to be charged.

The general language of the books is, that part performance will not take a parol agreement out of the statute, unless the terms of the agreement distinctly appear, or are made out to the satisfaction of the court. Amb. 586; 1 Ves. 221; 2 Schoales & Lefroy 1 and 459; 3 Atk. 503; 6 Ves. 470-1, and the cases already cited. I had occasion lately to consider this very point in the case of Philips *v.* Thompson and others, and it is, undoubtedly, the sound doctrine, though there may be, sometimes, a case or *dictum* which seems to impair it. The ground of

the relief in chancery, is the fraud in permitting a parol agreement to be partly executed, and in leading on a party to expend money in the melioration of the estate, and then to withdraw from the performance of the contract. 1 Ves. 221; 1 Bro. 417; 6 Ves. 27. The courts of equity, in their anxiety to guard the party from the effects of fraud, have been led to some fluctuating decisions on this point of part performance; but the current of cases, both ancient and modern, is pretty uniform and consistent with the principle I have stated, and the tendency of the latter cases is to prefer giving the party compensation in damages, instead of a specific performance. Wherever damages will answer the purpose of indemnity, this alternative is to be preferred, as it will equally satisfy justice, and will be in coincidence with the provisions, and in support of the authority, of the statute. It was the observation of the Master of the Rolls, afterwards Lord ALVANLEY, in the case of Froster *v.* Hale, 3 Ves. 713, that "the court had gone rather too far in permitting part performance, and other circumstances, to take a case out of the statute, part performance may be evidence of some agreement, but of what, must be left to parol proof. The court ought not to have held it evidence of an unknown agreement, but to have had the money laid out repaid. It ought to have been a compensation. It was very right to say the statute should not be an engine of fraud; therefore, compensation would have been very proper."

Other judges have felt and expressed the same sense of the inconvenient extent to which this doctrine of part performance has been carried. Under pretence of part execution, as Lord REDESDALE observed, in Lindsay *v.* Lynch, 2 Schoales & Lefroy, 1, if possession is had in any way whatever, means are frequently found to oblige a court of equity to break through the statute of frauds; and he said it was a common expression at the Irish bar, that it had become a practice to improve gentlemen out of their estates. This same distinguished Chancellor was led to remark, in another case, Harnett *v.* Yielding, 2 Schoales & Lefroy, 549, that decrees for specific performance had been carried to an extent which tended to injustice. The original foundation of these decrees was, that damages at law were not an adequate compensation; and, if damages at law be commensurate with the injury, the court will not interfere. This was the doctrine as early as 1683, soon after the passing of the statute of frauds, in the cases of Dean *v.* Izard, and Hollis *v.* Edwards, 1 Vern. 159. Those were bills for the execution of a parol agreement for a lease, and in confidence of which, the plaintiff had expended large sums on the premises. The statute of frauds was pleaded, and the Lord Keeper said, that the plaintiff, in each case had a clear equity to be restored to the money expended for improvements, and he thought the bill would hold so far as to be restored to the expenditures, and he directed an issue at law, to ascertain the damages.

The uncertainty of the terms of the agreement is, then, of itself, an insuperable objection to the specific execution sought by the bill; and

the compensation for improvements, which can be awarded under the authority of the court, affords to the party an adequate and a more suitable relief. Not only the case last cited, but the reasons and authorities contained in the recent decision, in Philips *v.* Thompson and others, show that the court possesses ample jurisdiction over this question of compensation, and that, though other relief cannot be granted, the bill may be sustained for that purpose. . . .

I shall accordingly correct the decree heretofore pronounced in this case, and shall direct a reference to a master, to take and state an account between the parties; and that, in taking the same, he charge the plaintiffs with the rent, if any, in arrear, and with what shall appear to be a reasonable rent for the time the same was not agreed on by the parties; and that he make to the plaintiffs a reasonable allowance for beneficial and lasting improvements made by them upon the land; (See a similar order, 2 Schoales & Lefroy, 513) and that he take the necessary proofs for that purpose, and report with convenient speed; and that all other questions be, in the meantime, reserved.[1]

[1] "The next question which presents itself, and which is, in fact, the most important one involved in the case, is whether the contract is so clearly and unequivocally proved, established so clearly and free from doubt, as to justify a court of equity in enforcing specific performance. Formerly, it is said, the court would make a contract for the parties, *ex æquo et bono,* out of their transactions, but such is not the rule now. The doctrine which governs courts of equity in cases of this kind, without a dissenting opinion in recent times, is laid down in Story's Equity Jurisprudence, § 764, and the numerous cases there cited. He says: 'But in order to take a case out of the statute, upon the ground of part performance of a parol contract, it is not only indispensable that the acts should be clear and definite, and referable exclusively to the contract, but the contract should also be established by competent proofs, to be clear, definite and unequivocal in all its terms. If the terms are uncertain or ambiguous, or not made out by satisfactory proof, a specific performance will not (as, indeed, upon principle it should not), be decreed. The reason would seem obvious enough, for a court of equity ought not to act upon conjectures, and one of the most important objects of the statute was to present the introduction of loose and indeterminate proofs of what ought to be established by solemn, written contracts.' Story's Eq. Juris. § 764.

"Upon these principles we must ascertain and determine the right of the complainant to a specific performance of the alleged contract under the proof submitted." Per SMITH, J., in Blanchard *v.* McDougal, 1858, 6 Wis. 167, 170. See same case with note in 70 Am. Dec. 458.

"A contract for the sale of standing wood or timber to be cut and severed from the freehold by the vendee, does not convey to him any interest in the land, within the meaning of the 1st section of the statute of frauds, Rev. Sta. c. 74. Such a contract is to be construed as passing an interest in the trees, when they are severed from the freehold, and not any interest in the land. So it was decided in Smith *v.* Surman, 9 Barn. & Cres. 561; [See Lord ABINGER'S remarks, 9 Mees. & Welsh 505, on the decision in this case

In BAILEY & BOGERT *v.* OGDENS, 1808, 3 Johns. 399, 404, 418. The memorandum was as follows: "Sold Huguet for J. Ogden & Co. notes with approved indorser, boxes white, do. brown Havanna sugars, at 12½ for brown, and 16¼ for white, payable at 60 and 90 days; debenture we will receive in part payment."

KENT, Ch. J. delivered the opinion of the court. This cause depends upon the decision of these two general questions:

1. Was there a note or memorandum in writing, binding upon the defendants, within the meaning of the statute of frauds? If not, then,

2. Was there a delivery of the sugars, so as to change the property, and throw the risk of the subsequent loss upon the defendants?

of Smith *v.* Surman]; in Bostwick *v.* Leach, 3 Day, 484; in Erskine *v.* Plummer, 7 Greenl. 447; and in Whitmarsh *v.* Walker, 1 Met. 313. The same principle is laid down in many other cases referred to in Chit. Con. 5th Am. ed. 300-302, and in Greenleaf on Eq. § 271 and note." Per WILDE, J., in Claflin *v.* Carpenter, 1842, 4 Met. 580, 583.

See to the same effect the elaborate and exhaustive opinion of BUSKIRK, J., in Owens *v.* Lewis, 1874, 46 Ind. 488.

"The evidence, at the trial, was of a contract of sale, from the plaintiff to the defendant, of the grass growing on the said lot, which grass was to be and might have been cut and carried away by the defendant, but which he omitted to cut and carry away. . . . The contract of the parties was an executory contract of sale to be completed by the defendant's severing the grass from the land. Until severed the grass was not personalty, not goods or chattels, but was part of the realty, and remained the property of the plaintiff. Claflin *v.* Carpenter, 4 Met. 582, 583; Lewis *v.* Culbertson, 11 S. & R. 48; Waddington *v.* Bristow, 2 Bro. & Pul. 455, by HEATH, J.; Crosby *v.* Wadsworth, 6 East. 610, by Lord ELLENBOROUGH; Evans *v.* Roberts, 5 B. & C. 832, by BAYLEY, J.; Whitmarsh *v.* Walker, 1 Met. 315, by WILDE, J.; Miller *v.* Baker, 1 Met. 33, by DEWEY, J." Per METCALF, J., in Stearns *v.* Washburn, 1856, 7 Gray, 187, 188.

"In Taylor's recent book on the Law of Evidence, 2d vol., sec. 952, the following propositions are submitted: 1st. A contract for the purchase of fruits of the earth, ripe, though not yet gathered, is not a contract for any interest in lands, though the vendee is to enter and gather them. 2nd. A sale of any growing produce of the earth, reared annually by labor and expense, and in actual existence, at the time of the contract, as for instance a growing crop of corn, hops, potatoes or turnips, is not within the 4th section, though the purchaser is to harvest or dig them. 3rd. An agreement respecting the sale of a growing crop of fruit, or grass, or of standing underwood, growing poles or timber, is within the 4th section, and a written contract of sale cannot be dispensed with.

"However sound his 1st and 2nd propositions, we think his 3rd is to be taken with some qualification—and that a growing crop of peaches or other fruit, requiring periodical expense, industry and attention, in its yield and production, may be well classed as *fructus industriales* and not subject to the 4th section of the statute." Per STEWART, J., in Purner *v.* Piercy, 1874, 40 Md. 212, 223. See same case with note in 17 Am. Rep. 591.

1st. The only memoranda which were made relative to the transaction, were, an entry of the sale of the sugars, made by one of the plaintiffs in their memorandum book, immediately after the alleged sale, and the minute made with the pencil of Huguet, in his pocket memorandum book. The entry of the plaintiffs, made and retained by them, was not binding upon the defendants, because the statute requires the note or memorandum to be signed by the party to be charged. The numerous cases admitting an agreement to be valid within the statute, if signed by one party only, are all of them cases in which the agreement was signed by the party against whom the performance was sought. Some of the cases arose under the 4th, and others under the 17th section of the English statute, but the words are, in this respect, similar, and require the same construction. 2 Cha. Ca. 164; 1 Powell on Contracts, 286; 5 Viner, 527, pl. 17; 1 Vesey, 82; 2 Bro. C. C. 162; 3 Atk. 503; 6 East, 307; 7 Vesey, jun. 265; 9 Vesey, jun. 234, 351; 1 Esp. Cas. 190; Ballow *v.* Walker, in this court, Jan. Term, 1802; 2 Caines 120. It has, however, been said, that there would be a want of mutuality, if the plaintiffs in this case were bound by their entry, and the defendants should not be. The same difficulty has occurred in other cases, and Lord REDESDALE felt it so strongly, that he observed, Lawrenson *v.* Butler, 1 Schoales and Lefroy, 20, that to enforce every agreement signed by one party only, against such party, would be to make the statute really a statute of frauds, and that there was no late case in which one party only was bound by the agreement, where equity had decreed performance, though he admitted the import of the statute to be, that no agrement should be in force, but when signed by the party to be charged. He further intimated, that as no man signed an agreement but under a supposition that the other party was bound, as well as himself, if the other party was not bound, he signed it under a mistake, which might be a ground for relief in equity. Whether the plaintiffs, in the present case, were bound at law by their memorandum, or if bound, whether they might have relief in equity, are questions not before us, and concerning which we are not now to inquire. It is sufficient to say, that the defendants were not bound by any note or memorandum in writing of the contract, unless the same was signed by them, or their authorized agent. Huguet was in this instance their agent to make the purchase, and any memorandum made by him respecting the purchase, would operate as a memorandum made by the defendants. But the memorandum which he made was too vague and indefinite to be a compliance with the statute. The form of the memorandum cannot be material, but it must state the contract with reasonable certainty, so that the substance of it can be made to appear, and be understood from the writing itself, without having recourse to parol proof. This is the meaning and substance of the statute, and without which, the beneficial ends of it would be entirely defeated. Prec. in Cha. 560; 3 Atk. 503; 1 Vesey, jun. 333. The memorandum of Huguet is absolutely unintelligible. It has not the essentials of the contract, or

memorandum of a contract. No person can ascertain from it which of the parties was seller, and which was buyer, nor whether there was any actual sale between them, nor what specific article was the object of the sale, or in what quantity, or what was the price. A memorandum much more intelligible than this, and defective only in one essential point, capable of full explanation by a witness, was lately rejected by the court of C. B. in England, on the same ground. Champion *v.* Plummer, 1 Bos. & Pul. New Rep. 252.

There was then no note or memorandum in writing which took the present contract out of the statute of frauds, as far, at least, as it respected the defendants.[1]

ANONYMOUS.

IN CHANCERY, BEFORE SIR HARBOTTLE GRIMSTONE, M.R., 1667.

[*Freeman* 128.]

Parol agreement with 20s. paid[2] for the sale of a house was decreed without further execution proved; and the Master of the Rolls said, he should have demurred on the bill,[3] but having now proceeded to proof, he would decree it, and did.

[1] "This is regarded as a leading case on the Statute of Frauds, and has been frequently cited in the New York and other courts. In New York it is cited in Justice *v.* Lang, 42 N. Y. 503; Blanchard *v.* Trim, 38 Id. 227; Dykers *v.* Townsend, 24 Id. 59; Shindler *v.* Houston, 1 Id. 272; Calkins *v.* Falk, 39 Barb. 622; First Bap. Church *v.* Bigelow, 16 Wend. 31; Outwater *v.* Dodge, 6 Id. 401; Peltier *v.* Collins, 3 Id. 465; Abeel *v.* Radcliffe, 13 Johns. 301; Fisher *v.* Fields, 10 Id. 501. See, citing it elsewhere, Cobb *v.* Haskell, 14 Me. 306; Crooker *v.* Appleton, 25 Id. 135; O'Donnell *v.* Leeman, 43 Id. 160; Hawkins *v.* Chace, 19 Pick. 504; Winslow *v.* Winslow, 24 Pa. St. 16; Blair *v.* Snodgrass 1 Sneed 25; Laird *v.* Boyle, 2 Wis. 434." Note to the principal case, in 3 Am. Dec. 515.

See notes in 17 Am. Dec. 58; 32 Am. Dec. 129; 66 Am. Dec. 405; 90 Am. Dec. 708.

[2] It must be recollected that this decree appears to have been made (though the date is but loosely fixed in the text) nine years before the Statute of Frauds was enacted; since that statute mere payment of money is not such a part performance as will take an agreement touching lands out of the statute. The reasons are given in Clinan *v.* Cooke, 1 Sch. and Lef. 40, where the leading case of Seagood *v.* Meale, Prec. in Cha. 560, is cited, to which add Alley *v.* Deschamps, 13 Ves. 229.—Reporter's Note.

[3] But see Cook *v.* Jackson, 6 Ves. 17, that the benefit of the statute may be had at the hearing.—Reporter's note.

ALSOPP *v.* PATTEN.

IN CHANCERY, BEFORE LORD CHANCELLOR JEFFREYS, 1687.

[1 *Vernon* 472.]

There are two joint lessees of a building lease; the one agrees to sell his moiety to the other by parol for four guineas, and accepts a pair of compasses in hand to bind the bargain; the bill is to have a specific performance of the agreement.

The defendant pleads the statute of frauds and perjuries; the agreement being in some part executed, the court ordered the defendant to answer, and saved the benefit of the plea to the hearing.

LORD PENGALL *v.* ROSS.

IN CHANCERY, BEFORE LORD CHANCELLOR COWPER, 1709.

[2 *Equity Cases Abridgment* 46, *pl.* 12.]

A. agreed with B. to make him a lease for 21 years of lands, rendering rent, B. paying A. £150 fine. B. paid £100 in part to A.'s agent, which A. knew of, and ordered his agent to prepare the lease; but before it was executed A. repented and refused to grant the lease. B. having paid £100 earnest, exhibited his bill for a specifick performance. L. Chan. The payment of this £100 is not such a performance of the agreement on one part as to decree an execution on the other; for the statute of frauds makes one sort of contracts, viz. personal contracts good if any money is paid in earnest. Now that statute says, that no agreement concerning lands shall be good except it is reduced into writing; and therefore a parol agreement, as it is in this case, cannot be good within the statute by giving money in earnest; for there must be something more than a bare payment of money on the one part to induce the court to decree a performance on the other part, either by putting it out of the party's power to undo the thing, or where it would be a prejudice to the party performing his part, as beginning to build, or letting the other into possession, etc., in such case where the agreement hath proceeded so far on one part, the statute never intended to restrain this court from decreeing a performance of the other. But he would not put the plaintiff to his action to recover his £100, wherefore decreed it to be refunded.

SEAGOOD *v.* MEALE AND LEONARD.

IN CHANCERY, 1721.

[*Precedents in Chancery* 560.]

The bill was brought for a specific execution of an agreement for the purchase of nine houses, which were in mortgage to the defendant Leonard for £150. The defendant Meale, the owner of the houses, agreed to sell them to the plaintiff for such a sum of money, and the plaintiff paid him a guinea in part, and sent a note to this effect; Mr. Leonard, pray deliver my writings to the bearer, I having agreed to dispose of them; am your humble servant. The defendant Leonard would not part with them unless all his money were paid him down, and after bought the houses of Meale himself; and thereupon the plaintiff brought this bill.

The defendant by his answer insisted upon the statute of frauds and perjuries; and the question was, whether the letter or note would bring it out of the statute? for as to the payment of the guinea, that was agreed clearly of no consequence, in case of an agreement touching lands or houses, the payment of money being only binding in cases of contracts for goods.

And it was decreed that it would not, for it ought to be such an agreement as specified the terms thereof, which this did not, though it was signed by the party; for this mentioned not the sum that was to be paid, nor the number of houses that were to be disposed of, whether all or some, or how many, nor to whom they were to be disposed of, neither did this letter mention whether they were to be disposed of by way of sale or assignment of lease, and so all the danger of perjury, which the statute was to provide against, would be let in to ascertain this agreement.

This case differs from a case which was cited, of a letter wrote by one, promising to give such a fortune with his daughter to one who should marry her. A man who marries on the encouragement of this letter, shall recover, because the agreement is executed on his part as far as it can be, can never be undone after.

So where a man, on promise of a lease to be made to him, lays out money on improvements, he shall oblige the lessor afterwards to execute the lease, because it was executed on the part of the lessee; besides, that the lessor shall not take advantage of his own fraud to run away with the improvements made by another; but if no such expense had been on the lessee's part, a bare promise of the lease, though accompanied with possession, as where a lessee by parol agreed to take a lease for a term for years certain, and continued in possession on the credit thereof, yet there being no writing to make out this agreement, it is directly within the statute, and so was held by the Master of the Rolls, in the case of Smith and Turner, Mich. last, at the Rolls; and in the principal case the bill was dismissed, but without costs, for some fraud in the defendants to defeat the plaintiff of his bargain.

CLINAN *v.* COOKE.

IN CHANCERY, IRELAND, BEFORE LORD CHANCELLOR REDESDALE, 1802.

[1 *Schoales & Lefroy* 22.]

The bill was filed by two persons named Clinan, against Cooke and Cahill; and prayed a specific performance of an agreement for a lease of three lives of the lands mentioned, entered into between the Clinans and Cooke, and in case it should appear by Mr. Cooke's answer that he had put it out of his power to make a lease pursuant to the agreement, the bill prayed that he should be decreed to make compensation to the plaintiffs.

The articles signed and sealed was made between the plaintiff and one Meagher as the result of an advertisement inserted in the public papers by the defendant Cooke, which advertisement stated "Application to be made to William Cooke, Esq., or Edmund Meagher." The memorandum of agreement acknowledged the receipt of part payment, which the defendant Cooke admitted he had received. Cooke refused to execute the lease as per the memorandum and relet the premises to the defendants Cahill, in whose possession they were at the time of the plaintiff's agreement, and who had notice of the plaintiff's contract. The bill alleged that Meagher was Cooke's general agent, but this was not proved.

In his answer the defendant Cooke denied the agency of Meagher, admitted the receipt of the money from the plaintiff, but alleged he received it pending an amicable arrangement with the Cahills as to the plaintiff's lease, in which event only was the plaintiff to have the lease.

It appeared that shortly before the bill was filed, the defendant had tendered to the plaintiff the money the plaintiff had advanced.

Parol evidence was offered also, that the defendant acknowledged Meagher as his agent and said he would abide by his bargains, and referred persons to him on matters respecting the lands.

LORD CHANCELLOR. Under these circumstances if it be not possible to make this a case of part performance it is impossible to make such a decree as is sought by the plaintiff.[1]

I should have great difficulty if there were evidence of a part performance. I must have directed a further inquiry, for the party has not suggested by his bill that the agreement was for three lives, or for any specific time, and the case stands, both on the pleadings and evidence, imperfect on that head. As to the fact that leases were tendered to Mr. Cooke and what passed on that occasion, it is not said that he had read them, or that he knew the contents; and at most it amounts only to

[1] Only so much of the opinion is given as relates to this question.

evidence of this, that if he found the leases not improper, and that the Cahills would give up possession, he agreed to execute them.

But I think this is not a case in which part performance appears; the only circumstance that can be considered as amounting to part performance is the payment of the sum of fifty guineas to Mr. Cooke. Now, it has always been considered that the payment of money is not to be deemed part performance to take a case out of the statute. Seagood *v.* Meale, Prec. Chan. 560, is the leading case on that subject; there a guinea was paid by way of earnest; and it was agreed clearly that that was of no consequence, in case of an agreement touching lands; now, if payment of fifty guineas would take a case out of the statute, payment of one guinea would do so equally; for it is paid in both cases as part payment, and no distinction can be drawn; but the great reason, as I think, why part payment does not take such agreement out of the statute is, that the statute has said, Sect. 13, that in another case, viz., with respect to goods, it shall operate as part performance. And the courts have therefore considered this as excluding agreements for lands, because it is to be inferred that when the legislature said it should bind in the case of goods, and were silent as to the case of lands, they meant that it should not bind in the case of lands.

But I take another reason also to prevail on the subject. I take it that nothing is considered as a part performance which does not put the party into a situation that is a fraud upon him, unless the agreement is performed; for instance, if upon a parol agreement a man is admitted into possession, he is made a trespasser, and is liable to answer as a trespasser if there be no agreement. This is put strongly in the case of Foxcraft *v.* Lister; Cited, Prec. Ch. 519; 2 Vern. 456; vid. Colles's Parl. C. 108. There the party was let into possession on a parol agreement, and it was said that he ought not to be liable as a wrongdoer, and to account for the rents and profits, and why? because he entered in pursuance of an agreement. Then for the purpose of defending himself against a charge which might otherwise be made against him, such evidence was admissible, and if it was admissible for such purpose, there is no reason why it should not be admissible throughout. That, I apprehend, is the ground on which courts of equity have proceeded, in permitting part performance of an agreement to be a ground for avoiding the statute; and I take it therefore that nothing is to be considered as part performance which is not of that nature. Payment of money is not part performance, for it may be repaid: and then the parties will be just as they were before, especially if repaid with interest. It does not put a man who has parted with his money into the situation of a man against whom an action may be brought; for in the case of Foxcraft *v.* Lister, which first led the way, if the party could not have produced in evidence the parol agreement, he might have been liable in damages to an immense extent.

On this ground therefore I think this is not a case in which I can consider that there is a part performance to warrant any decreeing per-

formance of an agreement, the terms of which are left thus imperfect, and must be supplied by parol evidence, which would be contrary to the statute; there is no sufficient ground to consider this case out of the statute, and I am of opinion that the bill must be dismissed.[1]

TOWNSEND *v.* HOUSTON.

IN THE COURT OF ERRORS AND APPEALS OF DELAWARE, 1835.

[1 *Harrington* (*Delaware*) 532.]

One Thomas Townsend died, seised of certain lands, which were appraised in the orphan's court, and stood for acceptance. It was agreed between Barkley Townsend and Robert Houston that they should join in the acceptance, Barkley to sell and convey to Houston a half interest in the lands, to be paid for, part in cash, by instalments, and part by meeting certain debts of Thomas Townsend, and by Houston transferring to Barkley a half interest in a scow. Part of the cash payments were made in pursuance of this contract, as the receipts therefor clearly established. Houston alleged a transfer of the interest in the scow, a tender of the balance of the purchase money, and a demand for a conveyance of title. This being refused, he prays specific performance of the agreement.

The CHANCELLOR [JOHNS, JR.] assigned the reasons for his decree at length.

After stating the case as before, pp. 325, etc. he proceeds:—The decision of this case appears to me to depend on that of the two questions. First: Whether there has been a part performance. Second: If there has, then whether the terms of the parol contract as set forth in the bill are clearly proved. It is now settled, that equity does decide upon equitable grounds in contradiction to the positive enactment of the Statute of Frauds; and in cases of part performance, will admit parol testimony to prove the terms of a parol contract, relative to land. Hovenden Tit. Spec. Per. 1, 2. The ground of equitable interposition, is the prevention of fraud: Vide Foxcraft *v.* Lister, Colles Parl. Ca. 108; Jeremy's Eq. Treatise, 437; 2 Atk. 100; 1 Br. Ch. Ca. 417; 1 Swanst. 181; 7 Ves. 341; 3 Ves. 39-40 and note; Parkhurst *v.* Vancourtland, 14 Johns. Rep. on Appeal. Whether payment of part of the purchase money is such a part performance as takes the case out of the statute, appears to be an unsettled point and the decisons are contradictory. 1 Madd. 379; Sugden Ven. 81 to 85. The early decisions upon the subject are, Lord Fengal

[1] For collection of cases in accord see 27 Am. Dec. 745; see also notes in 12 Am. Dec. 120; 61 Am. Dec. 745.

v. Ross, 2 Eq. Ca. Ab. 46; Seagood *v.* Meale, Prec. in Ch. 560; Luke *v.* Morris, 2 Ch. Ca. 135; these are generally cited as authorities to the point that it will not, but I would remark with respect to them, that they are adverted to in subsequent decisions as cases in which only a small sum was paid as earnest; and in 3 Atk. 1; 3 Ves. 37; 4 Ves. 720, it is held that part payment of the purchase money does take the case out of the statute upon the principle of part performance. These decisions have been objected to as extra judicial by SUGDEN and nothing more than dicta; he refers to one made by Lord REDESDALE as conclusive; 1 Sch. & Lef. 41. Upon looking into this case it appears to me, the contract was in writing, "the sum paid was in the agreement stated to be a deposit, and interest to be paid, if possession not delivered;" the plaintiff seeking a specific performance of this written contract, which was under seal, attempted to supply by parol proof one of the terms alleged to have been omitted. It is true in this case Lord REDESDALE does take up the question whether part payment is part performance; and reasoning upon the case before him and its circumstances concludes therefrom and also from the peculiar phraseology of the English Statute of Frauds, that part payment of purchase money does not take the case out of the Statute of Frauds; for he says, the great reason, as I think why part payment does not take such agreements out of the statute is, that the statute has said that in another case, viz: with respect to goods, it shall operate as part performance and the courts have therefore considered this as excluding agreements for lands, because it is to be inferred, that when the legislature said it should bind in the case of goods and were silent as to the case of lands, they meant that it should not bind in the case of lands. As this distinction does not exist in the act of assembly about contracts and assumptions, which is the act relied on by the defendant in this case, it may be questioned whether Lord REDESDALE's opinion can have any influence, especially as his reason does not apply.

So far as I have been able to trace the question in the American decisions upon the point of part payment; they accord with decisions and dicta of Lords HARDWICKE and ROSSLYN. In the case of Wetmore *v.* White, 2 Caine's Ca. in Error; New York, THOMPSON, J., in delivering the opinion of the court, p. 109, says expressly, payment of the consideration money had always been held as a part performance. Judge REEVE under the title, "Powers of Chancery," in his Treatise on Dom. Relations, has, after stating the conflicting decisions on this point, remarked in his peculiar manner, "that if it be fraud to receive another's money on the footing of a parol agreement, and then to refuse the fulfilment of the agreement, then the cases in Prec. in Ch. Eq. Ca. Ab. and Sch. & Lefroy, are correct, if the governing principle of the interference of chancery was to prevent fraud; but if it be fraud so to do, then they are incorrect and the cases in Vern., 3 Atk. and 4 Ves. are correct, which proceed on the ground that the prevention of fraud was the reason why they were supposed not to be within the statute." Justice WASHINGTON, in the

case of Thompson *v.* Tod, 1 Peters. Cir. Ct. Rep. 388, says, "although it should be admitted, that under all the circumstances of this case, payment of a part of the purchase money will amount to a part performance, still it should appear beyond all reasonable doubt, that the payment was understood by the parties to have been made and intended. . . ."

From the investigation of the several cases, I came to the conclusion that there may be cases in which payment of the whole or part of the purchase money will amount to performance of a parol contract concerning lands; and whenever the non-performance on the part of the vendor after receiving the purchase money or a part thereof would put the party into a situation that is a fraud upon him, unless the agreement is performed, the court upon the principle of preventing fraud should decree a specific performance; provided the terms of the agreement can be satisfactorily ascertained, that is, the agreement as set forth in the bill. The act relied on as part performance should be such as would not have been done independent of some contract or agreement relative to land; because as you are from the act performed to infer a contract, it must therefore be an act of that description, which will not admit any other inference. I would further remark, that the act must to a certain extent be a joint act, or such as clearly indicates mutual assent; thus entering into the possession of land as owner and with the consent of the vendor, has uniformily been considered and admitted to be part performance, and being evidence per se of an agreement for and concerning the land, the party seeking specific performance, is permitted, by parol, to prove the terms. This act of the vendee in entering upon the land and taking possession thereof as owner, with the assent of the vendor, is considered as in execution of an agreement and therefore a part performance; but acts which are only preparatory such as giving directions for conveyances, taking a view of the estate or putting a deed into the hands of a solicitor to prepare a conveyance, are not considered part performance. Clerk *v.* Wright, 1 Atk. 12; 6 Bro. Par. Ca. 45; 3 Bro. Ch. C. 400; 1 Mad. 381. So likewise where there was a parol agreement for a compromise and a division of the estate by arbitration, acts done by the arbitrators towards the execution of their duty, such as surveying, etc., were not considered as acts of part performance, 6 Ves. 41. And where there was a parol agreement for the purchase of a lease, and that upon the plaintiff procuring a release of right from a stranger, the defendant would convey, and the plaintiff procured the release for a valuable consideration, this was held not to be a part performance entitling the party to a specific performance, 2 Cox, 271. These cases and particularly the last clearly evince the principle which is essential to constitute an act a part performance; the thing done must be, as before stated, in execution of the contract, and not as preparatory or as inducement. See Gevins *v.* Calder, 2 Des. 190. Hence has arisen the difficulty with respect to the payment of money, not being such an act as of itself is conclusive, for it may have been made for a purpose different from that

alleged and if the party paying can by parol prove the fact of payment and the object, then it is apparent the door is open to perjury and fraud, and the statute would be rendered useless and its provisions defeated. This has no doubt given rise to the opinion that payment of money either in part by way of earnest or in full for the purchase is not a part performance; if the fact is to be established by parol, then I should consider the opinion to be well founded, but if the fact of payment, is connected with the concurrent act of the vendor receiving and appropriating the money paid as purchase money, and this appears either by the defendant in his answer confessing the receipt of the money for that purpose as charged in the bill, or if denied it be proved upon him by writing, as by letter under his hand or other written evidence; or if the defendant confesses the receipt of the money, but says he borrowed it from plaintiff and had it not in execution of the agreement, then if the plaintiff prove the receipt of the money by the defendant for the purpose in the bill by some written agreement; in all such cases and upon every principle it seems to me such a fact thus appearing would be conclusive evidence of an existing agreement of which it was part performance and which the defendant having carried part into execution should be compelled specifically to perform the whole. . . .

It being the settled rule of the court of chancery that where a contract relating to an interest in lands has been executed by one party, or carried partly into execution, it may be proved by parol evidence and specific performance decreed, in order that one side may not take advantage of the statute, to be guilty of fraud. 1 Ves. 221, 297; 2 Johns. Rep. 221, 573, 587; 1 Serg. & Rawl. 80; 5 Day 16; Parkhurst *v.* Vancourtlandt, 14 Johns. Rep. on appeal 15. And from the circumstances of this case as I was of opinion that the part payment of the purchase money is a part performance of the contract set forth in the bill, the next consideration was whether that contract was made out by clear and satisfactory proof.[1]

[1] The Chancellor delivered the same opinion on the hearing below in chancery. See 1 Delaware Ch. 416, where the facts are set out in detail.

"A parol agreement to lease land, and buildings to be erected thereon, for ten years, is a contract to convey an interest in lands, and within the statute of frauds. G. L. c. 220, s. 14; c. 1, s. 20; c. 135, ss. 4, 12; Moore *v.* Ross, 11 N. H. 547, 552; Whitney *v.* Swett, 22 N. H. 10; Crosby *v.* Wadsworth, 6 East. 602. A parol contract for the purchase of an interest in land is not taken out of the statute of frauds by part payment. Lane *v.* Shackford, 5 N. H. 133; Ayer *v.* Hawkes, 11 N. H. 148; Ham *v.* Goodrich, 37 N. H. 185; Emery *v.* Smith, 46 N. H. 151, 155; Luey *v.* Bundy, 9 N. H. 298; Folsom *v.* Company, 9 N. H. 355; Crawford *v.* Parsons, 18 N. H. 293; Kingsley *v.* Holbrook, 45 N. H. 313; Howe *v.* Batchelder, 49 N. H. 204." Per BINGHAM, J., in Webster *v.* Blodgett, 1879, 59 N. H. 120.

BUTCHER *v.* STAPELY AND BUTCHER.

IN CHANCERY, BEFORE LORD CHANCELLOR JEFFERIES,[1] 1686.

[1 *Vernon* 363.]

The defendant Butcher being seized of the lands in question, which he had mortgaged to one Colstock for £400, agreed with the plaintiff to sell the same to him for £750. A short note was drawn up of the agreement, but not signed by either party.[2]

Soon after this agreement the plaintiff puts in his cattle and makes encroachment on the defendant Butcher's other lands; thereupon the defendant to prevent differences desires the plaintiff to repeal the bargain, which he refusing, the defendant told him he should not have the bargain, and advised him not to procure any moneys to pay for it, and drove the plaintiff's cattle off the ground, and soon after sold the lands to the defendant Stapely for £740, and the 3d February, 1682, sealed articles for that purpose, and a bond of £1,000 to perform the same. The 26th March, 1683, the plaintiff tendered his purchase money and writings to seal, which the defendant refused, and the 28th of the same month Stapely paid Butcher £240 and took a conveyance of the estate free from incumbrances, except a mortgage; and in June after paid off the mortgage, and took an assignment of it to a friend of his own.

The bill was to have the bargain and agreement between the plaintiff and defendant Butcher decreed, and charged Stapely with notice of that agreement before his purchase, which Stapely and Butcher denied by answer; nor was there any direct proof of notice, save that some neighbors in discourse did say, they had heard the defendant Butcher had sold the estate to the plaintiff.

For the defendant Stapely it was insisted, that there was no sufficient proof of notice of the plaintiff's agreement, and that if there was notice, yet the agreement was not perfect nor binding by the act against Frauds and Perjuries, it not being signed.

The LORD CHANCELLOR declared that inasmuch as possession was deliv-

[1] Of JEFFERIES as a man and politician nothing can be said to give him a character. As a criminal judge he is said to be the worst that ever disgraced the bench. "In civil cases, however, 'when he was in temper and matters indifferent came before him, he became his seat of justice better than any other' Roger North 'ever saw in his place.' Life of Lord Speaker GUILFORD, p. 219. Speaker ONSLOW, too, records, on the authority of Sir JOSEPH JEKYLL, that he 'had great parts, and made a great Chancellor in the business of that court. In mere private matters he was thought an able and upright judge wherever he sat.' Burnet, Hist. of his own Time, ii. 400 n." Article Jefferies, Dictionary Nat. Biography.

[2] The agreement has been omitted.

ered according to the agreement, he took the bargain to be executed, and that Stapely had notice of it, and that it was a contrivance between the defendants to avoid the bargain; and therefore decreed the defendant Stapely's bargain to be set aside, and that Stapely should execute a conveyance to the plaintiff upon payment of £700 and interest, and the defendant Stapely to procure a conveyance from his trustee the assignee of the mortgage.

KINE *v.* BALFE.

IN CHANCERY, BEFORE LORD CHANCELLOR MANNERS, 1813.

[2 *Ball and Beatty* 343.]

The LORD CHANCELLOR. This Suit, unlike the Generality of Cases upon this Subject, is instituted by the Landlord to compel his Tenant specifically to perform his Agreement, by taking a Lease for twenty-one Years, or three Lives, whichever should last the longest. And it is resisted upon two Grounds.[1]

The second Ground, on which the Defendant relies, is, the Statute of Frauds (7 W. 3, C. 12), which provides that no Action shall be brought upon any Contract respecting any Interest in Land, unless the same, or a Memorandum thereof, be reduced into Writing, and signed by the Party sought to be charged therewith, or by some Person duly authorized; and he insists, that this Agreement not being so signed, the Execution of it cannot be enforced against him. That certainly is the Provision of the Statute, and it is also true, that this Agreement has not been signed by the Defendant, or an authorized Agent; but it is equally true, that this Court has excepted out of the Statute parol Agreements, which have not rested on Agreement only, but have been in Part performed.

In this Case, the Part-performance, relied upon by the Plaintiff, is the Possession taken by the Defendant, and the Rent paid pursuant to the Terms of the Contract. Now, whether Possession be an unequivocal Act, amounting to a Part-performance, must depend upon the Transaction itself. If it be distinctly referrible to the Contract alleged in the Pleadings, I think no Case has denied that it is a Part-performance; the Defendant is protected from any Liability as a Trespasser, and the Plaintiff disabled from dealing with any other Person for the Farm.

The Circumstances attending the taking of Possession of this Case are very peculiar. Gunning, by his Depositions states, that at the Instance of the Plaintiff and Defendant, he drew up the Memorandum of the Agreement; that the Plaintiff signed it, and that the Defendant immediately took it up, carried it off, went into Possession, and has ever since

[1] The discussion of the first point is omitted.

paid Rent according to the Terms of the Agreement. How is it possible to refer this Possession to any other Title, but this Agreement? and, as I before observed, what is the Situation in which the Plaintiff is placed by this Conduct of the Defendant? The Defendant could at any Time enforce this Agreement against the Plaintiff; he would be protected by this Court against an Ejectment, and from being treated as a Trespasser; and the Plaintiff was by the Contract, and the Acts of the Defendant, disabled from dealing with any one else for the Land. Is not this then an Act substantially in Part performance of the Contract? And if so, how can this Case be distinguished from all the Authorities in the Books, which state it to be the Law of this Court, specifically to execute a contract, even should it rest in Parol, when it has been substantially in Part performed. If it were an Agreement, not signed by the Party to be charged, or a mere parol Agreement, which the Defendant admitted by his Answer, but relied on the Statute, and that nothing had been done upon it, I admit this Court could not carry it into Execution; but here the Parties have gone farther; and the Acts of the Defendant, with the Concurrence of the Plaintiff, in my Opinion, take the Case out of the Statute.

These observations are peculiarly applicable to this Country, where scarcely an occupying Tenant is to be found who does not hold his Land under a Lease.

A specific Performance was decreed, pursuant to the Prayer of the Bill.

JOHNSTON *v.* GLANCY, 1835, 4 Blackf. (Ind.) 94, 97.—STEVENS, J., said:— . . . We now come to the main question respecting the statute of frauds. We here meet with objections that are not so easily disposed of. The importance of the questions raised is acknowledged, and the arguments of the defendants' counsel have been duly weighed and considered.

The statute of frauds, among other things, enacts: That all leases, estates, interests of freehold or terms of years, or any uncertain interest of, in or out of, any messuages, lands, tenements, or hereditaments made or created by livery and seisin only, or by parol, and not put in writing and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall be only leases or estates at will, &c., except certain leases enumerated, and that no action shall be brought whereby to charge any person upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some note or memorandum thereof, shall be in writing, and signed by the party to be charged thereby, or some person by him thereunto lawfully authorized. In England, and also in the several States of this Union, there

are statutes in substance similar to this. The object of all such statutes is to prevent frauds and perjuries; hence, in all cases where there appears to be an almost impossibility of the commission of those offences, courts have endeavored to take them out of the statute and enforce their performance, although they may not be in writing. The statute was not intended to create or protect fraud, and therefore courts have taken many cases out of the statute, not entirely on the principle of there being no danger of perjury, but for the purpose of preventing one of the parties to a contract from committing a fraud on the other, under the sanction of the statute.

Courts of equity have determined, and it seems now to be the settled rule of decision, that parol agreements may be enforced if the agreement has been in part performed, provided such part performance be admitted by the party charged, or be satisfactorily proven. What acts amount to such part performance as will take a parol contract out of the statute, is not entirely clear of doubt. It was, for a while, held that the payment of part, or all of the purchase-money, was such part performance; but that doctrine is now entirely rejected. Payment in whole, or in part, is a strong auxiliary fact in establishing part performance, but it is not, of itself, sufficient. The ground upon which relief is granted in these cases is fraud, and the great leading principle by which courts are governed is, that there must be some act of performance done that is palpable and evident to the senses of all—an act that can be relied on as certain, about which there can be no misunderstanding, and which does not rest solely in the recollection, understanding or belief of witnesses, such as absolute and visible possession of the premises, the actual building of houses, of the making of other lasting improvements. But even these acts of part performance must be done with a direct view of the agreement being performed, and be such acts as could be done with no other view, or the agreement will not be taken out of the statute.

If the purchaser was not previously in possession of the premises, and after the parol purchase he enters upon the estate with the assent of the vendor, such possession is always held as part performance, and takes the case out of the statute; and much more so if, after he enters, he makes valuable and lasting improvements. But the taking of such possession without the knowledge, consent or will of the vendor, will not do. Butcher *v.* Stapely, 1 Vern. 363; Lacon *v.* Mertins, 3 Atk., 1: Wills *v.* Stradling, 3 Ves. jun. 378; Bowers *v.* Cator, 4 Ves. jun. 91; Gregory *v.* Mighell, 18 Ves. jun. 328; Kine *v.* Balfe, 2 Ball & Beat. 343; Wilber *v.* Paine, 1 Ohio Rep. 251; Wetmore *v.* White, 2 Caines' Cas. 87; Givens *v.* Calder, 2 Des. 171, 190; Sugd. on Vend. 77 to 80; Tibbs *v.* Barker, 1 Blackf. 58; Morphett *v.* Jones, 1 Swanst. 181; Buckmaster *v.* Harrop, 13 Ves. jun. 474. But possession by a tenant, who was in possession of the premises as a tenant at the time of the purchase, and who remains in possession, is not considered a part performance; for a tenant,

of course, may continue in possession until he has notice to quit; and therefore the mere act of his continuing in possession amounts to nothing, and will not take the case out of the statute. Wills *v.* Stradling, 3 Ves. jun. 378; Savage *v.* Carroll, 1 Ball & Beat. 265; Anthony *v.* Leftwich, 3 Rand. 238; 2 Hovend. on Fr. 3; Sugd. on Vend. 80.

In this case the complainant at and long before the time of making the purchase, was in possession of the lot as tenant to the vendor; therefore, his continuance in possession cannot be considered as a part performance of the contract.[1] . . .

[1] "As to the objection that this agreement was in part performed, he allowed, that when a man takes possession in pursuance of an agreement, or does any act of the like nature, the court will decree an execution of it; but the circumstances only of giving directions for conveyances and going to take a view of the estate, he thought not sufficient." Per Lord Chancellor HARDWICKE, in Clerk *v.* Wright, 1737, 1 Atk. 12, 13.

"But no right could be acquired by an intruder who entered and cut down timber, or even improved, as against the owner, where it was never accompanied and followed by survey and articles.

"There then being no authorized contract, even possession under it would be unavailing to constitute part performance. But there was not a possession here in a legal point of view, such as would divest the plaintiff's original constructive possession and defeat his action of trespass *quare clausum fregit.* There is no evidence that the defendants had resided or built on the land, or cultivated or fenced it in, or had any *pedis possessio*, or paid the taxes; they had no other occupancy than while they were there cutting off timber, and this would not constitute a possession, though they owned the adjacent tract, and claimed this swamp or a part of it and used this woodland. There must be something else to constitute possession, as was held by this court in Wright *v.* Guier, 9 Watts 172, where the doctrine is fully examined by Chief Justice GIBSON. There an iron-master bought a tract of woodland at sheriff's sale, with other adjacent tracts, and entered from time to time to cut and coal the wood, using it as he did his other woods, claiming it under his sheriff's deed; yet this was held not to be such a possession as would give title under the Statute of Limitations. Now, what acts, if proved, make out a contract sufficient to take the case out of the Statute of Frauds, and pass a title by parol, and what acts constitute a possession such as defeats the action of trespass are questions of law for the court in the application of the principles of equity in each case, and it is error to throw these questions on the jury for their determination." Per SERGEANT, J., in Baring *v.* Peirce, 1843, 5 W. & S. 548, 552.

"Possession, considered as evidence of a parol contract and as part performance to take it out of the statute, must not only be delivered and taken, but must be maintained in pursuance of the parol contract. Hence, if a purchaser by parol takes possession under his contract, and afterward attorn to the vendor as landlord, or fix upon himself any other character than that with which he entered, he lets go his equities, and his possession is referred to his new agreement. And where the agreement, as in this case, is reduced to writing in terms perfectly inconsistent with the idea of a parol sale, it becomes the most faithful memorial which ingenuity can devise or

UNGLEY *v.* UNGLEY.

IN THE COURT OF APPEAL, 1877.

[*Law Reports, 5 Chancery Division* 887.]

JESSEL, M. R. This is an appeal from a decision of Vice-Chancellor MALINS, and two questions arise on the appeal, one of law and one of fact.

First, as to the question of law. A man, in consideration of the marriage of his daughter, promises his intended son-in-law that he will give his daughter a particular house on her marriage as a wedding present. This promise he makes orally without writing; and immediately after the marriage he puts his daughter and son-in-law in possession, and they remain in possession till the death of their father. The father dies intestate, and it is now objected by his administrator that by reason of the Statute of Frauds all that goes for nothing, and that they must give up the house. I am of opinion that that is not the law. The law is well established that if an intended purchaser is let into possession

the law adopt." Per WOODWARD, J., in Rankin *v.* Simpson, 1852, 19 Pa. St. 471, 476.

"His title could only commence, as against Myers, after the latter had acquired a right to the property himself. The bargain was only applicable to it as and when it became the property of the plaintiff; not a word exists to show that it was intended to be applicable to a mere expectancy. Even if this had been so, I do not see how it could be sustained as a parol contract, which might be so far executed as not to be within the statute." Per THOMPSON, J., in Myers *v.* Byerly, 1863, 45 Pa. St. 368, 371.

"In all cases in which possession, either as delivered by the vendor, or assumed by the purchaser, is relied upon, it must appear to be a notorious and exclusive possession of the land claimed, and to have been delivered or assumed in pursuance of the contract alleged, and so retained or continued. Where the purchaser moves upon the premises and remains there in company with the previous occupant, not as the ostensible and exclusive proprietor, or where the metes and bounds of the land alleged to be purchased are not fixed and recognized and the purchaser occupies it in common with adjacent land of his own, such possession, as an act of part performance, will not be sufficient to entitle the purchaser to specific performance." Per SNYDER, J., in Gallagher *v.* Gallagher, 1888, 31 W. Va. 9, 14.

Possession will not take the case out of the statute unless it be against the defendants. Osborn *v.* Franklin, 1848, 19 Conn. 63.

"We have seen that the possession of Nibert was against the wish and warning of Baghurst, and it clearly appears that the latter commenced proceedings in ejectment as soon as he heard the building was being erected. The erection of the house and the possession of the land are both of the same character. They fail as elements of part performance, because done without the knowledge or acquiescence of the vendor." Per GREEN, V.C., in Nibert *v.* Baghurst, 1890, 47 N. J. Eq. 201, 206.

in pursuance of a parol contract, that is sufficient to prevent the Statute of Frauds being set up as a bar to the proof of the parol contract. The reason is that possession by a stranger is evidence that there was some contract, and is such cogent evidence as to compel the court to admit evidence of the terms of the contract in order that justice may be done between the parties. In the present case it is quite clear that the defendants were put into possession of the house in pursuance of some contract, and the only other question is one of fact, namely, what were the terms of the contract. . . .

On the particular question in the present case, having read the evidence which was given before the Vice-Chancellor, my opinion is that it has been proved that there was a promise—not a mere expectation, but an actual promise—to give the house. The son-in-law swears so distinctly, and it is confirmed by the independent testimony of Mr. Hayes, the landlord of the house. . . .

Then it is proved that he let his daughter and her husband into possession immediately on their marriage, and that he said he would not pay any more ground rent or insurance, because his son-in-law was to pay them. There is no evidence on the other side in contradiction of this. . . .

With regard to the question of the £110 which was due to the building society on the property, it is clear that if you once prove that a man has made an agreement to sell a house, it must be taken that he means to sell it free from incumbrances, without his saying so. So, if a man agrees to settle a house in consideration of marriage, he must be taken to mean free from incumbrances. And I can see no difference in this respect between a freehold and a leasehold house. I am, therefore, of opinion that the respondents are entitled to have an assignment of this house free from incumbrance, and that the £110 must be paid out of the intestate's estate.

JAMES and BRAMWELL, L. JJ., concurred.[1]

POLAND *v.* O'CONNOR.

IN THE SUPREME COURT OF NEBRASKA.

[1 *Nebraska* 50.]

One Clark, claiming to act as the agent of the defendant, agreed to sell to the plaintiff for $1,000 a vacant lot adjoining a lot on which the defendant and another, partners, carried on the business of warehousemen. The plaintiff paid Clark $25 as an earnest. The plaintiff, after the contract, stored lumber, etc., on the vacant lot, and purchased, for erection

[1] See Neale *v.* Neales, 1869, 9 Wall. 1.

on the lot, a house which had been taken apart and moved to the vicinity of the lot, ready for rebuilding. On learning of the contract, the defendant repudiated the whole transaction and denied Clark's agency.[1]

CROUNSE, J. The bill was rightly dismissed.

The statute has said, that no person shall be charged with the execution of an agreement relating to the sale of land who has not personally or by his agent signed a written agreement. § 62, page 292, R. S. And when done by an agent, that the authority of such agent must also be in writing. § 84, page 297. The record shows no such case as should relieve the complainant from the operation of the statute.

1. The existence of a contract clear, definite and unequivocal in its terms should have been admitted by the answer, or satisfactorily established by competent proof. Story's Eq. Jur. § 764. Here, however, the very authority of the agent, who assumed to sell the property, is explicitly denied by the answer. To establish it we have but the unsupported testimony of the real estate agent himself, whose interest, next to that of securing his fee, seems to have been to serve the purchaser rather than the vendor; to combine with the former in tying up and hurrying the transfer of the property from one to the other. Opposed to this is the testimony of the respondent in direct contradiction—affording a striking exhibition of the evils against which the statute was designed to provide. One of the most important objects of the statute was, to prevent the introduction of loose and indeterminate proofs of what ought to be established by solemn written contracts. Story's Eq. Jur. 764.

2. Not regarding the contract as established, has there been such a part performance of it as entitles the complainant to the relief sought? The payment of the twenty-five dollars does not effect it. Clynan *v.* Cooke, 1 Sch. and Lefr. 40; Story's Eq Jur. 760; 2 Pars. on Con. 552. Neither is there such unequivocal and satisfactory evidence of possession given and entered upon, or of any acts clear, certain and definite in their object, and having reference to the contract made, as is required. Under the contract relied on, a deed was to be given in ten days. At the expiration of this time, Poland was advised that O'Connor disavowed the agreement of Clarke, and of his refusal to make a deed. What Poland may have done subsequently to that time therefore was without warrant, and defiantly.

The proofs leave it quite uncertain as to what acts of possession, if any, transpired under the agreement during that time. From the testimony of Poland it appears that the vacant lot in question, adjoining the warehouse of himself and partner, Patrick, was used subsequently to the time of agreement for storing lumber, wagons, and like articles for himself, the firm and others held on commission. It is quite probable that not only during the ten days, but both prior and subsequent thereto,

[1] A shortened statement of the facts is substituted.

such use would be made of an unoccupied lot adjoining a warehouse. This is far short, however, of that improvement, that open, visible and unequivocal possession under the contract, necessary to take the case out of the statute. Fry Sp. Per. § 403, p. 237.

As to the purchase of the house to put upon the lot: it may be remarked that the defendant is not to be bound by every possible act of the complaining party done with reference to the contract. He should be affected by those only to which he has been induced by positive action or permission, of the vendor; or, at most, by those results which naturally flow from the agreement. He certainly should not be concluded by the folly of the vendee.

Here, possession was not an expressed part of the agreement. It does not appear that the purchase of this lot was for the purpose of erecting or building thereon; much less with the design of moving one already constructed thereon. The building, in fact, never was moved on the premises. No damage of any character appears to have resulted from its purchase. Still, had the investment proved an entire loss, the complainant's conduct has not been such as to challenge the consideration of a court of equity. To purchase a valuable lot through a real estate agent who can show no authority, with the owner of property living on the next block; to pay but the amount of the agent's fee as earnest; and in the next hour to purchase a building ready constructed to place thereon without consent of or conference with the vendor, is an attempt at sharpness or an exhibition of folly which courts do not favor.

The decree of the court below is affirmed.[1]

Decree affirmed.

MILLER *v.* BALL, 1876, 64 N. Y. 286. EARL, J. . . .

It is not always easy to determine whether there has been sufficient part performance of a parol agreement for the sale of land, in the sense of courts of equity, to free it from the operation of the Statute of Frauds. The general rule is, that nothing is to be considered as a part performance which does not put the party into a situation which is a fraud upon him, unless the agreement is fully performed. Malins *v.* Brown, 4 N. Y. 403. The principle upon which courts of equity hold that part performance is sufficient is, that a party who has permitted another to perform acts on the faith of an agreement shall not be allowed to insist that the agreement is invalid because it was not in writing, and that he is entitled to treat those acts as if the agreement in compliance with which they were performed had not been made; in other words, upon the ground of fraud, in refusing to execute the parol agreement after a part performance thereof by the other party, and when he cannot be placed in the same situation that he was in before such part performance by him.

[1] See same case with note in 93 Am. Dec. 327.

Taking possession under a parole agreement, with the consent of the vendor, accompanied with other acts which cannot be recalled so as to place the party taking possession in the same situation that he was in before, has always been held to take such agreement out of the operation of the statute. Lowry *v.* Tew, 3 Barb. Ch. 407; Freeman *v.* Freeman, 43 N. Y. 34.

The payment of the consideration alone, in a case where its recovery in an action at law would fully indemnify the party paying, would not be a sufficient part performance within the rule under consideration, and neither would mere possession be, without any other circumstance of hardship or fraud. But payment of the consideration and possession under the agreement, or by the consent of the vendor, are facts which may be considered with other facts upon the question of part performance. Here the whole consideration money was paid, and the plaintiff took all the possession of such a lot which is ordinarily practicable. He built roads to it and upon it; built a shanty and made some clearing. His improvements thus made were probably equal in cost to the consideration paid for the lot, and that cost would be lost to him unless the defendant be compelled to perform his agreement. He paid the taxes, and the money thus paid he cannot recover back. I am therefore of opinion that enough was done by the plaintiff to bring his case within the equitable rule as to part performance.

But before acts, otherwise sufficient for part performance, can have that effect within the rule, they must have been done in pursuance or fulfilment of the parol agreement, or in just reliance thereon. They must have been done with a view to the agreement, and be referable exclusively thereto. Story Eq. Jur. 762, 764. In the respects here mentioned, plaintiff's acts were sufficient. The plaintiff paid the entire consideration under the agreement. The land was vacant, covered with timber, and distant from any highway. The defendant promised to give a deed, tendered one which was incorrect, took it back for correction, and then, after retaining the money paid for two years, repudiated the agreement, and refused to perform. The defendant could have no use of the land without the roads which he constructed. After he paid the entire consideration, and thus fully performed on his part, it must have been understood by both parties that he was to have possession and control of the land, and the right to commence and prosecute his improvements thereon. After plaintiff had paid the full consideration, in reliance upon the promise of the defendant to give him the title to the land, there was an implied consent, on the part of the defendant, that he might take possession as owner. It cannot be inferred that defendant meant to retain the money and, at the same time, retain control of the land from the only person interested in the use and protection of the same. It may be stated, as a general rule, that in all cases where the contract for the sale of land is silent as to the possession, the land being vacant, and the vendee has paid the entire consideration, and fully performed on

his part, and all that remains for the vendor to do is to give the deed, there must be an implied agreement or license that the vendee may at once take possession and have the use of the land. In such a case where the contract is in writing, and thus valid within the Statute of Frauds, the vendee is, in equity, considered the owner of the land, and he may even call the vendor to account for any waste committed thereon. He is, then, the only person interested in the protection of the land against waste or trespass; and he should have that possession which will enable him to protect his interests, and receive, in the use of the land, an equivalent for the money which he has paid. The same rule of construction should apply to a parol agreement. In the absence of any evidence to the contrary, it could not be inferred that in such a case the vendor intended to retain the use of both the land and the consideration paid therefor.

Our attention has been called to no authorities in conflict with these views. In Suffern *v.* Townsend, 9 J. R. 35, it was held that an agreement for the purchase of land did not of itself amount to a license to the party agreeing to purchase to enter on the land; but that was in a case where there was a parol agreement, silent as to the possession, no part of the consideration having been paid. In Erwin *v.* Olmsted, 7 Cow. 229, and Kellogg *v.* Kellogg, 6 Barb. 116, the contracts were in writing, silent as to the possession, but no part of the consideration had been paid. In Spencer *v.* Tobey, 22 Barb. 260, part only of the consideration had been paid. It cannot, therefore, be said that the plaintiff was a trespasser in what he did upon the land; but all his acts thereon, and in building the road thereto, and in paying the taxes, must be referred to the agreement for the purchase, and must be considered as done in pursuance thereof, and in reliance thereon.[1]

LESTER *v.* FOXCRAFT.

IN THE HOUSE OF LORDS, 1700.

[*Colles' Report,* 108.]

One Isaac Foxcraft seised in fee of certain premises made an oral agreement with the plaintiff by the terms of which the plaintiff was to tear down from certain of the premises an old house, and put up in its place a new one, on the completion of which Foxcraft was to make to the plaintiff a long lease for years. In accordance with this agreement the plain-

[1] "We think it is a general rule to be gathered from the authorities that mere payment of the purchase price of land is not sufficient to authorize the specific performance of the contract of sale unless the peculiar circumstances of the case be such that an action at law to recover back the money paid would not give the purchaser an adequate remedy. But it is also a general

tiff entered the premises and made large expenditures in carrying on the work of rebuilding. Before the agreement was put in writing, Isaac Foxcraft died, devising the premises to his children, who refused to execute the lease. It was alleged by the plaintiff and denied by the defendants, that the testator was very desirous, during his last illness, to make out the lease before his death, and that the defendants, by unfair means, kept him from doing it.

In Hilary term, 1698, the plaintiff exhibited his bill in chancery for a specific execution of the agreement, and the cause being heard the 6th March, 1700.

The LORD KEEPER declared that there was no sufficient proof of the said agreement, and ordered appellant's bill to stand dismissed without any relief; which decree appellant insisted ought to be reversed, for that the agreement was sufficiently proved; and though not originally reduced into writing, occasioned by the entire confidence the parties had in each other, yet the same having been at appellant's great expense so far executed on his part, there ought to be a reciprocal performance of it on the other part; and the rather so, as the terms of the agreement were reduced to a certainty by the lease prepared by direction of the lessor, and the execution thereof prevented by the unfair practices of the respondents, or some of them.

The respondents in affirmance of the decree alleged that they knew not that appellant was in any way concerned in tearing down or rebuilding except as agreed for the testator, to whom the appellant was greatly indebted, which indebtedness he was discharging by this work; and finally insisted that nothing of such pretended agreement being in writing, and signed by either of the parties, the statute made for preventing frauds and perjuries was a full bar to the appellant's pretences.[1]

The respondents, in affirmance of the decree, further alleged that Isaac Foxcraft made his will, dated 30th August, 1698, of the import stated by appellant, and died 15th September following; and, in Hilary term then next, appellant filed his bill against respondents for a specific execution of a parol agreement expended, and that respondents had answered. . . .

Die Lunæ, 70 Aprilis, 1701. Upon hearing council on this appeal, it was ordered and adjudged by the Lords, that the decretal order of dismission complained of should be reversed, and that the respondent, Isaac Foxcraft, or such other of the respondents to whom the estate in question should come by virtue of his father's will, should, when he or they should be of age execute to the appellant Lyster, his executors, etc., such a lease of the premises in question as was prepared and approved of by

rule that when the consideration has been paid and possession under the contract of sale has been taken, the contract will be specifically enforced, and to take the case out of this rule the circumstances must be peculiar and exceptional. This general rule is applicable to this case." Per EARL, J., in Dunckel *v.* Dunckel, 1894, 141 N. Y. 427, 435.

[1] This statement of the case is abridged.

the said Isaac Foxcraft, the father, before his death, and that the appellant and his assigns should in the meantime hold and enjoy the same under the covenants and agreements in the said intended lease contained, discharged of all incumbrances done by said Isaac Foxcraft, or any claiming under him. Lords' Journ. vol. xvi., p. 644.

FLOYD *v.* BUCKLAND.

IN CHANCERY, BEFORE SIR JOHN TREVOR, M. R., 1703.

[*Freeman* 268.]

The plaintiff having a house in Monmouth street, agreed with the defendant for a piece of ground adjoining, to take a lease of him for as long time as he had in the house; and thereupon the plaintiff entered upon the ground and built a wall, and made a vault, etc., for convenieney of his house, and when he had so done, the defendant refused to make him a lease; whereupon the plaintiff preferred his bill to have an execution of the agreement, that the defendant might make him a lease.

The defendant pleaded the Statute of Frauds and Perjuries, the agreement being only by parol, and no agreement in writing; his plea was overruled by the Lord Keeper, and the cause coming now to hearing before the Master of the Rolls, he decreed the defendant to perform the agreement and to pay costs; and said the statute was not made to encourage frauds and cheats; and the plaintiff having laid out his money in pursuance of the agreement and taken possession of the land, the defendant ought to execute a lease for as long time as the plaintiff had in his house. And the case of one Butcher was cited, where a parol agreement was decreed, possession being delivered in pursuance of it; and likewise a case decreed by the Lord NOTTINGHAM, where a deed was sealed for security of money borrowed, and the deed being absolute, the defendant promised to seal a defeasance, and afterwards refusing, a bill was preferred to compel him, and though he insisted upon the Statute of Frauds and Perjuries, he was decreed to seal a defeasance, though there was no agreement in writing for that purpose.[1]

[1] See, however, Wheeler *v.* D'Esterre, 2 Dow's P. C. 360, that the fact of expenditure by the tenant upon the premises will not establish a right to specific performance of a lease for lives, if such lives are not named in due time, or if some of the lives named were not in existence at the time of the agreement.—Reporter's note.

WILLS *v.* STRADLING.

IN CHANCERY, BEFORE LORD CHANCELLOR LOUGHBOROUGH, 1797.

[3 *Vesey* 378.]

The bill stated the following case:

The plaintiff was lessee of a farm for seven years at the rent of £34 a year under the defendant, the widow of the lessor, under whose will she is entitled to the premises during her widowhood. The lease being to expire in 1794, the plaintiff in June, 1793, being desirous of making some improvements upon the premises, which would be attended with a very considerable expense, applied for a new lease for the term of 14 years. The defendant agreed to grant a lease for the said term, if she should so long live and continue a widow, at the rent of £36 a year; and immediately, or very shortly after the agreement, the plaintiff, upon the faith of the agreement and in confidence that he should enjoy for the fourteen years under the agreement, began to make improvements, and hath laid out a great deal of money upon the premises. The plaintiff continued in possession after the expiration of the former lease, and paid the increased rent, for which the defendant gave him receipts.

The bill prayed a specific performance of the agreement.

The defendant pleaded the Statute of Frauds, with an averment, that there was no agreement in writing.

LORD CHANCELLOR. In Whaley *v.* Bagenal there were a vast many circumstances of conduct and behavior upon the supposition of an agreement; but none that amounted to part performance. One strong circumstance was, the vendor setting up that purchase, which he afterwards denied, as a defense against an *Elegit*.

Though in general I feel a very strong inclination to support the Statute of Frauds and to give the party the benefit of it by way of plea, I think I must in this case call upon the defendant to make an answer to one part of the bill. Three grounds are stated: Possession by the plaintiff, which he refers to the agreement; payment of an increased rent, which he also refers to the agreement, and the circumstance stated of considerable sums of money having been laid upon the improvement of the farm. As to the first ground, the possession, in the case of a tenant, who of course continues in possession, unless he has notice to quit, the mere fact of his continuance in possession (which is all the plea can admit, for *quo animo* he continued in possesssion is not a subject of admission) would not weigh. The delivery of possession by a person having possession to the person claiming under the agreement is a strong and marked circumstance; but the mere holding over by the tenant, which he will do of course, if he has no notice to quit, would not of itself take the case out of the statute or even call for an answer. As to the money laid

out, I feel the distinction pressed by the Solicitor General very strongly; that if it was part of the contract that money shall be laid out, and it is one of the considerations for granting the lease (the laying out which must be then with the privity of the landlord), it is very strong to take it out of the statute. But the circumstance, which I think distinguishes this case, is the payment of the additional rent. Payment of additional rent *per se* is an equivocal circumstance, it is true. It may be that he shall hold over from year to year, the lease being expired. There may be other inducements. But how stands the averment upon this plea? It is that the landlord accepted the additionel rent upon the foot of the agreement. Then the acceptance upon the ground of the agreement, which is the averment upon this plea, is not equivocal at all. It is incumbent upon the defendant to say whether it was merely accepted upon a holding from year to year, or any other ground. How would it stand at law? Suppose this averment was proved by parol evidence; it would be a good lease for three years, and would defend the tenant against an ejectment brought within the first three years. Charlewood *v.* The Duke of Bedford, which finally turned upon the want of authority in the steward, is an authority, upon which under the circumstances alleged in this bill the benefit of the plea ought to be saved to the hearing. Let the plea stand for an answer, with liberty to except.

As to the danger mentioned by the Solicitor-General, and which I a little anticipated, if the defendant admits the agreement, as stated in the bill, there can be no danger; if he does not admit the agreement, as stated, it will come to be a very material question, whether I should permit that agreement to be substantiated by any parol evidence.

FRAME *v.* DAWSON.

IN CHANCERY, BEFORE SIR WILLIAM GRANT, M. R., 1807.

[14 *Vesey* 386.]

The bill stated that the plaintiff, possessed of a house for a term of thirty-one years from Christmas, 1800, at the yearly rent of £35, with the usual covenant, among others, for repairing and keeping in repair, etc., having, in 1803, employed a builder to repair the house, the party-wall was discovered to be in a very ruinous state. The plaintiff upon that discovery applied to the defendant, to whom, as purchaser of the premises, he had attorned; requesting that the defendant would either contribute to the repairs, or make some abatement in the rent. The defendant refused to do either, but promised in consideration of the plaintiff's repairing the party-wall to grant him a further term of ten years.

Upon the faith of that promise the plaintiff proceeded, and laid out £460, being obliged to rebuild a great part of the wall. The bill therefore prayed that the defendant may be decreed specifically to perform his agreement to grant an extension of the lease for ten years.

The defendant by his answer admitted, that upon the plaintiff's request, that he would contribute something to the expense of rebuilding or repairing the party-wall, the defendant said that if the plaintiff should be obliged to pull down the wall and rebuild it, he might be induced to grant a farther term of ten years; but denied that he made any absolute promise or agreement, and insisted upon the Statute of Frauds.

Parol evidence was produced on both sides, proving the respective allegations in the bill and answer.

The MASTER OF THE ROLLS. It is admitted, that suposing an agreement ever so clearly proved, yet, as a parol agreement, the plaintiff is not entitled to have it executed. It is necessary therefore to show a part performance: that is, an act, unequivocally referring to and resulting from the agreement; and such that the party would suffer an injury, amounting to fraud, by the refusal to execute that agreement. But that is not the nature of the act in this case. First, it is equivocal. Secondly, it is such as easily admits of compensation, without executing the agreement. This is not an unequivocal act; for it would have taken place equally, if there had been no agreement. The principle of the cases is that the act must be of such a nature that, if stated, it would of itself infer the existence of some agreement; and then parol evidence is admitted, to show what the agreement is. But this act would not infer the existence of any agreement, as it must have been done by the party either at his own or the landlord's expense. Then is there such injury as cannot easily be repaired in any other way than by executing the agreement? No, for the money which he has expended, he may recover from the landlord, if it was by the landlord that the expense was to be borne. The circumstance that the party may be obliged to resort to an action to get back his money is no reason for taking the case out of the statute.

Lord REDESDALE, in a case before him, states his opinion that payment of money is not a part performance; yet there the act can hardly be said to be equivocal in its nature, as the payment of a price presupposes a sale; but the money may be repaid, and the parties are restored to their former situation. This case is stronger; for the expenditure does not imply a precedent agreement.

Suppose my tenant should set up an agreement for a purchase, and get a witness to swear to it, and then offer as evidence of part performance his possession and cultivation of the land; could that be deemed an act of part performance, which would have existed precisely in the same shape, whether there was any agreement for a purchase or not?

The bill was dismissed.[1]

[1] "It is always regarded as strongly confirmatory of the rights of a purchaser seeking the specific execution of a verbal contract for an estate in land, that

WACK *v.* SORBER, 1837, 2 Whart. (Pa.) 387, 392. PER CURIAM.—The law of the case was fairly stated. There was scarce sufficient evidence of a contract to be left to the jury. But, permitting them to find a parol gift, if they should think proper, they were directed to inquire whether, as an inducement to expenditure, the gift had been, in fact, a prejudice to the donee. This put the cause on its true point. The improvements, as they are called, were at most equal in value only to a year's rent, and the donee had the premises five years. Besides the improvements were not such as added to the permanent value of the land, consisting, as they did, in repairs of fences, and the erection of a shed for a cow-stable—expedients for present enjoyment, which can never be resorted to for an equity. These attempts to turn an experimental investiture of possession into a sale or gift executed, are of such repeated occurrence as to require the courts to hold a strict hand over them. There was nothing here to justify the inference of a gift in the first instance, or to take it out of the statute of frauds if there had been one.

Judgment affirmed.

he has proceeded, upon the faith of the contract and with a knowledge of the vendor, to expend money in the improvement of the land. But the improvements relied upon must be of a character permanently beneficial to the land, and involving a sacrifice to the purchaser who made them. Although the improvements are required to be beneficial to the land, a court of equity will not inquire whether the expenditures have been judiciously or injudiciously made, or whether the money has been well or ill laid out. Davenport *v.* Mason, 15 Mass. 85; Whitehead *v.* Brockhurst, 1 Brown Ch'y 417. It must appear, however, that the loss of his improvements would be a sacrifice to the purchaser. If, therefore, he had gained more by the possession and use of the land than he had lost by his improvements, or if he has been in fact fully compensated for the improvements, they will not be available to him as a ground for specific execution. Browne, St. Frauds, §§ 487-491." Per SNYDER, J., in Gallagher *v.* Gallagher, 1888, 31 W. Va. 9, 15.

"The expenditure of money by the tenant in making improvements on the premises, on the faith of the oral agreement for a lease, may be viewed not only as constituting of itself an act of part performance, but as furnishing strong if not conclusive evidence that the possession is continued under the oral contract and not under the lease. . . .

"The only rule we seek to derive from the authorities above cited is one of evidence. It is that where a party claiming under an oral agreement was in possession under a prior agreement, and continues in possession without interruption, the fact that he has put lasting and valuable improvements upon the premises under and in part performance of the oral agreement may be resorted to as evidence showing or tending to show that his possession, after he became entitled thereto under the oral agreement, is held under that agreement." Per BAILEY, J., in Morrison *v.* Herrick, 1889, 130 Ill. 631, 641.

FREEMAN *v.* FREEMAN.

IN THE COURT OF APPEALS OF NEW YORK, 1870.

[43 *New York* 34.]

Appeal from an order of the General Term of the Supreme Court in the sixth judicial district, reversing a judgment for the plaintiff entered upon the report of a referee, and ordering a new trial.

The action was ejectment, and the answer set up a claim for specific performance of a contract to give the premises in controversy.[1]

GROVER, J. . . .

The referee finds that when the plaintiff purchased the lands in controversy, being about forty acres of land, wild, with the exception of about six acres which had been wholly or partially cleared, he gave it to the defendants. That is, that he promised to give it to them for their lives and the life of the survivor, in case they would move to and reside thereon, and that in pursuance of such promise, the defendants moved to the premises and occupied the same from February, 1860, to the time of the trial of the action. That the defendants cleared twelve or fifteen acres of the land and fenced the same, and built an addition to the house upon the premises, being somewhat assisted therein by the plaintiff. That the defendants have paid a portion of the taxes assessed upon the land. I have assumed that the referee by the words "give the land to the defendants" meant to be understood, that he promised to give it to them. That such was his meaning appears from the evidence, as there was no evidence of any attempt at the former, while the proof of the latter was ample. The question then is, whether a parol promise by one owning lands to give the same to another will be enforced in equity, when the promisee has been induced by the promise to go into possession, and with the knowledge of the promissor, make comparatively large expenditures in permanent improvements upon the land. It is, and must be conceded, that if the promise by parol was to sell the land for a valuable consideration to be paid therefor by the promisee, such promise under this precise state of facts would be enforced. The ground upon which this equitable jurisdiction is exercised, although sometimes said to be part performance, really is to prevent a fraud being practiced upon the parol purchaser by the seller, by inducing him to expend his money upon improvements upon the faith of the contract, and then deprive him of the benefit of the expenditure, and secure it to the seller by permitting the latter to avoid the performance of his contract. In the case supposed, there has been no part performance of the contract, strictly speaking, except the taking possession; no part of the purchase money having been paid, and yet the cases are numerous where performance of such contract has been decreed

[1] The statement of facts has been omitted.

in equity, where possession has been taken under the contract and large expenditures upon permanent improvements made. In the present case, possession has been taken under the promise and expenditures upon improvements made, yet it is insisted that equity will not enforce the promise for the reason that it was to give, instead of having been to sell the land for a valuable consideration. Permitting the promissor to avoid performance operates as a fraud as much in the latter as in the former case, so far as expenditures upon improvements are concerned. The counsel for the appellant insists that there has been no part performance of the contract to give the land. The answer to this is, that possession has been taken, and valuable improvements made upon the faith of the promise. These acts constitute part performance by the respondents. It is true that the plaintiff has done nothing by way of performance on his part. It is not necessary that he should. Part performance by the party seeking to enforce the contract is sufficient. It is further insisted, that an executory promise, not founded upon any valuable consideration, is a mere nude pact, furnishing no grounds for an action at law, and that performance of such a promise will not be enforced in equity. This is true so long as the promise has no consideration. Anything that may be detrimental to the promisee or beneficial to the promissor in legal estimation will constitute a good consideration for a promise. Expenditures made upon permanent improvements upon land with the knowledge of the owner, induced by his promise, made to the party making the expenditure, to give the land to such party, constitute in equity a consideration for the promise, Lobdell *v.* Lobdell, 33 How. 347; id. 1, 32; Crosbie *v.* McDaul, 13 Vesey 147; Shephard *v.* Bivin, 9 Gill 32; Parsons on Contract, 3 vol., p. 359. The Statute of Frauds has no bearing upon the case. If the promise reduced to writing could, under the circumstances, be enforced in equity, it may be, although by parol, 2 Statutes at Large 139, § 10. The order granting a new trial must be affirmed, and judgment final upon the stipulation rendered against the plaintiff.

All concurring. Order of General Term affirmed and judgment for defendant ordered.

PURCELL *v.* MINER.

IN THE SUPREME COURT OF THE UNITED STATES, 1866.

[4 *Wallace* 513.]

Purcell filed a bill against Coleman, Miner and wife, and others, in the Supreme Court of the District of Columbia, where the Statute of Frauds —enacting that all estates in lands made by parol only and not put in writing and signed by the parties making the same shall have the force and effect of estates at will only—is in force. The bill set forth that

Coleman having a house in Washington, and he, Purcell, a farm in Virginia, "a trade" had been made between them; and the possession and key of the house delivered to him by Coleman, and full payment admitted by Coleman's receiving the farm, the title of which he had examined, and "the trade" closed; and that Coleman had requested the complainant to prepare both deeds; that Purcell had done so, and had tendered and was now ready to tender to Coleman a deed for the farm according to the contract.

The bill then went on:

"Your orator further avers that several weeks thereafter, to his great surprise, about the time he had commenced improving the house for the purpose of placing a tenant in it, the said Coleman, in the night-time, entered the back way, by means of a ladder, and took from the back door the key on the inside of said house, and held forcible possession of the same until he was found guilty of the charge by two justices, after hearing all the testimony and having the aid of two counsel. That the said Coleman then delivered the key to your orator, and stated in the presence of several gentlemen that the change of property was fair; that he knew its condition before trading, in relation to its value and title; that it was advantageous to him, but that his wife had a few days previous refused to go with him to the said farm, and that was his only reason for his unlawful conduct, and that he would not do it again, and that he would pay all the costs in the case, which he has failed to do.

"Your orator further avers that it is impossible to place your orator and the said Coleman in the same situation they were in before they exchanged property, because the said Coleman not having given attention to the farm, a barn had been destroyed, and also much of the fencing, as your orator has been informed and believes, and that he has been at expense in repairing the house and lot, etc."

The bill prayed a specific performance of the contract set up.

The bill was answered by Miner, denying, etc., and set out that Miner also having a farm in Virginia, he and Coleman had agreed on and actually consummated a *bona fide* and unconditional exchange of the house for it.

The answer then thus went on:

"This defendant further says, that soon after the execution of said deed to his said wife he took possession of the premises (as this defendant was authorized to do as the property of his wife) in a peaceable, quiet, and proper manner, and that he met upon the street a locksmith, who unlocked the front door of said house and sold this defendant a key. Some days subsequently the said complainant demanded of this defendant the possession of said house and lot, which demand this defendant refused to comply with. The next day the complainant came to the premises with a large number of officers and two justices of the peace, and in their presence again demanded possession of the house and lot, which this defendant again refused to grant, but being requested by said

justices, he opened the door and allowed them to enter. The said justices immediately proceeded to try the question of possession, and, to the utter surprise and astonishment of this defendant, imposed a fine for withholding from the said complainant the possession of the said house and lot. This defendant requested the said complainant to show his title to the said house and lot which he claimed, and the said complainant exhibited some papers, but none of them were signed by said Coleman, nor were they of any consequence in reference to the support of his pretended claim of title. This defendant immediately called upon Coleman and related to him the circumstances in reference to the claim upon the house and lot set up by the complainant, and was informed by Coleman that the complainant had no claim upon the said house and lot, but admitted that they had been negotiating for an exchange of properties, and while the negotiations were going on, he, the said Coleman, learned that the farm in Virginia that said complainant had offered him for said house and lot did not belong to the said complainant, and that he could not give him, the said Coleman, a clear title thereto, and consequently that he, the said Coleman, had declined closing any contract with said complainant."

Mrs. Miner did not answer, but made default. A good deal of testimony was taken, many of the interrogatories—the parties managing their own case—being of a most leading character.

The court below dismissed the bill, and the case was now here on appeal.

Mr. JUSTICE BRIER delivered the opinion of the court.

A contract for the exchange of lands is as much within the Statute of Frauds as a contract for their sale, and a party seeking to enforce a specific execution of a parol contract for that purpose, must bring himself within the same conditions before he can invoke the aid of a court of equity. The statute, which requires such contracts to be in writing, is equally binding on courts of equity as courts of law. Every day's experience more fully demonstrates that this statute was founded in wisdom, and absolutely necessary to preserve the title to real property from the chances, the uncertainty, and the fraud attending the admission of parol testimony. It has been often regretted by judges that courts of equity have not required as rigid an execution of the statute as courts of law.

Nevertheless, courts of equity have, in many instances, relaxed the rigid requirements of the statute; but it has always been done for the purposes of hindering the statute made to prevent frauds from becoming the instrument of fraud.

A mere breach of a parol promise will not make a case for the interference of a Chancellor. It is plain that a party who claims such interference has the burden of proof thrown on him. He knows that the law requires written evidence of such contracts, in order to their validity. He has acted with great negligence and folly who has paid his money without getting his deed. When he requests a court to interfere for

him, and save him from the consequences of his own disregard of the law, he should be held rigidly to full, satisfactory, and indubitable proof—

First. Of the contract, and of its terms. Such proof must be clear, definite, and conclusive, and must show a contract, leaving no *jus deliberandi,* or *locus pœnitentiæ.* It cannot be made out by mere hearsay, or evidence of the declarations of a party to mere strangers to the transaction, in chance conversation, which the witness had no reason to recollect from interest in the subject-matter, which may have been imperfectly heard, or inaccurately remembered, perverted, or altogether fabricated; testimony, therefore, impossible to be contradicted.

Second. That the consideration has been paid or tendered. But the mere payment of the price, in part or in whole, will not, of itself, be sufficient for the interference of a court of equity, the party having a sufficient remedy at law to recover back the money.

Third. Such a part performance of the contract that its rescission would be a fraud on the other party, and could not be fully compensated by recovery of damages in a court of law.

Fourth. That delivery of possession has been made in pursuance of the contract, and acquiesced in by the other party. This will not be satisfied by proof of a scrambling and litigious possession.

The application of these principles to the case before us will show that the plaintiff has wholly failed to establish a case proper for the interference of a court of equity.

We do not think it necessary to a vindication of our judgment to give a history either of the pleadings or evidence disclosed by the record. The case appears to have been carried on by the parties *propriâ personâ,* who are excusable for their ignorance of all the rules of pleading and practice in a court of chancery, or the proper mode of taking testimony. The merits of the case seem to have been tried in a verbal wrangle before two justices, and afterwards converted into a written one for the consideration of the court.

Taking the complainant's bill to be a correct statement of the facts, he has shown no case for the interference of the court. By his statement, the contract was not intended to be left in parol; but when the parties had each examined the properties proposed to be exchanged, they contemplated to come together and perfect the exchange. If either party had delivered a deed, in execution of the "trade" or bargain, and the other refused to fulfil his part, by making a proper conveyance, or if valuable improvements had been made by the party in possession, there would have been a case for a decree of specific execution. As it was, the defendant declined to go on with the "trade," alleging that the plaintiff's farm was incumbered. He had given the key of the house to the complainant, which was set up as a delivery of possession, while the defendant denied any intention to make such delivery, and took forcible possession of his house. While this contest about the possession was going on, the

defendant sold his house, and conveyed it to the wife of his counsel, who carried on the litigation for him before the justices, and here.

The bill must fail—

1. For want of clear, definite, and conclusive proofs of the contract.
2. For want of any delivery of peaceful and uninterrupted possession.
3. Or of valuable improvements made.

We find no part execution on either side, nor anything but a breach of promise, and a consequent quarrel before the contract of exchange was executed. Decree affirmed.

MADDISON, APPELLANT, *v.* ALDERSON, RESPONDENT.

IN THE HOUSE OF LORDS, 1883.

[*Law Reports* 8 *Appeal Cases* 467.]

Appeal from an order of the Court of Appeals (BRAMWELL, BAGGALLAY, and BRETT, L. JJ.) reversing a decision of STEPHEN, J.

June 4. EARL OF SELBORNE, L. C.[1] My Lords, the appellant, in this case lived for many years as housekeeper in the service of Thomas Alderson, who died on the 16th of December, 1877. She originally entered his service in 1845, and having become his housekeeper some years before 1860, continued to serve him in that capacity down to the time of his death. He was, when he died, the owner in fee simple of a freehold estate at Moulton, in Yorkshire, called the Manor House Farm, in extent about ninety-two acres, and in value about £137 per annum, which had been devised to him by the will of an uncle, who died in 1863. It is certain that he intended to leave the appellant, subject to a small annuity, a life interest in this estate, for he had a will prepared for that purpose in 1872, which he signed in 1874, and which only failed for want of due attestation.

The appellant having possessed herself of the title deeds, the heir-at-law, to whom the estate descended, brought the present action to recover them.

The question which (at the instance of the appellant's counsel, and without objection from the respondent) was left to Mr. Justice STEPHEN to the jury was, "whether the defendant was induced to serve Thomas Alderson as his housekeeper without wages for many years, and to give up other prospects of establishment in life, by a promise, made by him to her, to make a will, leaving her a life estate in Moulton Manor Farm, if and when it became his property?" That question the jury answered in the affirmative. The evidence on which the verdict proceeded was that of the appellant herself, without any corroboration

[1] Portions of Lord Chancellor SELBORNE'S opinion have been omitted.

other than the unattested will, which made no mention of any such inducement. I abstain from stating her evidence in detail, because, in the condensed form in which it appears upon the judge's notes, it certainly does not go beyond, if indeed it is sufficient to justify, the verdict. The material parts of it were to this effect: That the appellant, having been long, as already stated, in Thomas Alderson's service, contemplated leaving him, and had some idea of being married, in May, 1860, and so informed him. She had ten years before "begun to leave wages in his hand;" the arrear went on from that time, owing to his straitened circumstances; and in May, 1860, £23, 7s. 6d. remained due to her. He told her of his expectations from his uncle, and that his uncle wished her to stay with him as long as he lived, and wished him to "make her all right" by leaving her the Moulton Manor Farm, which he promised to do if she lived with him. "And so therefore," she said, "I took his advice, and I remained on by his promises;" in another place, "I did not leave, because he advised me not." She did not afterwards "press him" for wages; but, after his death, she brought an action against his administrator for them, which was dropped, as I understand, before or at the time when the present action was commenced. When he signed his will, he read it over to her and asked whether it was right, and "whether she was satisfied."

The case, thus presented, was manifestly one of conduct on the part of the appellant, affecting her arrangements in life and pecuniary interests, induced by promises of her master to leave her a life estate in the Moulton Manor Farm by will, rather than one of definite contract, for mutual considerations, made between herself and him at any particular time. There was certainly no contract on her part which she would have broken by voluntarily leaving his services at any time during his life; and I see no evidence of any agreement by her to serve without, or to release her claim to, wages. If there was a contract on his part, it was conditional upon, and in consideration of, a series of acts to be done by her, which she was at liberty to do, or not to do, as she thought fit; and which, if done, would extend over the whole remainder of his life. If he had dismissed her, I do not see how she could have brought any action at law, or obtained any relief in equity.

Mr. Justice STEPHEN and the Court of Appeal arrived at the conclusion that a contract was proved in this case, notwithstanding the character of the evidence and the form of the verdict, on which, but for the Statute of Frauds, the appellant might have been entitled to relief; but they differed on the question of part performance, Mr. Justice STEPHEN thinking that there was part performance sufficient to take the case out of the Statute of Frauds, the Court of Appeal thinking otherwise. This makes it necessary for your lordships now to examine the doctrine of equity as to part performance of parol contracts.

The cases upon this subject, which are very numerous, have all, or nearly all, arisen under those words of the 4th section of the Statute

of Frauds, which provide that "no action shall be brought to charge any person upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." It has been recently decided by the Court of Appeal in Britain *v.* Rossiter, 11 Q. B. D. 123, that the equity of part performance does not extend, and ought not to be extended, to contracts concerning any other subject-matter than land; an opinion which seems to differ from that of Lord COTTENHAM. See Hammersley *v.* De Biel, 12 Cl. & F. 64 n., and Lassence *v.* Tierney, 1 Mac. & G. 572. That equity has been stated by high authority to rest upon the principle of fraud: "Courts of equity will not permit the statute to be made an instrument of fraud." By this it cannot be meant that equity will relieve against a public statute of general policy in cases admitted to fall within it; and I agree with an observation made by Lord Justice COTTENHAM, in Britain *v.* Rossiter, 11 Q. B. D. 130, that this summary way of stating the principle, however true it may be when properly understood, is not an adequate explanation, either of the precise grounds or of the established limits of the equitable doctrine of part performance.

It has been determined at law, and, in this respect, there can be no difference between law and equity, that the 4th section of the Statute of Frauds does not avoid parol contracts, but only bars the legal remedies by which they might otherwise have been enforced. Crosby *v.* Wadsworth, 6 East, 602, 611; Leroux *v.* Brown, 12 C. B. 824; Britain *v.* Rossiter, 11 Q. B. D. 123.

From the law thus stated the equitable consequences of the part performance of a parol contract concerning land seem to me naturally to result. In a suit founded on such part performance, the defendant is really "charged" upon the equities resulting from the acts done in execution of the contract, and not, within the meaning of the statute, upon the contract itself. If such equities were excluded, injustice of a kind which the statute cannot be thought to have had in contemplation would follow. Let the case be supposed of a parol contract to sell land, completely performed on both sides, as to everything except conveyance; the whole purchase money paid; the purchaser put into possession; expenditure by him, say in costly buildings, upon the property; leases granted by him to tenants. The contract is not a nullity; there is nothing in the statute to estop any court which may have to exercise jurisdiction in the matter from inquiring into and taking notice of the truth of the facts. All the acts done must be referred to the actual contract, which is the measure and test of their legal and equitable character and consequences. If, therefore, in such a case a conveyance were refused, and an action of ejectment brought by the vendor or his heir against the purchaser, nothing could

be done toward ascertaining and adjusting the equitable rights and liabilities of the parties, without taking the contract into account. The matter has advanced beyond the stage of contract; and the equities which arise out of the stage which it has reached cannot be administered unless the contract is regarded. The choice is between undoing what has been done, which is not always possible, or, if possible, just, and completing what has been left undone. The line may not always be capable of being so clearly drawn as in the case which I have supposed; but it is not arbitrary or unreasonable to hold that when the statute says that no action is to be brought to charge any person upon a contract concerning land, it has in view the simple case in which he is charged upon the contract only, and not that in which there are equities resulting from *res gestæ* subsequent to and arising out of the contract. So long as the connection of those *res gestæ* with the alleged contract does not depend upon mere parol testimony, but is reasonably to be inferred from the *res gestæ* themselves, justice seems to require some such limitation of the scope of the statute, which might otherwise interpose an obstacle even to the ratification of material errors, however clearly proved, in an executed conveyance, founded upon an unsigned agreement.

Among later cases I may refer to Pengall *v.* Ross, 2 Eq. C. Ab. 46, decided by Lord COWPER in 1709; Lockey *v.* Lockey, Prec. Ch. 519, by Lord MACCLESFIELD in 1719; and Potter *v.* Potter, 1 Ves. Sen. 441, by STRANGE, Master of the Rolls, in 1750. "There must be something," said Lord COWPER, 2 Eq. C. Ab. 46, "more than a bare payment of money on the one part to induce the court to decree a specific performance on the other part, either by putting it out of the party's power to undo the thing, or where it would be a prejudice to the party performing his part, as beginning to build, or letting the other into possession, etc.—in such case, where the agreement hath proceeded so far on one part, the statute never intended to restrain this court from decreeing a performance of the other." Lord MACCLESFIELD said, Prec. Ch. 519, that an unwritten agreement, "if executed on one part, had always been looked upon so far conclusive as to induce the court to decree an execution on the other part, not to destroy or avoid the agreement so far as it was already carried into execution." Sir JOHN STRANGE said, 1 Ves. Sen. 441, "If confessed or in part carried into execution, it will be binding on the parties, and carried into further execution as such, in equity."

The doctrine, however, so established has been confined by judges of the greatest authority within limits intended to prevent a recurrence of the mischief which the statute was passed to suppress. The present case, resting entirely upon the parol evidence of one of the parties to the transaction, after the death of the other, forcibly illustrates the wisdom of the rule, which requires some *evidentia rei* to connect the alleged part performance with the alleged agreement. There is not otherwise enough in the situation in which the parties are found to raise questions which may not be solved without recourse to equity. It is not

enough that an act done should be a condition of, or good consideration for, a contract, unless it is, as between the parties, such a part execution as to change their relative positions as to the subject-matter of the contract.

Lord HARDWICKE in Gunter *v.* Halsey, Amb. 586, said: "As to the acts done in performance, they must be such as could be done with no other view or design than to perform the agreement, the terms of which," he added, "must be certainly proved." He thought it indeed consistent with that rule to treat the payment of purchase money, in whole or in part, as a sufficient part performance. Lacon *v.* Mertens, 3 Atk. 1; Owen *v.* Davies, 1747, 1 Ves. Sen. 83. This Lord COWPER in Pengall *v.* Ross, 2 Eq. C. Ab. 46, and Lord MACCLESFIELD in Seagood *v.* Meale, Prec. Ch. 561, A. D. 1721, had refused to do. On that point later authorities have overruled Lord HARDWICKE'S opinion; and it may be taken as now settled that part payment of purchase money is not enough; and judges of high authority have said the same even of payment in full. Clinan *v.* Cooke, 1 Sch. & Lef. 40; Hughes *v.* Morris, 2 D. M. & G. 356; Britain *v.* Rossiter, 11 Q. B. D. 123. Some of the reasons which have been given for that conclusion are not satisfactory; the best explanation of it seems to be, that the payment of money is an equivocal act, not, in itself, until the connection is established by parol testimony, indicative of a contract concerning land. I am not aware of any case in which the whole purchase money has been paid without delivery of possession, nor is such a case at all likely to happen. All the authorities show that the acts relied upon as part performance must be equivocally, and in their own nature, referable to some such agreement as that alleged. Cooth *v.* Jackson, 6 Ves. 38; Frame *v.* Dawson, 14 Ves. 386; Morphett *v.* Jones, 1 Sw. 181. "The acknowledged possession," said Sir. T. PLUMER in Morphett *v.* Jones, 1 Sw. 181, "of a stranger in the land of another is not explicable, except on the supposition of an agreement, and has therefore constantly been received as evidence of an antecedent contract, and as sufficient to authorize an inquiry into the terms, the court regarding what has been done as a consequence of contract or tenure."

"It is in general," said Sir JAMES WIGRAM, Dale *v.* Hamilton, 5 Hare 381, "of the essence of such an act that the court shall, by reason of the act itself, without knowing whether there was an agreement or not, find the parties unequivocally in a position different from that which, according to their legal rights, they would be in if there were no contract. . . . But an act which, though in truth done in pursuance of a contract, admits of explanation without supposing a contract, is not in general admitted to constitute an act of part performance taking the case out of the Statute of Frauds; as for example, the payment of a sum of money alleged to be purchase money. The fraud, in a moral point of view, may be as great in the one case as in the other, but in the latter cases the court does not in general give relief. See also Britain *v.* Rossiter, 11 Q. B. D. 130, per Lord Justice COTTON. The

acts of part performance, exemplified in the long series of decided cases in which parol contracts concerning land have been enforced, have been almost, if not quite, universally relative to the possession, use, or tenure of the land. The law of equitable mortgage by deposit of title deeds depends upon the same principles.

Examples of circumstances which have been held insufficient for this purpose are found in Clerk *v.* Wright, 1 Atk. 13, and Whaley *v.* Bagenal, 1 Bro. P. C. 345, where acts preparatory to the completion of a contract were held not to be part performance; (2) Wills *v.* Stradling, 3 Ves. 381, where the mere holding over by a tenant, unless qualified by the payment of a different rent, was held not to be enough "even to call for an answer;" (3) Lamas *v.* Bayley, 2 Vern. 627, where the plaintiff, being engaged in a treaty for the purchase of land, desisted in order that the defendant might buy it, on an agreement that he should have part of it when so bought at a proportionate price; but his "desisting from the prosecution of his purchase" was held to be no part performance; and (4) O'Reilly *v.* Thompson, 2 Cox 271, where the agreement alleged was that upon the plaintiff obtaining from a third party a release of a right to a lease claimed by him, the defendant would grant to the plaintiff a lease of the same premises on certain terms. The plaintiff did obtain a release from the party in question of the right claimed by him for valuable consideration; but, nevertheless, a plea of the Statute of Frauds was allowed, Chief Baron EYRE saying, "These circumstances are not a sufficient part performance, but they are a condition annexed, and necessary to be fulfilled by the plaintiff to entitle him to call for an execution of the contract:" meaning, as I presume, that they were a condition precedent to the contract, as distinguished from acts done after a concluded contract, and in part performance of it.

The law deducible from these authorities is, in my opinion, fatal to the appellant's case. Her mere continuance in Thomas Alderson's service, though without any actual payment of wages, was not such an act as to be in itself evidence of a new contract, much less of a contract concerning her master's land. It was explicable, without supposing any such new contract, as easily as the continuance of a tenant in possession after the expiration of a lease. The relinquishment of any chance which she might have had of marriage was of no greater force than the relinquishment of the treaty for purchase in Lamas *v.* Bayley, 2 Vern. 627. The alleged acts of part performance preceded, and therefore could not be evidence of any contract on her part; their performance was, as in O'Reilly *v.* Thompson, 2 Cox 271, a condition precedent, without the fulfillment of which the promise which the jury found to have been made by Thomas Alderson could not on his part become a binding contract.

Two cases, on which I think it well to add some remarks, were cited by the learned counsel for the appellant, as favorable to their argument, Walker *v.* Walker, 2 Atk. 98, and Parker *v.* Smith, 1 Coll. 608.

In Walker *v.* Walker, 2 Atk. 98, Lord HARDWICKE did not execute any parol contract on the ground of part performance or otherwise; all that he did was to relieve the defendant from a liability which the plaintiff's conduct had made it inequitable to enforce. There had been a parol agreement between A and B, that A would surrender a copyhold belonging to him to C, charged with annuities in favor of B, if B would surrender another copyhold of his own to C. A surrendered his copyhold accordingly, charged with the annuities, and died; B did not surrender; but he sought nevertheless by his bill to enforce payment of the annuities against C. Lord HARDWICKE dismissed the bill, saying that "he was not clear" that the agreement might not have been established by cross bill, upon the principle of part performance. To such a dictum, not even the authority of so great a judge can give much weight. It does not appear how, if there had been a binding agreement, C, who was no party to it, could have claimed specific performance. The true equity was that which was actually administered, viz., to relieve A's copyhold, in the hands of C, from the charge which B unconscientiously sought to enforce.

Of the other case, Parker *v.* Smith, 1 Coll. 608, before Vice-Chancellor KNIGHT BRUCE, I think it enough to say that it was dealt with in an extraordinary manner, and is difficult to reconcile with Cooth *v.* Jackson, 6 Ves. 38. The acts to which the court gave the effect of part performance were done before any definite terms of agreement had been, even by parol, concluded between the parties. It might well have been held that there was an agreement duly signed according to the Statute of Frauds on the 30th of November, 1842; but the supposed acts of part performance were done before that time; and, until then, everything, as to the terms of the intended new lease, remained unsettled. I cannot, therefore, regard Parker *v.* Smith, 1 Coll. 608, as a satisfactory authority.

I am sorry for the appellant's disappointment through the ignorance of her late master as to the attestation requisite for a valid testamentary act. But the law cannot be strained for the purpose of relieving her from the consequences of that misfortune. It would, in my opinion, be much strained, and the equitable doctrine of part performance of parol contracts would be extended far beyond those salutary limits within which it has hitherto been confined, if your lordships were to reverse the order of the Court of Appeal. I should have been glad if that court had dealt differently with the costs; as she has lost, not only the estate intended for her, but also her wages; but costs were within their discretion, and their decree cannot be altered in that respect, being otherwise correct. This House has also to exercise a discretion as to the costs of this appeal; and I humbly venture to recommend to your lordships that it should be dismissed without costs.[1]

[1] The opinions of Lords O'HAGAN, BLACKBURN and FITZGERALD have been omitted.

POORMAN *v.* KILGORE, 1855, 26 Pa. St. 365, 372.—LOWRIE, J.:— . . . We may notice still another principle of law that is applied very beneficially to restrain the exceptions to the statute, and which is of especial importance in this case, though its application is not peculiar to cases under this statute. We allude to the law of evidence that grows out of the family relation. It is so usual and natural for children to work for their parents even after they arrive at age, that the law implies no contract in such cases. And it is so natural for parents to help their children by giving them the use of a farm or house, and then to call it theirs, that no gift or sale of the property can be inferred from such circumstances. It is so entirely usual to call certain books, or utensils, or rooms, or houses, by the name of the children who use them, that it is no evidence at all of their title as against their parents, but only a mode of distinguishing the rights which the parents have allotted to the children as against each other, and in subjection to their own paramount right. The very nature of the relation, therefore, requires the contracts between parents and children to be proved by a kind of evidence that is very different from that which may be sufficient between strangers. It must be direct, positive, express, and unambiguous. The terms must be clearly defined, and all the acts necessary for its validity must have especial reference to it, and nothing else: 2 Penn. Rep. 365; 8 Barr 213; 9 Id. 262; 2 Harris 201; 7 Id. 251-366; 1 Casey 308; 2 Jones 175. The importance of this rule is very apparent; for it requires but a glance over the cases of this class to discover how sad has been the experience of the courts in family disputes, growing out of the exceptions which have been allowed to this statute; and how many and how distressing must have been the ruptures of the closest ties of kindred that have been produced and perpetuated by the encouragement thus given to try the experiment of extracting legal obligations out of acts of parental kindness.

The arrangement out of which the present controversy arose is so entirely similar in its spirit and intention to that which appeared in the case of McClure *v.* McClure, 1 Barr 376, that it ought to have been disposed of in the same way. This plaintiff had one son, Jacob, and one daughter, married to the defendant. Some nine years before the arrangement in controversy, he had given his farm to his son and son-in-law to farm on the shares, they giving him two-fifths of the produce. After they had farmed it awhile, Kilgore moved to another place in the same county, and Jacob then farmed the whole of it on the same terms. In 1844 the plaintiff went to Kilgore to get him to come back; and here we let the witness Fetter tell the story. The plaintiff said to his son-in-law, "if he would come back he would make a man of him; he would give him the half of the farm and Jacob the other half; if he would come back and give him, while he lived, the third of all he raised, he should have the farm at his death. Jesse agreed to the proposal. The offer was made three or four times within the year, and Jesse agreed to it every time."

Jacob testifies that the bargain, as he calls it, took place at his house on the farm. "At first he gave us the place to farm, and said we should have it after his death. He told us we should farm and go on, and we should have it and everything, and then after his death we should have it as our own. We were to give him one-third of the produce." Kilgore accepted the offer and moved on the land. No division line was fixed in this so-called bargain, but the plaintiff shortly afterwards called a surveyor, and directed him how to make the division, and it was done accordingly, giving Jacob 103 acres, and Kilgore 91.

There is much evidence of the declarations of the plaintiffs; but while this may corroborate the story of the direct witnesses of the arrangement, it can change nothing of the substance of it as they narrate it. There is much evidence also of the acts and declarations of both Jacob and Kilgore, that show very plainly that they did not regard the transaction as a present and executed gift. But we may lay all this out of the question. It only confirms, as matter of fact, what we assume as matter of law from the story of the two principal witnesses—that the father was merely putting into experimental operation, for the benefit of his son and daughter, an arrangement which he expected to confirm at his death.

The bargain, as it is called, is said to have been made four or five times, and this seems absurd. If the parties had understood it as a contract, they would have lived up to it or accused each other of a breach of it. If they had understood the three or four conversations that Fetter speaks of as a bargain, they would not have made another afterwards in connection with Jacob. We take this one as the best and only proper evidence of the transaction, because it is the last. "He gave us the place to farm, and said we should have it after his death." Here is nothing but a promise to give, and that cannot be enforced. The division line was not settled by a bargain, but the father fixed it as he pleased.

The statute forbids verbal conveyances of land, and we presume that the parties did not transgress it. It is not probable that the father was putting his property entirely beyond his control in his lifetime, and the terms of the arrangement do not require this inference. The delivery of possession does not demand such an inference, for it is perfectly accounted for by the relation of the parties, and by the annual delivery of a share of the produce, as a tenancy from year to year, which is allowed by the statute. If a contract to farm land on the shares, and a delivery of possession under it, can be supplemented by another for an absolute grant, then certainly, as between parent and child, delivery of possession becomes a worthless protection against violations of the statute. Both the terms of this arrangement and the possession under it may readily be accounted for as founded on other intentions than that of a gift of the land, and therefore the law forbids us to infer that purpose. 3 Ser. & R. 546; 3 Penna. R. 365; 9 Watts 42, 109; 7 Harris 469; 1 Johns., ch. 149.

Some reliance is placed upon the improvements made by the defendant,

but, having been made without an actual gift, and only on the expectation or promise of a gift, they do not avert the rule of the statute. 1 Barr 379; 3 Watts 138, 255. They are no evidence of the gift itself, and may be fully accounted for on the expectation of it. They are estimated at $2,000; but this gives no idea of the real outlay of the defendant. The only things worth naming are the house and the barn, and the only money proved to have been paid for these was under $250. Most of the materials seem to have been got from the place. Much of the work was done by frolics, and $50 of the money and some materials were furnished by the plaintiff, and the whole of it was conducted as such matters usually are in the country, when a father is providing a home for his son on his own land.

The fact that, since the arrangement relied on, the plaintiff has married again, and has another child, can have no influence, except as accounting for and justifying the change of his intentions, on the same principle that a will is revoked by marriage of the birth of a child after it was written. On the defendant's own evidence, the court ought to have instructed the jury that he had no title to the land.

Judgment reversed and a new trial awarded.

LEWIS, C. J., and BLACK, J., dissent.

SHAHAN, EXECUTOR, ET AL. v. SWAN

IN THE SUPREME COURT OF OHIO, 1891.

[48 *Ohio State* 25.]

Error to the Circuit Court of Knox County.

The defendant in error, by an action brought by her in the Court of Common Pleas of Knox County, Ohio, sought to have herself adjudged to be "the owner and entitled to the possession of the property, real and personal, coming from, and belonging to, the estate of" James E. Woodbridge, deceased.

BRADBURY, J. The pleadings in the action, together with the findings of the court, show that Mary J. Swan, the defendant in error, in the year 1840, being then about two years old, and living with her mother, a woman in humble circumstances, near Worthington, Ohio, attracted the notice of James E. Woodbridge and his wife, who resided in Mt. Vernon, Ohio, were in prosperous circumstances, childless, and without expectation of children being born to them; that the Woodbridges, then visiting at Worthington, entered into negotiations with the mother respecting her said child, which resulted in the mother yielding to them the person of the child, and their carrying her home with them on their return; that

they gave their name to the infant, and entered in their family Bible her birth, as their own offspring; that they reared her tenderly, taught her to believe that she was their child by birth, and carefully educated her; that when she reached a suitable age they introduced her into society as their own daughter; that she was an affectionate and dutiful child, and in all respects discharged the duties of a daughter, and continued to reside in the family until her marriage, at which ceremony she was given away by James E. Woodbridge as his daughter; that in August, 1874, James E. Woodbridge died intestate, having made no provision for the defendant in error, and his property, real and personal, passed to his wife, who survived him a few months, and who, by will, made some provision for defendant in error, but devised to others the bulk of the property that came to her from her husband, said James E. Woodbridge.

The questions made during the progress of the action in the Circuit Court are numerous, and many of them interesting, most of which have been elaborately and ably presented to this court, in the briefs of counsel. However, according to the view we have taken of the case, it has not been found necessary to discuss or determine all of them, and we have therefore confined ourselves to such of the questions as we deemed most material in deciding the cause.[1]

The Circuit Court also found "That such part performance was had of such contract, by the parties thereto, and by the plaintiff, in the rendition of such service and the performance of such duties as to take the case out of the operation of the Statute of Frauds." The acts found by that court, and held by it to constitute part performance of the contract, are as follows:

"That the mother of the plaintiff, in pursuance of said contract, surrendered the care, custody, control and education of the plaintiff to said James E. Woodbridge when she was about two years of age, and forever concealed from the plaintiff the fact of her motherhood, and wholly gave up its society and custody; and the said James E. Woodbridge continued the care, custody, control and education of the plaintiff until she became of age, and thereafter she continued to live in his family, continuously bestowing on said James E. Woodbridge and Lydia, his wife, all the affection, and performing all the services of a daughter until she was, by said James E. Woodbridge, given away as his daughter in marriage in the year 1870. The said James E. Woodbridge and Lydia, his wife, carefully concealed from said plaintiff the fact that she was not their daughter, the said Lydia breaking the news of that fact to her for the first time on the day after said James E. Woodbridge was buried.

"The court further finds that the plaintiff, during all those years, was kind, affectionate and obedient to both the said James E. Woodbridge and Lydia, his wife, and did perform about the house those domestic services, did render those domestic duties, and did perform those offices

[1] A portion of the opinion has been omitted.

of kindness and affection which a daughter usually renders for parents to whom she is attached or bound by the ties of blood and affection; that said James E. Woodbridge entered in the family Bible the name 'Mary J. Woodbridge, born February 2, 1838,' as the designation of parentage and date of birth of said plaintiff."

A large proportion of the elaborate briefs of counsel is devoted to the discussion of the sufficiency of these acts to constitute such part performance of the contract as will take it out of the Statute of Frauds. The adjudications upon the subject are innumerable, and not always in harmony with each other, and they have been supplemented by the reasonings of a large number of able text writers. The authorities in the main, if not exclusively, support two rules upon the subject, the more strict of which requires the acts of part performance to be referable to the contract set up, and to no other one. Lindsay *v.* Lynch, 2 Sch. & Lef. 1, is the leading case in support of the stricter rule.

The greater number of authorities, however, and, as we think, the better reason, is satisfied if the acts of part performance clearly refer to some contract in relation to the subject matter in dispute; its terms may then be established by parol.

"First, then, it seems evident that all that can be gathered from acts of part performance is the existence of some contract in pursuance of which they are done, and the general character of the contract; they cannot, unless possibly in some very singular case, be themselves sufficient evidence of the particular contract alleged, because they cannot in themselves show all the terms of the contract from which they flow." Fry on Specific Performance, § 558; see also Brown on the Statute of Frauds, § 455; Foster *v.* Hale, 3 Ves. 712; Pomeroy on Specific Performance, § 107; Anderson *v.* Chick, 1 Baily Eq., S. C. 118; Rathbun *v.* Rathbun, 6 Barb. 98; Stoddard *v.* Tuck, 4 Maryland Ch. 475; Semmes *v.* Worthington, 38 Maryland 298; Carlisle *v.* Fleming, 1 Harrington 421.

Usually possession is the act of part performance relied on to take a case out of the operation of the Statute of Frauds; that, of course, always discloses the subject-matter to which it refers, and courts in discussing its sufficiency have no occasion to expressly declare that an act of part performance must refer to the subject-matter of the contract in dispute, but it is apparent that such qualification is always understood. Surely, acts that refer to some contract between the parties, respecting a totally different subject matter than the one in dispute, would not take the case out of the operation of the statute. The very object of admitting proof of part performance is to show, not that there is some contract between the parties about something, but that there is some contract between them about the subject matter in dispute, in order that the contract set up respecting it may be established by parol. . . .

The mother of the defendant in error was a servant girl, burdened with the support of an illegitimate child of the age of about two years. The Woodbridges were prosperous people without children, or the hope

of any. The mother gave them the child, and never afterwards revealed her motherhood. The Woodbridges received the infant, reared her tenderly in all respects as if she were their own daughter, used great diligence in guarding from her any knowledge that she was not of their blood, and she in turn repaid this kindness by giving them the affection and performing the duties of a daughter. Acts of this character are not usually the offspring of contractual relations. Would the ordinary observer infer from them any contract whatever? Would they not, rather, be attributed to higher motives? Even if we acquit the mother of any desire to conceal the evidence of her shame, or to escape the burden of supporting her infant, yet might we not expect at her hands, from motives of maternal affection alone, just what she did? If she kept the child, the stigma of its birth would cling to it through life, and it would face a life of poverty, if not of actual want; to give it to the Woodbridges and conceal its birth, would be to remove that stigma for which she was responsible, and open up to it a useful and honorable future. Whether these acts of alleged part performance be taken singly or collectively, they do not indicate that they were done in performance of any contract or agreement respecting property rights of any kind, but rather were the manifestations of a benevolent and affectionate disposition on the part of a childless couple towards a gentle and affectionate child whose fate was placed in their keeping by a mother who was in destitute circumstances and homeless herself.

The case of Van Dyne *v.* Vreeland, 11 N. J. Eq. 370; same case, 12 N. J. Eq. 143, is in many respects like the one before us. And the reasoning of the court in that case would entitle the defendant in error to the relief demanded. In that case, however, the learned Chancellor gave but slight attention to the principles that underlie and support the doctrine of part performance of parol contracts; he simply recited the mutual acts of the parties, and assumed that they constitute such part performance as would take the case out of the operation of the statute. The doctrine of that case, Van Dyne *v.* Vreeland, finds support in Rhodes *v.* Rhodes, 3 Sanford Ch. 279; Sutton *v.* Hayden, 62 Mo. 101, and some other cases in that State. But it is repudiated in Wallace *v.* Rappleye, 103 Ill. 229; Wallace *v.* Long, 105 Ind. 522. Much stress, in some of the cases relied on by defendant in error, is laid on the circumstances that the services rendered by the party seeking specific performance were not capable of being measured, nor intended to be measured, by any pecuniary standard, and, therefore, as the party had no adequate remedy at law, an exception should be grafted on the general rule, that the payment of the consideration will not take a case out of the statute.

This general rule is well established in Ohio—Sites *v.* Keller, 6 Ohio 483, Pollard *v.* Kinner, 6 Ohio 528. And the rule in this State is not affected by the circumstance, that consideration was paid by personal services—Howard *v.* Brower, 37 Ohio St. 402, Crabill *v.* Marsh, 38 Ohio St. 331.

What we hold in the case before us is, that although the services rendered by the defendant in error may have been of such character, yet the circumstances under which they were rendered, when considered in connection with the other alleged acts of part performance, do not indicate that they were done pursuant to any contract or agreement whatever relating to property; and that this class of cases does not call for any further relaxation of the rule requiring proof of acts of part performance to take a case out of the operation of the Statute of Frauds. This, too, is an extreme case of its class. The contest is over an estate valued at about forty thousand dollars. The defendant in error claims to succeed to it all, by virtue of the terms of a parol contract made when she was a small infant, forty-six years before the trial in the Circuit Court. The only persons to whom the terms of the alleged contract were confided were her own mother, who at the time of the trial had not been heard from for over forty years, and her foster parents, James E. Woodbridge and wife, both of whom were dead; and the only proof of its terms was the declarations of Mr. Woodbridge, casually made to persons having no pecuniary interest in the matter, over forty years ago.

The judgment of the Circuit Court is reversed, and the petition dismissed at the costs of the defendant in error.[1]

[1] "The case made by the petition is, we think, a meritorious and equitable one throughout. During a period of twenty years the plaintiff, who was a girl, lived with the said McLaughlins, was obedient, dutiful, and affectionate, paying these parties all the attentions due from a child to parents, and which, as was observed in Sutton *v.* Hayden, *supra*, 'money, with all its peculiar potency, is powerless to purchase,' and performed, in all that time, the labor of the household, and did the family sewing and gave them all her wages. Said James McLaughlin, after making a will in her favor, as to one-half of his property, revoked the same, as we have seen, by codicil, to avoid making her independent, and to secure a continuance of the relation with his wife after his death, which occurred in the year 1876. Some years thereafter said Catherine died suddenly, in a spasm, intestate, and without providing for this plaintiff, or carrying out the said agreement, by which plaintiff was to acquire the property, at their death, and the whole property augmented, as alleged, in the sum of five thousand dollars by her own earnings, now goes, if her equitable claim on the property is not enforced, to defendants, who, it is alleged, were residents of St. Louis, visitors at the house of said Catherine, and were aware of the relations between plaintiff and said James and said Catherine McLaughlin, and of plaintiff's expectations, and thus acknowledged and acquiesced therein.

"For the reasons indicated, the petition contains, we think, a good cause of action, and we, therefore, reverse the judgment and remand the cause for further proceedings in conformity hereto, in which SHERWOOD, BLACK and BRACE, JJ., concur; NORTON, C. J., absent." Per RAY, J., in Sharkey *v.* McDermott, 1887, 91 Mo. 647, 654.

D. Fraud, Misrepresentation, and Concealment.

PRESTON *v.* WASEY.

In Chancery, before Lord Keeper Somers, 1697.

[*Precedents in Chancery* 76.]

One Worts had by will devised *inter al'* several lands to his wife, part of which were copyhold, and were surrendered to the use of his will, and others were not surrendered; the wife was executrix, and intermarried with the plaintiff Preston, and they for a small consideration got the defendant Wasey and his wife (who was heir at law to Worts the testator) to enter into articles for the conveying of these lands, and making good the will of Worts; and afterwards, on pretence of some mistake in the first articles, they were prevailed on to enter into new articles to the same purpose: there was some consideration for their entering into the articles, but it appeared they were not well apprised of their interest when they did; and there was some art used to bring them to it. And this bill was brought to have a specific performance.

But the Master of the Rolls would not decree the articles of a *feme* covert for conveying her inheritance to be specifically performed, but dismissed the bill, and left them to their remedy at law, as they should be advised; and on appeal my Lord Keeper affirmed the decree, but went upon the fraud, and did not seem to take notice of its being the inheritance of a *feme* covert, etc.[1]

[1] The three notes following give the legal requirements for fraud:

"The answer of fraud must contain the averments of all the elements necessary to be proved to make a fraud; and they are that the representation must go to a material fact; must be made under such circumstances that the party has a right to rely on it; the party must rely on it, and it must be false to a material extent. See the common law forms of a special plea of fraud." Per Perkins, J., in Jenkins *v.* Long, 1862, 19 Ind. 28, 29.

Freeman has the following note to Jenkins *v.* Long, in 81 Am. Dec. 376.

"Elements of Fraudulent Representation.—The representation must be of a fact, and not of law, nor the expression of an opinion. Clem *v.* Newcastle, etc., R. R. 68 Am. Dec. 653; Fulton *v.* Hood, 75 id. 664; Parker *v.* Thomas, *post*, p. 385; Estep *v.* Larsh, 21 Ind. 193; Davis *v.* Jackson, 22 id. 234: Arbuckle *v.* Biederman, 94 id. 174. It must be made for the purpose of inducing the other party to act. Fogg *v.* Pew, 71 Am. Dec. 662; Page *v.* Parker, 80 id. 172; Arbuckle *v.* Biederman, *supra*. It must, of course, be false. Campbell *v.* Hillman, 61 Am. Dec. 195; Watson Coal, etc., Co. *v.* Casteel, 16 Ind. 481; Arbuckle *v.* Biederman, *supra*. It must, at law, be made with a fraudulent intent. Campbell *v.* Hillman, *supra;* Howard *v.* Gould, 67 Am. Dec. 728; Wintz *v.* Morrison, id. 658; Henderson *v.* San Antonio, etc., R. R. id. 675;

YOUNG *v.* CLERK.

IN CHANCERY, BEFORE LORD CHANCELLOR MACCLESFIELD, 1720.

[*Precedents in Chancery* 538.]

The bill was to have a specific execution of articles, whereby the defendant had agreed to let the plaintiff a lease of the premises for 18 years, at the rate of £67, 10s. per annum.

The case was thus: The plaintiff, for about twenty years last past, had held the premises, as tenant to one Thomas Goodhew, at the rent of

Alvarez *v.* Brannan, 68 id. 274; Bunn *v.* Ahl, 72 id. 639; Brown *v.* Manning, 74 id. 736; Page *v.* Parker, *supra;* Estep *v.* Larsh, *supra;* Davis *v.* Jackson, *supra;* Watson Coal, etc., Co. *v.* Casteel, *supra;* Arbuckle *v.* Biederman, *supra;* It must be relied upon, but under such circumstances that the party had a right to rely. Campbell *v.* Hillman, *supra;* McGar *v.* Williams, 62 Am. Dec. 739; Newsom *v.* Jackson, 71 id. 206; Fulton *v.* Hood, 75 id. 664; Bell *v.* Byerson, 77 id. 142; Page *v.* Parker, *supra;* Parker *v.* Thomas, *post*, p. 385; Davis *v.* Jackson, *supra;* Hess *v.* Young, 59 Ind. 384; Watson Coal, etc., Co. *v.* Casteel, *supra;* Arbuckle *v.* Biederman, *supra.* And finally, it must be material. McGar *v.* Williams, *supra;* Bigby *v.* Powell, 71 Am. Dec. 168; Keller *v.* Johnson, id. 355; Brown *v.* Manning, 74 id. 736; Fulton *v.* Hood, *supra;* Page *v.* Parker, *supra;* State *ex rel.* Cartwright *v.* Holmes, 69 Ind. 591."

"The result is, that if a party represent as true that which he knows to be false, in such a way and under such circumstances as to induce a reasonable man to believe that it is true, and it is meant to be acted on, and the person to whom the representation has been made, believing it to be true, acts upon the faith of it, and by so acting sustains damage, such representation is fraudulent, and will sustain an action by the party damaged. Kerr on Fraud and Mistake 53." Per DEADERICK, J., in Wynne *v.* Allen, 1874, 7 Baxt., 66 Tenn. 312, 317.

"A misrepresentation, when analyzed, consists of the following elements, all of which are essential to its full legal signification: (1) A positive statement or representation; (2) must be made for the purpose of procuring the contract; (3) must be untrue; (4) the knowledge and belief of the party making it; (5) the belief, trust and reliance of the one to whom it is made; and (6) its materiality." Pomeroy, Equity Jurisdiction, § 211.

"With respect to the general rule of law, it is not contended that Small *v.* Attwood carries the doctrine as to representation so far as to cover this case. But there are other authorities which clearly show that it is not necessary to prove that the representation complained of was made with a knowledge that it was false. . . .

"There was a distinct representation of fact which the plaintiff, though he did not believe it to be false, made without seeking the further information which was within his reach, and which would have shown him that the statement was not true. After this, notwithstanding the inspection made by the defendant, it would not be right for this court to enforce performance." Per Sir W. PAGE WOOD, V.C., in Higgins *v.* Samels, 1862, 2 Johns. & Hem 460, 466.

£40 per ann. Thomas Goodhew was entitled to those lands, under a lease of 21 years, with power of a reversal from the Archbishop of Canterbury; and on his death, which happened about two years since, the estate came to Henry Goodhew, his brother, by virtue of a family settlement made the 20th of December, 1689; and thereupon his lease being determined, he applied to Henry Goodhew for a new lease; but before a new lease was made he likewise died, having first made his will, and thereby devised this estate to his daughter, with whom the defendant after intermarried, and thereby in her right became entitled to the premises for the residue of the lease, with a power of reversal; and thereupon the plaintiff applied to him likewise for a new lease, to make up the complete term of 21 years, which Thomas Goodhew had agreed with him for, and of which there was about 18 years to come.

The defendant had never seen the land, and knew nothing of the nature or value thereof, and therefore desired him to consider it, and come and see the lands which lay near Canterbury, before he came to any agreement concerning them: it appeared, and was fully proved in the cause, that the lands were worth, and were actually let by the plaintiff to under-tenants at £3 and £3 10s. an acre per ann. being hop lands, and the tenants were, by covenants in their leases, to plant them and leave them planted with hops, to lay on so many load of dung every year, to bear all parish taxes, and to be at other expenses, so that the plaintiff had £167 per ann. coming in by them, without any expense on his part, though he had never paid more than £40 per ann. rent to Thomas Goodhew.

When the defendant went down to Canterbury he did take a view of the lands in the plaintiff's company, who had promised and engaged him to lie at his house; but it did not appear that he had any opportunity whatsoever of informing himself otherwise than from the plaintiff himself, who was continually with him, what the value of the lands was, nor had the defendant himself any judgment, on a bare view of the lands, what they were worth per ann.; but he asked the plaintiff to let him see the counterpart of the leases he had made to his under-tenants, which would have fully informed him therein, but that was shuffled off on pretence he could not find them, or that they were left with a friend of his, and so the defendant knew nothing of the rent the plaintiff received from his under-tenants, or the terms on which they held the lands; and it was fully proved in the cause that the defendant expressed great dissatisfaction thereat, and was unwilling to come to any articles or agreement with the plaintiff; but by the importunity of the plaintiff and others then present, he was prevailed on to agree to it, and thereupon the articles in question were drawn up and executed between them; after which the defendant discovered the imposition, and that the plaintiff had above £100 per ann. clear above the rents he was to pay him, and that without any trouble or expense whatsoever on his part: the defendant on discovery of this, and informing himself fully of the value

and nature of the land, thereupon refused to execute a lease pursuant to the articles; and to oblige him to it was this bill brought.

LORD CHANCELLOR was clear of opinion that this court was not bound to decree a specific execution of articles, where they appeared to be unreasonable, or founded on a fraud, or where it would be unjust or unconscionable to assist them; that from the circumstances of this case, these articles were plainly of that sort; that though there was no direct fraud proved, yet from the great undervalue of the land, and that too without any expense whatsoever on the plaintiff's part, it appeared to him to be an unreasonable and shameful contract; that it was indeed good at law, and therefore left the plaintiff to his legal remedy for recovery of what damages he could by non-performance of the articles, but dismissed the bill as to any specific execution thereof.

DAY *v.* NEWMAN.

IN CHANCERY, BEFORE LORD ALVANLEY, M. R., 1798.

[10 *Vesey* 300, *Stated in the Argument by* SIR SAMUEL ROMILLY *from His Own Note.*]

The original bill prayed the specific performance of an agreement for the sale of an estate of the value, as represented, on one hand, of 9,000l. or 10,000l.; and, on the other, only 5,000l. The contract was for 6,000l. down and 14,000l. at the death of a life, aged sixty-five. Lord ALVANLEY said it was not a case of actual fraud, but it was insisted the bargain was grossly inadequate, and the inadequacy was very great: it was impossible upon the whole evidence to make the estate to be worth more than 10,000l. Though he would not decree the contract to be delivered up, he was satisfied he ought not to decree a performance: the court would decree neither the one nor the other; the only inconvenience of not delivering up the contract would be, that an action would lie for damages. Lord ALVANLEY, then adverting to Nott *v.* Hill, 1 Vern. 167; Berny *v.* Pitt, 2 Vern. 14, etc., desired to have it understood, he did not mean to disturb the cases where advantage was taken of necessity; adding, that there was no such circumstance in that instance and that upon the whole he was not warranted either to decree a specific performance or to deliver up the contract, and therefore dismissed both bills.[1]

[1] "The Lord Chancellor [TALBOT]," in Savage *v.* Taylor, 1736, Forrester 234, 236, "stated the three bills, and the design of them, and added to this effect: The first question is with regard to the articles under which the plaintiff claims whether he is entitled to have the benefit of them, which depends on two considerations: 1. Whether the articles are such as a court of equity will set aside,

KELLY *v.* RAILROAD CO., 1888, 74 Cal. 557. HAYNE, C.—

1. Assuming the correctness of the appellant's major proposition—viz., that in order to defeat a suit for specific performance on the ground of fraud, the fraud must be productive of injury—it is not necessary that the injury should result to the vendor. It is sufficient if it would result to third persons. It is upon this principle that the relief is refused where the thing to be done would operate as a fraud upon the public. Thus a court will refuse to decree specific performance of an agreement to publish a book purporting to be written by one person, but in fact written by another. Post *v.* Marsh, L. R. 16 Ch. D. 406. So upon the same principle the relief is refused where the agreement was in fraud of the rights of creditors. (St. John *v.* Benedict, 6 John. Ch. 117; Baldwin *v.* Campfield, 8 N. J. Eq. 600; Ryan *v.* Ryan, 97, Ill. 40) or in fraud of the rights of other parties. Kitchen *v.* Coffyn, 4 Ind. 507. So it is refused where the act sought to be enforced would operate to

and if the court will not, whether the plaintiff shall have its assistance by decreeing a specific performance of them. It is certain this court, in cases of articles, has discretionary power to carry them into execution or not; and if it appears they are unfairly obtained, though not to such a degree as to set them aside, yet this court will not order a performance, but will leave the plaintiff to his remedy at law."

"There is no case where mere inadequacy of price, independent of other circumstances, has been held sufficient to set aside a sale made between parties standing on equal ground, and dealing with each other without any imposition or oppression. And the inequality amounting to fraud, must be so strong and manifest as to shock the conscience and confound the judgment of any man of common sense. Sir TH. CLARKE, in How *v.* Weldon, 2 Vesey, 516; Lord THURLOW, in 1 Bro. 9; Lord Ch. B. EYRE, in 2 Bro. 179, note; Lord ELDON, in 9 Vesey, 246; Sir WILLIAM GRANT, in 16 Vesey, 517. There is a very important distinction, which runs through the cases, between ordering a contract to be rescinded, and decreeing a specific performance. Though inadequacy of price is not a ground for decreeing an agreement to be delivered up, or a sale rescinded (unless its grossness amount to fraud) yet it may be sufficient for the court to refuse to enforce performance. It is not an uncommon case for the court to refuse to enforce for inadequacy, and at the same time refuse to rescind. The two cases admit of very different views and considerations. . . .

"I need not multiply cases on this point. The doctrine is settled, that in setting aside contracts, on account of inadequate consideration, the ground is fraud arising from gross inequality. Unless the inadequacy does, of itself, *ex evidentia rerum*, prove fraud, the rule is, says Ch. B. MACDONALD, 1 Wightwick, 109, that inadequacy, by itself, has not the weight suggested. If, indeed, advantage be taken, on either side, of the ignorance or distress of the other, it affords a new and distinct ground, not applicable to this case, and a very great inadequacy may form a presumption of oppression. 1 Wightwick's Rep. 28, 29; 3 Ves. & B. 117. Dealing with young heirs, and for reversionary interests, is also watched with the utmost jealousy, and constitutes a particular class of cases, forming another exception to the general rule, that

the injury of interests in remainder, (Fry on Specific Performance 141, § 304; Thomas *v.* Dering, 1 Keen 747, 748) or to a wife's right in a homestead, (Phillips *v.* Stauch, 20 Mich. 383) or to subsequent purchasers from the same vendor. Curran *v.* Holyoke, 116 Mass. 90; and see Pomeroy on Specific Performance, § 181. The court will not make itself an instrument to carry out the fraud, whether the person to be injured be a party to the contract or not. It will not assist the plaintiff to get the benefit of the intervenor's labor and improvements upon the tract in controversy.

2. But we do not think that in order to defeat a suit for the specific performance of a contract to convey land, upon the ground of fraud, the fraud must be productive of damage either to the vendor or to third persons. If the misrepresentation was intentional, and made for the purpose of deceiving the vendor, and the vendor relies upon it, and was deceived by it, and would not have entered into the contract but for the fact that he was so deceived, then we think a court of equity will not

for mere inadequacy of price a contract is not to be set aside. Evans *v.* Peacock, 16 Vesey, 512; Gowland *v.* De Faria, 17 Vesey, 20. So, leases of charity estates will be set aside for an undervalue, if considerable, though there be no imputation of fraud, on grounds peculiar to that trust. 18 Vesey, 315." Per Chancellor KENT, in Osgood *v.* Franklin, 1816, 2 Johns. Ch. 1, 23.

"Mere inadequacy of price, or other inequality in the bargain, is not, it is said, to be understood as constituting *per se* a ground to avoid a bargain, in equity. Courts of equity as well as courts of law, act upon the ground that every person who is not from his peculiar condition or circumstances under disability, is entitled to dispose of his property in such manner, and upon such terms as he chooses; and whether his bargains are wise and discreet or otherwise, profitable or unprofitable, are considerations not for courts of justice, but for the party himself to deliberate upon. Where, however, the inadequacy is such as to demonstrate some gross imposition, or undue influence or, to use an expressive phrase, shock the conscience, and amount in itself to conclusive and decisive evidence of fraud, equity ought to interfere. And gross inadequacy of price, when connected with suspicious circumstances, or peculiar relations between the parties, affords a vehement presumption of fraud. 1 Story's Eq. 240-50; Eaton *v.* Patterson, 1 S. & P. Rep. 9; Bozman *et al. v.* Dranghan, 3 Stew. Rep. 243." Per COLLIER, C.J., in Juzan *v.* Toulmin, 1846, 9 Ala. 662, 686.

See same case with notes in 44 Am. Dec. 448.

"Mere inadequacy of price is not sufficient to set aside a deed. It is sometimes regarded as a suspicious circumstance when coupled with other strong evidence of fraud. Here it would hardly be entitled to that much consideration. The sale of this privilege at a low price is explained by so many reasons, that it is not necessary to account for it by supposing there was any foul play. But it is enough to say that the plaintiff had a right to sell at what price he pleased or keep his property. Having chosen to do the former, he cannot undo it by changing his own mind." Per BLACK, J., in Harris *v.* Tyson, 1855, 24 Pa. St. 347, 360.

enforce the contract, whether it be accompanied by damage or not. So far as this kind of suit is concerned, such a misrepresentation is material although not accompanied by damage.

The counsel for the appellant cite in this connection the case of Morrison *v.* Lods, 39 Cal. 385, as affirming the contrary doctrine. The report of that case is somewhat obscure. It does not show what the representation was, nor whether it was intentionally false or a mere innocent misrepresentation. But if the court meant to decide that a court of equity will enforce a contract obtained solely through a false and fraudulent representation, then we think the decision is in violation of established principles. It is perfectly true, as stated in the opinion, that an action at law cannot be maintained for fraud unless accompanied by damage. It is also true, as stated in the opinion, that a court of equity will not set aside a contract obtained through fraud unless it be productive of injury. 1 Story's Eq. Jur. § 203. But it is not true that this applies to suits for specific performance. It is well settled that a court of equity may refuse specific performance of a contract which it would not set aside. Mortlock *v.* Buller, 10 Ves. 308; Cadman *v.* Horner, 18 Ves. 11; Seymour *v.* Delancy, 6 Johns. Ch. 222; Jackson *v.* Ashton, 11 Pet. 248; Barksdale *v.* Payne, Riley 178; Frisby *v.* Ballance, 4 Scam. 299; Clement *v.* Reid, 17 Miss. 542, 543; Taylor *v.* Merrill, 55 Ill. 61; Hilliard on Vendors, 445; Fry on Specific Performance, Am. ed., 192, § 427.

Although the court will refuse to destroy the contract, it will not further in any way the fraudulent design. In such cases, by an application of the maxim, that he who comes into equity must come with clean hands, the court is enabled to give greater effect to the principles of morality than can be done in ordinary cases. The leading text-writers are agreed in this view.[1]

And it is evident that such must be the rule. To say otherwise is to place suits for specific performance on the same level with actions at law, which is contrary to all the authorities. If, therefore, the case of Morrison *v.* Lods is to be construed as affirming any such doctrine, it does not state the law correctly. The case of Board of Commissioners *v.* Younger, 29 Cal. 172, was a suit to set aside a contract, and not for specific performance.

In the present case the false and fraudulent representation of plaintiff was the inducing cause of the contract. This is apparent from the fact that as soon as the company discovered the fraud which had been practiced upon it, it repudiated the contract. And it is expressly found that "the land agent, but for such deception, would not have awarded said south half of northeast quarter to said Kelly, but would have awarded it to said Cole."

This state of facts well illustrates the wisdom of the doctrine which does not insist upon measuring everything by the standard of dam-

[1] The author cited and quoted from KENT, STORY, KERR and HOVENDEN.

age, but so far as can be done allows parties to determine what is for their own interests, and to contract or to refuse to contract accordingly. It is evident from the circulars contained in the record that it was the policy of the company to encourage the settlement of its vast tracts of unoccupied land. To carry out this policy it offered special inducements to settlers. It ought to be allowed to fulfil its promises to those who have relied upon its good faith. It is not for one who falsely pretends to be entitled to the benefit of those promises to say that it is all the same to the company because he pays the same price as the other would. The case is one where the vendor has special motives for selling to one person at a price which it would not accept from another. See *dictum* of Lord ELDON in Bonnett *v.* Sadler, 14 Ves. 528.

OLDFIELD *v.* ROUND.

IN CHANCERY, BEFORE LORD CHANCELLOR LOUGHBOROUGH, 1800.

[5 *Vesey* 508.]

The object of the bill was to obtain a specific performance of an agreement entered into by the defendant to purchase a meadow, called Burnett's Meadow, near Clewer, which was sold by auction to the defendant for £950.

The principal objections made by the defendant were, first, that the premises were described as a meadow, consisting of fifteen acres, without any notice of a way round and a foot-path across it; secondly, that the lot was raised to an extravagant price by puffing.

The way round the field was stated by the answer to be a public road; but upon the evidence it appeared to be only a foot-path, and the answer stated that the defendant was owner of a house and ground adjoining.

The Solicitor-General, for the defendant, observed upon the variance from the description, and the disadvantage arising from this way, which by length of time had become very wide.

LORD CHANCELLOR. Certainly the meadow is very much the worse for a road going through it; but I cannot help the carelessness of the purchaser, who does not choose to inquire. It is not a latent defect.

Decree according to the prayer of the bill with costs.[1]

[1]But then it is said that if the defendant had taken the pains to look, he might himself have seen what was the state of the premises. But this is a suit for specific performance; and in such a suit it is not an answer to the fact of the plaintiff having made false representations, to say the defendant was imprudent. If the case stood on this ground only, I should refuse specific performance. If a plaintiff comes here and asks relief; asks this court to

GIMBLIN *v.* HARRISON.

IN THE COURT OF APPEALS OF KENTUCKY, 1804.

[2 *Sneed* 315.]

The material question in this cause is, did the appellee make such misrepresentation of the quality or situation of the land sold by him to the appellant as ought to avoid the sale.

The appellant states in his bill, that the appellee positively stated and assured him that it was good second-rate land, and that he was induced to sell it as such from the information given him by Richard Barbour, on which statement and assurance he, the appellee, relied. He further states that the land does not lie at the place described, nor is it of the quality represented, and not worth twenty dollars.

The appellee, in his answer, states that he sold and conveyed the land agreeable to the calls of the patent, and that it lies agreeable to contract, and where it is said to lie in the patent, and denies that he was guilty of any deception or misrepresentation as to the quality; that he informed the appellant that he had never seen the land, but that he heard Richard Barbour say it was second-rate land, he denies that he warranted the land to be second-rate, or gave any other assurance than the aforesaid, from information which he believed to be true, as the land was entered with the commissioners of the tax as second-rate land, in the lifetime of the said Richard Barbour, by him, and paid for as such.

It is proved that the appellee informed the appellant that the land was located by Richard Barbour; that he, the appellee, was unacquainted with the quality of it, but had been informed by Barbour it was second-rate land. It is further proved that the appellant said he had purchased the land on the representations of Richard Barbour, who was a man that could be depended on, and who had located the land; that he did not purchase upon the word of the appellee, for he had never seen it. From these allegations and proofs, it is evident there was no misrepresentation as to the quality of the land. But the situation thereof is different from that described in the certificate of survey and deed; these represent it as being fifty poles below the mouth of Deserter's fork; the survey returned in the cause shows it to be fifty poles above the mouth of the said fork.

assist him in what is not the assertion of a strict legal right, but to assist him on grounds standing on the peculiar jurisdiction of this court, he must show that his conduct has been clear, honorable and fair. If he has been guilty of misrepresentation, this court will leave him to his remedy, if any, at law. Sir RICHARD T. KINDERSLEY, V. C., in Cox *v.* Middleton, 1854, 2 Drew. 209, 220.

This make a difference of one hundred poles, and the quality of the land lying between appears to be second-rate, and the other land of very inferior quality.

As neither the appellant or the appellee had seen the land before the purchase was made and the appellant trusted to the representation of a third person, and omitted to examine into the quality and situation of the land, which were objects on which he might have exercised his observation and judgment, and protected himself from surprise or imposition, the maxim *caveat emptor* ought to apply, and to provide against this rule he should have required an express warranty; but having neglected both, however hard his situation may be, he must submit to it.

Therefore, it is considered by the court, that the decree aforesaid be affirmed, that the appellee may proceed to have the benefit of the same in the court below, and recover of the appellant his costs in this behalf expended, which is ordered to be certified to the said circuit court of Mercer County.[1]

[1]See Bostwick *v.* Lewis, 1804, 1 Day, 250; S. C. 2 Am. Dec. 73, with valuable note.

"The law applicable to cases of this nature has been well settled for upwards of half a century; the simple question is, what are the obligations imposed on a person who deals for his own benefit, or as the agent of another with the property of one to whom he stands in a fiduciary character? I quite agree with what fell on this subject from Lord ELDON, in *Ex parte* Bennett, where, alluding to the facts of that case, he says, 10 Ves. 400, 'Upon the general rule both the solicitor and the commissioner have duties imposed upon them that prevent their buying for themselves, and if that is the general rule it follows of necessity that neither of them can be permitted to buy for a third person, for the court can with as little effect examine whether that was done by making an undue use of the information received in the course of their duty in the one case as in the other.' The principle to be deduced from the decided cases is, that there must be entire good faith, and in the instance of a solicitor it is incumbent upon him to satisfy the court that he has done as much for his client as he would have done if the purchaser had been a third person. I think this principle applies to almost all cases, and applying it to the one before me I do not come to the same conclusion as that arrived at by the Vice-Chancellor. . . .

"The circumstances show conclusively to my mind that there was not that fair, open dealing between the parties which the relation in which they stood to each other demanded. Although, therefore, I do not lay it down that an agent cannot act for and bind opposing parties, yet it must appear that the principals were at arms' length in the transaction; and it would require a very strong case to make this out where, as in the present instance, a vendor and purchaser are together in the same house, but the vendor is excluded from the room where the negotiation is going on, and the agent does not disclose to them both the whole nature of the dealing. Mr. Briant having intrusted to Mr. Mellersh the conduct of the sale, it seems to me quite impossible to sanction such a proceeding as that which took place. The case is not, in my opinion, one in which relief ought to have been granted,

FENTON *v.* BROWNE.

In Chancery, before Sir William Grant, M. R., 1807.

[14 *Vesey* 144.]

Bill for specific performance of an agreement by the terms of which the defendant was to purchase a leasehold estate. The principal objection taken was that of misrepresentation and concealment. It was alleged that the plaintiff by his agent had said that the estate was renewable on the payment of a small fine, not exceeding 130l.; whereas it was renewable at the option of Magdalen College, Oxford, which demanded about 700l. The only misrepresentation actually established was that the particulars described the estate to be of nearly equal value with the freehold.

The Master of the Rolls. I wish to consider a little the first point: what effect is to be given to such a representation; and, secondly, in what mode effect is to be given to it: to find out what is the same fine, which that representation purported to be payable, as compared with the fine which turns out to be actually payable.

The Master of the Rolls. The representation as to the small fine is indefinite. So is the representation, that the estate is nearly equal to free-

but one in which the bill ought to have been dismissed with costs." Per Lord Chancellor Cranworth, in Hesse *v.* Briant, 1856, 6 De G. M. & G. 623, 628.

In Fellowes *v.* Lord Gwydyr and Page, 1829, 1 R. & M. 83, 189, the defendant, Lord Gwydyr, being entitled to certain decorations of Westminster Hall used at the coronation of the King, sold them to the plaintiff, who without removing them sold them at an advanced price to the defendant, Page, the transaction being carried on in the name of Fellowes as agent for Lord Gwydyr. Page refused to carry out his written contract, and this was a bill for specific performance.

The Lord Chancellor [Lyndhurst]. "Mr. Page, I am satisfied, had every reason to believe that he was contracting with Lord Gwydyr; but the only question here is, what loss or inconvenience has he sustained in consequence of acting under that mistake? There is nothing in the cause which can lead me to suppose that he would not have contracted with the plaintiff, or that he would have declined to offer the sum of 1500 guineas had he been aware of the party who was really the owner of the property. It was strongly pressed upon me in the argument that the parties should be left to proceed at law. But from the situation in which they respectively stood, as well as from the form of the agreement, they could not have obtained an effectual adjudication upon their rights at law, and it was necessary for the plaintiff, therefore, to come into this court. Mr. Fellowes says that the name of Lord Gwydyr was not used for any improper purpose; but even if it were otherwise, that circumstance alone would furnish no reason why Mr. Page should be released from his contract without showing that the deception had in some way operated to his prejudice."

hold. All these representations ought to put the party upon inquiry. Connected with certain circumstances such representations may however be fraudulent. In this case the knowledge of Topping, that a larger fine would be required, is established: also his knowledge that the purchaser entertained a different idea of the fine. These are grounds for rescinding the contract if made out. This purchaser wished to ascertain the fine; and offered £150, which the agent refused. I cannot put the purchaser in the situation in which he would have been, if the £150 had been accepted. That circumstance ought to have put him upon inquiry. In the first place, therefore, this purchaser does not bring himself within any rule to avoid the contract. In the next place, if he had, he could only have rescinded the contract. I think, there is no sufficient ground for resisting the performance of the contract.[1]

[1] A part of the opinion discussing the question of costs has been omitted.

"J. S. had a term for years, and there being a discourse between him and J. D. about buying that term, J. S. said and affirmed to J. D. that the term was worth £150 to be sold, upon which J. D. gave J. S. £150 for the term; and afterward J. D. offered and endeavored to sell the term again, and could not obtain, nor get for the term £100, whereupon he brought an action on the case in nature of a deceit against J. S. and declared an *ut supra*, and that J. S. *asscruit* to him, that the term was worth so much, to which assertion J. D. *fidem adhibens*, did buy the term for so much money, but could not sell it again for so much money as was given at first in fraud and deceit of the plaintiff to his damages, etc. and upon not guilty pleaded, it was found for the plaintiff, and alleged in arrest of judgment, that the matter precedent did not prove any fraud; for it was but the defendant's bare assertion that the term was worth so much, and it was the plaintiff's folly to give credit to such assertion. But if the defendant had warranted the term to be of such value to be sold, and the plaintiff had thereupon given and disbursed his money, there it is otherwise; for the warranty given by the defendant is a matter to induce confidence and trust in the plaintiff. Between Harvey and Young, Mich. 39 Eliz. as TOWES of the Inner Temple said at the bar, and that he was of counsel with the defendant." Harvey *v.* Young, 1597, Yelv. 21a.

See Judge METCALF'S valuable note to this case in his Am. ed. of Yelverton.

"But there was evidence in the present case which, if believed, had a strong tendency to prove that the defendants, at the time of execution of the contract for the sale of the timber, made representations to the plaintiff's agent, concerning the quantity of land upon which the wood was standing, which were not only false, but were known by them to be false, and which might well have had a material influence on the mind of the plaintiff's agent, and have induced him to make the contract with the defendants. Upon such a state of proof, it was the right of the plaintiff to go to the jury. The contract having been seasonably rescinded by the plaintiff by a tender to the defendants of the note and money which they had given for timber, he would have been entitled to a verdict, if he satisfied the jury that his agent had been induced to enter into the contract for the sale of the timber by the fraudulent misrepresentations of the defendants." Per BIGELOW, J., in Prescott *v.* Wright, 1855, 4 Gray 461, 464.

"The mere fact that a party has the opportunity of investigating and ascer-

CADMAN *v.* HORNER.

IN CHANCERY, BEFORE SIR WILLIAM GRANT, M. R., 1810.

[18 *Vesey* 10.]

The bill prayed the specific performance of an agreement by which the defendant contracted to sell the fee simple of certain premises for the sum of £600, payable by instalments. The agreement was signed by both parties, and the defendant, having received part of the purchase money, resisted the performance on the ground that the plaintiff, who was his agent, had misrepresented the value of the estate, producing evidence that it was worth near £1,200; also, that the plaintiff had previously to the

taining whether a representation is true or false is not sufficient to deprive him of his right to rely on a misrepresentation as a defense to an action for specific performance. The person who has made the misrepresentation cannot be heard to say to the party to whom he has made that representation, 'You chose to believe me when you might have doubted me and gone further.' The representation once made relieves the party from an investigation, even if the opportunity is afforded. I do not mean to say that there may not be certain circumstances of suspicion which might put a person upon inquiry and make it his duty to inquire, but under ordinary circumstances the mere fact that he does not avail himself of the opportunity of testing the accuracy of the representation made to him will not enable the opposing party to succeed on that ground.

"Then that being so, the learned judge came to the conclusion either that the defendant did not rely on the statement, or that if he did rely upon it he had shown such negligence as to deprive him of his title to relief from this court. As I have already said, the latter proposition is, in my opinion, not founded in law, and the former part is not founded in fact; I think, also, it is not founded in law, for when a person makes a material representation to another to induce him to enter into a contract, and the other enters into that contract, it is not sufficient to say that the party to whom the representation is made does not prove that he entered into the contract relying upon the representation. If it is a material representation calculated to induce him to enter into the contract, it is an inference of law that he was induced by the representation to enter into it, and in order to take away his title to be relieved from the contract on the ground that the representation was untrue, it must be shown either that he had knowledge of the facts contrary to the representation, or that he stated in terms, or showed clearly by his conduct, that he did not rely on the representation. . . . Where you have neither evidence that he knew facts to show that the statement was untrue, or that he said or did anything to show that he did not actually rely upon the statement, the inference remains that he did so rely, and the statement being a material statement, its being untrue is a sufficient ground for rescinding the contract. For these reasons I am of opinion that the judgment of the learned

agreement represented to him that the houses had been injured by a flood, and would require between £50 and £60 to repair them; whereas in truth the premises at the time of the contract required no more than forty shillings to put them in complete repair. No evidence of the value of the premises was entered into by the plaintiff, but the defendant in his answer admitted that the clear yearly rent amounted to £49, and stated that in 1805 he had purchased these premises for £700, and had afterwards expended £300 in repairing them.

The MASTER OF THE ROLLS. The evidence of the inadequacy of the price in this case is considerably shaken by the defendant's admission of the clear rent of the premises. It is difficult to conceive that he could be ignorant of the value, having so recently purchased the estate, and laid out money in the improvement of it; and it is not easy to comprehend his conduct, nor does misrepresentation by the plaintiff in regard to what was requisite for the repairs of the houses by any means account for the disparity between the price paid for the estate and the sum at which the witnesses value it; yet, as upon the evidence, the plaintiff has been guilty of a degree of misrepresentation, operating to a certain, though a small, extent, that misrepresentation disqualifies him from calling for the aid of a court of equity, where he must come, as it is said, with clean hands. He must, to entitle him to relief, be liable to no imputation in the transaction. This is not a case where the court is called upon to rescind an agreement, and to decree the conveyance executed in pursuance of it, to be delivered up to be cancelled, which would admit a different consideration.

The bill was dismissed without costs.

judge must be reversed and the appeal allowed." Per Lord Justices BAGALLAY and LUSH, and JESSEL, M.R., in Redgrave *v.* Hurd, 1881, L. R. 20 Ch. Div. 1.

"It is material to observe that it is often fallaciously assumed that a statement of opinion cannot involve the statement of a fact. In a case where the facts are equally well known to both parties, what one of them says to the other is frequently nothing but an expression of opinion. The statement of such opinion is in a sense a statement of a fact, about the condition of the man's own mind, but only of an irrelevant fact, for it is of no consequence what the opinion is. But if the facts are not equally known to both sides, then a statement of opinion by the one who knows the facts best involves very often a statement of a material fact, for he impliedly states that he knows facts which justify his opinion. . . .

Treating this then as a misrepresentation, did it induce the purchasers to buy? It appears to me that it is in every case a question of fact whether a person is induced to buy a particular representation." Per BOWEN, L.J., in Smith *v.* Land & House Property Corporation, 1884, L. R. 28 Ch. Div. 7, 15.

TROWER *v.* NEWCOME.

IN CHANCERY, BEFORE SIR WILLIAM GRANT, M.R., 1813.

[3 *Merivale* 704.]

This was a bill by the vendor for specific performance of an agreement to purchase the advowson of Honychurch, in the county of Devon. The bill stated (which was admitted by the answer) that the plaintiff being seised in fee of the advowson in question caused the same to be set up to sale by auction, when the defendant became the purchaser, according to the conditions of sale. The printed particulars contained a description of the situation, number of acres, etc., and added "a voidance of this preferment is likely to occur soon," but made no mention of the present incumbent.

The defendant, by his answer, said he was induced to attend at the sale by the representation in the particulars above noticed; that the auctioneer, at the time of sale, said (in explanation) "that the living would be void on the death of a person aged eighty-two," of which the defendant took a note in writing, or a copy of the particulars, and that he was, by such statement, induced to bid, and did bid accordingly, and was declared the purchaser and signed the agreement. He then proceeded to state that he (the defendant) had, since the sale, discovered that the then present incumbent of the living was aged only thirty-two, upon which discovery his (the defendant's) solicitor sent back the abstract (which had been furnished) plaintiff's solicitor, with a note on the margin, stating the representation made at the time of sale, with these words added: "How does it become void?" to which the plaintiff's solicitors returned for answer: "We do not consider the purchaser entitled to call for any security for the voidance of the living at the death of a person aged eighty-two. No such security was required at the sale, and the auctioneer only stated that such a voidance would take place. We have no objection, however, to the patron engaging by covenant or bond, that the present incumbent will avoid the living on the death of a gentleman aged eighty-two."

Upon this statement the defendant insisted that the particulars of sale and the representations made by the auctioneer were untrue and calculated to mislead, and that they did, in fact, mislead the defendant; and that he (the defendant) would have not bid for, or become the purchaser of, the advowson, if he had not given credit thereto, and that he, therefore, ought not to be compelled to complete the purchase.

It appeared in evidence that the incumbent of Honychurch expected to be presented to another living on the death of its incumbent, who was aged eighty-two, which would cause the voidance of Honychurch.

The MASTER OF THE ROLLS thought the representation made by the

printed particulars so vague and indefinite that the court could not take notice of it judicially, and that its only effect ought to have been to put the defendant upon making inquiries respecting the circumstances under which the alleged evidence was likely to take place previous to his becoming the purchaser. That such a representation was capable of being supported by the fact, either of the incumbent being old or infirm, or by various collateral circumstances. His Honor compared this representation to that made in a case lately before him, respecting the purchase of a leasehold estate, which was stated in the particulars to be renewable "on the payment of a small fine," leading to the question, "What is a small fine?" with reference to the circumstances of the property, and the expression being so vague that no importance whatever could be attached to it.

Specific performance decreed.

WALL *v.* STUBBS.

IN CHANCERY, BEFORE SIR THOMAS PLUMER, V. C., 1815.

[1 *Maddock* 80.]

This was a bill filed by the vendor of an estate, against the vendee, for a specific performance of the agreement to purchase. The specific performance was resisted, on the ground, that misrepresentation had been employed to induce the vendee to purchase the estate at a price much beyond its value; and a further objection was, that as the vendor was himself only entitled to the estate in virtue of an agreement with the persons of whom he purchased, and no conveyance had been made to him, or possession taken, the Statute 32 Henry VIII. c. 9, applied.

A great deal of evidence was adduced by the plaintiff, to prove that the estate was of the value it had been represented to be; and by the defendant, to show it was of much less value.

The VICE-CHANCELLOR entered into a very minute consideration of the evidence; and thought there was proof, by persons best able to form a judgment, of great misrepresentation as to the value of the estate, which appeared to be worth 5,000l. less than it was represented to be; and considered that as a sufficient ground to refuse a specific performance; relying for authority, upon Buxton *v.* Lister, Prec. Chanc. 383, and see Williamson *v.* Joyce, 3 Ves. 168; Howard *v.* Hopkins, 2 Atk. 371; Higginson *v.* Clowes, 15 Ves. 516; Ellard *v.* Lord Landaffe, 1 Ball & Bea. 241; Legge *v.* Croker, ib. 506.

His Honor, also, further observed that, whether the misrepresentation be wilful or not; or of a fact latent, or patent, Duke of Norfolk *v.*

Worthy, 1 Camp. 337; Loyes *v.* Rutherford, Sugd. Vend. and Pur. 245, such misrepresentation may be used to resist a specific performance, unless the purchaser really knew how the fact was. Dyer *v.* Hargrave, 10 Ves. 515. In this case the plaintiff must be left to his remedy at law. In a court of law, on a proper case made, damages may be given, commensurate to the injury the plaintiff may have sustained; and such court can better examine into all the circumstances of a case like the present, in which there is contradictory evidence. Money is all the plaintiff seeks by his bill, as is the case in all bills by vendors, and money will be given him at law, if he is found entitled to it.

The VICE-CHANCELLOR being of opinion that the bill must be dismissed, on the ground of misrepresentation, thought it unnecessary to consider the objection arising out of the Statute of Henry VIII.[1]

Bill dismissed, without costs.

SCOTT *v.* HANSON.

IN CHANCERY, BEFORE SIR JOHN LEACH, V. C., 1826.

[1 *Simons* 13.]

An estate, sold by auction, was described in the particulars of sale as consisting of fourteen acres of uncommonly rich water meadow land, let on lease with other land for a term of which four years were unexpired, and it was then stated that the apportioned rent for this lot was £75.

A suit having been instituted by the vendor for a specific performance of the contract, it appeared in evidence that, on account of the high level of this meadow and the low level of some adjoining land, the former was imperfectly watered. It was objected, for the purchaser, that it was not proved to be a water meadow. But the Vice-Chancellor ruling that a meadow which was watered, though imperfectly, was not improperly described as a water meadow, it was then insisted that to describe it, in the particular, as uncommonly rich water meadow land, was a misrepresentation, and that a court of equity ought not to assist the vendor, but should leave him to his action at law.

[1] By this act no one shall sell or purchase any pretended right or title to land, unless the vendor hath received the profits thereof for one whole year for such grant, or hath been in actual possession of the land, or of the reversion or remainder, on pain that both purchaser and vendor shall each forfeit the value of such land to the king and the prosecutor.

The defendant, in the first instance, pleaded this statute; but the plea not being put in on oath, it was, on motion, ordered to be taken off the file. 2 Ves. & Bea. 354.—Reporter's Note.

For the vendor it was argued that the principles as to representation were the same in equity as at law; that the real quality of this land, being an object of sense and obvious to ordinary diligence, it was the fault of the purchaser if he did not inspect it and judge for himself; that the amount of the annual rent being stated, which was the criterion of the value, the purchaser could not be deceived; that when the land was said to be uncommonly rich, it was spoken of comparatively only; and that the question throughout the cause has been, not whether the land was uncommonly rich water meadow, but whether it was water meadow at all.

The cases cited for the plaintiff were Fenton *v.* Brown, 14 Ves. 144, and Trower *v.* Newcome, 3 Mer. 704.

The VICE-CHANCELLOR took time to consider the case, and then gave judgment to the following effect:

I do not accede to the argument that the principles upon the subject of representation are uniformly the same in equity as at law; for, in the case of Stewart *v.* Alliston, 1 Mer. 26, Lord ELDON, C., states the doctrine of the court to be otherwise. In a bill for a specific performance it is not sufficient to say that the purchaser has been negligent, if the vendor, who seeks the aid of a court of equity, has, in his conduct, been incorrect. I agree with Sir WILLIAM GRANT, M. R., in the case of Trower *v.* Newcome, that a representation which is vague and indefinite is to be treated, by a purchaser, only as a ground for inquiry; and the doubt in that case is whether the purchaser was not justified in concluding that the representation amounted to a statement that the incumbent was eighty-two years of age. Unless the expression used in this case can be considered as a representation that the land in question was not imperfectly, but perfectly, watered, then the expression is vague and indefinite; and, upon the best consideration I can give this case, I think I should strain the meaning of the words "uncommonly rich water meadow land," if I were not to confine the meaning to the quality of the land, and, in that sense, it professes to be nothing more than the loose opinion of the auctioneer, or vendor, as to the obvious quality of the land, upon which the vendee ought not to have placed, and cannot be considered to have placed, any reliance. I lay no stress upon the circumstance that a rent of the land is mentioned in the particular of sale, because it is not a rent fixed by contract with the lessee, but a part of a gross rent paid for the land in question and other premises comprised in the same lease, and is arbitrarily apportioned by the vendor. The purchaser must, therefore, complete his contract.

VISCOUNT CLERMONT *v.* TASBURGH, 1819, 1 J. & W. 112. Sir THOMAS PLUMMER, M.R.—

The more important defense, however, is that made in the answer—that

the defendant is absolved from the obligation of this contract, on the ground of its having been obtained by misrepresentation. On this point there are two questions: First, whether it was so obtained;[1] and, next, if that was the case, what the effect of it will be; whether it entirely puts an end to the agreement, and deprives the plaintiff of the right of having it performed, or whether, as has been contended for him, it only vitiates it *quoad hoc,* and leaves him at liberty to take the lands, subject to the interests of the tenants, which he stated them to be willing to resign.

Under these circumstances, supposing this fact to be made out, the next question is, what will be the consequence of it. On the part of the plaintiff, it was argued very judiciously, that, supposing the fact of misrepresentation proved, it does not go the length of establishing that the bill must be dismissed, or of preventing the plaintiff from having a right to specific performance, if he will take the estate subject to the lease. It was urged that it would be of no consequence to the defendant if the plaintiff would abide by the agreement, exonerated from what is affected by the misrepresentation. To this it is to be observed, in the first place, that it is not the case made by the bill. It is there said throughout that if the land is to continue subject to the lease, it must be considered as reduced in value, evidently meaning that as by the agreement possession was to be given, the defendant must make a compensation if that article is not performed. But it was contended at the bar that if the fact of misrepresentation was made out, and that the defendant had in consequence of it undertaken to put the plaintiff in possession, in which case it is impossible that he should be bound to make such a compensation; yet if that part of the contract be waived, that whatever may be the effect on the costs of the suit, if the plaintiff be willing to pay the costs and relinquish whatever was the effect of misrepresentation, he may demand the performance of the rest.

Thus, what was asked at the bar is not what is prayed in the bill; and if it were, it would be contrary to those principles on which the court acts in decreeing specific performance. There is no authority anywhere, no case where the court has, when misrepresentation was the ground of a contract, decreed the specific performance of it; and nothing would be more dangerous than to entertain such a jurisdiction. The principle on which performance of an agreement is compelled requires that it must be clear of the imputation of any deception. The conduct of the person seeking it must be free from all blame; misrepresentation, even as to a small part only, prevents him from applying here for relief.

The reason of this is obvious: if it be so obtained, the contract is void both at law and in equity. When an agreement has been obtained by fraud, is the effect to alter it partially, to cut it down, or modify it only? No; it vitiates it *in toto;* and the party who has been drawn in is totally absolved from obligation.

[1] The discussion of this question has been omitted.

If so, what equity has the other party who, by his misconduct, has lost one contract, to call on the court, for his benefit, to make a new one? If the defendant were willing to consent to it, and to enter into a new agreement, it would be a different case; but if he refuses, if he insists that he is absolved from it, what equity can there be in favor of the other.

There are many cases where, although a contract cannot be literally performed in all its parts, the court will modify it, attending to the substance of it, and carry it into execution, relieved from the collateral circumstances that form the difficulty. There are cases of this kind, where, from lapse of time it has become unconscientious to insist upon the agreement *modo et forma,* or where there happens to be a small deficiency in the number of cases. Here the contract becomes inoperative at law, and cannot be strictly performed; yet the court will decree it, dispensing with the articles that are not essential to the substance. But this is only where there has been a perfect *bona fides;* there is no case where it has been done at the instance of a plaintiff, who has practiced any misrepresentation. The principle is, that the party is barred, personally barred. It was on this principle that the late Master of the Rolls, in Cadmon *v.* Horner, 18 Ves. 10, says: "As upon the evidence, the plaintiff has been guilty of a degree of misrepresentation, operating to a certain, though a small extent, that misrepresentation disqualifies him from calling for the aid of a court of equity, where he must come, as it is said, with clean hands. He must, to entitle him to relief, be liable to no imputation." He takes the distinction between the case of a bill for specific performance and the cases where the court is called upon to rescind the agreement, which, he says, would admit of a different consideration, and he puts the refusal of relief on the ground of the misrepresentation forming a personal bar.

If it were otherwise, and if a contract under these circumstances were only to be altered *pro tanto,* and only the part thus obtained were to be taken out of it, what encouragement would be offered to fraud? The party, if not found out, would gain his object; and, if detected, would have the benefit of the contract, in the same manner as if he had practiced no deception. The court has therefore settled that he must come with perfect propriety of conduct. If he does not, that alone is a sufficient answer to him.

Again, consider it with reference to the contract itself. The defendant cannot give possession of the land, as his tenants do not consent; he engaged to do it under a wrong idea; he cannot, therefore, be compelled to do it. That part of the contract cannot be performed. There is, therefore, an end to that contract; it cannot be performed specifically, and there is no reason here to substitute another in its place. If the plaintiff came for the strict performance of the contract, terms might be put on him, but how can we put terms on the defendant? By the misconduct of the plaintiff that agreement is at an end; and can we, on that

account, say to the defendant, you must not perform that agreement, but you must, instead of it, perform another?

In both ways, therefore, first viewing the misrepresentation as a personal bar to the plaintiff, and, secondly, as destroying the contract, I am of opinion that he is entitled to no relief. The whole of the bill is negatived by the evidence, while the case of the defendant is proved. The bill must be dismissed, and with costs.

SHIRLEY *v.* STRATTON.

IN CHANCERY, BEFORE LORD CHANCELLOR THURLOW, 1785.

[1 *Brown's Chancery* 440.]

This was a bill for the specific performance of an agreement for the purchase of an estate in marsh land at Barking, in Essex, and for payment of a sum of £1,000, the purchase money. The defense was, that the estate was represented to the defendant as clearing a neat value of £90 per annum, and no notice was taken to him of the necessary repair of a wall to protect the estate from the river Thames, which would be an out-going of £50 per annum. And it appearing upon evidence that there had been an industrious concealment of the circumstance of the wall during the treaty,

LORD CHANCELLOR dismissed the bill, but without costs.

MEAUX *v.* HELM'S HEIRS.

IN THE COURT OF APPEALS OF KENTUCKY, 1803.

[2 *Sneed* 252.]

This suit was instituted by Richard Meaux, to obtain deeds of conveyance for a settlement and pre-emption for 1,400 acres of land, on Jessamine Creek, now in Jessamine County, which, on the 6th day of August, 1781, were sold by Leonard Helm, the ancestor of the defendants, to Thomas Quirk, of whom Meaux is the assignee, for £35,000, of the then current money of Virginia, payable on or before the 15th day of the September following.

It is the peculiar province of courts of chancery to compel the specific performance of contracts; and this they will do after the time agreed on by the parties for execution has elapsed, and without an inquiry into the equality of the considerations. There are, however, several exceptions to this general rule. For example, where a contract on the part of the complainant was fraudulent in its origin, and was entered into by the other party by mistake produced by the fraud; or when it has afterward been attended with some peculiar hardship, occasioned by a delinquency on the part of the complainant, for which an adequate compensation can not be devised. On either of these circumstances appearing in evidence, the court will dissolve the contract, if the parties can be left or be put in the same condition they were before the contract was made. It is urged that both these defects are apparent in the contract now under investigation, and that by a dissolution thereof both parties will be left or can be put in *statu quo*.

As to the first of these points, it is proven that this contract was entered into at the falls of the Ohio River, at a time when the sudden or rapid depreciation of the then paper currency was not generally known or expected in this country; and that Quirk had shortly before returned from Virginia, and probably was well acquainted therewith. Indeed, Quirk's knowledge of the rapidity of depreciation in the eastern parts of the United States, is rendered certain by his declaration just before the contract was concluded, that in a short time the proposed price of 1,400 acres of land would not buy a sow and pigs. On the reverse it is proven to be very improbable that Helm knew that this currency was depreciating much faster in other parts of the Union than in Kentucky. And Helm's ignorance of the fact may be inferred from his having sold a settlement and pre-emption of 1,400 acres, lying in the midst of the rich lands of this country, for a sum which, by the scale of depreciation, only amounts to £70 specie. It may, notwithstanding, be doubtful whether fraud on the one part and mistake produced thereby on the other are so fully proven as to authorize an absolute dissolution of the contract. But the court could not hesitate, on the proof which has been produced, to refuse decreeing conveyances for the land until its specie value at the time the contract originated should be ascertained and paid, with legal interest thereon. And on this footing the court would place the parties, did it not appear that after the contract was made it has been attended with several peculiar hardships to Helm and his heirs, occasioned by the delinquencies of the complainants and Quirk, his assignor; which, considered in conjunction with the evidence already recited, seem to render it still more proper to decree an unconditional dissolution; provided the parties can be placed in the situation they would have been had the contract never existed. . . .

Wherefore it is decreed and ordered, that the said decree of the district court, so far as it extends, be affirmed, and it is further decreed and ordered, that the said contract be dissolved: that the said judgment at law,

obtained by the executor of Leonard Helm, deceased, against Thomas Quirk, be void and of no effect; and that each party do pay their own costs occasioned by this appeal, which is ordered to be certified to the Circuit Court of Fayette County.[1]

ELLARD *v.* LORD LLANDAFF.

IN CHANCERY, BEFORE LORD CHANCELLOR MANNERS, 1809.

[1 *Ball and Beatty* 241.]

The LORD CHANCELLOR. This is a bill for the specific performance of a contract, entered into and signed by both the plaintiff and the defendant. That such an agreement was concluded, that all the terms agreed on are contained in it, and that it was reduced to writing, and signed by

[1] A part of the opinion dealing with laches and hardship has been omitted.

"On the other hand the instrument shows that there was a consideration, and there is no proof of its value which would lead to the inference that in the condition of the estate at that time there was gross irregularity or inadequacy in the bargain. It is true Meriweather was a young heir, dealing with the estate derived from his father, but still in the hands of others. But Buckner was under no fiduciary or confidential relation either to him or to the estate, and had not, so far as appears, better means of information with regard to its condition than he himself had. No overreaching or fraud is shown in the transaction; and we know of no rule which pronounces the transfer even of an infant heir to be absolutely void under such circumstances. The contract was evidently a chancing bargain, and there being no fraud, the purchaser was entitled, by its terms, to all that could be made from the sources referred to." Per MARSHALL, C. J., in Meriweather adm'r *v.* Herran, 1847-8, 8 B. Mon. 162.

"This was an unconscionable contract and could not be specifically enforced on the ground of the inadequacy of the consideration. The plaintiff lived near the lot and knew its value. The defendant lived at a distance and did not know its value. While the plaintiff did not make any misrepresentations, he concealed his knowledge of the recent rise in value of the lot and took advantage of her ignorance, and thus got from her a contract to convey to him the lot for but a little more than one-third of its value. Such a contract, it is believed, has never yet been enforced in a court of equity in this country. When a contract for the sale of lands is fair and just and free from legal objection, it is a matter of course for courts of equity to specifically enforce it. But they will not decree specific performance in cases of fraud or mistake, or of hard and unconscionable bargains, or when the decree would produce injustice, or when such a decree would be inequitable under all the circumstances. 2 Story's Eq. J. § 769; Willard Eq. J. 262; Osgood *v.* Franklin, 2 John. Ch. 1; S. C. 14 John. 527; Seymour *v.* Delancey, 6 J. Ch. 222; S. C. 3 Cow. 531." Per EARL, C. in Margraf *v.* Muir, 1874, 57 N. Y. 155, 158.

both parties, is not disputed; but Lord Llandaff resists the performance of it on two grounds. First, he insists that the plaintiff is not entitled to relief here, from having suppressed the state of health of Thomas Ellard, the then surviving life in the old lease, and which he alleges formed part of the consideration for granting the new lease.[1]

In respect to the first ground relied on, the circumstances are these: On the 23d October, 1806, the treaty first commenced; Thomas Ellard was not then in a dangerous state of health, but was able to be out on horseback, though certainly an old man. On the 8th of November following the treaty was concluded, and Thomas was then *in extremis,* which was known to the plaintiff and not to the defendant. Then the question is, was that a material fact in the contract? It is manifest Lanigan advised Lord Llandaff to accept of three guineas per acre, taking into consideration the surrender of the lease, then depending on the life of Thomas Ellard; Lord Llandaff therefore calculated on that as part of the consideration, and to him it appeared a material fact. This was known to the plaintiff, and unless Creswell be perjured, it was equally material to the plaintiff. Creswell states, that on the morning of the 8th of November, when Thomas's life was despaired of, the plaintiff left the house at an early hour, and when he next met him he apologized for not seeing him before his departure, assigning as the reason that he was obliged to see Lord Llandaff before the news of his uncle's illness reached him, that he had concluded the business, and would make a pretty thing of it. Is not this quite decisive to show that in the opinion of the plaintiff this was a material fact? But, it is said, the plaintiff denies this; supposing he were to deny it in answer to a cross-bill, who is best entitled to credit, Creswell, who has no interest in the transaction, or the plaintiff? Can it be for a moment contended that a life of this description was of no value, and can I pay any attention to the plaintiff when he asserts it? Surely it speaks for itself, and Creswell proves the anxiety of the plaintiff to have the business concluded before Lord Llandaff should hear of it.

On the part of the plaintiff it has been contended that unless there be a latent defect, the principle that governs contracts of this description is *caveat emptor;* and the case of Oldfield *v.* Round, 5 Ves. 508, is referred to, where it is laid down that the negligence or carelessness of a purchaser is no ground for not executing an agreement. I remember the case perfectly well, and I believe the bar was not very well satisfied with the decision; however, the principle upon which that case was determined does not apply to the present; the purchaser was undoubtedly extremely negligent not to look at the estate before he purchased it. Had he used ordinary caution, he would have discovered the easement. Here Lord Llandaff had no reason to suspect that any material change in the health of Thomas Ellard, between the 23d of October and the 8th of November, had happened; the plaintiff knew the fact, and must know

[1] Only as much of the opinion is given as relates to this point.

that it was a material fact in the transaction, so as to vary the contract, as treated for in the October preceding. The principles on which dealings of this description are to be carried on are now well understood; this is too sharp a practice to be countenanced here. The plaintiff must not be allowed to deal on a lease, as a good and subsisting one, when at the time he was conscious it was worth nothing, and that the other party was ignorant of that fact. The other authorities referred to were cases where the difference was in the description of the estate, and there was no suppression to vitiate the contract.

It is observed by Lord HARDWICKE in Burton *v.* Lyster, 3 Atk. 383, "that nothing is more established in this court than that every agreement of this kind ought to be certain, fair, and just in all its parts. If any of those ingredients are wanting in the case, this court will not decree a specific performance." All the material facts must be known to both parties; and is it not against all principles of equity, that one party knowing a material ingredient in an agreement, shall be permitted to suppress it, and still call for a specific performance? Thus far I have considered the case on the first ground of defense relied on by Lord Llandaff; and if he were owner of the fee, and enabled to grant a lease on the terms agreed on, I should feel no hesitation in dismissing this bill.

WALTERS *v.* MORGAN.

IN CHANCERY, BEFORE LORD CHANCELLOR CAMPBELL,[1] 1861.

[3 *De Gex, Fisher and Jones* 718.]

An agreement was entered into between the plaintiff and the defendant, by the terms of which the plaintiff was to take and the defendant to grant, for one year (with the option, at the end of a twelve month, of a renewal for twenty-one years) the right of digging, searching for, and carrying off from the defendant's land, all and all manner of stones, sand, minerals, and clay, the plaintiff to pay for the privilege a stipulated sum per long ton. At the end of the year the defendant refused to renew. The plaintiff brought his bill for specific performance.

[1] Notwithstanding the fact that Lord CAMPBELL'S Lives of the Chancellors has added a new sting to death, the student will find them, inaccurate and partisan as they undoubtedly are, full of interest and information conveyed in a pleasing form. Should he desire strictly accurate biographies of the Chancellors, he should consult The Lives of the Judges, by Foss. Still, it is, and almost must be, interesting to hear a Lord Chancellor gossip about his predecessors and betters.

CAMPBELL the lawyer was able and successful; as a common law judge he

The defendant by his answer stated that the agreement was entered into by him when he had recently purchased the property and was unacquainted with it, and under circumstances amounting to concealment and misrepresentation of the value of the property on the part of the plaintiff, who had lived in the neighbourhood of the property for some time and was well acquainted with it, and moreover that the defendant was induced to sign the agreement by surprise and without any opportunity of considering the stipulation as to granting a lease, the agreement having been brought to him ready for signature without any draft having been submitted to him, and that, upon his objecting to sign it without further consideration, the plaintiff had represented that the amount to be agreed to be given the agreement for the sand and clay was the same that he had given to Mr. Wilson, a neighbouring landowner, by which the defendant was led to believe that the sum offered was the fair value; that the plaintiff had stated that if the land turned out to be more valuable he would give the defendant his "fair share."

The LORD CHANCELLOR. This was a bill filed for the specific performance of an agreement for a lease of mineral property; the bill having been dismissed without costs.

After listening to the long and able arguments at the bar on this appeal, I have carefully perused the very voluminous papers connected with it; and I come to the conclusion that one of the grounds of defence set up by the respondent has been substantiated, so that the decree appealed against ought to be affirmed.

It was quite unnecessary to argue that an equity judge has not an unlimited discretion as to decreeing or refusing to decree the specific performance of an agreement. He is bound by rules which his predecessors have laid down, founded on justice and expediency.

The ground on which I am of opinion that the decree ought to be supported is, that by the contrivance of the plaintiff the defendant was surprised and was induced to sign the agreement in ignorance of the value of his property. I most fully concur in the doctrine of concealment and misrepresentation as laid down by Lord THURLOW in FOX *v.* Macreth, and qualified by Lord ELDON in Turner *v.* Harvey. There being no fiduciary relation between vendor and purchaser in the negotiation, the purchaser is not bound to disclose any fact exclusively within his knowledge which might reasonably be expected to influence the price of

was sound, and his opinion carries weight at the present day. Notwithstanding advanced years and professional unfamiliarity with equity, he did not fail as Chancellor; indeed, he was eminently respectable.

A writer in the Dictionary of National Biography thus sums up his career: "But whatever difference of opinion there may be as to the spirit in which he served his country, there is none as to the value of the services themselves. As a legislator and a judge he has left a name which can never be passed over when the history of our law is written." Article Campbell.

the subject to be sold. Simple reticence does not amount to legal fraud, however it may be viewed by moralists. But a single word, or, I may add, a nod or a wink, or a shake of the head, or a smile from the purchaser intended to induce the vendor to believe the existence of a non-existing fact, which might influence the price of the subject to be sold, would be sufficient ground for a Court of Equity to refuse a decree for a specific performance of the agreement.

So, *à fortiori,* would a contrivance on the part of the purchaser, better informed than the vendor of the real value of the subject to be sold, to hurry the vendor into an agreement without giving him the opportunity of being fully informed of its real value, or time to deliberate and take advice respecting the conditions of the bargain.

In the present case, although the parties had met on several occasions before the signing of the agreement, and had conversed about the digging in the land for a year by way of experiment, yet till the written agreement for the lease was brought by the plaintiff to the defendant "cut and dry," there does not appear to have been any negotiation between them for a lease, nor any proposal respecting the term to be granted (which is substantially forty-two years), or the royalty to be reserved, or any of the covenants to be contained in the lease. Then the plaintiff urges the defendant to sign the agreement, saying "you will trust to me for making a fair allowance if it should turn out more valuable." This is of a piece with his afterwards employing his own solicitor to prepare the lease, and trying to get it signed by the defendant without the defendant's solicitor having seen it. A purchaser who so conducts himself cannot be said to have proceeded with the good faith which even jurists require in such a transaction.

It has been argued, that although there might have been a parol representation as to giving the defendant a fair share of the value, this may now be considered as part of the actual agreement, and that a specific performance ought to be decreed of the written agreement with the parol agreement superinduced upon it. But I apprehend that this course can only be adopted properly where the party praying for the specific performance has conducted himself with perfect good faith. I think, therefore, that in this case the bill was properly dismissed.[1]

[1] See for a discussion of the law where a fiduciary or confidential relation exists between the parties, Turner *v.* Harvey, 1821, Jac. 169, 178; Matthews *v.* Bliss, 1839, 22 Pick. 48, 52; McCormick *v.* Malin, 1841, 5 Blackf. 509, 523; Fox *v.* Mackreth, 1788, 2 Bro. C. C. 400, 420; Livingston *v.* Iron Co., 1831, 2 Paige Ch. 390, 396; Smith *v.* Beatty, 1843, 2 Ired. Eq. 456, 458; Harris *v.* Tyson, 1855, 24 Pa. St. 347, 359. And see also on the general question of concealment, Fothergill *v.* Phillips, 1871, L. R. 6 Ch. App. 770.

WOOLLUMS *v.* HORSLEY.

IN THE COURT OF APPEALS OF KENTUCKY, 1892.

[93 *Kentucky* 582.]

Chief Justice HOLT delivered the opinion of the court.

In August, 1887, the appellant, John Woollums, was living upon his mountain farm of about two hundred acres in Bell County. He was then about sixty years old, uneducated, afflicted with disease disabling him from work, owned no other land, and but very little personal property. He knew but little of what was going on in the business world owing to his situation and circumstances in life. He moved in a small circle.

At this time the appellee, W. J. Horsley, who was then a man of large and varied experience in business, who was then buying mineral rights in that locality by the thousands of acres, and who was evidently familiar with all that was then going on and near at hand in the way of business and development in that section, through his agent entered into a contract with the appellant, which was signed by the latter only, by which he sold to Horsley all the oils, gases and minerals in his land, with customary mining privileges, for forty cents per acre, and obligated himself to convey the same by general warranty deed, free of dower claim or other incumbrance, when the purchase money was paid, to wit: one-half in three months and the balance in four months from the first payment, or as soon as the deed should be made, three dollars of it, however, being then paid.

It is suggestive upon the question of the then value of the purchase, and as regarded by Horsley, that his agent, who made it, was to get eighty dollars for his pay, or as much as Woollums was to receive for all he sold, and also that this agent does not testify in the case.

The purchase money was not paid as stipulated, but the reason given is that it was a sale of the minerals by the acre, and the quantity of land was not known, and Woollums refused to survey it. Nothing appears to have transpired between the parties until the summer after the trade, when Horsley demanded a deed. He says he sent his agent to do so before that time, but it does not appear he did so.

In December, 1888, this suit was brought for a specific performance of the contract. The main defense is that it was procured through undue advantage, and under such circumstances that, in equity, its performance should not be decreed.

The answer also sets up inability to convey with contingent right of dower relinquished, as the wife refused to unite in the deed; but it is alleged, and not denied, that the husband induced this refusal by her, and the appellee offered to accept a conveyance without her re-

linquishment, a proper reduction of the purchase money being allowed. Pomeroy on Contracts, § 438.

The specific execution of the contract was ordered.

Considering all the circumstances, and the rule applicable in such a case, the judgment should not be upheld.

There is a distinction between the case of a plaintiff asking a specific performance of a contract in equity, and that of a defendant resisting such a performance. Its specific execution is not a matter of absolute right in the party, but of sound discretion in the court. It requires less strength of case on the side of the defendant to resist the bill than it does upon the part of the plaintiff to enforce it. If the court refuses to enforce specifically, the party is left to his remedy at law.

Thus a hard or unconscionable bargain will not be specifically enforced, nor, if the decree will produce injustice or under all the circumstances be inequitable, will it be rendered. In other words, a court of equity will not exercise its power in this direction to enforce a claim which is not, under all the circumstances, just as between the parties, and it will allow a defendant to resist a decree, where the plaintiff will not always be allowed relief upon the same evidence.

A contract ought not to be carried into specific performance unless it be just and fair in all respects. When this relief is sought ethics are considered, and a court of equity will sometimes refuse to set aside a contract, and yet refuse its specific performance.

STORY says: "Courts of equity will not proceed to decree a specific performance where the contract is founded in fraud, imposition, mistake, undue advantage, or gross misapprehension; or where from a change of circumstances or otherwise, it would be unconscientious to enforce it." 2 Story's Eq., § 750a.

KENT also says: "It is a rule in equity that all the material facts must be known to both parties to render the agreement fair and just in all its parts; and it is against all the principles of equity that one party, knowing a material ingredient in an agreement, should be permitted to suppress it and still call for a specific performance." 2 Kent 491.

It was held in Patterson *v.* Bloomer, 95 Am. Decisions 218, and the same rule has been announced in other cases, that an application for specific performance is addressed to the court's sound discretion, and will not be granted unless the contract is made according to legal requirements; is certain, reasonable, equitable, mutual, on sufficient consideration, consistent with public policy, and is free from gross misapprehension, fraud, surprise, or mistake.

The appellee testifies that he did not know anything as to the mineral value of this land when the contract was made, but it is evident he had a thorough knowledge of the value in this respect of lands generally in that section, and of the developments then in progress or near at hand.

All this was unknown to the appellant. It is evident his land was valuable almost altogether in a mineral point of view. While it is not shewn what it was worth at the date of the contract, yet it is proven to have been worth in April, 1889, fifteen dollars an acre, and that this value arises almost altogether from its mineral worth, and yet the appellee is asking the enforcement of a contract by means of which he seeks to obtain all the oil, gas, and minerals, and the virtual control of the land, at forty cents an acre. The interest he claims under the contract is substantially the value of the land. Equity should not help out such a harsh bargain.

The appellee shows pretty plainly, by his own testimony, that when the contract was made he was advised of the probability of the building of a railroad in that locality in the near future. His agent, when the trade was made, assured the appellant that he would never be bothered by the contract during his lifetime. He was lulled in the belief that the Rip Van Winkle sleep of that locality in former days was to continue; and the grossly inadequate price of this purchase can only be accounted for upon the ground that the appellant was misled and acted under gross misapprehension.

The contract was not equitable or reasonable, or grounded upon sufficient consideration, and no interest has arisen in any third party. A court of equity should, therefore, refuse its specific enforcement, but the appellant should have what was in fact paid, with its interest; and when this is done his petition should be dismissed.

Judgment reversed, and cause remanded for proceedings consistent with this opinion.

E. Mistake.

JOYNES *v.* STATHAM.

In Chancery, before Lord Chancellor Hardwicke, 1746.

[3 *Atkyns* 388.]

The bill was brought to carrying an agreement into execution for a lease of a house during the life of the defendant's wife, which was signed by the defendant the lessor only: upon the face of the agreement the plaintiff was to pay a rent of £9 a year.

The defendant insists by his answer, that it ought to have been inserted in the agreement that the tenant should pay the rent clear of taxes, but the plaintiff having written the agreement himself, had omitted to make it clear of taxes, and that the defendant, unless this had been the agree-

ment, would not have sunk the rent from £14 to £9, and offered to read evidence to shew this was part of the agreement.

The plaintiff's counsel insisted, that the defendant ought not to be admitted to parol proof, to add to the written agreement, which is expressly guarded against by the statute of frauds and perjuries. The cases cited for the plaintiff were Cheyney's case, 5 Co. 68. *a.* and Selwin *v.* Brown, Cas. in Lord Talbot's Time 248.

LORD CHANCELLOR. I permitted this point to be debated at large, because it is decisive in the cause, for I am very clear this evidence ought to be read. This has been taken up by way of objection to the plaintiff's bill.

The constant doctrine of this court is, that it is in their discretion, whether in such a bill they will decree a specific performance or leave the plaintiff to his remedy at law. Now, has not the defendant a right to insist, either on account of an omission, mistake or fraud, that the plaintiff shall not have a specific performance? It is a very common defence in this court, and there is no doubt but it ought to be received, and quite equal, whether it is insisted on as a mistake or a fraud. It appears the agreement was drawn and written by the plaintiff himself; the defendant too cannot write, but is a marksman only; if there has been an omission, should not the defendant have the benefit of it by way of objection to a specific performance? There have been many cases in this court, where such evidence has been admitted.

Suppose an agreement for a mortgage drawn by the mortgagee, the mortgagor being a marksman, and the mortgagee omits to insert a covenant for redemption, and then brings a bill to foreclose, shall not the mortgagor be at liberty to insist in this court upon reading evidence to shew the omission.

So in a case which has happened, of the mortgage being drawn in two deeds, one an absolute conveyance, the other a defeasance, and the mortgagee omits to execute the defeasance, the mortgagor shall be admitted to shew the mistake.

Suppose the defendant had been the plaintiff, and had brought the bill for a specific performance of the agreement, I do not see but he might have been allowed the benefit of disclosing this to the court.

Because it was an agreement executory only, and as in leases there are always covenants relating to taxes, the matter will inquire what the agreement was as to taxes, and therefore the proof offered here is not a variation of the agreement, but is explanatory only what those taxes were: I am of opinion to allow the evidence of the omission in the lease to be read.[1]

[1] "In Harnett *v.* Yeilding, 2 Schoales & Lefroy 549, 554, Lord REDESDALE says courts of equity refuse to enforce specific execution of agreements when from the circumstances it is doubtful whether the party means to contract to the extent that he is sought to be charged. The chief authorities on a defendant's right to resist such a decree by proving error in any important particular are, in addition to those already mentioned, Joynes *v.* Statham,

MATHEWS *v.* TERWILLIGER, 1848, 3 Barb. 50, 54.—GRINDLEY, J.—We have said that upon the evidence we are satisfied that by the express agreement of the parties, interest was to be paid upon the purchase price of the farm. Any different agreement would have been very unusual; and in addition to that, there is the positive testimony of two respectable witnesses to the fact, strongly corroborated by that of another; and nothing to rebut it but the negative testimony of the witness Travis.

Now if by the actual agreement of the parties, Mathews was to pay interest on the purchase price of the farm, how did it happen that the written contract which should have truly expressed the agreement of the parties, wholly omitted all mention of interest? Was it by the fraudulent design of the complainant; or by the mistake and inadvertence of the defendant? If it was owing to either of these causes, then the complainant is not entitled to have the written contract, on which he has founded his bill, performed; but the defendant is entitled to have it reformed and the mistake corrected. We think that the defendant is entitled to relief, under the peculiar circumstances of this case, even if the mistake should be deemed to consist solely in an erroneous construction of the agreement.

It is undoubtedly true, as a general rule, that a mistake of the law is not a ground for reforming a deed founded on such mistake. Hunt *v.* Rousmanier, 8 Wheat. 212; 1 Peters' Rep. 15; see also 6 John. Ch. Rep. 169, 170; 1 Id. 515; 2 Id. 51, 60. It is equally true that there are some exceptions to this general rule; and that one of these exceptions occurs in a case "where the party is taken by surprise;" where "he had not sufficient time to act with caution;" and "when an undue advantage was taken of his situation." 1 Story's Eq. Jurisp. §§ 116, 119, 120, note 1. Evans *v.* Llewellin, 2 Bro. Ch. 150. 1 Cox's Rep. 340, 341. 16 Ves. 82. In the note upon page 135 of Story's Equity, above cited, the learned commentator remarks, "when a court of equity relieves on the ground of surprise, it does so on the ground that the party has been taken unawares, that he has acted without due deliberation, and under confused and sudden impressions." This seems to us to be the very case we are considering. Here the parties come out of the hall of the tavern, where it would seem they have been negotiating, into the bar room; and Mathews goes immediately to the counter of the bar, and there writes the contract; which is read over aloud, and on the defendant's alleging that as he understood the agreement he was to receive $200 a year and interest, Mathews replied that, as he understood it, the yearly instalment was to be $200 including interest. And thereupon, after a moment's hesitation, the

3 Atkyns 388; Lord Townshend *v.* Stangroom, 6 Vesey 328; Mason *v.* Armitage, 13 Vesey 25; Higginson *v.* Clowes, 15 Vesey 516; Flood *v.* Finlay, 2 Ball & Beatty 9, 15; Ramsbottom *v.* Gosden, 1 Vesey & Beames 165, 168; Clowes *v.* Higginson, ibid. 524, 527; Howell *v.* George, 1 Maddock 1; Lord W. Gordon *v.* Lord Hertford, 2 Maddock 106, and Gaward *v.* Grinling, 2 Swanstrom 244; S. C. Wilson C. C. 460." 1 C. P. Cooper Reports 335.

contract was signed, and the parties separated. And so great was the suddenness and inadvertence with which the whole transaction was conducted and concluded, that the written memorandum not only omitted to provide for the payment of any interest, but contained no stipulation for securing to the defendant his purchase money, either by bond and mortgage or otherwise. Far different were the facts of the case of Hunt *v.* Rousmanier, relied on by the complainant's counsel. There the parties executed the instrument with care, deliberation, and the advice of counsel. And it was precisely such an instrument as was intended to be executed by them clearly showing that the element of surprise and inadvertence was entirely wanting in that case.

Again; when a party seeks to obtain the aid of a court of equity in enforcing a specific performance of a contract, a different rule prevails from that which is applied when the other party seeks relief by the rescinding or setting aside of the agreement. The granting of a specific performance is not a matter of right, but is always a matter of sound and reasonable discretion, which grants or withholds relief according to the circumstances of each particular case. 2 Story's Eq. Jur. § 74, a. In exercising this sound discretion, the court will not decree a specific performance in cases of fraud or mistake, or of a hard and unreasonable bargain, or where the decree would produce injustice. Id. § 769. Under this salutary rule we do not think the court should exercise its power to enforce a contract which gives a long day of payment without making any provision for the payment of interest, and which provides for the execution of a warranty deed to an embarrassed and insolvent man, without any stipulation for a security of the payment; and where it is manifest that, owing to the suddenness and haste with which the agreement was signed, and to the surprise, inadvertence and confusion of one of the parties, it did not express the intent of the parties, as proved, at the time of its date and execution.

The decree of the court below must therefore be affirmed.[1]

LORD IRNHAM *v.* CHILD.

IN CHANCERY, BEFORE LORD CHANCELLOR THURLOW, 1781.

[1 *Brown's Chancery Cases* 92.]

Lord Irnham treated for an annuity with Child, who (though unknown to Lord Irnham) was an agent for H. Lawes Luttrel, his lordship's eldest son. Upon settling the terms it was agreed that the annuity should be redeemable; but, both parties supposing that this appearing upon the face

[1] See Western R. R. Corporation *v.* Babcock, 1843, 6 Met. 346, 352; Caldwell *v.* Depew, 1889, 40 Minn. 528, 529.

of the transaction would make it usurious, it was agreed that the grant from Lord Irnham to Child should not have in it a clause of redemption. It was accordingly drawn and executed without such clause. The annuity had been assigned by Mr. Luttrel to others of the defendants. Lord Irnham now filed his bill to redeem, alleging that such was the agreement, although it did not appear, for the reason above stated, upon the deed. At the bar they offered parol evidence of the agreement. In favour of the admissibility of the parol evidence were cited, 1 Eq. Abr. 20. Maxwell's Case; Harvey *v.* Harvey, 2 Ch. Ca. 180; Walker *v.* Walker, 2 Atk. 98; Joynes *v.* Stratham, 3 Atk. 388; Fitz Gibbon, 213; Lock *v.* Boult, before Lord CAMDEN. Vane *v.* Lord Barnard, Gilb. Rep. 6; Merkins *v.* Northey, 5th July, 1756; Baker *v.* Paine, 1 Vesey 457.

LORD CHANCELLOR. If this was supposed to be a subsequent contract, the question would be whether there could be a right of redemption of an annuity out of lands, by parol, where the purchase could not be but by deed. Whether this question arises upon the statute or at common law, I do not see much difficulty. The rule is perfectly clear, that where there is a deed in writing, it will admit of no contract that is not part of the deed. Whether it adds to, or deducts from, the contract, it is impossible to introduce it on parol evidence. It is contended to be the general authority of a court of equity, to relieve in cases of fraud, trust, accident, or mistake, and that this applies to agreements, as well as to other subjects. This must always clash with the argument drawn from the statute. It is admitted that the deed will bind if no fraud is committed, but objected that when a fraud interferes, there the evidence may be introduced. The objection is founded on a great deal of wisdom and good sense. But the question is, if it were always to be admitted, whether it would not be subversive of justice; the court has held that it would. If the agreement had been varied by fraud, the evidence would be admissible. The argument then must be to impute fraud to the party. The rule of evidence is not subverted, if there is clear proof fraud. The committing the agreement to writing is an argument against fraud. Then as to mistake, or accident; suppose it was a very clear thing that one agreement was intended, and that, by accident, it was extended further. But there is no such case in the books. If admitted to be a mistake, the court would not overturn the rule of equity, by varying the deed; but it would be an equity *debors* the deed. Then it should be proved as much to the satisfaction of the court as if it were admitted. The difficulty of this is so great, that there is no instance of its prevailing against a party insisting that there was no mistake. It is said a mistake of the law is equal to a mistake in point of fact. Here there was no intention that the agreement should make any part of the instrument. The thing insisted upon could not hold a moment, except as matter *debors* the deed, and on a separate head of equity. Here a large annuity is sold for rather a small price,—not for the natural sum,—the agreement they say was that it should be redeemable, but this does not meet my present

idea. To sell an annuity, and make it redeemable, is not usury, because it is not a loan. It is a question whether the intent to suppress this, as leading to usury, will admit the party to come into a court of equity. There is no case of a kind of mistake like this, where the doubt was, whether the clause would be evidence of usury. It was agreed by both parties not to introduce the clause, but it was to stand on parol evidence. Then it results as a question, whether I can admit the evidence. I was long inclined to admit the reading of it. It is necessary to see the statement of the bill: if it states that it was agreed that it should not be inserted, they cannot read it; but if it is stated that it was intended to be inserted, but it was suppressed by fraud, I cannot refuse to hear evidence read, to establish the rule of equity. They are at liberty to read evidence to prove such a fraud as will make a ground of equity.

The evidence being read for this purpose,

LORD CHANCELLOR. I admitted the evidence to be read, because I thought a case might come out which would afford a new head of equity; for if there was a fraud in admitting, or excluding a clause, the Court might reform the deed. As far as the object was to explain the agreement by any other matter, I thought it necessary to look into the bill, to see whether it alleged it to be fraudulent: had the bill been so, I should have thought myself bound to hear the evidence; and then my duty would be to consider whether it afforded a ground of equity. The plaintiff, supposing he had alleged in his bill what he now insists on in argument, should have stated that he agreed to grant an annuity redeemable, and then the fraud, or mistake, by which the grant was extended. Here, he could not have stated more than this, that the transaction was such as was capable of being usury, or that a little more might make it usury. If so, they thought fit that the agreement should not be inserted in the instrument. If the insertion would make it usurious, no plaintiff could come here and state that as the reason of its not being inserted:— but he says it was under the idea that it might be so, and that that idea was the reason of the surprise. Suppose one to grant for life, for the purpose of making a qualification for parliament, to be redeemable upon payment of a certain sum, but it was thought such a grant would be elusory, and not admitted as a qualification; it would be extraordinary, if a court of equity should be called upon to call that a surprise. The consequence would be, that the allegation must be that they had avoided inserting a part of the agreement, not that the agreement was intended to be in the deed. If the bill afforded a proper allegation, it would then be time enough to consider the evidence. But another head of fraud is set up, that he did not mean to treat with his son. I should be very sorry to lay it down that a man treating with a third person, in trust for a second, whom he had refused to deal with, could therefore set it aside. No case has gone so far. Philips *v.* Duke of Bucks, 1 Vern. 227, was upon a difference of price. Certainly here is no fraud stated on the face of the bill. The bill does not go to destroy, but to

affirm, and reform the contract. I have no idea of this being notice to the assignees of the annuities, that the annuity was to be redeemable. It is argued several ways that they had notice personally of the transaction —that they had notice by their agent—and that it was necessary for them to apply to Lord Irnham. This might have place, if the matter remained in *fieri* and they were bringing a bill against Lord Irnham, but here it has no place, for the deed was brought to them by which Lord Irnham had granted absolutely. I am not able to conceive that they were obliged to recur to Lord Irnham any more than if it had been a dormant equity.

Bill dismissed.[1]

CALVERLEY *v.* WILLIAMS.

IN CHANCERY BEFORE LORD CHANCELLOR THURLOW, 1790.

[1 *Vesey Junior* 210.]

The original bill was by Calverley, to have a conveyance made to him by the defendant Williams, of seven acres of copyhold land called Cuddington or Beaumont's Pits, part of an estate sold by auction and purchased by plaintiff, as being comprehended in the printed advertisement of the sale; which mentioned and divided into two lots the lands in the possession of Groombridge, at a rent of £65 a year, with a clause of surrender at any time on being paid the reasonable value; and these seven

[1] In Hare *v.* Shearwood, 1790, 1 Ves. Jr. 241: "[A] bill [was brought] to redeem an annuity of £50 per annum purchased by Haynes from plaintiff for £300, and to have the joint bond of plaintiff and his father delivered up, with the warrant of attorney to secure the annuity, and for an injunction from proceeding to sue out execution upon the judgment. Bill charged an agreement at the same time with the grant of an annuity that upon fourteen days' notice it might be redeemed at any time. Defendant by answer denied any knowledge of such agreement, and submitted to do what the court should think proper.

"BULLER, J. This is an attempt to carry the rule of evidence in this court farther than has ever been done, and it is not supported by any precedent or authority, but only by an ingenious argument to raise a distinction between this case and the case cited. In principle there is none, for this is not one of the excepted cases in this court, which are cases of fraud, and where the party will admit there was some agreement. Here there is nothing to be examined into, but to see whether it is incumbent upon plaintiff to prove this agreement in order to obtain a decree. If it is necessary for him to prove it, it must be by legal evidence, and that he cannot have. I do not see that he has any business here at all; he ought to have gone to law for any justice he might be entitled to. If there he can avail himself of this parol agreement against the general rule of law and equity, he may; but I am

acres were actually part of the lands in his possession at that rent. Defendant resisted this claim upon the ground that he did not intend to include these seven acres, or know that they were part of the lands in the possession of Groombridge; that they were not included in a schedule, which he called a terrier; and that plaintiff himself had not included them in the surrender. Calverley, having got into possession, the cross bill was to be let into possession.

LORD CHANCELLOR. The original bill is brought to compel the defendant to convey by way of surrender seven acres of land, as having been purchased at an auction June 15th, 1786. No doubt, if one party thought he had purchased *bona fide,* and the other party thought he had not sold, that is a ground to set aside the contract, that neither party may be damaged because it is impossible to say, one shall be forced to give that price for part only, which he intended to give for the whole, or that the other shall be obliged to sell the whole, for what he intended to be the price of part only. Upon the other hand, if both understood the whole was to be conveyed, it must be conveyed. But again, if neither understood so, if the buyer did not imagine he was buying any more than the seller imagined he was selling, this part, then, this pretence to have the whole conveyed, is as contrary to good faith upon his side as the refusal to sell would be in the other case. The question is, does it appear to have been the common purpose of both to have conveyed this part. Upon the 15th of June, 1786, when this contract was made, Williams had published a printed advertisement, in which he had divided the estate in the hands of Groombridge, the tenant, into two lots, and described, as parcel of the first, farm yards, etc., as let to him upon a lease, of which four years remained unexpired at Michaelmas, 1786; with a clause by which he was bound to surrender at any time upon being paid a reasonable value. This *primâ facie* gave out, that both lots were in the possession of Groombridge; also that he was in possession of them at £65 per annum rent; and also that Cuddington, being parcel of the second lot, was parcel of that let to him at that rent; so any man who had read this, would go upon a notion, that he had only to inquire what were these lands so let, and also which were to be included in the first lot, and which in the second. The other lot was described as containing sundry pieces of commonable lands, about 59 acres more or less. This would put them upon inquiry, what were those sundry pieces of commonable lands, etc. If the whole of the inquiry and consequent information had been contained within the compass of this paper, and nothing more was added than an

only to pronounce what that rule is, and I am of opinion upon the case cited, and many others, that such evidence cannot be admitted. As to the costs, I think it would be right to say here that in all cases where a man has got such an annuity as this for six years' purchase he may as well pay his own costs."

See notes to this case and to Marquis of Townshend *v.* Stangroom, 1801, 6 Ves. 328, in Sumner's edition.

inquiry of Groombridge, what was the estate he rented at that rent, and what part was contained within the first part of the description, and what within the second, to distinguish them, the circumstance of one part being in Cuddington, and one part in E———, would have had very little weight; for it is usual to describe, according to what contains the principal part. It must have been imputed to the owner that he knew the parcels which were let to Groombridge; for whether he did or not, he undertook to know by undertaking to give a description. Therefore, if the whole was upon this paper, I should have thought, upon the weight of evidence, that he intended to sell Cuddington too. But upon this it was evident, that it was necessary to go beyond the paper, to particularize the parcels intended to be included. Nobody would set about purchasing land so generally described, without finding out a more particular description. This was done; for the terrier, or what was called the terrier, was put into the hands of Kitchen, who lived there, in which the parcels of land were drawn out according to their descriptions as in the possession of Groombridge. Plaintiff went to Kitchen, who furnished him with this, that he might get this estate shown to him, telling him that he could not value the terrier, but that he must apply to Groombridge for that. He did so; and Groombridge described all in the terrier, and he also pointed out to him Cuddington, as part of the estate he had. The purchase took place upon the 15th of June, and then the question is, what part he intended to purchase, and what part the other intended to sell. In possession of the terrier, and having compared it with all the information he could get, plaintiff went to the steward to settle how the lands were to be described in the surrender; and settled it accordingly. After that, and having been shown all the information he could learn, the steward told him it was fit to examine the lands more particularly, and to obtain accurate information, that the estate might be surrendered in the duest manner; he did so; and brought descriptions of the lands he meant; and the surrender was made from the personal instructions of Calverley, and he got surrendered all contained in the terrier, that was applicable to the second lot, according to his own directions, and without the interference of any one else; so he himself proceeded upon a notion, that he ought to take all, except those seven acres, and that he had included all, except that part in the surrender. He then finds out, that the seven acres, being part of that which was let to Groombridge at that rent, did so come into the description of one or other of the lots so proposed to be sold. Accordingly in August he applied to Williams to have that conveyed. The conversation is particularly stated; "did you not intend to sell all in the possession of Groombridge?" and the attorney said, he was bound to sell that also, because in his possession; he said he first thought he was, but afterwards found he was not. The question then is, did he or not upon the advertisement and terrier intend to convey this piece of land; for they must be taken together; it is impossible not to consider the terrier as part of the advertisement. My opinion is, that he has described

all that he meant to convey, with a particularity giving proof that this was not in his contemplation. It is said for defendant, that he did not know there was this part, parcel of what was let to Groombridge; and there is nothing unnatural in that; for people possessed of considerable estates cannot know every parcel of land. But I think upon the other side, any person, however unconversant in the actual situation of his estate, that it will give a description, must be bound by that, whether conusant of it or not. And he has described it sufficiently to exclude this parcel and fix the rest; and consequently the other, having it surrendered with that view, with the schedule in his hand, must be understood to have bought it according to the schedule, not according to what was in the possession of Groombridge. It did not appear whether all Groombridge's land was under this same rent of £65 a year: there might have been an ulterior rent for Cuddington, and Groombridge never did explain that to the buyer; therefore no information was given to lead him to think that Cuddington was parcel of the land for which the £65 a year was, though it turns out so. The advertisement was awkward; but upon the whole I am extremely well satisfied that the understanding of these parties applied to the land specifically described; and that defendant did not mean to convey, nor the other to buy this; consequently he has no title to the conveyance, and the bill must be dismissed, but without costs. As to the cross bill to be let into possession, I cannot decree that; it is merely a legal title, and the object of an ejectment; therefore it must be dismissed with costs.[1]

WOOLLAM *v.* HEARN.

IN CHANCERY BEFORE SIR WILLIAM GRANT, M. R., 1802.

[7 *Vesey* 211.]

By a memorandum of agreement, executed between the parties on Dec. 11th, 1794, the plaintiff, possessed of a house under an agreement for a lease of seven, fourteen, or twenty-one years, agreed to let the house to Penelope Woollam for seventeen years. The lease was to commence

[1] For other discussions as to errors in the descriptions of the lands sold, see Higginson *v.* Clowes, 1809, 15 Ves. 516, 523; Calcraft *v.* Roebuck, 1790, 1 Ves. 221, 224; Dyer *v.* Hargrave, 1805, 10 Ves. 505, 507; Baxendale *v.* Seale, 1855, 19 Beav. 601, 608; Stewart *v.* Alliston, 1815, 1 Meriv. 26, 33; Chamber *v.* Livermore, 1867, 15 Mich. 381, 388; Denny *v.* Hancock, 1870, L. R. 6 Ch. App. 1, 11, 14; Jones *v.* Rimmer, 1880, L. R. 14 Ch. Div. 588, 592; Heywood *v.* Mallalieu, 1883, L. R. 25 Ch. Div. 357, 364; Dart, Vendors and Purchasers, vol. i., 5th ed., p. 113.

at the following Christmas at a yearly rent of 73l. 10s., the tenant to pay all taxes but the land tax, which was to be paid by Hearn. The plaintiff alleged that the rent of 73l. 10s. was inserted by fraud or mistake; that the real agreement was for the same rent as paid by the lessor, 60l.; and that she had already made certain payments under the contract for repairs and fixtures. The bill prayed a specific performance, and that the defendant be ordered to prepare a lease according to the agreement.

In his answer the defendant denied that the 73l. 10s. was inserted by fraud or mistake, and while admitting that he might have told the plaintiff she should have the premises upon the same terms as the defendant, he did not mean by that the same rent, but that she would upon the whole have them upon terms of equal advantage with the defendant. He admitted the payments.

It appeared from the evidence of the plaintiff's son and of her solicitor that the defendant had repeatedly said that the plaintiff "held the house upon the same terms upon which he held."

The MASTER OF THE ROLLS:—

The doubt I have felt during the argument of this case, whether there is any instance of executing a written agreement with a variation introduced by parol, still remains; and as it is an important question, I wish to consider it.

This bill calls upon the court for a specific execution of an agreement for a lease, at a rent of 60l. a year. There is no agreement in writing for a lease at that rent; the agreement expressing a rent of 73l. 10s. The plaintiff contends, however, that she signed that agreement under a belief that such was the rent payable by the defendant: the real agreement being for a lease at the same rent he paid to his landlord. The defendant in his answer admits he might have said she should have it upon the same terms, not meaning the same rent, but upon terms upon the whole equally advantageous; insisting, that, as he had laid out a great deal of money, she would upon the whole have as good a bargain. She offers parol evidence to prove an express agreement, that she was to have it upon the same terms as he had it; and to shew, that nothing could be meant by that expression but the same rent: nothing being in discussion between them, but the amount of the rent. He alleges a particular reason for not stating it; that he had not his own lease at hand. The question is, whether the evidence is admissible; for, though read, it has been read without prejudice. The defendant controverts the effect of the evidence, supposing it can be received: but I own, my opinion is, that, if received, it will make out the plaintiff's case; for, taking the whole together, there is hardly a doubt, that the impression meant to be conveyed was, that the rent should be the same; and, whatever he meant, that is the impression any person would have received from his language.

By the rule of law, independent of the statute, parol evidence cannot be received to contradict a written agreement. To admit it for the pur-

pose of proving that the written instrument does not contain the real agreement, would be the same as receiving it for every purpose. It was for the purpose of shutting out that inquiry that the rule of law was adopted. Though the written instrument does not contain the terms, it must in contemplation of law be taken to contain the agreement, as furnishing better evidence than any parol can supply.

Thus stands the rule of Law. But when equity is called upon to exercise its peculiar jurisdiction by decreeing a specific performance, the party to be charged is let in to show, that under the circumstances the plaintiff is not entitled to have the agreement specifically performed: and there are many cases, in which parol evidence of such circumstances has been admitted, as in Buxton *v.* Lister, which is very like this case. There upon the face of the instrument a specific sum was to be given for the timber: but it was shown by parol that the defendants were induced to give that upon the representation that it was valued by two timber merchants; which was not true. So here by the agreement upon the face of it she is to pay this rent: but by the evidence she was induced to do so because she thought, from his representation, that it was the rent he paid. If this had been a bill brought by this defendant for a specific performance, I should have been bound by the decisions to admit the parol evidence, and to refuse a specific performance. But this evidence is offered, not for the purpose of resisting, but of obtaining, a decree: first, to falsify the written agreement; and then to substitute in its place a parol agreement, to be executed by the Court. Thinking, as I do, that the statute has been already too much broken in upon by supposed equitable exceptions, I shall not go farther in receiving and giving effect to parol evidence than I am forced by precedent. There is no case in which the court has gone the length now desired. But two cases are produced, in which, it said, there is an intimation from Lord HARDWICKE to that effect. Upon that it might be sufficient to say, it was not decided. But it is evident from the manner in which that great judge qualifies his own doubts that he thought it impossible to maintain such a proposition as the plaintiff is driven to maintain. In Walker *v.* Walker it is to be observed, first, that the parol evidence was not offered for the purpose of contradicting any thing in the written agreement. It was admitted that, as far as it went, it stated the true meaning. But it was contended by the defendant that there was another collateral agreement which the plaintiff ought to execute, before he could have the benefit of the written agreement. It was evidence, too, offered in defence, to resist a decree. Lord HARDWICKE, after stating the ground, expresses himelf thus:

"The plaintiff for these reasons is not entitled to relief in this court for supplying the defect of a legal conveyance: but it is rebutted by the equity set up by the defendant. I am not at all clear whether, if the defendant had brought his cross bill to have this agreement established, the court would not have done it, upon considering this in the light of

those cases where one part of the agreement being performed by one side, it is but common justice it be carried into execution on the other; and the defendant would have had the benefit of it as an agreement."

So he states the special reason; not being at all clear, that the defendant would have been so entitled. There is nothing of admitting parol evidence to contradict a written agreement, and next to set up a parol agreement, to be executed by the court.

The other case referred to is Joynes *v.* Statham, referred to for the opinion expressed by Lord HARDWICKE:

"Suppose the defendant had been the plaintiff, and had brought the bill for a specific performance of the agreement: I do not see but he might have been allowed the benefit of disclosing this to the court."

But the reason is assigned:

"Because it was an agreement executory only; and as in leases there are always covenants relating to taxes, the Master will inquire, what the agreement was as to taxes; and therefore the proof offered here is not a variation; but is explanatory only of what those taxes were. I am of opinion to allow the evidence of the omission in the lease to be read."

The parol evidence was received for the purpose of resisting performance of the agreement; and received likewise, not to contradict it, but to show, that, as it stood, it did not fully express the meaning and intention of the parties; there being another stipulation agreed upon; but not introduced into the written instrument; and even if that had been a bill by the defendant to carry into execution the agreement, he would not have found it necessary to offer parol evidence to contradict anything in it; for he allowed it to contain the intention, as far as it went: but the provision that the rent was to be clear of taxes was omitted: and Lord HARDWICKE from the particular nature of that stipulation expresses a doubt whether if the defendant had been plaintiff he might not have been permitted to give evidence: it being usual to leave that open; intimating that it would be merely explanatory as to the taxes.

But this is evidence to vary an agreement in a material part; and having varied it to procure it to be executed in another form. There is nothing to show, that ought to be done; and my opinion being, that it ought not, I must dismiss the bill, but without costs.

The plaintiff then applied for a decree according to the written agreement; with a covenant for quiet enjoyment; as he had not power to grant such a lease.

The Master of the Rolls said, the bill was not for that purpose; expressly objecting to a lease at the rent of £73 10s.

The bill was dismissed without costs, and without prejudice to another bill for a lease, at the rent of £73 10s.[1]

[1] See same case with exhaustive notes in Vol. 2, White and Tudor's Leading Cases in Equity, pt. 2, p. 920.

PRICE *v.* DYER.

IN CHANCERY, before SIR WILLIAM GRANT, M. R., 1809-10.

[17 *Vesey* 357.]

The bill prayed a specific performance of an agreement for a lease by Dyer. The agreement was in the following words:—

"Memorandum of agreement between John Dyer of East Ham in the County of Essex, and Daniel Price of Cornhill, London, wherein I do agree to let unto the said Daniel Price the house-stabling gardens, and field at the net rent of sixty guineas per annum on lease of seven, fourteen or twenty-one years, Daniel Price paying all taxes—to commence at Lady Day next, and Daniel Price does agrée to take the fixtures as stated on the other side at a fair valuation. John Dyer, East Ham, 8th March, 1809."

About ten days after that agreement the defendant by parol agreed to demise to the plaintiff an additional piece of land; and the rent was to be increased to 65l. The plaintiff took possession on the 25th of March, 1809.

The defendant set up a parol agreement, on the 2d of April, 1809, made at the office and in the presence of his solicitor; by which the parties mutually abandoned the terms of the written agreement; and agreed that the lease should not be for the term of twenty-one years absolute in all events; but should be determinable by Dyer at the expiration of seven or fourteen years; unless the plaintiff should within the first seven years build two good rooms southward of the dwelling-house; but, if the plaintiff did build the said two rooms within that time, then the lease was to be absolute for the whole term of twenty-one years; but the precise sum to be laid out in building the said rooms was not then finally agreed upon; and it was also at the same time agreed between the plaintiff and the defendant that the annual rent should be £65; and that the plaintiff should insure the premises against fire; and should not underlet, or assign, without a written license from the lessor; and that the field should not be broken up or ploughed; and that all the usual covenants should be inserted in the lease. The defendant's solicitor took a note of the new agreement in the following words:—

"Lease for seven, fourteen and twenty-one years in consideration of Mr. Price laying out the sum of £ in building two rooms southward of the dwelling-house within the first seven years; then the lease to be absolute for twenty-one years; rent 65l. per annum—Mr. Price to insure the premises—not to let or assign without leave in writing of the lessor; and that the field should not be broken up or ploughed."

The defendant insisted that the possession had been retained by the plaintiff, not upon the terms of the original agreements, but upon the terms and conditions of the last verbal agreement.

The MASTER OF THE ROLLS [SIR WILLIAM GRANT]. There are two things to be considered in this cause; first, whether the agreement of the 8th of March, 1809, was originaly such as this court would have carried into execution: if it was, then, whether what passed subsequently ought to prevent a specific performance. The answer does not state any objection to the agreement, as being unfair or incorrect. It was indeed contended in argument that the parties did not mean it to be, what it is admitted to be in legal operation, an agreement for a lease for seven, fourteen, or twenty-one years, at the option of the lessee; and that inference is drawn from the plaintiff's willingness to comply with certain additional terms, upon which he was to have a lease for twenty-one years absolutely. Upon that it is enough to say, it is by no means a necessary inference; and I do not see how it is possible to deny effect to a written agreement upon the ground that it does not fairly state the meaning of the parties; where the defendant does not allege that to be the case in fact, or even according to his own conception of it. This agreement must therefore be taken to have been originally unexceptionable.

It is then said that the agreement was waived; and that a written agreement may be so far waived by parol that the court will refuse the interposition of its equitable jurisdiction to enforce it. Not conceiving that there was in this case any waiver, within the meaning of the *dicta,* or decisions, upon this subject, it is not necessary for me to give a precise opinion upon the point; but as at present advised, I incline to think that upon the doctrine of this court such would be the effect of a parol waiver, clearly and satisfactorily proved: but here was no such waiver. The waiver spoken of in the cases is an entire abandonment and dissolution of the contract; restoring the parties to their former situation. No such thing was for a moment in the contemplation of these parties. From the history of the transaction, in the answer and the evidence of the solicitor, all they at any time meant was to add to or modify the terms of the original agreement.

The question then is upon the effect of the variations, said to be agreed upon. Variations, so acted upon, that the original agreement could no longer be enforced without injury to one party, would be a bar to a specific performance of that original agreement. Such was the case of Legal *v.* Miller, 2 Ves. 299. The original agreement was unexceptionable: but the execution of it under the new circumstances would have been a fraud upon the landlord; having rebuilt, instead of repairing, the houses; and the tenant having agreed to pay an additional rent in consideration of the additional expense. But variations, verbally agreed upon, supposing any to have been so agreed upon in this case, are not sufficient to prevent the execution of a written agreement: the situation of the parties in all other respects remaining unaltered. The defendant has expended nothing upon the faith of having the added stipulations performed. He has sustained no positive loss. He will only be disappointed of that advantage, which he expected to de-

rive from the gratuitous covenants of the plaintiff. Gratuitous they clearly are; as it cannot be seriously represented that the obligation to build can be considered a privilege conferred upon him.

I am not therefore warranted upon authority or principle to refuse a specific performance of the written agreement: but under the circumstances of the case I do not think the plaintiff entitled to the costs of the cause.[1]

SULLIVAN ET AL. *v.* JENNINGS ET AL.

IN THE COURT OF CHANCERY OF NEW JERSEY, 1888.

[44 *New Jersey Equity* 11.]

The CHANCELLOR [McGILL]. The defendant, Ella C. Jennings, owned a tract of land in Essex County, which was subject, first, to a mortgage for $1,800, held by a physician David C. Smith, and second to a mortgage for $2,000, held by the complainants, and then to two judgments for amounts aggregating $400.

Upon the land there was a greenhouse, a windmill and a water-tank house, upon which the complainants held, and yet hold, a chattel mortgage for $1,050.

The complainants filed their bill to foreclose their mortgage for $2,000. They made the holders of the judgments and the owner of the land and her husband parties to the suit. Dr. Smith was not made a party, and no reference was made to the chattel mortgage.

The mortgaged premises were sold in pursuance of the decree in the suit, subject to Dr. Smith's mortgage and to whatever claim the complainants may have under their chattel mortgage.

At the time of the sale Dr. Smith had but little knowledge of legal matters, and was so self-reliant that he failed to take legal advice, and concluded to bid at the sale for the purpose, as he thought, of protecting his mortgage. As the sale was postponed from time to time, and he could not spare sufficient time to attend upon it, he authorized the under-sheriff, who had the sale in charge, to bid for the property, in his name, an amount not exceeding $2,500. He had calculated that that sum would pay the expenses of the sale and protect his mortgage. The property was struck down to him for $2,350.

The sum bid will not quite satisfy the decree of the complainants, and Dr. Smith, if he shall be held to his bid, must pay nearly $4,500 for land which is proved to be worth about $1,000 less than that sum, and to take

[1] For a case in which a new agreement has been substituted for the old one, and specific performance is asked of the new one, see Old Colony R. R. Co. *v.* Evans, 1856, 6 Gray 25; Ryno *v.* Darby, 1869, 20 N. J. Eq. 231, 232.

it either without the greenhouse, windmill and water-tank house, which are covered by the chattel mortgage, or contest the lien of that mortgage, or satisfy it.

The complainants seek to take advantage of the mistake that Dr. Smith so carelessly made, and claim that it is a mistake of well-settled law against which this court will not relieve.

I fail to perceive any ground upon which I could relieve Dr. Smith from his bid, if he were the applicant before me. To use the words of the Vice-Chancellor, in Hayes *v.* Stiger, 2 Stew. Eq. 196, 198, "A purchaser at a judicial sale who voluntarily abstains from all effort to get correct information, and deliberately assumes the hazard of making a purchase ignorantly must, as a general rule, bear the consequences of his negligence." But the complainants are the applicants. They did not make Dr. Smith a party to their foreclosure. They are the holders of the chattel mortgage against which the doctor must contend, and they ask that he may be compelled to pay more for the property than it is worth, not because of any equity in their favor, but because he has placed himself under legal obligation to pay it, and because the payment will redound to their advantage.

The specific performance of an agreement rests in the sound discretion of the court. It is a matter of favor, not of right. To secure the court's favor the agreement should be just, equal and agreeable to good conscience, and not a catching bargain. The contract here is not such an agreement, it is not conscionable, and should not be enforced in a court of equity.

When Dr. Smith made his bid he did not design to trifle with the court. I am satisfied that he intended in good faith to bid for the protection of his own interests, and that he now withholds the amount of his bid solely to obtain relief, if possible, from the consequences of his error. So far then as the element of contempt, in the doctor's attitude, is concerned, I fail to see that it is deserving of such punishment as the granting of this application will inflict.

The parties should be left to their remedy and defense at law. I am guided to this conclusion by the action of the Vice-Chancellor in Twining *v.* Neil.

The order to show cause will be discharged and the application denied, but without costs.[1]

[1] "In all those cases the court has held that it must look at the evidence, and that if the mistake is sufficiently proved the court will then set aside the agreement. But here the words of the agreement are quite certain, and the only thing that was not understood was the legal effect of certain words which it contained. Now, that is no ground of mistake at all. It is a question upon the construction of an agreement agreed to by everybody concerned." Per Lord ROMILLY, M.R., in Powell *v.* Smith, 1872, L. R. 14 Eq. 85, 91.

"The parties were both residents of the State of New York, and unac-

MASON *v.* ARMITAGE.

IN CHANCERY, before LORD CHANCELLOR ERSKINE,[1] 1806.

[13 *Vesey* 25.]

The bill stated that the defendant Armitage put up to sale by auction at Norwich, on the 7th of August, 1802, a freehold and copyhold estate; that there were several bidders; and the plaintiff, being the highest bidder, at the sum of £8,000, the estate was knocked down to him at that sum, and he was declared the purchaser. The plaintiff, after the sale was concluded, tendered the deposit, and a moiety of the auction duty to

quainted with our laws. The respondent was selling a very large property, valued at more than fifty thousand dollars, on time. Twenty-five thousand dollars' worth of that property was personal. There were also engagements for the fulfilling of contracts, upon which, if unfulfilled, the respondent would be liable for considerable damages. The cash down payment was small, and for the performance of the contract by the petitioner he stipulated for no other security than a mortgage upon the property sold. The respondent was entitled by the agreement to no security for the safety of the large amount of personal property or the performance of the contracts which he had made with others, except a chattel mortgage upon that personal property, and the agreement was made upon the supposition that such a mortgage would be valid. The parties were mistaken; such a mortgage would be worthless unless possession was retained by the vendor. It is too clear for doubt that the respondent never would have entered into that agreement but for the mistaken supposition that in the execution of it he was to have the protection of a valid mortgage on twenty-five thousand dollars' worth of personal property, and it is equally clear that such a mistake is a most material one, and that it was the right and the duty of the respondent to refuse to execute the agreement upon discovering the mistake. It would be grossly inequitable and unjust to compel him to perform it." Per BUTLER, J., in Patterson *v.* Bloomer, 1868, 35 Conn. 57, 64.

[1] The reputation of ERSKINE, like that of his fellow Scot, BROUGHAM, is extra-judicial. Though he held the great seal but for a short time, it was nevertheless long enough to show his unfitness for the Chancellorship. His decrees do not deserve the criticism beneath which they lie buried, for but a single appeal was taken from his judgments, Thelusson *v.* Woodford, Dow. 249, and that was affirmed. His judgments were for the hour, not for all time, as were those of his immediate predecessor and successor, Lord ELDON. They decided the question in the light of the past, but did not point the way to the future. At the common law bar he was unrivalled in his day, and as orator he has had no superior in the history of the English law. His importance lies not merely in his great abilities, but rather in the worthy use he made of them in the cause of constitutional liberty against the measures of the younger Pitt and his Tory placemen.

Lord JOHN RUSSELL'S happy phrase sums up his character: "The tongue of Cicero and the soul of Hampden."

the auctioneer, according to the conditions of sale, but the auctioneer declined to take the money, as the vendor seemed dissatisfied with the sale, and, as auctioneer and agent for the defendant, made and signed the following memorandum on the printed particulars and conditions of sale:

"Memorandum: Saturday, the 7th of August, 1802; attended at the Blue Bell on Hoghill, Norwich. Mr. Robert Mason was the highest bidder at the sum of £8,000; the deposit being 10 per cent. upon the purchase money. Mr. Mason offered me £800 for the same, as well as £100 for his moiety of the auction duty; but the owner nor his attorney being present, I did not think proper to receive the same. R. Bacon, auctioneer." Then, after the names of persons who were present,

"N. B.—There was a misunderstanding between the vendor and the person appointed by him to bid for the estate."

The bill prayed a specific performance of the agreement and a conveyance, etc.

The circumstances upon which the bill was resisted, according to the evidence of the auctioneer and other persons present at the sale, were these:

Armitage in the usual way, by writing, appointed William Rising to make one bidding for him. Through a mistake, Rising refrained from bidding at the proper time, he understanding that the auctioneer would call him by name when the time came for him to bid. As a result of this error, the estate went to the plaintiff for £1,000 less than the defendant's price.

Rising, by his deposition, stated that great intimacy subsisted between the plaintiff and the defendant Armitage, and previously to the sale, on the same day, Armitage told the plaintiff he had appointed Rising to buy the estate in for him at £9,000, and would not take less, and that the plaintiff had better take the estate for his friend. The plaintiff replied that he had no money, and would have nothing to do with it either for himself or his friend. Rising also stated that he expected to be called upon by name, and did not conceive the general call upon the company to be addressed to him, otherwise he would have bid £9,000.

The Lord Chancellor. I admit there is nothing in this contract showing that anything was fraudulently obtained by the plaintiff, and if he had been declared the purchaser, and had got into possession, so that the defendant had been obliged to come into this court upon the head of fraud, there would not be sufficient ground to deprive the plaintiff of the benefit of his legal contract. But that is not this case. This plaintiff has got all the law can give him and applies here desiring more, and the question is, whether, under all the circumstances and upon the authorities and principles, this is a case for a specific performance.

It is not necessary that fraud should be made out. Though from want of attention, misrepresentation, and mistake, a party may have acquired a right at law, this court will not, especially if upon other circumstances the case is hard, decree a specific performance, but the law is open to him.

Joynes v. Statham, 3 Atk. 388. Upon this subject the court is governed by a sound, not a capricious and arbitrary discretion.

In this case, I cannot say, the plaintiff has acted so as to be an example, though his conduct does not come up to fraud, so that I could have dealt with it as such if he had obtained possession. It is plain, he had talked of purchasing it for his friend, and his answer to the offer made to him that he would have nothing to do with it is rather against him, the defendant on that account not looking to him as a purchaser. Having thus put the defendant off his guard, the plaintiff went into the room, and was considered by every one as a puffer. This is not a damp upon the sale by a circumstance over which the man had no control, as in Twining v. Morrice, 2 Bro. C. C. 326. This arises from his own act. Upon the suspicion that the plaintiff was a puffer, the question was put whether any puffers were present, and then a fair account is given by the auctioneer, that the defendant had reserved one bidding, and any one who would advance £10 upon that should have the estate. This was not private, but a public conventional option not to let the estate go at a particular bidding. The result of the evidence is plain misapprehension and mistake, not an after-thought by the defendant, satisfied at the moment with the sum of $8,000. There is no difficulty as to the evidence, which is embodied upon the written memorandum, stating clearly that there was a misunderstanding. If, however, the plaintiff thinks he has a case which the statute will not meet, upon which I do not give any opinion, he is not injured by this decision. There is nothing to show that this land is of any peculiar value to him, as, if it was contiguous to his own estate, or purchased with a view to set up a manufacture. Therefore, Lord PARKER'S observation as to stock is applicable, and as the plaintiff declared he did not intend to make this purchase, and he has obtained an advantage through a mistake, a court of equity will not give him any assistance in that.

Dismiss the bill without costs.

MALINS v. FREEMAN.

IN CHANCERY, BEFORE LORD LANGDALE, M.R., 1837.

[2 *Keen* 25.]

The MASTER OF THE ROLLS.[1] The plaintiff being entitled to an estate called The Rookery, at Woodford in Essex, employed Richard Ellis and son as auctioneers to sell the same by auction, in five lots, on the 8th day of May, 1834; and the same auctioneers were employed by a Mr. Davies

[1] The statement of facts has been omitted.

to sell for him an estate at Layton on the same day and at the same place, Garraway's Coffee House.

The defendant, Freeman, who was acquainted with Davies, met Davies on the day preceding the sale, and offered to go and bid for him. Davies having accepted his offer, a meeting between them was appointed to take place at the auctioneer's on the day of sale at twelve o'clock. The object of Davies in appointing this meeting was, that the defendant should receive his instructions from the auctioneer; but the defendant, not having kept his appointment, joined Davies at Lloyd's Coffee House between one and two o'clock, and was in a hurry to proceed to the sale, fearing that he might be too late to bid for Davies's estate. Davies gave him his own instructions, and the defendant hurried away to Garraway's Coffee House.

The auctioneer's arrangement was to sell the several lots of the plaintiff's estate first, and then to sell Davies's estate, and it appeared that the defendant arrived at the auction-room when the second lot of the plaintiff's estate was under sale. He placed himself near enough to the auctioneer, for a person not deficient in hearing, to hear what the auctioneer said. Lot 2 of the plaintiff's estate was brought in, and the auctioneer, having described lot 3 in terms wholly applicable to Davies's estate, offered that lot for sale. The defendant began to bid for it, and kept bidding in a hasty and inconsiderate manner till the price was raised to £1,400. The lot was then knocked to him, and the auctioneer declared the property to be absolutely sold. The defendant was not at that moment called upon to sign the contract, but he handed in his card, showing his name as purchaser. About the same time, Mr. Cole, another person employed by Mr. Davies to bid for him, asked the defendant what had induced him to purchase the lot, to which he observed, "Why, it is Davies's property, is it not?" Mr. Cole having told him that it was not, but that he had bought part of Malins's property at Woodford, the defendant seemed much flurried, and said he would speak to the auctioneer. Cole advised him to do so at once, but he said he would wait till the sale was over; and, after the sale was over, being called upon to pay the deposit and sign the contract, he said he had made a great mistake in bidding for lot 3 of the plaintiff's estate, having, in fact, only intended to bid for Davies's, and he refused to sign the contract or pay the deposit.

The auctioneer wrote the defendant's name, as purchaser, on a copy of the conditions and particulars of sale, in such a manner as the plaintiff alleges is sufficient to make the contract binding on the defendant, and, therefore, he insists that he is entitled to a specific performance of the agreement.

Upon the facts proved, some questions are raised as to the validity of the contract; but supposing the contract to be valid, the defendant submits that he entered into it by error and in mistake, and that he ought not to be compelled specifically to perform it.

Certainly, if the defendant did fall into any mistake, it cannot be ascribed to the conduct of the plaintiff. The plaintiff and his agents in no respect contributed to it, and, if the defendant by his carelessness has caused any injury or loss to the plaintiff, he is accountable for it.

But the defendant may be answerable for damages at law without being liable to a specific performance in the court. In cases of specific performance the court exercises a discretion, and, knowing that a party may have such compensation as a jury will award him in the shape of damages for the breach of contract, will not in all cases decree a specific performance; as in cases of intoxication, although the party may not have been drawn in to drink by the plaintiff, yet, if the agreement was made in a state of intoxication, the court will not decree a specific performance. And the question here is not, as it has been put, whether the alleged mistake, if true, is one in respect of which the court will relieve, for the court is not here called upon to relieve the defendant from his legal liability, but whether, if the mistake be proved, the court will enforce a specific performance, leaving the defendant to his legal liability. And I think that, if such a mistake as is here alleged to have happened be made out, a specific performance ought not to be decreed; and after giving to the evidence the best consideration in my power, I am of opinion that the defendant never did intend to bid for this estate. He was hurried and inconsiderate, and, when his error was pointed out to him, he was not so prompt as he ought to have been in declaring it. It is probable that by his conduct he occasioned some loss to the plaintiff; for that he is answerable, if the contract was valid, and will be left so, notwithstanding the decision to be now made. But I think that he never meant to enter into this contract, and that it would not be equitable to compel him to perform it, whatever may be the responsibility to which he is left liable at law. Let the bill, therefore, be dismissed without costs.

MANSER *v.* BACK.

IN CHANCERY, BEFORE SIR JAMES WIGRAM, V. C., 1848.

[6 *Hare* 443.]

The vendors were owners of copyhold premises which they desired to sell, and advertisements containing particulars and conditions of sale were printed.

It appeared from the evidence, that, after the original particulars and conditions of sale had been prepared and distributed, it was discovered that the reservation of a right of way to the back yard of the Fox Inn

where there were stables and a coach or cart house, had not been made, and that there was no other access for carriages to those premises. The information of this fact was received in London, by the vendor's solicitor, on the evening before the day of sale, and he immediately altered a copy of the particulars of sale, by introducing a reservation of the right of way to the Fox Inn after the reservation of the right of way to Whitley's premises. Fourteen or fifteen copies of the original particulars were altered in the same manner by his clerks. These copies were brought to the auction room; some were distributed, without observation, and the others placed together on the table, and, after the sale, the greater part of the altered particulars were taken away. The vendor's solicitor directed the auctioneer to sell according to the altered particulars. It was proved by the evidence of the vendor's solicitor and the auctioneer, that the auctioneer, before the sale took place, read aloud the altered particulars; and, on that part of the plaintiff, it was proved that several persons in the room did not hear or notice the reading of the alteration. The particulars of sale, on which the memoranda as to the purchase were signed, were the original copies of the particulars, not containing the alteration. The auctioneer, in his evidence, stated that he had signed these particulars through inadvertence.

The plaintiff denying all knowledge of this reservation at the time of the sale, files his bill for specific performance of the agreement he signed.

Sir JAMES WIGRAM, Vice-Chancellor, after stating the facts to the foregoing effect: . . .

Whatever the effect upon the case may be, it is indisputable, that, at the time the auctioneer knocked down Lot 11, he had (as between himself and the vendors) no authority to sell except according to the altered particulars, provided the vendors' solicitor had authority to make the alteration.

Now with respect to the law which is to govern this case, I shall follow the arguments of counsel. Some of the points are clear. If the vendors had been plaintiffs asking a decree for specific performance, with an addition to the paper signed by Manser, such as they say ought to have been introduced, it is clear that no such decree could have been made. The evidence to prove the additional term would have been inadmissible. I notice this in passing, for the purpose of saying it is to a case of this description that the case of Jenkinson *v.* Pepys, cited by Sir W. GRANT, M. R., 15 Ves. 521; Id., by Sir J. Plumer, V. C., 1 Ves. & Bea. 528. See also 6 Ves. 330, in argument, must be referred. From the statement of that case in Higginson *v.* Clowes, 15 Ves. 516, it is manifest that Sir L. Pepys was the defendant, and that the evidence which was rejected was there adduced by the plaintiffs; and it is distinctly shown that such was the fact, by the citation of that case by the distinguished counsel in The Marquis of Townshend *v.* Stangroom, 6 Ves. 328, 331.

It is, however, a well established principle of equity, that the Court

will not enforce the specific performance of an agreement in writing, where, from fraud, mistake, or surprise, injustice would be done to the defendant by a decree for that purpose. And, therefore, where the terms of the written agreement have been ambiguous, so that, adopting one construction, they may reasonably be supposed to have an effect which the defendant did not contemplate, the court has, upon that ground only, refused to enforce the contract: Calverly *v.* Williams, 1 Ves. jun 201. See n. 48, Id.; Jenkinson *v.* Pepys, *Ubi supra,* Clowes *v.* Higginson, 1 Ves. & Bea. 524; Neap *v.* Abbott, C. P. Cooper, 333. See the cases there collected. In the first three cases the plaintiff was the author of the ambiguity; but, in the last, the vendor, the author of the ambiguity, had the benefit of the principle, although it was certain the purchaser supposed he was buying all he claimed. The principle is, that it is against conscience for a man to take advantage of the plain mistake of another, or, at least, that a court of equity will not assist him in doing so. See Sugden, V. & P. 355, 11th ed. In the cases last cited, the court was enabled to apply its principle without resorting to parol evidence. As the principle, however, is general, where the fraud, mistake, or surprise cannot be established without evidence, equity will allow a defendant, to a bill for specific performance, to support a defence founded upon any of those grounds by evidence dehors the agreement. It is unnecessary to do more than refer to the cases cited by Sir Edward Sugden, Vend, & Pur. pp. 157 et seq., 11th ed.

The question is, whether the facts which I have treated as established in this case, bring it, in favor of the vendors, within the principle I have referred to. I think the answer must be in the affirmative. True it is, that the plaintiff, upon the supposition I now make, *bona fide* believed, and was justified in believing, that he had purchased that which he claimed by his bill. But if mistake, without fraud, be a ground for refusing a decree for specific performance, what more can be necessary than distinct and satisfactory proof of such mistake. That the defendant, who undertakes to prove such a case, undertakes (as Lord ELDON said) a task of great difficulty, is not to be denied. But if the difficulty be got over by evidence so stringent that the court may safely act upon it, why is not the principle to be applied?

It is not, upon the evidence, to be doubted, that the vendor's solicitor did, before the sale, alter the particulars in the way suggested by the defence, and distribute them in the sale-room. Nor is it to be doubted that he instructed the auctioneer to sell according to the amended particulars; nor that the auctioneer was bound to do so, and was limited by those instructions, provided the vendor's solicitor had authority to give them. Are the vendors in such a case to be bound in this court by the carelessness of the auctioneer, in a case in which (according to my present hypothesis) the situation of the purchaser is substantially unchanged? or is it not a case in which justice is best consulted by leaving the parties to their legal remedies? Principle and authority appear to

me to show that the question must be determined in the defendant's favor.

It was said in argument, that, if there were any mistake, that mistake was all on the part of the vendors, and that all that had passed was, as regards the plaintiff, *res inter alios,* and not binding upon him. But that argument proves too much. If admitted, it would deprive a vendor of a power to revoke an authority to sell, unless he could prove that the revocation was actually known to the party who chanced to become the purchaser. This cannot be successfully contended for. The revocation of the authority of the auctioneer is operative *per se,* and therefore, like a deed, is binding upon persons not parties to or conusant of it. From deference to the arguments of counsel, I have considered this case with reference to the cases upon mistake, as a ground of defence to a bill for specific performance. But the ground upon which the defence might most properly be rested is, that the auctioneer had no authority to sell, except according to the altered particulars. No doubt the evidence must be very clear to let in such a defence, but I cannot bring myself to doubt the truth of the defendant's case.

Bill dismissed without costs.[1]

TAMPLIN *v.* JAMES, 1879, L. R. 15 Ch. Div. 215.—JAMES, L. J. In my opinion, the order under appeal is right. The vendors did nothing tending to mislead. In the particulars of sale they described the property as consisting of Nos. 454 and 455 on the tithe map, and this was quite correct. The purchaser says that the tithe map is on so small a scale as not to give sufficient information, but he never looked at it. He must be presumed to have looked at it, and at

[1] "The case of Jenkinson *v.* Pepys, not reported, is an authority, if an authority were required, for that proposition. In that case the second lot was described as an orchard and nursery, well planted. In the description of the third lot no notice was taken of any nursery, but the fact was alleged that a considerable nursery or plantation of young trees was upon that lot; and there was at the foot of the particular a *Nota Bene* that the timber and timber-like trees, with the underwood and plantation in the nursery, were to be paid for down to sixpence per stick, inclusive. Sir Lucas Pepys became the purchaser of lot 3, but not of lot 2. He admitted that the timber and timber-like trees upon all the lots were to be paid for, but contended that the underwood and plantation were to be paid for only in the nursery, which must be understood to be that only which was described in the second lot. Parol evidence was offered to show, first, that there was a nursery or plantation in the third lot, and secondly that the auctioneer had frequently during the auction declared that he sold nothing but the land; and everything that grew upon it was to be separately valued, down to the value of sixpence per stick, inclusive. Other witnesses also stated that the auctioneer had made that declaration. Witnesses who were at a

the particulars of sale. He says he knew the property, and was aware that the gardens were held with the other property in the occupation of the tenants, and he came to the conclusion that what was offered for sale was the whole of what was in the occupation of the tenants, but he asked no question about it. If a man will not take reasonable care to ascertain what he is buying, he must take the consequences. The defense on the ground of mistake cannot be sustained. It is not enough for a purchaser to swear, "I thought the farm sold contained twelve fields which I knew, and I find it does not include them all," or, "I thought it contained 100 acres and it only contains eighty." It would open the door to fraud if such a defense was to be allowed. Perhaps some of the cases on this subject go too far, but for the most part the cases where a defendant has escaped on the ground of a mistake not contributed to by the plaintiff have been cases where a hardship amounting to injustice would have been inflicted upon him by holding him to his bargain, and it was unreasonable to hold him to it. Webster *v.* Cecil, 30 Beav. 62, is a good instance of that, being a case where a person snapped at an offer which he must have perfectly well known to be made by mistake, and the only fault I find with the case is that, in my opinion, the bill ought to have been dismissed with costs. It is said that it is hard to hold a man to a bargain entered into under a mistake, but we must consider the hardship on the other side. Here are trustees realizing their testator's estate, and the reckless conduct of the defendant may have prevented their selling to somebody else. If a man makes a mistake of this kind without any reasonable excuse he ought to be held to his bargain.

BRETT, L. J. It would be dangerous to attempt an exhaustive definition of the cases in which the court will refuse specific performance. The jurisdiction is a delicate one, and the more so since the fusion of law and equity, for if the court refuses specific performance it must now, in my opinion, consider the question of damages. Here the property was put up for sale by a description which could not mislead anybody who took reasonable care, for it is defined by reference to the numbers on the tithe map, what follows being only a further description of what is included in the two specified closes on the tithe map. According to the finding of Lord Justice BAGGALLAY, the defendant bought under a mistake, but it was a mistake into which he was led solely by his not taking reasonable care. The defendant therefore has to support the proposition that although there is nothing misleading in the particulars, and

greater distance from the auctioneer than Sir Lucas Pepys himself, or his agent, swore that a particular question was put to the auctioneer as to what was comprehended in lot 3, and the answer was that nothing was comprehended in it but the land. Nixon, the agent, swore he did not hear this. The evidence was rejected, it being held incompetent to the court to receive any explanation of the particulars and the conditions to which the agreement that was signed referred." Per Sir WILLIAM GRANT, M.R., in Higginson *v.* Clowes, 1809, 15 Ves. 516, 521.

his mistake was not on a point of vital importance, and arose entirely from his own negligence, he is to be relieved. I think that such a proposition cannot be maintained. In Webster *v.* Cecil, 30 Beav. 62, the purchaser was acting fraudulently in seeking to take advantage of what he knew to be a mistake.

COTTON, L. J. It has been urged that if specific performance is refused the action must simply be dismissed. But in my judgment—and I believe the Lord Justice JAMES is of the same opinion—as both legal and equitable remedies are now given by the same court, and this is a case where, under the old practice, the bill, if dismissed, would have been dismissed without prejudice to an action, we should, if we were to refuse specific performance, be bound to consider the question of damages.

But in my opinion the decision of Lord Justice BAGGALLAY is right. I will not attempt to define the cases in which the court will refuse specific performance on the ground of mistake. The circumstances of each case have to be considered. Here in the particulars there is no specific reference to gardens, but there is a specific reference to the closes 454, 455, on the tithe map as comprising the property. The defendant says, "I was under a mistake, and believed that my purchase comprised something not included in those closes." He had no right to make such a mistake, and though he knew that the gardens had for years been occupied and held together with these tenements, he was bound to take notice of the description. In one sense he was not bound to look at it, but he cannot abstain from looking at it and say that he bought under a reasonable belief that he was buying something not included in it. There is no injustice in holding a man to a contract which specifically describes the property sold in a way not calculated to mislead.

JAMES, L. J. I also am of opinion that where an action is brought for specific performance, and specific performance is refused on the sole ground of a mistake by the defendant, the court ought to give the same damages as would, under the old practice, have been given in an action at law.

WEBSTER *v.* CECIL.

IN CHANCERY, BEFORE SIR JOHN ROMILLY, M. R., 1861.

[30 *Beavan* 62.]

This was a suit by a purchaser for the specific performance of a contract entered into under the following circumstances: After some negotiations between the plaintiff and defendant, the defendant wrote the plaintiff a letter dated the 22d of October, 1860, in which he said: "The twenty-one acres of land in question I will sell for £1,100, and put Moor Cottage into the bargain, the furniture of which you may take

too at a valuation if you like. I have only one £10 ground rent left, but will sell you that, also, if you like (with the rest) for £150."

On the 25th of October, 1860, the plaintiff wrote to the defendant in reply as follows:

"As you wish for an immediate answer, I write by return to say I accept your offer to sell twenty-one acres of freehold, together with Moor Cottage, for £1,100, and a ground rent of £10 for £150, making £1,250 (twelve hundred and fifty) as the total purchase money for the whole. I have no wish to be encumbered with any furniture, but if you will name a sum for the furniture I will see if I can find you a purchaser. A valuation would be objected to.

"I have written by this post to Messrs. Townsend, Ridley & Jackson, solicitors, of Liverpool and Birkenhead, to say that I have agreed to purchase the land, cottage, and ground rent of you for £1,250, and to request that they will prepare the necessary and usual contract and documents as my solicitors, and you would do well to employ them also."

On receiving this letter the defendant became aware that he had made a mistake as to the price asked, and which had occurred in the following way:

Previously to writing his offer the defendant had made a calculation upon a piece of paper of the value of each parcel of land called "the twenty-one acres of land in question." The calculation was produced and was as follows:

Moor Ground The Moor	£450
Broad Close	600
Withy Field Hearn's Piece	300
Bridge Mead	500
	£1,850
Moor Cottage	250
	£1,100

"Told him put M. Cottage into bargain at that price and he may have the £10 ground rent for £150."

It will be observed that the value of the lands and cottage, if correctly added up, amounted to £2,100, but through inadvertence and in his hurry to save the post the defendant added them up as amounting to the sum of £1,100, and without reflection inserted that sum in the letter. The property offered for £1,100 produced an annual return of £90, and was mortgaged for sums amounting in the aggregate to £1,800, and the defendant had already refused to sell it to the plaintiff's agent for £2,000.

Upon the receipt and perusal of the plaintiff's letter of the 25th of

October, 1860, the defendant became aware of the mistake he had made in his letter of the 22d of October, 1860, and he immediately went to the office of Messrs. Townsend, Ridley & Jackson and informed them of such mistake, and requested them not to take any steps with a view of the preparation of a contract, and on the 31st of October, 1860, the defendant wrote to the plaintiff informing him of the error.

The plaintiff, on the 1st of December, 1860, filed this bill for specific performance.

The MASTER OF THE ROLLS was of opinion that the mistake had been clearly proved, and that the defendant had immediately given notice of it, and he said that in that state of the case the court could not grant specific performance and compel a person to sell property for much less than its real value and for £1,000 less than he intended. The plaintiff, he said, might bring such action at law as he might be advised.

The bill was dismissed without costs.

MANSFIELD *v.* SHERMAN.

IN THE SUPREME JUDICIAL COURT, 1889.

[81 *Maine* 365.]

On report. Bill in equity, for specific performance, heard on bill, answer, and proofs.

The facts appear in the opinion.

EMERY, J. This is a bill in equity, in which the court is asked to decree the specific performance of a contract for the conveyance of two lots of land, as marked upon a plan.

Such an application is addressed to the sound discretion of the court. Not every party, who would be entitled as of right to damages for the breach of a contract, is entitled to a decree for its specific performance. Before granting such a decree, the court should be satisfied not only of the existence of a valid contract, free from fraud and enforceable in law, but also of its fairness and its harmony with equity and good conscience. However strong, clear and emphatic the language of the contract, however plain the right at law, if a specific performance would, for any reason, cause a result, harsh, inequitable, or contrary to good conscience, the court should refuse such a decree and leave the parties to their remedies at law. In an equity proceeding, the complainant must do equity and can obtain only equity. Mortlock *v.* Buller, 10 Ves. 305; Willard *v.* Taylor, 8 Wall. 557; Snell *v.* Mitchell, 765 Maine 48.

In this case the answer sets up the defense, among others, that the respondent made his offer to sell the land, and named the price under a

material mistake, as to the extent and boundaries of one of the lots—that he did not understand that the lots included a certain valuable building site, which he never intended to sell at such a price—that by reason of such mistake he named an inadequate price for the lot, and that for the complainant to seek to compel him to convey at that price is inequitable, and is taking an unfair advantage of his mistake.

The facts material to this issue seem to be these: Mr. Sherman, the respondent, living in New York, owned a tract of land in Bar Harbor, which he had caused to be laid out into avenues and building lots, and a plan to be made by a landscape engineer. There were twelve lots, marked on the plan by numbers.

In March, 1887, Mr. Mansfield, the complainant, saw these lots, and inquired of a firm of real estate brokers at Bar Harbor about lot No. 7, a small lot at the extreme southern end of the tract. The brothers wrote to Mr. Sherman in New York about this inquiry, and suggested that he authorize them to sell the lots. After some correspondence, Mr. Sherman sent from New York the plan, and a list of prices for the lots, and instructions about selling, the conditions, etc. The scale of prices on this list ranged all the way from $1,500 for lot 7, to $10,000 for lot 10. The price of lot No. 12 was marked $2,500, the lowest but two on the list. Lot No. 1 was reserved, and the aggregate price of the eleven lots was $44,000. Mr. Mansfield, after learning the prices and examining the lots, not only said he would take lot No. 7, but said he would take lot No. 12, nearly at the other extremity of the tract, at the price named. Mr. Sherman, on being written to, sent to the brokers, May 25, an offer to sell both the lots at the price of $4,000. He subsequently came to Bar Harbor early in June (the 3d or 4th), and went upon the land with the plan, and immediately afterward informed the brokers that he had made a great mistake as to lot No. 12—that he found it contained a valuable building site, which he supposed was not included, and which he had not intended to bargain at such a price—and that therefore he could not convey it.

The testimony of all the witnesses as to the relative value of the lots is to the effect that lot 12 was one of the most valuable lots in the tract, if, indeed, it was not the most valuable. The real estate agents (called by the complainant) so testified, and also that its value was nearly double that of lot No. 11, marked at $6,000. This evidence was not contradicted, and shows that from some cause Mr. Sherman named a very inadequate price for lot 12 in comparison with the other lots. If this was owing to an error in judgment, or a mistaken opinion about the relative values, perhaps the court should not consider it. Mr. Sherman, however, testifies that it was owing to a mistake in material matters of fact, and not to a mistake in judgment. He says there are two building sites within the territory of what is now lot 12, and that he directed the engineer to make two lots of what was lot 12, so as to include in lot 12, as left, only the more northern and cheaper building site, and exclude

the southern and more valuable site; that he supposed that his directions were followed, and that he made the offer to sell lot 12 for $2,500 under the belief that it did not include the more valuable of the two sites. The engineer corroborates Mr. Sherman. He testifies that he was directed to make such a division, but afterward thought it best not to do so, and so put both sites in one lot. It does not appear that Mr. Sherman was ever informed of this departure from his instructions.

It is urged that this story of Mr. Sherman's is not natural, and that he should have seen from the plan itself, when sent him by the engineer, that lot 12 included more than one site, or at least that it had not been divided. Mr. Sherman may have been careless in the matter, and perhaps he should have seen the departure from his instructions, but we can understand how, under the circumstances, he might overlook it and retain the belief that his instructions had been followed. The story explains an evident disparity in price. It is uncontradicted, and it seems to us probable that Mr. Sherman did make the offer under a mistake of facts, as he states.

It should be remembered here that Mr. Mansfield at first only inquired about lot No. 7—the smallest lot, and situated at the extreme southern end of the tract. It was not till after he saw the list of prices that he desired to include in his purchase lot 12, near the extreme northern end of the tract. The two lots are far apart, and have no possible connection with each other. It seems probable that Mr. Mansfield saw the disproportion of price as to lot 12, and for that reason endeavored to secure it.

Would it be equitable, and in accord with good conscience, to compel a conveyance under such circumstances? Do equity and good conscience require that Mr. Mansfield should gain and Mr. Sherman lose by this mistake? The equitable principle involved can perhaps be more vividly illustrated by stating a case similar in kind, but stronger in degree. Suppose Mr. Sherman had built a costly residence on lot 12, and yet, living in New York, he in some way had the impression that the structures were on lot 11, and that lot 12 was an unimproved lot, and under such actual impression had bargained lot 12 at a correspondingly low price to one who knew that the buildings were on lot 12. Would it be fair or honorable in the vendee, after being apprised of the vendor's mistake, to insist on a conveyance at such an inadequate price? Would not such a vendee justly be thought a hard, rigorous man, and the rule of law that sustained him justly be thought a harsh, inequitable rule?

Mr. Sherman, living at a distance, remembering the particular building site, which he thought so valuable, had somehow acquired the erroneous impression that it was not included in lot No. 12. It was a mistake of fact, and about an important and controlling fact. Mr. Mansfield must have been aware from the evident disparity that there was very likely some mistake about it.

Of course, if there was a valid contract, Mr. Sherman should answer in damages for all the loss his mistake and refusal to convey have occasioned Mr. Mansfield. The court when appealed to in an action at law can only consider whether there was a valid contract and a breach. The mere mistake of one party, however great, will not excuse him from making full compensation. When, however, application is made to the court, not to determine and enforce legal rights, but "to do equity" between the parties, the court will be careful to do only equity, and will not aid one party to take advantage of the mistake of the other party. We think in this case we should decline to decree a specific performance, and should leave the parties to their rights and remedies at law. It does not appear that pecuniary damages for the breach would not fully compensate Mr. Mansfield for all losses he has sustained in the matter.

A few cases will illustrate the principle that a mistake of one party will justify a court of equity in refusing to decree a specific performance against him. In Leslie *v.* Thompson, 9 Hare 268, an estate was put up for sale in several lots. The vendor made a mistake in computing the amount of land in four of the lots. These four lots were sold to one purchaser, and after the sale were found to contain more land than was stated at the sale. It was held that the vendor was entitled to increased compensation, although the mistake was his. In Alvanley *v.* Kinnaird, 2 Macn. & G. 1, land was sold under an order of court, with this description: "The manor of Bredbury cum Goite, with the court baron to the same belonging, and all and every the rights, royalties, liberties, privileges and advantages." The purchaser bought in good faith under this description. The vendors, however, did not intend to include the mines and minerals under any lands within the manor, and it was their mistake that the exception was not expressed in the order of sale. COTTENHAM, Lord Chancellor, said that in such a case specific performance would not be enforced against the vendors.[1] In Baxendale *v.* Seale, 19 Beav. 601, the land bargained was described to be "the manor of Stoke Fleming, ... embracing nearly the whole parish of Stoke Fleming," with certain immaterial exceptions. The vendor supposed that the manor did not include any lands beyond the parish, but after the sale it was found that the manor did include lands outside the parish. The purchaser, innocent of any mistake, insisted on specific performance, but the Master of the Rolls, Sir JOHN ROMILLY, refused to decree it. In Buckhalter *v.* Jones, 32 Kansas 5, Buckhalter wrote to Jones offering him $2,000 for a parcel of land. Jones wrote in reply, "We will accept your offer." It appeared that, although the offer was in fact only $2,000, yet Jones somehow understood it to be $2,100, and he refused to convey for less. The court declared the contract to be binding at law, but on account of the mistake refused a decree for specific performance, and left the parties to their remedies at law.

[1] The court here recited the facts and holding of Malins *v.* Freeman and Webster *v.* Cecil, *supra*.

In this case, were it clear that there is a contract binding at law, we should think it equitable for the respondent to pay the costs of this proceeding, which would then be defeated by his own mistake; but as there is some doubt about the validity of the alleged contract, we think it more equitable to leave each party to bear his own costs.

Bill dismissed.

PETERS, C. J., WALTON, DANFORTH, VIRGIN and HASKELL, JJ., concurred.

F. HARDSHIP.

COKE *v.* BISHOP.

IN CHANCERY, BEFORE LORD CHANCELLOR NOTTINGHAM, 1677.

[3 *Swanston* 401 *note.*]

The defendant having been long since arrested for £1,000 at the suit of J. S., the plaintiff was so kind to him as to lay down the money for him; whereupon, in requital of this kindness, the defendant entered into articles with the plaintiff to settle upon him all his real and personal estate, which he had or should have, except £3,000. Upon these articles a suit was commenced in chancery in the year 1664, and a decree made for the defendant to settle all he then had, which was performed; since that an attempt was made before me to have a new decree against the defendant to settle new acquisitions made by him; but I did not think a court of conscience obliged to execute such a strange agreement any farther than it had been carried already, since it tended to the discouragement of all honest industry; so the suit failed.[1]

FAINE *v.* BROWN.

IN CHANCERY, BEFORE LORD CHANCELLOR HARDWICKE, 1750.

[2 *Vesey Senior* 307 *cited.*]

A man was intitled to a small estate under his father's will, given on condition that if he should sell it in twenty-five years, half the purchase money should go to the brother; he agreed in writing to sell it, and afterward refused to carry it into execution, pretending to have been

[1] A part of the opinion is omitted.

intoxicated with liquor at the time. A bill was brought to compel it. Your Lordship [Lord HARDWICKE] said, that without the other circumstance, that hardship alone of losing half the purchase money, if carried into execution, was sufficient to determine the discretion of the court not to interfere, but leave them to law.

ADAMS *v.* WEARE.

IN CHANCERY, BEFORE LORD CHANCELLOR LOUGHBOROUGH, 1784.

[1 *Brown Chancery* 567.]

Bill brought by the vendor against the vendee for a specific performance of an agreement.

The contract was a memorandum, signed only by the defendant, to the following purport: That the vendee agreed to buy of the vendor the premises in question, provided he would convey them to him and make a good title thereto. The vendor took a guinea of the vendee by way of earnest.[1]

There was evidence in the cause of these circumstances, and that the purpose of building the mill, which depended on the consent of the corporation, was in the view of the vendee, but not that it was in the view of the vendor, and so far from having agreed to such condition, the vendor had never mentioned it.

The late Master of the Rolls had decreed for the plaintiff.

Upon an appeal:

LORD CHANCELLOR. It is very material, in this case, to attend to facts. I am not very anxious to discuss the point what bargains the court will execute or not; but when the court has laid it down as an article of the equity, which men shall obtain here and which they cannot obtain at law, that instead of damages they shall have a specific performance, and that every agreement must be performed, unless something at the time of making the bargain or something done since is to amount to a waiver of it at the time of carrying it into execution. If you do not confine yourself within that limit there are no bounds whatsoever; for rules ought to be fixed, and it would be calamitous that the matter should rest upon such loose expressions as hard and unconscionable; which expressions, unless they are properly applied, mean little or nothing. This bargain, if impeached, must be so at the time of its commencement; for nothing has happened since to impeach it, unless that the party has failed in his speculation in respect to a bargain which he made with his eyes perfectly open. It is perfectly necessary to see what were the real terms

[1] The vendee's answer and the arguments of counsel are omitted.

of the bargain. On the 11th of March overtures were made concerning the purchase of these lands by Weare. Eight hundred pounds was demanded as the price for the estate, putting that value upon it in contemplation of building the mill and other articles of no moment now, unless the erection of the mill was the real ground upon which the price was carried to the extent it was. It was insisted it cannot be carried into execution because it is proved that the price was more than three-fourths more than the value; but, for what I know to the contrary, it may be the value. After the 11th of March no answer was given to that letter; but Weare, in order to get a further treaty, applied to a Mrs. A. as a relation of the family to go with him and take Adams aside and ask him in privity the lowest price he would take; which she did, and he made the same demand as before; and some days afterwards Weare went again to Adams with Mrs. A. to treat with him. As to the objection that this is the evidence of relations, I think it is fair and unimpeachable evidence. They went to Adams before dinner, and conversation was had in regard to the improvement by building a mill, which is beyond doubt, and the price was reduced to £740. Mr. Weare agreed to give the price and to build the mill if he could get the consent of the corporation, and the single suggestion mentioned was the consent of the corporation. Mr. Adams said, I will have no if; it shall not be conditional; the business shall be all yours to get that consent. Weare was an alderman of the corporation and he had interest, but Adams had none. The price was settled upon an express acceptance of the estate, and Adams would have nothing to do with any conditional bargain as to obtaining the consent of the corporation. After dinner the agreement was made out, and it is suggested that it was intended as a conditional bargain, though the evidence has proved the contrary, and the agreement is written without expressing anything upon the application. Adams was the person to draw the agreement, and he observed we must be upon honor and no advantage to be taken of the condition. It is impossible, if that conversation had related to such a condition, he should not mention it in the writing. He knew himself to be incapable of executing any such condition, and therefore the conversation related to the mere form of drawing out the writing. Thus the matter rested until the 22d of March, when Weare wrote to Adams to inform him that he had wrote to Mrs. Day (tenant to the corporation), to whom the erection of the mill would have been injurious, and as her consent could not be obtained the bargain was off. It struck me as strange that he should confine himself to Mrs. Day and say nothing of the corporation; but the evidence says that he was informed by him that he had made this bargain, and proposed purchasing lands on the other side of the river, with her consent; but that was not made one of the terms, because he thought himself sure of her consent. When I consider the evidence, and upon what consideration this consent was to be had, I am sure he made no doubt of obtaining it; but the surveyor said it would be of prejudice to Mrs. Day, when the con-

sent was denied him. The question is, what he has done to obtain the consent of the corporation; could he, or could he not, have obtained Mrs. Day's consent if he had offered her a premium for any imaginary damages that would have arisen to her by his building the mill? The burden lay upon Weare to obtain that consent; it was his part to have done so; but there is no evidence of accommodation on his side as to that point, for it only says he applied to Mrs. Day and she refused her consent, but nothing is mentioned as to a premium being offered by him. Suppose he had obtained her consent and the corporation had been mentioned, when it was an express part of the case that the owner should not have been answerable, there appears rather to be fraud on the part of the defendant, for he had no authority to think so. It has been said, stating the answer given to that letter by Adams, that there is something in it, because he does not expressly deny that he could not obtain the consent. In reply, he only insists upon the agreement, but does not charge it in the manner it is done on the other side. It does not appear how this consent may be obtained, for if he can obtain it the agreement may still be executed. It does not appear to me what the value of the premises would be if applied to the purpose of working the mill. What the advantage of it might be is not stated. Therefore I think that, without entering into the particulars of the case, the Master of the Rolls has done right, for no case can be cited where parties have made a bargain with their eyes perfectly open and no surprise whatsoever, as in this case, in which the court has refused to decree a specific performance. Here is no mistake of the object, as in Hick *v.* Philipps; and as to the greatness of the price, Adams had a right to ask a large sum, and the other had agreed to give it, with a view to the intended purpose of erecting and working his mill; for he went upon the notion of that, that he was sure of Mrs. Day's consent, and, if so, of that of the corporation.

Decree affirmed.

PEACOCK *v.* PENSON.

In Chancery, before Lord Langdale, M. R. 1848.

[11 *Beavan* 355.]

Certain lots of land were put up for sale by auction. The printed particulars described them as suitable for building purposes, set out with good roads, etc., and referred to an accompanying map on which the whole plan was detailed. By one article of the particulars, the defendant (the vendor) bound himself to make and plant with lime trees the roads marked on the plan. Another article provided that any mistake or misdescription in the premises should be made a matter of compensation,

and should not annul the sale. The plaintiff purchased one of the lots, and required the vendor to build the roads as provided for. Part of the land was leasehold, and it turned out that by the terms of the lease one of the roads contemplated could not be made through it without incurring a forfeiture of the lease. The present bill was to compel the defendant specifically to perform the contract.

The MASTER OF THE ROLLS.

The dispute between the parties has not arisen upon any question as to the title of the vendor, but upon his obligation to make a new road, being one of those delineated as such upon the map referred to in the conditions and particulars of sale. The plaintiff requires him to make it; the vendor says, that he cannot make it without incurring a forfeiture of a piece of leasehold land through which it must pass, and moreover, that it is a road in which, notwithstanding its delineation on the plan, the plaintiff has no interest whatever.

On looking at the map it is difficult for me to consider that the owner of lot 17 has or can have much, if any, interest in the proposed new road in question. But he claims his right under the contract and alleges, what may be true, that the formation of such a road as he is entitled to and desires to have, may have a material effect upon the character of the houses to be built upon the land comprised in the other lots, and of the persons who may occupy them; and I cannot say that he ought to be treated, in this Court, as a person having no interest in the subject of his demand. The questions are:—1. Whether the formation of the roads delineated upon the map is part of the contract? 2. Whether this part of the contract ought, under the circumstances, to be specifically performed under the decree of this court? 3. Whether the plaintiff, if he cannot insist on the formation of the road, has a right to a conveyance of the lot, with compensation for that part of the contract which he cannot have performed?

1. I think, that where the vendor of land in lots for the purpose of building, accompanies his description, particulars, and conditions of sale with a map delineating the intended divisions of the property by new roads, he must be understood to hold out expectations that the lots will be so divided; and it would not be competent to him to divide the land in a different manner, so as to attract an occupancy and population entirely different from that which would have been produced by acting on the plan proposed and held out at the sale; and I incline to think that, in the present case, if no difficulty had arisen, the plaintiff had a right to require that the plan should not be deviated from.

But it appears to me that the vendor could not make the road without incurring a risk of forfeiture of the piece of leasehold through which it should pass, or of being sued by the lessor; and that this is not a case in which the defendant ought to be called upon to incur that risk; Harnett *v.* Yeilding, 2 Sch. & Lef. 549.

I think that the plaintiff is entitled to a specific performance of the

agreement, without any stipulation as to the new road in question, and if he desires it, I will refer it to the Master to inquire what, if any, damage will be sustained by him in consequence of the road not being formed.

Compensation was offered before the bill was filed. I have read the proceedings with great regret. The plaintiff seems to have acted as his own solicitor, and with less caution than he probably would have used in the case of a client. I dismiss the bill with costs against Hunter and Warde; and as against Penson, whose contract gave rise to the question, I give no costs up to the hearing.[1]

HAWKES *v.* EASTERN COUNTIES RAILWAY COMPANY.

IN CHANCERY, BEFORE LORD CHANCELLOR ST. LEONARDS, 1852.

[1 *De Gex. Macnaghten & Gordon* 737.]

The LORD CHANCELLOR:—In the present case a question arises, whether this court will or not enforce the specific performance of an agreement entered into, during the progress of a bill in Parliament, by a landowner on the line of a projected railway, for the sale of his property.

[His Lordship here examined at some length the agreement and the special Act, and proceeded:] The line, as it stands upon the parliamentary plan, goes through a part amounting to nearly two acres of the plaintiff's property, and to that extent clearly his property is subject to the provisions of the special act, and might have been affected by the exercise of the powers conferred by that act, whether the original line was adhered to, with or without the curvilinear diverging line. Parlia-

[1] "In the first place, it is said that if the court enforces specific performance of the agreement constituted by the reservation, the consequence will be a forfeiture of the lease, under which the landlord may re-enter. And it is said that courts of equity do not decree a specific performance of an agreement of which the consequence would be a forfeiture. But when a defendant sets up the consequence of forfeiture as a defense to a bill for specific performance, the court must be well satisfied before it admits the validity of such a defense that forfeiture will follow from the specific performance of the agreement, and it must also look at the fact by whose acts and conduct the forfeiture would be occasioned. The court will not permit a defendant to put himself in such a position as that his performance of his agreement shall create a forfeiture and then to turn round and say that the plaintiff shall not have a specific performance of the agreement because the defendant has by his own act enabled the landlord to enter upon the agreement being performed." . . . Per TURNER, L.J., in Helling *v.* Lumley, 1858, 3 DeG. & J. 493, 498.

ment, however, thought fit to reject so much of that curvilinear diverging line as would have enabled the Eastern Counties Company to cross the Great Northern Railway. It appears that the defendants had in contemplation a junction with a proposed line of the Ambergate Railway, at or near Spalding, and it was with reference to this scheme that the defendants contracted for the purchase of the lands in the plaintiff's occupation, as that would have enabled them in effect to get to the point they wished to arrive at by the scheme which they feared might not have been sanctioned, and which was in fact rejected. The agreement, it will be observed, contains not the slightest reference to any such intention; and there is nothing in the answer or in the evidence to lead to the supposition that the plaintiff had contracted with such a view.

[His Lordship here adverted to the correspondence, and proceeded:] Mr. Hawkes's solicitors gave a notice to the company's solicitor that Mr. Hawkes had, on the 18th January, 1849, vacated the premises, the subject of the contract, and that the company had full liberty to enter upon the property. It is impossible to find fault with Mr. Hawkes for going out of possession. He was bound to deliver up possession to the company, and he was under the necessity of providing himself with another residence. It cannot be expected that a man under such circumstances is to wait until the moment he is turned out of possession, and then to seek for a new habitation. The defendants, however, subsequently gave the plaintiff notice that they had abandoned their intention of making the railway, and that they did not require the plaintiff's land. Some further correspondence ensued, and in the result the present bill was filed, and it appears to me to have been filed without any unreasonable delay.

It was not from any doubt I entertained on the merits of this case that I postponed my decision, but on account of the important questions of law which were incidentally raised and which I thought required consideration. But it does not appear to me that any of those questions are really involved in the decision of the present case, which I consider to be very plain. The defendants are an incorporated company, competent to bind themselves, and acting undoubtedly within their powers. The property, the subject of the contract, was property a portion of which was directly to be affected by the bill as it stood at the time the agreement was entered into, and that is sufficient to give his court jurisdiction in the matter. It seems to me preposterous to hold that a company, capable of entering into a contract with reference to a subject before Parliament, and entering into that contract and receiving parliamentary powers enabling them to enforce the contract, can, by neglecting to exercise their powers, decline to perform the agreement, because either they have allowed their powers to lapse and can no longer exercise them, or because the exercise of such powers is according to their own notion illegal.

On principle I should not have had a moment's hesitation in saying that this was a clear case for specific performance; and the authorities, speaking generally, up to a very late time, admit of no doubt. In the case

of Stanley *v.* The Chester and Birkenhead Railway Company, 1 Railway Cases, 58; S. C., 3 Myl. & Cr. 773, the agreement to purchase being in consideration of the withdrawal of opposition to a bill before Parliament, was considered to be a contract that ought to be enforced. That case was followed by Edwards *v.* The Grand Junction Railway Company, 1 Railway Cases, 173; S. C., 1 Myl. & Cr. 650, and there the incorporated company was held to be bound by the act of the agent of the projectors; a difficulty with which we have not to contend here, because we are dealing now with the company on an agreement under its seal. The case of Simpson *v.* Lord Howden, 1 Railway Cases, 326; 9 Cl. & Fin. 61, was the next decision; in that case also there was an agreement by projectors, the line, however, was abandoned, yet the contract was enforced. An important question was raised there, as it was in the subsequent case of Lord Petre *v.* The Eastern Counties Railway Company, 1 Railway Cases, 462, whether Lord HOWDEN, a peer of Parliament, could properly enter into an agreement, behind the back of Parliament—if I may use the expression—by which he agreed to give up his opposition to the measure for a valuable consideration. It was held, that as there was no pretense for imputing improper conduct on the part of that noble lord, such could not be inferred; that a peer had as much right to enter into a contract, with reference to his property, as if he had not been a member of the legislature. Lord Petre *v.* The Eastern Counties Railway Company, 1 Railway Cases, 462, was a still stronger case, affirming the principles laid down in the previous decisions, and in that case there was the additional circumstance that the company had permitted the time to expire within which their compulsory powers of purchasing lands were to be exercised.

Upon these authorities I have not the slightest doubt that a *bona fide* agreement for the sale of lands, enabling a company to promote its views and carry them into effect by the aid of an act of Parliament (whether the company may pay a little more or a little less than the actual value) is perfectly valid. I have no means of measuring the value, but in most of these cases it is of the greatest importance to promoters of railways that they should be enabled to make purchases during the pendency of the bill before Parliament, and thus to get rid of opposition; and under such circumstances having obtained what they wanted, though they may have to pay a little more for their purchase, it is clearly not for this court to inquire too narrowly into that, or on such grounds to refuse specific performance of the agreement.

It was said that there was great hardship upon the general body of shareholders, who had no notice of the arrangement. That subject of hardship on the shareholders is fully considered and dealt with in the case of Edwards *v.* The Grand Junction Railway Company, 1 Railway Cases, 173, see p. 199; S. C., 1 Myl. & Cr. 650, where LORD COTTENHAM, in meeting the allegation, observes: "It was contended for the railway company that to enforce this would be injustice to the shareholders of the company, who had no notice of such an arrangement; to which two

obvious answers can be given: first, that the court cannot recognize the rights of individuals interested in the corporation; but must look to the rights and liabilities of the corporation itself."

It was also argued that there would be want of mutuality and great hardship in enforcing the contract against the company after the time limited for the exercise of their compulsory powers had expired; but that argument does not apply to this case, because at the period when this bill was filed the time had not expired, and there was sufficient time to complete the works, even after the period when the bill was filed. The company might have enforced the contract as soon as the act passed, and they cannot be permitted to avail themselves of impediments of their own creation. The whole fault here lies upon the part of the company. The plaintiff has never been guilty of any neglect—he has never swerved from his readiness to perform his contract; but this company, from the beginning to the end of the transaction, have acted with as much bad faith as I ever witnessed upon the part of any public body.

With respect, however, to this last ground of hardship, and assuming that the time had expired, I would refer to the observations of Lord COTTENHAM in the case of Lord Petre *v.* The Eastern Counties Railway Company, 1 Railway Cases, 462; see p. 479, where he says: "The hardship complained of is, the expiration of the parliamentary time; but, as I understand the case, the company have brought the hardship upon themselves." That is exactly the observation which I should make in this case were the facts as alleged by this company.

STONE *v.* PRATT, 1860, 25 Ill. 25. MR. CHIEF JUSTICE CATON.—This is a bill for the specific performance of an agreement by one who at law has no claims whatever upon the defendant, at least in his own name. Such a bill is always addressed to the sound discretion of the court, which must be governed by the circumstances of each case as it is presented. In the case of Lear *v.* Chouteau, 23 Ill. 39, this court said: "In order to induce a court of equity to enforce specifically a contract, it must be founded on a good consideration, it must be reasonable, fair and just. If its terms are such as our sense of justice revolts at, this court will not enforce it, though admitted to be binding at law." It may be added that the complainant must show no oppression or unconscionable advantage, when he comes into a court of conscience asking for a remedy beyond the letter of his strict rights. He must not ask for a favor beyond his technical legal rights when he bases his claim to that favor upon a hard, oppressive, technical advantage. He must stand before the court prepared to meet its scrutiny without a blush, relying upon the advocacy of a well regulated conscience in his favor. Such must not only be his own position, but he must show that it is not unjust or oppressive to the defendant, to compel him to perform specifically.

Let us then examine for a moment the position of these parties respectively. Waiving the question of the division of the contract, the complainant, before he could call on the defendant to convey to him this land, was obliged to satisfy an obligation which secured to the defendant about four thousand dollars. He attempts to do this, not by paying him or any one else having a right to receive the money, the actual amount due, or to become due, on the contract, but he purchases the contract at a forced sale for one thousand dollars. This is the extent of his merit. The defendant, by his contract with D'Wolf, was entitled to receive about the sum of four thousand dollars, before he could be asked, even by D'Wolf himself, to convey any portion of the premises. Now, what has he realized for this four thousand dollars worth of land? Absolutely nothing! His claim, or right to receive the money was sold (and upon the validity or effect of that sale we pass no opinion), to pay a forfeit. Nothing more—nothing for which he had received value. Now all of this may have been a strictly legal transaction. The defendant, by his own folly, may have frittered away his legal right to this money or to the land, but it is not such a transaction as should induce a court of equity to throw down the legal barriers which surround the defendant, and compel him to do more for the ease and benefit of the complainant than the strict rules of law will give him. Equity will never give the pound of flesh, although it is in the bond, but will leave the law to give its value only. We shall not compel the defendant to recognize a dividing up of his obligations under this contract, but shall allow him, without regret, to insist upon his legal rights.

The decree of the court below is affirmed.

Decree affirmed.

CLARKE *v.* ROCHESTER, LOCKPORT AND NIAGARA FALLS RAILROAD COMPANY.

IN THE SUPREME COURT OF NEW YORK, 1854.

[18 *Barbour* 350.]

T. R. STRONG, J. The general act to authorize the formation of railroad corporations and to regulate the same, to the duties imposed by which the defendants are subject, provides that the corporations subject thereto shall erect and maintain fences on the sides of their road, and "farm crossings for the use of the proprietors of land adjoining such railroad." Laws of 1850, p. 211, §§ 50, 49, 44. No distinction is made, in terms, in respect to this duty to make crossings, between cases in which the lands of the corporation, occupied by their road, were obtained by agreement with and conveyance from the owners, and those in which title

was acquired by the compulsory proceedings provided for by the act; and I think none was intended by the legislature. Nor is this provision, for making crossings, in terms limited to cases where the adjoining proprietors have farms, or any particular quantity of land to be benefited by the crossings; and if there is any limitation in cases within the language employed, to be imposed by construction, it is merely that the crossings must be useful.

In the present case I am satisfied that the defendants are under a legal obligation to make such a crossing as is intended by the statute, for the use of the plaintiff; and probably an under crossing only would be suitable. But it does not necessarily follow that because such an obligation upon the defendants to the plaintiff exists, which they have refused to perform, the plaintiff is entitled to a judgment for a specific performance of it. An action for a specific performance is an appeal to the equitable jurisdiction of the court—the relief is matter not of absolute right in the party, but of sound discretion in the court; and to sustain such an action the granting of such relief must appear to be entirely equitable. The court will never compel a performance specifically when, looking at all the circumstances on both sides, it is apparent that injustice would thereby be done. In this case the lands in respect to which a crossing is sought are two parcels of a small village lot, separated by a conveyance from the plaintiff to the defendants, for the use of their road, of a small strip through the lot, which parcels are not occupied by any building, and of the value of which there is no direct evidence; but from the sum paid for the portion conveyed to the defendant, and for damages, it may fairly be concluded that it is small; no special circumstances, in regard to the manner in which the land has been or may be used, rendering a crossing necessary, are shown; and if an under crossing is to be made and maintained it must be constructed in a permanent manner, through an embankment about fifteen feet in height, the expense of which, it is manifest, would much exceed the value of such a crossing to the plaintiff. The case is therefore one in which there is not only an absence of proof, that the enforcement of the performance of the alleged duty would be equitable, but it is affirmatively proved that it would be inequitable. The learned justice before whom this action was tried appears to have entertained the view, that the burthen of performing the duty would be greatly disproportioned to the value of the land to be benefited by its performance. This is evident, not only from the opinion delivered by him, but from the provisions of the judgment, giving the defendants an election to pay the damages for not making a crossing, and, in case of their so electing, relieving them from the obligation to make it, and directing a reference to ascertain the damages. Under the circumstances of the case, I think it clear that the court ought not to adjudge a specific performance, and that the plaintiff should be left to his remedy for damages. If the judgment for a specific performance is erroneous, the error is not cured by the election which is given to the defendants.

Under the practice of the late court of chancery, in cases like the present, if it now prevailed, the complaint in this case would be dismissed; it would not be retained to allow the plaintiff compensation in damages. Story's Eq. Jur. §§ 794 to 800. Morss *v.* Elmendorf, 11 Paige, 277. But under the code the plaintiff is, I think, entitled to assert his claim for damages in this action.

The judgment is therefore reversed, and a new trial granted, to be had before a jury, with costs to abide the event; except that the plaintiff is in no event to have costs of the appeal.

GRAY, J., concurred.

JOHNSON, J., dissented.

New trial granted.[1]

PORTER *v.* DOUGHERTY.

IN THE SUPREME COURT OF PENNSYLVANIA, 1855.

[25 *Pennsylvania State* 405.]

Error to the Common Pleas of Westmoreland County.

This ejectment was brought by John Porter against Andrew Dougherty to recover the possession of a tract of land containing 100 acres. The title was originally in John Beacam, whose daughter was intermarried with James Porter, the father of the plaintiff. At the instance of Beacam, James Porter and his wife went on to a tract of land belonging to Beacam in Allegheny County. After living there for four years Beacam gave the land to his son Robert, by whom 40 acres of the improved part of it was sold to Porter, who moved upon it, built a cabin, and cleared some additional land. He paid Roberts $40 for the land.

Porter lived there about a year, and he and Robert disagreeing, John Beacam came over and proposed to Porter to give up the land to Robert, and he would give him a tract in Washington Township, Westmoreland County, containing 60 acres. Porter acceded to this proposition, built a

[1] "The right to a specific performance by the decree of a court of equity rests in judicial discretion, and may be granted or withheld upon a consideration of all the circumstances and in the exercise of sound discretion. Seymour *v.* Delancey, 6 J. Ch. 222; Margraf *v.* Muir, 57 N. Y. 155. Enough appeared in the evidence to justify a conclusion that the lease would be of little benefit to the plaintiff, and yet work almost a destruction of the mine, and so a specific performance would simply injure both parties and benefit neither. Under such circumstances the court had a right to substitute damages for the breach in the room of specific performance." Per FINCH, J., in Miles *v.* Dover Furnace Iron Co., 1891, 125 N. Y. 294, 297.

cabin on the land, moved upon it and cleared six or eight acres, and lived there about fifteen years, until he was accidentally killed, leaving his wife and six children upon the land. The widow continued to live on the land for two years longer, when she married a man by the name of Baxter, and with her family went to reside with him.

Before she left, her father had given her notice to quit. He then made his will, and devised the land to his daughter, Mrs. Croops, under whom the defendant claims as tenant. Beacam died in 1817. He also bequeathed $100 to plaintiff's mother.

The widow and the other surviving children of James Porter conveyed their interests to John Porter. The widow left the land in 1840 or 1841, since which time it has been in the possession of John Beacam, and Mrs. Croops, who claims as devisee under Beacam's will.

The opinion of the Court was delivered by

LOWRIE, J.—This plaintiff claims this land under a grant from his mother, and he fails because she had no equity. One who desires to enforce specific performance of a parol contract for the purchase of land must present his claim without any unnecessary delay, and while affairs remain in such a condition that performance can be enforced without injury to others, and especially he must not himself have done any act that is incompatible with his claim for performance, or that makes such a claim inequitable.

Here eleven years elapsed between the breach of the alleged contract by the plaintiff's grandfather, when he claimed and got back the land from the plaintiff's mother, and the bringing of this suit. In the meantime the grandfather made considerable improvements on the land, and then died, having made his will devising away to his children this and his other land: the devisee of this portion is in possession of it as part of her share of her father's estate, and must lose it if this claim succeeds; and the plaintiff's mother was bequeathed $100, and it was paid to her.

These circumstances very obviously set aside the equity on which the plaintiff relies, if it ever existed, which is very doubtful. Besides this, ejectment is not the proper form of remedy for enforcing specific performance of such a contract against the estate of a decedent: 17 State Rep. 193; 19 Id. 491.

Judgment affirmed.[1]

[1] "The question, then, is, whether a court of equity is bound to assist a party to do that which neither party contemplated, and whether it would not be inequitable, unreasonable and unjust to enforce the covenant specifically in the existing state of the property; and considering it in that view, I entertain a strong opinion that this is not a case in which the court ought to interfere.

"Upon these grounds, therefore, and without the least imputation upon the Duke or those who advised him, I think he has voluntarily brought the property into a state which makes this part of the agreement no longer applicable, or which at least renders it unreasonable that the covenant should

CHUBB *v.* PECKHAM.

IN THE COURT OF CHANCERY OF NEW JERSEY, 1860.

[13 *New Jersey Equity* 207.]

The CHANCELLOR [GREEN]. On the 7th of April, 1855, William Chubb and Lydia his wife, by deed of that date, conveyed to their two children, William F. Chubb and Emma Peckham, a small farm, in the County of Somerset, containing about 46 acres of land.

By an agreement of even date with the deed, under the hands and seals of their children, made between the children, of the one part, and their parents, of the other, the children agreed, in consideration of the conveyance, to provide for the support and maintenance of their parents,

be enforced." Per Lord Chancellor ELDON, in Duke of Bedford *v.* Trustees of The British Museum, 1822, 2 Myl. & K. 552, 569, 571, 574.

"The application to a court of chancery to compel a specific execution of a contract is an application to the sound discretion of the court, regulated by certain established rules in the effectuation of the fair and honest contracts of parties. But this power courts of equity have always refused to exercise in favor of one who has failed or rendered himself unable in any essential part to perform his contract, or who has trifled and shown a backwardness and unwillingness to do what was incumbent on him; for he who asks equity from another must show that he has done equity, or that he has not by his own act placed it out of his power to render equity."—Per LOGAN, J., in Turner *v.* Clay, 1813, 3 Bibb. 52, 53, 55.

"On the argument, we intimated to counsel that, independent of any question of actual fraud or mistake, this contract was so one-sided and unconscionable in its provisions, that a court of equity could not enforce it. As the complainant had not in any way made himself personally reliable for the purchase money, and did not undertake to do so in giving a mortgage, he was, in fact, securing by the contract the option to buy the property at any time within ten years, but with the privilege of selling off the most valuable portions in the meantime, securing their release from the mortgage by paying a proportion of the mortgage equal to the proportion which the area of the land sold bore to the whole purchase, and then abandoning the purchase altogether by the forfeiture of the one thousand dollars paid on receiving a deed. Thus, if he went no further in his sales than to dispose of the acre where the buildings stand, and which was worth two thousand five hundred dollars, he would be entitled to have it released from the mortgage on payment of four hundred dollars or thereabouts, which was the average price of the whole by the acre, and if he abandoned the contract then, he would have sold nearly one-fourth in value of the land, without being compellable to pay therefor any more than the fourteen hundred dollars, or considerable less than one-seventh of the purchase price. It seemed to us that if a party had been able to secure such a contract, even without fraud, he could not properly ask its enforcement in equity." Per COOLEY, J., in Chambers *v.* Livermore, 1867, 15 Mich. 381, 387.

and each of them, in a comfortable manner, to provide and furnish each of them with proper and suitable clothing, food, medicine and medical attendance when sick, and to find a comfortable place to live in—all to be according to their age and situation in life—for and during their natural lives and the life of the survivor of them. The children further agreed to accept the title which the father had in the premises; and in case of any adverse claim of title, to be at the expense of defending the title which they thus acquired.

This bill is filed by the father against the children, and charges a failure upon their part to perform the contract, and asks either that the contract be rescinded, and the lands reconveyed to the complainant, or that a specific performance be decreed.

A decree *pro confesso* is taken against the son. The daughter alone answers. She admits the contract, alleges that they took the title at her father's request, and solely for the purpose of aiding her aged parents; that she has received nothing whatever from the farm; that its entire proceeds, together with considerable sums advanced by herself, have been appropriated to the support of her parents; that at the time of the contract it was understood and agreed that the father should remain upon the farm, and assist in its cultivation, until a sale could be effected; that the proceeds of the farm, and the limited means of the defendant, are utterly inadequate to support her parents elsewhere than on the farm, and with their assistance. She proffers herself ready and willing to reconvey the land, if the sums she has advanced under the contract are repaid to her.

The evidence in the cause shows that the farm was conveyed to the defendants, not at their request, but at the solicitation of the complainant, and that the title was reluctantly accepted by Mrs. Peckham, the daughter; that she had derived no benefit from it, but that the contract into which she entered upon taking the title has involved her in serious trouble and pecuniary loss. The evidence, moreover, tends to confirm the allegation of the answer that she accepted the title, and entered into the contract for her parents' support upon the faith of a parol agreement, cotemporaneous with the written contract, that her father would remain upon the farm, and assist in its cultivation until it could be advantageously sold, and the proceeds applied to his support, and the support of his wife, at such place as they might choose to reside. This evidence, however, is inadmissible to relieve her from the obligation of the written contract. It is in direct conflict with the express terms of her written engagement, by which it is stipulated that the parents, or either of them, should be at liberty to reside in the City of New York, or elsewhere. Evidence of a cotemporaneous parol agreement is inadmissible to alter the terms of the written contract.

However unfortunate or oppressive may be its terms, the parties must abide by their engagement as it is written.

The contract cannot be rescinded, or a reconveyance directed, even by

the consent of the defendants. The wife of the complainant joined in the conveyance, and the contract of the grantees is for her maintenance as well as that of her husband. Her rights are to be protected. She is not a party to the suit. She does not ask, and the evidence warrants the belief that she does not desire a dissolution of the contract. She resides upon the farm with her son, and is supported by her own labor and the assistance of her children. The husband and wife do not live together. The complainant contributes nothing to her support. His interest in the land has been sold, and to order a reconveyance might strip both parties of their means of support, and must of necessity be prejudicial to the rights and interest of the wife. This consideration is decisive against rescinding the contract for her support, and ordering a reconveyance of the land.

There must be a decree for a specific performance. Courts of equity may, in the exercise of a sound discretion, refuse to decree the specific performance of a hard bargain.

But this is not a case for the application of the doctrine, nor for the exercise of such discretion. The father conveyed his entire estate to his children, upon their stipulating to provide for their parents a comfortable support and maintenance suited to their condition, wherever they or either of them might choose to reside. It is no answer to a prayer for specific performance that the property conveyed is of little value and totally inadequate to the support of the parents in the City of New York, or elsewhere than in the country. That was a proper subject for consideration by the parties when the contract was entered into. But having been made voluntarily and in good faith, the parents are entitled to their support at the hands of the grantees so long as the avails of the property conveyed or the means of the children will suffice for that purpose.

There must be a decree for a specific performance and a reference to a Master to ascertain and report what would be a suitable provision, weekly or otherwise, for the comfortable support and maintenance of the complainant, and also of his wife, according to the terms and provisions of the contract.

LEE *v.* KIRBY.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1870.

[104 *Massachusetts* 420.]

In a contract of sale between the parties to this action, it was provided that the defendant should purchase from the plaintiff certain premises, the plaintiff to advance to the defendant certain sums of money to be used by the defendant in building nine houses on the lots demised, and the defendant to build the houses and to pay for the land at stipulated

price on a date specified. The price of the land was arrived at by fixing a value of $2.50 per square foot and adding thereto interest at 4 per cent. interest for six months on advances, and a bonus, together with a 2 per cent. commission on the whole. After building five houses, the defendant, having paid for the ground under them and repaid the advances, declined to build the other four houses.[1]

AMES, J. The original contract appears to have been free from all ambiguity. There is no suggestion of any omission, mistake or fraud. It is not claimed that it was not fair and just in all its parts, or that it was harsh or unreasonable, or that it was attended at the outset with any circumstances that would be likely to prevent the court, in the exercise of its discretion, from ordering its specific performance on the application of either party. It was in view of certain mutual advantages that the price of the land was agreed upon; and so far as the original contract is concerned, it does not appear to be necessary or expedient to inquire by what computation, or in what precise mode, the parties arrived at the sum of $3.40 per square foot as the price. They manifestly expected that all the dwelling houses would be completed in a little over one year from the date of the contract; and they were looking to the sale of the lots and houses as the source from which the defendant would derive his profits and the funds with which he was to repay the plaintiff's advances. There is nothing in the contract that imports that the defendant was at liberty to build or not as he should elect, or that he was to take the land at one price if he should build, and at a different and lower price if he should not. His promise to build on each of the nine lots, according to the prescribed model, was unconditional, and he reserved no right to recede or stop short if the enterprise seemed likely to prove unprofitable. The provision that, if he should not complete the houses, the plaintiff might do so, and charge the expenses to the defendant, is a cumulative remedy only, and does not confine the plaintiff to that mode of enforcing the contract. Dooley *v.* Watson, 1 Gray, 414. Hooker *v.* Pynchon, 8 Gray, 550.[2]

Another ground of objection on the part of the defendant is, that, as matters now stand, the contract is hard, unequal and oppressive, and that its literal enforcement against him would operate in a manner different from that which was in the contemplation of the parties when it was executed. In an application to a court of equity for a specific performance, a decree for such performance, on proof of the agreement, is not a matter of strict right, but is discretionary with the court, in view of all the circumstances. Western Railroad Co. *v.* Babcock, 6 Met. 346, 352. 1 Story Eq. § 742, and cases cited. It will not be directed, if it should be, under the circumstances, unreasonable to do so. Wedgwood *v.* Adams, 6 Beav. 600. This unreasonableness does not admit of being settled by

[1] The statement of facts has been abridged.

[2] A part of the opinion has been omitted.

any general definition, but must depend upon the circumstances of the case. King *v.* Hamilton, 4 Pet. 310. We do not understand the defendant in the case before us to charge that there has been either fraud, surprise or mistake. As to the alleged hardships of the case, the general rule is, that inadequacy of consideration, exorbitance of price or improvidence in the contract, in the absence of fraud, ambiguity or mistake, will not constitute a defence. "A court of equity does not affect to weigh the actual value nor to insist upon the equivalent, in contracts, when each party has equal competence." HART, Chancellor, in Sullivan *v.* Jacob, 1 Molloy, 472, 477. To invalidate a contract on the ground of hardship, the inadequacy of consideration or exorbitance of price must be so gross as to shock the conscience, and the proof of it so great as to lead to a reasonable conclusion of fraud or mistake. Coles *v.* Trecothick, 9 Ves. 234. Osgood *v.* Franklin, 2 Johns. Ch. 1, 24. In the language of Chief Justice SHAW, 6 Met. 358, we must say that "we can perceive no such proof, nor anything approaching to it." The question of the want of equality and fairness, and of the hardship of the contract, should, as a general rule, be judged of in relation to the time of the contract, and not by subsequent events. We do not intend to say that the court will never pay any attention to hardships produced by a change of circumstances, but certainly the general rule is that a mere decline in value since the date of the contract is not to be regarded by the court in cases of this nature. Low *v.* Treadwell, 3 Fairf. 441. Coles *v.* Trecothick, 9 Ves. 234. Revell *v.* Hussey, 2 Ball & Beat. 287.

The defendant's answer does not specifically charge usury as a ground of defence, but we have no doubt that usury may very properly be taken into consideration by the court, under an answer that insists upon the objection that the contract is hard, unconscionable and oppressive. It will hardly be contended, however, that there was not an actual sale of the land contemplated by the parties. It was not a mere cover for usury, like the case in which a loan is made, wholly or in part, in goods at exorbitant prices. The price at which the defendant undertook to buy was a distinct and definite sum of money. Beete *v.* Bidgood, 7 B. & C. 453. There was no misrepresentation or fraud, no abuse of advantages, and no inequality of position of which he can complain. It can hardly be said upon the evidence that the price was exorbitant, and as it was at the time satisfactory to the defendant, it can hardly be material how it was made up. If there was an independent or collateral agreement to the effect that the defendant might buy for cash at a lower price, and if that collateral agreement was intentionally omitted from the written contract, and left as a matter of honorary obligation merely, it would not present a case of mistake, fraud or surprise upon which the court would refuse a decree of specific performance. Irnham *v.* Child, 1 Bro. Ch. 92, was a case in which a right to redeem was omitted from a written contract to convey, and left to an honorary understanding, in order to avoid the objection of usury. Lord THURLOW held that it was no bar to a decree for

the specific performance of the written contract. 1 Sugden on Vendors, 7th Am. ed., 181. 1 Story Eq. § 750, and cases cited.

In view of all the facts, we cannot say that the contract presents any features of ambiguity, surprise, mistake, omission, usury or hardship that should deprive the plaintiff of his equitable remedy. It is his duty to fulfil all its stipulations on his own part; and his right on those terms to insist that the defendant shall do all that he undertook to do on his part.

Decree for the plaintiff, with costs.[1]

[1] "Whether or not the contract was unequal and therefore unjust, we have no means of determining because we cannot know exactly what importance it had in the negotiations of the parties, nor how much Nims may have conceded to obtain it. The evidence in the case shows very plainly that if enforced now it will operate severely upon Vaughn, for since 1874, while the debt of Vaughn has been steadily increasing, the value of the land has been steadily diminishing, and it is conceded that the mortgagor is irresponsible, and that nothing beyond the land can be obtained in enforcing the securities. But this is a risk that the mortgagee took when taking the papers; he drove what seemed to be a somewhat hard bargain at the outset, and cannot have his contract reformed to relieve him from an unexpected hardship attributable to general business depression. The contract must be construed and enforced precisely as it would have been if the value of the land had increased instead of diminishing.

"The real case in controversy seems to be this: A mortgagee has taken security upon several lots of land which apparently are more than sufficient to protect him, but has agreed with the mortgagor, as a part of the transaction, that the latter may withdraw from the lien the first three of the lots he may have an opportunity to dispose of. Afterwards the mortgagee refuses to perform his agreement, insisting npon its invalidity, and upon various excuses, none of which has force. We see no alternative but to hold him to his agreement; and as the circuit court has done so, the decree will be affirmed with costs." Per COOLEY, J., in Nims *v.* Vaughn, 1879, 40 Mich. 356, 360.

"The matter of compelling specific performance is one of sound and reasonable discretion—of judicial, not arbitrary and capricious, discretion. There must be some reason, founded in equity and good conscience, for refusing the relief. Such reason has been generally found, by the court refusing it, in some mistake or fraud or unconscionableness in the contract, or in some laches on the part of the plaintiff charging the circumstances so as to make it inequitable to compel a conveyance, or where the claim is stale, or there is reason to believe it was abandoned. But whatever the reason may be, it must have some reference to, some connection with, the contract itself, or the duties of the parties in relation to it. We have never found a case where the court refused the relief as a means of enforcing some independent claim of the defendant against the plaintiff, nor because the defendant had some independent claim which he might not be able to enforce against the plaintiff." Per GILFILLAN, C.J., in Thompson *v.* Winter, 1889, 42 Minn. 121, 122.

"But it is the value of the property at the time of entering into the agreement which stamps the character of fairness or unfairness upon the transaction. While it shall not be permitted to the one party to lie by and not perform until he ascertains that the contract is one of profit and then call

CONGER, ET AL., APPELLANTS, *v.* THE NEW YORK WEST SHORE AND BUFFALO RAILROAD COMPANY, RESPONDENT.

IN THE COURT OF APPEALS OF NEW YORK, 1890.

[120 *New York* 29.]

HAIGHT, J. This action was brought to compel a specific performance of a contract. The Jersey City and Albany Railway Company was incorporated for the purpose of constructing and operating a railroad from Fort Montgomery, in the County of Orange, to a point on the Hudson River opposite to the City of New York. As such incorporation it entered into a written agreement with one Catherine A. Hedges, the plaintiff's grantor, in and by the terms of which she gave to the company a right of way across her premises in Rockland County upon certain conditions, one of which was that the company should locate a station in the gorge commonly known as the Long Clove, and stop thereat five express trains each way daily. Subsequently the Jersey City and Albany Railway Company was consolidated with the North River Railway Company, under the name of the North River Railroad Company, and that company was consolidated with the defendant, which was incorporated for the purpose of constructing and operating a railroad from the New Jersey State line through the State of New York to the City of Buffalo.

The defendant had entered upon the lands of the said Catherine A. Hedges and constructed its roadbed across the same, but it has not

for a conveyance, not having seasonably fulfilled on his part, so neither will it be permitted to the other unwarrantably to delay the conveyance, and urge the use in the value of the property in the meantime, as a valid reason why he should be absolved from his contract. The parties, on entering into the agreement, assume the risk of the fluctuations in the market; and whether the value of the property, which is the subject of the agreement, be increased or diminished by such fluctuation, the validity of their contract is not thereby to be affected." Per PARRIS, J., in Low *v.* Treadwell, 1835, 12 Me. 441, 450.

"The counsel for defendant further contends that this is not a case where a specific conveyance should be decreed, on account of the peculiar circumstances attending the sale, and the hardship of enforcing it, but that the complainant should be turned over to his legal remedy. We do not think that this position can be sustained. Indeed, we see no hardship in a decree for specific performance. The land appears to have been sold for a fair price, and the fact that it has, since the contract was entered into, become more valuable, is not such a circumstance of hardship as ought to prevent a decree for a specific performance." Per WHITON, C. J., in Young *v.* Wright, 1855-57, 4 Wis. 144, 149. And see notes in 15 Am. Dec. 572.

And see Daughdrill *v.* Edwards, 1877, 59 Ala. 424.

constructed any station thereon in the Long Clove gorge or stopped any of its express trains thereat.

The trial court has found as facts that a suitable station for the accommodation of passengers and the receipt and delivery of freight at the Long Clove gorge could be built by the defendant only at a considerable expense, because of the nature of the ground at that point; that the place where the plaintiffs demand that the station be located is near the mouth of a long tunnel and at a sharp curve in the defendant's railroad, upon the side of a steep mountain approached by steep grades in both directions; that it is sparsely settled, and if a station were established there it would be of no use to the public; that very little, if any, benefit would result to the plaintiffs by the erection of a station or the stoppage of the trains thereat; that the public convenience would not be promoted, but the public travel would be delayed; and, as a conclusion of law, that a specific enforcement of the agreement would work hardship and injustice to the defendant, and such enforcement would not subserve the ends of justice; that specific performance should be denied and the plaintiffs left to their action for damages for a breach of the contract. The evidence sustains the findings of the trial court which have been affirmed by the General Term.

The questions for our consideration are, therefore, narrowed to a determination as to whether the conclusions of law reached are justified under the findings of fact.

It has become the well-settled doctrine of this court that the specific performance of a contract is discretionary with the court, and that performance will not be decreed where it will result in great hardship and injustice to one party, without any considerable gain or utility to the other, or in cases where the public interest would be prejudiced thereby. Clark *v.* R. L. & N. F. R. R. Co., 18 Barb. 350; Trustees of Columbia College *v.* Thacher, 87 N. Y. 311-317; Murdfeldt *v.* N. Y., W. S. & B. R. R. Co., 102 id. 703; Day *v.* Hunt, 112 id. 191-195.

As we have seen, the Long Clove gorge is located upon the side of a steep mountain, in a sparsely-settled district, and is approached by a steep grade, and that a passenger station with an approach thereat could be constructed only at a considerable expense. These are reasons worthy of consideration, but if there were no others the trial court might not have deemed them sufficient to refuse specific performance. But they are followed by another, which gives additional force and weight, and that is that public travel will be delayed by the stoppage of the trains and that the public convenience will not be promoted.

The defendant is a corporation organized under the laws of the State, and is a common carrier of passengers and freight; its duties are largely of a public nature, and it is bound to so run its trains and operate its road as to promote the public interest and convenience; and in view of the fact that but little, if any, benefit would result to the plaintiffs by the erection of a station and the stoppage of trains thereat, as found by the

trial court, it appears to us that that court properly refused to decree specific performance and remanded the plaintiffs to their action for damages.

The judgment should be affirmed, with costs.

All concur, except BROWN, J., not sitting.

Judgment affirmed.

FRIEND, APPELLANT, *v.* LAMB.

IN THE SUPREME COURT OF PENNSYLVANIA, 1893.

[152 *Pennsylvania State* 529.]

Bill in equity for specific performance.

MR. JUSTICE GREEN. We are of opinion that the learned court below, rather than the Master, adjudged correctly the facts and law of the present contention. It is not a case of mere legal right and is not dependent solely upon principles which control the determination of causes of that character. The proceeding is by bill in equity, and the relief sought is the specific performance of a contract for the sale of a tract of land for the price of fifty thousand dollars. The defendant against whom the contract is proposed to be enforced is a married woman, and as only five thousand dollars of the purchase money were to be paid in cash, the sale is to be regarded as one made almost entirely upon credit, and the credit is to be secured by a mortgage for the sum of forty-five thousand dollars in annual payments of five and seven thousand dollars respectively, with interest on all, and reaching over a period of seven years. For a man to encumber himself with such a contract, would be, in all ordinary circumstances, a rash, improvident and extremely hazardous undertaking. Nothing but a rare combination of fortunate events to occur in the very near future, capable of being foreseen by an extremely sagacious and experienced operator in speculative transactions, would justify such a contract in the ordinary judgment of men. But with a woman, especially a married woman, unless possessed of ample cash capital to meet her maturing payments, and a special skill and experience in conducting such affairs, an engagement of this character would seem to be almost entirely destructive of the least prospect of success, and improvident and oppressive to the last degree. There is no evidence in this case that Mrs. Lamb possessed any of the essential qualifications either in capital or experience to conduct such an enterprise to a successful conclusion. Where the money was to come from to meet the annual payments does not appear, and the consequences of "the usual *sci. fa.* clause" are well enough known to indicate what would become of the property if the payments were not promptly met. We deem the con-

tract in this case as highly improvident and rash, and most likely to result in great disaster even before the maturity of the payments and therefore oppressive in its character. In its merely legal aspects these considerations could not be regarded and they would not constitute a defense to an action to recover damages for its breach. But in equity the rule is very different where the application is for a specific performance of the contract. It was thus expressed by this court in Freetly *v.* Barnhart, 51 Pa. 279, where we said that "there is nothing better settled than that a decree for specific performance is not a matter of course, but rests in the sound discretion of a Chancellor. It may be refused, therefore, notwithstanding a contract obligation, if there be circumstances rendering it inequitable, and then the party seeking it is left to his action for damages. I know of no case in which specific performance is ever decreed unless it appears to accord with good conscience that it should be so decreed, be the contract ever so specific in its terms."

To the same effect are Weise's Ap., 72 Pa. 351; Elbert *v.* O'Neil, 102 Pa. 302, and Rennyson *v.* Rozell, 106 Pa. 407. In the last of these cases our late Brother CLARK said: "It is not sufficient to call forth equitable interposition of the court that the legal obligation under the contract may be perfect; if injustice would result from a decree for specific relief the parties must be remitted to their remedies at law. Even when the agreement is perfectly good, the price adequate and no blame attaches to the purchase, if the transaction be inequitable and unjust in itself, or rendered so by matters subsequently occurring, specific performance may be denied and the parties turned over to their remedy in damages." Henderson *v.* Hays, 2 Watts 148; Remington *v.* Irwin, 14 Pa. 143; Freetly *v.* Barnhart, 51 Pa. 279.

An unconscionable price, a clouded title, any circumstances of overreaching, misrepresentation, suppression of the truth, suggestion of the false, fraud of any kind, breach of confidential relation and many other similar causes will induce the courts to refuse specific performance. The cases and illustrations in the books are very numerous and of great variety.

In the present case, besides the improvident and oppressive character of the contract and the coverture of the purchase, it was alleged as a defense that it was represented to Mrs. Lamb, before the contract was made by the plaintiff or his agent, that the property was underlaid with coal.[1]

It was proved by McKelvey, a witness for the plaintiff, that the coal had been taken out years before by tenants of a former owner and that there was no coal on the premises left, but about five or six acres which was not included in the lease to the lessees of the coal.

Treating the whole case as one between parties *sui juris*, we do not regard it as one in which a Chancellor should decree specific perform-

[1] Parts of the opinion discussing the evidence on this point have been omitted.

ance. We do not discuss or decide the question whether the contract was within the legal competancy of Mrs. Lamb, because it is not necessary, but we do think it proper to give some consideration to her state and condition as being a married woman, in determining whether or not a decree for specific performance should be made against her. The very recent emancipation of married women from the disabilities formerly incident to their relation does not remove them from consideration by the courts, when questions of improvidence, hardship and oppression, in contracts made by them, require judicial attention. In so far as these circumstances are recognized as occasions for intervention, they will be availed of, in favor of married women as well as of all other persons, with the added consideration of their less protected and, comparatively speaking, more helpless condition. We are of the opinion that the case was correctly decided by the learned court below.

Decree affirmed and bill dismissed at the cost of the plaintiff.

McCLURE *v.* LEAYCRAFT.

IN THE COURT OF APPEALS, 1905.

[183 *New York* 36.]

See case as printed in the section "Rights for and Against Third Parties," p. —

G. PLAINTIFF IN DEFAULT.

CHEEKE *v.* LORD LISLE.

IN CHANCERY, BEFORE LORD KEEPER FINCH, 1674.

[2 *Freeman* 303.]

Cheeke married the daughter of the Lord Lisle, and upon the marriage it was agreed by articles, that he should have £1,500 in hand, and that he should within the space of four years settle £400 *per annum* upon her and her children, more than he had done upon the marriage, and upon such settlement made he should have £2,500 more. The marriage took effect, but the lady died within a month after marriage. The question was, whether or no he should have the £2,500, for he had four years' time

to make the settlement, and there was no default in him, but he was prevented by the act of God.

It was held by the LORD KEEPER and JUSTICE RAINSFORD, that he should not have it.

For first it was agreed he had no remedy at law, the condition not being performed: and so the question was, whether here was any inducement for equity; and it was held that there was not, and so the plaintiff's bill dismissed.[1]

[1] So in the case of Feversham *v.* Watson, 1680, 2 Freem. 35, it appeared that:

"The plaintiff married one of Sir George Sands's daughters, and upon the marriage it was agreed by articles that the plaintiff should settle £500 per ann. for separate maintenance, and likewise should purchase £840 per ann. within twenty miles of London, and settle it upon himself for life, remainder to his intended wife for life, with remainder over.

"And Sir George Sands did article, so soon as the plaintiff should perform the premises, that he would settle £3,000 per ann. upon the plaintiff for life, remainder to his wife for life, and so to the first and tenth son.

"The plaintiff did perform all that was to be done of his part, except the purchasing of the £840 per ann., and before that was done his wife died without issue."

Whereupon plaintiff filed his bill for a specific performance against the heirs of Sir George (who had died since the agreement), but Lord Chancellor NOTTINGHAM decreed for the defendant on the ground that plaintiff's performance was a condition precedent.

In the report of the case in Finch's Chancery, 445, 447, Lord NOTTINGHAM said: "So that the settlement of £840 per ann. to be made by the plaintiff was in nature of a condition precedent, which cannot be dispensed with in equity, because a court of equity cannot change or alter the contract of the parties, nor mend agreements they make between themselves.

"If the articles had been so penned that each party had depended upon the mutual and reciprocal covenants of each other, there might have been some colour to decree a performance to the plaintiff, though he had not performed his part; because in such case Earl George might have recovered damages at law without averring performance on his part.

"But where a covenant is penned by way of condition precedent, so as no action lies at common law without averring performance by the plaintiff in the action, it is plain in equity, and by the nature of the contract, that the covenantor was never to perform his part unless the other had performed with him; and there cannot be a better method for any man to save himself than to pen his covenant in this manner."

Lord NOTTINGHAM stuck to his "condition precedent," although the Lords overruled his case, for in Pepham *v.* Bampfield, 1682, 1 Vern. 79, 83, his Lordship said: "Precedent conditions must be literally performed; and this court will never vest an estate where by reason of a condition precedent it will not vest in law. And so it was ruled here in my Lord Feversham's case, though the Lords afterwards reversed that decree."

In the reporter's note to Pepham *v.* Bampfield, it is said: "There are no technical words to distinguish conditions precedent and subsequent, but the

HICK *v.* PHILLIPS.

IN CHANCERY, BEFORE LORD CHANCELLOR MACCLESFIELD, 1721.

[*Precedents in Chancery* 575.]

The defendant in June last entered into articles with the plaintiff for the purchase of an estate of £180 per ann. for which he was to give 35 years' purchase upon executing conveyances, and the plaintiff covenanted to grant and convey the lands to him upon payment of the purchase money; after the defendant discovering that about £30 per ann. of these lands were copyhold, refused to go on with his bargain, and hereupon the plaintiff brought his bill for a specific execution of the articles; and the rather, for that the defendant had paid £50 in part upon executing the articles.

It was argued for the plaintiff that there was no disabliity on his part to perform the agreement; that the conveyance agreed to be made must be construed *fecundum subjectam materiam*, that is, the freehold by conveyance at common law, and the copyhold by surrender in the Lord's court, which was the proper conveyance for that sort of land; and therefore the plaintiff being willing to perform his part, the defendant ought to be bound to complete his part likewise.

But on the other hand it was argued and decreed by my Lord Chancellor, that the plaintiff should have no assistance in a court of equity for carrying this agreement into execution; that they were not bound to assist contracts, which were harsh and unequitable, or were attended with such circumstances as would be a hardship on the defendant; that this was a case proper for a jury at law to consider of, where they might mitigate or moderate the damages according to what the circumstances should appear to be, but this court could take no advantage of such circumstances, but must either decree an execution of the agreement or dismiss the bill, and therefore the plaintiff ought to be left to make the most he could of it at law; that the plaintiff, in strictness, could not perform his part of the agreement, for part of the lands, being copyhold, could not be conveyed within the meaning of these articles, the words thereof being all proper for conveyances at common law only, and this being copyhold, could not be so conveyed, unless it had been infranchised; and the case of Young and Clark was cited, wherein the over

same words may indifferently make either according to the intent of the person who creates it. Robinson *v.* Comyns, Ca. Temp. Talbot 166. Neither does it depend on the circumstances whether the clause is placed prior or posterior in the deed, per ASHURST, J., in delivering the opinion of the court K. B. in Hotham *v.* East India Company, 1 Durnford & East 645. *Vide* also Co. Litt. 201a *et seq.* Shepherd's Touchstone, 4th ed., pp. 117 and 118, and cases cited in note there."

value of the land was the reason the court would not decree an execution of the leases; and for the same reason ought not, for the over value of the money, in this case; and therefore dismissed the bill, and ordered the £50 to be paid back, but without costs.

Note. The defendant swore in his answer, he had no notice of any part of these lands copyhold at the time of the articles; but there was no proof of any fraud or endeavors to conceal its being copyhold from the defendant, but only a general contract to convey all those lands, without distinguishing whether freehold or copyhold.

BUCKLAND *v.* HALL.

IN CHANCERY, BEFORE LORD CHANCELLOR ELDON, 1803.

[8 *Vesey* 92.]

In May, 1798, the plaintiff being in possession as assignee of the lease of a house belonging to the defendants in Duke street, Lincoln's-Inn-Fields, at a rent of £30 per annum, to expire at Midsummer, 1799, a treaty was entered into and concluded for a renewal; and a minute of an agreement was written by the defendant for a lease at the rent of £35, the defendant to make certain alterations, the plaintiff to do all substantial repairs by the 24th of June, 1801, and the painting, etc., by the 24th of June, 1802; then to have a lease signed for seven, fourteen or twenty-one years at his option, from Midsummer, 1800.

The plaintiff continued in possession after the expiration of his lease, but disputes arising, the defendant refused to execute a new lease, and at Christmas, 1801, served the plaintiff with a notice to quit, and brought an ejectment; upon which the bill was filed; praying a specific performance of the agreement and an injunction.

Upon the motion for the injunction the defendant, though he insisted upon the statute of frauds, Stat. 29 Ch. II. c 3, by his answer, admitted a part performance by money laid out in repairs.

The answer stated that the defendant instead of repairing, according to the agreement, erected a shed, so as to darken the ancient window of the plaintiff's house next door; which he refused to remove. In April, 1801, the plaintiff's repairs not being completed, he became insolvent, and paid a composition of 7s. in the pound to his creditors, and among them to the defendant for a debt due for goods sold. The plaintiff paid the old rent up to Michaelmas, 1802.

The Lord Chancellor [ELDON]. In a case of this kind the court must take care that the tenant is not rashly turned out of possession. On the other hand, it is too hard against the landlord to introduce upon the

record an averment that the tenant has some way or other become solvent. With respect to the insolvency the weight of that objection is more or less in different cases. There is a distinction certainly between a purchase and a lease. In the former instance the bill for a specific performance tenders payment of the purchase money, the latter is very much otherwise; and the court ought not to forget the habit of dealing among mankind with regard to the relation of landlord and tenant. Every man taking a tenant looks to the probability of the rent being paid; and that attention is paid to that circumstance through the whole currency of the lease, that introduces a provision not to assign or underlet without license; and that is often thought of so much consequence that special care is taken, at least as to the end of the lease, that there shall then be a responsible tenant; though it may not have been thought necessary to provide for that in the anterior period. A difference of opinion has, I know, prevailed, whether that is a usual covenant to be inserted as such or not. But recollecting that the leasee remains liable to the determination of the term, but an assignee only during his possession, it is of great importance to the lessor to take care that the lessee shall be a man of substance. Therefore, insolvency admitted, and not cleared away, is a weighty objection to a specific performance of an agreement for a lease: the party here seeking an execution beyond the law. Insolvency would be of weight with a jury. Such a question appears never to have been determined; and is of too much consequence to be decided upon motion. I shall therefore only say that at the hearing in general cases it would have considerable weight with me: in some cases more than in others. If the tenant undertakes for nothing but the payment of rent, it must be appreciated accordingly. If beyond that he undertakes for considerable expenditure upon the premises, before he is to be placed in the relation of lessee, that is directly connected as a most important circumstance with the fact of solvency or insolvency. Therefore, where very considerable repairs are to be done by the lessee, his solvency is to be looked to to that extent; for unless done before the bill is filed, they are to be done after the decree; not immediately upon tender, as in the case of a purchase, unless the bill can offer the amount of the utmost possible repairs to be paid into court.

There is in this case a material circumstance: the time by which the repairs were to be done. If the Master was ordered to settle a lease there ought to have been a clause of re-entry, if the repairs should not be done by the time, the time being part of the essence of the contract.

Under all the circumstances of this case, therefore, without relying upon any one, the injunction ought not to be sustained; certainly not without considerable terms imposed, such as bringing no writ of error, giving security for the costs of the cause, perhaps for the rent and repairs. If any proposition of that nature can be made I will hear it.

Injunction dissolved.

PRICE *v.* ASSHETON, 1835, 1 Y. & C. 441, 444.—ALDERSON, B.— . . . The other objection which has been raised to the plaintiff's is his insolvency. It is admitted to be discretionary with the court whether it will accede to an application of this sort made by an insolvent debtor; and that the court will not compel a landlord to take an insolvent party as his lessee. It appears to me, that the insolvency, of the plaintiff is well made out, and that the copies of the documents which have been produced, are sufficient evidence of that fact under the 19th section of the statute, without reference to the 76th. The bill must be dismissed with costs.[1]

TEN BROECK *v.* LIVINGSTON.

IN THE COURT OF CHANCERY OF NEW YORK, BEFORE CHANCELLOR KENT, 1815.

[1 *Johnson's Chancery* 357.]

This was a bill for a specific performance of an agreement, under seal, made between the parties, on the 22d of December 1812, by which they agreed to exchange the farms specified in the agreement, and to execute to each other "good and valid conveyances in the law of the same," with covenants of seisin and warranty; and they agreed further to refer it to J. R. V. R. and J. C. H., to arbitrate and assess the relative value of the farms, and what sums, if any, the defendant should pay to the plaintiff, to render the exchange equal; and that mutual possession of the respective farms should be delivered on the 1st of April, 1813. The arbitrators made an award on the 8th of January, 1813.

The answer of the defendant admitted the agreement and award, as stated in the bill; but alleged, after the publication of the award, he discovered that Robert Livingston, who owned the plaintiff's farm on the

[1] In Brooke *v.* Hewitt, 1796, 3 Ves. 253, Lord Chancellor LOUGHBOROUGH said: "It must be a very strong case that would induce the court to carry into execution an agreement between landlord and tenant, the estate not being executed at law, where the person who is to become the tenant has become a bankrupt. The court must certainly upon the circumstance of intervening bankruptcy do a great deal more in respect of the defendant than merely decreeing a specific performance. It is impossible to dispose of it upon a demurrer. There are a great many shades and circumstances."

In Willingham *v.* Joyce, 1776, 3 Ves. 168, 169, Mr. Lloyd for the defendants remarked, "There may be cases in which the court would not execute it [a contract for a lease] as if he had committed a felony." To this the Master of the Rolls [Sir RICHARD PEPPER ARDEN] replied: "Certainly in the case you put I would not execute the agreement; nor would I decree a specific performance merely to give up the house to assignees."

20th of October, 1694, conveyed to Dirck Wessells, (ancestor of the plaintiff,) for the consideration of £15, a tract of land, including the plaintiff's farm, in fee, the grantee "yielding and paying to the grantor, his heirs and assigns, the yearly rent of 10 shillings," and with a reservation to the grantor, his heirs and assigns, for ever, of the right of "cutting and hewing timber, and grazing in the premises, that is to say, in the woods not appropriated or fenced in." And the defendant therefore charged, that the plaintiff's farm was subject to the above rents and reservations; and that those encumbrances were unknown to the arbitrators when they made their award; and that all the declarations and acts of the defendant, towards ratifying the contract and award were made and done before he discovered the above encumbrances on the plaintiff's farm.

The CHANCELLOR. The master reports, that the parties respectively can make a good title to each other for the premises mentioned in the submission and award. But the defendant objects to the goodness of the plaintiff's title, on two grounds: 1. That the lands are charged with an encumbrance reserved in the deed of the 26th of October, 1694, from Robert Livingston to Dirck Wessells, the ancestor of the plaintiff. By this deed, which was for a tract of land of which the premises were only a part, the grantor reserved to himself, and his heirs and assigns, the right of cutting timber, and of grazing, in the woods "not appropriated or fenced in." 2. That the deed contained, also, a reservation to the grantor, and his heirs and assigns, of the yearly rent of 10s.

1. With respect to the first objection, it appears to me to be the true construction of the grant, that the reservation ceased and became extinguished, as to the lands belonging to the plaintiff, when those lands were enclosed by fence, and reduced from the state of common lands to that of specific and exclusive appropriation. It was proved before the master that excepting the small Ogden spot, which was more recently enclosed, all the plaintiff's farm had been under fence for above thirty years, and that the exercise of the right reserved by the deed had not been claimed or asserted within that period of time. It cannot be supposed to have been the intention of the reservation, that the lands should always continue subject to that servitude, however appropriated by the owner; for this would be giving the grantor a right repugnant to the nature of the grant itself, and to the absolute and beneficial ownership which an estate in fee was intended to convey. By construing the words according to their obvious and natural sense, we give to the reservation a reasonable operation, and one consistent with the interest of the grantee. It was no more than a right of common, and that right is utterly inconsistent with the exercise of the right of enclosure. The plaintiff either had no right to appropriate and fence in the woods, or the right of cutting and grazing ceased as soon as the woods were actually and *bona fide* enclosed. The long disuse of this right, if even it was used, is evidence of the sense of the parties that the right ceased when the woods were fenced

in; and a right of this kind, as well as other rights, may be lost by long negligence and disuse. This was so said in Gateward's case, 3 Leon. 202. It will let in the presumption of a release, or other discharge, and such presumptions are to be favourably received in opposition to dormant claims, because they conduce to the quiet of titles, and the security of estates; and this argument would be entitled to weight, if the construction which I have given to the grant was insufficient or doubtful.

2. The other objection founded on the quit rent, cannot be admitted to be set up in this case. The covenant that each party was to make a "good and valid conveyance in the law," will be satisfied if the party can make a good title, subject to that portion of the nominal quit rent of 10s., which might fall upon the premises of the plaintiff. It appears that this reservation of rent was well known to the defendant when he made the contract; it was a matter, also, of public notoriety that all the lands in the manor were subject to such a quit rent. It was never, then, within the contemplation of these parties that this rent was to form an obstacle to title. The quit rents due to government, under all colonial grants, might as well be set up as an objection to the performance of any covenant to convey. This rent was declared to be in lieu of all other rents, and was evidently, as the counsel observed, nothing more than the recognition of the manorial seigniory, and which, at that early day, was deemed a matter of some importance. On a due apportionment of that rent, if it was now to be collected, the burthen, or part, falling on the farm of the plaintiff, would be but fifty-four cents a year. As I do not consider this rent as forming any obstacle to the mutual good title intended by the contract of the parties, it becomes unnecessary to agitate the question whether the rent itself has not become extinguished by lapse of time, owing to the presumption arising from the want of evidence of its having been demanded, or paid, for the last 60, if not 100, years.

I shall, accordingly, decree a specific performance of the agreement of the parties, mutually to convey.[1]

BEAUMONT v. DUKES.

In Chancery, before Sir Thomas Plumer, M. R., 1822.

[*Jacob* 422.]

This was a bill for specific performance. The defendant was a purchaser at an auction sale, at which (he alleged) the auctioneer had declared that the plaintiffs intended to make certain alterations and improvements in and about the premises, and, among such improvements, to widen a narrow, dirty lane, and to make a new street. The defendant

[1] A small portion of the opinion is omitted.

further alleged that he purchased in reliance upon this representation and that the plaintiff had done nothing towards making the alterations in the lane, and had appropriated for a farmyard a part of the land over which the new street was to run.[1]

The MASTER OF THE ROLLS. It is fairly admitted that the court, having a discretion either to grant a specific performance, or to leave the parties to law, if the fact be established that any fraud is to be imputed to the vendor, or if there has been any mistake or surprise that operates in conscience against his demand to have the contract performed, it is an answer to him. The defendant here has made two objections in his answer; first, that the plaintiff's title was imperfect; and, secondly, that he purchased on the faith of representations made at the auction by the plaintiff's agent, which considerably enhanced the price, but which, in the event, have not been fulfilled. As to the first point, it appears that the title is now complete, though it was not at the time of filing the bill; that, however, goes to costs only, and not to the main point of specific performance.

As to the second point, it is unfortunate that the paper read at the sale has been lost. Its contents are, however, supplied by the memory of the auctioneer; and the first observation that arises is, that the subject of the representations was not a future project contemplated by a third person. If that had been the case, the plaintiff might have held out the expectations with a degree of uncertainty as to whether they would be fulfilled. If he had said merely that a plan was in contemplation, that would not have been an undertaking to do any thing himself; it would only be holding out an hope as to the future conduct of a third person, not under his control; and it would be the fault of the bidder if he relied on so loose and vague a report. But here the representation went to induce a belief that the plan was in contemplation by himself; we must take it as a statement of what he intended to do himself.

The ground was described as building ground in a street; and the value of the lot must, of course, depend very much upon the communication to it. The representation that was made was, therefore, calculated to enhance the price; and we must consider it to have been meant, not merely as a loose statement, but to operate on the sale; the auctioneer is authorized to announce it, and a plan, shewing the alteration intended, is put into the hands of the bidders. In one respect, indeed, it is overstated in the answer; for it appears that the plaintiff was not the owner of the land on which the improvement was to be made. This makes a difference as to the certainty of the plan being carried into execution: but he appears to have represented that if he was not the owner, he was about to become so, and that, if necessary, he would even apply to Parliament to overcome any obstacles that might intervene. Surely, then, he held it out to them as a plan with respect to which he was in earnest, and which, in his judgment, was practicable. Then, was he sincere in this? It does

[1] This statement of facts is abridged.

not appear that from that time he has taken any step to realize it. When the objection was made in the answer, the onus of shewing what steps he had taken, and what had prevented him from completing the improvement, lay upon him. He has not proved it, and we must therefore assume that he has done nothing. Is this keeping good faith with those who listened to his statements? It is perfectly consistent with every thing which appears, that this might only have been a plan upon paper, made use of to allure purchasers, without any design of carrying it into effect.

It comes to this, that the representation stated by the auctioneer was made by the directions of the plaintiff, and that it influenced the purchase; the defendant swears that he bought upon the faith of it; and from the nature of the subject it is reasonable to suppose that he did. I think this does afford a ground for saying that the plaintiff is not entitled to the specific performance of a contract thus obtained. It must stand or fall to the full extent; we cannot cut down the price, and say how much would have been given if this had not been done. The statement made was not the loose puffing of an auctioneer, but a written declaration by the vendor himself. The contract was obtained by representations made by the vendor as to his future plans, which he has not performed, and it cannot, therefore, be executed by a court of equity.

Bill dismissed with costs.

WELLS *v.* SMITH.

In the Vice-Chancellor's Court of New York, before Vice-Chancellor McCoun, 1833.

[2 *Edward's Chancery* 78.]

Bill by the vendee against the vendor for a specific performance of a contract under seal for the sale of a lot of land known as No. 708 Broadway in the City of New York.

The contract provided that the vendee, Wells, should within a designated time erect on the premises a carpenter shop and a three-story brick dwelling house, and that he should on or before a specified day pay a part of the purchase price, $3,700, and give a bond and mortgage for the balance or give a bond and mortgage for the entire sum. The defendant agreed to convey on this same day. The plaintiff was in default at the day specified in all his covenants, though the defendant seemed to have waived all but the one as to payment. The contract contained this clause: "But upon this express condition and the agree-

ment between the parties is such that if the said Benjamin G. Wells fails or neglects to perform all or any one of the covenants hereinbefore contained on his part, at the time or times hereinbefore limited, then and in such case all and singular the covenants and agreements on the part of the said Clotilda Smith shall cease and be absolutely void, and all the right, title and interest of the said Benjamin G. Wells in law or equity in the premises shall also cease." [1]

The VICE-CHANCELLOR.[2] . . . Since, then, parties entering into a contract may make the time of performance a material part of it, have they done so in the case now under consideration? The agreement in question is precise and particular as to the day on or before which several things are to be done. Those, on the part of the purchaser are conditions to the defendant's giving a deed, and which is the only thing she is to perform. . . .

If there be any form of words by which parties can bind themselves to strict performance, they have done it in this instance. Nothing can be stronger than the clause in question. It is full and explicit, and leaves no room to doubt the intention of making time an essential ingredient of the contract.

The next question then is: whether this court, under the circumstances, can relieve the party from the consequences of his own default?—a default, as already observed, not imputable to the defendant or founded upon any waiver on her part or attributable to accident, mistake or surprise so as to authorize an interference on any such account. It is a naked case of a condition unperformed within time. Much depends upon the nature and effect of the condition. The uniform object of a condition is to defeat or avoid an estate. Preston's Shep. Touch. 117. If it be a condition precedent, it defeats or rather avoids the estate, by not permitting the estate to vest until the condition is literally performed. In case it be a condition subsequent, the non-performance defeats the estate, by divesting the party of his title and the interest already vested: because the continuance is made to depend upon the performance of the act or the happening of the stipulated contingency. The first operates by giving an estate and conferring a benefit; and the second, as a defeazance or the destruction of an estate already raised and vested. This distinction is important in the view of a court of equity: because it can, upon principle, interfere with and control the effect of one species of condition and not of the other. The condition of the contract in question is clearly a condition precedent. No one can peruse it without perceiving that every act which the complainant has stipulated to perform is antecedent to what the defendant is to do. The performance of the covenants on the part of the former are made the consideration for the covenant of the latter to convey to him. It is only upon these conditions a deed is to be executed and delivered.

[1] The statement of facts is abridged.

[2] Portions of the opinion are omitted.

If he fail in any one particular the agreement ceases to be obligatory upon her. It is true he was to go into possession, make improvements on the lot and pay interest on the purchase money, as well as all taxes and assessments, but all this appears to be the result of a mere possessory right as tenant until the time for a fulfillment of the contract should arrive: and not the effect of any vested right or title. There are no words of grant in the contract itself. It rests merely in covenant on the part of the defendant, and no estate was to arise to him except upon the performance of the condition. This is, therefore, the case of a condition precedent, where no estate vests in law until the condition is performed. Coke Litt. 206 a; Hervey *v.* Aston, 1 Atk. 361, S. C. West's R. 350, and Com. Rep. 726.

It is next to be seen whether, in such cases, a court of equity can aid the party and help him to the estate notwithstanding the breach of the condition?

Whatever confusion there may be in some of the earlier cases on the subject—and it must be admitted there are some which seem to be contradictory and irreconcilable and a few which appear to have been reversed in the House of Lords (1 Chan. Ca. 90, note; 1 Eq. Cas. Abr. 107, B.; Freeman's C. R. 35 and 220 n; 1 Vern. 83; 3 Ch. Cas. 119, and Calles' P. C. 10), yet when we come down to the period of a more systematic equity jurisdiction, we find the decisions assuming greater steadiness and uniformity of character on this point. I shall begin with the decision of Lord HARDWICKE, in Reynish *v.* Martin, 3 Atk. 330. In this case a legacy had been left to a daughter upon the condition of her marrying with the consent of her trustees. She had married without their consent. A bill was filed for the legacy. His Lordship noticed the objection of its being a condition precedent unperformed. And he considered that, as there had been a breach of the condition and because the law would not, therefore equity could not help the party. In reference to the legacy being originally a charge upon lands, he observed, "It must have the same consideration as a devisee of lands would have; and in that case, nothing could be clearer than that the legacy could not be raised, because nothing vested before the condition performed." . . .

And this doctrine I consider to be brought down to the present day by the recent cases of Duffield *v.* Elwes, 1 S. & S. 239; Long *v.* Ricketts, 2 S. & S. 179, and Clifford *v.* Beaumont, 4 Russ. 425. It is founded in reason and justice. A man enters into a contract or makes a deed of settlement or a will (the instrument is immaterial) and he agrees to grant or devise an estate upon a condition which he declares must be performed before the person to be benefited can take it. No court of law or equity can have a right to say that the condition, which is lawful in itself and one the party had a right to impose, shall be dispensed with. In order to do this, the contract or act of the party himself must be annulled and one created by the court put in its place. This would be

contrary to reason and the assumption of a power which I, for one, must disclaim.

The principle whereon the court is to act in relation to conditions subsequent is widely different. In cases of this sort, if a breach or non-performance happens, the effect of which is to work a forfeiture or divest an estate, the court, acting upon the principle of compensation to the party for the injury sustained by the breach, will interpose and prevent the forfeiture. On account of the nature of conditions subsequent, they are said to fall within the lenient principle by which equity relieves against penalties; and the court will only give relief where compensation can be made in damages. There may even be cases of conditions subsequent unperformed in which the court will not relieve from forfeiture on account of the difficulty of ascertaining, with any degree of certainty, the amount or adequacy of compensation to be allowed. Jeremy's Eq. Jur. 475. It is unnecessary, however, to pursue this branch of the subject. The present case does not fall within it.

As I feel myself bound to give effect to the transaction between these parties as a mere matter of contract *in fieri* and constrained by principle and upon authority to regard the condition of the contract in this case as a precedent condition, the strict performance of which was necessary in order to entitle the complainant to a fulfilment of it on the part of the defendant, I cannot extend to him the relief of a mortgagor. The consequence may be a great hardship upon him, but this he himself should have foreseen and prevented by a greater diligence on his part and on the part of those upon whom he was induced to rely for the means of completing the purchase. A little exertion would have accomplished the object and saved trouble and expense.

The bill must be dismissed; but, under the circumstances, without costs.[1]

GREEN *v.* LOW.

IN CHANCERY, BEFORE SIR JOHN ROMILLY, 1856.

[22 *Beavan* 625.]

The defendant, Low, was owner of a plot of ground at Wimbleton. An agreement was signed between the defendant and plaintiff which provided for the building of a villa on these grounds by the plaintiff, who was also to insure the same with a particular company and in the joint names of himself the defendant. By a further provision the agreement was to become void if the plaintiff failed to perform fully his covenants.

[1] For an excellent discussion of a case of condition precedent involving a forfeiture in case of a breach, see Griggs *v.* Landis, 1870, 21 N. J. Eq. 494.

The defendant on his part agreed that as soon as the house should be completed he would grant the plaintiff a lease for ninety-nine years. The agreement also provided for the purchase by the plaintiff, at his option, of a fee simple to the premises. The villa was erected, but it was insured in a different company from the one specified, and in the name of the plaintiff only. No lease was made, and the plaintiff notified the defendant of his election to purchase. The defendant refused to convey, alleging a forfeiture of the plaintiff's rights by reason of his failure to insure as agreed. The defendant commenced proceedings at law to recover possession, and the plaintiff then filed his bill for a specific performance of the agreement.[1]

Mr. Lloyd and Mr. Smythe, for the plaintiff, contended that the right to purchase was independent of the right to have a lease of the property, and that, even, if the right to the latter had been forfeited, by the mere accident of insuring in the wrong office and in the plaintiff's name alone, still that the right to purchase remained unaffected.

Mr. Southgate, *contrà*, for the defendant, insisted that, by the breach of the engagement to insure, the whole contract had been put an end to. He cited Thompson *v.* Guyon, 5 Simons, 65.

The MASTER OF THE ROLLS [Sir JOHN ROMILLY] held, upon the construction of the contract, that the right to purchase was independent of the right to a lease, and he decreed a specific performance with costs, and awarded a perpetual injunction to restrain the defendant's proceedings at law.

SECOMBE ET AL. *v.* STEELE.

IN THE SUPREME COURT OF THE UNITED STATES, 1857.

[20 *Howard* 94.]

This case was brought up by writ of error from the Supreme Court of the Territory of Minnesota.

By stipulation of counsel, Secombe was made the representative of numerous other parties engaged in a common cause.

The chronological history of the case was this.

In the latter part of 1851 suits were pending between Steele and Arnold W. Taylor with regard to their respective interests in a parcel of land near St. Anthony's Falls, of which they were tenants in common.

On the 17th of January, 1852, Taylor executed his bond of conveyance of the property to Steele, for the consideration of twenty-five thousand dollars, one thousand of which was to be paid in cash, and the remaining twenty-four to be deposited to the credit of Taylor, within sixty days, in the Merchants' or Suffolk Bank, in Boston.

[1] This is an abridged statement of the facts.

On the 19th of January, 1852, this bond of conveyance was recorded in the proper office.

It was alleged by Steele that, on the 17th of March, 1852, he tendered to the Suffolk Bank, and also to the Merchants' Bank, in Boston, the sum of twenty-four thousand dollars, and requested a certificate of deposit therefore; but that each of the banks refused to receive the money. In consequence of such refusal he deposited the money in the Bank of Commerce, at Boston, and received a certificate of deposit from that bank. On the 5th of May, 1852, he tendered this certificate to Taylor, who refused to receive it or to execute a deed of conveyance.

On the 25th of May, 1852, Steele filed a bill in equity, (that form of proceeding not having been then abolished), praying for a specific performance of his contract with Taylor, and paid into court the sum of $24,240. He also obtained an injunction prohibiting Taylor from selling or encumbering the property, etc. Taylor answered the bill, and moved to dissolve the injunction, which motion was overruled, and the case stood for hearing upon bill and answer in July, 1852.[1]

Mr. JUSTICE CAMPBELL delivered the opinion of the court.

This cause comes before this court upon a writ of error to the Supreme Court of the Territory of Minnesota.[2]

It is not denied that the plaintiff paid one thousand dollars at the execution of the contract, nor that the twenty-four thousand dollars were paid within sixty days into a bank at Boston—a bank of solvency and credit—nor that a certificate of deposit within a reasonable time afterward was offered to Taylor, at St. Anthony's Falls; nor that, upon his refusal to take the latter, the money and interest were immediately tendered to him; and, upon a farther refusal, that relief was sought from a court of chancery, whose order for the payment of the money into court was promptly complied with. The precise grounds of complaint are, that neither the Merchants' nor Suffolk Bank was made the depository of the money; and a certificate from one of them has never been tendered to Taylor, and that he has the right to rely upon the letter of his contract. No specification has been made of any injury or inconvenience suffered by him as a consequence of the deposit having been made in the Bank of Commerce, rather than the banks mentioned in the agreement. And the plaintiff avers that the only reason for the change was the refusal of those banks to give a certificate of the kind mentioned.

At law, if there is an express agreement for the payment of the purchase money, and the delivery of the conveyance of the land by a particular day, and at a particular place, the parties will be bound by it, and time will be of the essence of the contract. But, in equity, the estate bargained and agreed to be sold becomes the property of the purchaser as soon as the agreement is concluded. It will descend to his heirs at

[1] The statement of facts is abridged.

[2] Only that portion of the opinion dealing with the question of the place of deposit has been printed.

his death, or may be devised by him; while the purchase money vests in the vendor, and forms a part of his personal estate. In the ordinary case of the purchase of an estate, the assignment of a particular day or a specified place for the perfection of the title is considered as merely formal, the general object of the contract being the sale of an estate for a given sum, and the stipulation signifying that the purchase shall be completed promptly, and in reasonable manner, regard being had to the circumstances of the case, and the nature of the title and property. Time may be made of the essence of the contract by express stipulation, or it may become essential by considerations arising from the nature of the property, or the character of the interest bargained. And the principle of the court of equity does not depend upon considerations collateral to the contract merely, nor on the conduct of the parties subsequently, showing that time was not of the essence of the contract in the particular case.

But it must affirmatively appear that the parties regarded time or place as an essential element in their agreement, or a court of equity will not so regard it. Hiperall *v.* Knight, 1 Y. and C., 416. . . . Upon a view of the chancery record, our conclusions are, that the plaintiff, in good faith, attempted a literal performance of his contract with Taylor; that the deposit of the money due in a bank of solvency and credit, other than those named in the contract, did not inflict an injury upon Taylor, and the offer of its certificate of deposit, *prima facie,* was a substantial performance of its requirements. That his subsequent offer of the money and the interest that had accrued, and, on the refusal of Taylor to receive it, his prompt application to chancery, and the payment of the money into court, relieve the plaintiff from every imputation of laches or delay. The District Court expressed an opinion corresponding to this, in July, 1852, in denying the motion to dissolve the injunction, and this was a virtual decision of the cause in that court.

We are of opinion that there is no error in the record, and the judgment of the Supreme Court of Minnesota Territory is affirmed.

HALL *v.* WHITTIER.

IN THE SUPREME COURT OF RHODE ISLAND, 1873.

[10 *Rhode Island* 530.]

DURFREE, J. This is a suit in equity to enforce the specific performance of a contract for the sale of real estate. The terms of the contract are indicated in the condition of a bond given by the defendant to the plaintiff, on the 14th day of March, 1873. The terms were that the plaintiff should pay for the land ten thousand dol-

lars, on delivery of the deed, on or before the 1st day of April, 1873, and should assume a mortgage on the land for five thousand dollars, and that the defendant should, on or before the same day, deliver to the plaintiff a good deed of the land, subject to said mortgage, the plaintiff making demand for the same, and fulfilling the conditions of the contract on his part. The bill alleges, that on the 14th day of March, 1873, the plaintiff paid to the defendant, at her request, the sum of three hundred dollars, in part consideration for the real estate, and that, on the 1st day of April, 1873, he diligently sought the defendant, having with him the sum of $9,700, in legal tender notes, and an agreement to assume the mortgage, till about six o'clock in the evening, both at her place of business in Providence and at her residence in North Providence, for the purpose of demanding a conveyance of the real estate and tendering said money and agreement, but that, as the plaintiff believes, the defendant wilfully and persistently kept herself out of the way, with the intent that the plaintiff should not find her and should not be able to demand the conveyance and tender the money and agreement; that, at about six o'clock P. M., despairing of being able to find the defendant, and not deeming it safe to take so large a sum of money to his home in North Providence, he deposited the same in a bank for safe keeping and started for home; that when he had nearly reached his home, and when it had become quite dark, he was stopped in the road by the defendant, who brandished a paper in his face, exclaiming, "There is your deed; where's your money?" That he replied: "I have been looking for you with the money ready to take the deed, at your house and place of business, all day long; I have deposited it in the bank for safe keeping; I will get the money in the morning, and be round to your place early, ready to take the deed, and, if I do not find you, shall look for you till I do;" that the defendant replied: "This is the day; I don't know anything about to-morrow," and went on her way toward Providence. The bill further alleges, that on the 2d day of April, 1873, the plaintiff again diligently sought the defendant, prepared to perform the said contract on his part, but without success; that, on the 3d day of April, 1873, he also again sought for and found the defendant, and demanded the conveyance, and, at the same time, tendered the money and agreement; that the defendant refused a deed, and referred the plaintiff to John Eddy, Esq., as her counsel and agent; that he afterwards made demand on said Eddy, accompanying the demand with a tender, as aforesaid, and that Eddy replied he had no authority in the premises.

To the bill the defendant has filed a general demurrer, under which she claims that the plaintiff is not entitled to the relief prayed for in the bill, on the ground that the plaintiff did not, on or before the 1st of April, 1873, perform or tender performance of the contract on his part, or do what was equivalent thereto, or that if he did, the effect thereof was avoided by subsequent tender and refusal of a conveyance.

There is no claim that on the first day of April the plaintiff actually either performed, or tendered performance, of the contract on his part, but only that he was ready to perform it, and would have tendered performance, but for the default of the defendant in not being present to receive it. If this be so, the court will not allow the defendant to profit by her own default, but will treat the plaintiff's readiness to perform as equivalent to a tender of performance. Morse *v.* Merest, 6 Mad. Ch. 26. The question then is, does the bill show or contain allegations under which evidence can be introduced to show that there was any such default on the part of the defendant as will excuse the plaintiff from not performing or tendering performance of the contract on his part. The rule, as we find it declared in the cases, is this: Where a contract is to be performed on a certain day and at a certain place, the legal time of performance is the last convenient hour of the day for transacting the business; usually, that is to say, such convenient time before sunset as that the act may be completed by daylight. This rule is established for the convenience of both parties, that neither may be compelled, unnecessarily, to attend during the whole day. Earlier in the day, therefore, neither party can discharge himself in the absence of the other by being present and ready to perform; though, if both parties are earlier present, a tender and refusal then will be as effectual as at a later hour. Wade's case, 5 Co. 114; Lancashire *v.* Killingworth, 12 Mod. 530; S. C. 1 Ld. Raym. 686; Hammond *v.* Ouden, 12 Mod. 421; Rutland *v.* Batty, 2 Str. 777; 1 Plowd. 172, 173; Tinkler *v.* Prentice, 4 Taunt. 555; Doe *v.* Paul, 3 C. & P. 613; Acocks *v.* Phillips, 5 H. & N. 183 and note; Savory *v.* Goe, 3 Wash. 140; Tiernan *v.* Napier, 5 Yerg. 410; Aldrich *v.* Albee, 1 Greenl. 120. A tender, however, which is made after sunset, will be sufficient if the party to receive is present, but after sunset, the absence of either party is not a default. Startup *v.* Macdonald, 6 M. & G. 593; Sweet *v.* Harding, 19 Vt. 587. The rule may also be varied by special agreements and usages of business. Lancashire *v.* Killingworth, and Rutland *v.* Batty, *sic supra*. But the bill contains no allegation from which we are entitled to infer any such variation in the case at bar.

It is urged on the part of the defendant that the rule above stated applies only where the place as well as the time of the performance is appointed; that, in the case at bar, no place of performance was named, and that it was therefore incumbent on the plaintiff to seek the defendant and make the tender to her wherever she was to be found, if within the State. Where money is to be paid in discharge of a debt, or in fulfilment of a condition, the rule suggested is the rule generally recognized. Co. Lit. 210; Plowd. 71; Haldane *v.* Johnson, 20 Eng. L. & Eq. 498; Smith *v.* Smith, 2 Hill. 351 and note. In such a case no one is subject to the obligation but the debtor. There may be dicta extending the rule to the case of a more executory contract; but we know of no decision which so extends it. In such a case, if the contract binds both

parties, the obligation is mutual; if it binds only one of them, the other certainly should have the right to seek him, on the appointed day, in the place where, if he were going to perform his contract, he would be most likely to be found. Where the contract is for chattels to be delivered on a certain day, and no place is designated for the delivery, the deliverer is required to bring the chattels to the residence of the receiver, unless there are circumstances, or something in their nature or use, from which it can be inferred that they were to be delivered at some other place. In such a case a tender of the chattels, at the proper place and time, will be good, even though nobody may be present to receive them. 2 Pars. on Cont. 5th ed. 649-653. Doubtless the rule is deduced from the presumed understanding of the parties; and we see no reason why the rule applicable to the execution of a contract for the sale and purchase of real estate should not be similarly deduced. There are cases which favor this view, though it would be going too far to say that the rule deducible from this view is clearly established. . . .

The plaintiff alleges in his bill that on the 1st of April, being prepared to perform the contract, he diligently sought the defendant till about six o'clock in the evening, both at her place of business and at her residence. Evidence may be submitted under this allegation to show, if so great strictness is necessary, that the tender was made at the defendant's residence and at the last convenient time before sunset. We cannot, therefore, refuse relief under this bill on the ground that the bill does not allege a sufficient tender or readiness to perform on the plaintiff's part.

The defendant contends that, if there was a tender, or what was equivalent to it, the effect thereof was avoided by her offer of the deed and demand of the money. We think not. If the plaintiff's readiness to perform was equivalent to a tender, the absence of the defendant was equivalent to a refusal. The plaintiff might treat it as an actual refusal, and, consequently, deposit his money, it being a larger sum than he could conveniently or safely keep about him, in the bank. Having done this, the defendant's demand, to say nothing of its unseasonableness, would not have the effect to put him in default, so long as he did not refuse a compliance with it, but merely requested such reasonable delay as would enable him to comply with it. The cases of Tucker *v.* Buffum, 16 Pick. 46, and Town *v.* Trow, 24 Pick. 168, cited by plaintiff, are decisive of this point.

Our conclusion is that the demurrer be overruled. In coming to this conclusion, we have not thought it necessary to inquire whether, under the circumstances, the plaintiff is to be held to an exact observance of the time mentioned in the contract. If, after the answer is in and the testimony has been taken, the question becomes material, we can then consider it to better advantage.

Demurrer overruled.

H. Lapse of Time and Laches.

GIBSON *v.* PATTERSON.

In Chancery, before Lord Chancellor Hardwicke, 1737.

[1 *Atkyns* 12.]

A bill brought for a specific performance of articles of agreement for sale of an estate, and decreed in favor of the plaintiff, the vendor, without any regard had to the plaintiff's negligence in not producing his title deeds, etc., and not tendering a conveyance within the time limited for that purpose by the articles; Lord Chancellor saying, most of the cases which were brought in this court relating to the execution of articles for sale of an estate were of the same kind, and liable to this objection, but thought there was nothing in the objection.

His Lordship decreed the articles to be performed and referred to a Master to see if a good title could be made by the plaintiff of the premises in question, and in case a good title could be made, then the defendant to pay plaintiff's costs to be taxed.[1]

GREGSON *v.* RIDDLE.

In Chancery, before Lord Chancellor Thurlow, 1784.

[7 *Vesey* 269, *stated by* Sir Samuel Romilly *from his own note.*]

The agreement was for a particular day, with a proviso, that in case the title should not be approved in two months, the agreement was to be void, and of no effect. There was an outstanding legal estate, which could not be got in by that time. A bill was filed for that purpose to have the legal estate conveyed. The defendant resisting, a reference was directed, to see whether a good title could be made; Lord Loughborough expressed an opinion, that the terms of the agreement were complied with. The report was in favor of the title. The cause coming on before Lord Thurlow, the performance was still resisted. Lord

[1] In reaching his decision in Lloyd *v.* Collett, *infra*. Lord Chancellor Loughborough had occasion to examine this case. Mr. Vesey, in a note to Harrington *v.* Wheeler, *infra*., gives the Chancellor's report on it as follows: "I have looked into the case of Gibson *v.* Patterson, in which the reporter has made Lord Hardwicke treat the time as totally immaterial. It is to be observed that the circumstances of that case, of which I have taken a copy, did not call for any such opinion. The purchaser, who hung back, had bought

THURLOW said it had been often attempted to get rid of agreements on this ground, but never with success. The utmost extent was to hold it evidence of a waiver of the agreement; but it never was held to make it void. Mr. Mansfield, for the defendant, said, the intention was clearly to make it void; and that it would be necessary to insert a clause, that notwithstanding the decision of the Court of Chancery it should be void. Lord THURLOW said, such a clause might be inserted, and the parties would be just as forward as they were then.

MACKRETH *v.* MARLAR, 1786, 1 Cox Ch. 259 [a bill to have a contract delivered up and cancelled].—Master of the Rolls [Sir LLOYD KENYON.] This is the case of an agreement which by the express stipulation of the parties was to be completed by the 30th of November, 1781, and agreements under such circumstances should as far as possible be literally performed. I remember a case before Lord THURLOW, where a bill was filed for the performance of an agreement for the purchase of a place for a Jewish synagogue, and on account of the delays of the party, the bill was dismissed with costs. I am perfectly well satisfied with the good sense and justice of that decision. Now, in this case are the delays on the part of Whittaker's executors sufficiently apologized for? As to the decree in this court in 1784, it is *res inter alios acta,* and cannot touch Mr. Whittaker's interest; that, therefore, I lay totally aside. With regard to the difficulties attending the proving the will in the Ecclesiastical Court, Mr. Whittaker's representatives are not blameable for the delay occasioned by them; but yet those difficulties ought not to affect Mr. Mackreth; and I am of opinion, if the case rested upon that, those very difficulties would be a ground to relieve the plaintiff. However, all these difficulties were removed on the 31st March, 1784, from which time more than a year elapsed before the present suit was commenced. Now how can the defendants be said to have used due diligence? At first two months was the time stipulated for completing the contract; shall I add to that time ten months or a

an estate in mortgage. The contract took place in November and was to be completed in February; in that time, therefore, the mortgage could only be paid off by treaty with the mortgagee. Upon the facts it appeared that application had been made to the mortgagee, who consented to take his money. Draughts of the conveyance were made, and countermanded by the purchaser. He had after the contract devised part of the estate to the vendor at a rent; and upon application being made to him, everything being ready, he said he would be off the bargain; that he had no money to pay for it, and if they attempted to force him he could go to Scotland to avoid it.

"There could not be the smallest argument upon it, nor the least doubt about the decree."

Another statement of the case, taken from Lord COLCHESTER'S MS. notes on the case of Lloyd *v.* Collett, *infra.*, will be found in 4 Bro. C. C. 470, n. 3, Belt's edition.

year? It has been suggested that the plaintiff has been guilty of delays; but what are those delays? He waited patiently till 1785, when he filed the bill; he did not plunge them hastily into a law suit; but he left them *locum pœnitentiæ*. In May, 1783, he stated to them his inconveniences, and that his object in selling the estate was defeated by the delay. If he had brought an action to recover his deposit, he must have succeeded. I think, therefore, that on these circumstances of delay, which cannot be imputed to Mr. Mackreth, I am bound to relieve Mr. Mackreth from the contract. But there are difficulties beyond this; it is uncertain whether there are assets of Whittaker to complete the purchase; then it is said that Mr. Macketh hath an equitable lien on the estate for the residue of the purchase; so that for a ready money sale he is to wait for recoveries to be suffered by the infant devisees. Upon the whole, I am clearly of opinion that Mr. Mackreth is entitled to the relief he prays, and to have this contract delivered up, and to have his costs, which he shall deduct out of the deposit, the residue of which, with interest on the whole at 4 per cent. must be repaid to defendants.[1]

LLOYD *v.* COLLETT.

IN CHANCERY, BEFORE LORD CHANCELLOR LOUGHBOROUGH, 1793.

[4 *Brown's Chancery* 469.]

In May, 1792, the plaintiff, Young printed particulars and conditions of sales of certain ground rents. In August, 1792, the defendant, by writing agreed to purchase the rents according to the particulars, the purchase to be completed on or before March 25, 1793. November 6, 1793, the plaintiffs filed this bill for a specific performance and for an injunction against the plaintiff from proceeding in an action he had brought for a deposit he made at the date of the bargain. The defendant alleges, and it was not controverted, that he had repeatedly applied to the plaintiff Young, to his clerk and to his solicitor, for an abstract of title, but without success; that shortly after March 25th he demanded a return of his deposit, which demand he has several times since repeated; and that the value of the ground rent had materially fallen off in value. An abstract had been tendered him September 16th, 1793, but the defendant refused to accept it.

The plaintiff's counsel urged that time was not regarded in a court of equity, and cited the cases Pinche *v.* Curteis, 1793, 4 Bro. C. C. 329; Gregson *v.* Riddle, *supra;* and Gibson *v.* Patterson, *supra*.[2]

[1] This case is said to manifest "the first repugnance to follow the previous stream of authority." 4 Bro. C. C. 470, n. 1.

[2] This statement of facts is abridged.

The CHANCELLOR [LORD LOUGHBOROUGH].

There is nothing of more importance, than that the ordinary contracts between man and man, which are so necessary in their intercourse with each other, should be certain and fixed; and that it should be certainly known, when a man is bound, and when not. There is a difficulty to comprehend, how the essentials of a contract should be different in equity and at law. It is one thing to say, the time is not so essential, that in no case, in which the day has by any means been suffered to elapse, the court would relieve against it, and decree performance. The conduct of the parties, inevitable accident, etc., might induce the court to relieve. But it is a different thing to say, the appointment of a day is to have no effect at all; and that it is not in the power of the parties to contract, that if the agreement is not executed at a particular time, the parties shall be at liberty to rescind it. In most of the cases there have been steps taken. Is there any case, in which, without any previous communication at all between the parties, the time has been suffered to elapse? I want a case to prove, that, where nothing has been done by the parties, this court will hold in a contract of buying and selling a rule, that certainly is not the rule at law, that the time is not an essential part of the contract. Here no step has been taken from the day of the sale for six months after the expiration of the time, at which the contract was to be completed. If a given default will not do, what length of time will do? It is true, the plaintiff must have considered himself bound after the day: so he was: he could not take advantage of his own neglect. He says, "by my own default this contract is void in law: I cannot succeed at law: on the contrary the other party is entitled to recover back the money he has paid in expectation of the execution of his contract; therefore an equity arises to me." An equity out of his own neglect! It is a singular head of equity. The consequences of this idea, which I know has prevailed, have been extremely inconvenient. The hardship generally falls upon the other party. The utmost extent of relief, where the party is discharged at law, would be on making him full compensation. Is interest of the purchase money compensation? The time may go on for years. Suppose the subject was an estate sold for payment of debts: debts and legacies carry interest at 5 per cent.: the purchase money may carry 4 per cent. from the time the contract ought to have been completed. Where it is with a view to a resale, as in this case, what is the consequence? Here a man has purchased these ground rents upon a speculation which is totally defeated. I see no reason to enjoin the action. You deliver yourself from that by paying the money. The action is against the auctioneer. I do not think the equity extends to him; for he personally contracts, that he receiving the deposit money will return it, if the terms are not complied with.[1]

[1] This opinion is printed as taken from a MS. note of Mr. Vesey and inserted by him as a note to Harrington *v.* Wheeler, *infra*.

Mr. Belt in a note to the principal case says: "The principal case seems

HARRINGTON *v.* WHEELER.

In Chancery, before Lord Chancellor Loughborough, 1799.

[4 *Vesey* 686.]

Richard Wheeler, John Wheeler and James Goostree, in the right of his wife Leonora, were seised in fee simple of a certain estate, subject to a mortgage in fee for £1500 and to an estate for life in Leonora Wheeler, widow of John Wheeler, the elder, under whose will they claimed. April 22, 1790, John and Richard, for themselves and in behalf of the others interested, agreed to convey the premises to the plaintiff, Harrington, on or before June 24th, 1790. The price fixed was £2500, £100 of which was paid by Harrington, and for which he took a mortgage from the Wheelers on their share of the property. Harrington filed his bill for specific performance March 3, 1796. The defendants, Goostree and wife, on learning of the transaction agreed to it provided the mortgage should be paid off out of the purchase money and their share of the balance deposited in a bank. They stated in their answer that the plaintiff had taken no steps for six years to complete the transaction; that he had declined to pay off the mortgage; that, April 3d, 1792, the mortgagee threatening to foreclosure, the defendants, Goostree and wife, on learning of the transaction agreed to had paid off the mortgagee and taken an assignment. The plaintiff's daughter Sarah, being examined on his behalf, in order to account for the delay, deposed that from 1790 to 1795, repeated enquiry gave no information of the Wheelers, though she stated that she learned in 1791 they had absconded, and that, hearing they were in prison, "she consulted an attorney, who told her he could take no steps, as they were dead in law." [1]

to be one of the first in which the practice began to be corrected, and the benefit is attributable, in a great degree, perhaps, to Lord Loughborough having detected the error in Gibson *v.* Pattison.

"The old doctrine of this court is represented as being that wherever there was a contract entered into, the court would carry it into execution. This doctrine is supported by the case of Gibson *v.* Patterson, 1 Atk, 12, from whence the rule has been drawn, that no negligence ever so gross would be an excuse for not performing the contract. It is impossible Lord Hardwicke should have used the language that is attributed to him by the reporter in that case. It appeared by a MS. note cited of it by Lord Chancellor, lately, in a case of Lloyd *v.* Collett, ante, p. 469, that there was no gross negligence in the case."

"But suppose the court had been so loose in cases of this sort: the rule certainly now is, that where in a contract either party has been guilty of gross negligence the court will not lend its assistance to the completion of the contract." Per Sir Richard Pepper Arden, M.R., in Fordyce *v.* Ford, 1794, 4 Bro. C. C. 494, 497.

[1] This statement of the case is abridged.

This cause was very fully argued by the Attorney-General, Mr. Lloyd and Mr. Alexander, for the plaintiff, and the Solicitor-General and Mr. Roupell, for the defendant Goostree; who relied upon the length of time and the conduct of the plaintiff.

LORD CHANCELLOR. There is no one case to support this bill, except Gibson *v.* Patterson, 1 Atk. 12, which is a totally false report. Lord HARDWICKE is there made to say, the time is not at all material. I had occasion to look into Lord HARDWICKE'S note book upon it; and by the evidence it appeared, that after several acts done the vendee threatened to go into Scotland to avoid being compelled to complete the purchase. Lord HARDWICKE determined it entirely upon the evidence; of which no notice is taken in the report.

In this case the plaintiff had done no one act. The pretence, that the Wheelers, who were in prison, could not be found, is ridiculous. I do not see what this defendant could do but endeavour to purchase it.

The bill must be dismissed with costs.

SETON *v.* SLADE.

IN CHANCERY, BEFORE LORD CHANCELLOR ELDON, 1802.

[7 *Vesey* 265.[1]]

The plaintiff, who was entitled to a certain estate Kilgorough, in the County of Glamorgan, under a contract he had with the trustees of the Marquis De Choiseul, employed one Phipps, as agent to sell it. Phipps contracted for its sale with the defendant who, on the 12th of April, signed a memorandum providing the purchase price to be paid, etc., the sale to be completed within two months from the date, by June 12, 1799. The memorandum was signed neither by the plaintiff nor by any person for him. The day after signing the agreement, the defendant wrote to Phipps stating objections to the title, and that if title were not made on June 12, and possession delivered, he should demand his deposit and interest. To the payment of interest the plaintiff acceeded. From the middle of May on, he pressed Phipps for an abstract of title, and affirmed his intention of repudiating the contract if it was not completed within the specified time. June 7th, an abstract of title was left at the defendant's solicitors with a note stating that the plaintiff had title under an agreement only, but that all parties were ready to convey. On the 9th of June the defendant was informed by the plaintiff's solicitor that the authenticity of the abstract could not be vouched for as it was pre-

[1] S. C. in 2 White and Tudor's Leading Cases in Equity, pt. 2, p. 1041, 4th Am. ed., with elaborate American and English notes.

pared by the solicitors of the trustees for the Marquis De Choiseul. Nothing further passed till June 13th, when the defendant repudiated the agreement and demanded the return of his deposit with interest. This he afterwards recovered at law.

The plaintiff filed his bill for specific performance.[1]

The Lord Chancellor [Eldon]. If it were necessary for the decision of this case to express myself with great accuracy upon the principle of the court as to suits for specific performance, as far as objections are to be founded upon what the court has done, and has forborne to do, in a great variety of cases, in which the objection has been taken, that the agreement was not carried into execution within the time stipulated upon the face of it, I should think it my duty to look through a great number of cases. But in the view I have of this case I incur no hazard of making a decree in its principle inconsistent with any authority, that can be stated.

To say, time is regarded in this court, as at law, is quite impossible. The case mentioned of a mortgage is very strong: an express contract under hand and seal. At law the mortgagee is under no obligation to re-convey at that particular day; and yet this court says, that, though the money is not paid at the time stipulated, if paid with interest at the time a re-conveyance is demanded, that there shall be a re-conveyance: upon this ground; that the contract is in this court considered a mere loan of money secured by a pledge of the estate. But that is a doctrine, upon which this court acts against what is the *prima facie* import of the terms of the agreement itself; which does not import at law, that, once a mortgage, always a mortgage; but equity says that; and the doctrine of this court as to redemption does give countenance to that strong declaration of Lord Thurlow, that the agreement of the parties will not alter it; for I take it to be so in the case of a mortgage; that you shall not by special terms alter what this court says are the special terms of that contract. Whether that is to be applied to the case of a purchase is a different consideration. I only say, time is not regarded here as at law. So in the instance of a mortgage with interest at 5 per cent. and a condition to take 4, if regularly paid; or at 4 per cent., with a condition for 5, if not regularly paid. At law you might in that case recover the 5 per cent. for it is the legal interest. But this court regards the 5 per cent. as a penalty for securing the 4; and time is no further the essence, than that if it is not paid at the time, the party may be relieved from paying the 5 per cent. by paying the 4 per cent. and putting the other party in the same condition, as if the 4 per cent. had been paid: that is, by paying him interest upon the 4 per cent. as if it had been received at the time. So in this court, before courts of law dealt with a bond, under a penalty, as they do now. Time was of the essence there: but this court relieved against the penalty long before a court of law; and there are many other instances.

[1] The statement of facts is abridged.

But there is another circumstance. The effect of a contract for purchase is very different at law and in equity. At law the estate remains the estate of the vendor; and the money that of the vendee. It is not so here. The estate from the sealing of the contract is the real property of the vendee. It descends to his heirs. It is devisable by his will; and the question, whose it is, is not to be discussed merely between the vendor and vendee; but may be to be discussed between the representatives of the vendee. Therefore I do not take a full view of the subject upon the question of time, unless that is taken into consideration; and many very nice and difficult cases may be put, in which the question would be to be discussed between the representatives, founded upon the conduct between the vendor and vendee. It is obvious, that a due consideration of the value of the objections will embrace that consideration also. . . .

But I need not address myself to the consideration of what is the precise principle with much industry; for no authority would support me in saying, that under the particular circumstances of this case the defendant can resist a decree, if a good title can be made. This agreement is signed by the defendant Slade only: but that makes him within the statute a party to be charged. I do not say, whether terms might or might not be introduced, that would make time expressly of the essence of the contract. It is enough to say, that, if this agreement has that effect, there never was an agreement, that would not; for upon that point the agreement is as loose as possible. There is no passage in it *eo intuitu*; not that sort of passage in Gregson *v.* Riddle. The clause as to liberty to resell, etc., is not considered of much importance in this court: but in this instance it is a clause against the vendee, having no corresponding clause against the vendor. That clause expresses little more than would be the legal effect, if that was not inserted. But it is enough to say upon that, the objection relied upon in the argument, that the plaintiff might have sold, after the two months were expired, admits of this answer; that it is assuming the whole question. If you make out, that he would have been at liberty to resell, that does not make out that he lets the other off. But under the circumstances he would not have been at liberty to resell. The evidence clearly imports, that the defendant did not understand it to have bound them in that mutual respect, in which he seems in his letter to think it reasonable they should be bound. But I will construe it for the purpose of this case, as if it had mutually bound them; and that, if the title was not made out by the day, then the defendant should be at liberty to say, he was off; for, if that clause had been in the agreement, he might have waived the benefit of it; and it must have been made out, that his conduct did not occasion the non-fulfilling the agreement. Take it, that there was the mutual clause. The moment after the sale the auctioneer was no longer the agent of the plaintiff. He was his agent only to sell, not to deal with the terms, upon which a title was to be made. The defendant must show the auctioneer had acquired a character to bind the plaintiff

in that respect. There is no evidence of that: on the contrary the defendant applies to the auctioneer as such agent; and he refuses to act as such; and refers him to the plaintiff. But he applies again to the auctioneer; and never to the plaintiff.

One clause of this letter is very important; marking the knowledge of the title in the law-agent of the vendee; and that he was able in the first instance, the day after, to state the material objections; namely, the proceeding in chancery and Darby's claim. That is distinct evidence, that the defendant did not then understand, that he had entered into an agreement, by force of which he thought he had a right to say, the time of two months was absolutely of the essence of the contract. Whether that was misunderstanding, or not, that was his understanding. By the last words he seems desirous of having an agreement, which would for the first time give a mutuality as to time. But he does not choose to give up the one, till he gets the other; reserving to himself the power to deal with the first agreement, as he thinks fit; though he may not get the stipulation he wishes. If the plaintiff acceded to that proposition, he would be bound. But what is the evidence, that he did? There is a good deal of reasoning in support of the argument, that Phipps's letter is not merely a statement, that he would pay interest, but with regard to some circumstances that the contract was to be off; namely, the deposit money to be returned with interest, connected with the dissolution of the agreement; which might be either within or after the expiration of the two months: but, if the former, it ought to be shown to be clearly the effect of something, that passed subsequently, and was acceded to. The letter of Phipps in answer is no evidence of the facts stated in it. Does the defendant conceive the matter as resting on that letter, and consider it as an undertaking to the extent he proposed; or as completely settling that mutuality he desired; giving him a right to insist upon the time as the essence of the contract? No: for afterwards he goes again to Phipps, not an agent to bind the plaintiff for this purpose; and not being able to prove the date farther than that it was between the 13th of April and the 5th of June. This proves, that the defendant by repeated inquiries, addressed to his solicitor, who knew a good deal of the title, was informed from time to time, that the abstract was not delivered. The proof is complete as to that. This is a complete waiver of any objection from the non-delivery of the abstract at the time the defendant proposed, that Phipps should write that letter. Being told Phipps would not write that letter, he does not write himself; or direct his solicitor to apply: but upon the 7th of June by his solicitors he receives the abstract: they knowing the history of the title and the estate; and stating the two grounds of objection the day after the contract took place. There was a note at the bottom of the abstract; stating distinctly, that the plaintiff had only a title under an agreement; but that all necessary parties were ready to convey; and making a proposal for that purpose; which might or might not be completed within the time. The abstract was delivered on the 7th

of June. No objection was made to receiving it. It was kept, till the time expired, without objection. Ought not the objection to have been made on the 7th? The plaintiff was bound till the 12th. He could not sell to another; and if the solicitor had returned the abstract upon the objection, the plaintiff was at liberty to say, he had undertaken to remove all objections, or to tender a conveyance; and he might have proceeded to prepare a conveyance; which under the circumstances was to be prepared by the defendant; and he might have tendered that conveyance; so as to have a right to an action, or to file a bill, as upon an agreement, which he had undertaken to make good within the time.

This case is not like Lloyd *v.* Collett, in which the defendant immediately sent the abstract back; and would not look at it. What right had this defendant to read the abstract if it came too late? He had either an intention to execute the contract, or a hope, that he had time to get through the abstract, in order to carry it into execution: but the evidence in this respect is totally silent; and it is clear upon the objections stated in the solicitor's depositions, that at some period or other he had gone into the abstract.

As to the other circumstances, stated by the defendant, his selling out stock, etc., there is no evidence whatsoever. As to his intention of making this place his residence, there is nothing in the contract, having the least reference to that; and upon an intention, not disclosed in the contract or afterwards, as essential, this court has never been in the habit of acting.

Under the circumstances therefore, whether the time is or is not an objection, founded upon the authorities the reports of this court furnish, which I will not discuss, let the authorities upon that point turn the scale either for the defendant or the plaintiff, there is no authority, that has not some reference to the conduct of the party in the meantime; and upon the conduct this defendant has no right under the circumstances to say, this contract was not performed within the two months. There must therefore be a decree for a specific performance; and as to all the rest a reference to the Master, to see, whether a good title can be made. Where the party has not been able to make his title before the decree, it is always a question very important as to the costs, but not, whether he shall take the title or not. According to old cases it was sufficient, if the title was made by the time of the report.

HIPWELL *v.* KNIGHT, 1835, 1 Y. & C. 401, 415.—ALDERSON, B.— . . . Now the first question is, whether time is of the essence of this agreement. After examining with as much attention as I can the various cases brought before me during the argument, it seems to me to be the result of them all that a court of equity is to be governed by this principle—it is to examine the contract, not merely as a court of law does,

to ascertain what the parties have in terms expressed to be the contract, but what is in truth the real intention of the parties, and to carry that into effect. But, in so doing, I should think it prudent, in the first place, to look carefully at what the parties have expressed, because in general, they must be taken to express what they intend; and the burden ought, in good reason, to be thrown on those who assert the contrary. . . . If, therefore, the thing sold be of greater or less value according to the effluxion of time, it is manifest that time is of the essence of the contract, and a stipulation as to time must then be literally complied within equity as well as in law. The cases of the sale of stock, and of a reversion, are instances of this. So also, if it appear that the object of one party, known to the other, was, that the property should be on or before a given period, as the case of a house for residence or the like. I do not see, therefore, why, if the parties choose even arbitrarily, provided both of them intend so to do, to stipulate for a particular thing to be done at a particular time, such a stipulation is not to be carried literally into effect in a court of equity. That is the real contract; the parties had a right to make it; why then should a court of equity interfere to make a new contract which the parties have not made? It seems to me, therefore, that the conclusion at which Sir EDWARD SUGDEN, in his valuable treatise on this subject, has arrived, is founded in law and good sense.[1]

EDGERTON *v.* PECKHAM.

IN THE COURT OF CHANCERY OF NEW YORK, 1844.

[11 *Paige* 352.]

The defendant agreed to sell to one Strobeck certain property for $300, one-third to be paid down and the residue in one and two years with interest. Strobeck entered at once into possession, and made, on the dates specified in the agreement, the first two payments. He then assigned to the plaintiff, who failed to make the last payment on the proper date. Payment was tendered later, but the defendant, refusing to accept it, asserted that the contract was forfeited and himself entitled to the premises as well as the purchase money already paid.

A clause in the contract provided to this effect.[2]

GRIDLEY, V. C. This case presents upon the facts, and by the concession of the counsel, the naked question, whether in a case where the

[1] For an excellent collection and analysis of the early cases, and a discussion of their underlying principles, see Benedict *v.* Lynch, 1815, 1 Johns. Ch. 370.

[2] The statement of facts is abridged.

agreement was clear, certain, fair and mutual, when possession was taken under it and valuable improvements made upon the premises, and large payments made upon the contract, (in this case two-thirds of the purchase price,) and a long occupation of the premises enjoyed by the purchaser, and where no change has occurred in the circumstances of the premises, the omission to pay an instalment by the exact day prescribed therefore will work a forfeiture of the contract and of previous payments, at equity as well as at law; and will enable the vendor to repossess himself of the premises, by an enforcement of a literal construction of the provisions relating to the forfeiture.

It is undeniably true, and the books are full of authorities to prove the proposition, that in ordinary cases time is not of the essence of the contract; and that a mere default of payment at the day agreed on will not, in such cases, without some change in the circumstances of the property or of the parties, occasioned by such delay, authorize a court of chancery to deny specific performance.

But it is equally clear that there is a class of cases where time is of the essence of the contract; and where a disregard of the conditions of the contract will deprive a party of relief, both at law and in equity.

1st. Time may have become of the essence of the contract by the rise or depreciation of the value of the premises contracted to be sold. And, therefore, one who has given evidence of the abandonment of the contract, by lying by to see whether it will or will not be a bargain to take the property, will not be relieved, though he may have paid some portion of the purchase money. And gross negligence is evidence of an abandonment which will be a bar to a bill for relief. This doctrine is advanced in and supported by a great variety of cases. 13 Ves. 244; 5 id. 818, 720, S. C.; 4 id. 667; 4 John. 494; 3 John. Ch. 370.

2d. Time may be of the essence of the contract, by reason of the nature of the interest in the property which is to be conveyed. Contracts for the purchase of stock are of this description; and the reason assigned is, that the daily fluctuations in the price would render a punctual performance of the essence of the contract. See 4 Ves. 492; 1 Sim. & Stew. 59. So also in the case of the sale of a reversionary interest, where the vendor may be supposed to be in want of the consideration money, and to whom it is of importance that the money should be paid punctually. McChum *v.* Rogers, 4 Bro. C. C. 391; Osmond *v.* Anderson, 2 Ball & Beat. 370. So where there is an agreement to sell at a valuation to be made within a certain time, by persons who are named. 6 Mad. 26. So also in a sale of a lease depending on lives. Osmond *v.* Anderson, Ball & Beat. 370. There a distinction is taken between such a case and a case of purchase, where time is said to be not of the essence of the contract; as a compensation for the delay may be paid in the interest, etc.

3d. Time may be of the essence of the contract when there is an express stipulation to that effect, and where the contract is executory at the time of the default; no part or no considerable part of the purchase

money having been paid. And this is on a very plain principle, to wit: that the performance, by the vendee, is a condition precedent to the performance of the contract by the vendor. It is believed that most of the modern cases which have been supposed to establish the rule that a mere naked default will *ipso facto* work a forfeiture, not relievable in equity, will be found to fall within this class of cases or the one last above mentioned. Such was the case of Mills *v.* Smith, 2 Edw. Ch. Rep. 78. There no part of the consideration money had been paid, though some money had been expended on the premises. I cannot forbear remarking on this case, however, highly as I respect the opinion of the Vice-Chancellor of the first circuit, that I consider it as adopting an exceedingly severe rule; and a case which upon the facts disclosed entitled the complainant to relief. I have examined all the authorities cited on the argument, which were supposed to deprive the party vendee of relief in the case of a naked default merely, and I do not find any of them to establish the principle in a case parallel to the one at bar. None of them are cases of the purchase of premises accompanied with a long enjoyment, and the expenditure of moneys on them, and the payment of two-thirds of the purchase money. . . .

There are other cases which establish a similar doctrine, but I have not found any cases which, when fairly examined, did not fall within one or the other of the two last mentioned classes of cases, being distinguished from the case at bar by the absence of any proof of long enjoyment of the premises, payment of most of the purchase money, and expensive improvements made. And I have found no case where these features did exist in which it was held that the contract was forfeited, in equity, unless there had been such delay as to be evidence of abandonment, or at least, to have in some degree affected the circumstances of the parties, or the property in question. The case of Lynch *v.* Benedict, 1 John. Ch. Rep. 370, relied on by the defendant's counsel, was a case of the grossest neglect, and of a clear abandonment of the contract; there was a sale of the premises to a third person, with the consent of the complainant. Nor do I understand the late Chancellor, though his language is strong, as laying down, in his review and summing up of the cases, any such rule as is insisted on in this case.

The proposition which is maintained by the defendant's counsel, is a bold and startling one. If that proposition be the law of the court of equity, then a purchaser and holder of lands, under such a contract as this, may have paid, upon purchasing a farm, $1,000 annually, for many years, may have expended thousands of dollars in improvements, may be in truth one of the wealthiest farmers and landholders in the country, and may, from forgetfulness, or some other accidental cause, (which of course is not susceptible of other proof than his own assertion,) omit to pay the last instalment of $1,000, by the exact hour prescribed by the contract; and although he may be ready with the money, an hour after the default, and offer it to his inexorable creditor, yet he may be doomed

to see the whole of his estate, the reward of years of toil and industry, swept from him in a moment, by this unyielding rule of law; and may invoke in vain the benign powers of the court of chancery for his relief. This consideration gains strength immeasurably, when it is remembered that a large portion of the land contracts in the western section of this State, are framed with a provision similar to the one in the contract in this case; which clothes the holders of such contracts with power, (if the alleged construction of this contract be the true one,) to insist upon the forfeiture of every farm in that prosperous and wealthy region of the country, upon the unexplained failure to pay merely a single dollar, upon the contract, at the exact time prescribed therein. It seems to me, that this is too monstrous a proposition to be maintained in the nineteenth century. For while the application of this rule to the case of a contract which is not executed, by the payment of any part of the purchase money, is strictly just and proper, it is clear that to apply it to cases such as I have supposed, or to the very case at bar, would work the greatest injustice; and would require the court of chancery to be the organ and instrument of every Shylock, who chose to insist upon the rigorous exaction of his pound of flesh.

It is said, that it is not the province of the court of chancery, any more than of a court of law, to make contracts for parties, but to enforce them. This is true, as a general proposition. But it is also true, that the court of chancery looks to the substance of a contract; and when the substance of a contract is fulfilled, and the general intention of the parties carried into effect, the court relieves against any forfeiture or penalty, inserted for the purpose of enforcing the contract. See Jeremy on Eq. Juris. 470; Fonbl. Eq. 130, 4th Am. ed. It is upon this principle, that upon the forfeiture of the penalty of a penal bond, the court of chancery was accustomed to relieve against the penalty, upon the payment of the sum really due, and the interest thereon, before the statute had rendered a recourse to a court of equity necessary.

In England it is laid down, in all the elementary books and cases, that a specific performance will be decreed, notwithstanding a bare default, except in the classes of causes, which I have noted above. . . .

The American cases it is believed follow the English doctrine of holding time non-essential, in a case of an agreement of purchase, when the purchase price is partly paid; unless there have been such laches as amounts to evidence of abandonment, or such as has caused the lands to fluctuate in value, or has in some way put the party, to whom the performance was to be made, in a worse condition, by the delay. . . .

The Chancellor is reported to have held, as was held by Lord ELDON, in the case put by him in 7 Vesey 27, that the complainant could not insist upon the forfeiture in this court; but that the provision referred to would be available to him only upon a foreclosure at law, by advertisement under the statute. This seems to affirm the principle that a mere default as to time, and nothing else, will not, in this court, be held to

work a forfeiture, though such will be the effect at law. This is undeniably in accordance with the elementary doctrine of the court of chancery, that it is an original ground of the jurisdiction of this court to relieve against penalties and forfeiting; regarding them as a means only of enforcing the main contract and dispensing with them when that contract can be substantially carried into effect without any injury to the party for whose security the forfeiture was provided, except such injury as may be compensated by the interest on the money due. It is, moreover, consonant to the great principles of justice, which would be outraged if, in the case at bar, the defendant could be allowed to wrest from the hands of the complainant the premises he has long enjoyed, and greatly improved, and almost entirely paid for, by reason of the mere default of a day, confessedly working no injury to the defendant. My opinion is, that jurisdiction was given to the court of chancery for the express object, among others, of relieving against such cases of hardship, on the part of cruel and unprincipled creditors. My conclusion, therefore, is that the complainant is entitled to relief, by having the contract in question specifically performed.

The only other question in the case relates to costs; and I am referred to the case of Dumond *v.* Sharts, 2 Paige 182, as an authority for giving costs. That would seem to be an authority in point; and so the counsel of the defendant conceded the rule to be, in the event that the law should be found to be against the defendant, on the merits of the case.

KIRBY *v.* HARRISON, 1853, 2 Ohio St. 326. [Bill to rescind an agreement.]—THURMAN, J. It has been oftentimes held, that time is not of the essence of a contract for the sale of real estate, unless made so by the contract of the parties. Indeed, Lord THURLOW is reported to have said, in Gregson *v.* Riddle, cited in 7 Ves. 268, that it could not be made so even by a positive stipulation in the contract. But that this dictum is not law is now generally, if not universally, admitted. Lloyd *v.* Collett, 4 Bro. 469; Harrington *v.* Wheeler, 4 Ves. 689; Omerod *v.* Hardman, 5 Ves. 722; Enest *v.* Hemfray, 5 Ves. 818; Seton *v.* Slade, 7 Ves. 265; Alley *v.* Deschamps, 13 Ves. 225; Benedict *v.* Lynch, 1 J. C. R., 374; Scott *v.* Field, 7 O. R. pt. 2, 94; Remmington *v.* Kelley, ib. 101.

It is said by Judge STORY, that formerly courts of equity carried the doctrine, that time is not of the essence of the contract, beyond the true limits to an extravagant length; but, that "the tendency of modern decisions is to bring the doctrine within such reasonable bounds, as seem clearly indicated by the principles of equity, and a reasonable regard to the convenience of mankind, as well as to the common accidents, infirmities, and inequalities belonging to all human transactions." 2 Story's Eq.

That this remark is fully justified by the decided cases, no one who examines them will doubt.

The result of the cases seems to be:

1. That time may be made of the essence of the contract by the express stipulation of the parties. See cases above cited.

2. Or, without such express agreement, by the nature of the contract itself, or of the circumstances under which it was made; as where the benefit to accrue from the consideration to be paid, or the conveyance to be executed, materially depends upon a strict performance in point of time. Hutcheson *v.* McNutt, 1 O. R. 18 to 21 inclusive; Hepwill *v.* Knight, 1 Young and Collyer, 415, 2 Story's Eq., 776 and note.

3. Although there is no stipulation of the parties that time shall be of the essence of the contract, nor anything in the nature or circumstances of the agreement to make it so, yet it may be made essential by the proper action of a party who is not in default and is ready to perform, if the other party is in default without justification. Thus, if the vendee, without sufficient excuse, fail to pay at the stipulated time, and the vendor is in no default, and is able and ready to perform all that the contract then requires of him, he may notify the vendee to pay within a reasonable time, or he (the vendor) will consider and treat the contract as rescinded. In such case, if payment be not made within a reasonable time, the vendor has a right to treat the contract as abandoned by the vendee. In like manner, and with like consequences, the vendee may notify the vendor, if the latter is in default and the former is not. Remmington *v.* Kelley, 7 O. R. pt. 2, 97; Higby *v.* Whittaker, 8 O. R. 201.

4. Although there has been no such express notice, yet, "where the party who applies for a specific performance has omitted to execute his part of the contract by the time appointed for that purpose, without being able to assign any sufficient justification or excuse for his delay; and where there is nothing in the acts or conduct of the other party that amounts to an acquiescence in that delay, the court will not compel a specific performance." Benedict *v.* Lynch, Hutcheson *v.* McNutt, and Remmington *v.* Kelley, *supra.*

5. It is undoubtedly within the sound discretion of the Chancellor to refuse to rescind a contract, the specific execution of which he would not decree; and thus leave the parties to their legal remedies. The State *v.* Baum, 6 O. R. 386. But, in general, where a specific execution would be refused, a recision will be decreed. And where the party in default "has trifled, or shown a backwardness on his part," and his default is gross, and the circumstances and value of the property have materially changed, a recision ought to be decreed. Hutcheson *v.* McNutt, 7 O. R., pt. 2, 21, 22, 25.

6. The idea that vendor and vendee stand in the mere relation of mortgagee and mortgagor, so that, in equity, the same time will be given to a mortgagor to redeem, is contrary to reason and the whole current of modern authorities. It was distinctly repudiated in Benedict *v.* Lynch and Remmington *v.* Kelley; and nearly every case I have cited, and a multitude of others that might be cited, are directly opposed to it. It

was well said by the Chancellor, in Benedict *v.* Lynch, that "the notion that seems too much to prevail, that a party may be utterly regardless of his stipulated payments, and that a court of chancery will, almost at any time, relieve him from the penalty of his gross negligence, is very injurious to good morals, to a lively sense of obligation, to the sanctity of contracts, and to the character of this court. It would be against all my impressions of the principles of equity to hold those who show no equitable title to relief." And we quite agree with the Lord Chancellor's remark, in Alley *v.* Deschamps, 13 Ves. 224, that "it would be dangerous to permit the parties to lie by, with a view to see whether the contract will prove a gaining or losing bargain, and according to the event, either to abandon it, or, considering the lapse of time as nothing, to claim a specific performance." [1]

HATCH *v.* COBB.

IN THE COURT OF CHANCERY OF NEW YORK, BEFORE CHANCELLOR KENT, 1820.

[4 *Johnson's Chancery* 559.]

Bill for specific performance of a contract, on the part of the defendant, to sell land to the plaintiff.

It appeared, from the pleadings and proofs, that the plaintiff had made default in the payments which, by the contract, were made a condition precedent to the conveyance. That the defendant had accepted one small payment, subsequent to such default, but, that about six months thereafter, the defendant repeatedly called for payment, and gave notice, that if the plaintiff did not pay him, he should be obliged to part with his interest in the land agreed to be conveyed. No payment being made, he assigned over his right to a third person; and the plaintiff, with the knowledge of that fact, made a tender of the balance due on the contract, and filed his bill for a specific performance of the contract, or for a compensation, in damages, for the payments he had already made, and the improvements he had made upon the land. The plaintiff, subsequent to his default in payment, had confessed a judgment to a third person, for 1,000 dollars, to cover his property.

The CHANCELLOR. A specific performance cannot be decreed. The defendant had fairly disabled himself before the suit was brought, and

[1] For other discussions of the question of time as a condition precedent, see Low *v.* Treadwell, 1835, 12 Me. 441, 449; House *v.* Beatty, 1836, 7 Ohio 417, 422; Bullock *v.* Adams, 1869, 20 N. J. Eq. 367; Day *v.* Hunt, 1889, 112 N. Y. 191, 195; Richmond *v.* Robinson, 1864, 12 Mich. 193, 201.

this was known to the plaintiff. He was not bound to wait any longer upon the plaintiff, but had a clear right to exact immediate payment, or else to part with his interest in the land to another, in order to meet his own convenience or necessities. It is doubtful how far the court has jurisdiction to assess damages, merely in such a case, in which the plaintiff was aware, when he filed his bill, that the contract could not be specifically performed or decreed. It is properly a matter of legal cognizance. The case of Denton *v.* Stewart, 1 Cox, 258, was hesitatingly followed by Sir WM. GRANT, in Grenaway *v.* Adams, 12 Vesey, 395, but it has been much questioned by Lord ELDON, in Todd *v.* Gee, 17 Vesey, 273, and though equity, in very special cases, may possibly sustain a bill for damages, on a breach of contract, it is clearly not the ordinary jurisdiction of the court. In Phillips *v.* Thompson, 1 Johns, Ch. Rep. 131, the bill was retained in order to afford a compensation, in damages, under a feigned issue, but that case was under peculiar circumstances. The bill was filed for discovery and for specific performance, and the plaintiff made out a case of very clear equity to relief, and the remedy was precarious at law.

If the defendant had not parted with his interest before the filing of the bill, it might, even then, have been a point deserving of consideration, whether the plaintiff was entitled to assistance, when no accident, mistake or fraud, had intervened, to prevent the performance of the contract, on his part, and when after indulgence, and after considerable subsequent delay, he had twice been required to make payment, and had omitted to do it. The acquiescence in his default, or the waiver of it, by the defendant, had terminated before the assignment, by these calls for payment, and the doctrine in Benedict *v.* Lynch, 1 Johns. Ch. Rep. 370, would seem to apply.

But it is not intended to prejudice any claim the plaintiff may have under his contract, at law, for damages. Vide Ballard *v.* Walker, 3 Johns. Cas. 60, where the vendee suffered four years to elapse, before he offered to fulfil the agreement, on his part, and in the meantime, the vendor had sold the land to another; the Supreme Court considered the contract of sale as rescinded or abandoned; and in an action brought by the vendee, to recover damages for the non-performance, gave judgment for the defendant. Orby *v.* Trigg, 9 Mod. 2.

Bill dismissed without costs.[1]

[1] "The jurisdiction of the court on this point was discussed in the case of Hatch *v.* Cobb, 4 Johns. Ch. Rep. 559, and it was considered that the court ought not, except in very special cases, to sustain a bill merely for the assessment of damages. The more I have reflected on the subject the more strongly do I incline to that opinion. Lord ELDON intimated, in Todd *v.* Gee, 17 Vesey, 273, that the whole course of previous authority was against the decision of Lord KENYON, in Denton *v.* Stewart, 1 Cox, 258, and in that case Lord ELDON said, the defendant had disabled himself *pendente lite*, from performing the agreement; and that fact materially distinguishes that case from this. When

TILLEY *v.* THOMAS

IN THE COURT OF APPEAL IN CHANCERY, 1867.

[*Law Reports* 3 *Chancery Appeals* 61.]

This was an appeal from a decision of Vice-Chancellor STUART.

The plaintiff, James John Tilley, was the owner of a leasehold dwelling house and premises at Fulham, held under a lease for a term of forty-nine years, from Michaelmas, 1834.

On the 14th of December, 1864, the plaintiff agreed to sell the premises to the defendant, Charles Thomas, for £700. The agreement was in the following terms:

"LONDON, 14th December, 1864.

"I hereby agree to purchase the lease of Cambridge Lodge, North End, Fulham, for the sum of £700, to include house, fixtures and fittings of outbuildings adjoining thereto, and garden stock in ground. Possession to be given on the 14th January next."

On the 23d of December the plaintiff delivered an abstract of his title, but difficulties arose in the production of the lessor's title, which were not cleared up before the 14th of January, 1865. At the date named the plaintiff offered to deliver possession of the house, but the defendant refused to accept possession because of a defect in the title; he insisting

the defendant had disabled himself before the filing of the bill, and the plaintiff knew of that fact before he commenced his suit (and I consider such knowledge a material circumstance in the case) it is then reduced to the case of a bill filed for the sole purpose of assessing damages for a breach of contract, which is a matter strictly of legal, and not of equitable jurisdiction. The remedy is clear and perfect at law, by an action upon the covenant; and if this court is to sustain such a bill, I do not see why it might not equally sustain one in every other case sounding in damages, and cognizable at law." Per Chancellor KENT, in Kempshall *v.* Stone, 1821, 5 Johns. Ch. 193, 195.

"Now, the rules of this court are plain. A purchaser may by the terms of the agreement make time the essence of the contract, but it requires a very strict stipulation to effect that object; or he may make time the essence of the contract, by a notice at any time during the progress of the negotiations. If, therefore, time was not an essential part of the contract, the defendant might have made it so by giving the plaintiff notice to that effect. . . . But if time be made the essence of the contract, that may be waived by the conduct of the purchaser; and if the time is once allowed to pass, and the parties go on negotiating for completion of the purchase, then time is no longer of the essence of the contract. But, on the other hand, it must be borne in mind that a purchaser is not bound to wait an indefinite time; and if he finds, while the negotiations are going on, that a long time will elapse before the contract can be completed, he may in a reasonable manner give notice to the vendor,

he must at this time have a good title. On June 5th the present bill for specific performance was filed. In his answer, the defendant alleged he had at the time of making the contract "distinctly informed" the plaintiff that he was buying the premises for a residence, and desired before entering to make certain alterations in the house: and, moreover, that possession at the date named was necessary because he had already sold the building in which he then lived.[1]

Lord CAIRNS, L. J. So far as the construction of the memorandum is concerned, there cannot, I think, be any doubt that the words "possession to be given on the 11th of January next" point to and intend, not a possession of sufferance, or with the risk of eviction, but a possession to be delivered to the purchaser, as proprietor, in exchange for the price, and as Lord ELDON, in Boehm *v.* Wood, 1 Jac. & W. 420, puts it, after such a previous manifestation of title as would show that the possession could be safely taken. A contract may indeed be, and sometimes is, so framed as to show by the contrast drawn between possession and the completion of the purchase, that the former possession is intended to be provisional and irrespective of title. It was argued that the words in the receipt given by the vendor for the deposit, "to be returned in event of the sale not being completed through the vendor's fault," were in this case used in contrast to "possession" in the contract. The receipt was, however, given after the contract was written and signed, and I read the words "completed" in the receipt as referring to the period already mentioned for possession in the contract, namely, the 14th of January, 1865, otherwise there would be a stipulation for the return of the deposit, depending on delay in completing the purchase, without any time by which delay might be tested, except the period of reasonable time which the law would imply—a test for such a purpose eminently vague and unsatisfactory.

The legal construction of the contract is, in my opinion, such as I have expressed, and the construction is, and must be, in equity, the same as in a court of law. A court of equity will indeed relieve against, and enforce, specific performance, notwithstanding a failure to keep the dates

and fix a period at which the business is to be terminated. But, having once gone on negotiating beyond the time fixed, he is bound not to give immediate notice of abandonment, but must give a reasonable notice of his intention to give up his contract if a title is not shown. . . . Taylor *v.* Brown is a case I often have occasion to refer to upon this subject. The rule was there laid down by Lord LANGDALE that where the contract and the circumstances are such that time is not in this court considered to be of the essence of the contract—in such a case, if any unnecessary delay is created by one party, the other has a right to limit a reasonable time within which the contract shall be perfected by the other. It has been repeatedly so considered in this court." Per Sir R. MALINS, M.R., in Webb *v.* Hughes, 1870, L. R. 10 Eq. 281, 286.

[1] The statement of facts is abridged.

assigned by the contract, either for completion, or for the steps toward completion, if it can do justice between the parties, and if (as Lord Justice TURNER said in Roberts *v.* Berry,) 3 D. M. & G. 284, there is nothing in the "express stipulations between the parties, the nature of the property, or the surrounding circumstances," which would make it inequitable to interfere with and modify the legal right. This is what is meant, and all that is meant, when it is said that in equity time is not of the essence of the contract.

Of the three grounds against interference mentioned by Lord Justice TURNER, "express stipulations" requires no comment. The "nature of the property" is illustrated by the case of reversions, mines, or trades. The " surrounding circumstances" must depend on the facts of each particular case.

In this case the property sold was a residential leasehold house, not apparently let or producing rent at the time of sale, and intended by the defendant to be used as his own residence. (His Lordship then referred to the statements in the defendant's answer, and in the affidavit of the plaintiff, and continued:)

Looking to the admitted facts thus stated, I can have no hesitation in saying, that in my opinion it was essential, and known to both parties to be essential, that the defendant should have, by the time stipulated, possession of the house for repairs and improvements with a view to his own immediate residence, a possession, therefore, which could not be disturbed—a possession, that is to say, with a title, and that to enforce against the purchaser performance of the contract after a breach of it by the vendor in this respect would be inequitable.

The abstract was delivered two days before Christmas Day, 1864. An appointment to examine the deeds was forthwith made by the defendant's solicitor for the 27th, and the statement in the answer as to what then occurred is not contradicted.

There was, therefore, no delay or waiver on the part of the defendant in asserting and maintaining his rights. It appears that during all this time the vendor could not make a good title, irrespective of the question of his landlord's title to the house; for there was a mortgage irredeemable before 1868, with powers of sale and distress in the mortgage.

I think the defendant was, under the circumstances, entitled on the 14th of January to refuse to perform the contract. Some subsequent negotiation took place as to making out the lessor's title, but it was after this refusal had been distinctly made, and it was expressly without prejudice to the defendant's right so asserted.

It is unnecessary, in the view I take of this case, to consider whether the compromise of this suit alleged to have been afterwards made was or was not binding on the plaintiff. In my opinion the suit for specific performance fails, and the bill ought to have been dismissed, with costs.[1]

[1] The opinion of Sir JOHN ROLT is omitted.

JONES *v.* NOBLE.

IN THE COURT OF APPEALS OF KENTUCKY, 1868.

[3 *Bush* 694.]

JUDGE PETERS delivered the opinion of the court:

In March, 1866, this action was brought by the personal representatives and heirs of J. R. Shivell, deceased, against appellant Jones and others, to enforce an alleged contract for the sale of a tract of land in Henry County, made by Jones in August, 1863, with their ancestor, and file a paper as the evidence of the alleged contract, with their petition, in the following language:

"This instrument of writing is to certify that I have this day sold to J. R. Shivell a certain tract of land described in a deed, which has been duly acknowledged in the Henry County Court Clerk's office, which deed is now in my possession, and which is to be delivered to said Shivell on the payment of two thousand dollars on the 25th of December, 1863. J. B. Jones."

It is alleged that Shivell died about the 1st of November, 1863, and, in consequence thereof, the purchase price was not paid or tendered to Jones on the day specified for payment; but that, in a reasonable time thereafter the money, with the interest accrued, had been tendered to him, and the delivery of the deed demanded; that he refused to receive the money and to deliver the deed; and that he had sold and conveyed the land to one Reese, and he had sold and conveyed it to one Miller, both of whom, it is alleged, had notice at the time of their purchases of the prior sale to Shivell. They pray for a cancellation of the deeds to Reese and Miller respectively, and a conveyance of the land to them; and if that cannot be granted, they pray that Jones shall be adjudged to pay them five hundred dollars, the amount he received from Reese more than he contracted to sell it for to their intestate.

Jones, in his answer, admits the execution of the deed as stated in the writing filed with the petition, and also the execution of that writing, and says he was in embarrassed circumstances, was anxious to sell the land to raise money to relieve him, and only agreed to sell the land to Shivell upon condition that he paid him on the day therein named; that he retained the deed and possession of the land, and never intended to part with either until the money was paid; that a short time after the 25th of December, 1863, he went to the widow of decedent, now one of the plaintiffs, and offered to make the deed and deliver the land to her if she would then pay the money, or would pay it within one or two weeks; that she declined to pay the money, or to promise to pay it; and in February afterwards he sold and conveyed it to Reese; claims that he never sold the land to Shivell, but agreed to sell it to him if he would pay

for it on the day named; and denies that any tender of the money was made to him until May or June, 1864, and denies that he is bound to convey.

Miller and Reese both deny any notice or knowledge of the alleged sale to intestate when they purchased, and resist the relief sought against them.

The circuit judge was of opinion that Shivell acquired, by the writing sued on, an equitable title to the land; but, as the subsequent vendees had acquired the legal title without notice of his equity, he could not therefore adjudge a specific execution, but rendered judgment against Jones for five hundred dollars, the amount he sold the land to Reese for more than Shivell was to pay him for it, and Jones now seeks to reverse that judgment.

It is not even alleged in the petition, nor is it shown that Shivell was under any obligation whatever to pay for the land; he did not sign the writing which is filed as the foundation of the action. It is obvious that Jones could not have sustained an action to compel the execution of the contract on the part of Shivell; but it was left to his election whether or not he would pay for the land and accept the deed prepared by Jones; if the money was never paid, the deed was not to be delivered; and that, by the writing, was entirely at the discretion of Shivell.

They understood that a delivery of a deed was necessary to its validity, and although Jones acknowledged the deed to repel the implication of a delivery from the acknowledgment, it is stipulated in the writing that Jones was to retain the possession of the deed, and deliver it to Shivell on the payment of two thousand dollars, and on no other terms. Appellees do not allege or claim that the title passed by the deed, but rely on the writing, and treat it as an executory contract.

This case is within the rule recognized by this court repeatedly, that to enable either party to compel a specific execution, the contract must be mutually binding on each. Boucher *v.* Vanbuskirk, 2 Mar., 345; Allen *v.* Roberts, 2 Bibb. 98; New on Contracts, 154.

The foregoing is the general rule, and there is no reason shown why this case should form an exception on account of any peculiar hardship its enforcement would impose.

But another reason quite sufficient may be stated why the relief could not be granted, even admitting that there was a contract binding between the parties: the sale was a conditional one, the payment of the price being a precedent condition to the conveyance and surrender of the possession of the land; time, therefore, was of the essence of the contract, and appellees could not recover without performance of the condition precedent.

Wherefore, the judgment is reversed, and the cause remanded, with directions to dismiss the petition.[1]

[1] "Now I have more than once had occasion to say that I think this court

HUBBELL, APPELLANT, *v.* PAULINE VON SCHOENING ET AL., RESPONDENTS.

IN THE COURT OF APPEALS OF NEW YORK, 1872.

[49 *New York* 326.]

The action was brought to compel the specific performance of a contract for the sale of three lots on One Hundred and Twenty-first street in the City of New York.

Defendants were husband and wife; the property belonged to the wife. By the contract, plaintiff was to pay $1,180 on the 24th day of January, 1868, and was to assume a mortgage upon the premises for the balance of the purchase money. Defendants on receiving such payment at the time stated, agreed to convey the premises by warranty deed, the deed to be delivered at the office of Z. W. Butcher, defendants' attorney.

On the 23d of January, the day before the time named in the contract for the payment of the purchase money the plaintiff applied to the defendants' attorney for an extention of time of performance, to enable him to complete his searches against the property.

The attorney then promised the plaintiff to send him word as soon as the defendants came to his office, if they arrived the next day, so that they might see them about it.

The defendants or one of them was at the office of their attorney, where the deed was to be delivered, from before twelve o'clock, of the said day.

The attorney did not, according to his promise, notify the plaintiff of the arrival of his clients.

The plaintiff after waiting for such notification until about four o'clock, went around to the office of defendants' attorney, where he met Dr. Von Schoening, and was informed by him that Mrs. Von Schoening, who owned the property, had been there at twelve o'clock, and, as he was not there, she had gone home, and would have nothing more to do with it.

has gone to too great an extent in departing from the precise terms of the contracts into which parties have entered, and so in effect making other contracts for them. If a contract can, by fair construction, be divided into two contracts, i. e., one contract to do an act and another to do it at a certain time, the court may say that there are independent stipulations. But if the contract be that on payment of a sum of £1000 at or before a specified day, a specified act shall be done on my part, I am at a loss to see why I can properly be called on to do the act if the money be not paid at the day; or why I should be compelled to perform not my contract but another contract into which I have not entered. If cases are found in the books which go to that extent I can only say that I cannot see the principle on which they are founded." Per Lord Chancellor CRANWORTH, in Brooke *v.* Garrod, 1857, 2 De G. & J. 62, 66.

The plaintiff was then informed that he could not see Mrs. Von Schoening that evening, for she would not be at home; but that she would be at home the next morning, when she could be seen.

The defendants lived far up town, at the corner of One Hundred and Tenth street and Broadway. The plaintiff went there the next morning, but did not find Mrs. Von Schoening. On the same day the plaintiff tendered the amount due on the contract, at the office of the defendants' attorney. The tender was refused by Mr. Butcher, the attorney, on the ground that "it was a day too late." This was on Saturday. The plaintiff sought defendants on Monday. He saw Dr. Von Schoening at Mr. Butcher's office, and was informed by him that Mrs. Von Schoening had sold the lots. He was unable to see her personally.

ALLEN, J. There were no laches on the part of the plaintiff, nor any delay in the assertion of his rights. He has shown himself, in the language of the cases, "ready, desirous, prompt and eager" to carry out the contract and have a performance of it. The brief delay of a few hours in making a formal tender of the purchase money and demanding a conveyance of the property was explained and excused. . . .

Time, in the performance of an agreement either for the sale or purchase of real property, is always material, and a court of equity will not any more than a court of law, excuse laches and gross negligence in the assertion of a right to specific performance. But time is not of the essence of the contract unless made so by the terms of the contract; and, therefore, although there may not, when time has not been made essential, be performance at the day, if the day is excused, and the situation of the parties or of the property is not changed so that injury will result, and the party is reasonably vigilant, the court will relieve him from the consequences of the delay and grant a specific performance. Radcliffe *v.* Warrington, 12 Vesey 326; Moore *v.* Smedburg, 8 Paige 600; Edgerton *v.* Peckham, 11 id. 352. Each case must be judged by its own circumstances.

A party may not trifle with his contracts and still ask the aid of a court of equity. Neither will the law be administered in a spirit of technicality, and so as to defeat the ends of justice. In this instance there is no vexation, no room for suspicion of any trick, on the part of the plaintiff; at most, it was a mistake in depending upon the promise of the defendant's attorney to advise him when the defendants arrived, if they should arrive on the day fixed for the performance of the contract.

It was assumed by the learned judge on the trial that one of the parties could, by notice to the other, make time of the essence of a contract, when, by its terms, it was not made so. This may be questionable, but need not be considered. The party in such case, if the operation and effect of the contract are to be essentially changed so as to vary his rights or duties at the volition of the other, should have reasonable notice in advance of the time when he will be called upon to act. Here no such notice was given, but, on the contrary, the plaintiff was put at ease by the

promise of the attorney of the defendants. Doubtless, a party may be held to a strict performance as to time and put in default for non-performance, that is, a default in law; and whether equity would relieve would depend on circumstances. But to do this, the party seeking to put the other in default must not only be ready and willing to perform, but he must tender performance at the time and demand performance from the other. Von Schoening testified that a deed had been prepared and was ready, but the plaintiff was not notified of the fact, and it was not shown or offered to him. The defendants took especial pains to prove by the *feme* defendant, the owner of the premises, that she had never authorized any one to complete the contract or to receive the money for her, and she was not at the place of performance when the plaintiff called. The plaintiff was not in default, and was not put in default by any acts or offers of the defendants. The judge, before whom the cause was tried, has not found that the defendants put the plaintiff in default by an offer and a demand of performance, and the evidence would not have justified such a finding. But he has found that the plaintiff had failed to perform, and therefore, was not entitled to relief merely by reason of a casual and justifiable delay of a few hours in making a formal tender of performance. In this, we think, there was error.

The judgment should be reversed and a new trial granted.

All concur.

Judgment reversed.[1]

BELLAMY *v.* DEBENHAM, 1891, 1 Ch. Div. 412.—LINDLEY, L. J. This is an appeal by a vendor who seeks specific performance of an agreement alleged to have been entered into by the defendants for the purchase from the plaintiff of a house at Chestnut, and asks in the alternative for damages if he cannot obtain a decree for specific performance. . . .

[1] In Clark *v.* Sears, 1856, 3 Iowa 104, 106, STOCKTON, J., said: "The judgment in this case must be affirmed. It is unnecessary for us to discuss at any length either the facts or the law as applicable thereto. It will be sufficient to remark that the plaintiff is shown by the evidence to have been ready to pay the instalment of the purchase money, due on the 1st of January, 1854; that he sought the defendant at his usual place of business, on or about that day in order to pay him, and did not find him; and that in several days between the first and fifteenth of the month, he was ready and anxious to pay the money, and when he tendered it, about two weeks after the first, defendant refused to receive it, on the ground that the tender was not in due time, and he intended to take advantage of it. Plaintiff then told defendant that he had been ready all the time to pay the money, and had tried to find the defendant and could not. This is not denied by the defendant, and the evidence of the son of the defendant shows that plaintiff called several times and inquired for defendant, and he could not be found. We think the plaintiff has shown himself sufficiently prompt to perform his part of the contract and to pay the money, and he is entitled to a specific performance of the contract."

The position of affairs is this: The contract, if there was one, was a contract for the sale of this house at the price of £800, the house being treated as freehold, since there is nothing to the contrary mentioned in any of the letters. There was in terms no day fixed for completion, but the contract was made in April, 1889, and the 24th of June was the time fixed for the delivery of possession. Now, having regard to the nature of the property, to the time which had elapsed, and to that stipulation about possession, it appears to me that the 24th of June was the end of a reasonable time for completing the contract. I do not think that any judge would say that a longer time for completion ought to be allowed. . . .

The plaintiff had, if I am right in the assumption I have made, a time allowed for completion which did not expire until the 24th of June, and if he had been ready and willing on the 24th of June to complete his contract and to give to the defendant such a conveyance as the defendant was entitled to, I am not prepared to say that the defendant would not have been liable to damages if he refused to complete.

But what are the facts? The facts are that on the 24th of June the plaintiff had no more got the property than he had in April. He had begun to negotiate for it, but he did not get it until September. If you look at this action, therefore, as an action by the vendor for damages for non-completion, the purchaser's defense is, "You, the vendor, were not in a position at the time for completion to give me that which I bargained for." That is a complete defense to an action at law for damages.

It appears to me, therefore, that both the equitable remedy and the legal remedy fail, and the appeal ought to be dismissed.

TALMASH *v.* MUGLESTON.

IN CHANCERY, BEFORE SIR JOHN LEACH, V. C., 1826.

[4 *Law Journal, Chancery* 200.]

The bill was filed for the specific performance of an agreement, dated in 1806, by which the defendants agreed to sell certain premises to the plaintiff; £100 had been paid as deposit. Great mutual delays had taken place; and the bill stated a correspondence between the solicitors of the parties which continued at intervals throughout several years. The last letter was dated 1815, and was written on the subject of the title by the solicitor of the plaintiff to the solicitor for the defendants. The bill averred that the contract had not been rescinded or abandoned.

To this bill, the defendants put in the plea of the statute of limitations, 21 Jac. 1.

The contract was made nearly twenty years ago; and the last transac-

tion, mentioned in the bill, precedes the institution of the suit by much more than six years.

Vice-Chancellor. It was not necessary to plead on what day the bill was filed; that is apparent on the record. But what has the statute of limitations to do with the specific performance of a contract? The rule of this court, which refuses to enforce the specific performance of a contract after a certain interval, does not result from the statute of limitations. Suppose the rule to be adopted by analogy to the statute, that would not enable the defendant to plead the statute.

The statute of limitations never can be made available in any court, unless pleaded; for a party may abandon the protection which it throws round him. But this court, like every other, is bound to take notice of every public statute for the purposes of analogy, and of the statute of limitations among the rest. Where a court of equity proceeds by analogy to the statute, it is bound to know the statute, in order to apply the analogy. It is not necessary, therefore, to plead the statute; nor can the rule of the court, and the analogy on which it is founded, enable the party to protect himself by such a plea. If the case stated in the bill is of such a kind, that the court, according to its known rules, will refuse to decree specific performance, the defendant ought to demur. It can serve no end for him to put in a plea, which only states an act of Parliament, to which the court, in applying its rules by analogy to that statute, would be bound to advert. It is impossible that the statute can be a bar to a species of suit to which it has no reference.

If the case appears sufficiently on the bill to lay a proper foundation for the application of the principle alluded to in the cases which have been cited, the defendant ought to have demurred; and, in support of that demurrer, the argument would have been, that it appears by the plaintiff's own showing that, if he were to proceed at law, he could not recover damages, and consequently the court, adopting by analogy the legal rule, will refuse to assist him.

If the circumstances did not appear on the bill so as to warrant the application of the rule, it would then be necessary to plead the facts, which were suppressed by the bill, and which were supposed to bring the case within the range of the equitable principle.

Mr. Koe submitted, that, in Hony *v.* Hony, where that which might have been the subject of an action was made matter of complaint in a bill of equity, it was not even attempted to be argued that the plea, though bad for another reason, was bad on the ground now suggested; namely, that the statute of limitations, which would have been a bar at law, would not be a bar also to the equitable relief.

Vice Chancellor. In that case this court had a concurrent jurisdiction with a court of law; and, consequently what would be a good plea at law would be a good plea in equity. But the jurisdiction of compelling specific performance is not a concurrent jurisdiction; and a suit for specific performance is within neither the words nor the purview of the

statute of limitations. In Hony *v.* Hony, an action might have been sustained for the produce of the timber; but, under the circumstances, this court had a concurrent jurisdiction in the way of account. If the value of the timber had been sought to be recovered in the shape of damages in an action, the statute of limitations would have been a good plea at law; and, consequently, the same plea would be good here; for a man cannot escape from the statute by coming into a court of concurrent jurisdiction. That has nothing to do with a suit for specific performance.

The plea was overruled.[1]

BRUCE *v.* TILSON, 1862, 25 N. Y. 194.—ALLEN, J. Prior to the enactment of the Code of Procedure, the subject-matter of this action was cognizable only by a court of equity, courts of common law having no jurisdiction to entertain a suit for the specific performance of a contract. The cause of action was therefore within the ten years' limitation prescribed. 2 R. S. 301, § 52. The language of that section is: "Bills for relief, in case of the existence of a trust not cognizable by the courts of common law, and in all other cases not herein provided for, shall be filed within ten years after the cause thereof shall accrue, and not after." If a cause of action had ever accrued to the original vendor,

[1] "The next point made was the delay on the part of the respondent, from 1787 to 1802. It was insisted that after such a lapse of time he had forfeited all right to a specific execution. Generally speaking, the obligation of an agreement binds the parties from the moment it is entered into; and place and time are circumstances affecting only the performance of the engagement; and do not import, in a court of equity, conditions by which the parties are to be considered as contracting on the ground of a strict compliance, but are mere circumstances admitting of compensation. 1 Pow. on Cont. 268. . . . The lapse of time, in a case like the present, where no material inconvenience has been suffered by the appellant, can be urged only on the ground that the agreement has lain dormant; and that this is evidence of the abandonment of it by the parties. In the case of Lloyd *v.* Collet, 4 Bro. Ch. Cas. 469, a., Lord LOUGHBOROUGH said, the conduct of the parties, inevitable accident, etc., might induce the court to relieve, notwithstanding the lapse of time." Per SPENCER, J., in Waters *v.* Travis, 1812, 9 Johns. Rep. 450, 466.

"Action to compel specific performance of a contract for the sale of land. The contract was executed August 5, 1876, and by its terms the purchase money was to be paid, and the deed delivered in one year from that date; the two being concurrent and dependent. May, 1883, plaintiff offered to pay the purchase money, with interest, and demanded a conveyance; but defendant Prendergast refused to accept the money or make a deed. This action was commenced April, 1887. The contract was wholly executory, and there is no allegation that the time of performance had ever been extended.

"We think the action was barred by the Statute of Limitations. The case

the plaintiff's assignor, and the Statute of Limitations had been permitted to run against it, the bar of the statute could not be avoided, and a new cause of action created, upon the same contract, by the demand of the specific performance by the assignee in 1854. The right of action once barred by statute can only be revived by the act and assent of the party to be charged. Kelsey *v.* Griswold, 6 Barb. 436. The cause of action accrued whenever the plaintiff or his assignee could have filed a bill for the relief sought in this action. If, at any time, without further act on their part, or default or breach of duty on the part of the defendant, they could have come into a court of equity and entitled themselves to a specific performance of the contract, the Statute of Limitations commenced running from that time, and the lapse of the statutory period of ten years barred the action. In order to put a party in default, in the case of dependent covenants, so as to subject him to an action at law, there must be a tender of performance by the other party to the covenant or agreement, and a demand of performance on his part, and when an act is to be done requiring time for its performance, a reasonable time must be given for such performance, unless the party of whom the demand is made absolutely refuses to perform at the first demand. An action at law upon the contract, or to recover back the consideration as upon a rescission of the contract by the act of one of the contracting parties, can only be maintained upon such technical

comes within section 6, chapter 66, Gen. St., which requires suit to be brought within six years after the cause of action accrues. The cause of action of a vendee, in an executory contract for the sale of land, accrues whenever he becomes entitled to file his bill for specific performance. In the present case the plaintiff (or his assignor) might have done this August 5, 1877, when, by the terms of the contract, the purchase money was to be paid, and the deed delivered." Per MITCHELL, J., in Lewis *v.* Pendergast, 1888, 39 Minn. 301.

"The second objection deserves more consideration. It is the lapse of time since the agreement was entered into, before the defendant was called upon for his deeds. The agreement was signed in July, 1816, and the deed, it would seem from the evidence, was not demanded until July, 1839, a period of twenty-three years. Mere lapse of time is not held from an examination of the cases to constitute a bar to relief, but may be explained. The court will look to it that no experiment is practiced on the part of the complainant, however, as by waiting to see whether it is to his advantage to have the agreement carried into effect or not, before he seeks relief, and if the delay under the circumstances amounts to an abandonment of the contract, relief will be denied. 1 Vesey & Beam, 23; 12 Vesey, 326; 13 Vesey, 225; 9 John. R. 450; 1 Saxton, 279.

"In the present case the road was laid out and the land taken possession of by the company [plaintiffs] at or about the time the contract was entered into, the fences were changed, and the complainants have ever since occupied and enjoyed the land." Per Chancellor PENNINGTON, in New Barbadoes Toll Bridge Co. *v.* Vreeland, 1842, 3 H. W. Green, 157, 160.

and formal default, unless it may be in some exceptional cases, as when a party has put it out of his power to perform, so that a tender and demand would be nugatory. The rule at law is well settled by a long line of cases, some of which are cited by the plaintiff's counsel. Hackett *v.* Huson, 3 Wend. 249; Blood *v.* Goodrich, 9 id. 68; Connolly *v.* Pierce, 7 id. 129, Fuller *v.* Hubbard, 6 Cow. 13; Lutweller *v.* Linnell, 12 Barb. 512. The same principle applies when equitable relief is sought, on the alleged ground of a rescission of the contract by the act or default of one of the parties to it.

COMBS *v.* SCOTT.

IN THE SUPREME COURT OF WISCONSIN, 1890.

[76 *Wisconsin* 662.]

This was an action for specific performance brought by the plaintiff, Harrison Combs, against Walter A. Scott, trustee of the estate of Thomas B. Scott, deceased, and his heirs, as defendants, of a contract by which Thomas B. Scott bound himself to convey to the plaintiff, on or before July 1, 1882, certain lands to be thereafter located along Hay Meadowbank. Scott refused during his lifetime to convey. At the time suit was brought the statute of limitations had not wholly run on the contract.[1]

ORTON, J.[2]—The objection to this judgment that has peculiar force, and makes the strongest appeal to a court of equity, is that specific performance ought not to have been adjudged in this case on account of the laches and unreasonable delay of the plaintiff in bringing his suit. The contract is dated May 1, and was to be performed July 1, 1882. Thomas B. Scott died October 7, 1886, and this action was commenced in April, 1888. These lands, July 1, 1882, when the contract was to have been performed, according to the testimony of the plaintiff himself, were of the value of only $10 for each forty-acre tract, and at the time of the trial they were worth from twenty to fifty times as much, or from $200 to $500 for each forty acre tract. The timber on these lands has become much more valuable by the long delay, and a railroad has been built and is in operation through these lands, and the country generally has been greatly improved since July 1, 1882. The plaintiff has never taken any care of the lands, and has neglected to pay any taxes on them, and has allowed many of them to be sold for taxes; and Thomas B. Scott, in his

[1] This is an abridged statement of facts.

[2] A part of the opinion, detailing the facts, has been omitted, as also a part discussing the question of damages.

lifetime, paid all the taxes on them, and redeemed them from previous sales for taxes; and the defendant, as trustee, has paid all the taxes since the death of Thomas B. Scott, at an expense of many hundred dollars—many times as much as the value of the lands when the contract was made.

The enforcement of the contract at maturity would have been of merely nominal expense and damage to Thomas B. Scott, but will now impose an enormous claim upon his estate of many thousands of dollars. There was a delay of over four years while Thomas B. Scott was living, and nearly two years since, before bringing the suit, and without extenuation or excuse. It would be difficult to find a case in the books of greater change in the situation and value of the lands and the circumstances material to the relief, occasioned by the delay, or in which specific performance has ever been granted under such circumstances. Although it may not be impossible to select, locate, and identify the lands within the intention of the contract, it has certainly been rendered much more difficult and uncertain by the death of one of the parties whose personal knowledge would seem to be requisite, if not necessary, to determine what lands were meant by "stump lands," and the meaning of the other unusual conditions of the contract. The material testimony of Thomas B. Scott has been utterly lost by the delay. He refused to convey the lands, and could do no more than to await the suit of the plaintiff for the specific performance or for the breach of the contract. The plaintiff waited until the Statute of Limitations had nearly run on the contract before bringing his suit.

"It is a settled principle that specific performance of a contract of sale is not a matter of course, but rests entirely in the discretion of the court, upon a view of all the circumstances." Chancellor KENT, in Seymour *v.* Delancey, 6 Johns. Ch. 222. "A matter not of absolute right in the party, but of sound discretion in the court." 1 Story's Eq. Jur. § 769. "Specific performance will not be decreed when for any reason it would be inequitable. 'It is an application to sound discretion.'" Chief Justice RYAN, in Williams *v.* Williams, 50 Wis. 311. "The jurisdiction . . . is not compulsory upon the court, but the subject of discretion." Lord ERSKINE, in Radcliffe *v.* Warrington, 12 Ves. 331. The learned counsel of the appellant has cited in his brief numerous authorities to the same effect, but the principle is elementary, and the above authorities are sufficient.

In consideration of the peculiar circumstances of this case, we cannot but think that it would be an abuse of sound discretion to grant such relief. "Unreasonable delay in bringing suit for the specific performance of a contract to convey will be a defense to the relief, especially where the other party has made improvements in the meantime, or the property has greatly increased in value." Johns *v.* Norris, 22 N. J. Eq. 102. The delay of only about two years was held sufficient to defeat the action in Haughwout *v.* Murphy, 21 N. J. Eq. 118, and Merritt *v.*

Brown, 21 N. J. Eq. 401. Where one party to the contract has notified the other party that he will not perform it, by refusing to convey as in this case, acquiescence in this by the other party, by a comparatively brief delay in enforcing his right, will be a bar to this remedy, McDirmid *v.* McGregor, 21 Minn. 111. Change in the circumstances of the parties, and in the situation of the subject matter of the contract, the destruction of evidence, and the death of one of the parties to the contract, who if living could make clear what his successor might not be able to explain, are mentioned in Anthony *v.* Leftwich, 3 Rand. Va. 238, as reasons for denying the relief. In Ruff's Appeal, Williams *v.* Williams, 50 Wis. 311, a railroad had been built which brought the lands within reach of the market, and greatly enhanced their value, and some of the lands had been sold, and the plaintiff laid by for years while these changes were going on. It was held inequitable to decree specific performance. That was very much like this case. The lands have been sold for taxes, and yet the plaintiff waited until they became vastly enhanced in value by railroad and other improvements. Specific performance will not be enforced if for any reason it is inequitable to do so. Williams *v.* Williams, 50 Wis. 311. The following authorities enforce the principle that laches and unreasonable delay in bringing suit will defeat an action for specific performance of a contract to convey. Pom. Spec. Perf. §§ 407, 408, and cases cited; Fry Spec. Perf. §§ 1072, 1078, 1079; Eads *v.* Williams, 4 De Gex, M. & G. 691; Watson *v.* Reid, 1 Russ. & M. 236; Southcomb *v.* Bishop of Exeter, 6 Hare 226; Harrington *v.* Wheeler, 4 Ves. 686; Alley *v.* Deschamps, 13 Ves. 225; McWilliams *v.* Long, 32 Barb. 194; Delevan *v.* Duncan, 49 N. Y. 485; Davison *v.* Associates, 71 N. Y. 333; Henderson *v.* Hicks, 58 Cal. 364; Taylor *v.* Merrill, 55 Ill. 52; Smith *v.* Lawrence, 15 Mich. 499; Holt *v.* Rogers, 8 Pet. 420; Preston *v.* Preston, 95 U. S. 200; State *ex rel.* Polk Co. *v.* West, 68 Mo. 229. See other cases cited in appellant's brief.

The reasons are abundant why equitable relief should be denied in this case. The disparity in the value of the lands, of from twenty to fifty fold over their value when the contract was made or when it was to have been performed, is ample reason to leave the plaintiff to his legal remedy for the breach of the contract.

In analogy to all other like cases, as in the sale of personal property, or for the breach of the covenant of seizin in deeds, the plaintiff would be entitled only to recover the consideration paid and interest, on the difference between that and the value of lands when they ought to have been conveyed, or at most, and by the most liberal rule, the value of the lands at the time of the breach of the contract. The equitable remedy in this case would be so extravagantly greater than at law that it would scarcely seem to be in the same case.[1]

[1] "The property has greatly changed in value if not in condition, and the title has, by divers conveyances and devices, passed into other hands, and the

1. DEFECTS IN THE TITLE, THE QUANTITY, OR THE QUALITY OF THE ESTATE.

STAPYLTON *v.* SCOTT.

IN CHANCERY, BEFORE LORD CHANCELLOR ELDON, 1809.

[16 *Vesey Junior* 272.]

An exception was taken to the Master's Report in favor of the title of the defendants to the premises, for the purchase of which the plaintiff had contracted, Stapylton *v.* Scott, Ante, Vol. XIII. 425. The objection arose upon the will of the testator John Nicholson; devising his undivided moiety or half part of the dwelling house, etc., and all his other shares, proportions and interest, if any, in the premises to the defendants upon trust to sell.

The LORD CHANCELLOR [ELDON]. The habit of this court formerly was, not to refuse the decree for a specific performance upon the ground that the title was doubtful. The court, relying on its own opinion in favor of the title, would not admit any doubt detracting from the value of that opinion; and the notion was very generally entertained, that the true way of getting rid of the difficulty, arising from any doubt, was by an appeal to the House of Lords. The course has, however, varied entirely; and it has been held repeatedly, that, though in the judgment of the court the better opinion is, that a title can be made, yet, if there is a considerable, a rational, doubt, the court has not attached so much credit to its own opinion as to compel a purchaser to take the title; but leaves the parties to law. The first modern case of that sort was, I believe, Shapland *v.* Smith (1 Bro. C. C. 175; ante, Cooper *v.* Denne, Vol. I. 565, and the note, 567; 4 Bro. C. C. 80; Lowes *v* Lush. XIV. 547, and the ref-

estates and interests of the owners are complicated so that a specific performance cannot be awarded without great danger of doing injustice. In other words, the situation of the parties and the condition and value of the property have so greatly changed during the time that elapsed between the making of the contract and the bringing of the action, that it is not a case for a specific performance within the rules governing courts of equity in administering this branch of their jurisdiction. . . .

"The time within which actions may be brought for specific performance of contracts has not been extended by implication by the statutes prescribing a time within which the action must in all cases be brought. The question still remains, and must be decided in each action, although brought within the statutory limit as to time, whether under the peculiar circumstances equity and good conscience require that the contract shall be specifically performed or whether the party should be left to his remedy at law for the non-performance." Per CHURCH, C. J., in Peters *v.* Delaplaine, 1872, 49 N. Y. 362, 365.

erences, 548, note; and XI. 465, note; Biscoe *v.* Perkins, 1 Ves. & Bea. 485; see 495. In Sloper *v.* Fish, 2 Ves. & Bea. 145, Sir WILLIAM GRANT, M. R., observes, that this was not first introduced by Lord THURLOW; but is at least as old as Sir JOSEPH JEKYLL'S time; and was repeatedly acted upon by Lord HARDWICKE. See the references in the note, 149); in which Mr. Hett differed from Baron EYRE; and the opinion of the former was confirmed by Lord THURLOW who, however, felt the doubt so forcibly that he refused a specific performance, and unquestionably in many instances since that time it has been refused where there was reasonable doubt upon the title.

The doubt in general cases has been, not of the same nature as this, but upon matter of law respecting the title: yet, if there is as rational a doubt, whether in this instance the testator had the entirety of the premises, as if the title was affected by an objection of law. I cannot see the ground for a different principle. Considering this question, first, generally, without the special circumstances, it appears, that the testator John Nicholson, who became the owner of the entirety in 1781, made his will in 1801; devising these premises by express description as one undivided moiety; and, instead of describing the other moiety, he devises all his other shares, proportions and interest, if any; not asserting, that he has any, to trustees to sell; and it appears by a subsequent instrument, on which however I do not lay much stress, that the same description following in each of those subsequent conveyances. Taking the principle to be, that a purchaser shall have a reasonably clear title, can this be so represented? Admitting, that it may be explained by extrinsic circumstances, that the testator's doubt can be accounted for, the true question is, whether this is a reasonably clear, marketable, title, without that doubt as to the evidence of it, which must always create difficulty in parting with it. I am satisfied, that it is not.[1]

PYRKE *v.* WADDINGHAM.

IN CHANCERY, BEFORE SIR GEORGE JAMES TURNER, V. C., 1852.

[10 *Hare* 1.]

VICE-CHANCELLOR:[2] The bill in this case is filed by a vendor against a purchaser, for specific performance; and the question in the cause is, whether the vendor has shown such a title as the court will compel the purchaser to accept.

It is not disputed that the vendor has shewn a good title, upon the

[1] A small part of the case has been omitted.

[2] The statement of facts and arguments of counsel are omitted.

true construction of the will of Thomas Pyrke, the testator. It is clear either that Joseph Watts, who, after the death of the testator, assumed the name of Pyrke, and became Joseph Pyrke the elder, took an estate tail in possession, or even in remainder expectant upon the estates given to his sons; or that the sons of Joseph Pyrke the elder, who had several sons, some of whom are yet living, took estates either in tail or in fee; or lastly, that the remainders in favour of Robert Pyrke and the Skippes are contingent, and not vested remainders: but the title of the vendor is questioned upon all these points.

It has now for so long a time been the settled rule of courts of equity not to compel a purchaser to accept a doubtful title, that it is quite unnecessary for me to make any observations upon that subject, but, in considering this case, I have found it necessary to look into the question, what titles are to be considered as doubtful within the meaning of this rule. Whether the rule applies only in those cases in which the court itself entertains doubts upon the title, or whether it extends further to cases in which, although the court itself may entertain an opinion in favour of the title, it is satisfied that that opinion may fairly and reasonably be questioned by other competent persons. I have, therefore, examined the cases upon this point; and, upon examining them, I do not think that the question is open to much doubt; for in Marlow *v.* Smith, 2 P. Wms. 198, one of the earliest, and in Price *v.* Strange, 6 Madd. 159, 164, one of the latest cases on the subject, there are distinct opinions upon the question. In Marlow *v.* Smith, the then Master of the Rolls not merely expresses his own opinion against the title, but adds, and "there being the opinion of learned men against the title, I will not, nor do I think it reasonable that a court of equity should, compel the purchaser to accept the purchase;" and in Price *v.* Strange, Sir JOHN LEACH, though he expressed his opinion in favour of the title, declined to compel the purchaser to accept it.

There is also the case of Rose *v.* Calland, 5 Ves. 186, in which I find the Lord Chancellor saying "I should be in a strange situation in desiring a purchaser to take this title, because I think the point a good one, though the Court of Exchequer have determined against it. It is telling him to try my opinion at his expense," 5 Ves. 188. And these dicta and decisions seem to accord with the principle on which the rule appears to be founded; for it may be collected from what fell both from Lord ELDON and Lord REDESDALE in Bloss *v.* Lord Clanmorris, 3 Bligh, 62, 71, and afterwards from Lord ELDON in Lord Braybroke *v.* Inskip, 8 Ves. 417, that the rule rests upon this, that every purchaser is entitled to require a marketable title; by which I understand to be meant, a title which, so far as its antecedents are concerned, may at all times, and under all circumstances, be forced upon an unwilling purchaser. I think, therefore, that in these cases it is the duty of the court not to have regard to its own opinion only, but to take into account what the opinion of other competent persons may be; and that this is the true rule to be applied

in such cases, is, I think, the more apparent, from the repeated decisions that the court will not compel a purchaser to take a title which will expose him to litigation or hazard, of which Cooper *v.* Denne, 4 B. C. C. 80, Crewe *v.* Dicken, 4 Ves. 97; Roake *v.* Kidd, 5 Ves. 647; Sharp *v.* Adcock, 4 Russ. 374, and Price *v.* Strange, 6 Madd. 159, may be mentioned as instances.

Such, then, being the rule by which the court is to be guided in enforcing or refusing to enforce specific performance in cases of this nature, it may well be asked by what scale are the doubts which may be entertained upon the title to be measured; and the cases, I think, throw some light upon this question also. If the doubts arise upon a question connected with the general law, the court is to judge whether the general law upon the point is or is not settled, enforcing specific performance in the one case, as in Moody *v.* Walters, 16 Ves. 283, 312, and Biscoe *v.* Perkins, 1 V. & B. 485, 493; and refusing to enforce it in the other, as in Blosse *v.* Lord Clanmorris, 3 Bligh, 62, and Sloper *v.* Fish, 2 V. & B. 115. If the doubts arise upon the construction of particular instruments, and the court is itself doubtful upon the points, specific performance must of course be refused, as in Sheffield *v.* Lord Mulgrave, 2 Ves. jun. 526, 529, Willcox *v.* Bellaers, 1 T. & R. 491, 495, and Jervoise *v.* The Duke of Northumberland, 1 J. & W. 559, 569, the doctrine in which case has been followed by the Vice-Chancellor KNIGHT BRUCE in The Earl of Lincoln *v.* Arcedeckne, 1 Coll. 98, and even though the court may lean in favour of the title, its duty is either, as expressed by Lord ELDON in Jervoise *v.* The Duke of Northumberland, following in effect what had been said in Sheffield *v.* Lord Mulgrave, to consider whether it would trust its own money upon the title, or, at least, as stated by the same learned Judge in Lord Braybroke *v.* Inskip, 8 Ves. 428, with reference to the doubt upon the legitimacy, to weigh whether the doubt is so reasonable and fair that the property would be left in the purchaser's hands not marketable. If the doubts which arise may be affected by extrinsic circumstances, which neither the purchaser nor the Court has the means of satisfactorily investigating, specific performance is to be refused, according to Lowes *v.* Lusk, 14 Ves. 547, Hartley *v.* Smith, Buck's B. Cas. 368, and Smith *v.* Death, 5 Madd. 371, 372.

It may be thought, perhaps, that, if the Court is of opinion in favour of the title, a specific performance ought necessarily to be decreed; and the cases of Rushton *v.* Craven, 12 Price, 599, and of Chorlton *v.* Craven, Cited Id. 619, mentioned in it, were cited in support of that position, as was also Clonmert *v.* Whitaker, 2 Jarm., Wills, 373, but in those cases the opinion of the court has been fortified by the opinion of a court of law; and, looking at the other cases to which I have referred, I cannot venture to hold, that, because this court is of opinion in favour of the title, a purchaser is to be compelled to accept it. I think that each case must depend upon the nature of the objection, and the weight which the court may be disposed to attach to it; and that, in determining whether

specific performance is to be enforced or not, it must not be lost sight of that the exercise by the court of its jurisdiction in cases of specific performance is discretionary; and that, as was observed in Cooper *v.* Denne, and Sheffield *v.* Lord Mulgrave, the court has no means of binding the question as against adverse claimants, or of indemnifying the purchaser, if its own opinion should ultimately turn out not to be well founded.

It remains for me only to apply these principles to the present case.

The question upon this title depends, I think, principally, if not wholly, upon the construction of this particular will, and not upon any general rule of law. I have fully considered the questions, and the authorities which were referred to in the argument. My opinion, I do not hesitate to say, is much in favour of the title, more especially upon the point as to the remainders being contingent; but I find myself unable to base that opinion upon any general rule of law, or upon any reasoning so conclusive as fully to satisfy my mind, that other competent persons may not entertain a different opinion, or that the purchaser, if compelled to take the title, might not be exposed to substantial and not merely idle litigation, or even that he would be free from all possible hazard. Upon these grounds, therefore, I am of opinion, that a specific performance ought not in this case to be decreed; and I am the more strongly of that opinion, because I think that, in cases of this nature, where titles may be affected by rights which may hereafter arise, it is the duty of the court to consider how it would act if those rights had actually arisen, and were in the course of active litigation; and I am satisfied, that if the questions which may arise upon this title were now in active litigation between the plaintiff and adverse claimants, I should not feel myself justified in disregarding that litigation, and decreeing a specific performance during its pendency.

It was pressed in argument, that, if I should arrive at this conclusion, a case might be directed; but, the defendant objecting to that course, the plaintiff has no right to insist upon a case. The court refused to send a case both in Rooke *v.* Kidd, in Willcox *v.* Bellaers, and in Sharp *v.* Adcock; and in Sheffield *v.* Lord Mulgrave, where a case had been directed, the court refused to act upon the certificate against the purchaser. I take the rule of the court upon this subject to be, that it will not, against a purchaser, send a case upon a doubtful question of law, any more than it will direct an inquiry upon a doubtful question of fact, and for the same reason, that adverse claimants would not be bound by the result.

The conclusion, therefore, at which I have arrived is, that this bill must be dismissed. I repeat, that I dismiss it, not from any opinion against the title—my opinion being in favour of it—but upon the grounds which I have stated. The bill being dismissed, I must give the defendant the costs. The case of Blosse *v.* Clanmorris is, I think, decisive upon that point.

EMPIRE REALTY CORPORATION *v.* SAYRE.

IN THE APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK, 1905.

[107 *Appellate Division* 415.]

O'BRIEN, J. This action is brought to compel the specific performance of a contract for the exchange of real estate which the defendant refused to carry out on the ground that the plaintiff could not give a marketable title to the premises which it agreed to convey. These premises consist of a corner lot in the City of New York, having a frontage of about fifty feet on University place and eighty-two and one-half feet on Twelfth street, upon which lot is standing a ten-story building erected in the year 1899-1900, and valued in the contract of sale at $387,500.

The title to this property was held to be unmarketable by the learned court at Special Term, for the reason that the building encroached upon two adjacent streets, the nature of the encroachment being described in the 3d and 4th findings of fact, which are as follows:

"III. The lower portion of the building on plaintiff's premises is constructed of stone, except the doors and windows, and for two stories the stone piers are channeled longitudinally at regular intervals, the channels being about two inches in depth. The outer surface of this stone work projects both on University place and Twelfth street two inches over the street line, the inner surface of the channels being on the line.

"IV. As to the two lower stories of the building in question, the superficial area of the portion of the wall which encroaches on the street is much larger than the superficial area of the inner surface of the channels. It does not appear that so much of the stone work which thus encroaches bears any part of the weight of the building, nor does it appear what the cost would be of cutting off the projecting stone work, or what effect such cutting would have on the appearance of the building."

No exception was taken to these findings, and the court must, therefore, adopt the facts there stated as the basis upon which to rest its determination as to the marketability of the title.

In approaching the consideration of this question it must be borne in mind that there is no claim made that the encroachment affects any property rights in and to the easements of light, air and access which may be possessed by owners of other property abutting upon these streets. It is also to be observed that the encroachment is within the stoop and area line, or, in other words, within that part of the sidewalk which in a proper case and by the exercise of proper authority may be withdrawn from the use of the general public. Broadbelt *v.* Loew, 15 App. Div. 343; affd., 162 N. Y. 642. Under these circumstances the only party that has the legal authority to question the right of the owner to maintain the building as it now stands is the City of New York.

As to the city, it may be assumed, although there is no evidence upon the subject, that in contemplation of the erection of the building the then owner observed the preliminary requirements of filing with the proper city department, the department of buildings, the necessary plans, and that the building was erected with the consent of the city after it had approved of these plans. Any contrary assumption would be based upon the conclusion that the city officials had failed to perform their duties by permitting an owner to erect a building without complying with the legal requirements, and such an assumption will not be indulged in in the absence of proof to sustain it. So far as the record shows, no complaint has been made by the municipality concerning the encroachment and no steps have been taken looking toward its removal, although the building has now been standing for about five years. Under these circumstances is not the possibility of hostile action by the city so remote that it should not be regarded as affecting the marketability of the title? Would this not be a case where the principle *de minimis non curat lex* would apply?

It is undoubtedly the rule of law that a purchaser will not be compelled to take property the possession of which he may be obliged to defend by litigation. He should have a title that will enable him to hold his land free from probable claim by another, and one that, if he wishes to sell, would be free from any reasonable doubt that would interfere with its market value. Fleming *v.* Burnham, 100 N. Y. 1; Greenblatt *v.* Hermann, 144 id. 13; McPherson *v.* Schade, 149 id. 16; Blanck *v.* Sadlier, 153 id. 551; Heller *v.* Cohen, 154 id. 299; Moot *v.* Business Men's Investment Assn., 157 id. 201; Brokaw *v.* Duffy, 165 id. 391; Salisbury *v.* Ryon, 105 App. Div. 445. But this rule will not operate in every case to bar the enforcement of a contract of sale. As said in Cambrelleng *v.* Purton, 125 N. Y. 610, 616: "If the existence of the alleged fact, which is claimed or supposed to constitute a defect in or cloud upon the title, is a mere possibility or the alleged outstanding right is but a very improbable or remote contingency, which, according to ordinary experience, has no probable basis, the court may in the exercise of a sound discretion, compel the purchaser to complete his purchase." Ferry *v.* Sampson, 112 N. Y. 415. It has been well said that this discretionary power is to be carefully and guardedly exercised, and applied only in cases free from all reasonable doubt, Ferry *v.* Sampson, *supra;* Moore *v.* Williams, 115 N. Y. 586; Mutual Life Ins. Co. *v.* Woods, 121 id. 302, but when such a case arises, then the court will not refuse to exercise it. In the present case the encroachment is slight, and the rights of abutting property owners, as already indicated, are not affected by it. It was not caused, so far as the record shows, either through bad faith or wilfulness on the part of the owner who erected the building, and the city has acquiesced in the situation for five years. In view of all these facts it seems to us that the possibility of an attack is so remote as to take the case out of the operation of the general rule and place it within the ex-

ception where the court should exercise its discretion and direct that the contract be enforced.

Our conclusion in this respect is strengthened by the fact, of which we can take judicial notice, that twice within recent years the State Legislature has sanctioned the continuance of greater encroachments upon public streets. By chapter 610 of the Laws of 1896, amdg. Consol. Act (Laws of 1882, chap. 410), § 471, it was provided that "if the front or other exterior wall of any building now standing in said city shall extend not more than four inches upon any street, avenue or public place, such wall shall not be removable unless an action or proceeding shall be instituted by or in behalf of . . . the City of New York within the period of one year from the passage of this act, for the removal of said wall." And in 1899 a similar act was passed (Laws of 1899, chap. 646) legalizing walls theretofore erected which projected not more than ten inches upon the street unless an action or proceeding for their removal should be commenced within a year from the passage of that act. This legislation is of some importance as indicating, to an extent at least, the attitude which the city and the State may be expected to take in the future in relation to buildings erected subsequent to 1899 in good faith and upon plans which the city has approved, but which buildings may, to a slight extent, encroach upon a public thoroughfare.

We think that the contingency of an attack upon this title is so remote that a reasonably prudent man would not refuse to accept it, and that the court at Special Term was wrong in its conclusion that the title was unmarketable by reason of the encroachment. See Klim *v.* Sachs, 102 App. Div. 44; Volz *v.* Steiner, 67 id. 504; Webster *v.* Kings Co. T. Co., 145 N. Y. 275. . . .

Upon the trial the further claim was made by the defendant that the plaintiff was not entitled to a specific performance of the contract because it contained the covenant that the property should be free from incumbrance except one mortgage therein mentioned, and it was urged that the evidence established the existence of another incumbrance, to wit, an easement in favor of the tenants of the adjoining building in a covered stairwell located in the premises contracted to be conveyed. A careful reading of the record satisfies us that the evidence fails to establish such an easement. In relation to this it appears in one corner of the building and running from the top to the bottom, there is a triangular space, one side being formed by the party wall between this building and the adjoining one, and the other two sides being formed by interior walls of this building; that the triangular space is occupied by a stairway with a door opening upon it from each floor of this building, and also one opening upon it from each floor of the adjoining building; that the stairway is, to an extent, used as a storage place for pails, brooms, etc., by the tenants of the adjoining building, and that at the time the leases with these tenants were made there was a common owner of the two buildings. Further than this nothing appears tending to support the claim

that these tenants have an easement in the stairwell. It is not shown that, by their respective leases, they acquired any right to use it, and so far as anything in the record discloses their use of it may be under a mere license, revocable at any time. As to the plaintiff itself, it denied that any such easement existed in favor of the tenants, and as it was the owner of the adjoining property as well as the premises in suit at the time the contract of sale was made, it would be estopped by reason of its covenant against incumbrances from asserting an easement in its own favor in the stairwell.

Furthermore, the existence of this alleged easement was a question of fact to be determined by the court at Special Term, and not only, as we have already shown, does the evidence fail to warrant any finding that such an easement existed, but no question as to it is properly before this court. Apparently no request was made to the court at Special Term to find, as a matter of fact, that such easement existed, and no exception appears in the record by which the failure to so find can be reviewed by us.

Other objections were raised to the marketability of the title, on the ground that certain cornices, window shutters, fire escapes, etc., encroached upon adjoining property, and also that there was an encroachment by a cornice of an adjoining building upon the property contracted to be conveyed. We have examined the record in relation to all these alleged defects of title, but we do not consider any of them of sufficient materiality or importance to warrant specific consideration. It is sufficient to say that in our opinion they do not render it unmarketable. It follows, therefore, that the court at Special Term, upon the evidence presented to it, was not justified in holding that the title was unmarketable, and the judgment dismissing the complaint and rescinding the contract must be reversed.

If upon a new trial it shall then be made to appear that such an easement exists and constitutes a material incumbrance upon the property, then it would be a violation of the covenant in the contract of sale against incumbrances, and might present a valid ground for holding that such contract was not enforcible. In view of the possibility of such a situation arising, it may be proper for us at this time to consider the appeal now taken by the defendant from that portion of the judgment which excludes from the damages awarded him the amount paid his brokers as commissioners in securing the contract.

The measure of damages in this class of cases, where a vendor, although acting in good faith, is not able to convey a marketable title to the land which he has contracted to sell, differs from that which is applicable upon a breach of contract for the sale of personalty. . . .

But whatever the origin of the rule may be, we regard the law as settled that where the vendor, without fraud on his part, is unable to convey a marketable title, the vendee is not entitled to damages for the loss of his bargain, beyond the money paid with interest and expenses

resulting from the obligations of the contract itself, although the completion of the bargain might have been profitable to him. But where the vendor is guilty of collusion, tort, artifice or fraud, the vendee is then entitled, not only to compensatory damages, but to damages arising from the loss of the bargain, or the money he might have derived from its completion. Northbridge *v.* Moore, *supra;* Cockcroft *v.* N. Y. & H. R. R. Co., 69 N. Y. 201; Leggett *v.* Mutual Life Ins. Co. of N. Y., 53 id. 394; Pumpelly *v.* Phelps, 40 id. 59; Conger *v.* Weaver, 20 id. 140; Bitner *v.* Brough, 11 Penn. St. 127; Morgan *v.* Bell, 3 Wash. 554, 578; 16 L. R. A. 614, 623. As stated by the Court of Appeals in the Northbridge Case, *supra:* "The vendee in a contract for the sale of land is not ordinarily entitled, upon breach or failure to convey, to recover of the vendor damages measured by the goodness of his bargain or the financial benefit which would result from performance, and it is only when the vendor is for some reason chargeable with bad faith in the matter that recovery beyond nominal damages on that account can be had. If the vendee has paid any of the purchase money he may recover that back, and he may also recover such expenses as he has reasonably incurred in examination of the title to the property. This is the general rule."

Only one case has been called to our attention where the court has enlarged the measure of damages as above set forth, so as to permit a recovery which would include the commissions paid to a broker. That is the case of Hening *v.* Punnett, 4 Daly, 545, decided at Special Term in 1873, where an action was brought by a vendor to recover from the vendee the damages caused by the latter's failure to complete the purchase, and the court without discussion or citation of authority held that he was entitled to recover as damages the commissions which he had paid his broker.

The General Term of the Superior Court of New York, however, in 1893, specifically refused to follow the Hening case in the later case of Steers *v.* Laird, 3 Misc. Rep. 408. . . .

It is to be observed that the broker's commissions which the present defendant seeks to recover had nothing to do with the obligations of either party under the contract itself. The commissions were not incurred in performing that contract, but in procuring it.

The recoverable damages are such as flow from the breach, and they include, in addition to the amount paid upon the purchase price, only the expenses incurred in the attempt to carry out the contract, and which were caused or assumed by its obligations. To this class of damages belong those recovered in Cogswell *v.* Boehm, 5 N. Y. Supp. 67. In that case the vendee had unreasonably refused to accept title, and the plaintiff had thereby been compelled to borrow money to pay a mortgage upon the premises, and it was held that he could recover as his damages the amount of legal commission paid for securing the new loan, and the attorney's fees and disbursements connected therewith. But those expenses, it will be observed, were incurred subsequent to the execution

of the contract, and resulted directly from its obligations. They, therefore, stand upon a basis different from the broker's commissions in the present case, which were paid, not to carry out, but to procure the contract. That payment was purely personal to the plaintiff, and not within or touching the contractual relations of the parties. The return of the commissions could not have been claimed if the contract had been performed, and the non-performance of it does not give a right to the defendant to recover them, in the absence at least of any provision to that effect in the contract, or any proof tending to show knowledge and assent on the part of the plaintiff which would bind it to the repayment of such commissions. We see no reason upon the facts in this case for enlarging the measure of damages as fixed by the courts in this class of cases extending through a long course of judicial decisions.

We are of the opinion, therefore, that the trial court properly excluded the broker's commissions from the damages which the defendant could recover, but for the reason stated in the discussion of the marketability of the title the judgment must be reversed and a new trial ordered, with costs to the plaintiff, appellant to abide the event.

PATTERSON, HATCH and LAUGHLIN, J.J., concurred.

Judgment reversed, new trial ordered, costs to plaintiff, appellant to abide event.[1]

TWYFORD *v.* WAREUP.

IN CHANCERY, BEFORE LORD CHANCELLOR NOTTINGHAM, 1677.

[*Reports Temp. Finch* 310.]

This bill was to have the performance of articles of agreement made by the plaintiff with the defendant Wareup, for the purchase of the lands in the bill, which were accordingly conveyed by the plaintiff to the defendant Wareup, and for which Wareup was to pay £6,500 and that with part thereof he was to pay off several statutes and incumbrances; and it was by the said articles agreed, that Wareup should obtain several inclosures of common, which if obtained by a decree would be of great advan-

[1] Commenting on the principal case, the Columbia Law Review says: "While it is usually said that specific performance will not be granted the vendor if the likelihood of litigation is considerable, Fry, Specific Performance, § 870; Pomeroy, Specific Performance, §§ 347, 352, the cases cited refused the relief wherever any adverse claim existed, and allowed it whenever such claim was absent. Moreover, the relief has been denied where a reasonable claim existed, although the probability of its enforcement was no greater than in the principal case. Seaman *v.* Hicks, N. Y. 1841, 8 Paige, 655; Smithers *v.* Steiner, N. Y. 1895, 13 Misc. 517; Klim *v.* Sachs, N. Y. 1905, 102 App. Div. 44.

tage to him, and the commons worth 40s. per acre; and that the enclosures would be obtained for a small charge, and that the plaintiff should be at that charge.

That Wareup refuses to pay the remaining part of the purchase money, being £1,500 for that in the particular given of the estate, and which was the foundation of his agreement, there were several things very false; for that the lands did not contain the quantity of acres therein mentioned; and in one place there is but one life charged to be in being, when there were two lives then subsisting; and in another place two lives are charged, when there were three lives, etc.

The court declared, that though the covenant in the articles was, that the lands completely contained so many acres as mentioned in the particular; yet in that very particular, and likewise in the conveyance it is mentioned to contain so many acres by estimation; so that if there were four or five acres more, the plaintiff cannot have them back again, and if there were so many less, the defendant must take it according to the conveyance.

That the articles were only a security and preparatory to the conveyance, and the defendant having afterwards taken a conveyance, shall not resort to the articles, or to any particular, or to any averment or communication afterwards; for such things shall never be admitted against the deed; and therefore there was no reason to make the defendant any allowance for the defect in the articles; but that he should have allowance for more lives than were charged in the particular, but none for defect of commons.

HOWLAND *v.* NORRIS.

IN CHANCERY, BEFORE LORD CHANCELLOR THURLOW, 1784.

[1 *Cox Chancery* 58.]

This was a bill to compel a specific performance of an agreement under the following circumstances:

The plaintiffs, trustees under a will, sold to one Norris, at auction, the premises in question, Norris purchasing on behalf of Earl Stanhope,

If the cases are looked at from the point of the actual facts in issue, it would seem that the test for specific performance might well be the existence of a litigable claim rather than the probability of litigation. From the meager facts it cannot be determined whether the principal case comes within the well established rule compelling acceptance when the failure of title is to an unessential part only; but in closely analagous encroachment cases, specific performance has been denied, the courts holding this rule did not apply. Smithers *v.* Steiner, *supra;* Klim *v.* Sachs, *supra.*" 6 Columbia Law Review, 57.

Norris died and the present bill was brought against the representatives of Norris and against Earl Stanhope.

In his answer, Earl Stanhope objected to completing the purchase on the ground that the estate was not as represented, being subject to a tythe instead of being tythe free; that it had not an unlimited right of common, the common being for sheep only; that it had, since the sale, been let at £127 per annum instead of for £150, as contracted for; and that there were several other smaller circumstances in depreciation (mentioned). While objecting to any performance, he claimed that if the court thought he ought to carry the contract into execution, he was entitled to compensation for the defects mentioned.

The plaintiffs did not object to performance with compensation.

LORD CHANCELLOR. To be sure, if this case came before me as a new one, I should think it would require a great deal of consideration indeed, before I compelled the defendant to go on with this agreement; for if there be any material difference between the real subject of the contract and what the party supposed he was contracting for, such as the party may fairly and conscientiously be supposed to have relied upon in the purchase, he ought in justice to be discharged from it. But it would now overturn a great many cases. I remember a case where a man purchased an estate, part of which was a wharf, and where the wharf appeared to be the whole object of his making the purchase; yet, the vendor not being able to make out a title to the wharf, the court made him take the estate without it.[1] There are fifty cases which go farther than the present, where the court has made the party accept of a compensation; and however these cases were first established, it is now settled that wherever it is possible to compensate the purchaser for any article which diminishes the value of the subject matter, he must be satisfied with such compensation; or to speak in the usual terms, wherever the matter lies in compensation: but I cannot lay down this rule as universal, for a case may be so cir-

[1] Two years later than Howland *v.* Norris, Hon. JOHN VERNEY, M.R., said: "The court has most certainly gone a very great length in compelling parties to go on with purchases contrary to their original agreement and intention; but I am clearly of opinion that a case might be made where, if it turned out that the seller could not make a good title to a part, it might be a sufficient reason to put an end to the whole contract. Such was the case of the Cambridge wharf, where it appeared that the seller could make a good title to all the estate but the wharf, which was the principal object of the buyer in making the agreement. In that case the buyer was compelled to complete his purchase without the wharf, but it was a determination contrary to all justice and reason. But in the present case I am bound to suppose that the lots (two from an entire estate), to which no title can be made, are not of sufficient importance to make the loss of them a reason for vacating the agreement as to the remainder. The steps already taken in the cause by the Lord Chancellor must have proceeded on the ground that the agreement was to be executed, notwithstanding this defect." Poole *v.* Shergold, 1836, 1 Cox Ch. 273, 274.

cumstanced that the party may have purchased purely for the sake of the very particular wanting. The case of the wharf was nearly this: and if I had been to have judged of that case, and if it had appeared that the purchaser was in a trade in which that wharf was essentially useful, and that he made his purchase for the sake of his trade, I should not have thought that it interfered with the general rule, if I had discharged him from his contract; and other cases may be put of a similar nature; but wherever the general doctrine will apply, the remedy must lie in compensation.

His Lordship referred it to the Master to inquire whether the sum of £5,928, residue of the said purchase money had been for any and what period of time set apart by Lord Stanhope to answer the purchase, and, in contemplation of such purchase being completed; and also to inquire what compensation ought to be made to Lord Stanhope for the several particulars mentioned by him in his answer. Reg. Lib. A. 1783, fol. 337.[1]

[1] In Binks *v.* Lord Rokeby, 1818, 2 Swanst. 233, "the Master [Sir THOMAS PLUMER] certified that a good title could be made, except that the particulars of sale stated about thirty-two acres of the estate to be tithe free, whereas no sufficient evidence had been produced to him of any part thereof being tithe free." . . .

The Lord Chancellor [ELDON]. "There seems little reason to doubt that the vendor will eventually obtain both a compensation for a supposed liability of part of this estate to tithe, and also the advantage of the fact that it is not liable. I mention that for the sake of the observation, that if this had been a case in which the greater part of the lands sold had been subject to tithe I should not have followed the doctrine that the purchaser of an estate described as exempt from tithe shall be compelled to take it subject to tithe; but here only a small part was described as exempt; and the fourth condition of sale expressly stipulates that errors in description shall not vitiate the sale. I was therefore of opinion that the purchaser must accept the estate."

"Then is this a case in which specific performance with compensation ought to be ordered? It has been suggested that compensation may be given in one of three several ways, and first by a partition by the court. I am by no means satisfied that if a partition had been effected before the time for completion, and four acres out of the estate had been allotted to the vendors, that the purchaser would have been bound to complete; for in any proceeding to enforce the contract against him, I am disposed to think that he would have been entitled to say that it was a contract to sell the whole of the piece of land surrounded by the mauve color on the plan. But be that as it may, no such partition has been obtained, and it might take weeks or months to obtain it. It is then said that it may be attained by a partition or exchange through the Inclosure Commissioners. Both these proceedings may, and probably would, take a long time, and is the purchaser to complete and take the chance of his being able to obtain such partition or exchange after he had completed his purchase, or is he to postpone the completion of his purchase till it is done? As far as regards exchange, it appears to me monstrous to say, 'We will let you have the seven acres at the bottom

DREWE *v.* CORP.

IN CHANCERY, before SIR WILLIAM GRANT, M.R., 1804.

[9 *Vesey* 368.]

An exception was taken by the plaintiff to the Master's report, against his title to the estate contracted by him to be sold to the defendant; the estate being described as freehold; but the plaintiff's title being a mortgage term of 4,000 years, foreclosed.

The MASTER OF THE ROLLS [SIR WILLIAM GRANT] said, there was no instance of compelling a man, who has contracted for a freehold estate, to take a leasehold estate. Where the party gets substantially that, for which he contracts, any small difference may be remedied by conpensation; but not where it extends to the whole estate. See ante, Drewe *v.* Hanson, Vol. VI, 675. Calcraft *v.* Roebuck, I, 221, and the note, 226. In Fordyce *v.* Ford, 4 Bro. C. C. 494, where the term was 2,000 years, almost as good as this, Lord ALVANLEY'S opinion was, that the objection, if taken, would have been a good objection to a specific performance of the contract. But the purchaser had gone on after notice; and had taken objections to the title as leasehold.

The exception was disallowed; and the cause coming on for farther directions, the Bill, for a specific performance of the contract, was dismissed.

of your property, but you shall give up the four acres in another material part of your property comprising a frontage on the road.' As regards the only remaining mode in which compensation could be given, viz., pecuniary compensation, that is only adopted in a case where there is a trifling difference between the actual state of the property and the state in which it was represented to be by the vendors. When the property conveyed falls short of the right number of acres to a small extent, or comprises a larger number of acres, pecuniary compensation may be given or taken by the one side or the other, but no case is present to my mind in which pecuniary compensation has been given when the property to which a title cannot be made is a material part of the property bought. If there had only been a want of title to a little bit of land in a remote part of the property, the purchaser might be ordered to complete with compensation; but this piece with a long frontage to a high road is so material to the enjoyment of the rest that I am satisfied it is not, according to the authorities, a proper case for compensation. I agree that the appeal must be allowed.

"But it seems that a practice sprang up in the courts of equity of disregarding the old, sensible rule that a bargain is a bargain, and that people should be held to it, and of making bargains for the contracting parties which they never would have made for themselves. Lord ELDON said that in his time the court was becoming more and more in the habit of holding people to the contracts they had made. That is what I humbly venture to

PEERS *v.* LAMBERT.

IN CHANCERY, BEFORE LORD LANGDALE, M. R., 1844.

[7 *Beavan* 546.]

This was a bill for specific performance of an agreement.

The plaintiff put up some property for sale by auction, which, in the particulars of sale, was described as a very valuable copyhold property, known as Ashton's Wharf, consisting of superior water-side premises, first-rate wharf, with jetty, extensive warehouses, rigging-house, counting-house, and shop, situate at Blackwall.

The defendant became the purchaser for £5,820, and a bill for specific performance having been instituted, it was referred to the Master to ascertain whether a good title could be shown.

The Master reported "that a good title could be made to the said premises, except as to a certain jetty in the agreement mentioned: and he found, that such good title, except as aforesaid, was first shown before the institution of this suit. And as to the said jetty to which a good title could not be made according to the said agreement, he found that the same was a wooden structure, with a wooden top placed upon wooden piles, between high and low water mark of the river Thames, and was subject to the regulations of the navigation committee of the Corporation of the City of London, and liable at any time to be removed, in case the

think should be the rule, and I trust that this case will be a step further in that direction." Per Lord Justices BAGALLAY and BRAMWELL in *In re* Arnold, 1880, L. R. 14 Ch. Div. 270, 282, 284.

In Paton *v.* Rogers, 1813, 1 Ves. & B. 351, where the purchaser was resisting performance of the contract, Lord Chancellor ELDON said: "The general rule is, as I see it, stated in Blyth *v.* Elmhirst, that where the record raises merely the question of title, or where it is agreed at the bar that there is no other question, the court will immediately direct a reference to the Master upon the title, following the first decision upon that point by Lord ROSSLYN, in that sort of case both parties agreeing that if there is a good title there ought to be a specific performance; and the parties supply what stands at the head of every such decree, a declaration that the contract ought to be specifically performed; and then a direction to the Master to look into the title. But if the record furnishes the question whether there ought to be a specific performance, the court does not give that reference, as upon other circumstances a question is made whether, even if there is a good title, there should be a specific performance. As to the question of compensation, it is true generally, but not universally, that the purchaser may take what he can get with compensation for what he cannot have, and I doubt whether that is ever done except where there is an express undertaking on his part to do what the court shall order, which, perhaps, may distinguish the case that has been mentioned."

said corporation should think fit to remove the same. And he found that the said jetty was essential to the beneficial occupation and enjoyment of the said premises contracted to be sold as aforesaid."

The plaintiff excepted to the report.

The MASTER OF THE ROLLS concurred with the Master in opinion that the jetty was essential to the enjoyment of the property; and he, therefore, overruled the exceptions, and dismissed the bill with costs.

PERKINS *v.* EDE.

IN CHANCERY, before SIR JOHN ROMILLY, M.R., 1852.

[16 *Beavan* 193.]

Some property, consisting of a residence and about four acres, was sold in suit to Mr. Forbes. The question was, whether a good title could be made. It appeared that part of the property consisted of a slip of ground between the house and the public highway, which the vendors claimed as part of an allotment under an inclosure. This they failed in establishing.

The MASTER OF THE ROLLS. I think it clear that the strip of land, consisting of thirty-eight poles, is not included in the award. It is argued that twenty years' possession gives a sufficient title, but Edwards *v.* McLeay, Sir GEO. COOPER, 308, decided the contrary, and here there is evidence that the door which separated it from the road was bricked up window. This is not a case for compensation.[1]

Under ordinary circumstances this would be a case of compensation, but here is a house with a long strip of land between it and the road, to which there is no title, so that the people in passing can look in at the window. This is not a case for compensation.[1]

[1] "The court will not undertake to compel the defendants, jointly or severally, to purchase the specific property, or to procure the right of way from the city. And it is not a case for compensation, because, conceding that the court might compel the depot company and Sabin to convey a partial interest representing a relative or proportionate share of individual obligors, as above described, the same would be relatively so small, as compared with the whole amount embraced in the contract, that the compensation or damages would apparently be the main object of the suit. In such cases a court of equity will not assess damages as compensation, but only where they are incidental to the principal ground of relief; and the court will leave the party to his action at law unless he will consent to accept the part subject to conveyance without damages." Per VANDERBURGH, J., in Chicago, Milwaukee and St. Paul R. R. Co. *v.* Durant, 1890, 44 Minn. 361, 365.

LESLEY *v.* MORRIS.

In the District Court of Philadelphia, 1873.

[9 *Philadelphia* 110.]

Rule for a new trial. Opinion delivered March 29, 1873, by

Thayer, J. Covenant by vendor against vendee upon articles for the sale of land. The defendant declined to take the land or pay the purchase money. His defence was first, that the plaintiff's title was a tax title, which he contended was not a good and marketable title; and secondly, that the property was subject to certain building restrictions imposed upon it by a former owner in the line of the plaintiff's title.

In answer to the first objection, it was replied that a tax title is, if regular in all respects, a good title, and one which the defendant was bound to accept; and further, that inasmuch as the plaintiff was not only the purchaser at the tax sale, but also administrator *cum testamento annexo* of the person who was owner at the time of the sale, and had under the will a full power to sell and convey, the title could be freed from all doubt by the execution of the power, which the plaintiff was ready to do.

We are not prepared to say that a tax title is not such a title as a purchaser is bound to accept, where it clearly appears that the tax was due and unpaid, that the proceedings were in all respects regular, and that the time of redemption has gone by. But it is unnecessary to decide this. It is a sufficient answer to the defendant's objection, that the plaintiff was, at the time of the trial, in a position to remove the objection, and to make an indefeasable title, and that he was prepared, and offered to do so. It is not a defence to an action for the purchase money of land, that defects of title, or incumbrances, existed at the time of action brought. In Pennsylvania, the law in such cases is administered upon the same principles, and regulated by the same rules which prevail in equity. Where a chancellor would decree a specific performance, there the plaintiff shall recover the purchase money. Where he would refuse it the vendee may refuse to accept the estate and to pay the price of it. The defendant stands upon an equitable defence, and must himself submit to all equitable conditions. Hence, although defects may exist at the time of the bargain made or the bringing of the action, yet, if the vendor has cured them, and is ready at the trial with a good title, he is in time, and entitled to insist upon performance. Hart *v.* Porter, 5 S. & R. 201, and Thompson *v.* Carpenter, 4 Barr, 132, are illustrations of the rule. In the former case, at the time of action brought the land was subject to a widow's dower, but the vendor having obtained a release of it before the trial, it was held that the defence failed and that the purchaser must perform the contract. When defects of title have been

remedied subsequent to the bringing of the action for the purchase money, the only question which remains is, as to who shall pay the costs of the action, and even that, as is said by TILGHMAN, C. J., is an equity which depends on a variety of circumstances in the conduct of the parties.

The plaintiff's answer to the second branch of the defendant's case was, that the building restrictions of which the defendant complains had been removed, by operation of law, by reason of a subsequent judicial sale for taxes, and that if they had not been removed, the restrictions were not in themselves of such a character as seriously to affect the value of the property. . . .

The particular restrictions in the present case arose out of a covenant not to build on a lot any frame or wooden buildings, and that if any piazza or back buildings should at any time be erected, the same should be erected fronting to the south. It would be difficult to maintain that a restriction against the erection of wooden buildings in a locality where their erection is prohibited by law is a restriction which would impair the value of property, or render it inequitable to compel the purchaser to perform his contract. The first restriction, so reasonable in itself, and in such entire accord with the local law, would hardly be a serious impediment in the plaintiff's path. But the second restriction is of a different character. By means of it an absolute and unqualified use is converted into one which is clogged with conditions and restricted in its enjoyment. A perpetual prohibition of this kind fastened upon property has a tendency not only to diminish the enjoyment of the estate but also to affect its marketable value to a considerable degree; a degree very difficult to be measured by any pecuniary allowance to be made to the defendant, and which makes his equity incapable of accurate or reasonable adjustment in money. He did not bargain for an estate fettered by a perpetual restriction upon the enjoyment, but for an absolute and unqualified ownership, and if that which is offered to him is not that which he bargained for, and is incapable of being made such, he ought not in equity to be compelled to accept it.

Rule absolute.[1]

[1] In Rudd *v.* Lascelles, 1900, 1 Ch. 815, the vendee was seeking to enforce a contract for the sale of houses, a workshop, garden and land, with compensation on the ground of undisclosed restrictive covenants as to building and user. FARWELL, J., said: "It is plain that the purchaser was aware of the vendor's ignorance as to her own title, and that there was no representation by the vendor leading the purchaser to suppose he would get an absolute fee simple. I am asked to decree specific performance with compensation. I adhere to what I said in Hexter *v.* Pearce, *ante* p. 341, to the effect that a court of equity will grant the equitable remedy of specific performance in all cases 'unless there has been some conduct on the part of the plaintiff disentitling him to the relief in equity, or in some rare instances where there would be great hardship imposed on an innocent grantor or lessor by reason

HALSEY *v.* GRANT.

IN CHANCERY, BEFORE LORD CHANCELLOR ERSKINE, 1806.

[13 *Vesey* 73]

The bill prayed the specific performance of an agreement by the defendant to purchase premises from the plaintiff. On reference to the Master for ascertaining whether a good title could be made out, the defendant objected, first, that the titles contracted to be purchased were subject to certain perpetual annual rent charges, and to other small charges, and the repairs of the chancel of the parish church of Woking; and secondly, a defect as to the enfranchising of certain copyholds. The

of some mistake which he has made, although the other party has not contributed to it.'

". . . In my opinion, the jurisdiction to enforce specific performance with compensation on a vendor, where the contract is silent as to compensation, rests on the equitable estoppel referred to in Mortlock *v.* Buller, 10 Ves. 292, namely, that a vendor representing and contracting to sell an estate as his own cannot afterwards be heard to say he has not the entirety."

In Anderson *v.* Kennedy, 1883, 51 Mich. 467, GRAVES, C.J., said: "The defendant agreed in writing to convey a strip of land to the complainant for $350. The terms were unconditional. The complainant paid the consideration and demanded a conveyance. The defendant refused to give a deed, and complainant filed this bill to compel specific performance.

"The defendant claimed in his answer that it was verbally understood at the time of the written contract that a certain passageway appurtenant to his homestead should be accepted. He also claimed that his holding was subject to a reservation of minerals, and that he was not aware of this fact at the time of the agreement. He further contended that complainant represented that no mention was necessary in the writing of the reservation of the passageway, and further, that he himself was ignorant that his title was subject to a reservation of minerals, although the complainant was aware of it and did not suggest it.

"An argument is made to show that the complainant acted in bad faith and took a fraudulent advantage; but this is not borne out by the evidence. We discover no marks of fraud whatever. The complainant made no surrender in regard to the accuracy of his own version of the facts, but he consented to waive his rights under the contract as written and to accept performance in precise accordance with the maximum claims of the defendant. He consented to take a deed with the fullest reservation in relation to the stairway and subject to an ample exception of the right to minerals, and the court made a decree in conformity with this offer of complainant, and gave costs to neither party.

"The defendant had no cause to complain. On the facts, as he admits them, the complainant was at least entitled to all the relief granted, and we are inclined to think he might have insisted on something more."

Master was of the opinion that the objection to the titles being subject to the rent and other outgoings and repairs could not be supported; and that the copyholds might be so enfranchised as not to be subject to the demand of such reserved rent, and other outgoings and repairs. The Master therefore reported that a good title could be made.[1]

The LORD CHANCELLOR. This case involves a principle of general importance. The authorities upon this subject are not so satisfactory as I could wish. I am therefore desirous of expressing my opinion with distinctness; that the principle may be understood.

If a court of equity can compel a party to perform a contract, that is substantially different from that which he entered into, and proceed upon the principle of compensation, as it has compelled him to execute a contract substantially different, and substantially less than that from which he stipulated without some very distinct limitation of such a jurisdiction, having all the precision of law, the rights of mankind under contracts must be extremely uncertain. There is no doubt, that this jurisdiction had its origin upon the foundation of a legal right: the law giving the title; but a court of law from the modes, in which justice is there administered, not being capable of giving a complete remedy; all the relief to which the party was entitled. This jurisdicton began so long ago as the time of King Henry the Seventh; and, though courts of equity then proceeded upon that principle, yet the courts of law thought proper to resist the jurisdiction. Bromage *v.* Genning, 1 Roll's Rep. 368, in the 14th year of King James I., was the plainest case that can be stated; and the ground, taken against the jurisdiction, the most untenable, preposterous, and unjust. This most beneficial jurisdiction was in that instance maintained in equity.

When the court of equity had quieted these doubts, and maintained their jurisdiction, they could not confine it to cases of strict legal title; for another principle, equally beneficial, is equally well known and established; that equity does not permit the forms of law to be made instruments of injustice; and will interpose against parties, attempting to avail themselves of the rigid rule of law for unconscientious purposes. Where therefore advantage is taken of a circumstance that does not admit a strict performance of the contract, if the failure is not substantial, equity will interfere. If, for instance, the contract is for a term of 99 years in a farm, and it appears that the vendor has only 98 or 97 years, he must be nonsuited in an action; but equity will not so deal with him; and if the other party can have the substantial benefit of his contract, that slight difference being of no importance to him, equity will interfere. Thus was introduced the principle of compensation, now so well established; a principle which I have no disposition to shake.

In Seton *v.* Slade,[2] ante, Vol. VII, 263; see page 274, Lord ELDON takes

[1] This is an abridged statement of facts.

[2] "There had been several very hard cases under the description of the specific

notice of that, as being the foundation of this jurisdiction. So upon the same contract, for the lease of a farm, with immediate possession; and six months of the old lease are unexpired: the lessee may not want it immediately. He may not look to an immediate entry. In that instance also equity will upon the same principle of compensation interfere. This is the perfection of our jurisdiction. If the rigid construction of the law were relaxed, there would be no safety: but the system is rendered perfect by this healing power of equity; preserving the substantial part of the contract, but not forcing upon the party something different; and the effect is substantial justice.

Upon the several authorities, which are all referred to in the case of Drewe *v.* Hanson,[1] ante, Vol. VI, 675, my opinion concurs exactly with that of Lord ELDON and the Master of the Rolls. I collect from the manner in which the judgment in that case is expressed, that Lord ELDON did not feel disposed to sanction some cases, that go to an extent to which I never will follow. Lord ELDON states his opinion upon the cases of the House and the Wharf, and Shirley *v.* Davis,[2] in the strongest way,

performance of agreements, upon the principle of compensation: that, for instance, when a person contracted for an estate in Essex, with the object of becoming a freeholder of that county, and it turned out to be in Kent: yet he was held to it. So in a case before Sir THOMAS SEWELL, upon an agreement for a leasehold house with a wharf, the object of the purchaser being to be a wharfinger, he was compelled to take the house without the wharf. So, where the object was to purchase an estate tithe free; and he was compelled to take it subject to tithe. The value of the tithe is not a compensation." Per Lord Chancellor ELDON, in Seton *v.* Slade, 1802, 7 Ves. 264, 270.

[1] "Without meaning to say what may be the final decision, I am of opinion, attending to all the circumstances, it is too hazardous to say there is not a fair and reasonable question whether this contract may not be specifically executed. It is certainly to be observed that under the head of specific performance contracts substantially different from those entered into have been enforced. In the case of a contract for a house and a wharf, the object of the purchaser being to carry on his business at the wharf, it was considered that this court was specifically performing that man's contract by giving him the house without the wharf. So in Shirley *v.* Davis, in the Court of Exchequer, the subject of the contract was a house on the north side of the River Thames, supposed to be in the County of Essex; but which turned out to be in Kent; a small part of which county happens to be on the other side of the river. The purchaser was told he would be made a church warden of Greenwich; and though his object was to be a freeholder of Essex, he was compelled to take it. So in Lord Stanhope's Case, the object was to get an estate tithe free; and yet Lord THURLOW obliged him to take it subject to tithes." Per Lord Chancellor ELDON, in Drewe *v.* Hanson, 1802, 6 Ves. 675, 678.

[2] Mr. Belt, in his edition of Brown's Reports, prints as a note to Shirley *v.* Stratton (see p.—) the following: "The owner of the estate (the same plaintiff) afterwards sold the estate again to another gentleman of the name of Davis, under a like concealment of the expenses of the wall. That gentleman's

in which, expressing strong disapprobation with due respect to the decision of another court, it could be stated. In such a case a court of equity has no jurisdiction upon the principle of compensation; and I distinctly say, much as I reverence the Judges, of whose opinions I am speaking, I never will exercise such a jurisdiction.

In the case of Fordyce *v.* Ford, 4 Bro. C. C. 494, this sound distinction was taken by Lord ALVANLEY; that, if the objection that the estate contracted for as freehold was leasehold, except seven acres only, had been made, the contract ought not to have been carried into execution. The same point was decided by the Master of the Rolls in Drewe *v.* Corp, ante, Vol. IX, 368. That was the case of a term of 4,000 years, foreclosed: in point of title just as good as a freehold. The Master of the Rolls states, that, where the party gets substantially that, for which he contracts, any small difference may be remedied by compensation: but not, where it extends to the whole estate. The principle, as there stated by the Master of the Rolls, and by Lord ELDON towards the conclusion of Drewe *v.* Hanson, ante, Vol. VI, 675, is sound, clear, and most beneficial; that, where one party would be foiled at law, but the other may have the reasonable, substantial, effect of his contract, compensation shall be omitted: not, where the effect will be to put upon him something constitutionally different from that for which he contracted.

The case of indemnity against a supposed defect of title, differs in some respects from compensation. There is some difference between this case and Horniblow *v.* Shirley, the next case; for the defendant in that case did not by his answer insist, that he had a right to be discharged from the contract; though it was argued upon that ground. The parties also appointed judges of their own choice; for the authority of the arbitrators was not by the Act of Parliament; which the parties agreed to obtain for the sanction of their proceedings. The answer insisted, that there should be no specific performance, unless the plaintiff would make a considerable abatement in the purchase money; not resisting the execution *in toto;* but desiring an abatement, both in respect of the outgoings and the mistake in the valuation. The defendant therefore did not stand upon such an objection as that an estate, represented as tithe free, was subject to tithes. Lord ALVANLEY, then Master of the Rolls, directed a reference to the Master, to inquire as to the incumbrances and outgoings, to set a value on them and to ascertain an indemnity. The indemnity proposed was a charge upon the land, allotted to the plaintiff as a compensation for his tithes: a complete indemnity, going with the land through all alienations; and a value was set upon the incumbrances; to be deducted as an abatement from the price; which was what the defendant desired by his

known object was to be a freeholder of Essex, and the plaintiff represented the estate to be in that county. Some time after the purchase Mr. Davis ascertained it was in the County of Kent, by his having been chosen church warden of Greenwich. He had therefore to cross the Thames on all parochial occasions besides the deprivation of the main inducement to his purchase. Note particu-

answer. That case therefore cannot be considered an authority altogether compulsory.

Upon the case now before the court there can be no ultimate difficulty. This objection may be something visionary. It does not appear upon the Master's Report what is the nature of the incumbrance. It consists of an annual rent of £19 6s. payable to Lord Onslow, and some other small charges: but the Report states, that the rectory amounts to £100 per annum, in tangible property, far beyond the amount of the charge, within reach, with a clear remedy by distress. It is not likely therefore, that these tithes will be resorted to. Lord Onslow's title must be known to the plaintiff, paying his rent; who therefore cannot have any difficulty in quieting this objection, and putting an end to the incumbrance. The object of the Statute (Stat. 22 Ch. II, c. 6) was to enable the Crown to sell fee-farm rents, and other rents; and with a view to encourage purchasers, they were to have remedies, which they had not before. There is no evidence that Lord Onslow was a purchaser falling within that Act; and, if not, he cannot have a distress. There is no remedy for rent except distress, or an action of debt or covenant; and here is no privity to support that. Some farther inquiry is necessary as to the nature of this rent. If it gives a right of distress, an indemnity will be necessary. There may be difficulty in releasing a rent charge. I see in Mr. Cruise's Work, (see Mr. Cruise's Digest of the Law of Real Property, tit. 28, vol. iii, page 355, s. 20,) this has been the subject of much consideration; and if the person entitled to the rent charge joins in a conveyance, which does not operate as a release, an injunction would be granted. The plaintiff therefore can relieve the purchaser from all uneasiness upon this head; and, if he can, he ought to do so.

The exceptions were overruled; and a specific performance was decreed; with a reference to the Master, to inquire, whether there ought to be any, and what, indemnity.

HILL *v.* BUCKLEY.

IN CHANCERY, BEFORE SIR WILLIAM GRANT, M. R., 1811.

[17 *Vesey* 394.]

The MASTER OF THE ROLLS [Sir WILLIAM GRANT].[1] The facts of this case are very few; and there is very little controversy upon them. In the

larly that Lord Redesdale's MSS. expressly state that 'the court refused to confirm the contract,' stating the suit as a cause and cross cause, Shirley *v.* Davis and Davis *v.* Shirley. The suit was in Exchequer, and Lord ELDON, C., seems to have been always under an impression, contrary to Lord Redesdale's note, that the court compelled the purchaser to take the estate." 1 Bro. C. C. 440, n. 2.

[1] A statement of the case and the arguments of counsel are omitted.

particular, which was sent by the defendants' agent to the plaintiff's, which is the basis of the subsequent negotiation, the woods, called the Kestle Woods, including the Gulberry Marsh, were represented as containing two hundred and seventeen acres and ten perches. In fact there was not that quantity by about twenty-six acres. No deception was intended. The defendants' agent fell into a mistake; the nature and cause of which now distinctly appear; but I do not think myself warranted by any evidence in the cause to infer, that the plaintiff knew the real quantity. A very intimate acquaintance with the premises would not necessarily imply knowledge of their exact contents; while the particularity of the statement, descending to perches, would naturally convey the notion of actual measurement. Where a misrepresentation is made as to the quantity, though innocently, I apprehend the right of the purchaser to be to have what the vendor can give; with an abatement out of the purchase money for so much as the quantity falls short of the representation. That is the rule generally; as, though the land is neither bought nor sold professedly by the acre, the presumption is, that in fixing the price regard was had on both sides to the quantity which both suppose the estate to consist of. The demand of the vendor and the offer of the purchaser are supposed to be influenced in an equal degree by the quantity which both believe to be the subject of their bargain: therefore a rateable abatement of price will probably leave both in nearly the same relative situation, in which they would have stood if the true quantity had been originally known; and I do not think I could upon any principle in the case of Mortlock *v.* Buller, to which this bears no resemblance, exempt these defendants from this equity upon the ground of their being trustees, and not owners.

But there is a difficulty in this case from the nature of the mistake; which must have influenced the vendors in their estimate of the price in a manner, that if a rateable abatement were now to be decreed, would be extremely disadvantageous to them; for though they believed they had two hundred and seventeen acres to give to the purchaser, and must be supposed to have asked a price in proportion, yet they did not believe that it was all woodland. They imagined that twenty-eight acres consisted only of hedges and fences, and other waste. They could not certainly set the same value upon that, though perhaps it was considered of some value, as upon land covered with wood or mature growth; therefore, by a rateable abatement from the purchase money it is clear they must allow to the purchaser much more than they would have received from him; and consequently they would be compelled to accept less than it was ever in their contemplation to take. That is not all. The purchaser also would obtain a better bargain than he had ever had in his contemplation. He was in the course of the negotiation furnished with the value of the woods, *quâ* wood, as ascertained in the year 1805. The value being given, it was immaterial, in that respect, whether the woods were spread over a greater or less number of acres. The valuation had

no reference to the quantity of ground. All the wood upon the estate was comprehended; and it was represented to the purchaser that what he was to get was wood, which in 1805 was of the value of £3,500. He had got all the wood upon which that value was set. Is he entitled also to the value of twenty-six additional acres of wood? which he would have in effect by an abatement, made to him out of the purchase money upon the proportion merely of quantity and price. The wood would have been no more valuable to him, if in fact it had occupied two hundred and seventeen acres, instead of one hundred and eighty-eight; nor would he have paid a shilling more for it, as the price of the wood was not fixed with reference to the ground which it covered. Therefore it is only in the price of the soil, and not in the price of the wood, that the purchaser could be injured by the mistake of the vendor: the particular representing the wood as occupying two hundred and seventeen acres: the purchaser has the right quantity of wood; but not of soil. He is therefore entitled to some abatement, as they gave him reason to believe, that he was to obtain two hundred and seventeen acres of soil; but the abatement is to be only so much as soil, covered with wood, would be worth, after deducting the value of the wood; and with an abatement, to be ascertained upon that principle, the agreement ought to be carried into execution.

EARL OF DURHAM *v.* LEGARD, 1865, 24 Beav. 611.—Sir JOHN ROMILLY, M. R.: I admit that the general rule is that where there is a deficiency in quantity, such deficiency is properly the subject of compensation; but that rule must be confined within certain limits. Where a person sells 21,000 acres, and finds that he has only 11.000 to sell, or, in point of fact, little more than half of what he has disposed of, that, in my opinion, is not a case for compensation, nor do I know how the court could deal with it as a case of compensation. In all these cases, where the court has found that it is utterly impossible to deal with the case as one for compensation, it has said "this is not a case for compensation, but one for avoiding the contract." For instance, if a man sells freehold land, and it turns out to be copyhold, that is not a case for compensation; so if it turns out to be long leasehold, that is not a case for compensation; so if one sells property to another who is particularly anxious to have the right of sporting over it, and it turns out that he cannot have the right of sporting, because it belongs to somebody else, I apprehend it is not a case in which the court can ascertain what should be the amount of compensation to be given. In all those cases the court simply says it will avoid the contract, and it will not allow either party to enforce it, unless the person who is prejudiced by the error be willing to perform the contract without compensation. . . .

In the case of Hill *v.* Buckley, 17 Ves. 394, which is usually cited upon

these occasions, Sir WILLIAM GRANT laid it down that when the land turns out to be less than it is represented to be, the ordinary mode of calculating the compensation is, to ascertain the quantity, and allow for the deficiency. But if that principle were followed here, the plaintiff would get for less than £36,000 an estate the rental of which was accurately stated and which the defendant intended to sell for £66,000. It is, therefore, clear I should be doing great injustice if I applied that rule upon the present occasion.

I am of opinion that this is simply a case of mistake, and that the purchaser is not entitled to any compensation. He may elect to perform the contract without compensation, but, considering the defendant's offer before suit, the plaintiff must pay the costs of suit down to the present time.

WHEATLEY *v.* SLADE, 1830, 4 Sim. 126, 127. The VICE-CHANCELLOR [Sir L. SHADWELL]: In Hill *v.* Buckley it was decided that a purchaser might file a bill, and insist on having the agreement performed as far as the vendor was capable of performing it, and that a deduction should be made, to him, in respect of the deficiency: but that is not allowed where a large portion of the estate cannot be conveyed.

In this case, the defendants Slade, Stephens and Studley agreed to sell the lace manufactory to the plaintiffs for £12,200 under the impression that they were possessed of the entirety of it. But it afterwards appeared that they could make a title to nine sixteenth shares only of the property, and that it was subject to a debt of £10,000 and interest, which would exhaust nearly the whole of the purchase money. It appears, therefore, that I have not before me such a case as will justify me in continuing the injunction; as the court, at the hearing, would not deal with this case as it dealt with Hill *v.* Buckley.

Injunction dissolved.[1]

[1] "This decision [Wheatley *v.* Slade] may, perhaps, be referred to the nature of the property—although the sellers' object appears to have been to get rid of one sale in order to join in another—otherwise it might be difficult to support it, for whatever was really the number of the shares to which the sellers were entitled, they were bound to that extent to pay the charges, and it is no objection to the performance of a contract that the charges on the estate will, contrary to the sellers' expectation, exhaust the purchase money. If the case be reduced to the simple one that the sellers had only nine-sixteenths, although they considered they had the entirety, the authorities would seem to show that the purchaser had a right to those shares at a price *pro tanto*; no hardship would have been thrown upon the sellers; but they would not have had the other shares left on their hands with a bad tithe, for the nine-sixteenths were all the shares they possessed; the owner of the other seven-sixteenths was a party to the suit, and his title was undisputed by the sellers of the nine-sixteenths." Sudgen, Vendors and Purchasers, 14th ed., p. 317.

KING *v.* BARDEAU.

IN THE COURT OF CHANCERY OF NEW YORK, BEFORE CHANCELLOR KENT, 1822.

[6 *Johnson Chancery* 38.]

The Chancellor [KENT.][1] This sale was marked by good faith. It was unknown to the plaintiff and to the Master at the sale, as well as to the purchaser, that the front building on lot 42 projected over upon lot 43. The observation that was made to the Master a few days before the sale, that the building in the rear of the lot encroached in a very small degree

"But this is not the whole case against the plaintiff. The colliery belonged to two persons in undivided moieties. The plaintiff filed his bill against them both, alleging that the contract was binding upon both; but by an alternative prayer, he prayed relief against one, if he should fail to establish his claim against the two. The bill was afterwards dismissed against Mary Jenkins, leaving only the owner of the other share. But the owner of the other share never meant to contract for one share alone. If he intended to contract at all, he intended to contract for a lease of the whole colliery. Cases may be conceived where a person, who has contracted to convey more than it is in his power to convey, ought to be decreed to convey what he can, either with or without compensation to the vendee for such part of the subject-matter of the contract as the vendor is unable to convey. But a lease of an undivided moiety of a colliery is a very different thing from a lease of a whole colliery; and in this case there is no evidence of improper conduct, or misrepresentation, or of the defendant Griffith having held himself out as capable of contracting for the whole, or in fact, any other circumstances constituting a ground for a decree as to one undivided share alone." Per KNIGHT BRUCE, L. J., in Price *v.* Griffith, 1851, 1 De G. M. & G. 80, 84.

"The plaintiff is, therefore, incumbered with several difficulties in respect of this contract. In the first place, he has entered into a contract with two persons as tenants in common for the sale of the entirety. It is found that one of those supposed tenants in common has no interest whatever in the property, and the question then is, whether the plaintiff can enforce against the other a conveyance so far as it relates to his moiety.

"In my opinion the plaintiff can enforce it. I think that where an agreement is entered into by A. and B. with C. and it afterwards appears that B. has no interest in the property, A. may nevertheless be compelled to convey his interest to C. I should have come to that conclusion upon principle, for I do not see why a purchaser is to lose his right against a vendor who can complete, because from a circumstance of which the purchaser had no knowledge, he has no right against persons who cannot complete. But I am very much fortified in that conclusion by a passage in the judgment of Lord HARDWICKE, in Attorney-General *v.* Day, 1 Ves. Sen. 218. There he was dealing with the case of a contract entered into between tenants in common in tail, and he assumes the death of one of them leaving heirs in tail. He

[1] The statement of facts is omitted.

on the neighboring ground, was too light and trivial a circumstance to affect the *bona fides* of the transaction. The purchaser was informed at the sale, and it was one of the terms of sale repeatedly read over and publicly proclaimed, that the two lots would be sold together as one lot or parcel, and that they were free of all incumbrances, except the lease upon lot 42. The terms of that lease and the disposition of the buildings at the expiration of it, under the covenants in the lease, were also explained. But the buildings were stated to be on lot 42, and it turns out that they do project a little over upon lot 43, and this is the variation in the condition or quality of the lots, which, it is contended, ought to vacate the sale. As the purchaser purchased both the lots together for one con-

points out that whereas the contract could have been enforced against the contracting tenant in tail, it could not be enforced against the issue of the tenant in tail because they claim *per formam doni*, and are not subject to the contract of the previous tenant in tail. He points out further that the one tenant in tail could not enforce against the purchaser the performance of the contract with regard to the moiety of which he was possessed; but, contemplating the alternative case, that of the enforcement of the contract by the purchaser against the vendor, Lord HARDWICKE, 1 Ves. Sen. 224: 'On the other hand, if on the death of one of the tenants in common who contracted for a sale of the estate, the purchaser brings a bill against the survivor desiring to take a moiety of the estate only, the interest in the money being divided by the interest in the estate, I should think (though I give no absolute opinion as to that) in the case of a common person he might have a conveyance of a moiety from the survivor, although the contract cannot be executed against the heir of the other.' It appears to me to be immaterial whether the impossibility arises from the death of the contracting party leaving heirs in tail who take *per formam doni*, or from the fact that one of the contracting parties cannot perform the contract. Lord HARDWICKE'S opinion is that the inability with regard to one moiety would not preclude the purchaser from having performance with regard to the other moiety, and I so hold." Per FRY, J., in Horrocks *v.* Rigby, 1878, L. R. 9 Ch. Div. 180, 182.

"In Burrow *v.* Scammell, 1881, L. R. 19 Ch. Div. 175, 183, the defendants agree to let and plaintiff to take certain business premises for a period of one year, with option of renewal for seven, fourteen or twenty-one years. The plaintiffs entered and made considerable expenditures. At the end of the year they exercised their option. It then developed that the defendant had but a moiety of the premises. In decreeing a conveyance of what she had, BACON, V.C., said: 'The rule of the court, and the principles upon which it is founded, are very distinctly stated by Lord ELDON in Mortlock *v.* Buller, 10 Ves. 292, in which his Lordship says: "I also agree, if a man, having partial interests in an estate, chooses to enter into a contract, representing it and agreeing to sell it as his own, it is not competent to him afterwards to say, though he has valuable interests, he has not the entirety, and therefore the purchaser shall not have the benefit of the contract." And further, he says, the vendor "is bound by the assertion in his contract, and if the vendee chooses to take as much as he can have, he has a right to that, and to an abatement, and the Court will not hear the objection by the vendor that the purchaser cannot have the whole."' "

solidated price, and as one entire parcel of land, it would seem not to be very material to him if the buildings on one lot did encroach a few inches on the other. But he says he purchased with intention to build a house upon the vacant lot twenty-two feet wide, leaving an alley of three feet to pass to the rear of his lot. The disappointment in the case, then, is that he will be obliged to build his house two feet narrower if he intends to have the alley of the width of three feet. He is not disappointed in the main object of his purchase. He has the lots of the dimensions described, and with a perfect title; but his house will be a little narrower, if he will not contract his alley, or will not wait until the lease expires, or will not compel the tenant to withdraw his buildings on to lot 42.

This is clearly not such a material defect in the subject, or variation from the terms of the description at the sale, as will permit the purchaser to abandon his contract. If we were to allow such very nice and critical objections to prevail, we should expose to great hazard the efficiency and value of public judicial sales. If the sale be fair, and the title good, and the quantity of land exist, and the substance of the description be true (and all those circumstances exist in this case), it is as much as ought to be expected or required. Some care and vigilance must be exacted of the purchaser. In this case the purchaser lived near the lots, and they were open to his daily examination; and one of the witnesses says he might have observed by the eye, without even the trouble of measurement, that the house on the front of lot 42 projected a little upon lot 43.

In Calcraft *v.* Roebuck, 1 Vesey, Jr., 221, a farm sold at auction was advertised as a freehold estate, consisting of about 186 acres, of which 45 acres were described to be a compact farm, and the rest a park. It turned out that two acres in the center of the park were not freehold property, but land held at will only. On a bill for a specific performance, Lord THURLOW observed, that where an estate was sold at auction it was difficult to state specifically all the little particulars relative to the quantity, title and situation of the estate, so as not to call for some allowance and consideration when the bargain comes to be executed. He considered that the binding force of the contract and the consideration of enforcing it depended essentially upon the good faith with which it was made. In that case he gave the party some compensation for the failure of title as to the two acres, and referred it to a Master to consider what, under all the circumstances, ought to be allowed as a deduction from the price when the money ought to have been paid.

The English rule has been very strict in requiring the specific performance of these sales at auction when the case was free from misrepresentation and fraud, and it casts upon the purchaser the duty of informing himself of matters within his means of information in respect to the quality, condition, situation and circumstances of the subject sold. Thus, in Oldfield *v.* Round, 5 Vesey 508, there was a bill for a specific performance of an agreement to purchase a meadow sold at auction. The

defendant objected, that the premises were described as a meadow consisting of 15 acres, without taking notice of a footpath across it. But Lord LOUGHBOROUGH, while he admitted that the meadow was very much the worse for a road going through it, said he could not help the carelessness of the purchaser who does not choose to inquire, and that the path in that case was not a latent defect. He accordingly decreed a specific performance, with costs. This case was afterwards shaken by Lord MANNERS, Ellard *v.* Lord Llandaff, 1 Ball and Beatty 241, who said it was not well received at the time, though he admitted that the purchaser, in that case, if he had used ordinary caution, would have discovered the easement. In Dyer *v.* Hargrave, 10 Vesey 505, there was a bill also for a specific performance of a purchase at auction. The particular preceding the sale described the house as in good repair, and that the farm was all within a ring fence. The defendant objected on the ground that the description was not true. It was admitted that there was a variation from the description, but a minute examination might have discovered the defect. The Master of the Rolls decreed a performance and said it was much too late to contend that every variance from the description would enable a man to resist the performance. If he gets substantially that for which he bargains he must take a compensation for a deficiency in the value.

This last case establishes what I apprehend to be the true doctrine on the subject, and many of the old cases which required a performance when the subject was substantially different from what it was supposed to be have been justly questioned. Lord ELDON, in Drewe *v.* Hanson, 6 Vesey 678, mentioned a number of hard cases in which performance had been enforced, though there was a very essential variance between the actual and the supposed circumstances of the subject, and when those circumstances were wanting, which were the strong inducement to the contract. The counsel, in 10 Vesey 507, considered those cases as going to an excessive length upon the point of compensation, and Lord ERSKINE afterwards declared, Halsey *v.* Grant, 13 Vesey 78, and Stapylton *v.* Scott, 13 Vesey 426, that he would not follow those decisions, nor decree specific performance, even under the allowance of compensation.

In the present case there is no pretense that the substantial inducement to the purchase has failed by reason of the projection of the house. There is no analogy whatever between this case and that stated by Lord ELDON, of a contract for a house and wharf. The object of the purchase being to carry on business at the wharf, and though the title to the wharf had failed the court compelled the purchaser to take the house. Here are the lots, and a good title, and the lease as disclosed, and all the disappointment is that the purchaser may be obliged to compel his tenant to remove his house a few inches, or to make his own intended building or alley a few inches narrower than his original plan. The main inducement to the purchaser cannot be said to be defeated by that circumstance. Nor is there anything in the case to prevent the conclusion that the purchaser

can, by ejectment, recover possession of the land so encroached upon by the buildings.

But, while the case most clearly requires that the contract of sale should be fulfilled, yet the fact of the encroachment of the buildings on lot 43 was not such a patent and obviously visible circumstance as to conclude the purchaser from compensation, if the case should otherwise entitle him to it. The strongest ground for compensation is that the vendor himself, in his notice, declared that the two dwelling houses were on lot 42. Now, it turns out that they are partly on lot 43, and if a person, as Lord THURLOW observed, 1 Vesey, Jr. 210, however unconversant in the actual situation of his estate, will give a description, he must be bound by it, whether cognizant or not. I shall, therefore, declare that the purchaser is held to perform his contract and shall direct an inquiry by a Master as to the amount of compensation, if any, which ought to be made. It appears from one of the cases already referred to, and from that of Horniblower *v.* Shirley, 13 Vesey 81, that such is the course of the court in cases where compensation is to be made for incumbrances or defects in the subject.

The following order was entered: "It is declared that the sale and purchase, in the documents and proofs stated and shown, were fair, and that the quantity of land existed, and the title as declared existed, and that the description given of the premises was substantially true; and that the fact that the buildings, stated to be on lot 42, being part and parcel of the premises which were sold entire, and for one entire price, do project, in a small degree, on lot 43, being another part and parcel of the said premises, is not sufficient, nor are any of the circumstances stated in the case sufficient to set aside the sale, or to exempt the purchaser from being holden to the performance of the contract of sale. But as the circumstance of that projection may diminish the value of the purchase below what would be its value if such projection did not exist, and may entitle the purchaser to compensation by a deduction from the price he gave. It is thereupon ordered, that it be referred to a Master to ascertain and report what, in his opinion, under all the circumstances of the case, is the diminution in value, if any, of the premises, as one entire parcel, by means of the projection, below what it would be if no such projection existed, and assuming the value thereof, if the projection did not exist, at $1,400 dollars; and the question of costs is reserved," etc.

WILSON *v.* WILLIAMS.

IN CHANCERY, BEFORE SIR WILLIAM PAGE WOOD, V. C., 1857.

[3 *Jurist, New Series* 810.]

This was a bill for specific performance, filed by a purchaser against a vendor. The defendant had entered into an agreement, dated the 28th February, 1855, to sell in fee-simple in possession. An abstract was to be delivered on the 10th March, 1855. On the 10th April, 1855, the purchaser gave notice that he would take steps to enforce the contract, which the vendor was resisting, on the ground of surprise and undervalue. Ultimately, and before the delivery of any abstract, this bill was filed. A decree was made for specific performance, if a good title could be made, and the ordinary reference as to title. It appeared that previously to the present contract the vendor had attempted to sell the premises to the plaintiff, but his wife would not release her right of dower, and on that account the plaintiff had abandoned his purchase. The plaintiff, at the time of entering into this contract, asked whether Mrs. Williams would join. The defendant expressly stated that she would join. Join, however, she would not; and it being found that the title of the vendor was good in other respects, the purchaser now asked for a specific performance, with a compensation in this request.

July 20.—Sir W. P. WOOD, V. C., after stating the circumstances.—There are many authorities in which the rule as to compensation is laid down. In Mortlock *v.* Buller, *ubi supra,* which was a case of a husband with a partial interest contracting to sell absolutely, Lord ELDON, if it had been simply a case of the husband contracting for himself alone, without reference to the trustees, would have ordered specific performance, with a compensation. But it appearing that the husband was the agent of the trustees, and that he had contracted in that character, and not in respect of his own interest only, and the sale being such a one as it would be a breach of duty in a trustee to carry out, he on that ground declined to order specific performance with an abatement, and not on account of any alleged or real difficulty in estimating the amount of abatement. Thomas *v.* Dering, *ubi supra,* was a case arising under special circumstances. The Master of the Rolls refused to give effect to a contract, relying on this—that the effect would be to introduce into a family settlement, and arm with various powers and discretions against those in remainder, a person as tenant for life who was an utter stranger to the family. That judgment has been remarked on by text-writers, but it was affirmed by the Lord Chancellor. Then there was the case of Graham *v.* Oliver, 3 Beav. 128, in which Lord LANGDALE explained the ground of his decision in Thomas *v.* Dering, and directed an inquiry as to title, with a

view to a specific performance. In the case of Nelthorpe *v.* Holgate, *ubi supra,* before Sir J. L. KNIGHT BRUCE, V. C., which was the case of a person purporting to sell an absolute interest, but who was in fact entitled subject to his mother's life interest, a specific performance was decreed, with an abatement. At the close of his judgment the Vice-Chancellor says, "I make this decision without acceding to the broad and general argument which has been urged on the plaintiff's part, as to the performance of contracts with compensation wherever the vendor can give part, but not the whole, of what he has contracted to sell." It might be different, and the case of the defendant in resisting specific performance with an abatement would be much stronger, if he could shew any peculiar difficulty in estimating the amount of compensation; and the words I have just read made me somewhat anxious in examining the present case. Here the vendor has only a partial interest, and it was known to the purchaser that the wife had already refused to release her dower; but then he asked that very question, and received an answer that she would release. One obvious observation upon this question of compensation is that which pressed Lord REDESDALE in Lawrenson *v.* Butler, *ubi supra,* and Harnett *v.* Yielding, 2 Sch. & L. 553, viz., the disadvantage under which the vendor would lie for want of mutuality if it were to be held that the purchaser could enforce the contract with a compensation; whereas the vendor never could force the completion upon a purchaser, even by submitting to a deduction for compensation; so that there is no mutuality. At the same time, however, it is to be observed, that the court has gone a long way in favor of a vendor on the point of mutuality. According to the observations in Mortlock *v.* Buller, this court has allowed a vendor, who has contracted without any title at all, to sustain a bill if he can acquire a good title before the report on the decree, and to take steps, even pending litigation, to perfect his title, even by going so far as to obtain a private act of Parliament for that purpose. In such cases there would have been no mutuality, for the purchaser could have had no decree against the vendor in the absence of all title; so that the vendor alone had the sole power of determining whether the contract should be carried out or not. Here the vendor, having a good title, except as to this right of dower, assured the purchaser at the time of the contract that that right would be released. He gets the contract upon that footing. Can it be said that there is any hardship on the contractor in calling upon him, if he cannot literally make good his assurance, at all events to make it good as far as he can? It occurred to me that the case of dower might be such an interest as to make it difficult to calculate what abatement ought to be made in respect of it—whether there was such a difficulty as was felt in the case of White *v.* Cuddon, 8 Cl. & Fin. 766, before the House of Lords. In this case, however, there is very little difficulty beyond what was found in Nelthrope *v.* Holgate, *ubi supra,* the only additional circumstance being that it is here uncertain whether the wife will ever claim, for she

may die before her husband; and that contingency may be very easily provided for by simply directing a sufficient portion of the purchase money to be set aside, allowing the vendor to receive the interest during the joint lives of himself and his wife, and the principal upon her decease. In considering the propriety of enforcing the contract it is not immaterial to see whether there is an easy way of getting an indemnity. There will be a reference, if necessary, as to the amount proper to be set aside; but probably the amount can be fixed by the parties; and the defendant must pay the costs of the suit.

On the question of costs,

Hallett again pointed out, that though this question of indemnity had been raised at the bar at the hearing, and though the court had then said that the specific performance was without prejudice to compensation, as was in the recollection of the court itself, and appeared also by the indorsement on his own brief and the shorthand note, yet the plaintiff had elected to take a simple decree for specific performance; and such a decree being inconsistent with the present decree, the plaintiff could not have, at all events, the costs of the present contention.

July 30.—Sir W. P. WOOD, V. C.—In Balmanno *v.* Lumley, *ubi supra*, there does not appear to have been anything in the prayer of the bill about compensation, but merely for specific performance; but upon a reference being directed as to the title, an inquiry was also added as to what, if anything, would be a proper compensation in the event of the title proving defective. In Hanbury *v.* Litchfield, 2 My. & K. 629, the plaintiffs had agreed with the defendants for a thirty-one years' lease, but they were decreed to accept a lease of twenty-one years only, with a covenant for renewal for other ten years, with compensation for the difference in value, although the bill was framed with a view to a different specific relief, the decree going upon the prayer for general relief. In Ambury *v.* Jones, 1 Younge, 200, ALEXANDER, C. B., gave relief in a case where the apparent inconsistency was as great as that which is called inconsistent here. In this case I find nothing in this decree for compensation which is inconsistent either with the prayer of the bill or with the decree made at the hearing for an inquiry whether a good title could be made; and although upon that inquiry only this defect has been discovered, which was known upon the inquiry before the suit, so that I was at first minded to give the purchaser no costs of this second hearing on further directions, yet as the purchaser was entitled to the inquiry at all events, and as the cause must have come back here after inquiry, whatever had been the result as to the title, I think that the purchaser must have his further costs after the first hearing. I was pressed with Bennett *v.* Fowler, 2 Beav. 304, where it is said that a purchaser choosing to take a general reference for title takes it at his own risk as to costs. But what fixes the defendant in this case is, that in Bennett *v.* Fowler the whole abstract had been delivered before the reference; here no abstract at all was produced until the parties were sent to chambers.

BARNES *v.* WOOD, 1869, L. R. 8 Eq. Cases 424.—Sir. W. M. JAMES, V. C. In this case the plaintiff seeks specific performance of a contract which he entered into with John Stringer. The contract whereby he undertook to sell the property in fee simple to the plaintiff was binding on John Stringer himself, but it turned out that John Stringer was not owner of the property in fee simple, but simply had an estate *pur autre vie,* with the possibility of a tenancy by the courtesy; the remainder, on the determination of the particular life, being vested in his wife, Betty Stringer. The wife did no act by which she was bound to ratify the contract. She was owner, and had the power, by certain means known to our law, of assenting to such a contract. She did not adopt those means, and therefore I must assume that she was in no way bound by the contract, and that her husband was under no obligation which this court recognizes to compel her to consent. . . . The husband here represented himself to be owner of the fee, being, in fact, only entitled to the limited interest I have mentioned. The purchaser entered into his contract with the husband in total ignorance of the state of the title, and without any knowledge that the husband could only sell with the concurrence of his wife. The husband, therefore, is bound to convey all the interest that he has, according to the principle of the authorities that have been cited, and the court must endeavor to find out, in the best way it can, what compensation is to be made in respect of the interest which he is unable to convey. The plaintiff is therefore entitled to relief according to the second part of his prayer, and the defendant must pay the costs of the suit. Reference to Chambers to ascertain what compensation should be given to the plaintiff for the interest of Betty Stringer.

CASTLE *v.* WILKINSON, 1870, L. R. 5 Ch. App. 534.—Lord HATHERLEY, L. C. Now I apprehend that the law is settled as to this upon the authorities referred to by Lord ST. LEONARDS, Sug. V. & P., 14th Ed., Ch. 8, § 1, that if a man professes to be owner of the fee simple, and undertakes to sell the fee simple, and it turns out that he had not power so to do, the purchaser not being at the time aware of the difficulty, then the vendor must convey as much as he can, and submit to an abatement. But the case is wholly different where the vendor does not profess to sell the fee, but only that estate which he is able to dispose of. Here, on the face of the agreement, the husband and wife intended to sell, and the purchaser knew that he was contracting with them for the estate of the wife, and that he could only get what the wife was willing to convey; and there is no authority at all approaching to such a proposition as it has been necessary to contend for here, that the husband can be compelled to part with his partial interest in the estate, the agreement being by him and his wife to convey the whole.

Sir G. M. GIFFARD, L. J. In this case the attempt made by this bill is to enforce specific performance of a contract between a husband and wife and the purchaser; the purchaser not being misled in the slightest degree by anything appearing upon the face of the contract, because the contract states plainly and clearly upon the face of it, not that Richardson is entitled to the fee simple, but that he is entitled to the land in right of his wife, and that the fee simple is in truth in his wife.

That being so, it is the unquestionable law of this court that such a contract cannot be enforced either partially or wholly. All those cases in which the contract has been enforced partially, and a partial interest has been ordered to be conveyed, have been where the vendor has represented that he could sell the fee simple, and the purchaser has been induced by that representation to believe that he could purchase the fee simple. Here it is quite clear that the purchaser never could have believed for one moment that he could purchase the fee simple; and that being so, the bill must be dismissed. For myself, I should have thought the law too clear for argument.[1]

HARRELL *v.* HILL.

IN THE SUPREME COURT OF ARKANSAS, 1857.

[19 *Arkansas* 102.[2]]

By Court, HANLEY, J.[3] . . . We propose to consider this cause under the following inquiries: 1. Did the defendant covenant to convey to the complainant any given number of acres? 2. Under the pleadings, have we a right to look beyond the bond of defendant to determine the issue between the parties? 3. Does the proof show a deficiency in the acres agreed to be conveyed? If there is a deficiency in the quantity, has the complainant shown herself entitled to any compensation therefore?[4]

[1] "The rule is beyond question in this State that in an action for specific performance a husband will not be decreed to procure his wife to join in the execution of a deed for the purpose of releasing her inchoate right of dower if she is unwilling to do so. Hulmes *v.* Thorpe, 1 Halst. Ch. 423; Young *v.* Paul, 2 Stockt. 401; Hawralty *v.* Warren, 3 C. E. Green 128; Welsh *v.* Bayaud, 6 C. E. Green 187; Reilly *v.* Smith, 10 C. E. Green 158. A rule requiring him to do so would overthrow a wise statutory safeguard designed

[2] S. C. 68 American Decisions, 202, from which the case is printed, with references to the series included.

[3] The statement of facts and arguments of counsel have been omitted.

[4] Portions of the opinion dealing with these questions have been omitted.

In answering this question it will be necessary for us to recur to the covenant. By reference to that, it will be perceived the defendant agreed to convey to complainant for a gross sum, one thousand five hundred dollars, a certain farm or tract of land "lying on the Arkansas River, below Little Rock, and known on the books of the public surveys as part of sections 13 and 20, it being the place whereon the said Hill resides, and joining the lands of James Jones, Jacob Jones, and those of the Milliner estate, etc. . . . It is expressly agreed and understood that it is all the land owned, or in any wise appertaining to the tract now owned, by said Hill, one hundred and eighty acres, more or less." A question necessarily arises in this connection as to whether the quantity stated or expressed is to be regarded as a part of the description, or does the statement of the quantity import a covenant to convey the number of acres designated? To determine this, we have to have recourse to certain rules which have been prescribed for the purpose; *e. g.*, in the description of land conveyed the rule is that known and fixed monuments control courses and distances. So the certainty of metes and bounds will include and pass all the lands within them, though they vary from the given quantity included in the deed. The least certain and material parts of the description must yield to those which are the most certain and material, if they cannot be reconciled; though in construing deeds the courts will give effect to every part of the description, if possible. The mention of quantity of acres, after a certain description of the subject by metes and bounds, or by other known specifications, is but matter of description, and does not amount to any covenant, or afford ground for the breach of any of the usual covenants, though the quantity of acres should fall short of the given amount: See 4 Kent's Com., 7th ed., 514, 516; Mann *v.* Pierson, 2 Johns. 37; Smith *v.* Evans, 6 Bing. 102; Doe *ex dem.* Phillip's Heirs *v.* Porter, 3 Ark. 18, 57; 36 Am. Dec. 448; Powell *v.* Clark, 5 Mass. 355; 4 Am. Dec. 67; Jackson *v.* Moore, 6 Cow. 706; Allison *v.* Allison, 1 Yerg. 16; Beach *v.* Stearns, 1 Aik. 325; Roat *v.* Puff, 3 Barb. 353. In this latter case the deed contained the language: "There being in the lot conveyed one hundred and thirty-five acres, strict measure," etc., yet it was held there was no covenant to make up the deficiency. In the case before us the covenant contains as full a description of the premises by metes and bounds as it is presumed it was convenient for the

to protect married women against coercive alienations. But if the refusal of the wife is made in bad faith, or by the procurement of the husband, merely to enable him to escape his just obligation, the court may decree a conveyance by the husband alone, and compel him to give indemnity by mortgage, or otherwise, against the claim of the wife. However, to warrant a decree of indemnity it must appear the refusal is not the voluntary act of the wife, but the device of the husband. Nothing appears in this case to justify the suspicion even that the refusal was fraudulent. I think it is apparent it was prompted by the highest considerations of prudence." Per VAN FLEET, V.C., in Peeler *v.* Levy, 1875, 26 N. J. Eq. 330, 335.

defendant to give at the time it was executed, and the quantity, one hundred and eighty, being expressed or mentioned after this more certain or definite description, must be regarded as merely part of the description, and not to amount to any covenant as to that precise quantity. Besides this, whenever it appears by definite boundaries, or by words of qualification, as "more or less," or as "containing by estimation," or the like, that the statement of the quantity of acres in the deed is mere matter of description, and not of the essence of the contract, as a general rule the buyer takes the risk of the quantity, if there be no intermixture of fraud in the case: See Stebbins *v.* Eddy, 4 Mason, 414; Marvin *v.* Bennett, 8 Paige, 312; S. C., 26 Wend. 169; Weaver *v.* Carter, 10 Leigh, 37; Eubank *v.* Hampton, 1 Dana, 343, 344; Brown *v.* Parish, 2 id. 9; Jackson *v.* McConnell, 19 Wend. 175; 32 Am. Dec. 439; Jackson *v.* Moore, 6 Cow. 706; Lush *v.* Druse, 4 Wend. 313; Peden *v.* Owens, Rice Eq. 55; Whicker *v.* Crews, 1 Ired. Eq. 351; Nelson *v.* Matthews, 2 Hen. & M. 634; Cleveland *v.* Rodgers, 1 A. K. Marsh. 193; Fleet *v.* Hawkins, 6 Munf. 188; Perkins *v.* Webster, 2 N. H. 287; Large *v.* Penn, 6 Serg. & R. 488; Galbraith *v.* Galbraith, 6 Watts, 117.

Looking alone to the face of the bond or covenant, we are constrained to hold that the defendant did not covenant as to quantity, maintaining, as we do, that the specification of one hundred and eighty acres in the instrument was but descriptive of the premises designed to be conveyed under the conditions of the bond. But notwithstanding he did not covenant to convey the precise quantity of one hundred and eighty acres, yet it has become the settled doctrine of the courts of chancery in this country, as well as in Great Britain, to relieve, when there is a very great difference (as thirty-three per cent, for instance) between the actual and the estimated quantity of acres of land sold in gross, on the ground of gross mistake: Sec. 4 Kent's Com., 7th ed., 517, note; 1 Sugd. Vend 434, note; Quesnel *v.* Woodlief, 6 Call. 218, cited in note to Nelson *v.* Matthews, 2 Hen. & M. 164, 173; 3 Am. Dec. 620; Harrison *v.* Talbott, 2 Dana, 258. In this last case the series of the Kentucky decisions on the subject are very ably reviewed by Chief Justice ROBINSON. See also Golden *v.* Maupin, 2 J. J. Marsh. 239; Thomas *v.* Perry, 1 Pet. C. C. 49. We are aware, however, that there are many cases to be found in the books of reports in which a different doctrine is maintained, and seemingly, too, upon well-established principles; as, for instance, in Hull *v.* Cunningham's Ex'r, 1 Munf. 330; Twiford *v.* Wareup, Finch, 311; Winch *v.* Winchester, 1 Ves. & Bea. 375; Smith *v.* Evans, 6 Binn. 109; 6 Am. Dec. 436; Boar *v.* McCormick, 1 Serg. & R. 166; Glen *v.* Glen, 4 id. 488; and also in Stebbins *v.* Eddy, 4 Mason, 414, in which Mr. Justice STORY says: "It seems to me there is much good sense in holding that the words 'more or less,' or equivalent words used in contract or conveyances of this sort, should be so construed to qualify the representation of quantity in such a manner that, if made in good faith, neither party should be entitled to any relief on account of a deficiency

or surplus. . . . I do not say cases may not occur of such extreme deficiency as to call for relief; but they must be such as would naturally raise the presumption of fraud, imposition, or mistake in the very essence of the contract."

We are inclined to hold to the doctrine first stated, *i. e.,* that the effect of the words "more or less," added to the statement of quantity, can only be considered as intending to cover inconsiderable or small differences, the one way or the other, and particularly so in the case before us, for the reason that the contract of the defendant with the complainant in regard to the land was and is an executory one, being yet *in fieri,* the general opinion being in such case that the purchaser, if the quantity be considerably less than it was stated, will be entitled to an abatement, although the agreement contain the words "more or less" or "by estimation." See 1 Sugd. Vend. 433, note 2; Hill *v.* Buckley, 17 Ves. 394.

Without reference or regard to the testimony respecting the representations of the defendant as to the quantity of the tract of land in question, but looking to the contract alone, in connection with the fact of the deficiency in the quantity, and the extent of this deficiency being nearly one-half of the whole quantity stated in the contract, we think there can be no doubt but that complainant was entitled to some abatement on account of the deficiency.

Having held that there is a deficiency in the quantity, we will proceed to answer the inquiry as to whether the complainant has shown herself entitled to any relief.

The general rule is, that when a misrepresentation is made as to quantity, though innocently, the right of the purchaser is to have what the vendor can give, with an abatement out of the purchase money for so much as the quantity falls short of the representation: See 1 Sugd. Vend., 7th ed., 431; also Hill *v.* Buckley, 17 Ves. 394; Bond *v.* Jackson, 3 Hayw. 189; Quesnel *v.* Woodlief, 6 Call, 218, referred to above as reported in 2 Hen. & M. 173, note; Nelson *v.* Carrington, 4 Munf. 332; 6 Am. Dec. 519; Wainwright *v.* Read, 1 Desau. 573; Glover *v.* Smith, id. 433; 1 Am. Dec. 687; Durrett *v.* Simpson, 3 T. B. Mon. 519; 16 Am. Dec. 115.

The same principle is thus expressed by Mr. Justice STORY: "The general rule is that the purchaser, if he chooses, is entitled to have the contract specifically performed, as far as the vendor can perform it, and to have an abatement out of the purchase money or compensation for any deficiency in the title, quantity, quality, description, or other matters touching the estate: See 2 Story's Eq. Jur., sec. 779; also Morse *v.* Elmendorf, 11 Paige, 277; Voorhees *v.* De Meyer, 2 Barb. 37; Wiswall *v.* McGowan, id. 270.

In Nelson *v.* Matthews, 2 Hen. & M. 177, it was held that the compensation, or abatement on account of the deficiency, ought to be in proportion to the price given for the whole tract as represented; and this we believe is the general rule when applied to a state of facts as shown by

the record before us. Applying this rule, what should be the amount of the abatement or compensation in this cause? We have already held the deficiency in quantity to consist of sixty acres. The sum stipulated, supposing the tract to contain one hundred and eighty acres, was one thousand five hundred dollars. By this computation, the land was estimated at eight dollars, thirty-three and a third cents per acre. At the same estimate the value of the sixty acres deficient is worth by computation five hundred dollars. This amount should be considered as paid on the land at the date of the contract, so that there only appear due on the judgment enjoined fifty dollars, and interest on this sum from the third of February, 1845, at ten per cent, and cost of suit.

SECTION 3.—INCIDENTS OF THE RIGHT TO SPECIFIC PERFORMANCE.

TOWNLEY *v.* BEDELL.

IN CHANCERY, BEFORE LORD CHANCELLOR ELDON, 1808.

[14 *Vesey* 591.]

By the Master's report under an order of reference to state encumbrances, it appeared that a lease had been executed in 1795 by the testator in this cause to Townley, for thirty-three years, with a proviso, that if Townley, his executors, administrators, or assigns, should be desirous to purchase the premises within six years, he, his executors, administrators, or assigns, should pay to the testator, his heirs or assigns, £600 for the purchase upon having a good title made to him, Townley, his executors, administrators, or assigns.

The testator died before the expiration of six years from the date of the lease. After his death, and within that period, Townley declared his option to purchase, according to the proviso.[1]

A petition was presented by the heir at law, praying to be let into possession, and to have the rents accrued paid to him out of court.

The LORD CHANCELLOR. This precise question was decided at the Rolls by Lord KENYON; holding, that upon such a contract by a lessee, for liberty to purchase the freehold and inheritance within a certain period at a limited price, that from the death of the lessor the rent went to the heir, but the money, when the purchase was claimed, belonged to the executor.

April 1. The case to which I alluded yesterday is Lawes *v.* Bennet, which, according to my own note, was this:

[1] A part of the case relating to another estate has been omitted.

A person named Whitrong, in 1758, demised to Douglas for seven years, with a covenant, that if, after the 29th of September, 1761, and before the 29th of September, 1765, Douglas should choose to purchase the inheritance for £3,000 Whitrong would convey accordingly. Whitrong died in 1761, no election having been then made by Douglas, and left all his real estate to the defendant Bennet, and all his personal estate to Bennet and his sister, equally as tenants in common. In 1765, before the 29th of September, Waller, who had purchased the lease and the benefit of the agreement from Douglas, called upon Bennet, the devisee of the real estate, to convey upon payment of £3,000. The bill was filed in 1781, by Lawes, the husband of Bennet's sister, against the personal representative of Bennet the brother, claiming a moiety of the £3,000 and interest, and Lord Kenyon made the decree accordingly, observing, that though Whitrong could not have compelled Douglas to purchase, the money was, at the time of the election, declared to be considered as the personal estate of the testator, and did not belong to the devisee of the real estate.

That case was very much argued, and I do not mean to say that a great deal may not be urged against it; but, where there is a decision precisely in point, it is better to follow it.

Therefore the rents of the premises demised to Pratt, and the rents of the other premises demised to Townley, until the option declared by him, belong to the heir; and from the time of that option Townley is entitled to the latter, and must be charged with interest upon his purchase money, which money and interest are personal estate of the testator, and go to his next of kin.[1]

[1]A testator gave to his children, in succession, the option of purchasing his real estate, and in the meanwhile, the rents were to be divided equally between them. Before an option had been exercised, and while some of the children were still infants, a corporation purchased part of the property for public improvement under compulsory parliamentary powers.

"I am of opinion that this is real estate, until it has been converted by the exercise of the option given to the children by the will. I also think that the option is not taken away by the circumstance that the city of London has purchased the property under its compulsory powers. The option will remain, whether the fund continues, as it is, in stock, or is reinvested in land. I must, therefore, wait until the youngest child attains twenty-one years, and see what takes place, and abstain from dealing with the corpus of the fund in the meanwhile. It is not clear that the option of purchasing will be exercised at all, for the children may die infants.

"I have no doubt that this is now real estate, and that the heir is entitled to receive the rents or income until the option has been exercised. I will therefore direct payment of the income accordingly." Per Sir JOHN ROMILLY, M. R., in City of London Imp. Act, ex parte Hardy, 1861, 30 Beav. 206, 208.

"The contract was a valid one, and it worked an equitable conversion of the land into personalty from the time when it was made. See the cases cited in the notes to Fletcher *v.* Ashburner, 1 W. & T. Lead. Ca. in Eq. 546 [659]; Smith *v.* Hubbard, 2 Dick. 730; Story's Eq. Jur. § 790; Champion *v.* Brown,

IN RE ISAACS.

IN THE SUPREME COURT OF JUDICATURE, CHANCERY DIVISION, 1894.

[*Law Reports* (1894) 3 *Chancery Division* 506.]

Adjourned Summons.

Isaac Isaacs, being seised in fee of certain premises known as No. 8, Nevill Street, Abergavenny, demised the same, by an indenture of lease of the 13th of August, 1880, to one Thomas Arthur Cadle, his heirs and assigns, for the life of the said Isaac Isaacs, at a yearly rent of £40. The lease contained a provision that after the decease of the said Isaac Isaacs the said Thomas Arthur Cadle, his heirs or assigns, should have the right and option of purchasing the premises thereby demised at the price of £750, such option to be declared in writing within six months from the time of the decease of the said Isaac Isaacs.

On the 9th of January, 1894, Isaac Isaacs died intestate, and letters of administration to his personal estate were granted to the Plaintiff Charles Isaacs. The Defendant R. M. Reginall was the heir-at-law.

On the 25th of April, 1894, Thomas Arthur Cadle sent formal notice in writing to the heir-at-law and legal personal representative of the late Isaac Isaacs of his intention to exercise his option to purchase the premises comprised in the said lease. The intestate's estate was more than sufficient for the payment of his debts and funeral expenses.

The question now submitted to the Court was, whether the purchase-

6 Johns. C. R. 398; Mulford *v.* Heirs, 2 Beas. 1; King *v.* Ruckman, 6 C. E. Green, 599. And on the principle of equitable conversion, the purchase money became a part of John B. Miller's personal estate, and, as such, was distributable to his widow and next of kin. Bubb's Case, Freem. Ch. R. 41; Baden *v.* Countess of Pembroke, 2 Vern. 215; Hawley *v.* James, 5 Paige, 323, 456; Drenkle's Estate, 3 Barr, 377; 1 Sugd. Ven. 8th Am. ed., 287. In Lawes *v.* Bennet, 1 Cox, 167, it was held that, where an estate is contracted to be sold, it is, in equity, considered as converted into personalty from the time of the contract, and that this notional conversion takes place, although the election to purchase rests merely with the purchaser. See also Ripley *v.* Waterworth, 7 Ves. 425, 437; Townley *v.* Bedwell, 14 Ves. 591; Daniels *v.* Davison, 16 Ves. 249; Collingwood *v.* Row, 3 Jur. N. S. 785; Goold *v.* Teague, 5 Jur. N. S. 116; Farrar *v.* Earl of Winterton, 5 Beav. 1. And in Curre *v.* Bowyer, reported in a note to Farrar *v.* Earl of Winterton, it was held that, where the contract is binding at the death of the vendor, although the purchaser by subsequent laches loses his right to a specific performance, yet the estate will belong to the next of kin, and not to the heir-at-law. In Att'y Gen. *v.* Day, 1 Ves., sen., 220, it was held however, that such conversion will not take place where the court holds that the contract cannot, or ought not to be performed." Per Chancellor RUNYON, in Miller *v.* Miller, 1874, 25 N. J. Eq. 354, 365.

money, £750, belonged to the Plaintiff as the legal personal representative of Isaac Isaacs, or to the Defendant as the heir-at-law. . . .

CHITTY, J. (After shortly stating the facts, continued):—

The question now is whether the heir is entitled to the purchase-money of £750, paid by virtue of the exercise of the option, or the administrator, in other words whether after the exercise of the option, this property is to go as part of the real or part of the personal estate of the intestate.

It appears to me that the case is covered by the well-known authority of Lawes *v.* Bennet, a case which has been approved of and followed in numerous subsequent authorities. It may be open to question whether Lawes *v.* Bennet could not have been decided otherwise than it was; but the question, decided nearly a century ago, has stood the test of time, and stands as a landmark upon this subject. The option in Lawes *v.* Bennet was exercised after the death of the person who grantd it, and Lord KENYON, who decided the case, was aware of what he terms a possible difficulty: "The only possible difficulty in this case is, that it is left to the election of Douglas whether it shall be real or personal. It seems to me to make no distinction at all;" nor did he think that there was any distinction in the lapse of time that occurred after the death and before the option was exercised. Lord ELDON, who argued that case, made observations on it in a case of Ripley *v.* Waterworth, 7 Ves. 436, which was cited in argument, but which I need not further refer to; he also had a similar case before him in Townley *v.* Bedwell, 14 Ves. 590, and what he said in reference to Lawes *v.* Benett was, ibid. 596: "That case was very much argued; and I do not mean to say, that a great deal may not be urged against it: but, where there is a decision precisely in point, it is better to follow it;" and so he followed it. But there was a question who was entitled to the rents that had accrued after the testator's death and before the exercise of the option, and he held that the rents went to the heir; in other words, that it was a conversion, by virtue of the contract, of the testator's real estate into personal estate, as between his real representative and his personal representative, but that the conversion operated for all purposes only from the time when the option itself was exercised. That was necessarily the principle of his decision, because he held that the rents went to the heir. . . .

I am told that Lawes *v.* Bennet has never been applied to the case of an intestacy, and that I ought not to extend the doctrine of Lawes *v.* Bennet. The argument really means that I ought not to apply Lawes *v.* Bennet; but notwithstanding any subsequent case, it appears to me to apply, without any possible limitation or qualification, to the case of an intestacy. In Weeding *v.* Weeding there was no intention (of course, the testator could have manifested it on the face of his will) that the purchase money derivable from, and payable under, the option which he subsequently granted, should go to the person to whom he gave the real estate, which was the subject matter of the contract. The Vice-Chan-

cellor, ibid. 430, deals with the case thus: "Then what indication have you, on the will, of the quality which the testator intended this property to possess? He only says, 'I wish A. to take what is land, and B. to take what is money.'" Consequently, there was no intention in that case, as was said by counsel who were arguing for the heir, which rendered Lawes *v.* Bennet, 1 Cox 167, inapplicable to the circumstances. That case appears to me, if any authority is wanted besides Lawes *v.* Bennet itself (which I do not think is the case), to shew that Lawes *v.* Bennet does apply even to intestacy, because it did apply to a will where there was no intention manifested one way or the other on the face of the will.

Then the case of Emuss *v.* Smith, 2 De G. & Sm. 722, was cited. There the option was exercisable only after the death of the person granting it, and that circumstance is relied on for the heir here, as ground for my not applying in this case the doctrine of Lawes *v.* Bennett. But Emuss *v.* Smith is only a case of ascertaining the testator's intention. It is plain that a man may, either before or after his will, have given an option to somebody, which would have the effect of converting his realty into personalty, as between his real and personal representatives, but may shew on the face of his will, an intention that the devisee of the land should take all the testator's interest in the land, including the purchase-money which would arise from exercising the option, and that is the explanation, if explanation be required, of Emuss *v.* Smith. The Vice-Chancellor said, 2 De G. & Sm. 735: "As the case stands, taking together the particular language of the will, and the particular language and the nature of the contract, upon which no option was expressed during the life of the testator, coupled with the fact of the re-publication by the codicil, I am of opinion, that it is consistent with the true construction of the testator's testamentary instruments, and the effect that ought to be given to re-publication,—that it is consistent with law and justice, and reason, and consistent also with the cases of Lawes *v.* Bennet and Knollys *v.* Shepherd, 1 J. & W. 499, to say, that the purchase moneys of Williams' Farm and Nash's own farm belong to those who would have enjoyed them if Mr. Galton had not exercised the option of buying." It is a case which was decided entirely upon the testator's intention.

I cannot see that I should be extending Lawes *v.* Bennet if I say that that decision applies to a case where the option arises only after the death. It seems to me to be an immaterial circumstance, and I should be, under the pretence of distinguishing Lawes *v.* Bennet, 1 Cox 167, declining to follow it, if I adopted this argument. In Lawes *v.* Bennet the option was exercisable as well before as after the death. It was, in fact, exercised after the death. I can see no substantial ground for saying that the circumstance that the option was so limited, as to be only exercisable after the death, creates a material distinction.

If I had adopted, which I do not, the principle contended for in the argument on behalf of the heir-at-law, that the decision of Lawes *v.* Bennet, and the subsequent cases involved this proposition, that the

conversion related back to the contract, then I might have thought there was something in the distinction; but, in my opinion, that is not the result of the authorities. As I have pointed out during the course of the argument, I think the judgment in the case of Townley *v.* Bedwell, 14 Ves. 590, alone is a decison on the point, that the option does not operate completely to convert the property until it is exercised, because the rents in the interval after the testator's death go to the heir-at-law. The other cases cited (such as, for instance, *In re* Adams and Kensington Vestry, 27 Ch. D. 394, are not in point, because the question there arose with reference to the estate of the person to whom the option was granted, and the option being found in a lease, which was personal property in the lessee, it was held that his administrator, who was also the heir, could not exercise the option so as to convert the leasehold interest, which would devolve upon him as administrator, and for the benefit of the next of kin, into real estate, which he would have taken as heir; and, in substance, that the option and all that flowed from it was part of the lessee's personal estate.

The other case mentioned for the heir, of Edwards *v.* West, 7 Ch. D. 858, is plainly distinguishable. No doubt it was said there by Mr. Justice Fry that the principle of Lawes *v.* Bennet was not to be extended, and that an attempt was made by the argument in that case to extend it to a very considerable degree; and Mr. Justice FRY said, 7 Ch. D. 863, that he did not think he was at liberty to extend it (that is the doctrine in Lawes *v.* Bennet, 1 Cox 167), so as to imply that there was a conversion from the date of the contract giving the option, as between the vendor and purchaser who claimed under it. Edwards *v.* West, 7 Ch. D. 858, therefore, was a case arising between vendor and purchaser, and not a case arising between the real and personal representatives of a man who had granted the option.

For these reasons, I am of opinion that the purchase money here forms part of the personal estate of the intestate, and consequently, that it goes to the plaintiff as his personal representative.

LANGFORD *v.* PITT.

IN CHANCERY, BEFORE SIR JOSEPH JEKYLL, M. R., 1731.

[2 *Peere Williams* 629.]

Upon a bill brought by the plaintiff for the performance of articles for a purchase, the case was: The plaintiff Langford, vicar of Axminster in Devon, did by attorney enter into articles with Governor Pitt for the sale of lands in Cornwall. The articles were dated November, 1725, whereby the plaintiff agreed to convey the premises to the governor and his

heirs, on or before Lady Day then next, at the costs and charges of the governor, and as counsel should advise; upon the making of which conveyance the governor covenanted to pay £1,500 to the plaintiff.

Governor Pitt lived until after Lady Day, but in 1722, long before the executing of these articles, made his will, by which he devised all his real estate to his son Robert Pitt for life, remainder to his eldest son John Pitt for life, remainder to his first, etc., son in tail mail successively, with several remainders over, bequeathing all his personal estate to trustees, to be invested in lands and settled as above; and dying soon after Lady Day, 1726, his said eldest son and heir laid claim to the premises, as descending to him, and made his will, wherein by express words he devised the premises thus articled to be purchased to his wife and others, in trust to pay his debts, etc., and soon afterwards died, leaving John Pitt his son and heir, to whom the governor had devised all his estate expectant on the death of Robert Pitt the son.

The plaintiff Langford brought his bill against the executors of the governor, the executors of Robert Pitt the son, and against John the grandson, to be paid the £1,500 purchase-money; and though it appeared in the cause by the plaintiff's own witness, that in 1728 the plaintiff had paid to his eldest brother's daughter (being the heir general of the family) £750 for her joining with her husband in a deed and fine to the use of the plaintiff and his heirs (note—the witness said, this was rather to clear up the title than that it was necessary), from whence the defendant's counsel urged it to be evident, even by the plaintiff's own showing, that he had not at the time of entering into the articles a good title to the premises.

Yet, by the Master of the Rolls, it is sufficient if the party entering into articles to sell has a good title at the time of the decree, the direction of the court being in all these cases to inquire whether the seller can, not whether he could make a title at the time of executing the agreement. In the case of Lord Stourton *v.* Sir Thomas Meers, the Lord Sturton at the time of the articles for a sale, or even when the decree was pronounced, could not make a title, the reversion in fee being in the crown; and yet the court indulged him with time more than once for the getting in this title from the crown, which could not be effected without an act of Parliament to be obtained in the following sessions; however it was at length procured, and Sir Thomas Meers decreed to be the purchaser. Indeed it would be attended with great inconveniences, were decrees to direct an inquiry, whether the contractor to sell had at the time of entering into such contract a title; for thus all incumbrances and defects must be raked into; wherefore it has been thought sufficient to answer the end, if at the time of the decree or report the seller can make a good title, and accordingly it is usual for the report to mention, that if such a third person joins, the title will be good.

Then the question was between the defendants, whether the devisees

of Robert Pitt the son, or the grandson, under the will of the governor, were entitled to the lands thus articled to be purchased, for it was agreed that the purchase-money was to be paid by the executors of Governor Pitt.

And for the latter it was objected by the attorney and Solicitor-General, that when the governor by his will devised all his real, and also his personal estate to be laid out in land, and all this to be for the benefit of his grandson John, after the death of his son Robert Pitt, either in one shape or other, these lands thus agreed to be purchased by the governor should pass; that nothing could be plainer than his intention to dispose of all his estate both real and personal; and Mr. Solicitor cited the case of Greenhill *v.* Greenhill, 2 Vern. 697, by which it is decreed, that where a man articles to buy land, this gives the party contracting an equitable interest in such land, which he may devise, though before the day on which the conveyance is to be made.

MASTER OF THE ROLLS. I admit the case of Greenhill and Greenhill in which I myself was of counsel, to have been so determined; but this material difference is observable between the two cases: there the articles for the purpose were entered into by the testator before he made his will, and so the equitable interest which he gained thereby was well devisable; but in the present case Governor Pitt's will was made prior to the articles for this purchase, before he had any equitable interest in the land, consequently, vide Green *v.* Smith, 1 Atk. 572; Potter *v.* Potter, 1 Vez. 437, when he had no kind of title, he could devise nothing; so that his interest in the premises gained by the governor's articles must have descended to his son Robert Pitt as heir-at-law, who might well devise the same; and though it may at first look strange, that when the governor devised all his real and personal estate, these words should not carry all, yet it will not seem strange, when it is considered that an estate purchased after the will cannot pass thereby; now these articles are as a purchase subsequent, and though the governor's executors are to pay for such purchase, they cannot have the benefit of it, being to advance the money only as a debt due from their testator.

Decree the Master to inquire, whether the plaintiff can make a title, if he can, the purchase-money to be paid by the governor's executors out of his assets; the Master to see who has been in possession since Lady Day, 1726, at which time the purchase-money was to be paid and the conveyance completed; interest and costs to be reserved.

MAYER *v.* GOWLAND.

IN CHANCERY, before LORD CHANCELLOR THURLOW, 1779.

[2 *Dickens* 563.]

Bill in the original cause was for an account of the estate of John Gowland, to have the residue paid to the plaintiff John and the defendant Thomas Mayer according to an agreement between them; to have a contract the testator had entered into with the defendant Dinely for the sale of an estate to him completed; and to have the purchase-money considered as personal estate.

LORD CHANCELLOR. The testator was seised in fee of a manor and farm in Sussex called Mayes.

On the 8th of March 1775 he made his will, and thereby divised Mayes farm to Ralph Gowland for life; remainder to Thomas Gowland the elder for life; remainder to Thomas Gowland the younger in fee; and devises his leasehold estate, and also his jewels used or worn by his wife, to a trustee to permit his wife to use and enjoy the above particulars during her widowhood; and, on her death, or second marriage, to go as part of his personal estate.

He also gives two long annuities he was then possessed of to John Shirly and Ann Shirly; these annuities the testator sold, and a faint claim was attempted to be made to have them reinstated, but it was soon dropt.

The testator also gave 500l. a year to his wife for her life, and a power of disposing of 2000l.; and, after other legacies, gave the residue to the plaintiff John Mayer: he and Thomas Mayer, as it is said, have entered into an agreement to divide the residue.

The testator, after making his will, entered into a contract with the defendant Dinely to sell to him Mayes farm for 1500l., in which agreement he averred it was not subject to any lease; and if Banister the tenant should make out a title to any lease, the agreement was to be void.

The bill in the cross cause is, by the devisee of Mayes farm, to establish the will as to that devise; and by Banister the tenant, to have a lease according to an agreement he sets up, but he cannot make out.

The defendant the widow insists that the jewels, of which the use is given to her by the will for her life, are her paraphernalia, and therefore do not pass by the will; if she persists in the claim, which it doth seem to be her interest to do, she must be put to her election.

The principal question in this cause arises on the estate called Mayes farm, devised by the will, and which the testator afterwards contracted to sell: by the heirs-at-law it is insisted, that the agreement with Dinely, though not carried into execution, is a revocation of the will as to that devise, and therefore the estate descended: By the devisee of that

estate it is insisted, that if Banister's title to a lease is established, the agreement with Direly is void, therefore no revocation; that a void agreement is not a declaration of trust, and therefore will not prevent the devise taking effect: And by the residuary legatees it is insisted, that the testator having contracted, it is evident, he meant to turn it into personalty, and as such they are entitled to it.

And I am of opinion that the agreement is good, that it ought to be carried into execution; and of consequence, the money arising from the sale is to be considered as personal estate.[1]

KNOLLYS *v.* SHEPHERD, 1819, as stated by Sir THOMAS PLUMER, M. R., in Wall *v.* Bright, 1820, 1 J. & W. 494, 499: One case was mentioned to have occurred lately, that was supposed to be similar to it; I have made some enquiry, and have been favoured with a note of it. The case was Knollys *v.* Shepherd, and was decided in April 1819. Knollys having contracted with Sir T. Metcalfe, for the sale of an estate at Fearne Hill, afterwards devised it to his wife by the description of, all that my estate at Fearne Hill, etc., which I have lately contracted to sell to Sir T. Metcalfe. There were several questions in the cause, one was, whether this was a specific legacy to the wife of the purchase money for the estate? and the Lord Chancellor held, that it was not, and that it was nothing more than a devise of the legal estate, to enable her to carry the contract into execution; he thought it was a disposition of the legal, but not of the beneficial estate.

TOWNSEND *v.* CHAMPERNOWNE.

IN THE EXCHEQUER CHAMBER, BEFORE LORD CHIEF BARON RICHARDS,[2] 1821.

[9 *Price* 130.]

This cause, which was a suit for specific performance of an agreement for the purchase of freehold estates in Devon to a very considerable amount, had been revived against the executors of the will of the defendant, who died pending the suit, and whilst the cause was at issue, leaving all his real and personal property to his infant children.

[1] See on this point the elaborate note by the Reporter in Keep *v.* Miller, 1886, 42 N. J. Eq. 100.

[2] As a judge, RICHARDS has commended himself to the profession. For example, Sir. THOMAS PLUMER terms him "the very learned Chief Baron. Chichester *v.* Sheldon, 1823, 1 Tur. & R. 245, 252. Lord LYNDHURST con-

It appeared by the pleadings that the defendant had paid over several large sums on account of the purchase money, and that great delay had taken place in making title to the estate. A very considerable proportion of the purchase-money was still due.[1]

The LORD CHIEF BARON. I am sorry to find myself obliged to allow the objection, for the object of such objections is too often quite apparent and palpable. In this case, however, it may be very proper to have taken it.

As to the possibility of a deficiency of assets, I consider that there is nothing in that to support the objection, because the court charges the real estate, and gives a lien for the purchase money.

This bill states the estate to belong to the defendant Champernowne. It is certainly his in equity, and an equitable title is subject to the same rules as a title at law. There appears to be a large proportion of the purchase money still due from the defendant's estate. The personal property is clearly applicable to the payment of it in the first instance, but the real estate is liable for any deficiency. After all, the question is whether the agreement is for the benefit of the heir or devise. Executors are trustees for dēvisees, legatees, creditors, and residuary legatees. But an heir-at-law or devisee may say he has a right, as creditor, against legatees, to inquire whether a good title can be made, and, therefore, he has a direct interest in the thing; and he may, indeed, file a bill against all parties now, for the purpose of ascertaining the validity of the contract, and the title to the estate. If so, the consequence of not making the real representative a party would be to expose the defendant to the danger of double vexation, in being called on for a double account. The moment it is admitted that the real estate does not belong to the executors, but to the heir or devise, there is an end of the question. He must be made a party.

Another reason is that I am bound to order a conveyance to be made by the person entitled to the estate, and on that account he ought to be before the court, that I may be enabled to make such an order, which otherwise I could not do. The devisee is not bound to take the estate if *damnosa hæreditas*. But, in fact, I cannot make an effectual decree without him.

The cause was, therefore, ordered to stand over for the purpose of bringing the infant devisees before the court by a supplemental bill, to be filed against them for that purpose.[2]

sidered him "an eminent equity judge," Collins *v.* Hare, 1828, 1 Dow & Cl. 139, 150; while Baron HULLOCK referred to him on two occasions as "a most experienced and able equity lawyer," Governors, etc., *v.* Searlet, 1824, 13 Price, 54, 73, and again in the complicated but complimentary phrase, "than whom an abler equity lawyer never sat here," Governors, etc., *v.* Smith, 1824, McClel. 17, 24.

[1] The arguments of counsel have been omitted.

[2] "Another ground of demurrer is, that the action cannot be maintained

ROBERTS *v.* MARCHANT.

IN CHANCERY, BEFORE LORD CHANCELLOR LYNDHURST, 1843.

[1 *Phillips* 370.]

The LORD CHANCELLOR.[1] This was a suit by the administrator of the vendor against the purchaser of an estate for a specific performance of the agreement of sale. The defendant by his answer objected that the heir-at-law of the vendor ought to have been a party to the suit. The Vice-Chancellor, WIGRAM, allowed the objection. This is an appeal from that decision.

It was argued that by the contract the estate was converted into personalty, and that the heir-at-law had no interest in the matter. But that is to assume the very point in controversy, for the heir-at-law may dispute the contract and controvert its validity. It was further argued, that, as a general rule, it is not necessary to make parties to the bill those who are not parties to the contract; but that rule does not extend to representatives; and the heir-at-law is the representative of the vendor as to the realty.

The cases which were cited do not apply. The mortgagee, it is said, need not be a party in a suit by the mortgagor. But his interest is not affected by the sale, and on payment of the mortgage-money by the purchaser it entirely ceases. So, as to the cases where the sale is by a person holding the estate under a conveyance or a

against the heirs, but should have been brought against the administrator. The statute, Rev., § 2460, provides that specific performance of a contract to convey real estate which might be enforced against the person agreeing to convey, if living, may be enforced against his executor. And, by § 2461, it is not necessary to make any other than the executor party defendant to such proceeding in the first instance, but the court, in its discretion, may direct other persons to be made parties. And heirs and devisees may, on motion, at any time, be made defendants. Generally, under the statute, the action may be brought in the first instance against the executor, but the statute does not require that it must be against the executor or administrator. But for this statutory provision the action could not be brought against him; he represents only the personal property of the decedent. The real estate descends to the heir, and in the present case it is the heir who refuses to convey. It appears that there is no executor who could be sued in the present instance, and surely the statute did not mean to deprive the party of this remedy unless there should be an executor or administrator in this State over whom the Court could acquire jurisdiction. While the statute makes the executor or administrator a proper party, it does not make him a necessary party, in our opinion." Per MILLER, J., in Judd *v.* Mosely, 1870, 30 Iowa, 423, 427.

[1] Arguments of counsel and a short opinion of the Chancellor at an earlier hearing have been omitted.

devise; the heir-at-law of the grantor or devisor need not be made a party; he does not claim though, or in any way represent, the vendor. I agree with the Vice-Chancellor that the purchaser is not to be prejudiced by the death of the vendor, but is entitled to the same benefit from a decree as if it had passed against the vendor himself.

A case of William *v.* Shaw was cited in the course of the argument at the bar, in which the Vice-Chancellor is said to have decided, upon the objection being taken at the hearing, that the heir-at-law was not, in a case of this nature, a necessary party to the suit. That case was not mentioned in the court below. Neither the argument at the bar, nor the reasons of the judgment, are stated. I do not think, if it had been referred to, it would, under these circumstances, have changed the opinion of that learned judge in the present case. It has not altered mine.

Appeal dismissed.

HODDEL *v.* PUGH.

IN CHANCERY, BEFORE SIR JOHN ROMILLY, M. R., 1864.

[33 *Beavan* 489.]

This suit was instituted by the executors of a deceased vendor against the purchaser and the vendor's heir-at-law, to compel them to complete the contract by executing the conveyance.

The contract was signed on the 26th of July, 1860, and was in the following words:—

"Mr. Elias Pugh agrees to sell Pwlleront Estate, and James G. Price agrees to buy the same for twelve hundred pounds.

"Elias Pugh.
"James. G. Price."

Four days afterwards, the vendor gave the purchaser notice to rescind the contract; but the latter insisted on its fulfilment, and an abstract of title was delivered in February, 1861.

Some further delay took place on the part of the vendor, and on the 21st of August, 1861, the purchaser filed his bill against him for a specific performance of the contract. The vendor, having been advised by counsel that he had no defence to the suit, agreed to fulfil the contract, and his solicitor accordingly wrote a letter to the purchaser stating that the vendor was ready to complete the sale.

The vendor died on the 21st of January, 1862, before the conveyance had been executed, having previously made his will, dated the 15th of January, 1861, whereby he appointed the plaintiffs his executors, but he

made no devise of the estate contracted to be sold, and the testator's interest therein descended on the defendant Israel Pugh, his heir-at-law. The plaintiffs were willing to complete the contract entered into by their testator, but the defendant Israel Pugh refused to execute the conveyance of the property to the purchaser.

Under these circumstances, the present suit was instituted, and the bill prayed, that it might be declared that the plaintiffs were entitled to have the contract specifically performed, and that the defendant Israel Pugh might be declared a trustee for the plaintiffs, as the personal representative of Elias Pugh deceased, of the lands contracted to be sold, and might be ordered to execute a proper conveyance and pay the costs of the suit. . . .

The MASTER OF THE ROLLS. My present impression is, that the heir-at-law has mistaken his rights and duties. There was a distinct contract in existence when the testator died; the consequence of which was, that the purchase-money became part of his personal estate, the land having, by the contract, ceased to be real estate belonging to the testator. By his will he has disposed of his personal estate, and it follows that his personal representatives were entitled, in order to obtain the purchase money, to file a bill against any person who merely filled the position of a trustee for the purchaser to obtain his concurrence in the conveyance of the property to the purchaser. This being a valid contract, the heir was only a trustee, and was bound to convey all his interest at the expense of the person requiring it. . . .

I am of opinion, in this case, that the defendant Price could have enforced the specific performance of the contract, and that none of the circumstances stated by the defendant Pugh are such as disentitled Price to that relief.

It is clear that the contract could have been enforced against the vendor; but he died, having made no provision for its completion, and his interest descended on his heir-at-law. The heir is called upon to convey, the whole matter is explained to him and he is offered 50l., but he refuses, and says he will have 200l., and he stands out for that sum.

The right of the plaintiffs to make the defendant Pugh convey all the right in the property which has devolved on him by reason of being heir-at-law of the vendor is clear. He has refused to convey, and the necessity of this suit has been caused by his refusal. I shall direct him to execute a proper conveyance of all his right, title and interest in the property by reason of his being heir-at-law, to be settled in chambers if the parties differ. Pugh must pay the costs of the suit, which he has occasioned, and the plaintiff must pay Price's costs and have them over as against Pugh.

HOUSE *v.* DEXTER.

IN THE SUPREME COURT OF MICHIGAN, 1861.

[9 *Michigan* 246.]

Appeal in Chancery from Washtenaw Circuit.

Complainant, as administrator of Richard Shear, filed his bill in Chancery to compel the specific performance, by defendant Dexter, of a contract by which he agreed to convey to one Waldo, certain lands in said county, which contract had been assigned to Shear in his lifetime. The heirs of Shear were not made parties, and complainant by his bill claimed to be entitled, as administrator, to the contract, and to the premises under it.

The court below dismissed the bill, and complainant appealed.

MANNING, J. The objection that the heirs of Shear are not made parties, or that the bill should have been filed by them is well taken. The bill is for the specific performance of a contract for the sale of lands by Dexter to one Waldo, who assigned the contract to Shear; and is filed by complainant as administrator of Shear.

At law, a contract for the purchase of land gives the vendee no interest in the land; but the rule is otherwise in equity, which considers the vendor as to the land a trustee for the purchaser, and the vendee as to the money a trustee for the seller. The land in equity belongs to the vendee, and may be sold, devised or encumbered by him; and on his death it descends to his heirs, who take it subject to the rights of the vendor under the contract. Wing *v.* McDowell, Wal. Ch. 175, and cases there cited. The bill therefore should have been filed by the heirs of Shear, unless there is some statute authorizing it to be filed by the administrator.[1]

[1] The part of the opinion dealing with the statutory provisions on this last point has been omitted.

In Buck *v.* Buck, 1844, 11 Paige 170, 171, the object of the bill was to obtain the specific performance of an agreement to convey lands to the complainants' testator.

"The difficulty of the complainant's case, however, is that, as to the only proper subject of equitable cognizance, the personal representatives of John Buck were not the persons to bring the suit. The decedent has devised the premises in controversy to his four sons; and they, in their character of devisees, are the proper persons to file a bill for a specific performance of the agreement to reconvey the lands in question, after the defendant should have received payment of the whole amount of his debt. It is true the decedent directs his personal representatives to take such just and proper means as will insure a deed of the premises to the devisees. But that cannot authorize them to institute a suit here for a specific performance in their own names; but the devisees, who are the real and only parties in

POTTER *v.* ELLICE.

IN THE COMMISSION OF APPEALS, 1872.

[48 *New York* 321.]

This is an action against the heir of a vendor, to compel the specific conveyance of land. The executors of the deceased vendor are not made parties. The litigation at the trial was chiefly upon the claim of the defendant that he could repudiate the contract because the payments were not made at the time specified in the contract. The complaint alleged the death of the vendor, and the appointment by the surrogate of St. Lawrence county of Charles R. Westbrook and John F. Rossell as his administrators within this State, which was not denied in the answer. Charles R. Westbrook was the attorney of the defendant in this action.

At the close of the testimony, the defendant's attorney "moved to dismiss the complaint, on the ground that the said Charles R. Westbrook and John F. Rossell were not made parties to the action." The motion was denied by the referee, who rendered judgment for the plaintiff to the effect that the property be conveyed by the defendant to the plaintiff; that the money paid into court by the plaintiff (upon a tender) remain until the delivery and execution of the said deed to the plaintiff, and that then the same be paid to the administrator of Ellice, upon application for the same to the court.

HUNT, C. It is difficult to say that this action is well brought, the administrators of Mr. Ellice not being made parties. The heir of Mr. Ellice holds the legal title, in trust, to convey the same to the vendee upon performance of the conditions of the contract. He is a mere instrument, having no real interest in the matter in a case where the contract is performed. The administrators are the real parties in interest.

interest, either at law or in equity, in the land, cannot file a bill for a covenant to reconvey, to recover damages for a breach of such covenant, the executrix and executors might be the proper persons to institute the suit; but in this court the devisees, who have by the will acquired all the testator's interest, either at law or in equity, in the land, cannot file a bill for a specific performance in the names of the personal representatives, who have no interest whatever in the land in their characters of executrix and executors." Per Chancellor WALWORTH.

"It does not appear what became of the legal title to the land upon the death of Jesse Thomson, but as he left a will it must be presumed that it passed under the will to some devisee. The person taking the legal title under the will should properly have been made a party to this action, so as to be bound by the judgment. He might be able successfully to defeat the contract, and if not a party, the purchaser under the judgment might not get a good title." Per EARL, J., in Thomson *v.* Smith, 1875, 63 N. Y. 301, 303.

Both by the statute and the common law the interest in the contract passes to them. They are the parties to whom the money is to be paid, and who have the entire beneficial interest in the contract. Their discharge or receipt is a necessary muniment to the vendee. They are the parties not only who receive, but who are to settle or to contest, as the case may be, the amount to be paid by the vendee in fulfilment of his contract. No one else can legally adjust the amount to be paid, or acquit for the payment. 2 R. S. 83; id. 194, § 169; Havens *v.* Patterson, 43 N. Y. 221; Lewis *v.* Smith, 5 Seld. 502, 510; 1 Sug. on Vend. 264; Calvert on Parties in Eq. 327. The administrators are parties, without whose action some of the most important points cannot be determined. Among these are the existence of the contract and the amount to be paid in fulfilment of its terms. Admitting these general rules, the court below supposed that reasons existed why they should not control the present case. Among other things, it is said that the personal representatives of the vendor were tendered the amount claimed to be due upon the contract, according to their own statement of the amount due. How has this been established, and by whom? By witnesses in a suit to which the administrators were not parties. This is a loose rule, by which the parties are to be bound, and their rights cut off by testimony in suits to which they are not parties, and in which they have no opportunity to establish their rights.

It is said, also, that Mr. Westbrook, one of the administrators, is also the defendant's attorney in this suit. All we know is, that a gentleman by the name of Charles R. Westbrook is one of Mr. Ellice's administrators, and that a gentleman of the same name appears as an attorney in this suit. This is an accidental circumstance, which cannot affect the rule of law or alter the general principle. Mr. Rossell is one of the administrators, but not one of the attorneys. He may be the one administrator who knows the facts of the case, and who is kept in ignorance of the present proceeding, by which they are to be affected.

It is further stated in the opinion below that where the vendee and the heir are the only parties, a judgment might be made saving and protecting the rights of the administrators, to wit: the right to litigate the amount of the purchase-money and the protection of the heir for its payment. If a judgment were thus rendered, it is quite possible that a purchaser under the judgment would be held to have notice and to buy subject to those reservations. This is not, however, a practical question in the present case. The amount of the purchase-money due is absolutely fixed by the judgment, and upon payment of the amount to the clerk the plaintiff is entitled to his deed, free from all question or condition. There are no reservations or restrictions contained in the judgment entered in this case.

Upon the abstract question discussed, I find great difficulty in sustaining the judgment. I apprehend, however, that the point discussed has not been so presented that it is necessarily or fairly in the case. On

the evidence as it is before us, there is no reason to suspect fraud, collusion, or that the omission is other than an error in pleading. As I have already shown, this may be otherwise, but there is nothing here to make us suspect that the case is other than a fair one, and that the amount has been properly ascertained.[1]

BAILEY *v.* DUNCAN.

In the Court of Appeals of Kentucky, 1827.

[4 *Monroe* 256.]

Owsley, J. John Bailey and Mary, his wife, formerly Mary Duncan, claiming in right of the latter an interest in the personal estate, slaves, and land of Isaac Duncan, senior, deceased, exhibited their bill in chancery against Margaret Duncan, the executrix of the last will, etc., of the said Isaac, deceased, and the surviving brothers and sisters of Mrs. Bailey, for the purpose of obtaining an account of the personal estate, hire of slaves, rents and profits of the land, and partition of the slaves and land.

After several amended bills, cross bills and answers (the particular import of which need not now be mentioned) were filed, the cause came on to be heard, and the decree to which this writ of error is prosecuted was pronounced.

The questions made in the pleadings and involved in the assignment of errors may, with propriety, be said to embrace the following points: . . .

Fourth. As to the right of dower in the land claimed by Margaret Duncan, the widow of Isaac Duncan, senior, and which was decreed to her by the court below. . . . The question arises whether or not a wife is entitled to dower in land, of which her husband dies possessed, though without having the legal title, but to which at the time of his death he is equitably entitled to a conveyance of the legal title from another?

Were this question to be decided upon common law principles, the answer would undoubtedly be in the negative. As early as Vernon's case, 4 Co. R. 1, it was held that a wife was not dowable of a use before the statute of uses; and since the statute, uses or trusts not executed, by the statute have been repeatedly held not to give the wife a greater interest than uses at common law.

[1] The Court held, however (in an omitted portion of the opinion), that the objection as to the defect of parties had not been properly raised, and so affirmed the decree below.

In the case of Bottomley *v.* Lord Fairfax, Prec. Ch. 336, the court say, "that if a husband before marriage conveys his estate to trustees and their heirs, in such a manner as to put the legal estate out of him, though the trust be limited to him and his heirs, that of this trust estate, the wife, after his death, shall not be endowed, and that this court hath never yet gone so far as to allow her dower in such a case."

In the case of Chaplin *v.* Chaplin, 3 Peere Wm. R., the chancellor says, "that as at common law, an use was the same as a trust is now, it follows, that the wife can no more be endowed of a trust now, than at common law, and before the statute, she could be endowed of an use."

And in the case of Godwin *v.* Winsmore, 2 Atkins, 526, Lord HARDWICKE observes, that "it is an established doctrine now that a wife is not dowable of a trust estate; indeed, says he, "a distinction is taken by Sir Joseph Jekyll, in Banks *v.* Sutton, 2 P. W. 708, 709, in regard to a trust, where it descends or comes to the husband from another, and is not created by himself; but I think there is no ground for such a distinction, for it is going on suppositions which hold on both sides."

Thus stood the doctrine of the law upon the subject of estates in trust, until the passage of an act by the legislature of Virginia before the separation, and which has since been re-enacted by the legislature of this State, and is contained in 1 Dig. L. K. 315.

The act provides, that, "where any person to whose use, or in trust for whose benefit, another is, or shall be seized of lands, tenements, or hereditaments, hath or shall have such inheritance in the use or trust, as if it had been a legal right, the husband or wife of such person would thereof have been entitled to courtesy or dower, such husband or wife shall have and hold, and may by the remedy proper in similar cases, recover courtesy or dower of such lands, tenements, or hereditaments."

With respect to uses and trusts embraced by the provisions of this act, the doctrine of the common law has undoubtedly undergone a change, and although formerly a wife was not dowable of such a use or trust, she may now by the remedy proper in such a case, recover dower of the lands to which others are seised to the use, or in trust for the benefit of the husband. In deciding upon the question under consideration, therefore, the main and only inquiry for the court, is to ascertain whether or not it was intended by the makers of the act, to authorize a wife to recover dower in lands, to which the husband had at his death an indisputable right in equity to a conveyance of the fee simple estate, though the right be devised under an executory contract for the title, and not resulting from an use or trust, expressly declared by deed. With respect to trusts of the latter sort, the provisions of the act are too explicit, in favor of the wife's right, to admit of a difference of opinion; and if we advert, as we should do, to the old law as it stood at the passage of the act, the mischief which must have actuated the legislature in making the change, and the remedy which the act has provided, we apprehend, but little doubt can be entertained as to the propriety of giving such a con-

struction to the act, as will embrace all trusts, whether expressly declared by deed or resulting from executory contracts, by construction of courts of equity. The interest of the *cestui que trust* is precisely the same, let the trust be created in the one way or the other, the justice of the wife's claim is as strong in one case as the other; and, as she was not dowable in a trust of either sort, before the enactment of the statute, the mischief to be remedied by the act, emphatically demands that the wife should be endowed of trust estates of both sorts.

We have been unable to find any case, either in this country or Virginia, where dower has been decreed to the wife, in an equitable estate in fee, to which the husband became entitled by contract, for a conveyance of the land; but the right of the wife to dower in such a case came before the appellate court of the State of Virginia, in the case of Rawton *v.* Rawton, 1 H. M. R. 92, and although a majority of the court decided against the claim of dower in that case, two out of the five judges composing the court, were expressly in favor of the claim for dower; and the decision of the others went not upon the idea of dower, not being allowed in an equitable estate, but upon the principle that the equitable estate, of which dower was claimed, was not made out by the testimony in the cause. And in the case of Claibourn *v.* Claibourn,[1]

[1] The cases of Rawton *v.* Rawton and Claibourn *v.* Claibourn contain elaborate arguments on the general question of dower rights in the equitable estates of the husband.

"In this case two questions are made: 1. Whether a widow is entitled to dower of a trust estate. . . . 1. In England a woman is not dowerable of a trust estate, although a husband may be tenant by the curtesy. This is the more remarkable as dower is the favorite of the common law. A woman has her dower where the husband had only a seisin in law, but a man cannot be tenant by the curtesy unless there was a seisin in fact. No good reason has been assigned for excluding the wife of her dower in a trust estate. It rests upon usage, which, though not now approved, cannot be altered by any authority less than the parliament. In Pennsylvania the usage has been more reasonable and more analogous to the general principles of dower. The husband and wife are placed on an equal footing. He has his tenancy by the curtesy, and she has her dower. I do not know that the question has ever been brought to a decision in this court. The reason of this I take to be that it has never been doubted. I have frequently heard it taken for granted, but never seriously questioned. I do not understand that the learned counsel who now makes the point supposes the law to be in his favor. But he wishes it to be settled by a solemn decision. It is best that it should be so. My opinion is that by the usage and law of Pennsylvania a woman is dowable of a trust estate." Per TILGHMAN, C.J., in Shoemaker *v.* Walker, 1816, 2 S. & R. 554, 555.

"The doctrine is now well established that where a vendee of lands has died without making a full payment of the purchase money, and without having received a conveyance of the legal title, his widow may nevertheless, in those States in which dower is allowed in equitable estates, go into a court of chancery and compel a sale of the lands for the satisfaction of the

which afterward came before the same court, Judge ROANE, who was one of the judges that decided against the widow's claim of dower in the former case, in remarking upon that case, after stating its circumstances, says, "the transaction having happened subsequent to the act of 1785," (the act of which the act of this country is a transcript), "the widow claimed her dower only under the provision of that statute. Three of the judges overruled her claim; but it was on the ground of no contract having been proved, as they thought, for more than a life estate, in favor of the husband: two other judges thought that the husband had an equitable estate in fee, and on that ground were in favor of the dower, under the act of 1785." In the course of his remarks he further says, "the counsel in opposition to the claim of dower, admitted that under the act of 1785, the widow was entitled to dower, provided it should appear that her husband had such an equity in a fee simple estate, as

balance due the vendor and an assignment of her dower in the surplus. Thompson *v.* Cochran, 7 Humph. 72; Daniel *v.* Leitch, 13 Gratt. 195; 2 Scribn. Dower 152. As Hart, the husband, had paid a large portion of the purchase money, his widow was entitled to dower in all that remained after satisfying the unpaid balance. The court below decided upon the theory that the husband did not have such an estate as would entitle the plaintiff to dower under any circumstances, and in this we think it erred." Per WAGNER, J., in Hart *v.* Logan, 1871, 49 Mo. 47, 51.

"Mrs. Barnes, at the death of her husband, was entitled to dower in the whole farm, subject, however, to a just contribution upon her part to the payment of the unpaid purchase money going to the heirs of Mrs. Fuller. 2 R. S. 112, §§ 71, 72; Hawley *v.* James, Paige 453, per the Chancellor." Per SANDFORD, Asst. V.-C., in Church *v.* Church, 1846, 3 Sandf. 434.

"The balance due from Coult, then, on the purchase of the land, remaining unpaid, Malin might have filed a bill to extinguish the equity existing in favor of Coult's widow and heirs, and Mrs. Coult could only have claimed as dower the interest for life of one-third that the land might have sold for over and above the unpaid purchase money, interests and costs." Per PERKINS, J., in Melin *v.* Church, 1853, 4 Ind. 535, 536.

"He claims that the vendor's lien is paramount to the rights of the widow, and must be satisfied before she can have any interest in the property. If the question depended upon general principles of law, the position of the appellant would seem to be well fortified; but it cannot prevail against the explicit and unequivocal language of the statute above set out. Indeed, the construction contended for would, it seems to us, substantially overturn and abrogate the statute: for the vendor always has a lien upon real estate sold for the purchase money unless he has taken other security, or has otherwise waived it. This statute does not abrogate the vendor's lien, but it cuts down slightly the amount of land against which it may be enforced in case of the purchaser's death leaving a portion of the purchase money unpaid, and the land is sold as provided for therein." Per WORDEN, J., in Carver *v.* Grove, 1879, 68 Ind. 371, 373.

And see on the whole subject, with the rules of the different States, 1 Scribner on Dower, ch. 20.

would authorize a court of equity to decree the legal estate." Thus it seems to have been the concurrent opinion of the bar and the bench of the supreme court of Virginia, that since the act of 1785, of which ours is a copy, that a wife is dowable of any equity in a fee simple estate, belonging to the husband, if it will authorize a court of equity to decree the legal title.

CARRODUS *v.* SHARP.

IN CHANCERY, BEFORE SIR JOHN ROMILLY, M. R., 1855.

[20 *Beavan* 56.]

In August, 1853, the plaintiff Carrodus, being entitled to the lease of a mill, called Beckfort Mill, agreed to assign it to the defendant Sharp. The lease contained a covenant against assignment and underletting without the consent of the lessor, which consent the plaintiff undertook to obtain, and a covenant to keep the premises in repair. The contract also provided that the machinery and effects should be valued by a person named and taken by the plaintiff at that valuation. They were afterwards valued at £707. Differences took place after long communications between the parties, and ultimately, in November, 1853, the defendant having denied the plaintiff's right to specific performance, the vendor on the 30th of November, 1853, filed this claim for specific performance. A decree was made in February, 1854, when a reference was made as to title.

The principal point in contest was, when the lessor had given an unqualified assent to the assignment, and both the chief clerk and the court came to the conclusion, on an examination of the evidence, that such assent had not been given until the 1st of December, 1854.

There was some evidence to show that a beam or some timbers which were old were decaying, and some flags on the pavement or floor seemed to be in an unsatisfactory state, but this was waived by the lessor.

The claim now came on for further consideration. The questions remaining to be decided related to the expenses and outgoings of the mill, the repairs and sustentation of the premises and machinery, the interest on the amount of the valuation of the machinery, etc., and the costs of the suit.

THE MASTER OF THE ROLLS. The questions remaining to be decided relate to the expenses and outgoings belonging to the mill, and to the repairs and sustentation of the premises and the machinery there, and the costs of the suit.

They all, I think, in a great measure depend on the same question, which is this: From what time is the defendant to be treated as the

purchaser of the mill? In the absence of any express contract on the subject, the principle on which this question depends is this: At what time could the purchaser, acting prudently, have taken possession of the premises sold? Up to that time the expenses and outgoings must be borne by the vendor, and from that time they fall upon the purchaser. Although this is not universally true, yet usually this inquiry is answered by considering at what time a good title was first shown, it being commonly clear that no purchaser can prudently take possession of what he has contracted to buy until he is satisfied that he will be able to retain possession of it, or, in other words, until a good title is shown. The first showing of a good title, however, may depend on a slight circumstance, evidence of which could always have been furnished, if required, but which was not done, because of some other matter, which was the real point of contest between the parties, and which has been ultimately decided against the purchaser.

In this case, my certificate shows, that a good title was first shown on the 1st of December, 1854. I have read through the affidavits, and attended carefully to the arguments of counsel, for the purpose of ascertaining whether the defendant could prudently have taken possession of the premises before that time; and the solution of this question, in my opinion, depends on whether the lessor had assented to the assignment of the lease to the defendant, for the lease to the plaintiff contained a condition that he was not to assign without the consent in writing of the lessor. [His Honor examined the evidence minutely, and then stated the conclusion to which he had arrived as follows]: I am of opinion that no such assent was communicated to the defendant as would have enabled him to take possession of the mill with a reasonable security that he would be able to continue in possession of it until the 1st of December, 1854. In fact, I think that this question is concluded by the certificate, and that if it had been previously shown to the defendant that the lessor would have assented to a simple and unconditional assignment to him of the plaintiff's lease, there being no question between the parties beyond this, a good title would have been shown and the matter settled between the parties; subject, however, to some question respecting compensation for dilapidations.

The result is that, in my opinion, the plaintiff will have to pay the outgoings incidental to the lease of the mill up to the 1st of December, 1854.

With respect to the dilapidations, it appears to me, upon the evidence, that some, though not a considerable, repair is required, for the purpose of putting the mill into tenantable repair, and to comply with what is required by the landlord; I refer to the evidence with regard to the beam in the mill and some flags on the pavement. On this part of the subject, I trust that the parties will have the good sense to come to an agreement as to the payment of a small sum, otherwise it must be ascertained by the chief clerk.

With respect to the machinery, I am of opinion that the defendant must pay the £707, the amount of the valuation, but that he is not liable to pay any interest on that sum down to the 1st of December, 1854.

I am of opinion that the defendant must pay the costs of the suit up to and including the hearing, as it was occasioned by his resisting a decree for specific performance, which, in my opinion, he was not entitled to do; but since that period the parties appear to me to have mutually claimed what they were not entitled to, and I shall therefore give no subsequent costs on either side.

There will therefore be a decree directing an assignment of the lease; the defendant must pay the £707, with interest thereon from the 1st of December, 1854, together with the rent, rates and taxes, and other outgoings of the mill and machinery, and the preservation thereof, since the 1st of December, 1854. The plaintiff will have to bear them down to that date, and must pay a sum to be arranged or ascertained in respect of the dilapidations of the mill. The defendant must also pay the plaintiff the costs of suit up to and including the first hearing.'

[1] "I think that the distinction drawn between an executed and an unexecuted contract is sound. Where there is only a contract for sale a suit is necessary to declare the vendor a trustee; but where the contract has been executed by payment of the purchase money and a formal covenant to surrender, I think that no suit is necessary." Per Sir G. M. GIFFARD, L.J., in *In re* Cuming, 1869, L. R. 5 Ch. 72, 73.

"COTTON, L.J.: Where a contract for sale has not been completed in the lifetime of the vendor, can he, at his death, be considered a trustee? To hold that he can would be a dangerous departure from the rules on which the court has been in the habit of acting. The case which furnishes the best guide to a decision is *In re* Carpenter, Kay 418, 420, where Lord HATHERLEY, when Vice-Chancellor, refused to make an order under circumstances very similar to those of the present case, and said that he could not do it unless the right to specific performance had been settled by a decree. It is difficult on an application of this kind to enter satisfactorily into the question whether the circumstances are such that specific performance would have been enforced. His Lordship, after referring to Section 29 of the Trustee Act, 1850, and to Section 1 of the amending act as showing that in cases of real estate the constructive trust must first have been declared by a decree of the court, said 'that the reason of that was, that there might always be a question whether the contract could be enforced by a suit for specific performance; and it would be extremely inconvenient to declare the vendor to be a trustee upon a petition on which that point could not be decided.' I think that is the correct principle." *In re* Colling, 1886, L. R. 32 Ch. Div. 333, 335.

It was determined in *Ex parte* Minor, before Lord Chancellor ELDON, 1805, 11 Ves. 559, that where sales are made under the authority of a court, the contract is not regarded as consummated until it has received the court's sanction or ratification, and, therefore, any loss happening before confirmation falls upon the vendor.

CLARKE *v.* RAMUZ.

IN THE COURT OF APPEAL, 1891.

[*Law Reports* (1891) 2 *Queen's Bench* 456.]

Action by the purchaser of land against the vendor for wrongfully, and in breach of his duty to the plaintiff under the contract for sale of the land, suffering one Jackson to remove from the said land some hundreds of cartloads of soil.

At the trial before GRANTHAM, J., with a jury, the facts appeared to be as follows: On August 2, 1889, the defendant entered into a contract for the sale to the plaintiff, for £255, of the fee simple of five small plots of building land situate at Southend. The property in question formed part of various lots sold by auction under the same conditions of sale. The date fixed by the contract for completion was August 12, 1889. By the conditions of sale it was provided that a purchaser who required a free conveyance, as thereinafter provided, should not be entitled to an abstract of title except on payment of a specified fee; and it was further provided that the contents and dimensions of the property as stated in the particulars should be taken to be correct, and no compensation should be required for any excess or deficiency in any of the quantities stated, and that no misdescription should annul the sale, nor should any compensation be allowed in respect thereof. On August 17 the defendant's solicitors wrote to the plaintiff reminding him that August 12 was the time fixed for completion, and asking him to name an early date for completion. On September 10 they again wrote reminding him that August 12 was the day for completion. On September 11 the plaintiff answered, asking for a free conveyance. On October 21, 1889, a conveyance of the land to the plaintiff was executed by the defendant, and the plaintiff then paid the balance of the purchase money.

The defendant remained in possession of the land sold till completion. The defendant had employed one Jackson to make roads on his property adjoining the land sold to the plaintiff. Jackson, between September 11 and 30, 1889, without the knowledge of or any authority from the defendant, who lived at Herne Bay on the other side of the Thames, removed a large quantity of surface soil from the plots of land sold to the plaintiff, for the purpose of filling up a hole in a road being made by him on the defendant's land. At the time when completion took place neither the plaintiff nor the defendant knew that this had been done. The plaintiff did not find out that the soil had been removed till August or September, 1890. He then commenced the action. It seemed to have been assumed at the trial that the question was one of law for the judge, except so far as the amount of damages was concerned. The jury accordingly assessed the damages, and the judge gave judgment for the plaintiff for the amount found by them.

The defendant now moved for judgment or for a new trial, on the ground that the judge's ruling was erroneous.

LORD COLERIDGE, C. J. The contention is that such an action as this will not lie. It appears to be well established in equity that, in the case of a contract for the sale and purchase of land, although the legal property does not pass until the execution of the conveyance, during the interval prior to completion the vendor in possession is a trustee for the purchaser, and as such has duties to perform towards him, not exactly the same as in the case of other trustees, but certain duties, one of which is to use reasonable care to preserve the property in a reasonable state of preservation, and so far as may be, as it was when the contract was made.[1] Of course, where, from any cause, a long period of

[1] "It was said, in Green *v.* Smith, 1 Atk. 572, and had been so long held before, in Davie *v.* Beardsham, 1 Ch. Cas. 39, that from the time of a contract for the sale of land, the vendor, as to the land, is considered a trustee for the purchaser, and the vendee, as to the money, a trustee for the vendor." Per Chancellor KENT, in Champion *v.* Brown, 1822, 6 Johns. Ch. 398, 403.

"The way of reasoning with respect to trust estates has been this, that the party having no beneficial interest, it can hardly be considered his for purposes of disposition; and to treat it as his own would be quite inconsistent with its nature. He has no right to dispose of it, except by the direction of his *cestui que trust*, or for the objects for which it is confided to him. When the devise is not consistent with the trust, to suppose he meant it to pass is to suppose that he was taking upon himself to do an act of injustice. This the court will not presume, and therefore says that he did not intend to include it.

"To a certain degree the same reasoning applies here. The contract to sell is a disposition of the estate, and by it the purchaser parts with his right and dominion over it. It is in equity no longer his; he is considered constructively to be a trustee of the estate for the purchaser, and the latter as a trustee of the purchase money for him. They are so considered by construction only; but in many instances the court acts upon that notion, as in cases between the heir and executors of the vendor or purchaser, if they die before the sale is completed, and in giving the purchaser the right of disposing of it by a subsequent will in the same manner as other real estates. Therefore, to suppose the party intentionally to devise for purposes of his own that which he cannot thus dispose of is open in some measure to the same objections, but we are to consider whether it does exactly come up to the case I have adverted to.

"Now, though there is a great analogy in the reasoning with respect to the will of a naked trustee and that of a constructive trustee, on the ground of the impropriety of their attempting to dispose of the estate, yet for many purposes they stand in different situations. A mere trustee is a person who not only has no beneficial ownership in the property, but never had any, and could, therefore, never have contemplated a disposition of it as of his own. In that respect he does not resemble one who has agreed to sell an estate that up to the time of the contract was his. There is this difference at the outset, that the one never had more than the legal estate, while the other was at one time both the legal and beneficial owner,

time elapses during which such possession of the vendor continues and deterioration of the property takes place, other considerations may come in; but in this case the injury complained of is the removal of a considerable portion of the soil for purposes for which the vendor had no right to allow such removal without the consent of the purchaser. The case of Phillips *v.* Silvester, Law Rep. 8 Ch. 173, is stated by Mr. DART to have been commented upon by JESSEL, M. R.; but the doctrine that the

and may again become the beneficial owner if anything should happen to prevent the execution of the contract; and in the interim, between the contract and conveyance, it is possible that much may happen to prevent it. Before it is known whether the agreement will be performed, he is not even in the situation of a constructive trustee; he is only a trustee *sub modo*, and provided nothing happens to prevent it. It may turn out that the title is not good, or the purchaser may be unable to pay; he may become bankrupt, then the contract is not performed, and the vendor again becomes the absolute owner. Here he differs from a naked trustee, who can never be beneficially entitled. We must not, therefore, pursue the analogy between them too far.

"The agreement is not for all purposes considered to be completed. Thus the purchaser is not entitled to possession unless stipulated for; and if he should take possession, it would be a waiver of any objections to the title. The vendor has a right to retain the estate in the meantime, liable to account if the purchase is completed, but not otherwise. Till then it is uncertain whether he may not again become sole owner; the ownership of the purchaser is inchoate and imperfect; it is in the way to pass, but it has not yet passed. If the purchase money has not been paid, the purchaser cannot cut timber on the estate; a court of equity will restrain him at the instance of the vendor. In this respect he is not in a situation similar to that of a naked trustee without a remnant of property, but has for certain purposes a power over the beneficial estate. While a suit for a specific performance is pending, nice questions may arise, and it is settled that the vendor may complete the title while under investigation in the Master's office.

"The vendor is, therefore, not a mere trustee; he is in progress toward it, and finally becomes such when the money is paid, and when he is bound to convey. In the meantime he is not bound to convey. There are many uncertain events to happen before it will be known whether he will ever have to convey, and he retains, for certain purposes, his old dominion over the estate. There are these essential distinctions between a mere trustee and one who is made a trustee constructively by having entered into a contract to sell, and it would, therefore, be going too far to say that they are alike in all respects. The principle that the agreement is to be considered as performed, which is a fiction of equity, must not be pursued to all its practical consequences. It is sufficient to say that it governs the equitable estate without affecting the legal." Per Sir THOMAS PLUMER, M.R., in Wall *v.* Bright, 1820, 1 J. & W. 494, 500.

For an excellent discussion of the relationship between a vendee and a vendor in possession (in which Sir GEORGE JESSEL, M.R., analyzes and criticises the opinion of Sir THOMAS PLUMER, *supra*), see Lysaght *v.* Edwards, 1876, L. R. 2 Ch. Div. 499.

vendor in possession is, under such circumstances, a trustee for the purchaser appears to have been entirely acquiesced in by him in the subsequent case of Earl of Egmont *v.* Smith, 6 Ch. D. 469; Phillips *v.* Silvester,[1] Law Rep. 8 Ch. 173, is a decision with which we not only agree, but which is binding upon us. It lays down in clear terms, under circumstances hardly distinguishable from those which exist in the present case, that there is such a duty as I have mentioned incumbent upon a vendor in possession after a contract for sale. If there is such a duty, it is clear in the present case that there has been a breach of it, because no care has been taken by the vendor to keep the property in the state in which it was when the contract was made. The counsel for the defendant were driven to contend that no care was under the circumstances reasonable care, a position which cannot possibly be supported. Then it was contended that by reason of the execution of the conveyance there was an end of any remedy for the breach of trust which had taken place and which had lessened the value of the land. I could understand that, where the purchaser knew what had happened, it might possibly be argued that, by reason of his taking a conveyance without making any claim in respect of the breach of trust, there was evidence of a waiver by him of his right; but where, as in this case, neither party at the time when the conveyance was executed knew anything about what had happened. I cannot see any ground whatever for the suggestion that the execution of the conveyance had the effect contended for by the defendant. It appears to me clear on principle, and upon the authority of the decision in Phillips *v.* Silvester, Law. Rep. 8 Ch. 173, followed, as it has been, by JESSEL, M. R., in Earl of Egmont *v.* Smith, 6 Ch. D. 469, and by KEKEWICH, J., in Royal Bristol Permanent Building Society *v.* Bomash, 35 Ch. D. 390, that this action is maintainable; and that, therefore, this application must be dismissed.

Application refused.[2]

[1] "On principle, I can see no reason why a vendor who insists upon continuing in possession of the land over which he has security—the contract being one which, in the view of a court of equity, has changed the title of the land—I see no reason why such a vendor should not be under the same obligations as those under which any other person would be, who, having security on land, insisted on the possession of the land as a further security. He, when the account comes to be taken between himself and the purchaser, will be entitled to credit for all proper expenditure for the purpose of maintaining the purchaser's property in a proper condition, as against the account of rents and profits to which he is necessarily subject. He will receive, on the other

[2] The opinions of Lord Justices BOWEN and KAY have been omitted.

"The Vice-Chancellor [Sir JOHN LEACH]. If a purchaser is kept out of possession for three years, by difficulties in the title, and the land during that time remains uncultivated and otherwise deteriorated, it is obvious the purchaser cannot have what he agreed to purchase, but land diminished in value. If there had been wilful waste by the vendor, I should have had no

PINCKE *v.* CURTEIS.

AT THE ROLLS, BEFORE SIR RICHARD PEPPER ARDEN, M. R., 1793.

[4 *Brown's Chancery Cases*, 329, 333.]

Bill for a specific performance of an agreement to purchase the premises in question.

The defendant purchased from the plaintiff at auction certain premises and made a part payment, the purchase to be completed upon having a good title. By the terms of the sale, the purchase was to be completed by April 5, 1793. In January or February of 1793 the defendant wrote the plaintiff's solicitors, asking for an abstract. He did not receive this until after April 5. Learning then that a suit in chancery must be determined before title could be made, he, a few days after April 21st, repudiated the contract, and demanded a return of his deposit. The plaintiff not complying with this demand, the defendant sued at law for the deposit.

hand, the interest which, by the contract, he is entitled to receive. Perfect justice is done in that way; and it is wholly unimportant, as it appears to me, that he has the right, which undoubtedly he has, to insist upon retaining possession until payment of the purchase money is made and the conveyance is accepted. He has that right; but the question is, upon what terms that right is to be exercised? It appears to me that it must be upon the terms of his undertaking the duties of possession while he insists upon retaining possession. He is *pro tanto* a trustee in possession for the purchaser, although he holds the purchaser at arm's length, and a trustee, therefore, who is bound to do those things which he would be bound to do if he were a trustee for any other person." Per Lord Chancellor SELBORNE, in Phillips *v.* Silvester, 1872, L. R. 8 Ch. App. 173, 176.

hesitation in making him answer for the same out of the purchase money, but there is no wilful waste in this case; it is waste occasioned by negligence. . . .

"Part of the deterioration seems attributable to the conduct of a tenant whose lease has expired, but the vendor is answerable for his tenant.

"I do not sift the affidavits as to the deterioration of the land. It is enough to say they are sufficiently strong to justify a reference to the Master. Let it be referred to the Master, to inquire whether the lands or hedges and fences of the estate have suffered any, and what deterioration, and to what amount, by unhusbandlike conduct and mismanagement of the lands since the date of the purchase; and reserve the consideration of costs until the Master shall have made his report." Foster *v.* Deacon, 1818, 3 Madd. 394.

"A party agreeing to sell and convey at a future day does not, in the absence of stipulations to that effect, owe the vendee any duty to keep them in good repair, or to guard against the decay which is due to time and ordinary use. Circumstances might occur which would impose such a duty upon the vendor; but they do not exist in this case, and were not offered to be proved." Per EARL, J., in Hellreigel *v.* Manning, 1884, 97 N. Y. 56, 61.

The bill prayed the specific performance of the agreement to purchase, and for an injunction against the defendant's proceeding in his legal action.

At a hearing on June 26, 1793, Lord Commissioners held that "if there is no damage done to the party, an agreement may be enforced after the time named. If there is probable ground that a good title can be made in a reasonable time, that will do."

Later the case came on before LORD CHANCELLOR LOUGHBOROUGH, who found that the "vendee was apprised of the title depending on the ability of the vendors to make a good title, which itself depended on the event of a chancery suit, and was, notwithstanding, willing to go on with his purchase; there had been a communication of the delay of the suit, and the present bill was filed after great delay. If the vendee had called for the deposit at the end of the time limited for completing the purchase, and insisted that he would not go on with the purchase, the court would not have compelled him." On a later day, "when all the evidence was read, and his Honor, being of opinion that there had been a sufficient communication of the real state of the delay, and that the defendant had acquiesced in it, or at least not sufficiently declared his dissent to go on with the purchase, referred it to the Master to enquire whether the plaintiff could make good title." [1]

December 19th, 1793. The cause standing for judgment on further direction and costs. Master of the Rolls [Sir RICHARD PEPPER ARDEN[2]] :—I approve of the order made by the Lords Commissioners in staying the action, and as the cause stands at present Pincke, the vendor, has ultimately shewn that he can make a good title. But the contract

[1] This is an abridged statement of the facts and the holding of the court at the earlier hearings.

[2] "It is said, 6 Ves. 676, that in this case Lord LOUGHBOROUGH ultimately relieved the purchaser from his contract, upon the ground of there appearing upon the face of the Master's report, to have been a gross misrepresentation as to tithes. Previously, however, to this stage of the cause, it came on before Sir P. ARDEN, M.R., in the December following the period of Mr. Brown's report: and as His Honor's judgment is reported in Lord Colchester's MS. and seems very valuable, the editor thinks it material to be subjoined. Lord Colchester's note of it is as follows:" This note is printed in the text *supra*, as the opinion.

"The vendee, by his bill, seems to have conceded the title was good in the vendor; at least on the fifth day of April he filed his bill to enforce specific performance of the agreement. Having determined the vendee was entitled to relief, a question arose from what date interest should be allowed on the purchase money. It was decided that inasmuch as the interest was considerably more than the rents and profits, the case should be controlled by the English rule, which holds the vendor should be left in possession of rents and profits until a good title should be shown, and from that period only will the vendor be entitled to interest, and the purchaser to rents and profits." Per SCOTT, J., in Lombard *v.* Chicago Sinai Congregation, 1874, 75 Ill. 271, 273.

is only too barefaced upon fair terms; viz. if the vendor has filed a bill to compel the acceptance of a title which was not ready at the time, then the vendor shall pay costs of the suit at law, which was well founded at the time it was commenced. Therefore down to the . . . day of . . . the purchaser is not liable to costs.

The fair terms, it is said, would be to put the parties in the same situation as if the contract had been performed at the day; and therefore rents should be accounted for on one side, and interest on the other: but then that would be on the ground that the purchaser ought to have taken the estate without a title, for none was ready at the day: therefore the only fair mode is to give the purchaser his interest on his deposit down to the time when the title was cleared by the King's Bench judgment, the purchaser not being bound to take the estate till then.

The defendant, the purchaser, must have his costs down to the time of hearing, to be paid by plaintiff; and plaintiff must have his costs before the Master, because after the title was cleared by the King's Bench —there was no reason to quarrel with the title. The possession ought to be considered and the rents accordingly to belong to the purchaser from the rent day after the title was cleared in the King's Bench, viz. rent day in April, 1793; and the interest on the deposit money from the time of the deposit till then.

Decree costs of the cause till first hearing, and interest of deposit to defendant out of his purchase money, subsequent costs to be paid by him to plaintiff, and residue of purchase money with interest subsequent to the day from which he is let into receipt of the rent.

ACKLAND *v.* GAISFORD, 1816, 2 Madd. 28, 31. VICE-CHANCELLOR PLUMER:— . . . "I have not found any authority which determines what is to be done with the estate during the interval when the title is under dispute, during the suspension of an executory contract. In equity, an estate agreed to be purchased is considered as the estate of the purchaser from the time of the contract, and the purchase money from that time is held to belong to the vendor; but with respect to possession, there is no change in the notion of equity until the purchase money is paid. The vendor has a clear right to keep possession until the purchase money is paid; if the purchaser enters before he has paid his purchase money he is a trespasser. See Crockford *v.* Alexander, 15 Ves. 138. *Quoad* possession, the estate belongs to the vendor—it is not the estate of the vendee for the purpose of possession; for though in many cases the purchaser is responsible, as if there be a fire, see Paine *v.* Meller, 6 Ves. 349, and Poole *v.* Shergold 2 Bro. C. C. 118, still as to possession the right is in the vendor till his purchase money is paid.

"What has been decided as to responsibility for the purchase money? If the purchaser suffers the money to lie dead it is matter of indifference to

the vendor. Why? Because the vendee, having the money, must take care to employ it. Roberts *v.* Massey is an authority to show that the vendor is entitled to his purchase money and interest, though the vendee has kept it at his bankers unemployed. The vendor, therefore, may call for interest upon his purchase money, although the vendee has suffered it to lie dead. Then, to pursue that principle, must not the vendor, the legal owner of the estate, by a parity of reasoning, take care of the purchased estate? He must. If he has received rent he must account for it; if he has suffered tenants to run in arrear he is responsible for the loss thereby occasioned. If possession of the estate was given, or any tender of possession was made to the defendant, or the defendant exercised acts of ownership over the premises, that may make a difference."

DAKIN *v.* COPE.

IN CHANCERY, BEFORE LORD CHANCELLOR ELDON, 1827.

[2 *Russell* 170.]

The assignee of a leasehold, Joseph Dakin, being dead, his executors, on the 29th of June, 1821, put up the leasehold public house to auction, with the good will thereof, and the ale, wine, and spirit licenses taken out in respect of it. By the conditions of sale, the household furniture, fixtures, brewing utensils, stock in trade, and other effects in and upon the premises were to be taken by the purchaser at a valuation; and the purchase was to be completed, and possession delivered, on the 29th of September next.

Cope was declared the purchaser at the price of £260, and signed an agreement pursuant to the conditions of sale. On the 24th of September, and the following days, the valuation was made. . . .

The assignment was executed only by the executors; and, Cope having refused to accept it, and to pay the residue of the purchase money, they filed their bill against him for the specific performance of the contract.

The executors had continued to carry on the business in the public house.

The Lord Chancellor inquired, whether the vendors had given the purchaser notice that the trade would be carried on at his risk?

It was answered, that it did not appear that any such notice had been given; but that it was a notorious fact, and unquestionably well known to the purchaser, that the trade had been all along carried on in the public house, and in the usual manner.

The Lord Chancellor also inquired, whether cases had not occurred, in which, a lease of a farm having been sold, and the vendor, or the re-

fusal of the purchaser to complete his contract, having abandoned the land, the Court, though the property had been greatly deteriorated in consequence of the cultivation not being duly maintained, had, nevertheless, compelled the purchaser to perform his contract, provided the duty had been thrown upon him of considering at the time, whether he would occupy the farm or not?

The Counsel stated, subsequently, that they had not been able to find any such case, or any case bearing directly on the point.

In the course of the argument, the Lord Chancellor expressed considerable doubt with respect to the decision in Doe *v.* Bancks.

The Lord Chancellor stated, that the decision of the Master of the Rolls was right, so far as it directed a specific performance of the agreement; but that the decree could not stand, so far as it made the defendant answerable for the trade which the vendors had carried on in the public house, since the time fixed for the completion of the contract.

His Lordship's final judgment was as follows:—

This decision, in a moral view, appears to me perfectly just. But as far as it considers the trade, which was carried on, as the defendant's trade, and makes him liable for all the transactions of the trade, I think it cannot be supported. The bill seeks no such decree expressly: the counsel on both sides admitted, that they could cite no precedent for a decree to this extent, where it was not part of the contract of purchase and sale, that, if the buyer did not pay and take possession according to the contract, he should be liable for all trading loss.

I think, therefore, that the decree must be so altered, as to be rendered a decree for the principal and interest of the purchase money for the lease and licenses; for the principal and interest of the valuation of the household furniture, fixtures, brawing utensils, and effects—as to all which, other than the stock in trade, the petition of appeal does not complain. As to the stock in trade, I think the decree can only be for payment of principal and interest of such parts, if any, of the stock in trade valued, as can be delivered to the defendant, and for payment of what he hath received (if any thing he hath received) for any part of the property, part of the stock in trade. I think, also, that the defendant must account for all sums of money, which the plaintiffs have laid out for rent, taxes, and other necessary outgoings of the house and premises since the 29th September 1821, as directed by the decree, and that he should pay interest for such sums.

I think the defendant cannot be compelled to take the present stock in trade, which was not part of the stock in trade to be paid for according to the conditions of sale; and if that is to be taken to and paid for by the defendant, it must be by agreement.

I think the petition of appeal cannot be supported, as far as it seeks an allowance for an occupation rent to be paid or allowed by the plaintiffs. As the decree asserts that the defendant ought to have taken possession, he cannot charge occupation rent against those who have possessed

only by reason of his wrongdoing; whereas I think he ought to pay the rent, taxes, and outgoings, which they have been by his wrongdoing compelled to pay.

The decree, therefore, must be varied, so as to introduce these alterations, and all necessary directions in consequence of them.[1]

[1] "I am of opinion that the order of the Vice-Chancellor is quite right. No doubt it is the ordinary rule as between vendor and purchaser, that after the time fixed for completion the vendor is entitled to interest, and the purchaser to the rents and profits. But when the property is occupied by the vendor for the purposes of his business, and the purchaser makes default in payment of the purchase money, until payment of which the vendor is not bound to give up possession, the vendor continues the business, not on the account of the purchaser, but on his own behalf, under a pressure arising from the purchaser's default. He carries it on under great inconvenience, for all his arrangements must be made subject to determination on the payment of the purchase money. In such a case the application of the ordinary rule would not be just and right. The decree proceeds on the footing that the ordinary rule does not apply; and the onus of showing that an occupation rent ought to be allowed is thrown on the railway company, from which onus they have not discharged themselves. The appeal motion must be refused with costs." Per Sir W. M. JAMES, L. J., in Leggott *v.* Metropolitan Railway Co., 1870, L. R. 5 Ch. App. 716, 719.

In The Metropolitan Railway Co. *v.* Defries, 1877, L. R. 2 Q. B. Div. 387, the plaintiff set forth a claim for rent of certain premises occupied by the defendants (vendors) after the date for performance of a contract for sale to the plaintiff. By the terms of the agreement the plaintiff was to receive the rents and profits, and the defendants' interest on the purchase money from a stated date until the contract was completed. The court said:

"Lord COLERIDGE, C. J. In my opinion this judgment ought to be affirmed. (The Lord Chief Justice stated the terms of the agreement.) It was contended that the agreement must be strictly construed, and that the rents and profits must be such as were actually received, the relation of landlord and tenant not existing between the parties. But that is not the true construction of this agreement. The true construction is that which has been put upon it by the court below, that a fair rent must be paid by the vendors for the benefit which they have had by their occupation."

In Kershaw *v.* Kershaw, 1869, L. R. 9 Eq. 56, a purchaser agreed to pay the purchase money on requirement, upon timely notice. He was let into possession. Difficulties arising in making title, the sale was not completed on the day specified. Later the purchaser deposited £38,000 in a bank to a separate account, and notified the vendees, who disputed the sufficiency of the notice. Afterward the purchaser learned that his deposit was £500 short. He immediately deposited this with interest. The defendant claimed interest on the whole sum until the last deposit.

Lord ROMILLY, M. R., said: "It is quite clear that if the purchaser had paid £38,500 into his bankers to a separate account, and said that it was lying idle, that would have stopped the interest; and if the vendors wished for interest they ought to have called on him to invest it. There is nothing in the contract to make him liable for interest after appropriating the purchase

WORRALL *v.* MUNN.

IN THE COURT OF APPEALS OF NEW YORK, 1868.

[38 *New York* 137.]

One Prall contracted to convey to the plaintiff certain lands, but conveyed them instead to the defendant Munn, who had knowledge of the prior agreement. The plaintiff, in 1844, filed his bill in chancery to compel a specific performance of the agreement, and a decree was entered requiring Prall to convey to the plaintiff, and the plaintiff to pay the purchase price to Prall, with interest from the date of the agreement; and further directing reference to a master in chancery to ascertain the amount of damages sustained by the plaintiff by reason of having been kept out of possession, and by reason of waste committed by the defendant Munn. The purchase money was paid by the plaintiff, according to the decree, and Prall executed and tendered a conveyance of the premises, but the defendant Munn continued in possession, pending sundry appeals, until 1859. These appeals related to the question of damages as found and assessed, first, by the master, and subsequently by a referee appointed by the Supreme Court. It appeared that the lands were of little value for agricultural purposes, and were purchased by the plaintiff with a view to their value for the manufacture of brick.[1]

WOODRUFF, J.

The questions raised on this appeal are:

1. What is the rule of damages for the delay, the vendor being in possession of the lands?

2. Is the vendor liable for deterioration arising from wilful waste committed by himself?

3. To what time shall the damages be allowed?

money in this way. Then what he does is this: he pays in £38,000 only; and the vendors write this letter in reply to his notice:— [His Lordship read it.] It is to be observed that they do not tell him that he has not paid in enough; all that they say is that the notice is not sufficient. The case is quite different from that of Winter *v.* Blades; there the purchaser had simply a floating balance at his bankers; but here this sum of £38,000 was throughout appropriated to the purchase. Then the vendors say nothing about the deficiency, and after a while the purchaser finds out the defect and pays in £500 and interest. I think that in substance he paid in the whole purchase money on the 12th of November, 1868, and that the slight defect which there was at first he has completely repaired. Therefore, I do not think he is chargeable with interest after the 12th of November, but he must pay to the vendors any interest he may have received from the bank in respect of the sum which he paid in."

[1] This statement of facts is from the headnote of the report.

4. Shall the vendor be charged with interest on the damages as they arise until final judgment?

1. What is the rule of damages for the delay in the conveyance of the premises to the plaintiff, which damages the decree in this case awards to him, or, in the language of such decree, the damages sustained by reason of being kept out of the possession?

The general rule on this subject, as laid down by the elementary writers, and in the adjudged cases, is, that the court of equity will, so far as possible, place the parties in the same situation as they would have been if the contract had been performed according to its terms; and, to that end, the vendor will be regarded as trustee of the land for the benefit of the purchaser, and liable to account to him for the rents and profits; and the purchaser will be treated as trustee of the purchase money, if not paid, and will be charged with interest thereon. 2 Story's Eq. Jur. § 789; Fry on Spec. Performance, § 889, and cases cited.

And where the vendor is himself in the actual occupation of the premises, he is charged with the value of the use and occupation. Robertson *v.* Skelton, 12 Beav. 360; Dyer *v.* Hargrave, 10 Ves. 506.

But, while this is the general rule, it is not inflexible; a court of equity molds its relief, and gives redress, according to the circumstances of each case. Where the purchaser has always been ready to pay, and has kept his money unappropriated, he is excused from the payment of interest. De Visme *v.* De Visme, 1 McN. & Gordon, 352; Regents' Canal Co. *v.* Ware, 23 Beav. 575. Where part of the purchase money had been paid, the court sought to effect an equitable result by charging the vendor not only with the rents, but with interest from year to year upon a corresponding portion of such rents. Burton *v.* Todd, 1 Sw. 255. So, where the subject of the purchase was a mill, and the delay of performance arose from the failure of the vendor to show good title, he was charged with the expenses of repairs, and of keeping up the mill and machinery until the purchaser could properly be required to take possession. Carrodus *v.* Sharp, 20 Beav. 56.

Some other qualifications, apt to this case, will be presently noticed; it is, however, clear, that, in the endeavor to do equity between the parties, regard must be had to the special circumstances, wherever there are any peculiarities, which render the rigid application of any general rule unsatisfactory.

It is clear, in my judgment, that it is the endeavor to apply this rule to the present case without any qualification, and to treat the rule of damages as if it were a question at law, and, on an assessment in trespass for mesne profits, that has involved the question in apparent doubt, and wrought to the plaintiff apparent hardship.

Thus, he has purchased and paid (as acquired by the decree to pay) $4,500 for the land, and, while the use of the money has been presumptively worth $315 per annum, he has been kept out of possession for more than twenty years, and has been permitted to recover as damages, for

the loss of possession, fifty dollars a year for two years, and interest thereon,—less in all than one year's interest on the purchase money.

It should be a matter of regret, if the rules applicable to the subject are such, that a court of equity cannot render more equal justice.

The present case is peculiar in two respects, viz., first, the purchase money with the interest thereon was payable, and was properly decreed to be paid to the defendant Prall, the original owner and vendor of the premises, who acquiesced in the decree, and executed a deed in obedience to its requirements, while the possession was held by the defendant Munn; and, second, the principal value of the lands consisted in the deposits of clay, adapted by the consumption thereof to the manufacture of brick on the premises.

The inapplicability of the general rule above stated, to land of this description, may be rendered quite apparent, by an illustration closely analogous to the present. E. g.: Suppose a sale of land of no value for ordinary use, because incapable of cultivation, and entirely unsuited to pasture, and yet, by reason of a bed of valuable ore of very large value, and for that sole reason, sold at a large price. On a decree for specific performance, shall the purchaser be charged with interest on the purchase money, for the period during which he is kept out of possession, and the vendor pay nothing (because the rents and profits are nothing), for depriving the purchaser of the opportunity of working the mine or ore bed during the period of delay? Or, if the purchase money has been paid, shall the vendor, who has enjoyed the use of the purchase money, have the advantage of his own wrong, and make no compensation to the purchaser for his loss of opportunity? The answer must be not so, unless the rules of equity are so imperfect that such injustice cannot be prevented.

Does it follow that the damages are to be ascertained by inquiring what profits the purchaser could have made by working the mine? That question is in substance this, was the referee right on the first reference in the present case, in inquiring how much the plaintiff might have received for the privilege of making brick on the land, thereby exhausting the bed of clay, which in fact now remains to him to be worked presumptively with equal benefit, and thereupon allowing to the plaintiff interest on such possible receipts from year to year as damages for the delay? This mode of estimating his damages proceeded upon the ground, not that the plaintiff lost the clay beds (which constituted the chief value of the land), but that he lost the opportunity of converting them into money, so soon as he might perhaps have done, if he had obtained the possession when he was entitled thereto.

I find no warrant for any such speculative rule or measure of damages; no case is cited to us, and I think it may be safely averred, that no case can be found, in which such a rule was adopted. No analogy can be found in any rule of assessment of damages at law. The rule, there, is the value of the use, not the profits of the consumption of the property

detained, when in fact the entire property is restored to the plaintiff's possession.

True, witnesses may testify, that the premises would have supplied a given number of brick kilns; that they would have annually made a stated number of brick; and that the privilege of making so many brick would be worth a sum mentioned, and may add an opinion, that persons could have been found to pay an annual sum named for the privilege. But it is quite obvious, that such evidence is, in its very nature, conjectural and lacks that element of certainty which ought to determine the extent of liability. Neither does any rule suggested by cases in equity, or by writers of authority, authorize this mode of measuring damages. Invariably, so far as I have been able to discover, when loss of the use of the land itself has been made the criterion or test of the plaintiff's damages, it is the value of the use, and not the profits of its exhaustion of whatever it contains of value, that furnishes the rule.

But, on the other hand (as in part already suggested), is the value of the use the only rule or measure of damages? In the case above supposed, and in the case now before us, the value of the use of the land, in any mode not involving its consumption, is nothing, or at most very trifling. If it were a ledge of sterile rocks, of no value but for its mine, and yet of very large value for the privilege of exhausting the mine of all that made it valuable, such use, apart from the privilege of mining, would be literally nothing. If, then, the plaintiff is not entitled to recover damages computed upon the basis of profits anticipated from consuming the clay and sand upon the premises, or letting to others that privilege, and, on the other hand, the use of the land for any other purpose would furnish no real indemnity—is there any recognized equitable rule or measure by which injustice can be prevented?

To this, I answer, although he may not be compensated for the profits or gains, which possibly he might have realized by converting the land, or its deposits, into money at an earlier day, he may be protected against actual loss. If this be done, the result ought to be satisfactory, and more than this would be to impose a penalty upon the defendant (who has certainly not realized profits by the detention), which a court of equity will not do, beyond what indemnity to the plaintiff requires.

The subject of the sale was peculiar. It has little value for any annual use that does not involve the consumption of that which gives it value. The plaintiff offered to prove that he purchased for the express purpose of devoting it to the making of brick, and to converting its contents into money. Now, suppose the plaintiff, although he had contracted to pay therefor a large sum, had in fact paid no part of the purchase money, and he was now to be put in possession, and permitted to carry into effect the purpose for which he bought the property.

He would be completely indemnified against loss by relieving him from the payment of interest. True, he would fail to realize, at so early a day as he anticipated, the profits of his bargain, but he has now that

chance of profits, and meantime he has had the use of the purchase money. In short, the general rule which allows to the vendor the interest, and the purchaser the rents and profits, failing to apply, because, from the character of the land, there are no rents and profits, or an amount grossly inadequate to a just indemnity, the purchaser is equitably entitled to be indemnified, if any definite and certain mode can be found by which to ascertain it.

Relief from the payment of the interest is, in such case, palpably the most obvious, as it is the most equitable, mode of doing so. For, otherwise, the vendor is permitted to profit by his own wrong, and the purchaser compelled to submit to a certain loss.

This is no novel suggestion, nor a new mode of doing equity in such case, but is one of the recognized exceptions to the general rule on the subject. . . .

The principle of these cases furnishes a clear and precise guide to the true equity between the present parties. If the money was in the hands of the plaintiff to be paid over to the defendant, he would not be chargeable with interest. The use of the money during the time that he has been kept out of possession by the defendant would have been enjoyed by him and the defendant would have left to him the rents and profits, or the use and occupation while thus wrongfully retaining the possession. But it is one of the peculiarities of this case that the purchase money and interest was due to the defendant Prall, and has been paid while the defendant Munn is in possession, and, during the period of the litigation down to 1859, at least, has kept the plaintiff out of possession.

The plaintiff has lost the interest on the purchase money, and the nature of the property is such, that there can be no measure of damages founded on the rents and profits, or the value of the use of the premises, which furnishes any indemnity. Within the principle of the cases referred to, and, as I think, in most just conformity to reason and equity, the defendant should be charged with the amount of that interest as damages down to the time when the plaintiff was let into possession.

2. That in order to avoid multiplicity of suits, it was proper to decree compensation for waste committed by the appellant, does not appear to be questioned. No exception to the report of the referee, nor to the interlocutory decree directing the allowance, appears. To proceed with the cause to the rendering of full and complete justice between the parties, and, if possible, put an end to the litigation, is the familiar practice of the court. Story's Eq. Jur. §§ 794, 799, and cases above referred to.

3. To what time ought the damages to be computed and allowed? First, as to the damages for keeping the plaintiff out of possession—I have no hesitation on this point. They should be allowed down to the time when the defendant surrenders possession, or, if he be in possession at the time of the assessment, then to the time of making the allowance.

In this case the Supreme Court have deemed it proper to allow the computation by the referee down to the date of the interlocutory decree only. I do not perceive any just reason for this; it was certainly not intended to furnish the defendant a premium for protracting the litigation concerning the damages through many years.

If it was proper to allow the damages accruing after the commencement of the suit, it was proper to allow them down to the time when they were assessed. This is true, even at law; in those cases in which damages arising after suit brought may be taken into view, the time of the assessment will be the time to which they are allowed.

No reason can be assigned for not allowing to the purchaser his damages, by reason of being kept out of possession, when, according to the general rule above stated, he is bound to pay interest on the purchase money down to the final decree and its actual execution.

Second, as to damages for waste committed *pendente lite,* that also has been allowed down to the interlocutory decree. Why not, then, down to the time of the assessment? The suggestion that they are not within any issue between the parties begs the question, and assumes that such damages are not within the exercise of the jurisdiction of the court in such cases, which is the very question. If it is according to the practice of a court of equity, and is reasonable and just, that a defendant so unlawfully withholding possession and committing waste shall be compelled not only to convey, but pay all damages down to the time he surrenders the possession, then those damages are within the proper range of inquiry, and he is for that reason perfectly apprised from the moment a bill is filed that for those damages he can be required to respond in that suit. . . .

In the present case the subject was before the court at the first hearing. The decree awarded compensation in damages for the waste. There was no ground, whatever, for stopping the inquiry at that date; the cases above referred to show that the plaintiff is entitled to be allowed for all damages down to the time when he is let into possession. And the interlocutory decree comtemplated an inquiry not exclusively into the past, but directed an inquiry which, to the referee, was to be a present inquiry how much, at the date of his report, have the premises been damaged by the defendant's waste.

4. The remaining question is, Shall the vendor be charged with interest upon the damages?

This question must also be considered in reference to the nature and ground of the damage awarded.

First, as to the damages caused by the mere fact that the plaintiff has been kept out of possession.

These damages are a substitute for the rents and profits which the purchaser was entitled to receive and enjoy. Now, if this case had not been peculiar in the particulars above adverted to, and the decree was therefore that the defendant account for and pay over the rents and

profits received by him, it would, I think, hardly be doubted that the vendor should be charged with interest. Surely a court of equity should not be less just in this respect than a court of law. And in Jackson *v.* Wand, 4 Wend, 453, it was held that, in ascertaining the mesne profits to be allowed to a plaintiff in ejectment, the plaintiff was not only entitled to interest, but the premises being situated in the City of New York, where rents are payable at quarter days, it was proper to compute the interest upon the rents from each usual quarter day to the time of the assessment.

Now, it is not material to this question, that the measure of damages in this case is not rents, but a compensation in lieu of rents, viz., a sum annually equal to the interest on the purchase money paid. This is allowed as damages. It is just what the plaintiff paid out from year to year. It is allowed not as interest, but as annually lost by being kept out of possession. Allowed, because, from the peculiar circumstances of this case, there is no other equitable and yet safe rule of indemnity. Interest should, therefore, be allowed from the end of each year; not compound interest, but simple interest, to the date of the report.

Second, the damages caused by waste are not within any such rule; the actual amount of depreciation caused by the waste is to be allowed. But, that being allowed, the purchaser obtains the full value of the premises purchased, and all just indemnity. Thus, first, he obtains possession of the premises; second, he obtains an amount equal to the deterioration.

These place him in the same situation in which he would be if the premises had not deteriorated when he obtained possession.

Then, finally, he has, as further damages, what he is decreed to have lost by being kept out of such possession.

The result is, that he would be more than indemnified if he was permitted to add interest on the deterioration.

He is, however, entitled to interest as damages on that deterioration from the time when he was let into possession, because at that time all allowance for damages arising from being kept out of possession ceases, and, because, as to the amount of deterioration caused by waste, he can never be let into possession.

The result is, that for the time the plaintiff was kept out of possession he should be allowed as damages, his loss, to wit, an annual sum equal to the interest on the purchase money.

He should be allowed the damages sustained by the waste committed by the defendant.

These amounts should be allowed down to the time when the plaintiff was let into the possession.

Interest should be allowed in ascertaining the damages caused by the delay in admitting the plaintiff into possession, computed on each annual amount, from the end of each year down to the time of the assessment or report.

Interest should only be allowed in estimating the damages caused by depreciation from waste, from the time when the plaintiff was let into possession, and, on the aggregate amount of such depreciation, interest may properly be allowed down to the time of such assessment or report of a referee.

The judgment must, therefore, be reversed. And, as this reversal in part sustains the plaintiff's appeal, and in part that of the defendant, it is proper that the reversal should be without costs to either party.

The case should be, therefore, remitted, to have the damages ascertained in conformity with these views.

Judgment reversed.[1]

WORRALL *v.* MUNN, 1873, 53 N. Y. 185, 188. ANDREWS, J., said:

The rule declared by this court on the former appeal, that the plaintiff was entitled to interest on the purchase money paid by him, as damages for being kept out of possession of the premises, was supported upon reason and authority in the able opinion of WOODRUFF, J. It is supposed, however, by the counsel for the defendant, that the additional facts, claimed by him to have been shown on the hearing before the referee, viz., that no profitable use could have been made of the premises for brick-making purposes during the retention of the possession by the defendant, and that, in fact, no use was made of them for that purpose by the plaintiff for several years after he obtained possession, and that the premises meanwhile advanced in value, change the legal aspect of the case, and require that the damages for withholding possession be limited to the rental value of the land for ordinary uses, as the plaintiff lost nothing beyond that by being deprived of the possession.

I think this view proceeds upon a misconception of the principle upon which courts of equity adjust the rights of vendor and vendee where the vendor retains the possession of the land and refuses to deliver it according to his contract. If the purchase money has not been paid, the vendee may elect either to pay the interest on the purchase money during the time he has been wrongfully deprived of the possession, and take the rents and profits received or which might have been received by the vendor during the same time, or he may allow the vendor to retain the rents and profits, in which case he will be exempted from the payment of interest. It is not because the rental value of the land is, or is suposed to be equal to the interest on the purchase money that the right of election is given. It is, often, and perhaps in most cases it is less. But the enjoyment of the possession of the land, according to the contract, may be of more value to the purchaser, or he may regard it as of more value to him than the amount of rents and profits he might realize from the use. The possession of the premises by the purchaser is by the

[1] This case was before the court in 1851, 5 N. Y. 229.

contract of sale treated as of equal value to him as the interest on the purchase money. And when the vendor wrongfully refuses to give possession, and resists the performance of the agreement, he ought not to be allowed to reap the benefit of the contract and compel the vendee to pay interest on the purchase money, if it turns out that the interest exceeds the rental value of the land. In this case the purchase money was paid some years before the plaintiff was let into possession, but the rule of damages for wilfully withholding the possession is not changed by that fact. The purchaser is entitled to be allowed the interest on the purchase money. The advantage to the vendee from the appreciation in the value of the land was incident to his right as purchaser, and if it had fallen in value the loss must have been borne by him.

The new facts claimed to have been proved do not affect the application to the case of the rule of damages for withholding the possession of the premises declared by the court on the former hearing.

The question whether the damages for waste committed by a vendor pending a contract of purchase should be measured by the injury to the inheritance occasioned thereby or by the value of the materials taken from the premises, where timber has been cut or stone has been quarried or earth removed by him, or whether either method may be adopted in ascertaining the damages, was not particularly considered in the opinion of WOODRUFF, J. The former appeal on this branch of the case related to the time from which interest should be computed on the value of the materials taken. It was assumed by the counsel and by the court that the plaintiff was entitled to recover the value, and no question was made in respect to it. The judgment, as has been seen, specifically adjudges the right of the plaintiff to recover it. It is not denied that the defendant is liable to the same extent as the vendor would have been. He entered under a contract with him, and with notice of the plaintiff's rights, and the waste was committed *pendente lite*. It is clear, I think, that the deterioration in the value of the land would be an appropriate method of fixing the amount of the injury. In some cases it would be the only way in which compensation for waste could be given, in view of the nature of the plaintiff's interest and the character of the injury. A mortgagee or lienor could only recover on proof that his security was rendered inadequate by the injury to the freehold. If the soil, having no value separated from the land, was stripped from it, so as to render it unproductive and unfit for the use to which it was applied, the diminished value of the land would be the only adequate measure of compensation. So, also, where trees designed for shade or ornament have been cut down, whereby the value of the land has been greatly lessened. And in cases of permissive waste, where a purchaser has been kept out of possession, and the land has suffered from lack of cultivation, the court would compel an allowance to be made by the seller for the injury to the land. Foster *v.* Deacon, 3 Madd., 394; 3 Sug. on Ven., 133. But the diminished value of the land is not the exclusive measure of relief for an

injury in the nature of waste committed by a wrongdoer on the land of another. In many cases it would substantially exempt him from responsibility. Cutting a few trees on a timber tract, or taking a few hundred tons of coal from a mine, might not diminish the market value of the tract, or of the mine, and yet the value of the wood or coal, severed from the soil, might be considerable. The wrongdoer would, in the cases instanced, be held to pay the value of the wood and coal, and he could not shield himself by showing that the property from which it was taken was, as a whole, worth as much as it was before. Martin *v.* Porter, 5 M. & W., 351; Morgan *v.* Powell, 3 Ad. & El. N. S., 278; Bennett *v.* Thompson, 13 Ire., 146. The liability of the vendor who, pending a contract of purchase, commits waste upon the premises by cutting timber, trees, or removing stone, sand or clay therefrom, to pay or account to the purchaser for the value thereof, results, I think, from the principle that in equity everything which forms a part of the inheritance belongs to the purchaser from the date of the contract. The purchaser is deemed in equity to be the owner of the land, and a court of equity will, in an action for specific performance, adjust the respective rights and liabilities of the parties upon this assumption. I am satisfied that the judgment declaring the defendant liable for the value of the sand, clay and timber taken by him from the premises was not inadvertently pronounced, but is supported by reason and authority, and I shall content myself by citing some authorities bearing on the subject, without further discussion: Nelson *v.* Bridges, 2 Beav. 239; Attersoll *v.* Stevens, 1 Taunt. 182; De Visme *v.* De Visme, 1 McN. & G., 336; Dart on Vend., 116; 3 Sug. on Vend., 134; Paine *v.* Meller, 6 Ves., 349; Mooers *v.* Wait, 3 Wend., 104.

There was great diversity of opinion expressed by witnesses on the hearing before the referee as to the value of the brick material taken and used by the defendant, but it cannot be said that the finding of the referee upon that subject was not supported by evidence. I am of opinion that the judgment should be affirmed. If this opinion shall be concurred in, it will close a litigation commenced in the Court of Chancery nearly thirty years ago, and which has passed in its various stages through all the higher courts of the State, and is now determined by a tribunal which had no existence when the action was brought.

The judgment should be affirmed.

ALLEN, RAPALLO and FOLGER, JJ., concur GROVER, J., dissents. CHURCH, Ch. J., and PECKHAM, J., do not vote.

Judgment affirmed.

KING *v.* RUCKMAN.

In the Court of Errors and Appeals of New Jersey, 1873.

[24 *New Jersey Equity* 556.]

The opinion of the court was delivered by the Chief Justice [Beasley].

This is not the first occasion that this controversy has called for the attention of this court.

The bill was filed for the specific performance of a written contract, whereby Elisha Ruckman agreed to sell and convey certain lands to Benjamin W. King, the complainant. The vendor refusing to make the stipulated conveyance, the suit in chancery was begun. The judgment in the first instance was unfavorable to the complainant, but that result being disapproved of was reversed in this court, and the defendant was accordingly directed, among other things, to make a conveyance in conformity to his contract. The proceedings have been remitted to the Court of Chancery, a reference was made to a Master to ascertain certain particulars. On the coming in of the report of this Master, his finding was excepted to by both parties, and it is from the final decree of the Vice-Chancellor, following on this report and the exceptions to it, that the present appeals have been taken. This decision stands now before this court subject to the exceptions as well on the part of the complainants as on the side of the defendants.

The contention of the defendant is that interest on this sum should be awarded to him in the same manner as though he had complied with his contract, and had executed a deed and put the complainant in possession of the property, as he agreed, on the first day of July, 1868. The lands during this interim have been, comparatively, unproductive, the Master reporting that the rents and profits have been equalled by the taxes.

The Vice-Chancellor rejected this claim of the defendant, and I think such rejection is clearly justifiable on grounds both of natural and legal equity. The proposition that when unproductive lands are agreed to be sold, the vendor, breaking his contract, can refuse to convey, and thus keep the vendee from the use or improvement of the property, and when at last compelled to perform his agreement by the decree of a court may throw the loss, in the form of accumulated interest, on the innocent vendee, appears to me to be devoid of even a color of justice. Such a principle would cast the burden on the innocent instead of on the faulty party. Even when the intention of the vendor has been blameless, and when he has refused to comply with his engagement from an honest belief of his right so to do, if a loss ensues in consequence of such refusal, such loss should be borne by him. The common rule of the law is that where one of two innocent parties

is to bear a loss he must bear it through whose act such loss has occurred. That a vendee, kept out of the possession of unproductive lands, must always be placed at great disadvantage is undeniable. And yet much of the argument in the present case proceeded on the idea that because these premises have, since the sale, advanced in value, the complainant has suffered no injury by being kept out of possession. But this is altogether false reasoning. The change in value has nothing to do with the point. If the vendee had been put in possession the same change would have occurred. The injury to him is that he has, by an illegal act, been deprived of the enjoyment of the property for over five years, and if he should pay the interest claimed, he will pay precisely the same that he would have paid if he had been in possession during this long period. I do not see how any one can deny that this deprivation of enjoyment and of title is a matter of concern to a vendee. Who can say that in the present case the interest of this vendee would not have been greatly promoted by having had the opportunity to sell or improve these lands? But it seems futile to spend time in any argument to show that a present title and a present possession of real property, in contrast to a precarious expectation of a future title and possession, are valuable interests, the withholding of which is necessarily attended with great risk of disaster and detriment. The complainant, by the misconduct of the defendant, has suffered this wrong for over five years, and it is now insisted that the loss resulting must be borne exclusively by the complainant, and that the defendant should be placed, by a court of equity, in the precise situation that he would have been in if he had performed his contract to the letter. As I have said, I see no justice in such a demand, and if the question was now to be settled on principles of common sense and right, I should, on that ground, be prepared to reject it. But such is not the case, for, in my estimation, the rule applicable to the case is not, and never has been, in any doubt whatever. The equity of the situation has been so clear that the course of practice seems to have assumed from the first a settled form, and it has been continued to the present day without, so far as I have learned, any voice of dissent or even of criticism being heard.

This general theme, as to when a vendee will be required to pay interest on the purchase money, is discussed at large in the text books, and the rules which are applicable in general or in particular conjunctions are there defined and elucidated. Among the principles there stated will be found the one at present applicable, and with which alone I shall attempt to deal.

The rule which I deem apt in this instance is thus expressed by Lord ST. LEONARDS, viz.: "Where interest is more in amount than rents and profits, and it is clearly made out that the delay was occasioned by the vendor, to give effect to the general rule would be to enable the vendor to profit by his own wrong; and the court, therefore, gives the

vendor no interest, but leaves him in the possession of the interim rents and profits." 2 Sug. V. & P., 8th Amer. ed., p. 322, § 24.

The Vice-Chancellor has applied this rule to the present case, and the questions are as to the existence of the rule and the propriety of its application.

As to the first question, with regard to the existence of the rule, as I have already said, I do not know what its prevalence, whenever applicable, has on any occasion, either in dictum or judgment, been challenged or gainsaid. That the vendee, if kept out of possession by the vendor, would not be charged with interest was referred to as a settled rule by Lord HARDWICKE in the case of Blount *v.* Blount, 3 Atk. 636, and from that time to the present this rule can be traced in constant use through a long line of decisions. The briefs of counsel in the present case point to many of these adjudications, which are so clearly to the purpose that I think it is necessary for me only to make this general reference to them.

I consider, then, the rule to be indisputable; why, then, is it not applicable to this case?

This rule, as I conceive this subject, is put in force in every case in which these three qualities enter; first, the rents and profits must fall below the interest; second, the delay must be the fault of the vendor; and, third, the vendee must be out of possession. I do not find that in any case in which these three elements exist interest has been exacted. That these elements are present in the case now before us is, of course, beyond denial.

But in case of the pressure of this settled practice it has been intimated, in the course of the present discussion, that in order to put the rule in force it was necessary that the vendor should not only be in fault, but that such fault should be wilful. I think there is not the least foundation for such a contention. Indeed, the rule has been almost universally applied in those instances when there was no suggestion of anything intentionally wrong in the conduct of the seller of the property. It has received its most frequent exemplifications in cases in which the delay in completing the contract has arisen from the discovery of latent defects in the title. On such occasions the vendor was no further in fault than every one is in fault who undertakes to do what he afterwards discovers he is not prepared to do. In such cases a vendor is blamable simply for having perhaps omitted to have his title looked into with sufficient care. These illustrations make it demonstrably clear that the point as to the degree of the culpability of the vendor has not, in the least, affected the course of equity in the particular in question. The only inquiry has been whether the vendor has failed to fulfil his contract. Whether such nonfeasance was the result of an act of volition, or of his inability, has not been deemed of any consequence. In the case of Jones *v.* Mudd, 4 Russ. 118, which is one of the examples of the rule referred to by Mr. Sugden, there was no entire

absence of any wilful refusal, on the part of the vendor, to carry his agreement into effect, and yet interest was denied to him during the time that he had been unable to perfect his title. I regard that case as not distinguishable from the present one. . . .

As long as the case of Jones *v.* Mudd shall be suffered to stand as a legal precedent, I cannot think that it can rationally be denied that when the default is on the side of the vendor, no matter how involuntary such default may be, he can have no just claim to an allowance of interest. . . .

Being satisfied that the rule in question is entirely established as a part of our system of laws, and that it is applicable in this present instance, my conclusion is that the result reached on this head in the Court of Chancery is correct.[1]

This disposes of the grounds of appeal which were urged in behalf of the defendant.

With respect to the exceptions taken to the decree on the other side. I do not think any one of them is well taken. I shall dispose of them in a few words.

The complainant has been directed to allow the expenses of making the roads and fences. These improvements of the property cannot be looked upon as voluntary; the roads were made by the public authority, and the fences are incidents of them. They enter into the value of the corpus of property which will go to the complainant, and under the circumstances it is just that he should pay for them.[2]

The last objection related to charging the annual taxes for the land against the complainant. These taxes are so large that they absorb the whole of the annual profits of the property, so that it seems to me that they ought not, as between these parties, to be regarded as a render paid to the public for the mere enjoyment of the possession. They have been obviously imposed in view of the value of the fee in the land, rather than with any reference to the mere usufruct. They have, therefore, been properly charged to the complainant. If the sum estimated on this score comprises, in part, taxes for lands not embraced in this controversy, that matter, it seems to me, should be corrected on an application to the court below. From the case as it is now developed before this court it would seem that this point has been started, in a specific form, for the first time, on this appeal. The petition of appeal objects to the entire allowance for taxes rather than to any particular part of it. A matter which is thus wrapped up in the proceedings, and which has not received a distinct adjudication, should not be made a subject of appeal. If a small error creeps into a Master's report, and such error is not pointed out to the Chancellor, and a general decree is made, it does not seem to

[1]A part of the opinion, dealing with a question concerning a purchase money mortgage, has been omitted.

[2]The discussion of some of the objections has been omitted.

me that such decree can be attacked in this court by reason of such minute defect.

In my opinion, the decree in this case should be affirmed, each party paying his own costs in this court.

The whole court concurred.[1]

CASS *v.* RUDDLE.

IN CHANCERY, BEFORE THE LORDS COMMISSIONERS, 1692.

[2 *Vernon* 280.]

The defendant, on behalf of Jeremiah Tilly, articles to purchase of the plaintiff four houses at Port Royal, in Jamaica, by which articles the plaintiff covenants to convey, and the defendant on behalf of Tilly, covenants to pay £800 for the purchase thereof by articles dated August 6, 1690, afterwards £100 is paid in part. The bill was for a specific performance of the articles. The defendant insisted he had not sufficient effects of Tilly's in his hands, and that the plaintiff had not made out a good title to the houses, by which means the agreement had not been performed, and pending this suit, the great earthquake happened at Jamaica, in which the four houses in question (*inter alia*) were entirely destroyed and swallowed up; and therefore such agreement ought not

[1] In Ballard *v.* Shutt, 1880, L. R. 15 Ch. Div. 122, 123, the plaintiff (purchaser), as soon as the contract of sale was signed, erected a notice board on the land announcing it was for sale, and entered into contracts relating to the land. The land was not really occupied, nor were rents and profits received from it by the vendee. On a suit for specific performance the vendor claimed interest from the time the vendee posted the notices. The vendee refused payment on the ground that interest was allowed only where rents and profits were received. DENMAN, J., held:

"It was said that the rule of equity that the purchaser shall pay interest on the purchase money from the time he takes possession does not apply to this case, because there was no profit by the plaintiff out of the land.

"I can find no such distinction drawn in the cases upon the subject. It is true that in many of the cases, notably in Birch *v.* Joy, 3 H. L. C. 565, the purchaser was not only in possession, but also in actual receipt of rents and profits; but where possession of land of which there are no tenants is taken by a purchaser pending delay in the completion of the purchase, even though such delay be attributable to the vendor, especially where, as in the present case, he takes possession with a view to making a profit out of the land, I apprehend there is the same reason as in the other case that the vendor should not remain without the land and also without interest upon his purchase money."

now to be decreed in specie, but the plaintiff rather left to recover what damages he can at law.

But the court notwithstanding the estate *pendente lite* was destroyed and gone, and notwithstanding defendant had not sufficient effects of Tilly's in his hands, decreed a specific execution of the articles. And the same was afterwards affirmed upon an appeal to the House of Lords.[1]

[1] "By agreement 6th August, 1690, Cass, who claimed under one Elizabeth Waterhouse, agreed in consideration of £800, to be paid to him in England, to convey two houses at Port Royal in Jamaica, to Tilly and his heirs. Ruddle was agent for Tilly, who lived in one of the houses, and paid 2s. 6d. in part of the purchase money, and covenanted that the remainder should be paid in England, and that the conveyance should be executed on or before the 1st September then next ensuing, and plaintiff delivered to defendant one part of the deed under which he claimed title, and the other part was sent to Jamaica, to be enrolled, together with an account of the transaction: Cass applied to Ruddle for the money; he desired time to pay it; 8th November Ruddle paid £100, and only objected to the title that Mrs. Waterhouse's conveyance had not been recorded in Jamaica. Cass's receipt was produced in January, 1691, Cass executed a conveyance to Jeremiah Tilly, and gave it to Ruddle, the earthquake happened in June, 1692, and Tilly died soon after, and the decree was, that Ruddle should specifically perform the agreement, and pay the remaining £700, with interest, from the date of the agreement, it being admitted by Ruddle in his answer that he had that sum of money of Tilly's in his hands, and this decree was affirmed on appeal to the Lords, 25th January, 1692-3, Journal House of Lords, 16 vol. p. 453. Vide note to White *v.* Nutt, 1 P. Wms. 62, note. In the case as stated in the Register's Book, 1692, A. fol. 93, nothing appears to turn upon the circumstance of the earthquake, nor is it all stated."—Reporter's note.

In Stent *v.* Bailis, 1692, 2 P. Wms. 217, the plaintiff sought relief from an expressly unconditional contract to purchase, by a certain day, shares of stock in a corporation whose patent, since the making of the contract, Parliament had repealed. In granting the relief, Sir JOSEPH JEKYLL, M. R., said (p. 219): "It is against natural justice that anyone should pay for a bargain which he cannot have; there ought to be *quid pro quo*, but in this case the defendant has sold the plaintiff a bubble or moonshine. . . .

"If I should buy an house, and before such time as by the articles I am to pay for the same the house be burnt down by casualty of fire, I shall not in equity be bound to pay for the house, and yet the house may be built up again; but I doubt it will be impossible to set up the company again, as in the other case the seller may do the house."

In his argument for the heirs in Mortimer *v.* Capper, 1782, 1 Bro. c.c. 156, Mr. Attorney-General [Lloyd Kenyon] said: "The court refused to carry the agreement into specific execution in the South Sea year, 1 Wms. 750, Cud *v.* Rutter. So in the case of a house which was burnt down before the payment of money." On this statement Mr. Brown makes the following comment: "This is not a determined case, but only put by Sir JOSEPH JEKYLL, Master of the Rolls, in giving judgment in Stent *v.* Bailis, 2 Wms., p. 220. The only determined case at all similar is that of Cass *v.* Ruddle, 2 Vern, 280, where a specific performance was decreed; but that case was said by Lord C.

WHITE *v.* NUTT.

IN CHANCERY, BEFORE LORD KEEPER WRIGHT, 1702.

[1 *Peere Williams* 61.]

One by articles, reciting that he had an estate for two lives in a church lease, covenanted to convey his title to the premises by such a day to J. S. as J. S. or his counsel should advise.

It happened that after the articles and before the time appointed for the conveyance one of the lives dropped. And the question being upon whom the loss should fall.

It was decreed per Lord Keeper, Reg. Lib. B. 1702, fol. 47: That in regard here was no default in the seller making the conveyance, the loss of the life ought to be borne by the purchaser in the same manner as if the reversioner had articled to sell the reversion expectant upon two lives, and one of them had died before the conveyance the purchaser should there have had the benefit of it; and in each case in equity the estate is as conveyed from the time of the articles sealed.

But His Lordship seemed to think that if all the lives had dropped before the execution of the conveyance it might have been another consideration, for that the money was to be paid upon the conveyance, and no estate being left, there could be no conveyance.

PAINE *v.* MELLER.

IN CHANCERY, BEFORE LORD CHANCELLOR ELDON, 1801.

[6 *Vesey* 349.]

Upon the 1st of September, 1796, the plaintiffs sold to the defendant by auction some houses in Ratcliffe Highway, upon the usual terms, a deposit of £25 per cent. and a proper conveyance to be executed upon payment of the remainder of the purchase money at Michaelmas next. The premises were, with others, subject to certain annuities; but a trust of stock was declared for the payment of these annuities. The first abstract delivered was clearly defective; so that the purchase could not be completed at the time. A farther abstract was delivered to the

APSLEY, in Pope *v.* Roots, to be misreported, for that it appeared by the printed cases in the House of Lords that Cass made a title in January, 1691, by conveyance executed, and the earthquake did not happen till July, 1692; that Ruddle by his answer admitted he had the £700 in his hands, and the decree was founded on a good title to the premises having been conveyed to him."

solicitor for the defendant at the end of September or the beginning of October. He insisted upon having a release from the annuitants. The treaty continued through October; and about the end of that month the defendant's solicitor agreed to waive all objections, if the plaintiff would allow him eleven guineas, and if the trustees of the stock would join in the conveyance; and refused a proposal to give up the purchase. The plaintiff agreed to make the allowance desired. On the 4th or 5th of November the defendant's solicitor sent a draft of conveyance. The trustees of the stock were prevailed upon to join in the conveyance by a new declaration of trust. The draft was returned to the defendant's solicitor; the deeds were engrossed; and upon the 16th or 17th of December he declared himself satisfied with the title, and said the deeds would be ready in two or three days, and that he should complete the purchase under the promise of the eleven guineas. Upon the 18th of December the houses were burned, the insurance having been suffered to expire at Michaelmas, 1796. On the 20th of December the defendant's solicitor wrote a letter, observing that he had taken an objection to the freehold title, and should not have thought anything more of the purchase but for the covenant of indemnity from the trustees, inserted in the draft by him, and approved by one of the trustees of the stock; but as that had been struck out by another trustee, he could not advise his client to accept the title, and he should call for the deposit.

The bill was then filed, praying a specific performance of the contract; and a decree was made by the late Lord Chancellor, simply referring it to the Master, to see whether a good title could be made. This decree was dissatisfactory to both parties as not deciding the question; and a petition of rehearing was presented by the plaintiff.

Lord Chancellor. The abstract first delivered was undoubtedly imperfect in certain respects. It did not go back farther than forty-three years, and there was no specific mention of the property in Ratcliffe Highway in the abstract. There was also the objection upon the annuities. Unquestionably that abstract was not satisfactory, and the express condition of the sale could not be complied with. Of course the defendant could not be called on to pay his purchase money. Then it was with the vendee to choose to go on with the bargain or to put an end to the contract. The agent, however, chose not to put an end to it, and though a circumstance took place at Michaelmas sufficient to put an end to any action at law, the contract was kept alive, at least to the 10th of December. It is clear the objection was given up as to the freehold title; and the only difference was as to the indemnity against the annuities, affecting these with other premises. I do not consider whether this objection is of form or substance, but leave it to be determined, when it may be necessary, whether the purchaser under such circumstances has not a right to insist that the annuitants shall release the premises; or, whether this court will say, under all the circumstances, the purchasers shall take the premises burdened with the

annuities with a great number of others, and seek their indemnity against the trust property and the trustees; if they preferred a personal covenant by the trustees. If in equity these premises belonged to the vendee, he would have a title to the rents and profits at Michaelmas by relation; and he must pay the purchase money with interest from that time. First, it is said, the title was never accepted in fact; secondly, if not, under these circumstances a court of equity will not compel a specific performance. As to the second point the objection is grounded upon two circumstances: First, the simple fact of the fire; secondly, that the premises had been insured prior to the contract; that that fact, and the fact that the insurance expired at Michaelmas, 1796, were not disclosed, and that the premises afterwards remained uncovered by any insurance. The authority of Sir JOSEPH JEKYLL has been mentioned; but no case has been cited in support of that *dictum,* and it is in a degree suggested, not admitted at the bar, that it may be considered overruled by subsequent cases. As to the mere effect of the accident itself no solid objection can be founded upon that simply, for if the party by the contract has become in equity the owner of the premises, they are his to all intents and purposes. They are vendible as his, chargeable as his, capable of being incumbered as his; they may be devised as his; they may be assets; and they would descend to his heir. If a man had signed a contract for a house upon that land, which is now appropriated to the London docks, and that house was burned, it would be impossible to say to the purchaser, willing to take the land without the house, because much more valuable on account of this project, that he should not have it. As to the annuity cases and all the others the true answer has been given, that the party has the thing he bought, though no payment may have been made, for he bought subject to contingency. If it is a real estate, he, of course, has it. Then as to the non-communication, I cannot say, that in my judgment forms an objection, for I do not see how I can allow it, unless I say this court warrants to every buyer of a house that the house is insured, and not only insured, but to the full extent of the value. The house is bought, not the benefit of any existing policy. However general the practice of insuring from fire is, it is not universal; and it is yet less general that houses are insured to their full value or near it. The question, whether insured or not, is with the vendor solely, not with the vendee, unless he proposes something upon that and makes it matter of contract with the vendor, that the vendee shall buy according to that fact, that the house is insured. I am therefore of opinion that if the agent on behalf of this purchaser did accept this title previously to the destruction of the premises, the vendors are in the situation in which they would have been if the title and the conveyance were ready at Michaelmas, 1796, but by the default of the vendee were not executed, but the title was accepted, and the premises were burned down on the quarter day. As to the fact where there has been a great deal of

treaty, and a considerable hardship must fall upon one party, if the case is to be put entirely upon the fact, the court must guard against surprise; and I am not sure even the plaintiff's witnesses accurately understand the nature of the facts they depose to. It is to be observed they are all the plaintiff's agents, subject to the influence necessarily belonging to that situation. The case is, therefore, not sufficiently clear upon the fact, and there ought to be some reference to the Master, or an inquiry before a jury; but that must not be upon the validity of the title, for it is clear, the objection to the freehold title, that it was not old enough, and the other objection, that the purchaser had a right to insist upon a release of the annuities, were waived. The question between them is whether the parties agreed that an indemnity should be given in any form, and if so, in what form. The inquiry must be whether the title had been accepted by the agent on behalf of the defendant on or before the 18th of December, 1796. That inquiry will miscarry unless the Master or the jury, if satisfied that there was an acquiescence in the proposal, shall be of opinion that is an acceptance of the proposal. I should think a court of law would hold that; but if there is any doubt of it I would rather refer it to the Master to inquire whether the agent, on behalf of the defendant, had accepted or acquiesced in the proposal, with a direction that he should be examined; and they will appreciate the credit due to him, and will not forget that he was bartering for himself for eleven guineas; if that appears.

The decree was reversed, and the reference to the Master directed accordingly.

COMBS *v.* FISHER.

In the Court of Appeals of Kentucky, 1813.

[3 *Bibb* 51.]

Opinion of the Court by Judge Owsley:

Combs being the owner of a tract of land, with a cabin and other improvements thereon, on the 10th day of January, 1806, sold the same to Fisher, and promised to deliver possession thereof to Fisher, in the same situation it then was, against the first day of January next thereafter. To recover the amount of an obligation executed by Fisher in part pay for the land and improvements, Combs prosecuted suit and obtained judgment in the Casey Circuit Court. For the purpose of obtaining relief against that judgment, Fisher exhibited his bill in chancery, alleging the purchase of the land and improvements aforesaid, the promise of Combs to deliver possession in the same situation it was when the purchase was made, etc., and charges that the place was not delivered in that

situation, but that the cabin was burned and a number of rails destroyed, etc. He prayed and obtained an injunction on the judgment at law, and asked for general relief. The injunction was dissolved; but on a final hearing of the cause, the Circuit Court decreed compensation for the cabin and rails, the value whereof was ascertained by the verdict of a jury. From which decree this writ of error has been prosecuted. We think the decree of the Circuit Court correct. The evidence in the cause satisfactorily proves the promise on the part of Combs to deliver possession of the place in the same situation it was when Fisher purchased, and that the cabin was burned and rails destroyed before possession was delivered. Combs' express promise, therefore, should be binding on him. The circumstance of the cabin having been burnt by accident, as is urged by Combs, cannot relieve him from his express undertaking. For wherever the covenant is express, there must be an absolute performance, nor can it be discharged by any collateral matter whatever—Esp. N. P. 270. The objection to the smallness of the amount in controversy we think not entitled to any weight. The cause was finally tried on the bill, answer, etc. No objections were taken to the jurisdiction by plea in abatement, nor does any exist on the face of the bill; upon such a state of pleadings, no objection to the jurisdiction can be maintained on the final hearing of the cause.—Decree affirmed.

BREWER *v.* HERBERT.

IN THE COURT OF APPEALS OF MARYLAND, 1869.

[30 *Maryland* 301.]

See case as printed in Vol. 1, p. 425, of this Collection.[1]

[1] "The notes in suit, with three others, were given in payment for a lot of land on which were a dwelling house and other buildings and on payment of the notes at maturity the plaintiff agreed to convey the premises to the defendant. The defendant was to have possession of the premises till he made default of payment as agreed, and he entered into possession under the agreement. Within a year from that time the buildings were burnt without the fault of either party.

"The question presented to the court is whether the destruction of the buildings can be set up by the defendant as a defense to the notes. We think it can be.

"When the owner of a lot of land with buildings upon it agrees to convey it at a future day on payment of the purchase money by the purchaser, and before payment and conveyance the buildings are destroyed by fire without the fault of either party, the loss must fall upon the vendor; and if the buildings formed a material part of the value of the premises the vendee cannot be compelled to take a deed of the land alone and pay the purchase

REED *v.* LUKENS.

IN THE SUPREME COURT OF PENNSYLVANIA, 1863.

[44 *Pennsylvania State* 200.]

Error to the Common Pleas of Delaware County.

This was an amicable action in the nature of an interpleader, in which Nathan Lukens was plaintiff, and Thomas J. Reed defendant, under the following agreement of counsel:—

"It is agreed that an amicable action in the above form be entered in the Common Pleas of Delaware County, to try the right to sum of $900 in the hands of the Delaware County Mutual Insurance Company, and due from them to the said Thomas J. Reed, or his assignee, Nathan Lukens, on account of the destruction of Reed's barn by fire; the said Lukens claiming the whole thereof, and the said Reed admitting Lukens's claim to the $300 only, and claiming the balance himself; the question being which of them is entitled to the $600. It is agreed to try the question upon this agreement without any other pleadings, and if it shall be determined that the plaintiff is entitled to said sum of $600, the verdict and judgment shall be in his favour, and if the defendant shall be so entitled, the verdict and judgment shall be in his favour, the costs to abide the event."

All the material facts of the case will be found in the following opinion of the learned court below (BUTLER, J.):—

It appears from the evidence that Thomas J. Reed, the defendant, was the owner of a farm in Delaware county, the buildings on which he had insured in the Delaware County Mutual Insurance Company, to the amount of $3,150—$900 of which was on the barn; that on the 25th day of January, 1862, he entered into a written contract with Nathan Lukens, the plaintiff, whereby he sold the property to Nathan Lukens, for the sum of $12,825, and undertook to make and deliver to him a deed for it on the 2d day of April following. After the execution of the contract of sale, and before the time appointed for the delivery of the deed, the barn was destroyed by fire. On the 2d day of April, the parties met to carry out the provisions of the contract. The property, from the records, appeared to be encumbered, and Mr. Reed was not then prepared to have it released. On the face of the policy of insurance, the barn appeared to be insured for but $300; and while Mr. Reed seemed to think this was a mistake, as the sum was much less than the loss sustained by the fire, it was regarded by the parties as the amount insured upon that building.

money; and if he has paid it he may recover it back. Thompson *v.* Gould, 20 Pick, 134, and cases there cited; Gould *v.* Thompson, 4 Met. 224; Wells *v.* Calnan, 107 Mass. 514." Per LIBBEY, J., in Gould *v.* Murch, 1879, 70 Me. 288, 289.

After considerable effort to make things satisfactory in view of existing encumbrances, it was agreed that $60 should be abated from the contract price of the property, and it should be taken with the encumbrances unsatisfied, the vendee holding the indemnifying bond of the vendor, and receiving a transfer of the policy of the insurance. A doubt subsequently arising in the minds of the counsel of the respective parties, whether this transfer of the policy might not be understood to have exclusive reference to future losses, a second assignment was executed, transferring to the vendee the vendor's 'right, title, and interest in and to a certain claim of $300 I (the vendor) have against the Delaware County Insurance Company,' arising from the loss of the barn. The amount insured on the barn, it is agreed, was $900, and the company acknowledges itself liable for this sum, although the amount was erroneously inserted in the policy as $300. The company has paid $300 to the plaintiff. Is he entitled to receive the remaining $600, or does it belong to the defendant? This is a question for the court. The rights of the parties must be determined from the papers (the contract of sale and assignment) referred to, and there is therefore nothing for the consideration of the jury.

On the execution of the contract of sale, the plaintiff became, in equity, the owner of the property—the defendant holding it thereafter as his trustee, with a right to retain it until the purchase money should be paid. Whatever advantage might thereafter arise to it would be the plaintiff's, and whatever loss might befall it, he must sustain; the defendant had no further interest in it, except as a security for the purchase money; he would neither lose nor gain by any change which might occur to it: Siter, James & Co.'s Appeal, 2 Casey. When, therefore, the barn was burned, it was the plaintiff's property that was destroyed; defendant lost nothing; the plaintiff was still obliged to take the property and pay the purchase money. The insurance company, however, became liable to pay for the loss to the defendant, because as is said in Updegraff *v.* Insurance Co., 9 Harris 513, he, as respects third persons, not privy to the contract of sale, is still to be regarded as the owner of the property. But as between himself and the plaintiff, the property was not his, but the plaintiff's; he could not appropriate to himself the money which the insurance company became liable to pay on that account; he had the property in trust, and the right which accrued in consequence of its destruction, took its place, was held in the same way, and liable to be enforced in a court of equity. This would seem to be the plain result of the principles governing the relations between these parties, established by the contract of sale. Did the subsequent conduct of the parties (on the 2d day of April) affect their rights in this respect? We think not. The original contract was not annulled; the parties stood upon it, and substantially carried it out: the conveyance was made in pursuance of it—the plaintiff yielding nothing but the right to have the property unencumbered, and the defendant abating

$60 of the purchase money. It was, of course, competent for the parties to agree that the defendant should have a part of the money due on account of injury to the property, but there is no evidence of such an agreement. On the contrary, the defendant executed a written assignment on the policy, transferring 'all his right, title, and interest in the policy of insurance, and all benefit and advantage to be derived therefrom,' to the plaintiff. If the plaintiff had not been before entitled to the money, he would have become so on the execution of this assignment. No claim existed against the company, except by virtue of the policy; no suit could be sustained for the loss, except on the contract which it constituted. This assignment transferred all possible interest in this contract, and all benefit and advantage to be derived therefrom. Such a transfer necessarily included as well the money then due on the policy, as what might thereafter accrue. If the authority for what seems to be so plain a principle is wanted, it may be found in Goit *v.* Insurance Co., 25 Barb., N. Y., 189. The second assignment had not, in our judgment, any effect whatever on the rights of the parties; it was an afterthought, designed to avoid misconstruction of the assignment already made. The defendant's counsel testifies that it was suggested to him by the plaintiff's counsel, 'whether, for the loss which had occurred, there should not be a separate transfer—whether the transfer on the policy might not only be regarded as relating to the future; I said to him the same thing had been running in my mind, and I then made the one which has been exhibited.' This explains how the second assignment came to be made. It was, we repeat, in our judgment, without any effect upon the rights of the parties. Its description of the claims for the loss, as $300, is regarded as of no consequence; it furnishes additional evidence that the parties were in error in regard to the extent of the company's liability; but this error, it must be seen, is immaterial in the view we take of the case.

Judgment is therefore ordered to be entered for the plaintiff for $600, with costs.

Under these instructions, there was a verdict and judgment in favour of plaintiff for $600; whereupon the defendant sued out this writ, and averred here,

1. The court erred in charging that there was no fact to be submitted to the jury.

2. The court erred in directing judgment to be entered upon the verdict for the plaintiff.

Per Curiam.—We affirm this judgment for the reasons given by the learned judge below. They fully meet the requirements of the case, and an elaboration of our views on the specifications of error, would be little more than a repetition of what has already been so well said.

Judgment affirmed.[1]

[1]See same case with valuable note in 84 Am. Dec. 425.

RAYNER *v.* PRESTON.

In the High Court of Justice, Chancery Division, 1880.

[*Law Reports* 14 *Chancery Division*, 297.]

A vendor contracted with a purchaser for the sale of a house which had been insured by the vendor against fire. After the date of the contract, but before the date fixed for completion, the house was burnt, and the vendor received the insurance money from the office. The contract contained no reference to the insurance:—[1]

Jessel, M. R.:—

If this case were *res integra*, and I had to decide it on my view of what was reasonable, I might have found some way of assisting the plaintiff; but it appears to me that the case is really concluded by authority.

The only point that remains to be considered is as to the general law. The general law is asserted to be this, that when a man contracts to buy a house without immediately paying his purchase money, and the vendor has insured the house against fire, and a fire happens before the completion of the contract by payment of the purchase money, and then the insurance company pays the insurance money to the vendor instead of laying it out in reinstating the house, there is an equity on the part of the purchaser to make the vendor apply the insurance money in part payment of the purchase money; in other words, that the insurance money results to the purchaser without any special contract.

Having regard to Lord Westbury's decision in the case I have mentioned, it is possible that, were I making the law for the first time, I might in this case devise some arrangement which would be fair to the purchaser, but I find that the law on this subject has already been laid down long ago.

Now let us see how Lord Eldon laid down the law seventy-nine years ago in Paine *v.* Meller, 6 Ves. 349. That was a peculiar case: the insurance policy was allowed to expire on the day on which the contract was to have been completed, and it was said that the vendor should have communicated to the purchaser the circumstance of the insurance expiring. Upon that Lord Eldon says, 6 Ves. 352, "Then as to the non-communication, I cannot say that in my judgment forms an objection, for I do not see how I can allow it, unless I say, this Court warrants to every buyer of a house, that the house is insured, and not only insured, but to the full extent of the value. The house is bought, not the benefit of any existing policy." So there he puts it in plain terms, that in buying a house you do not buy the existing policy. Then he goes on, "However general the practice of insuring from fire is, it is not universal; and it is yet less

[1] This statement of facts is taken from the headnote.

general that houses are insured to their full value, or near it. The question, whether insured or not, is with the vendor solely, not with the vendee; unless he proposes something upon that; and makes it matter of contract with the vendor, that the vendee shall buy according to that fact, that the house is insured."

Then the point came before Vice-Chancellor KINDERSLEY in 1864 in Poole *v.* Adams, 12 W. R. 683, where the Vice-Chancellor held that, in the absence of any provision in his contract, a purchaser of a house is not entitled to the benefit of an existing insurance against fire. There the very point we have here occurred: before the completion of the contract the house was burnt down. At the date of the contract and the fire the house was insured in the name of the vendor for £100, and he received the insurance money from the office without the privity of the purchaser, and without communicating to the office the fact that a sale had taken place. The Vice-Chancellor held that, there being no provision in the contract that the purchaser should have the benefit of the insurance, the vendor was entitled to retain the insurance money, and that the purchaser must pay the whole of his purchase money.

That decision was in 1864, and I am not aware that it has since been doubted.

The case of Collingridge *v.* Royal Exchange Assurance Corporation, 3 Q. B. D. 173, has no direct bearing upon this case. All that the Judges there decided was that an unpaid vendor who had insured was entitled to recover from the insurance company, the ground of the decision being that an unpaid vendor could not know whether he would ultimately get his purchase money or not. Mr. Justice MELLOR says, 3 Q. B. D. 177: "Whether, when he (the vendor) receives this money, supposing that the defendants do not choose to reinstate the premises, he will become trustee of it for the Board of Works (the purchasers), is another question, but I do not see why the unexecuted bargain between him and the board can affect his right to recover." There was another question, namely, whether a contract for fire insurance being merely a contract of indemnity the insurance company were not entitled to recover from the vendor on his being paid his full purchase money by the purchaser. That question was not considered at all. Then Mr. Justice MELLOR proceeds, "If it were otherwise he would suffer great inconvenience, and would have to rely on the solvency of this purchaser of his property, and though in the present case the purchaser is a powerful corporation, and there is no reason to doubt that the purchase money will be paid, this is a mere accident, which ought not to interfere with his right to take measures for the protection of his security. The defendants are quite mistaken in supposing that they have only to pay the plaintiff the amount of the loss which, as between him and third persons, he may ultimately sustain."

Then Mr. Justice LUSH says, "If the plaintiff had actually conveyed them (the premises) away before the fire, that would have been a defence

to the action, for then he would have had no interest at the time of the loss." That is, if the vendor had been paid his purchase money in full, he would have had no interest in the property, and could have maintained no action.

We will now turn to a text-book on the subject. On looking at Bunyon on Fire Insurance, 2d ed. p. 181, I find the law thus stated: "If, therefore, a fire occurs between the time of the sale and the completion of the contract, in the absence of any provision to the contrary, the loss falls upon him (the purchaser); he cannot claim either an abatement for his purchase money or repudiate his bargain. Neither is the vendor under any obligation to communicate to him whether there is any existing policy or not. The vendor is indeed trustee for him of the legal estate, and of the possession until the purchaser is put into possession, but he is not a trustee to all intents and purposes, so as to place him under the same obligations as might attach upon an express trustee. If there is an insurance existing at the time of the fire, without an express stipulation to that effect, the purchaser cannot claim the benefit of it, and if there is none, it follows that he is not damnified."

That is how the law was stated in 1875.

Therefore, whether we look at actual decision, or whether we rely on the text-books on the subjects, we find the law treated as settled. I do not think I can, in the year 1880, take upon myself to alter what Lord ELDON said in 1801, or what Vice-Chancellor KINDERSLEY said in 1864.

The action must, therefore, be dismissed with costs.[1]

HAMPSON *v.* EDELEN.

IN THE COURT OF APPEALS OF MARYLAND, 1807.

[2 *Harris and Johnson,* 64.]

Appeal from the Court of Chancery. The bill of the complainant (the now appellee), stated, that in September, 1797, he purchased a part of a tract of land, lying in Prince George's County, called Stoney Harbour, containing 163 acres, from a certain Benoni H. Wade, at the price of £5 per acre; and on the 24th of December, 1797, Wade gave him full and absolute possession thereof, and that he has ever since continued in possession. That at the time of the purchase of the land, Wade was

[1] From this decision of Sir GEORGE JESSEL an appeal was taken to the Court of Appeals, L. R. 18 Ch. Div. 1. The decree was there affirmed per Lord Justices COTTON and BRETT, Lord Justice JAMES delivering a strong dissenting

indebted to the complainant on bond, with Thomas Mundell his surety, in the quantity of 15,605 pounds of net tobacco, to be paid at the price of 65 shillings per hundred, the whole amounting to £482 current money, and it was then agreed, that the bond should be received in part payment of the land at the said amount, and the same was accordingly given up to Wade. That the complainant continued in possession of the land, and used and cultivated it, and having paid up the whole purchase money, on the 12th of November, 1798, obtained a conveyance for the same. That after he had purchased the land from Wade, and had paid the amount of the bond in manner aforesaid, and had been in possession, and had used the land from the month of December, 1797, to May, 1798, a certain Bryan Hampson obtained three judgments against Wade at May term, 1798, in the general court, on which judgments several writs of *fieri facias* have issued returnable to the next general court at May term, 1800, and have been laid on the land of the complainant so as aforesaid bought and paid for, and there will be an immediate sale thereof, unless prevented by this court. That at the time the complainant purchased and paid for the land as aforesaid, he never heard of the judgments against Wade, and was wholly ignorant of the same, until the writs of *fieri facias* were about to be laid on the land. That he is advised that, having bought the land, and having been in possession thereof as aforesaid, and having paid to the amount aforesaid, before any judgment was obtained against Wade, he is entitled to the aid of this court to secure him in his title to the land. Prayer for an injunction to enjoin proceedings on the judgments and executions, and for other relief, etc. An injunction accordingly issued. . . .

CHASE, Ch. J., delivered the opinion of the court. In this case it appears that a considerable part of the purchase money was paid, and possession given of the land, prior to the obtention of the judgments by Hampson against Wade.

A contract for land, bona fide made for a valuable consideration, vests the equitable interest in the vendee from the time of the execution of the contract, although the money is not paid at that time. When the money is paid according to the terms of the contract, the vendee is entitled to a conveyance, and to a decree in chancery for a specific execution of the contract, if such conveyance is refused.

A judgment obtained by a third person against the vendor, mesne the making the contract and the payment of the money, cannot defeat or impair the equitable interest thus acquired, nor is it a lien on the land to affect the right of such *cestui que trust*.

opinion. Both ruling opinions contained doubts whether as between the insurance company and the defendants the latter could keep the money. Acting on this doubt, the insurance company sought, in Castellain *v.* Preston, 1882, L. R. 8 Q. B. 613, to recover the money paid to the defendant, the vendor. CHITTY, J., in an elaborate opinion, denied the relief; but on appeal, in L. R. 11 Q. B. 380, he was reversed by a unanimous court.

A judgment is a lien on the land of the debtor, and attaches on it as a fund for its payment; but the legal estate in the land is not vested in the judgment creditor, although he can convert it into money, to satisfy his debt, by pursuing the proper means.[1]

Decree affirmed.

FILLEY *v.* HOPKINS, ——, 1 Neb. 134, 137. CROUNSE, J., said:— . . . Where there is a contract to convey an estate, which the vendor has not at the time, if he afterwards becomes the owner, a court of equity will compel a specific performance. Edwards *v.* Varrick, 5 Denio, 664; per Porter, Senator, 695. So, when Bell completed his title by securing the deeds from the heirs, it was in fact for the benefit of Mrs. Duncan, and the transaction is so related to the contract with her, that in my opinion, her rights to this after-acquired title are the same as to that about which there is no dispute. However this may be, the lands in question were not levied upon, under these judgments until Bell had conveyed by deed to Mrs. Duncan; and as to after acquired lands, no lien attaches so as to effect *bona fide* purchasers, until levied upon. Code 477; Roads *v.* Symmes, 1 Ohio, 281, 313. For the purposes of this case, therefore, it may be assumed that, at the time of making his contract with Mrs. Duncan, Bell was the absolute owner of the land bargained to her.

The position of Mrs. Duncan in July, 1859, when she had made her contract with Bell, was this: She was the purchaser from the owner in fee of the land in question; she was in possession of, and cultivating the same, and on making payment, according to the terms of her contract, was to receive a good and sufficient deed. The transaction was a lawful and a usual one, and entered into in good faith.

The judgments under which Hopkins and Filley, the appellants, claim, were entered in December following, and before the execution of the deed from Bell to Mrs. Duncan, which was on the 28th day of May, 1860.

The lands and tenements of the debtor are bound for the satisfaction of a judgment against him, from the first day of the term at which it is rendered. Code 477. But it is well settled, that in equity, the lien of a judgment is subject to all equities that existed at the time it was recovered. Mayer *v.* Hinman, 3 Kernan, 180, 190; in the matter of Howe, 1 Paige, 125; Ellis *v.* Tousley, id., 280; White *v.* Carpenter, 2 id. 217; Keirsted *v.* Avery, 4 id. 9; Parks *v.* Jackson, 11 Wend. 442. It is true, an agreement for the sale of lands is a personal contract; it does not attach to the lands sold, nor divest the vendor of his estate. The legal title still remains in him, and he can convey to a *bona fide* purchaser, without notice, a title to the premises, freed from the equity of the ven-

[1]See same case with note in 3 Am. Dec. 530.

dee. But while this is so, a purchaser with notice would take the premises, subject to the equitable rights of a vendee. This notice may be actual personal notice, or it may arise from open, notorious possession of the lands, by the vendee, which is constructive notice to all the world. Gouverneur *v.* Lynch, 2 Paige, Ch., 300; Chesterman *v.* Gardner, 5 Johns, Ch., 29. The lien of these judgments went no farther. They attached to the interest of the vendor, Bell, as they found it. Had the vendee abandoned the contract, the entire fee in the vendor would have become subject to the lien of the judgments; and the purchaser at sheriff's sale under them, would have received a clear title to the lands so sold. With the contract subsisting, the lien extended only to the unpaid balance of the purchase money. To the extent of the five hundred and twelve dollars remaining unpaid upon Mrs. Duncan's contract, these judgments were a lien, which could have been made available to these judgment creditors, in a proper proceeding.

Subsequent to the entry of these judgments and before sale of the premises under them, Mrs. Duncan paid this balance of the purchase money to Bell and took a deed from him. No actual notice to her of the entry of these judgments nor claim upon her for the balance of the purchase money is shown. But it is claimed that the record of these judgments was constructive notice to her, and that any payment by her to Bell after this entry was in her own wrong, and not to the prejudice of these judgment creditors. In support to this position, counsel refer to Gouverneur *v.* Lynch, 2 Paige, 300. All that is there said by the chancellor on this point is: "If a vendee is in possession of land, under a contract to purchase, a subsequent purchaser or mortgagee has constructive notice of his equitable rights, and takes the land subject to his prior equity. If the purchase money has been paid before notice of or prior to the recording of a subsequent mortgage, the mortgagee will have no claim upon the land. Where a part remains unpaid, he will have an equitable lien thereon to the extent of the unpaid purchase money." . . .

This case was taken to the Court of Appeals (*vide* 13 N. Y., 3 Kernan, 180), and there reversed, as to so much as holds that the record of a judgment is sufficient to insure the payment of the balance of the purchase money from vendee to judgment creditors. Judge DENIO delivering the opinion of the court, after assuming the law as fully established, that one in possession under contract of purchase is to be protected in equity as to his rights which existed at the time of docketing a judgment, says:—"I consider it equally well settled, that the docketing of a judgment against the vendor affords no notice of its existence, either actual or constructive, to the prior vendee of the judgment debtor. Parties who deal with the debtor respecting his lands, subsequently to the docketing of the judgment, are affected with notice. Such persons may make themselves perfectly safe in that particular, by searching the docket book of judgments in the proper office; and they will of course abstain from purchasing, if they find the land which they are proposing to buy, en-

cumbered by a judgment. So, it may be said, a party holding a contract upon which payments remain to be made, may, before making such payments, examine for judgments against the vendor; but it would be an intolerable inconvenience to require this, where the payments, as is usually the case, are to be made annually or oftener; and should such examinations be ever so strict, the vendee would have to run the risk of an incumbrance intervening, while he was going from the office where the search was made to the residence of the vendor, to make the payment." . . .

In Maryland, in the case of Hampsen *v.* Edelen, 2 Har. & Johns., 64, it was held, that where a vendee, subsequently to the recovery of a judgment against a vendor, but without actual notice thereof, had paid over the balance of the purchase money and taken a conveyance from the judgment creditors, such vendee was, in equity, entitled to be protected against the claim of the judgment creditors.

These latter cases, besides challenging the consideration due to so high authority, are based on the better reasoning. The conclusions reached are deduced from doctrines so fully established by authority, as to entitle them to be regarded as among the elementary principles of the law; and when applied here afford an easy solution of this case. At the time of the entry of the judgments under which Hopkins and Filley claim, Mrs. Duncan had made a contract with Bell for the premises in question, and had parted with a part of the purchase price. At the time of her purchase there was no suggestion of right or interest to the same in these parties, either actual or constructive. She took the hazard of the vendor's title, and relied upon his responsibility to make her a deed in due time. She also ran the risk of prior judgments against the vendor, and at her peril was bound to search the records for incumbrances prior to the date of her contract. Her possession was notice to all the world of her interest. She was the equitable owner of so much at least, as had been paid for and was entitled to a conveyance of the whole of the lands, when the balance of the money should be paid. She had obligated herself to pay Bell the balance, and to assume to pay any one else, might embarrass her or lead to litigation with Bell, or those to whom he might assign his contract with her. These judgment creditors, came into this arrangement rather as intruders. They are given a right to the unpaid purchase money, which, in a proper proceeding, may be secured by them. To this extent they are to be benefited and it is but right that as to this they should become the actors.

They should at least have given Mrs. Duncan or her representatives actual notice of the entry of their judgments and their claim under them. Whether a simple notice to the vendee of the existence of judgment liens, acquired since her contract, would be suffcient to make any further payments to the vendor, the judgment debtor, at her own peril, it is unnecessary to decide. In my opinion, however, it is not. In a proceeding in the nature of a creditor's bill, payment could be enjoined until the

rights of the parties are determined. The party who seeks to interfere with and override a lawful transaction, and intercept payments due under legal obligations, and have the same applied in satisfaction of his claims, should, it seems to me, provide himself with authority from some competent power.

Here, Mrs. Duncan, pursuant to her agreement, has paid all of the purchase money, and taken a deed; and her heirs now ask that the title so taken be cleared from the cloud raised by the sale of these premises, under the judgments mentioned. To this relief they are entitled. When the sheriff's sale was made, no title remained in Bell, and of course no title passed. Bell had already conveyed to Mrs. Duncan. The rule that the purchaser at sheriff's sale becomes possessed of the title and interest held by the judgment debtor at the time of the entry of judgment, is subject in equity to this qualification—that he takes such title, subject to the equities that then existed against him, or which have since arisen, through want of knowledge of such judgments.

Judgment of the court below affirmed.[1]

SECTION 4.—RIGHTS FOR AND AGAINST THIRD PERSONS.

PHILLIPS v. DUKE OF BUCKS.

IN CHANCERY, BEFORE SIR FRANCIS NORTH, LORD KEEPER, 1683.

[1 *Vernon* 227.]

The case was; that Mr. Phillips having formerly treated with the Duke of Bucks for the purchase of the manor of Sheapeshead and Garrowden, in the County of Leicester, and not agreeing upon the price, the treaty was broke off: but to compass this purchase Mr. Phillips procured by Mr. Niccoll, the Lord Chancellor NOTTINGHAM'S Secretary, to negotiate this matter for him; and it being pretended to the Duke (as was proved in this cause) that this purchase was for the Lord Chancellor, or for the Solicitor-General his son, the Duke declared himself willing to oblige any of that family;[2] and said if the Lord Chancellor would place any

[1] See same case with elaborate note in 93 Am. Dec. 337.

[2] Both Mr. Fry and Mr. Waterman remark that the Duke had several cases depending in chancery, and, wishing to oblige the Lord Chancellor, he entered into the articles. Fry, 4th ed., p. 93; Waterman, p. 100.

way to satisfy himself of the value of the estate, he should set his own price. Afterwards Mr. Niccoll agreed with Hemmings, a land jobber, whom the Duke had employed in this affair, to buy this estate for 28,000l. And thereupon the Duke and Mr. Niccoll entered into articles, whereby the Duke did mention to grant, bargain and sell this estate to Niccoll and his heirs in the present tense: and Niccoll covenants to pay 28,000l. for this purchase, at such times as were therein mentioned; and both of them sealing each part of the indenture, they were both originals: and Niccoll goes immediately, and acknowledges before a Master in Chancery the deed in his custody, and gets it enrolled. If two are parties to a deed, and one acknowledge it before a judge it will bind the other. Taylor *v.* Jones, 1 Salk. 389, and the deed may be enrolled without the examination of the party, upon proof by witness, that party delivered it. Godb. 270, cited in Taylor *v.* Jones, *ub. sup.* *Sed vide* 1 Lord Raymond, 746, S. C. as to copy of enrollment of a deed leaving the uses of a fine being received in evidence.

The Duke afterwards discovering this purchase was in trust for Mr. Phillips, looks on himself as ill used in this matter, and refuses to perform the articles, or to execute conveyances: but one article being, that it should be lawful for the purchaser to sue in the Duke's name to compel his trustees to convey and his mortgagees to assign to Mr. Niccoll: Phillips and Niccoll exhibit a bill and make the Duke a party plaintiff against the trustees and mortgagee, setting forth the articles, and that the purchase was in trust for Phillips, and praying the defendants might convey and assign to the plaintiff Phillips.

Afterwards the Duke upon a motion, affirming that the bill was exhibited in his name without his privity or consent, gets his name struck out of the bill: then Mr. Phillips amends his bill, and makes the Duke a defendant, and as against him prays an execution of the articles in specie. The trustees and mortgagees answer. But the Duke stands out to a sequestration; and then the plaintiffs go on against the trustees and mortgagees without the Duke, and obtain a decree against them to convey and assign, which the mortgagees afterwards on payment of their money did accordingly. Vide Downes and Al' Creditors of the Marquis of Donegal *v.* Thomas, 7 Ves. jun. 207, as to process against peers and other privileged persons.

Afterwards the Duke comes in and answers, and examines his witnesses, and the cause coming on this day regularly to be heard as against him; and the matters aforesaid being made out by proof, and likewise (though but slenderly proved) that the lands were of greater value, and were worth between 35 and 36,000l.

The Lord Keeper declared his opinion, that there had not been fair and open dealing in the managing of this affair: but that the Duke appeared to him to have been misinformed and drawn in: and that the Duke, having a great value for the Lord Chancellor or Mr. Solicitor, declared himself willing to part with the estate to either of them for less

than he would have done to another: and that being the intention of the agreement, Lord Keeper said, he would not in equity carry it into execution for the benefit of a stranger: and said articles, out of which an equity could be raised for a decree in specie, ought to be obtained with all imaginable fairness, and without any mixture tending to surprize or circumvention: and therefore declared, he could not in justice decree these articles to be performed in specie; vide Young *v.* Clerke, Pre. Ch. 538; Savage *v.* Taylor, Forr. 236; Eyre *v.* Popham, 1 Bro. Ch. Rep. 95, in not.; but proposed that if the parties would agree to go before a Master; and if a better purchaser did not come in within six months, Mr. Phillips might retain his purchase; but that proposition was disliked on each side. The Duke desired the opinion of the court, and Mr. Phillips thought he had a good cause at law on his deed enrolled; but offered to submit the matter to the Lord Keeper as an arbitrator: vide Lord NORTH'S Life of Lord Keeper GUILFORD; but that was declined by the Duke; he understanding the court was of opinion for him: and thereupon the Lord Keeper pronounced his decree for dismissing the plaintiff's bill: and put this case, that if a man, being about to sell an estate, should be informed by J. S. that the vendor's brother desired to be the purchaser, and thereupon the vendor should declare his brother should have a better pennyworth than another person; and he should article with J. S. for the sale of it at an under value; and this purchase should be in truth for a stranger; Lord Keeper thought, that equity ought not to decree this purchase: and said, that Mr. Phillips had here a person of great honour to deal with, and ought to have carried the matter fair and open with him; but declared, if the bill had been brought in Mr. Solicitor's name, and he would have patronized the purchase, the articles must have been decreed, and no one can doubt, but he might have sold it to Mr. Phillips the next day: but it was another case that was now before him.[1]

[1] "The statement in this report is not correct. It appears from the Register's Book that at the hearing on the 11th February the court respited the judgment, and recommended a compromise to the parties. This not being effected, the cause came on for judgment as to the Duke of Bucks the 3d March following, when it was stated on the part of the plaintiff Phillips that the plaintiffs had obtained a decree against the other defendants, the mortgagees and trustees, and that pursuant to such decree the plaintiff Phillips had paid on the 23d December, 1682, £15,957 14s. 4d. to said mortgagees, according to a report of the Master, who was ordered to state and settle the said mortgage debts, and had also at the same time paid the sum of £5,000 to the said trustees, and that plaintiff Phillips was now in possession of the said estate, and that the said Master had, by his report of the 27th February, 1683, directed how the remainder of the said purchase money, with interest at the rate of £5 per cent., ought to be paid and applied. The decree is then stated in the Register's Book in these words: "Whereupon, etc., the court doth think fit and so order and decree, that the plaintiff Phillips do pay unto the said defendant Duke of Bucks, and his wife, the £1,500 mentioned in the Master's Report of the 27th February, 1682-3, as thereby is directed, and that the

FLOOD *v.* FINLAY.

IN CHANCERY, IRELAND, BEFORE LORD CHANCELLOR MANNERS. 1811.

[2 *Ball and Beatty* 9.]

The defendant, Mrs. Finlay, being seised in fee of certain premises, agreed with her son-in-law, Blackwood, to demise the lands to him for his life, if his wife or a son he had by her, should so long live, the rent to be ascertained by two gentlemen of the neighborhood. The articles were executed and Blackwood entered upon the premises in 1806. In

defendant Duke of Bucks do make and perfect a good assurance to the plaintiff Phillips of the said manors and premises by fine and common recovery, and by deeds leading the uses of the same to the plaintiff Phillips and his heirs, and the said defendant is to procure his wife, the Duchess of Bucks, to join in the levying and executing such deeds and fine. And upon defendant and his wife making such further assurance by deed, fine and common recovery, the plaintiff Phillips is forthwith to pay the residue of his said purchase money remaining unpaid, with interest at £5 per cent., as the Master should direct, to defendants Clayton and Wildmeers, the acting trustees of the said Duke, for the use of the said trust, and it is hereby referred to the Master to tax the plaintiffs costs of this suit, which are to be allowed and deducted out of the plaintiff's said purchase money accordingly." Reg. Lib. 1683, B. fol. 258.

"Harding *v.* Cox, Hill. 21 G. 2, Harding treated with Cox for the lease of a house, and pretended he took it for Evans, a barber, and articles were entered into. Harding brought a bill for performance of the articles. Cox, by his answer, alleged that it was not taken for Evans, but for a coffee-house man who lived at the back of his house, and who proposed throwing it into his coffee-room, and suggested that the name of Evans was only used as a blind. Upon hearing the defendants failed in their proof, but Lord Chancellor HARDWICKE said that if they had been able to prove the fraud he would have dismissed the bill with costs, on the authority of this case of Phillips and Duke of Bucks. Sed vide post not. p. 229."—Reporter's note.

"I should be very sorry to lay it down that a man treating with a third person, in trust for a second, whom he had refused to deal with, could therefore set it aside. No case has gone so far. Phillips *v.* the Duke of Bucks, 1 Vern. 227, was upon a difference of price." Per Lord Chancellor THURLOW in Irnham *v.* Child, 1781, 1 Bro. C. C. 92, 95.

"I do not enter into the question in the case of Phillips *v.* the Duke of Buckingham; but, with reference to such a transaction as was the subject of that cause, though certainly Lord THURLOW intimated a doubt (Lord Irnham *v.* Child, 1 Bro. C. C. 95) whether a man, treating with a third person, in trust for a second, whom he had refused to deal with, could therefore set it aside, I cannot possibly admit, that it may not under some circumstances be a decisive answer to a bill for the specific performance of an agreement.

1810, becoming embarrassed in circumstances, he surrendered his interest under the agreement. Shortly after a commission of bankruptcy issued against him. The plaintiffs, as assigns in bankruptcy, prayed a specific execution of the agreement. This was resisted on the ground, among others, that it was the understanding and express intention of the parties, that this was a mere family arrangement to allow Blackwood to live in the mansion house and demesne, Mrs Finlay intending to go to England, and that he was not to alien or sell his interest under the agreement. These facts were proved at the trial.[1]

The LORD CHANCELLOR.[2]

It is not necessary for me, in this Case, to decide the abstract Question, whether the Assignees of a Bankrupt cannot, in any Case, be entitled to a Decree for a specific Performance of an Agreement for a Lease, entered into with the Bankrupt; as I am satisfied, that it would be contrary to the Intention of the Parties, and to the Justice of the Case, to give that Relief to the Plaintiffs in this Cause. It is perfectly clear to my Mind, both from the Nature of the Premises comprised in the Agreement, as well as the Interest and Term which Mr. Blackwood was to have in them, that this was merely a personal Accommodation to Mr. Blackwood; and if he had called upon the Court for an Execution of the Article, it would have been competent for Mrs. Finlay to have insisted upon a Covenant against assigning, or alienating the Term without her Licence; and the Court would not in such a Family Transaction, have hesitated to dismiss the Plaintiffs' Bill, if he had declined a Lease with such a Clause in it. Can the Assignees of Mr. Blackwood then in this Court stand in a better Situation? Certainly not.

And the Circumstance of Mr. Blackwood's having given up the Possession &c. of this Mansion House and Demesne, when he found himself unequal to keep and enjoy them; although perhaps not to be relied upon in expounding the Article of Agreement, yet is consistent with the Defence set up by Mrs. Finlay.

There had been several instances of the same name, or the same sign, being set up next door, or opposite, to a tradesman: there could be no doubt of the view; or that the party might do so: but that is very different from the case of an agreement for a lease, obtained from the owner of the original shop with a studious concealment of the object: or a landlord from motives of kindness to an old tenant letting to him a farm upon lower terms than he would let it to any other person; and that tenant, being informed by the landlord, that he would not upon any account let that farm to a particular individual (from some clashing interests in mines), declaring himself a trustee for that person. This court would pause long, before it would execute an agreement under such circumstances." Per Lord Chancellor ELDON in Bonnett *v.* Sadler, 1808, 14 Ves. 526, 528.

See also the cases of Scott *v.* Langstaffe cited in Popham *v.* Eyre, 1774, Loft 786, 797; and Barebone *v.* Barnes, 1682, 2 Cas. in Ch. 121.

[1] The statement of facts in the report has been abridged.

[2] A part of the opinion has been omitted.

It would surely then be contrary to the Justice of the Case, that this Agreement, so understood by all the Parties, should be set up to be sold by public Auction, or that a Stranger should be forced upon Mrs. Finlay. If I could discover any Fraud upon the Creditors, by their having advanced Money, or given Credit in any Manner on the Faith of this Agreement; it might have raised some Question; but no such Case is made out, nor is any Fraud imputed either to Mr. Blackwood, or Mrs. Finlay. And as I would not execute the Article for Mr. Blackwood himself, without a Covenant against Alienation, I will not for his Assignees.[1]

[1] "There is a great deal to be considered with respect to contracts of this kind. Here is a contract for the occupation of land, in which contract the solvency and the character of the tenant are intimately concerned: they are not so important, however, as if the lease were at a rack-rent—there the solvency and character of the tenant are everything. Now, suppose a trustee was to contract for a lease at a rack-rent, and that *cestui que trust* filed a bill for a specific performance. Says the defendant: 'I agreed with this man as a good tenant—a solvent man, and skilled in the improvement of ground; you are poor, you are ignorant of the cultivation of land; and because he happens to be your trustee, though there is no trust apparent, must I put upon my estate a tenant who will ruin it?' Can this be equity? I think not. If, indeed, such a lease had been actually executed, and without containing a provision that the tenant should not assign without license, in such case the landlord must suffer for his folly. The difference in the character of the tenant may make a great difference with respect to the lands, and may be an injury to the landlord to an incalculable extent, and therefore it would be dangerous to establish merely on the principle that a trustee shall gain no benefit for himself, that a party not knowing of the trust shall be obliged to execute an agreement made with the trustee. Suppose a farmer in possession of a farm at a rack-rent, holding under an assignment of a lease, and being the apparent owner. He cultivates the land well and gives satisfaction to his landlord, who for his encouragement proposes to give him a further term, and he enters into a contract to that effect; and then the person who assigned the lease starts up and insists that the farmer was his trustee, and, though the landlord knew nothing of such trust, that he must execute a lease to him and not to the tenant. Surely, the landlord has a right to say, 'I never would have entered into such a contract with you.'" Per Lord Chancellor REDESDALE in O'Herlihy *v.* Hedges, 1803, 1 Sch. & Lef. 123, 130.

"Then does the circumstance that Wilkinson was unwilling to admit the plaintiff into the agreement for a renewal make any difference? I think it does not, as it is no injury whatsoever to him, or any other of the trustees of Mr. Lambton, to declare the defendants trustees of this property for the plaintiff. There may be cases where the interest which a third party may have against the specific performance of an agreement would preclude the execution of it, as between *cestui que trust* and trustee, as in a case, O'Herlihy *v.* Hedges, 1 Sch. & Lef. 123, before Lord REDESDALE." Per Sir WILLIAM GRANT, M.R., in Featherstonhaugh *v.* Fenwick, 1810, 17 Ves. 298, 312.

In Stevens *v.* Benning, 1854, 1 Kay & J. 168, it was held by Sir WILLIAM PAGE WOOD, V.C., that an agreement by an author to prepare a book for press,

JACKSON'S CASE.

In the Exchequer, 1609.

[*Lane* 60.]

Upon a motion made by Sir John Jackson in a suit by English Bill, between Jackson and another; TANFIELD [C. B.] said, that it had been decreed in the Chancery, betwixt one GORE and WIGLESWORTH, that if A. agree with me to lease black-Acre for certain years to me, and after before he makes up my lease according to his promise, he infeoffes B. of that Acre for a valuable consideration, and B. had notice of this promise, before the feoffment made unto him, now B. should be compelled in the Chancery to make this lease to me, according to the promise, and by reason of his notice, and so the Court agreed upon a

correct the proof sheets and superintend the printing for a division of the profits from the undertaking, was a personal one.

"But, waiving that, what is the effect of an agreement to assign where the lease is not assignable without license? If the landlord does not give the license, the agreement cannot be carried into execution. The lessee may subject himself to an action; but that is all. A court of equity cannot consider that as done which, if done, would extinguish the very subject of the contract." Per Sir WILLIAM GRANT, M.R., in Weatherall *v.* Geering, 1806, 12 Ves. 504, 511.

"I do not say that what appears in this case amounts in strictness to champerty or maintenance, nor do I even say that these may not be cases in which a purchaser who has completed his contract may well be entitled to impeach a title founded upon fraud committed upon his vendor; but I do not hesitate to say that, in my opinion, the right to complain of a fraud is not a marketable commodity, and that if it appears that an agreement for purchase has been entered into for the purpose of acquiring such a right, the purchaser cannot call upon this court to enforce specific performance of the agreement. Such a transaction, if not in strictness amounting to maintenance, savors of it too much for this court to give its aid to enforce the agreement." Per Sir G. J. TURNER, L.J., in De Hoghton *v.* Money, 1866, L. R. 2 Ch. 164, 169.

"Does error in regard to the person with whom I contract destroy the consent and annul the contract? I think that this question ought to be decided by a distinction. Whenever the consideration of the person with whom I am willing to contract enters as an element into the contract which I am willing to make, error with regard to the person destroys my consent, and consequently annuls the contract. . . . On the contrary, when the consideration of the person with whom I thought I was contracting does not enter at all into the contract, and I should have been equally willing to make the contract with any person whomsoever as with him with whom I thought I was contracting, the contract ought to stand." Pothier, Traité des Obligations, § 19.

motion made in the like case, by the said Jackson, for as before the Statute of 27 II. 8, a feoffee upon valuable consideration, should be compellable in the Chancery to Execute an use, whereof he had notice, so here.[1]

DANIELS *v.* DAVISON.

In Chancery, before Lord Eldon, 1811.

[17 *Vesey* 433.]

In this case the Lord Chancellor pronounced the following judgment.

I have already expressed my opinion that the plaintiff is entitled to a specific performance of the agreement for the sale of these premises to him; and, with regard to the subsequent sale by the defendant Davison to the other defendant Cole, my notion is, that the plaintiff has an equity to have a conveyance of the premises from Cole, upon the ground that Cole must be considered in equity as having notice of the plaintiff's equitable title under the agreement; that Cole was bound to inquire; and therefore, without going into the circumstances to ascertain whether he had or had not actual notice, he is to be considered as a purchaser of the other defendant's title, subject to the equity of the plaintiff to have the premises conveyed to him, at the price which he had by the agreement stipulated to pay to that defendant; and that it is competent to the court to make that arrangement as between co-defendants.

The plaintiff, therefore, deducting his costs out of the money he is to pay, must have such conveyance from one or both the defendants, as the Master shall settle, if they differ; but I can go no further than to regulate as between the defendants the payment of that money which the plaintiff is to pay.[2]

[1] "*Bona fide* purchasers without notice were protected on the ground of public convenience. . . . But a purchaser could not take advantage of the equitable rules in his favor if he were liable to the imputation of fraud, or improper practices. . . . A purchaser taking notice of an agreement for a lease was bound to confirm it." 1 Spence, Jurisdiction of the Court of Chancery, p. 424, citing the principal case.

[2] "There is no difficulty in enforcing the specific performance of the contract against the alienee of the vendor. Where the alienee has notice of the original contract at the time of the alienation, he is liable to its performance at the suit of the purchaser. If he is a purchaser with notice he is liable to the same equity, stands in his place, and is bound to do that which the person he represents would be bound to do by the decree. Taylor *v.* Stibert, 2 Vesey, jun. 430; Fry on Spec. Perf., § 135, 137." Per Chancellor Green in Downing *v.* Risley, 1862, 15 N. J. Eq. 93, 96.

CROSBIE *v.* TOOKE.

IN CHANCERY, BEFORE LORD CHANCELLOR BROUGHAM,[1] 1833.

[1 *Mylne & Keen* 431.]

In the month of September, 1831, the defendant Tooke and a person of the name of Bickmore entered into an agreement (which, on the 26th of the same month, was reduced to writing and signed by the parties), whereby Tooke agreed to grant, and Bickmore to accept, a lease of a farm and premises at Little Burstead for a term of fourteen years, at a yearly

In Graham *v.* O'Connor, 1895, 73 L. T. 712 "an action [was] brought by Thomas Graham, a newspaper proprietor, of Wolverhampton, against Thomas Power O'Connor, M. P., Francis Howard O'Connor, his stepson, and the Tudor Publishing Company, Limited, carrying on business at Sun buildings, Tudor street, Temple, for specific performance of an agreement to transfer 2000 fully paid-up deferred shares in the company to the plaintiff. KEKEWICH, J. "It is admitted that, if the subject matter of the contract was land, F. H. O'Connor, being a mere volunteer, could not hold the land which he received by way of gift as against the prior equity of the plaintiff under his contract. Why should not that doctrine apply equally to a contract for the sale of shares? In principle I see no reason why it should not. The ingenuity of counsel has not produced any authority upon the subject, and I therefore feel justified in believing that no authority can be cited, and I must deal with the matter as *res integra*, and upon principle. The principle applicable to the case is thus laid down by Sir Edward Fry in his work on Specific Performance, 3rd edit., p. 105. 'Where a contract has been entered into for the sale or demise or other dealing with property, and that property is afterward transferred to a third person, such third person is liable to perform the contract at the suit of the purchaser or intended lessee in either of the events: (1) When the transferee takes as a volunteer. (2) When the transferee takes with notice of the prior contract. (3) When the transferee has acquired only an equitable title, and has no better equity than the purchaser or intended lessee.'"

"It is settled, Johnson *v.* Stagg, 2 Johns. Rep. 510; Frost *v.* Beekman, 1 Johns. Ch. Rep. 298; Parkist *v.* Alexander, ib. 398, that the registry of a mortgage under the mortgage act is notice to all subsequent purchasers and mortgagees; and the same construction ought to be given to the act above referred to, for the case is within the same reason and policy.

"When, therefore, Preston purchased of Thomas, and when Matthews pur-

[1] It is common practice to belittle BROUGHAM'S legal attainments and to repeat the jest that if he had known a little law he would have known a little of everything. The truth is, that his judgments were mediocre rather than bad, and while they generally satisfied the immediate occasion, they have not served as landmarks in the development of equity.

The Chancellorship, his best title to remembrance, was a mere incident in a long and notable career, and it is as reformer of law and of Parliament, a promoter of popular education and of all liberal movements, that posterity will gratefully recall him when his critics and detractors are wholly forgotten.

rent of £140. Under this contract Bickmore took possession of the farm; and in the month of April, 1832, he, for valuable consideration, executed an assignment of all his interest in the farm and premises, and in the benefit of his contract for a lease thereof, to William Crosbie, who was thereupon let into possession; and Tooke having soon afterwards brought an ejectment against Crosbie, the present bill was filed by the latter for a specific performance of the agreement for the lease, and for an injunction

chased of him, they were each of them chargeable with notice of the conveyance of Thomas to the plaintiff, and of its contents. They therefore took, subject to that equity, equally with Thomas himself, or with his heirs; and in the words of Ch. B. EYRE in Morse *v.* Faulkner, 1 Anst. 14: 'It is clear that where there is an agreement to convey, or a defective conveyance by a person then actually having title, that would be such an equity as would bind the lands in the hands of the heir.'" Per Chancellor KENT, in Wadsworth *v.* Wendell, 1821, 5 Johns. Ch. 224, 230.

"The first question offering itself to the consideration of a court of equity is, whether the purchaser had notice. I have no difficulty to lay down, and am well warranted by authority, and strongly founded in reason, that whoever purchases an estate from the owner, knowing it to be in the possession of tenants, is bound to inquire into the estates those tenants have. It has been determined that a purchaser, being told particular parts of the estate were in possession of a tenant, without any information as to his interest, and taking it for granted it was only from year to year, was bound by a lease that tenant had, which was a surprise upon him. That was rightly determined, for it was sufficient to put the purchaser upon inquiry that he was informed the estate was not in the actual possession of the person with whom he contracted; that he could not transfer the ownership and possession at the same time; that there were interests as to the extent and terms of which it was his duty to inquire." Per Lord Chancellor LOUGHBOROUGH in Taylor *v.* Stibbert, 1794, 2 Ves. 437, 439.

"It has been held in this State that where a vendor, in a contract like the one under consideration, had conveyed the land to a third person in possession of the premises under a contract with the vendee in disregard of the rights of the vendee, the vendee had a right to a specific performance of the vendor's contract by such third person holding the title. The original vendor was made a party in that case, because there were no contract relations between the vendee and the vendor's assignee; and so also in Daily *v.* Litchfield. But in this case it was not necessary to make the Car Company, original grantor, a party, as the complainant had fully accepted the defendant in its stead." Per MORSE, J., in Lovejoy *v.* Potter, 1886, 60 Mich. 95, 100.

"My opinion is that in such a case as this a suit to enforce performance of an executory contract, where the vendor has passed title to a second purchaser with notice, the proper decree is to direct a conveyance by the vendor with such warranty as he stipulated, and from the second purchaser without warranty, in one or separate deeds. As the legal title passed, a conveyance from the second purchaser would be sufficient to give the first one such title; but you want the warranty of the first and the estoppel created by it." BRANNON, J., Bates *v.* Swiger, Mich., 1905, 21 S. E. 874, 877; see also White *v.* Moores, 1893, 86 Maine 62, 64.

against legal proceedings in the meantime. From the answer of Tooke it appeared that Bickmore, at, or shortly after the date of the assignment to Crosbie, had become insolvent; and the Vice-Chancellor, being of opinion that Tooke was released from his contract in consequence of the insolvency of Bickmore before any lease had been executed, His Honor dissolved the injunction.

A motion by way of appeal was now made on behalf of the plaintiff, that the Vice-Chancellor's order might be discharged and the injunction revived.

The LORD CHANCELLOR. I have looked minutely into the circumstances of this case with a view to ascertain whether there was anything, either in the dealing of the parties or in the instrument itself, to justify the defendant's contention that this was a contract made by the landlord specially and personally with Bickmore. But I have been unable to discover anything which should differ the interest here contracted to be given from that which any tenant would have under a common farming lease. The case is, therefore, left to rest upon the ground upon which it was decided in the court below; and I am clearly of opinion that the circumstance of the party who originally contracted having assigned his interest cannot be taken into consideration, provided (which is the fact here) the assignee be admitted to be a person in solvent circumstances, and able to enter into the covenants in the proposed lease, and that the insolvency of the assignor cannot be set up with effect for the purpose of releasing the defendant from the specific performance of his agreement. That doctrine, which seems to have been approved by Lord LOUGHBOROUGH in Brooke *v.* Hewitt, 3 Ves. 253, has been since fully recognized and adopted in Powell *v.* Lloyd, 1 Y. & Jerv. 427; 2 Y. & Jerv. 372; and the case of Weatherall *v.* Geering, 12 Ves. 504, is no authority against the general principle, for the agreement there was for a lease which should contain a covenant not to assign. It may further be observed that, even in cases where alienation without license from the landlord is expressly prohibited and guarded by a clause of forfeiture, such a clause has been held to furnish no protection against an assignment of the lease by operation of law, under a commission of bankrupt, for example, or upon an execution for debt. 3 Doe dem. Mitchinson *v.* Carter, 8 T. R. 57, 300; Lord Stanhope *v.* Skeggs, 8 T. R. 59.

I am therefore of opinion that the Vice-Chancellor's order must be discharged, and the injunction revived; but, having regard to the intention of the parties, I shall annex, as a condition to my order, that the plaintiff obtain the injunction on paying the defendant the sum due for rent from Michaelmas, 1831, to Michaelmas, 1832.

The cause was afterwards brought to a hearing at the Rolls, when the defendant abandoned the objection on the ground of the original tenant's insolvency; and a decree was made according to the prayer of the bill.[1]

[1] In Buckland *v.* Papillon the defendant agreed to grant to one Bloxam a lease of certain premises with privilege of renewal by Bloxam, the lease to

CURRIER *v.* HOWARD.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1860.

[14 *Gray* 511.]

BIGELOW, J. This suit having been commenced while the St. of 1853, c. 371, § 1, was in force, and before the enactment of St. 1855, c. 194, was properly brought in the form of an action at law, praying for relief in equity, and may well be maintained to enforce the specific performance of a contract. Darling *v.* Roarty, 5 Gray 71.

The defendant was bound by a written contract to make conveyance of the premises by a "division deed." Such a contract might be assigned for a sufficient consideration. Ensign *v.* Kellogg, 4 Pick. 1. And no assignment in writing is necessary to its validity. An obligation of record or under seal may be assigned by a writing unsealed or by a mere verbal agreement. Dunn *v.* Snell, 15 Mass. 485; Dawson *v.* Coles, 16 Johns. 51; Ford *v.* Stuart, 19 Johns. 342.

In the present case there was ample proof of the assignment, not only by evidence of a verbal agreement, but also by the delivery to the plaintiff of the written contract, and by the deed from John H. Currier to the plaintiff of one undivided half of what remained of the two lots of land which were to be divided.

The assignee of the written contract is entitled to maintain this action for its specific performance. Ensign *v.* Kellogg, *ubi supra.* Batten on Spec. Perf. 358. The assignment being absolute and unconditional, and there being no remaining right or liability in the assignor which can be

contain all the usual covenants for protecting the interest of the lessor. Bloxam intered into possession without the lease, and before it was executed, Bloxam became bankrupt, his interest under the lease being sold by the assignees in bankruptcy to the plaintiff, who filed this bill for specific performance of the contract to execute a lease.

"In the agreement in the case before me of the 27th of September, 1856, there is no intimation that the lease to be granted is to contain any clause against assignment, unless it be in the proviso that the lease shall contain the usual covenants for the protection of the lessor, and in the absence of the word 'assigns.' With regard to the first, I am of opinion that a proviso that the lessee shall not assign without the consent or license of the lessor is not a usual covenant; and as to the absence of the word 'assigns' from the agreement, having regard to the case of Church *v.* Brown, 15 Ves. 258, I am of opinion that the absence of this word from an agreement for a lease (which is not, I apprehend, very unusual) cannot have the effect of preventing the agreement and interest under it from vesting in the assignees in bankruptcy of the intended lessee; and if it vests in the assignees in bankruptcy, it is clear that it may be assigned by them." Per Lord JOHN ROMILLY, M.R., in Buckland *v.* Papillon, 1866, L. R. 1 Eq. Cas. 477, 481.

affected by the decree, it was not necessary to make him a party to the suit. Montague *v.* Lobdell, 11 Cush. 115.

The defendant, being now the sole owner in fee of the interest of Eli B. Howard, and being capable of transferring the legal title, is bound to perform the contract to which she was a party, by making a deed dividing the estate according to its terms, and is also liable for the damages caused to the plaintiff by her unlawful refusal to perform the contract. Decree accordingly.[1]

MILLER *v.* WHITTIER.

In the Supreme Judicial Court of Maine, 1850.

[32 *Maine* 203.]

Shepley, C. J., orally—Whittier entered into a written contract. This bill is brought by an assignee who seeks a performance. The contract required that Whittier should convey certain lands to Wendell's wife or her appointee. Whittier was also to transfer to Wendell & Co. all bonds and securities which he had received on certain sales. He was to manage

[1] "Such equitable interest may be assigned by the vendee or party who stands in the position analogous to that of the vendee, and the assignee may maintain an action to compel a specific performance of the contract. Pom. Spec. Perf. § 487; Nat. Spec. Perf. § 68; House *v.* Dexter, 9 Mich. 246." Per Rising, C., in Hunt *v.* Hayt, 1887, 10 Colo. 278, 282.

"The defendant has made no contract with the plaintiff; and assuming that the plaintiff, as grantee of the Leightons [vendees], could maintain a bill to enforce such rights as they had under their contract with the defendant for a conveyance, yet it is plain he can have no greater rights than they had, and that he is bound to do all which they would be required in equity and good conscience to perform before obtaining a conveyance. Love *v.* Sortwell, 124 Mass. 446. As he does not offer to do this, the decree from which he appeals must stand." Per Endicott, J., in Wass *v.* Mugridge, 1880, 128 Mass. 394, 395.

"The option having been given to Haley, could he transfer his right so that his assignee could enforce the same? The ground upon which a court enforces an executory contract for the sale of lands is that equity considers things agreed to be done as actually performed; and when an agreement has been made for the sale of lands, the vendor is deemed the trustee of the purchaser of the estate sold, and the purchaser as trustee of the purchase money for the vendor. The vendee, in equity, is actually seized of the estate, and, as a consequence, may sell the same before a conveyance has been executed, notwithstanding an election to complete the purchase rests entirely with the purchaser. Haley had an estate in the premises, and was equitably the owner thereof, and could transfer this right, and his assignee can enforce the option to the same extent as his assignor." Per Schofield, J., in House *v.* Jackson, 1893, 24 Ore. 89, 99.

the estates for a year, making sales and paying debts, and was then to transfer to Wendell all the remaining personal property.

There were many stipulations, which Wendell on his part was to perform.

The bill substantially alleges the performance of them all, except that which required Wendell to procure and lodge in the hands of Smith, to be delivered by Smith to Whittier, certain notes outstanding against Whittier amounting to $10,500, and interest.

As to that stipulation, the bill alleges, that the plaintiff had obtained said notes, and is ready to deliver them to Whittier, whenever Whittier shall have performed his part of the contract.

Whittier has never made the conveyances and transfers, on his part to be done.

The bill sets forth, that the interest both of Wendell and of Mrs. Wendell has become vested in the plaintiff, who was, by his stipulation, to perform all that Wendell was to perform.

The bill also alleges, that Whittier for the purpose of avoiding the trust, conveyed to the other defendant, Jones, who is his son-in-law, 4500 acres of the land and other portions of the trust estate; and that Jones, in receiving said land, and other of the trust estate, had full knowledge of the agreements and trusts, into which Whittier had entered with Wendell & Co.

A general demurrer to the bill has been filed by each of the defendants. One objection to the bill is, that the personal property was to be conveyed to Mr. Wendell and therefore Wendell ought to join as plaintiff in the bill.

But all that Wendell had, and all that Mrs. Wendell had, went to the plaintiff, as is alleged in the bill and admitted by the demurrer. The defendant's chief objection is, that the plaintiff permits one of the specified conditions of the bill to remain unperformed on his part. He was to take up and deposit with Smith the $10,500 notes, outstanding against Whittier, and has not done so. It appears, however, that the plaintiff took up the notes, and holds them ready to be delivered to Whittier, when Whittier should fulfil his part of the contract. Still that objection would be fatal, except, that the bill alleges another fact, which is, that Whittier, for the purpose of avoiding the trust, conveyed to his son-in-law, Jones, 4500 acres of the land, and thereby incapacitated himself to perform the contract on his part. By that proceeding, he exonerated the plaintiff from delivering up the notes.

The bill further alleges, that Jones, in receiving the conveyance from Whittier, not only of the 4500 acres of land, but of other of the trust property, had full knowledge of the agreements and trusts between Wendell and Whittier. Upon such a state of facts, both demurrers must be overruled.[1]

[1] "Taking the allegations of the complaint as true, Dryfus & Meyer, upon their purchase under the decree, held the naked legal title to the lands that

HANNA *v.* WILSON.

In the Supreme Court of Appeals of Virginia, 1846.

[3 *Grattan* 243.]

In December, 1843, Joseph Hanna filed his bill in the Superior Court of the county of Greenbrier, against James B. Wilson and David Watts, in which he charged that Wilson, by a certain writing duly executed, on the 5th of November, 1838, bound himself to pay to David Watts the sum of 154 dollars 34 cents, and that Watts had assigned the same to the plaintiff, for value. That this debt was a part of the purchase money of a tract of land sold by Watts to Wilson. That Watts had executed a deed to Wilson for the land, and tendered it to him, and demanded the purchase money, but that Wilson neglects and fails to pay it. He therefore prays that the land, or so much thereof as may be necessary, may be decreed to be sold in satisfaction of his debt and interest, and the costs of this suit, and for general relief. And he files the deed from Watts to Wilson with his bill, as an exhibit.

Watts was regularly proceeded against as an absent defendant. Wilson

had been previously conveyed to Hilliard in trust for him, and it was their legal duty to execute a deed to him in accordance with their contract. After the conveyance by Dryfus to Meyer, the latter held the legal title subject to the same duty. The obligation of Dryfus & Meyer was assumed for their own as well as for the express benefit of Hilliard and others in similar circumstances, and was induced by their common grantors, who were resting under a legal obligation to protect from harm the interests in the lands they had sold.

"The right of a party to maintain an action on an agreement made with another for his benefit is a doctrine to which this court has given its assent, and it entitled Hilliard to maintain suit in his own right to enforce the contract set forth. Hecht *v.* Caughron, 46 Ark. 132. The appellant, by Hilliard's conveyance to him of his entire interest, succeeded to his rights, and was entitled to file the complaint in his own name." Per Cockrill, C.J., in Weis *v.* Meyer, 1886, 1 S. W. 679, 680.

"Now, of course, as a general rule, a contract cannot be enforced except by a party to the contract; and either of two persons contracting together can sue the other, if the other is guilty of a breach of or does not perform the obligations of that contract. But a third person—a person who is not a party to the contract—cannot do so. That rule, however, is subject to this exception: if the contract, although in form it is with A, is intended to secure a benefit to B, so that B is entitled to say he has a beneficial right as *cestui que trust* under that contract, then B would, in a court of equity, be allowed to insist upon and enforce the contract. That, in my opinion, is the way in which the law may be stated. The general rule is undisputed, but the question is whether this case is within any of the exceptions to that rule." Cotton, L.J., Gandy *v.* Gandy, 1885, L. R., 30 Ch. Div. 57, 66.

answered the bill, admitting his indebtedness; but he insists that he had received no deed for the land purchased by him of Watts, and he does not believe Watts is yet able to make him a deed, according to the contract. He then proceeds to state the difficulties in the way of Watts' conveying to him according to his contract; but there was no proof of his allegations. He concludes by pleading the statute of limitations.

When the cause came on to be heard in the Court below, that Court sustained the plea of the statute of limitations, and dismissed the bill; whereupon Hanna applied to this Court for an appeal, which was allowed. . . .

ALLEN, J. delivered the opinion of the Court.

The Court is of opinion, that as by the contract between David Watts and James B. Wilson, the former was only bound to make a deed for the land upon the payment of the purchase money, it would have been competent for the vendor at any time whilst he retained the legal title as a security for the payment of the purchase money, to have filed a bill for the specific execution of the contract; and to subject the land to sale, for the purchase money in arrear; and this right in equity, under such circumstances, could not be affected by any lapse of time, short of the period sufficient to raise the presumption of payment; whatever might be the operation of the statute of limitations in an action at law brought to recover the purchase money. The Court is further of opinion, that it was competent for the assignee for value of the note given for the purchase money, by a bill against his assignor, the vendor, and the vendee, to enforce the specific execution of the contract, in a case proper for such relief, for his benefit, and to obtain satisfaction of the amount due to him by subjecting the land to sale for the payment thereof. And it appearing from the papers in the cause, that the defendant Watts, as to whom the bill was taken for confessed, has complied with the contract on his part, by executing and acknowledging a deed for the land sold, to be delivered to the vendee on his paying the purchase money; and the affirmative allegations of the answer, that the deed is not in pursuance of the contract, being unsupported by proof, the Court on the hearing, under the prayer for general relief, should have decreed a specific execution of the contract, instead of dismissing the bill with costs. It is therefore considered that said decree is erroneous, and should be reversed with costs.

And this Court proceeding, etc., doth adjudge, order and decree, that the plaintiff recover of the said James B. Wilson, the sum of 154 dollars 34 cents, with interest thereon from the 5th day of November 1838, until paid, and his costs by him about the prosecution of his suit in this behalf expended; and upon the payment of said debt, interest and costs, it is further ordered that the clerk do deliver to the said James B. Wilson, the original deed filed as an exhibit with the bill, retaining a certified copy thereof to be filed with the papers in the cause. And it is further adjudged, ordered and decreed, that unless the said J. B.

Wilson shall pay to the plaintiff the debt, interest and costs aforesaid, within sixty days after the entering of this decree, the sheriff of Greenbrier county after advertising the time and place of sale by advertisement published, etc., and posted, etc., for four weeks successively, do proceed before the court-house of said county, on some court day, to sell said land in said deed described, upon a credit of six and twelve months, taking from the purchaser bond and security, and retaining a lien on the land for the security for the purchase money; and report his proceedings in order to a final decree.

CORBUS *v.* TEED.

In the Supreme Court of Illinois, 1873.

[69 *Illinois* 205.]

Mr. Chief Justice Breese delivered the opinion of the Court:

This was a bill in chancery in the La Salle circuit court, by John S. Teed against John C. Corbus and James Hastings, to enforce the specific performance of a written agreement; entered into by complainant with defendant Corbus, and to which, it is alleged, his co-defendant, Hastings, has some claim, by assignment or otherwise.

The defendants filed their answer, and the cause went to a hearing, and testimony was heard, and a decree passed in favor of complainant—to reverse which defendants appeal, and make several points, which will be noticed.

The first point made by appellants is, that the contract set out in the bill of complaint was executed in duplicate, and that he, Corbus, over his hand and seal, executed, upon the back of the duplicate held by him, an assignment of the contract to Hastings, of which complainant had notice, and received payment upon the contract from Hastings as such assignee, which complainant indorsed upon the contract and appropriated to his own use, and which he never offered to refund to Hastings, but, in violation of his contract, executed and tendered such deed to him, Corbus. In this connection appellant Corbus questions the proper execution of the deed so tendered.

We do not suppose it was incumbent on complainant to take the hazard of the validity of the alleged assignment of the contract to Hastings. Had Hastings offered to pay the money stipulated by the contract to be paid, and produced the assignment, complainant would have been justified, no doubt, in executing the conveyance to him and taking up the contract for cancellation. But Hastings has done no such thing, nor has he offered to do so, and complainant had a clear right to hold Corbus, the

party with whom he contracted, to the contract, and tender the deed to him in fulfillment of the contract. As this court said in Comstock *v.* Hitt, 37 Ill. 542, it was optional with Hastings to perform or not—complainant could not compel him to perform. Should he file a bill for such purpose, the answer would be, that he had made no contract with complainant. Hastings, by the assignment, had right to pay the money and demand a deed. In such case a court of equity would, undoubtedly, compel a conveyance, if the transaction was *bona fide*. The offer of the deed to Corbus was according to the contract. . . .

We do not perceive that complainant has been unmindful of his obligation under the contract. He tendered a deed, with fuller covenants than he had entered into, properly executed, and free from objection. It was then Corbus' duty to pay the money. Headley *v.* Shaw, 39 Ill. 354. As to Hastings, if he was a *bona fide* assignee of the contract, he could have filed a cross-bill, tendered the money due, and had a decree in his favor. . . .

We perceive no error in the record, and must affirm the decree.

Decree affirmed.[1]

Comstock *v.* Hitt, 1865, 37 Ill. 542, 549. [The assignee of the vendor brought a bill against the assignee of the vendee to compel the latter to pay purchase money notes, which would in effect specifically enforce the contract entered into by the original parties.] Mr. Justice Breese said: We can perceive no principle of law, justice or equity requiring the plaintiff in error to pay these notes. Because he has taken a deed for the premises subject to the terms of a title bond, and without any promise to pay them, there can be no rule of law subjecting him to their payment. By taking the deed of the Wilsons [vendee] he stepped into their shoes, and on payment of the notes he could compel a deed. This is the attitude in which he is placed. Taking a deed 'subject to an outstanding mortgage' creates no personal liability on the grantee to pay off the incumbrance, unless he has specifically agreed so to do, or the amount of the mortgage has been deducted from the purchase price. This is the extent to which the authorities cited go, and no farther. The land is the primary fund between all the parties for the payment of the debt secured by it.

[1] A part only of the opinion is printed.

GOILMERE *v.* BATTISON.

In Chancery, before Lord Chancellor Nottingham, 1682.

[1 *Vernon* 48.]

The heir at law pretending a right to the land in question, came to the tenant in possession, who likewise claimed an interest in the fee; and threatening to evict her at law, she makes this promise, viz. *If I die without issue of my body, I will either give you* 500*l. or leave you my land:* and now she being dead, and having devised her land to her second husband, who had never any notice of this former agreement, a bill was brought to have an execution of this agreement.

It was insisted, that this was all the portion her husband had with her, and therefore he was *quasi* a purchaser; and that a remainder after an estate tail is so remote, that such an agreement should never be executed in equity: for if the wife had really by deed executed settled the estate to the use of herself in tail, remainder in fee to the plaintiff, yet she might at any time have docked that remainder by a common recovery.

But the counsel on the other side insisted that an agreement for such a remainder should be executed in equity, and that the plaintiff could in no sort be called a purchaser, and cited the case of Serjeant Maynard *versus* Moseley, where such an agreement after an estate in tail was decreed.

The Lord Chancellor decreed the ageement to be executed.[1]

[1] "There can be no doubt but that a person may make a valid agreement binding himself legally to make a particular disposition of his property by last will and testament. . . . A court of equity will decree the specific performance of such an agreement upon the recognized principles by which it is governed in the exercise of this branch of its jurisdiction. . . .

"In Izard *v.* Executor of Izard, 1 Dessau. Rep. 116, there is a note to the case in which most of the old authorities bearing upon this subject are collected." Per Chancellor Williamson in Johnson *v.* Hubbell, 1855, 10 N. J. Eq., 2 Stockton 332, 335.

"This curious subject of agreements by two parties to make mutual wills in favor of each other on certain contingencies has not been often litigated in the courts either of England or of this country. But some cases have occurred. The learning upon it is collected by Mr. Hargreave, in the second volume of his juridical arguments and collections, from page 272, 290 to 315. It appears that there is one class of cases in which actions have been brought at law, and have succeeded, for breach of agreements, upon the faith of which a person has made his will, or otherwise settled his affairs in a particular manner, or has omitted to make provisions which otherwise he would have made. 1 Leon. 192, Croke Eliz. 163, Rockwood *v.* Rockwood, 1 Ventr. 318; 2 Lev. 210; T. Raym. 302; 2 Freem. 285, case of Dutton and Wife *v.* Poole.

"Another class of authorities, on compacts, connected with promises of testa-

LADD *v.* CITY OF BOSTON.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1890.

[151 *Massachusetts* 585.]

Owners of lots bounding a passageway and Pemberton Square covenanted mutually that no buildings should be erected within specified distances of the open spaces, unless by consent of a majority of the owners; nor should any buildings in specified divisions exceed certain heights. The plaintiff was a grantee of one of the original owners. The defendant city, by its commissioners for the erection of new buildings, had seized by right of eminent domain, certain of these lots, and was proceeding to build contrary to these covenants. The plaintiff, admitting that the city took the premises free from the restrictions, asks for damages.

The petition concluded by alleging that the petitioner was "aggrieved that his easements and privileges of light and air, and especially his view into the open area of Pemberton Square, also an easement reserved to him by said indenture, should have been taken away and destroyed, and no compensation allowed him therefor;" and prayed for a jury to assess his damages.

The respondent filed a motion to dismiss the petition, for the reason that "said petition does not set forth or show any taking of any estate,

mentary or other settlements, consists of cases in which the courts of equity have enforced such compacts by decreeing specific performance at the suit of those for whose benefit the promises were intended to enure. Berenger *v.* Berenger, Lord Nottingham's cases; see 2d Hargr. 291; Chamberlaine *v.* Chamberlaine, Prec. Ch. 3, 2 Freem. 34; Thynn *v.* Thynn, 1 Vern. 296; another case in 1689, Prec. in Ch. 5; Leicester *v.* Foxcroft, cited in Gilb. Eq. Rep. 11; Devernish *v.* Baines, Prec. in Ch. 3; Reech *v.* Kennigale, decided by Lord HARDWICKE in 1748, taken from Mr. Capper's MS. notes, 2d Hargr. 294; Goilmer *v.* Battison, by Lord NOTTINGHAM, 1 Vern. 48; Cassey *v.* Fitton, by Lord NOTTINGHAM, 2 Hargr. 296; Jones and Wife *v.* Martin, Anstruther's Rep. 882; see important notes to this case, 2 Hargr. 298.

"But the great case on this subject is that of Durour and Wife and Others *v.* Perrara and Wife and Others, defendants, in which Lord CAMDEN, who has treated the subject very luminously, decreed in 1769 that such agreements to make mutual wills, when properly proved, are binding on the parties, and will be enforced by the court of equity. See 2d Hargr. 304 to 311.

"In a later case, Lord Wapole *v.* Lord Oxford, the Lord Chancellor LOUGHBOROUGH, without denying the doctrine of Lord CAMDEN, refused to sustain such an alleged agreement, for want of sufficient proof to establish it. See 3 Vesey, Jr., 402, and 2 Hargr. 272 to 315." Note to Izard *v.* Middleton, 1785, 1 Desau, 116.

"The principle upon which courts of equity undertake to enforce the exe-

property, or land of the petitioner" for which the respondent city was liable, or for which the petitioner was entitled to compensation. The Superior Court granted the motion, and dismissed the petition, and ordered judgment for the respondent; and the petitioner appealed to this court.

HOLMES, J. The ground of the motion to dismiss the petition is, that the petition does not show any taking of any estate of the petitioner for which the City of Boston is liable, and that is the only question upon which we pass. It may be that a separate petition ought to have been filed for each estate taken, but upon that we express no opinion at this stage. Neither do we express any opinion on the question of parties, or upon the effect of a previous petition having been filed in respect of some of the same lots, if such be the fact.

It appears that the petitioner's predecessor in title and the then owners of the land taken by the city for the new court-house were parties to an indenture whereby it was covenanted, among other things, that the land in front of the petitioner's lot and just across the street should not be built upon beyond a certain line on what is now Pemberton Square, and should be subject to some other similar negative restrictions. This land the city has taken free of these restrictions. If the plaintiff has an easement, the city must pay for it.

The right to have land not built upon, for the benefit of the light, air, etc. of neighboring land, may be made an easement, within reasonable limits, by deed. Brooks *v.* Reynolds, 106 Mass. 31. And such an easement may be created by words of covenant, as well as by words of grant. Hogan *v.* Barry, 143 Mass. 538. In order to attach the easement to the

cution of such agreements is referable to its jurisdiction over the subject of specific performance. It is not claimed, of course, that any court has the power to compel a person to execute a last will and testament carrying out his agreement to bequeath a legacy, for this can be done only in the lifetime of the testator, and no breach of the agreement can be assumed so long as he lives. And after his death he is no longer capable of doing the thing agreed by him to be done. But the theory on which the courts proceed is to construe such an agreement, unless void under the statute of frauds or for other reason, to bind the property of the testator or intestate so far as to fasten a *trust* on it in favor of the promise, and to enforce such trust against the heirs and personal representatives of the deceased, or others holding under them charged with notice of the trust. It is in the nature of a covenant to stand seized to the use of the promisee, as if the promisor had agreed to retain a life estate in the property, with remainder to the promisee in the event the promisor owns it at the time of his death, but with full power on the part of the promisor to make any *bona fide* disposition of it during his life to another, otherwise than by will. The power to make such a will having been renounced, the attempt to exercise it is deemed a fraud on the rights of the promisee under the contract, thus bringing into exercise another ground of equity jurisdiction." Per SOMERVILLE, J., in Bolman *v.* Overall, 1886, 80 Ala. 451, 455.

dominant estate, it is not necessary that it should be created at the moment when either the dominant or the servient estate is conveyed, if the purport of the deed is to create an easement for the benefit of the dominant estate. Louisville & Nashville Railroad *v.* Koelle, 104 Ill. 455; Wetherell *v.* Brobst, 23 Iowa, 586, 591. Gale on Easements, 6th. ed. 59. Of course it does not matter that by the same deed numerous parties grant similar or reciprocal easements over, or in favor of, many parcels of land. Tobey *v.* Moore, 130 Mass. 448; Beals *v.* Case, 138 Mass. 138, 140. Neither is it material that the indenture provides that a majority of three fourths of the owners of the lots concerned may terminate the rights which it creates.

If, then, we are to assume that at the time of the indenture the owner of the petitioner's lot was a different person from the owner of the opposite lot taken by the city, we have a plain case of a grant of easements to have certain parts of the latter not built upon, or not built upon above a certain height. Such would seem to have been the fact from the plan, referred to in the petition, which was exhibited to us at the argument, and from the petition itself, which states that the petitioner's right acquired under the indenture was an easement.

It follows that we need not consider the argument for the city, that owners of purely equitable restrictions are not entitled to maintain a petition of this nature. Motion overruled.[1]

TULK *v.* MOXHAY.

IN CHANCERY, BEFORE LORD CHANCELLOR COTTENHAM, 1848.

[2 *Phillip* 774.]

In the year 1808 the plaintiff, being then the owner in fee of the vacant piece of ground in Leicester Square, as well as of several of the houses forming the Square, sold the piece of ground by the description of "Leicester Square Garden or Pleasure Ground, with the equestrian statue then standing in the centre thereof, and the iron railing and stonework around the same," to one Elms in fee; and the deed of the conveyance contained a covenant by Elms, for himself, his heirs, and assigns, with the plaintiff, his heirs, executors, and administrators, "that Elms, his heirs and assigns, should, and would from time to time, and at all times hereafter at his and their own costs and charges, keep and maintain the said piece of ground and Square Garden, and the iron railing round the same, in its then form, and in sufficient and proper repair as a Square Garden and Pleasure Ground, in an open state, uncovered with any buildings, in neat and ornamental order; and that it should be

[1] See note in 21 Am. St. Rep. 484.

lawful for the inhabitants of Leicester Square, tenants of the plaintiff, on payment of a reasonable rent for the same, to have keys at their own expense and the privilege of admission therewith at any time or times into the said Square Garden and Pleasure Ground."

The piece of land so conveyed passed by divers mesne conveyances into the hands of the defendant, whose purchase deed contained no similar covenant with his vendor; but he admitted that he had purchased with notice of the covenant in the deed of 1808.

The defendant having manifested an intention to alter the character of the Square Garden, and asserted a right, if he thought fit, to build upon it, the plaintiff, who still remained owner of several houses in the Square, filed this bill for an injunction; and an injunction was granted by the Master of the Rolls to restrain the defendant from converting or using the piece of ground and Square Garden, and the iron railing round the same, to or for any other purpose than as a Square Garden and Pleasure Ground in an open state and uncovered with buildings.

On a motion now made to discharge that order,

The LORD CHANCELLOR (without calling upon the other side).

That this court has jurisdiction to enforce a contract between the owner of land and his neighbor purchasing a part of it that the latter shall either use or abstain from using the land purchased in a particular way is what I never knew disputed. Here there is no question about the contract; the owner of certain houses in the Square sells the land adjoining, with a covenant from the purchaser not to use it for any other purpose than as a Square Garden. And it is now contended, not that the vendee could violate that contract, but that he might sell the piece of land, and that the purchaser from him may violate it without this court having any power to interfere. If that were so it would be impossible for an owner of land to sell part of it without incurring the risk of rendering what he retains worthless. It is said that, the covenant being one which does not run with the land, this court cannot enforce it; but the question is, not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased. Of course the price would be affected by the covenant, and nothing could be more inequitable than that the original purchaser should be able to sell the property the next day for a greater price in consideration of the assignee being allowed to escape from the liability which he had himself undertaken.

That the question does not depend upon whether the covenant runs with the land is evident from this, that if there was a mere agreement and no covenant this court would enforce it against a party purchasing with notice of it; for if an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased. There are not only cases before the Vice-Chancellor of England, in which he con-

sidered that doctrine as not in dispute; but looking at the ground on which Lord ELDON disposed of the case of the Duke of Bedford *v.* The Trustees of the British Museum, it is impossible to suppose that he entertained any doubt of it. In the case of Mann *v.* Stephens before me, I never intended to make the injunction depend upon the result of the action, nor does the order imply it. The motion was to discharge an order for the commitment of the defendant for an alleged breach of the injunction, and also to dissolve the injunction. I upheld the injunction, but discharged the order of commitment, on the ground that it was not clearly proved that any breach had been committed; but there being a doubt whether part of the premises on which the defendant was proceeding to build was locally situated within what was called the Dell, on which alone he had under the covenant a right to build at all, and the plaintiff insisting that it was not, I thought the pendency of the suit ought not to prejudice the plaintiff in his right to bring an action if he thought he had such right, and, therefore, I gave him liberty to do so.

With respect to the observations of Lord BROUGHAM in Keppell *v.* Bailey, he never could have meant to lay down that this court would not enforce an equity attached to land by the owner, unless under such circumstances as would maintain an action at law. If that be the result of his observations, I can only say that I cannot coincide with it.

I think the cases cited before the Vice-Chancellor and this decision of the Master of the Rolls perfectly right, and, therefore, that this motion must be refused, with costs.[1]

[1] "The doctrine of that case, rightly considered, appears to me to be either an extension in equity of the doctrine of Spencer's Case, 5 Co. Rep. 16a, to another line of cases, or else an extension in equity of the doctrine of negative easements; such, for instance, as a right to the access of light, which prevents the owner of the servient tenement from building so as to obstruct the light. The covenant in Tulk *v.* Moxhay was affirmative in its terms, but was held by the Court to imply a negative. Where there is a negative covenant expressed or implied, as, for instance, not to build so as to obstruct a view, or not to use a piece of land otherwise than as a garden, the Court interferes on one or other of the above grounds. This is an equitable doctrine, establishing an exception to the rules of common law, which did not treat such a covenant as running with the land, and it does not matter whether it proceeds on analogy to a covenant running with the land or on analogy to an easement. The purchaser took the estate subject to the equitable burden, with the qualification that if he acquired the legal estate for value without notice he was freed from the burden. That qualification, however, did not affect the nature of the burden: the notice was required merely to avoid the effect of the legal estate, and did not create the right, and if the purchaser took only an equitable estate he took subject to the burden, whether he had notice or not. It appears to me that, rightly considered, that doctrine is not an authority for the proposition that an equitable estate or interest may be raised at any time, notwithstanding the rule against remoteness. It is, if I may say so, another exception to the rules against remoteness, exceptions which had pre-

KETTLE RIVER R. R. CO. *v.* EASTERN RAILWAY CO. OF MINNESOTA, 1889, 41 Minn. 461, 471. Per VANDERBURGH, J.

But the most important question in the case is whether the burden of the covenant in the deed of the sandstone company, whereby that company undertakes "that all marketable sandstone hereafter to be quarried, removed, or transported by rail from the lands or premises" described in the deed "shall be worked, quarried, or transported, over and in connection with the tracks of" the plaintiff, rests upon the grantees of the

viously been thoroughly established in many cases at law as regards easements, and in equity as regards charities. That being so, it does not appear to me that Tulk *v.* Moxhay, 2 Ph. 774, has any direct bearing on the case which we have to decide." Per Sir GEORGE JESSEL, M.R., in London & S. W. Railway Co. *v.* Gomm, 1882, L. R. 20 Ch. Div. 562, 583.

"The covenant in that case [Keppell *v.* Bailey, 1834, 2 M. & K. 517] failed to run with the land, because the rights and restrictions which it imposed on the one hand, or conferred on the other, went beyond the limits of any estate or interest in land known to the law, or which it will permit to be invested with the capacity of assignment or transfer; and sound policy will not permit an end to be obtained by a covenant which cannot be directly affected by grant. Covenants should have as wide a range as grants; they should not be allowed to go further, or subject land to restrictions—to diminish its utility to the owners and to the community at large." Per LACY, J., in Tardy *v.* Creasy, 1886, 81 Va. 553, 564.

"The force of this conclusion does not seem to have struck any other court." Sims on Covenants, p. 248.

"It will be found upon examination that these decisions proceed upon the principle of preventing a party having knowledge of the just rights of another from defeating such rights, and not upon the idea that the engagements enforced create easements or are of a nature to run with the land. . . . I am entirely satisfied that a court of equity will sometimes impose the burden of a covenant relating to lands on the alienee of such lands, on a principle altogether aside from the existence of an easement or the capacity of such a convenant to adhere to the title." Per BEASLEY, C.J., in Brewer *v.* Marshall, 1868, 19 N. J. Eq. 537, 543.

"The uncertainty as to the true legal principle of the decisions upon the passing of the benefit and burden of restrictive agreements is evident from the statement by JESSEL, M.R., as late as 1882, that the doctrine of Tulk *v.* Moxhay, a leading case on the subject, appeared to him to be 'either an extension in equity of Spencer's case to another line of cases, or else an extension in equity of the doctrine of negative easements.' Subsequent judgments in England have made no choice between the alternatives suggested by the Master of the Rolls. On the other hand, many American courts have countenanced the supposed analogy between restrictive agreements and negative easements. But the courts of New Jersey have rejected this analogy, and, it is submitted, they were right in so doing. There is, it is true, a certain superficial resemblance between restrictive agreements and negative easements. Two estates are essential to the passing of the benefit and burden of each. But the differences between them are fundamental." J. B. AMES on Specific Performance For and Against Strangers to the Contract, in 17 Harv. L. R. 174, 181.

sandstone company. The parties, undoubtedly, have very clearly expressed their intention that this covenant should bind the assignees and successors in interest of the parties. No mere form of words, however, is sufficient for such purpose; but the nature of the covenant and its relation to the estate must be such that the law will permit the intention to be effectual. Masury *v.* Southworth, 9 Ohio St., 341, 348. Strictly speaking, at law there must be privity of estate existing between the

"The real truth is that the Court invariably regards stipulations of this kind with reference to the benefit to the property which is reserved by the vendor; and, looking at every possible analogy, even at law, I think I am bound to hold that a covenant of this kind, though not strictly a reservation, is yet so analogous to it that it would clearly enure to the benefit of all parties interested under the settlement, like the reservation of a right of way in a similar conveyance." Per Sir W. PAGE WOOD, V.C., in Child *v.* Douglas, 1854, Kay, 560, 568.

In Tobey *v.* Moore, 1881, 130 Mass. 448, 450, the Court, by GRAY, C.J., in speaking of a restriction covenant as to the use of buildings for specified trades, said: "The provision in the deed before us is not a common-law condition, for the deed expressly provides that any breach of it shall not work a forfeiture of the estate. It does not affect the title, but only the mode of use; and, though unlimited in point of time, it is a valid restriction, which equity will enforce at the suit of any party entitled to the benefit of it. Whitney *v.* Union Railway, 11 Gray 359; Sanborn *v.* Rice, 129 Mass. 387; Lewis on Perf. 599, 612."

"The effect of such a restriction, inserted in contemporaneous conveyances of the several parcels under the circumstances alleged in the bill, was to confer on each owner a right or interest in the nature of a servitude in all the lots situated on the same street which were conveyed subject to the restriction. Thus it entered into the consideration which each purchaser paid for his land, either by enhancing its price in view of the benefit secured to him in the restraint imposed on adjoining owners, or by lessening its value in consequence of the limitation affixed to its use. In this view of the case it is quite immaterial to determine the precise legal nature or quality of the restriction in question. In strictness, perhaps, the right or interest created by the restrictions, being a qualification of the fee, did not pass out of the original grantors, and now remains vested in them or their heirs. But if so, they hold it only as a dry trust, in which they have no beneficial use or enjoyment, the entire usufruct being in their grantees and their assigns now holding the estates, for whose use and benefit it was intended. Such being the case, then the latter are proper parties to enforce the restriction; and the former, not having any present interest in it, need not be parties to the proceeding. The same result would follow if the restriction be construed as in the nature of a covenant by each grantee with the other owners of estates on the court or others holding under a similar restriction. In either view, the present plaintiffs, having a common interest in the subject-matter of the bill, and the right to ask for the same remedy against the defendants, are rightly joined as parties. Story Eq. Pl. §§ 121, 126; Adair *v.* New River Co., 11 Ves. 429, 444; Gray *v.* Chaplin, 2 Sim. and Stu. 267." Per BIGELOW, C.J., in Parker v. Nightingale, 1863, 6 Allen, 341, 348.

See notes to Barrow *v.* Richard, *infra.*

parties when the covenant is made, and it must concern the land or estate. "The covenant must respect the thing granted or demised. When the thing to be done or omitted to be done concerns the lands or estate, that is the medium which creates the privity between the plaintiff and defendant." Bally *v.* Wells, 3 Wils. 25. It must inhere in or be attached to the land, or relate to its mode of occupation or enjoyment. And it runs with the land when either the liability to perform it or the right to take advantage of it passes to the assignee of the land. Savage *v.* Mason, 3 Cush. 500; Shaber *v.* St. Paul Water Co., 30 Minn. 179 (14 N. W. Rep. 874). In some cases covenants in respect to lands are construed as equivalent to the grant of an easement or servitude, and as such held to attach to the land, and run with it regardless of change of ownership. Weyman *v.* Ringold, 1 Bradf. Sur. 40, 54; Bronson *v.* Coffin, 108 Mass. 175. Thus a covenant by a railway company to keep its right of way fenced, or a covenant by an adjoining owner, for himself and his heirs and assigns, to maintain a division fence, is construed to be a grant creating an easement. Boyle *v.* Tamlyn, 6 Barn. & C. 329; Blain *v.* Taylor, 19 Abb. Pr. 228; Easter *v.* Little Miami R. Co., 14 Ohio St. 48; Hazlett *v.* Sinclair, 76 Ind. 488. In Pitkin *v.* Long Island R. Co. 2 Barb. Ch. 221, (47 Am. Dec. 320,) an agreement by the defendant with the owner of adjoining land to maintain a side track and depot at a particular point, and in Gilmer *v.* Mobile & M. Ry. Co., 79 Ala. 569, a similar agreement, with the grant of the right to cultivate certain portions of the right of way, were supported on similar grounds; the chancellor saying, in his opinion in the first-named case, that "it was, in substance, the grant of an easement or servitude, which was to be binding on the property of the railroad company as the servient tenement, for the benefit of the complainant and those who should succeed him in his estate." But in any event these were covenants that could have been upheld and enforced in equity against all subsequent purchasers or owners with notice. But the covenant under consideration is, in substance, a traffic agreement, giving to the plaintiff the exclusive railway transportation of the product of the quarries. The track had been laid to the quarry when the agreement was made, and it contains provisions for its extension to other parts of the quarry at the joint expense of the parties. To secure this transportation was the consideration which induced the plaintiff to construct the road and enter into the contract. But it is not a covenant real, and does not run with the land as such. It is not of such a nature that it can be said to inhere in the land, nor does it grant any right or easement therein. As respects the land, plaintiff's grant is limited to its right of way, and the right to use and occupy such portions of the premises as it may require for its business. But it has no easement in the rest of the premises. It is to furnish track and cars for the transportation of stone, as it might, under other circumstances, to a lumber-yard or grain elevator, under a similar contract. It has no right to operate the quarry, and has no other interest in it. The quarried stone is personal property

which the sandstone company covenanted should be transported as freight by plaintiff's railway. But conceding the personal liability of that company for the violation of that covenant, it is not binding on the Northern Land Company or its lessees, if it does not run with the land, or does not constitute a charge upon it. The case of Hemingway *v.* Fernandez, 13 Sim. 228, cited and relied on by the plaintiff, is dissimilar in important particulars. In that case there was a lease, and a tenure was created, and the stipulation, agreeing to transport all the coal mined from certain land, and to pay a certain rate per ton for all the coal so conveyed, was in the nature of a covenant for the payment of rent. 1 Smith. Lead. Cas. (8th Ed.) 187.

The Northern Land Company acquired its interest with notice of plaintiff's rights; for it is a general rule that a purchaser is bound to inquire into the title of his vendor, and is affected with notice of any equities that appear upon the title. Leake, Cont. 1236; Hazlett *v.* Sinclair, 76 Ind. 488. And here the deed containing the stipulation and covenants in question had been duly recorded. It is therefore very earnestly contended by the plaintiff that, since these parties have acquired their title and interest with notice, equity will not permit them to evade the covenant in relation to the transportation, but will enforce it by injunction. There is a growing tendency to incorporate equitable doctrines with common-law rules, and, in equity, covenants relating to land, or its mode of use or enjoyment, are frequently enforced against subsequent grantees with notice, though there is no privity of estate, and the covenants do not strictly run with the land. . . .

Such privileges or restrictions, which are sometimes called equitable easements, servitudes, or amenities, are enforced by injunction irrespective of the question of privity of estate, or the nature of the tenure, but they must be such as relate to or concern the land or its use or enjoyment. It is not enough that a covenant affects the use of land, or the enjoyment of an easement therein, or the value or profitableness of the use thereof, in a collateral way. Mayor *v.* Pattison, 10 East, 130. That the plaintiff, as a common carrier, should have a monopoly of the transportation of the freight to and from the quarries is not a privilege affecting the land of either party to the covenant, except in a collateral way, though it might very seriously affect the amount and value of its freight business, and have been the chief inducement for constructing the road. In other words, equity follows the law in that it will not enforce a covenant as against the heir or assignee unless the obligation it imposes is one which attaches to or concerns the land or its use or mode of enjoyment. . . .

The order appealed from is reversed, and the injunction directed to be dissolved as to the defendants Ring & Tobin, and modified and limited as to the Eastern Railway Company so as to restrain any interference with the lands, right of way, and property of the plaintiff.

NOTE. A motion for reargument of this case was denied October 25, 1889.

CATT *v.* TOURLE.

IN THE COURT OF APPEAL IN CHANCERY, 1869.

[*Law Reports* 4 *Chancery Appeals* 654.]

This was an appeal by the Defendant from an order of Vice-Chancellor STUART overruling a demurrer.

The Plaintiff, a brewer at Brighton, sold certain land at Brighton to a land society, and conveyed it to the trustees, who covenanted that the Plaintiff, his heirs and assigns, should have the exclusive right of supplying all ale, beer, and porter which might be consumed in any house or other building which might be erected on the land, and which should be opened or used as an inn, public-house or beershop.

The Defendant, who was a member of the society, acquired a portion of this land with notice of the covenant, and built upon it a public-house which, being a brewer, he supplied with his own beer, and, on being applied to by the Plaintiff, denied the Plaintiff's right to the exclusive supply of malt liquor.

The Plaintiff thereupon filed his bill for an injunction to restrain the Defendant from supplying beer to the public-house in question, alleging that he had been always ready and willing to supply the occupiers of the public-house with malt liquor of good quality, in requisite quantities, and at fair and reasonable prices.

The Defendant demurred to the bill for want of equity, and Vice-Chancellor STUART overruled the demurrer. The defendant appealed. . . .

Sir C. J. SELWYN, L.J., after shortly stating the case made by the bill, continued:—

In answer to that case many objections have been raised to the legality of this covenant, and to the jurisdiction of this Court to enforce such a covenant, or, at all events, to the propriety of the Court's interfering to grant the relief which is sought; and it has been said that even if the Plaintiff has any right, he ought to be left to assert that right in a court of law. In the first place, I think it needless to consider the question which has been discussed, whether covenants of this nature run with the land. . . .

The objections which have been raised to the covenant are, first, that it is void for uncertainty. This is a covenant entered into as a part of the transaction on the sale and purchase of a piece of land, and what the vendor stipulates for is that he shall have the exclusive right of supplying all ale, beer, and porter which shall be consumed in any building erected on this particular piece of land which shall be used as a beerhouse. That is a right which is capable of being abused, capable of being waived, capable of being lost, and if at any time, either in the progress of this suit or any other time, it can be shewn that it has been so abused, so waived, or so lost, then there would be good ground for saying that this

Court ought not to interfere in favour of a person who might otherwise be entitled to the benefit of it. But I am at a loss to see how it can be said that there is anything like uncertainty in this covenant. It might be said that it is too wide, that it is too general, but it appears to me to be impossible to say with any reasonable chance of success that it is in any degree uncertain. Then Collins *v.* Plumb, 16 Ves. 454, is cited as a clear authority for the proposition that a covenant of this kind is so uncertain that a Court of Equity will not enforce it. I entirely agree with the learned Vice-Chancellor that Collins *v.* Plumb does not in the least degree govern this case. The covenant there was not to sell or dispose of water from a well to the injury of the proprietors of the water-works, their heirs, executors, administrators, and assigns, and Lord ELDON says: "I never met with such a covenant as this, upon which I must try in each instance whether the act of selling the specified quantity of water is a prejudice to the proprietors of these waterworks." He is there obviously referring to the very peculiar language of that particular covenant, which in express terms involved the question whether the sale was or was not to the prejudice of the proprietors of the waterworks, and therefore he said that a Court of Equity ought not to exercise its jurisdiction upon such a covenant. But this is not a covenant not to sell ale, beer, or porter to the prejudice of the Plaintiff; it is a covenant that he shall have the exclusive right of supplying all ale, beer, and porter consumed upon these premises. Therefore the question as to whether the sale is to his prejudice cannot be raised, because the extension of a man's trade is, of course, to his benefit, and the diminution of that trade must be to his prejudice. . . .

Then the third objection that has been urged is, that this is an unreasonable restraint of trade. Now, in the first place, the rule laid down in the leading case of Mitchel *v.* Reynolds, 1 P. Wms. 181, is, that where the restraint is not general but partial, and is founded on valuable consideration, then it cannot be said to be an unreasonable restraint. But here it is said that the restraint is unreasonable because it is perpetual. I think the rule upon that subject has been well settled by authority, and, as I understand, the rule is this,—that a restraint preventing a person from carrying on trade within a certain limit of space, though unlimited as to time, may be good, and the limit of space may be according to the nature of the trade. As an instance of such a covenant being upheld I may mention the case of Wilson *v.* Hart, Law Rep. 1 Ch. 463. And then with respect to this particular covenant, it seems to me that the Court cannot but take judicial notice of its being extremely common. Every Court of justice has had occasion to consider these brewers' covenants, and must be taken to be cognizant of the distinction between what are called free public-houses and brewers' public-houses which are subject to this very covenant. We should be introducing very great uncertainty and confusion into a very large and important trade if we were now to suggest any doubt as to the validity of a covenant so

extremely common as this is. I think there is no ground for the distinction which has been contended for, viz. that such a covenant might be good in a lease for 21, 50, or 100 years, but is not good if entered into as part of a transaction where the fee simple of a property is conveyed. I think, therefore, that none of the objections taken to the covenant can be sustained, especially at the present stage of this cause. At some future period of this cause, upon a motion, as in the case of Hills *v.* Croll, 2 Ph. 60, or at the hearing of the cause, circumstances may be shewn which render it improper for the Court to interfere—it may be shewn either that the Plaintiff has placed himself in such a situation that he ought not to be allowed to exercise his right, or that the Defendant had not notice of the covenant when he purchased the property, and then possibly Hills *v.* Croll may have some application, though, in my opinion, it is very difficult to reconcile that case with Lumley *v.* Wagner, 1 D. M. & G. 604, which has been repeatedly followed, and if Hills *v.* Croll is to stand with that case at all it can only be upon its particular circumstances. What we have to deal with here is the general abstract question—whether a person purchasing with notice of such a covenant as this is to be bound by it, and upon that I can only say that I entirely agree with the conclusion at which the learned Vice-Chancellor has arrived, and I think this appeal must be dismissed with costs.[1]

[1] The opinion of Lord Justice GIFFORD is omitted.

In Wilson *v.* Hart, 1865, 2 Hem. & M. 551, 555, the question was as to the binding force on a lessee of a covenant not to sell intoxicating liquors on certain premises, the covenant being made by the lessor, a grantee of the plaintiff. Vice-Chancellor WOOD said:

"Further than that, it may be a question how far such a covenant as this, not to exercise a certain trade on property to be built, can be considered to be anything more than a personal covenant. It is not like a covenant that no building shall be erected, which, being a covenant that the land shall remain in its existing state, and not a covenant to do anything future, as in Spencer's case, might perhaps be held to run with the land; but a covenant as to the personal act of some one living on this property, that he will not carry on a particular trade or business, which does not require the property to be specially built for that purpose, because beer might be sold in a house built for a dwelling house. This is a personal engagement, entered into for the non-performance of certain particular acts on the property; and I cannot say that it runs with the land. Nevertheless, if the tenant had notice of such an engagement, the covenant must be performed."

For the same case on appeal see L. R. 1 Ch. App. 463.

In Clegg *v.* Hands, 1890, L. R. 44 Ch. Div. 503, 518, Clegg and another, partners, owners of a brewery and leasehold interest in a hotel, sublet the hotel to the defendant, the latter binding himself to buy all the beer, etc., used in the house from the partners and "their each and every of their heirs, executors, administrators and assigns." Clegg and partner sold out to one Cain, a party plaintiff. The defendant refused to purchase beer from Cain. The bill sought to restrain defendant from purchasing elsewhere than from Cain. In the course of his opinion, COTTON, L.J., said:

LEWIS, APPELLANT, *v.* GOLLNER ET AL., RESPONDENTS.

IN THE COURT OF APPEALS OF NEW YORK, 1891.

[129 *New York* 227.]

The defendant Gollner purchased a lot in a private residential district of Brooklyn, and announced his intention of building thereon "flats." The residents of the neighborhood remonstrated, and, finding him determined in his purpose, they bought him out at an advance of $6000 over the price he paid. He agreed at this time not to "construct or erect any flats in plaintiff's immediate neighborhood or trouble him any more." Gollner soon after purchased other property in the immediate neighborhood, transferred it into his wife's name, and began the erection of a flat.

The plaintiffs seek to enforce their agreement with Gollner.

FINCH, J. All the facts alleged in plaintiff's complaint were found by the court, but were held to be insufficient to entitle him to equitable relief.[1]

I think we should first examine the situation, as between plaintiff and Gollner upon the supposition that the latter had remained owner of the land and was himself engaged in violating his contract, and ask of ourselves the question whether in such event it would have been possible for equity to interfere, or whether the objections and difficulties suggested by the respondents would have proved insuperable.

Two of those objections we may dismiss quite briefly. The agreement was not in the least indefinite or uncertain, as it respects the matter in controversy. The phrase "immediate neighborhood," taken in connection with the subject-matter of the contract, is not so indefinite as to be incapable of just and natural boundaries, but in any event

"Then it is said that this covenant does not run with the land. I think it does run with the land. That is my opinion; but there are other points on which this case may be decided independently of that question. It is a contract relating to the way in which the business at a particular house is to be carried on, therefore it is a contract relating to the public house just as much, in my opinion, as a contract as to the mode in which the cultivation of a particular bit of land is to be carried on relates to the land. It affects the value of the reversion, it affects the house, and, in my opinion, it is a contract running with the land. If that is so, that will enable the judgment to be supported, and will enable the present owner of the reversion in this case to sue.

"But there is another ground on which I think the judgment may be supported. Here there has been a sale to the plaintiff by the lessors of the good will of the business. The plaintiff is, therefore, independently of the question

[1] A portion of the opinion, detailing the facts, is omitted.

covers and includes the locality of the construction in progress. The court has so found, and there is no reason for doubting its correctness. Nor is there any foundation for saying that, in its restrictive character, the agreement is against public policy. We have too lately discussed that subject to make a recurrence to it necessary. We have perhaps widened and extended the area within which restraints of trade and business may lawfully operate, and certainly should not narrow them till they are less than one neighborhood in a single city.

Nor is there any difficulty in the fact that the agreement is by parol and purely personal. If just grounds of equitable jurisdiction exist, any valid contract, however unsolemn, may be enforced by a decree of specific performance. The cases are very numerous in which agreements purely personal not to engage in a particular trade or business within certain reasonable boundaries have been enforced by injunction, and it certainly does not lessen the duty or imperil the right that the contract proved or established is by parol. In one possible view of this case we are in fact dealing with just such a contract. The occupation of the defendant Gollner was that of a builder of flats and tenement-houses. He so describes himself and gives that as his specific business and occupation. He sought to carry it on in plaintiff's neighborhood, and was paid six thousand dollars not to carry it on in that locality, and because his doing so would in fact cause injury to the persons who paid him the money. Of course, there is a difference between the present case and those in which the contract purpose is to prevent competition; a difference which respects the nature and character of the injury resulting from a breach; but that difference does not disturb the doctrine common to both, that in a proper case equity will specifically enforce by affirmative decree or restraining injunction a definite and fully established and valid contract, although a personal one, and irrespective of the fact that it happened to be by parol. The jurisdiction attaches upon the ground that an action at law for damages will not do

whether the covenant runs with the land, entitled to sue so far as by assignment the landlord who entered into this covenant could give him the right. That being so, the difficulty as to the title to sue which there was in the case Renals *v.* Cowlishaw, 9 Ch. D. 125, before Vice-Chancellor HALL, is got rid of. There is no doubt that there is here an actual assignment of the benefit of the covenant to Cain, even if that benefit did not pass by the mere assignment to him of the reversion of this public house. Then, in my opinion, as he is thus entitled to sue, the doctrine of Tulk *v.* Moxhay, properly applied, will enable him to enforce that right as against the defendant—that is to say, considering that the defendant obtained this public house at a less rent, as we may assume he did, by reason of the covenant, we ought not, as against the person entitled to the benefit of that covenant, to allow him to deal with the public house in a way inconsistent with the covenant by reason of which he got it at a lower rent. Therefore, in my opinion, on that ground, even if this covenant did not run with the land, the judgment of the Vice-Chancellor is right."

complete justice, or accomplish the purpose contemplated by the contract. Even though the agreement itself fixes a penalty for its breach, it will not follow that equitable relief must be denied, for, if the contract appears to be such in its character and purpose that its performance was contemplated by the parties and not merely damages for the breach, the equitable relief will be awarded. Diamond Match Co. *v.* Roeber, 106 N. Y. 474. When that relief is by injunction to restrain the commission of an injurious act, the complaint of the plaintiff is somewhat in the nature of a bill *quia timet,* in which equity acts to prevent a mischief rather than to redress it. There is, therefore, no reasonable doubt that if Gollner was still the owner of the land and engaged in constructing the flats his enterprise could be restrained by injunction. No other remedy would have the dimensions or proportions of the contract purpose. Money damages could not be an accurate substitute and would merely palliate and not redress the injury. It would be a continuing one whose full and actual effects could scarcely be foreseen, and which the plaintiff could only escape by breaking up his home and retreating to some possible locality in which tenements were not and their builders did not afflict.

But Gollner did not remain the owner of his new purchase, and that brings us to the difficulty which the courts below deemed insurmountable, and which needs to be thoughtfully considered. They reasoned that the new vendee could not be affected, except through or by the purchase of the land, and so, only when the land carried with it as an inseparable attachment the burden of the contract; that when the contract was made there was no land to which it did or could attach; and the agreement remained wholly personal to Gollner and did not affect or bind his wife. I do not see the contract in that way. Gollner might have fulfilled it by omitting to buy or lease any land within the prescribed limits, but his agreement left him at liberty to do so or not as he pleased, and yet required that if he did so purchase or lease, he should not erect upon the land so owned or possessed the prohibited structures. The moment he bought or leased any such land, he came under an obligation not to use it in a particular way; the land in his hands necessarily became restricted and limited in the use of which it was capable; and as much so, though bought of another, as if it had come from the contractor who imposed the restraint as vendor. I do not see why the equitable rights of the plaintiff did not attach to the land when bought if it came, as it did, within the scope of the contract. Why should it affect the result that the obligation and the land ownership were not simultaneous, or that the latter came from a vendor who did not restrict when the contractor could and did? In the case of a mortgage the lien may attach to and bind after-required property, or cover future and later advances, as between the parties themselves, and that is permitted because they have so agreed and their contract contemplates

that precise result. In like manner I think the agreement under discussion was in substance and effect, that whatever land the defendant Gollner might thereafter possess in that immediate neighborhood should be restricted in its use by him, and should not be devoted to the construction of tenements or flats. In other words, when he bought the land the plaintiff's equitable rights at once attached to it, became a burden upon it so long as Gollner owned it, so that apparently the contract ceases to be merely and purely personal, because it affects and was intended to affect the use and occupation of Gollner's after-acquired land in that neighborhood. But if the contract remains technically a personal one, I think the reasonable and settled doctrine is that the contract equity is so attached to the use of the land which is the subject-matter as to follow the land itself into the hands of a purchaser with full knowledge of all the facts, who buys with his eyes open to the existing equity, and more especially when he buys for the express purpose of defeating and evading that equity. It has been held that the equity resulting from a valid agreement, although the latter was not a covenant running with the land, or a legal exception or reservation out of it, but stood solely upon the ground of a personal contract dictating the mode of user, would, nevertheless, go with the land into the hands of a purchaser, with notice, and who did not buy innocently or in good faith. Whitney *v.* Union Railway Co., 11 Gray 363.

In Hodge *v.* Sloan, 107 N. Y. 250, we substantially affirmed that doctrine, holding that a purchaser without restriction in his deed, but from one who was restricted by a personal covenant not running with the land or binding his assigns, yet with notice of the facts, is bound by the restriction in a court of equity. Judge Danforth described the character of the agreement thus: "It is restrictive, not collateral to the land, but relates to its use."

It is true and should be noted that in these cases the restrictions followed the line of title and were imposed by the original owners and vendors of the land, while here they were not so imposed, but came from one never an owner of the land, but deriving his right from a contract with one who did become such owner. But why should that difference change the result? The original owner's right rests upon one consideration, and that of the stranger to the title upon another, but each are equally good and worthy of equitable regard. In Parker *v.* Nightingale, 6 Allen, 344, it is declared not to be in the least material that the restrictive stipulations should be binding at law, or that any privity of estate should subsist between parties in order to render them obligatory and to warrant equitable relief in case of their infraction. I think that doctrine is sound and just. The source of the restriction would seem to be immaterial if itself binding and founded upon sufficient consideration; and a breach is no greater wrong to a privy in estate than to a stranger validly contracting about its use. Nor can

the vendee in bad faith stand upon such a difference. Equity has no compassion for a fraud, and he who buys in aid of one with full knowledge of what is right, but with purpose to defeat it, should not escape the hand of equity by a criticism upon the origin of the restriction violated. If these views are correct it will follow that plaintiff should have been awarded the relief which he sought.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concur, except RUGER, Ch. J., and ANDREWS, J., not voting.

MURPHY *v.* CHRISTIAN PRESS ASSOCIATION PUBLISHING COMPANY.

IN APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK, 1899.

[38 *Appellate Division* 426.]

The Catholic Publication Society Company, owning the copyright of a prayer book, sold one set of plates to the plaintiffs under an agreement providing that no other plates should be sold to other printers, except by the plaintiffs' consent, and specifying the minimum retail price for which the book was to be sold. Subsequently a receiver of the Catholic company sold certain remaining sets of plates to the defendants (who had notice of the plaintiffs' contract) and they proceeded to get out a finer book than the plaintiffs' and to sell the same below the stipulated price.

The plaintiffs seek to restrain the selling of the book below the price named, and ask for an assessment and an award of their damages.

CULLEN, J.[1] We think this action can be maintained against the appellant, and that it is bound by the agreement of the Catholic Publication Society Company from which it acquired the copyright and electrotype plates. The agreement on the part of the defendant's predecessor in title, though technically a personal one, related to the use of its property, the copyrights, and the plates, and obligated all who might acquire that property with notice of the agreement. This is the settled doctrine of the Court of Appeals where the agreement relates to real estate. Hodge *v.* Sloan, 107 N. Y. 244; Lewis *v.* Gollner, 129 id. 227. We can see no reason why the same rule should not apply in the case of personal property, nor are we wanting in authority to sustain the proposition. New York Bank Note Co. *v.* Hamilton Bank Note Co., 83 Hun 593; 28 App. Div. 411; Littlefield *v.* Perry, 88 U. S. 205. In Drone on Copyright (p. 374) it is said: "It may

[1] A portion of the opinion, detailing the facts, is omitted.

be regarded as settled that a Court of Chancery will restrain an author, or any person having notice, from violating an express negative covenant made by the author." This is equally applicable to the covenant of any person who has acquired title to the copyright in any manner. While the plaintiffs under their agreement with the Catholic Society acquired no legal title to any part of the copyright, in equity they acquired an interest very similar to a negative easement in real estate, which easement incumbered the property in the hands of any party who might have notice. A copyright is very much of the same character as a patent. Under a license a patentee acquires no title to the patent, but he may in the name of his licensor prosecute infringers on his rights, or compel the licensor to specifically perform the terms of his agreement.

The most serious question arises on the construction of the written agreement. The agreement refers in terms solely to the prices at which "plainly-bound copies" may be sold. The appellant contends that its publications are not plainly-bound copies, and do not fall within the terms of the agreement. The agreement, however, must be construed reasonably, and some effect given to it. Certainly it never contemplated that while the parties were restrained from selling plainly-bound copies at less than a prescribed price, they should be at liberty to sell handsomer editions of the publication for a less price than that stipulated for the plainly-bound copies. The evidence shows that "plainly-bound copies" is not a technical term of the trade. We think that in this agreement the words must be construed as meaning the cheapest editions that might be published; otherwise they are without effect.[1]

RENALS *v.* COWLISHAW.

IN THE HIGH COURT OF JUSTICE, CHANCERY DIVISION, 1878.

[*Law Reports* 9 *Chancery Division* 125.]

The former owners in fee of a residential estate and adjoining lands, sold part of the adjoining lands to the defendant's predecessors in title, who entered into covenants with the vendors and their assigns restricting their right to build on and use the purchased land.

The same vendors afterwards sold the residential estate to the plaintiff's predecessors in title. The conveyance contained no reference to the re-

[1] "Independent of the acts in relation to the filing of chattel mortgages, if a party purchases personal property knowing that the same is mortgaged, can it be claimed that he would acquire a title relieved from the mortgage? It seems hardly necessary to discuss such a proposition. So in the case at bar, the defendant in this action knowing that the Kidder Com-

strictive covenants, nor was there any contract or representation that the purchasers of the residential estate were to have the benefit of them; there was, moreover, in the plaintiff's conveyance a covenant limiting their use of the purchased property, but such covenant was not co-extensive with the covenants above mentioned.

The plaintiffs sued to restrain the defendants, who had purchased the land first sold under the above mentioned restrictive covenants, from building in contravention of those covenants.[1]

HALL, V. C. I think this case is governed by Keates *v.* Lyon, by Child *v.* Douglas, Kay. 560; 5 D. M. & G. 739, as ultimately decided by Vice-Chancellor WOOD, 2 Jur. N. S. 950, who, after granting an interlocutory injunction in the first instance, refused to grant the plaintiff an injunction at the hearing, and by the case of Master *v.* Hansard.

The law as to the burden of and the persons entitled to the benefit of covenants in conveyances in fee was certainly not in a satisfactory state; but it is now well settled that the burden of a covenant entered into by a grantee in fee for himself, his heirs, and assigns, although not running with the land at law so as to give a legal remedy against the owner thereof for the time being, is binding upon the owner of it for the time being, in equity, having notice thereof. Who, then (other than the original covenantee), is entitled to the benefit of the covenant? From the cases of Mann *v.* Stephens, 15 Sim. 377; Western *v.* Macdermott, Law Rep. 2 Ch. 72, and Coles *v.* Sims, Kay, 56; 5 D. M. & G. 1, it may, I think, be considered as determined that any one who has acquired land, being one of several lots laid out for sale as building plots, where the court is satisfied that it was the intention that each one of the several purchasers should be bound by and should, as against the others, have the benefit of the covenants entered into by each of the purchasers, is entitled to the benefit of the covenant; and that this right, that is, the benefit of the covenant, inures to the assign of the first purchaser, in other words, runs with the land of such purchaser. This right exists not only where the several parties execute a mutual deed of covenant, but wherever a mutual contract can be sufficiently established. A purchaser may also be entitled to the benefit of a restrictive covenant entered into with his vendor by another or others where his vendor has contracted with him that he shall be the assign of it, that is, have the benefit of the covenant. And such covenant need not be express, but may be collected from the transaction of sale and

pany had no right or authority to sell its presses except with a restriction, which restriction the plaintiff had purchased, can it be said that in purchasing from the Kidder Company it acquired an absolute title relieved from such restrictions? Clearly not. The party purchasing under such circumstances takes the property burdened with the contracts made by its owner in reference thereto, and which he had the power to make." Per VAN BRUNT, in N. Y. Bank Note Co. *v.* Hamilton B. N. Co., 1895, 83 Hun 393, 396.

[1] This statement is taken from the headnote.

purchase. In considering this, the expressed or otherwise apparent purpose or object of the covenant, in reference to its being intended to be annexed to other property, or to its being only obtained to enable the coventee more advantageously to deal with his property, is important to be attended to. Whether the purchaser is the purchaser of all the land retained by his vendor when the covenant was entered into is also important. If he is not, it may be important to take into consideration whether his vendor has sold off part of the land so retained, and if he has done so, whether or not he has so sold subject to a similar covenant: whether the purchaser claiming the benefit of the covenant has entered into a similar covenant may not be so important.

The plaintiffs in this case, in their statement of claim, rest their case upon their being "assigns" of the Mill Hill estate, and they say that as the vendors to Shaw were the owners of that estate when they sold to Shaw a parcel of land adjoining it, the restrictive covenants entered into by the purchaser of that parcel of land must be taken to have been entered into with them for the purpose of protecting the Mill Hill estate, which they retained; and, therefore, that the benefit of that restrictive covenant goes to the assign of that estate, irrespective of whether or not any representation that such a covenant had been entered into by a purchaser from the vendors was made to such assigns, and without any contract by the vendors that that purchaser should have the benefit of that covenant. The argument must, it would seem, go to this length, viz., that in such a case a purchaser becomes entitled to the covenant even although he did not know of the existence of the covenant, and that although the purchaser is not (as the purchasers in the present case were not) purchaser of all the property retained by the vendor upon the occasion of the conveyance containing the covenants. It appears to me that the three cases to which I have referred show that this is not the law of this court; and that in order to enable a purchaser as an assign (such purchaser not being an assign of all that the vendor retained when he executed the conveyance containing the covenants, and that conveyance not showing that the benefit of the covenant was intended to inure for the time being of each portion of the estate so retained or of the portion of the estate of which the plaintiff is assign) to claim the benefit of a restrictive covenant, this, at least, must appear, that the assign acquired his property with the benefit of the covenant, that is, it must appear that the benefit of the covenant was part of the subject-matter of the purchase. Lord Justice BRAMWELL, in Master *v.* Hansard, 4 Ch. D. 724, said: "I am satisfied that the restrictive covenant was not put in for the benefit of this particular property, but for the benefit of the lessors to enable them to make the most of the property which they retained." In the present case I think that the covenants were put in with a like object. If it had appeared in the conveyance to Bainbrigge that there were such restrictive covenants in conveyances already executed, and expressly or otherwise that Bainbrigge was to have the benefit of them, he

and the plaintiffs, as claiming through him, would have been entitled to the benefit of them. But there being in the conveyance to Bainbrigge no reference to the existence of such covenants by recital of the conveyances containing them or otherwise, the plaintiffs cannot be treated as entitled to the benefit of them. This action must be dismissed with costs. Affirmed on appeal; L. R. 11 Ch. Div. 866.[1]

NORCROSS AND ANOTHER *v.* JAMES AND ANOTHER.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1885.

[140 *Massachusetts* 188.]

HOLMES, J. One Kibbe conveyed to one Flynt a valuable quarry in Longmeadow, of six acres, bounded by other lands of the grantor, with covenants as follows: "And I do for myself, my heirs, executors, and administrators, covenant with the said Flynt, his heirs and assigns, that I am lawfully seised in fee of the afore-granted premises, that they are free of all incumbrances, that I will not open or work or allow any person or persons to open or work any quarry or quarries on my farm or premises in said Longmeadow." By mesne conveyances the plaintiffs have become possessed of the quarry conveyed to Flynt, and the defendants of the surrounding land referred to in the covenant. The defendants are quarrying stone in their land, like that quarried by the plaintiffs; and the plaintiffs bring this bill in equity for an injunction.

The discussion of the question under what circumstances a landowner is entitled to rights created by way of covenant with a former owner of

[1] "The law on the subject has never been stated more clearly than it was by Vice-Chancellor HALL in Renals *v.* Cowlishaw, 9 Ch. D. 125, 129. The opinion of that learned judge on any question relating to conveyancing and real property law, owing to his great experience as a conveyancer, would of itself carry the utmost weight. In this instance his opinion was emphatically confirmed in the Court of Appeal, 11 Ch. D. 866, where Lord Justice JAMES expressly concurred in every word of the Vice-Chancellor's judgment. It has also, I may observe, been approved and followed in the Queen's Bench Division, Nottingham Patent Brick and Tile Company *v.* Butler, 15 Q. B. D. 261, 269; S. C., on appeal, 16 Q. B. D. 778.

"I should be disposed to hesitate if I were invited to extend the principles recognized in Renals *v.* Cowlishaw. But those principles, as defined by the Vice-Chancellor, are, I think, perfectly sound, consistent with the authorities, and consistent with good sense. I think they apply to the present case, and I think they must govern it." Per Lord MACNAGHTEN in Spicer *v.* Martin, 1888, L. R. 14 App. Cas. 12, 23.

"The infirmity of the plaintiff's case is that there is nothing from which the Court can infer that the restriction in the deed from Downing to Boardman

the land has been much confused since the time of Lord COKE, by neglecting a distinction, which he stated with perfect clearness, between those rights which run only with the estate in the land and those which are said to be attached to the land itself: "So note a diversity between a use or warranty, and the like things annexed to the estate of the land in privity, and commons, advowsons, and other hereditaments annexed to the possession of the land." Chudleigh's case, 1 Rep. 120a, 122b; S. C. nom. Dillon *v.* Fraine, Poph. 70, 71.

Rights of the class represented by the ancient warranty, and now by the usual covenants for title, are pure matters of contract, and from a very early date down to comparatively modern times lawyers have been perplexed with the question how an assignee could sue upon a contract to which he was not a party. West, Symboleog. I. sect. 35; Wingate's Maxims, 44, pl. 20, 55, pl. 10; Co. Lit. 117a; Finch's case, 4 Inst. 85. But an heir could sue upon a warranty to his ancestor, because for that purpose he was *eadem persona cum antecessore.* See Y. B. 20 and 21, Ed. I. 232, Rolls ed.; Overton *v.* Sydall, Poph. 120, 121; Oates *v.* Frith, Hob. 130; Bain *v.* Cooper, 1 Dowl. Pr. Cas., N. S., 11, 14. And this conception was gradually extended, in a qualified way, to assigns, where they were mentioned in the deed. Bract. fol. 17b, 67a, 380b, 381; Fleta, III. c. 14, § 6; 1 Britton, Nich. ed., 255, 256; Y. B. 20 Ed. I. 232-234, Rolls ed.; Fitz. Abr. Covenant, pl. 28; Vin. Abr. Voucher, N. p. 59; Y. B. 14 Hen. IV. 56; 20 Hen. VI. 34b; Old Natura Brevium, Covenant, 67, B, C, in Rastell's Law Tracts, ed. 1534; Doct. & Stud. Dial. 1, c. 8; F. N. B. 145, C.; Co. Lit. 384b; Com. Dig. Covenant, B, 3; Middlemore *v.* Goodale, Cro. Car. 503; S. C. ib. 505; W. Jones 406; Philpot *v.* Hoare, 2 Atk. 219.

But in order that an assignee should be so far identified in law with the original covenantee, he must have the same estate, that is, the same

was inserted for the benefit of the estate now owned by the plaintiff. If it appeared that the parties to that conveyance intended to create or reserve a right in the nature of a servitude or easement in the estate granted, which should be attached to and be deemed an appurtenance of the whole of the remaining parcel belonging to the grantor, of which the plaintiff's land forms a part, then it is clear, on the principles declared in the recent decision of Whitney *v.* Union Railway, 11 Gray 359, that the plaintiff would be entitled to insist on its enjoyment and to enforce his rights by a remedy in equity. But there is an entire absence of any language in the deeds under which the parties claim from which it can be fairly inferred that the restriction in the deed to the defendant against erecting his building above a certain height was intended to inure to the benefit of the estate now owned by the plaintiff. . . . We are therefore of opinion that the clause in the deed to the defendant, creating the restriction on the enjoyment of his estate, must be construed as a personal covenant merely with the original grantor, which the plaintiff cannot ask to have enforced in this suit.

"Bill dismissed with costs." Per BIGELOW, C.J., in Badger *v.* Boardman, 1860, 16 Gray 559, 560.

status or inheritance, and thus the same *persona, quoad* the contract. The privity of estate which is thus required is privity of estate with the original covenantee, not with the original covenantor; and this is the only privity of which there is anything said in the ancient books. See further Y. B. 21 and 22 Ed. I. 148, Rolls ed; 14 Hen. VIII. 4, pl. 5. Of course, we are not now speaking of cases of landlord and tenant, and it will be seen that the doctrine has no necessary connection with tenure. F. N. B. 134, E. We may add, that the burden of an ordinary warranty in fee did not fall upon assigns, although it might upon an heir, as representing the person of his ancestor. Y. B. 32 and 33 Ed. I. 516, Rolls ed.

On the other hand, if the rights in question were of the class to which commons belonged, and of which easements are the most conspicuous type, these rights, whether created by prescription, grant, or covenant, when once acquired, were attached to the land, and went with it, irrespective of privity, into all hands, even those of a disseisor. "So a disseisor, abator, intruder, or the lord by escheat, etc., shall have them as things annexed to the land." Chudleigh's case, *ubi supra;* See 1 Britton, Nich. ed., 361; Keilw. 145, 146, pl. 15; F. N. B. 180; N.; Nevil's case, Plowd. 377, 381. In like manner, when, as was usual, although not invariable, the duty was regarded as falling upon land, the burden of the covenant, or grant, went with the servient land into all hands, and, of course, there was no need to mention assigns. See cases *supra et infra.* The phrase consecrated to cases where privity was not necessary was *transit terra cum onere.* Bract. fol. 382a, b.; Fleta, VI. c. 23, § 17; See Y. B. 20 Ed. I. 360, Rolls. ed.; Keilw. 113, pl. 45. And it was said that "a covenant which runs and rests with the land lies for or against the assignee at the common law, *quia transit terra cum onere,* although the assignee be not named in the covenant." Hyde *v.* Dean of Windsor, Cro. Eliz. 552; S. C. ib. 457; 5 Rep. 24a; Moore 399.

It is not necessary to consider whether possession of the land alone would have been sufficient to maintain the action of covenant; it is enough for our present purposes that it carried the right of property. Neither is it necessary to consider the difficulties that have sometimes arisen in distinguishing rights of this latter class from pure matters of contract, by reason of their having embraced active duties as well as those purely passive and negative ones which are plainly interests carved out of a servient estate and matters of grant. The most conspicuous example is Pakenham's case, Y. B. 42 Ed. III. 3, pl. 14, where the plaintiff recovered in covenant as terre-tenant, although not heir, upon a covenant or prescriptive duty to sing in the chapel of his manor. Spencer's case, 5 Rep. 16a, 17b. Another, which has been recognized in this Commonwealth, is the quasi easement to have fences maintained. Bronson *v.* Coffin, 108 Mass. 175, 185; S. C. 118 Mass. 156. Repairs were dealt with on the same footing; they were likened to estovers and other rights of common. 5 Rep. 24a, b.; Hyde *v.* Dean of Windsor, *ubi*

supra; See F. N. B. 127; Spencer's case, *ubi supra;* Ewre *v.* Strickland, Cro. Jac. 240; Brett *v.* Cumberland, 1 Roll. R. 359, 360; and other examples might be given. See Bract. 382a, b; Fleta, VI. c. 23, § 17; Y. B. 20 Ed. I. 360; Keilw. 2a, pl. 2; Y. B. 6 Hen. VII. 14b, pl. 2; Co. Lit. 384b, 385a; Cockson *v.* Cock, Cro. Jac. 125; Bush *v.* Cole, 12 Mod. 24; S. C. 1 Salk. 196; 1 Show. 388; Carth. 232; Sale *v.* Kitchingham, 10 Mod. 158. The cases are generally landlord and tenant cases, but that fact has nothing to do with the principles laid down.

When it is said that in this class of cases there must be a privity of estate between the covenantor and the covenantee, it only means that the covenant must impose such a burden on the land of the covenantor as to be in substance, or to carry with it, a grant of an easement or quasi easement, or must be in aid of such a grant, Bronson *v.* Coffin, *ubi supra;* which is generally true, although, as has been shown, not invariably, Pakenham's case, *ubi supra;* and although not quite reconcilable with all the old cases except by somewhat hypothetical historical explanation. But the expression "privity of estate" in this sense is of modern use, and has been carried over from the cases of warranty, where it was used with a wholly different meaning.

In the main, the line between the two classes of cases distinguished by Lord Coke is sufficiently clear; and it is enough to say that the present covenant falls into the second class, if either. Notwithstanding its place among the covenants for title, it purports to create a pure negative restriction on the use of land, and for the moment we will take it as intended to do so for the benefit of the land conveyed.

The restriction is, in form, within the equitable doctrine of notice. Whitney *v.* Union Railway, 11 Gray 359; Parker *v.* Nightingale, 6 Allen 341; Beals *v.* Case, 138 Mass. 138; See Austerberry *v.* Oldham, 29 Ch. D. 750; London and South Western Railway *v.* Gomm, 20 Ch. D. 562; Haywood *v.* Brunswick Building Society, 8 Q. B. D. 403; Tulk *v.* Moxhay, 2 Phillips 774. But, as the deed was recorded, it does not matter whether the plaintiff's case is discussed on this footing, or on that of easement, if there is any difference so far as the present point is concerned.

The question remains, whether, even if we make the further assumption that the covenant was valid as a contract between the parties, it is of a kind which the law permits to be attached to land in such a sense as to restrict the use of one parcel in all hands for the benefit of whoever may hold the other, whatever the principle invoked. For equity will no more enforce every restriction that can be devised, than the common law will recognize as creating an easement every grant purporting to limit the use of land in favor of other land. The principle of policy applied to affirmative covenants applies also to negative ones. They must "touch or concern," or "extend to the support of the thing" conveyed. 5 Rep. 16a, 24b. They must be "for the benefit of the estate." Cockson *v.* Cock, *ubi supra.* Or, as it is said more broadly, new and

unusual incidents cannot be attached to land, by way either of benefit or of burden. Keppell *v.* Bailey, 2 Myl. & K. 517, 535; Ackroyd *v.* Smith, 10 C. B. 164; Hill *v.* Tupper, 2 H. & C. 121.

The covenant under consideration, as it stands on the report, falls outside the limits of this rule, even in the narrower form. In what way does it extend to the support of the plaintiff's quarry? It does not make the use or occupation of it more convenient. It does not in any way affect the use or occupation; it simply tends indirectly to increase its value, by excluding a competitor from the market for its products. If it be asked what is the difference in principle between an easement to have land unbuilt upon, such as was recognized in Brooks *v.* Reynolds, 106 Mass. 31, and an easement to have a quarry left unopened, the answer is, that, whether a difference of degree or of kind, the distinction is plain between a grant or covenant that looks to direct physical advantage in the occupation of the dominant estate, such as light and air, and one which only concerns it in the indirect way which we have mentioned. The scope of the covenant and the circumstances show that it is not directed to the quiet enjoyment of the dominant land.

Again, this covenant illustrates the further meaning of the rule against unusual incidents. If it is of a nature to be attached to land, as the plaintiff contends, it creates an easement of monopoly—an easement not to be competed with—and in that interest alone a right to prohibit an owner from exercising the usual incidents of property. It is true that a man could accomplish the same results by buying the whole land, and regulating production. But it does not follow, because you can do a thing in one way, that you can do it in all; and we think that, if this covenant were regarded as one which bound all subsequent owners of the land to keep its products out of commerce, there would be much greater difficulty in sustaining its validity than if it should be treated as merely personal in its burden. Whether the latter is its true construction, as well as its only legal operation, and whether, so construed, it is or is not valid, are matters on which we express no opinion. See further Brewer *v.* Marshall, 4 C. E. Green 537; Taylor *v.* Owen, 2 Blackf. 301; Thomas *v.* Hayward, L. R. 4 Ex. 311.

Bill dismissed.

HODGE, EXECUTOR, ETC., ET AL., APPELLANTS *v.* SLOAN, RESPONDENT.

IN THE COURT OF APPEALS OF NEW YORK, 1887.

[107 *New York* 244.]

This action was brought to restrain the defendant from selling sand taken from land conveyed by the plaintiff to John D. Sloan, and by him to the defendant, in violation of a covenant contained in the deed to John D. Sloan, and of which the defendant, when he bought, had notice.

The complaint was dismissed. After an appeal to this court from the Judgment of General Term, the plaintiff died and his executor was substituted as appellant. . . .

DANFORTH, J. The conclusion of the trial court is against our ideas of natural justice, for it it takes from one party an advantage which he refused to sell, and secures to the other without price a privilege which his grantor was unable to buy. Nor do we find that this denial of private right is required by any rule of public policy. Assuming with the respondent that the covenant is in restraint of trade, it is still valid if it imposes no restriction upon one party which is not beneficial to the other, and was induced by a consideration which made it reasonable for the parties to enter into it, or in other words, if it was a proper and useful contract, or such as could not be disregarded without injury to a fair contractor. This is the doctrine of Chappel *v.* Brockway, 21 Wend. 157, and Ross *v.* Sadgbeer, id. 166, derived by a learned court from the leading case of Mitchel *v.* Reynolds, 1 P. Wms. 181, and an examination of subsequent decisions. It is also so amplified and discussed in a case just decided by this court (Diamond Match Co. *v.* Roeber), opinion by Andrews, J., 106 N. Y. 473, as to make any elaboration of the general rule quite superfluous.

The subject of the contract at the bottom of this controversy was a piece of land which Sloan wanted to buy and which the plaintiff was willing to sell provided it should not be made an instrument for the destruction of his means of livelihood or detrimental to his business. The principle which favors freedom of trade requires that every man shall be at liberty to work for himself, and shall not deprive himself or the State of the benefit of his industry by any contract that he enters into. The same principle must justify a party in withholding from market the tools, or instruments, or means by which he gains the support of his family, or if, as in the case before us, the instrument or means are susceptible of several uses, one of which will work mischief to himself by the loss or impairment of his livelihood, there is no reason of public policy which requires him upon a sale of the instrument to consent to that use, or prohibits him from binding his vendee against it.

We see nothing unreasonable in the restriction which the grantee imposed upon himself. He was not a dealer in sand. He wanted to buy the land on the best terms and in the most advantageous way, and in order to do this it was necessary that he should preclude himself from so using it as that by its means he should enter into competition with the vendor. I cannot find that such a covenant contravenes any rule of public policy, nor that it is incapable of being enforced in a court of equity. It stands upon a good consideration, and is not larger than is necessary for the protection of the covenantee in the enjoyment of his business.

But the question presented is, upon the conceded facts, really one of

individual right with which the question of public policy has little if anything to do.

Parties competent to contract have contracted, the one to sell a portion of his land, but only upon such conditions as will protect himself in the prosecution of business carried on upon the residue, the other agreeing to buy for a consideration affected by that condition, and enabled to do so only by acceding to it, and he therefore binds himself by contract to limit the use of the land purchased in a particular manner. There seems no reason why he and his grantee, taking title with notice of the restriction, should not be equally bound. The contract was good between the original parties, and it should in equity at least bind whoever takes title with notice of such covenant. By reason of it the vendor received less for his land, and the plain and expressed intention of the parties would be defeated if the covenant could not be enforced as well against a purchaser with notice as against the original covenantor. In order to uphold the liability of the successor in title, it is not necessary that the covenant should be one technically attaching to and concerning the land and so running with the title. It is enough that a purchaser has notice of it. The question in equity being, as is said in Tulk *v.* Moxhay, 11 Beav. 571; 2 Phillips 774, not whether the covenant ran with the land, but whether a party shall be permitted to use the land inconsistently with the contract entered into by his vendor, and with notice of which he purchased. . . .

Many other instances of restraint might be referred to, and where it is of such nature as concerns the mode of occupying or dealing with the property purchased in the way of business operations, or even the omission of all business or certain kinds of business, or the erection or non-erection of buildings upon the property, we see no reason to doubt the validity of an agreement fair and valid in other respects, which secures that restraint. Indeed, it seems well settled by authority that a personal obligation so insisted upon by a grantor and assumed by a grantee, which is a restriction as to the use of the land, may be enforced in equity against the grantee and subsequent purchasers with notice. Parker *v.* Nightingale, 6 Allen 341, 344; Burbank *v.* Pillsbury, 48 N. H. 475. Nor is it essential that the assignees of the covenantor should be named or referred to. Morland *v.* Cook, L. R. 6 Eq. Cases 252. . . .

Each case will depend upon its own circumstances, and the jurisdiction of a court of equity may be exercised for their enforcement, or refused, according to its discretion. (Trustees, etc., *v.* Thacher, 87 N. Y. 311); but where the agreement is a just and honest one, its judgment should not be in favor of the wrongdoer. Such seems to us the character of the covenant in question; it is restrictive, not collateral to the land, but relates to its use, and upon the facts found the plaintiff is entitled to the equitable relief demanded.

Brewer *v.* Marshall, 4 C. E. Green, N. J. Eq. 537, is cited by the

respondent as requiring a different construction. The general rules in regard to such covenants are not stated differently in that case. But in the opinion of the court it was not one for the interference of a court of equity. Among many other cases Tulk *v.* Moxhay, *supra,* is cited, and the learned court says: "It will be found upon examination that these decisions proceed upon the principle of preventing a party having knowledge of the just rights of another from defeating such rights, and not upon the idea that the engagements enforced create easements or are of a nature to run with the land. In some of the instances the language of the court is very clear on this point," and from a "review of the authorities," the court says, "it is entirely satisfied that a court of equity will sometimes impose the burden of a covenant relating to lands on the alienee of such lands, on a principle altogether aside from the existence of an easement or the capacity of such covenant to adhere to the title." The only question which the court regarded as possessed of difficulty was whether the covenant then in controversy was embraced within the proper limits of this branch of equitable jurisdiction. By a divided court an injunction was denied. The circumstances were quite unlike those before us and the decision furnishes no precedent for us to follow.

The judgment appealed from should be reversed and new trial granted, with costs to abide the event.

All concur except PECKHAM, J., not voting, and ANDREWS and EARL, JJ., dissenting because, in their opinion, the covenant was a personal one and did not bind the grantee of the land.

Judgment reversed.

WESTERN *v.* MACDERMOTT.

IN THE COURT OF APPEAL IN CHANCERY BEFORE LORD CHANCELLOR CHELMSFORD, 1866.

[*Law Reports 2 Chancery Appeals,* 72.]

In 1766 Sir Bennet Gerrard granted a part of his estate to one Wood, Sir Bennet reserving a perpetual rent-charge. The two parties entered into mutual covenants as to the kinds and dimensions of buildings, the height of trees, etc., to be permitted both on the lands granted and those retained. Wood conveyed part of his land to one Rodbum, Sir Bennet joining, with similar covenants, and the plaintiff's title was derived from this last conveyance. By a conveyance made a few days earlier, Wood had conveyed with similar covenants another portion of his land to one Freeman, through whom the defendant had title. The rent charges issuing out of the respective lots had become vested in other parties. With trifling exceptions all the houses on the Wood estate were built on a uni-

form plan adopted in 1766. MacDermott began to build in violation of his express covenant, and at variance with the plan.

LORD CHELMSFORD, L.C., after stating the facts of the case, and the substance of the decree made by the Master of the Rolls, continued:—

Various objections were made to the Plaintiff's right to interfere with the Defendant's building.

Before the Master of the Rolls, the question appears to have been raised, whether the covenant against building beyond a certain height, in the original conveyance of the Defendant's house, was a covenant which ran with the land. But I am relieved from the necessity of considering the question, because it was admitted on the part of the Defendant, that, he having purchased his house with notice of the restrictive obligation attached to it, a court of equity would interfere to prevent his violation of it. This, indeed, could not be disputed, after the cases of Tulk *v.* Moxhay, 2 Ph. 774, and Coles *v.* Sims, 1 Kay 56; 5 D. M. & G. 1.

But the Defendant, admitting that he is bound by the covenant, denies that he has been guilty of any violation of it, because the prohibition against building is confined in terms to the garden, and he alleges that he has not built upon the garden.

[His Lordship then considered the facts and the evidence, and came to the conclusion that the bow or projection was upon the garden within the meaning of the covenant.]

But the Defendant contends that, even if the covenant would have been originally applicable to the proposed addition to the back of his house, it has long since ceased to be so, inasmuch as it has been generally disregarded by the owners of the other houses on the south side of Brock Street; and buildings have been erected, and trees have been planted, in violation of the covenant, without any attempt to enforce it. But, assuming that the Plaintiff and his predecessors have suffered these things to pass without notice when they sustained no particular injury, how can that deprive the Plaintiff of his equity to use the covenant for his protection where the breach of it immediately affects the enjoyment of his house? It is not like the case of Duke of Bedford *v.* Trustees of the British Museum, 2 My. & K. 552, where a covenant not to use the land conveyed in a particular manner with a view to the more ample enjoyment of the adjoining lands of the feoffer, was sought to be enforced by the Plaintiff, in whom the adjoining lands were vested, after the whole of the property had been altered by his consent. The court, without expressing any opinion whether an action at law could be maintained, refused the injunction upon the ground that the party seeking to enforce the obligation which applied to the property in its former state had himself created the alteration out of which a new set of interests and rights had arisen. I cannot, however, understand how a passive acquiescence in one breach of covenant can be considered to be a waiver for all future time of the right to complain of any other breach.

But the Defendant alleges that the Plaintiff has not only acquiesced

in breaches of the covenant by others, but that he has been guilty of a breach of it himself by permitting trees above the prescribed height to remain upon the ground at the back of his house. The only tree to which this observation applies is a mulberry tree, which, though it has been periodically trimmed and cut, was at the time of filing this bill above the limited height. This appears to me to be a frivolous objection. No complaint has ever been made as to this tree, nor has it produced the slightest injury to any one. If the Plaintiff had been requested to reduce its height, and had refused, and had proceeded to complain of the Defendant's building, there would have been something to have urged against him, but, under the circumstances, there is not the shadow of an answer to the Plaintiff's bill upon this ground.

The Defendant, in the next place, says that, admitting the addition to his house to be a violation of the covenant, yet that equity will not interfere, as the Plaintiff has not sustained, nor is likely to sustain, any actual damage thereby. Whether this ground of non-interference by equity can be applicable to a case of this peculiar description, may be matter deserving of some consideration. The object of the covenant was to prevent, for all future time, any obstruction to the view from the backs of the houses on the south side of Brock Street by buildings or trees above a certain height. Any buildings erected, or any tree permitted to grow above this height, would be a breach of the covenant; and yet the damage to any one of the owners of the houses might be scarcely appreciable. If, then, it were necessary to wait until "substantial injury" (to use the words of the Master of the Rolls) were sustained, that period might never arrive, although violations of the covenant might be continually occurring, and the owners of the houses would never be in a situation to invoke the interposition of this court to prevent the breach of a covenant intended solely for their benefit. But it is unnecessary to determine this question, because there is evidence, upon which the court may fairly act, that actual damage will be produced by the Defendant's building diminishing the value of the Plaintiff's house.

The Defendant says, in the last place, that even if his proposed building entitles those who are interested in the covenant to apply for the protection of the court, yet that the Plaintiff cannot sue alone, but all the owners of the houses who are the assigns of the original covenantee, ought to be parties to the suit. It may be observed that this objection is a little at variance with the former one—that no person who does not sustain actual damage can apply to the Court for an injunction. The owners of the houses remote from the Defendants may possibly not sustain the slightest injury, and it would be rather strange that they who, according to the former argument, could not have sued at all on their own rights, should yet be necessary parties to a suit by the only sufferer from the violation of the covenant. I think that the owner of a house, who is injuriously affected by acts which are contrary to the covenant, may proceed against the party who commits them, without requiring the other

owners, to whom they are not in the smallest degree prejudicial, to join him in the suit.

The Defendant's grounds of resistance to the injunction altogether failing, the decree of the Master of the Rolls must be affirmed, and the Petition of appeal dismissed with costs.[1]

[1] "In a case resting simply upon covenant, if the party seeking specific performance be entitled in possession, he has a right to the enjoyment of the property *modo et formâ* according to his covenant; but if he be entitled in remainder only, I think he must shew that he has sustained some material damage by reason of the breach, to entitle him to relief of this nature.

"It was argued, that the court will never inquire what is the amount of special damage incurred, but will consider the parties to be bound by their contract; and it is true, that, if the court sees that the actual enjoyment of the property by one of the parties to the contract is interfered with in any manner contrary to what he stipulated for, the court will not enter into his reasons for seeking to have that enjoyment secured to him; but if the application is by a reversioner, I think the court is bound to consider what amount of interest he has in the question.

"Nothing so small as the interest of the reversioner in this case could well be presented to the consideration of a court of equity. I am asked, on a lease for 999 years, at a yearly rent of 33l. 12s. 8d., in which the reversioner is interested subject to a preceding life estate—the rent being amply secured—to grant an injunction in order to keep the property for the reversioner in the exact state provided for by the lessee's covenants. I rest my judgment on the ground that the relief asked is so minute that the court will not interfere, as the plaintiffs are not in possession of the property, and there is no case of anything like waste, but only a possibility of the respectability of the neighborhood being in some measure affected. I feel myself at liberty to inquire whether there is any such injury as to authorize me to interfere by injunction, and I think that there is not." Per Sir W. PAGE WOOD, V. C., in Johnstone *v.* Hall, 1856, 2 Kay & J. 414, 422.

"But it is very clear that a suit in equity to compel a compliance with such stipulations concerning the use of property must be seasonably commenced before the persons in possession of the estate have expended money or incurred liabilities in erecting buildings or other structures on the premises. It would be contrary to equity and good conscience to suffer a party to lie by and see acts done involving risk and expense by others, and then permit him to enforce his rights and thereby inflict loss and damage on parties acting in good faith. In such cases, a prompt assertion of right is essential to a just claim for relief in equity." Per BIGELOW, J., in Whitney *v.* Union Railway Co., 1858, 11 Gray, 359, 367.

"When a man is suing on a covenant, leaving out of the question of course those *minima* about which the law is said not to care, it is immaterial whether there is damage or not. A man is entitled to enforce that covenant, which is a species of property. In a case like this, however, it is important to prove damage, but when a man has proved the damage, then, to my mind, if he has got a right to sue the right to relief follows." Per KEKEWICH, J., in Collins *v.* Castle, 1887, L. R. 36 Ch. Div. 243, 254.

HAYWOOD *v.* THE BRUNSWICK PERMANENT BENEFIT BUILDING SOCIETY.

IN THE COURT OF APPEAL, 1881.

[*Law Reports* 8 *Queen's Bench Division* 403.]

Appeal from the judgment of STEPHEN, J., on further consideration.

This was an action against a building society, the mortgagees of certain land, upon a covenant to build and keep in repair houses erected upon the land. The facts were these:

By an indenture dated the 17th of May, 1866, made between Charles Jackson and Edward Jackson, Charles Jackson granted a plot of land to Edward to the use that Edward should pay Charles an annual chief rent of £11, and Edward for himself, his heirs, executors, administrators, and assigns, covenanted with Charles, his executors and assigns, that he, Edward, his heirs and assigns, would pay Charles, his heirs and assigns, this rent half yearly, and would erect and keep in good repair, and, when necessary, rebuild, messuages on the land of the value of double the rent. On the 2d of March, 1867, Charles Jackson conveyed to Haywood to the use of Haywood, his heirs and assigns, the said chief rent and all powers and remedies in respect thereof, together with the benefit of the said covenant. Edward Jackson assigned his interest to MacAndrew. MacAndrew by deed of the 8th of September, 1871, mortgaged the premises in question to certain persons described as the trustees of the Brunswick Building Society in fee subject to the rent-charge and covenants above mentioned. The building society was afterwards incorporated under the act of 1874, and under the mortgage deed took possession of the land and the buildings on it. It was conceded on the one hand that buildings of the stipulated value had been erected upon the land, and on the other that they had not been kept in repair, and the question was whether, under the circumstances stated, the building society was liable upon the covenant to keep them in repair. No question arose as to their liability to pay the chief rent, as the arrears were paid into court in the action.

The case was tried before STEPHEN, J., without a jury, at the Manchester Winter Assizes, 1881, who reserved it for further consideration, and later gave judgment for the plaintiff. . . .

BRETT, L. J. This appeal must be allowed. I am clearly of opinion, both on principle and on the authority of Milnes *v.* Branch, 5 M. & S. 411, that this action could not be maintained at common law. Milnes *v.* Branch, 5 M. & S. 411, must be understood, as it always has been understood, and as Lord ST. LEONARDS, Sug. V. & P., 14th ed., p. 490, understood it, and it will be seen, on reference to his book, that he considers the effect of it to be that a covenant to build does not run with the rent in the hands of an assignee.

This being so, the question is reduced to an equitable one. Now the equitable doctrine was brought to a focus in Tulk *v.* Moxhay, 2 Ph. 774, which is the leading case on this subject. It seems to me that that case decided that an assignee taking land subject to a certain class of covenants is bound by such covenants if he has notice of them, and that the class of covenants comprehended within the rule is that covenants restricting the mode of using the land only will be enforced. It may be also, but it is not necesary to decide here, that all covenants also which impose such a burden on the land as can be enforced against the land would be enforced. Be that as it may, a covenant to repair is not restrictive and could not be enforced against the land; therefore such a covenant is within neither rule. It is admitted that there has been no case in which any court has gone farther than this, and yet if the court would have been prepared to go farther, such a case would have arisen. The strongest argument to the contrary is, that the reason for no court having gone farther is that a mandatory injunction was not in former times grantable, whereas it is now; but I cannot help thinking, in spite of this, that if we enlarged the rule as it is contended, we should be making a new equity, which we cannot do.

I think also that Cox *v.* Bishop, 8 De G. M. & G. 815; 26 L. J. (Ch.) 389, shows that a court of equity has refused to extend the rule of Tulk *v.* Moxhay, 2 Ph. 774, in the direction contended for, and that if we decided for the plaintiff we should have to overrule that case. But it is said that if we decide for the defendants we shall have to overrule Cooke *v.* Chilcott, 3 Ch. D. 694. If that case was decided on the equitable doctrine of notice, I think we ought to overrule it. But I think there is much to show that the ground of the decision was that MALINS, V. C., was of the opinion—wrongly as it now turns out—that the covenant ran with the land, and the decision of the Court of Appeal appears to have proceeded on an admission. . . .[1]

[1]"The owners in fee simple of five adjoining estates mutually covenant with each other that a certain wall, which is for the common benefit of all, shall from time to time be repaired and maintained at the expense of the owners for the time being of these estates, that the expenses shall be borne ratably, and that the expense of each owner shall be a charge upon and issuing out of his estate. . . .

"I am unable to understand the distinction endeavored to be drawn between Tulk & Moxhay, 2 Ph. 774, and the present case, on the ground that in that case the covenant was, that the proprietor should not use the land in a particular manner, and that here the covenant is, that the proprietor shall contribute his quota to a common benefit. In my opinion there is no distinction between the two cases. . . .

"But even if this were not so, I am of opinion, that it being manifest to each of the defendants when he bought this land that it was protected by the sea wall in question, he was bound to inquire by whom that sea wall was maintained, and that therefore he must be held to have had notice of all that he would have learned if he had made such inquiry, and that as by

McCLURE *v.* LEAYCRAFT.

IN THE COURT OF APPEALS OF NEW YORK, 1905.

[183 *New York* 36.]

This action was brought to restrain the defendant from erecting an apartment house upon premises owned by him situate on the southwest corner of 145th street and St. Nicholas avenue in the city of New York.

Either party owns land nearly adjacent to that of the other and on the same block. There is a four-story dwelling designed for but one family standing on the land of the plaintiff, while the premises of the defendant

so inquiring he would have ascertained the existence of this covenant, he cannot now repudiate it, or refuse to perform the condition which affected the ownership of the land in the hands of the person for whom he bought." Per Lord ROMILLY, M.R., in Morland *v.* Cook, 1868, L. R. 6 Eq. 252, 260, 265-267.

"This is the case of two persons claiming title under grants from the same vendor, by which one piece of land became bound for the benefit of the other, and the question is whether the covenant can be enforced against the person who contracted to bear the burden. That as between the original parties, it could have been enforced, I cannot entertain a doubt; and I think that it is a covenant which runs with the land for all time. I entertain no doubt that as between contiguous owners, both being sub-purchasers under the same vendor, they take subject to the burden." Per Sir RICHARD MALINS, V. C., in Cooke *v.* Chilcott, 1876, L. R. 3 Ch. Div. 694, 700, 702.

"But in my opinion a court of equity does not and ought not to enforce a covenant binding only in equity in such a way as to require the successors of the covenantor himself, they having entered into no covenant, to expend sums of money in accordance with what the original covenantor bound himself to do. The case principally relied upon by the appellant was one before Vice-Chancellor MALINS. That was the case of Cooke *v.* Chilcott, 3 Ch. D. 694. Now undoubtedly the Vice-Chancellor did decide that case on the equitable doctrine, and said that he would enforce the covenant; but that is an authority which in my opinion was not right on that point. In the subsequent case of Haywood *v.* Brunswick Permanent Benefit Building Society, 8 Q. B. D. 403—both Lord Justice LINDLEY and myself were members of the court which decided that case—we expressed our opinion against Cooke *v.* Chilcott being a correct development of the doctrine established by Tulk *v.* Moxhay, 2 Ph. 774, or for which Tulk *v.* Moxhay was an authority.

"Then there was another case, before the late Lord ROMILLY, of Morland *v.* Cook, Law Rep. 6 Eq. 252, which was relied upon; but that was really a case not turning upon that doctrine, because it was this: There was a deed of partition of land all of which was below the sea level and was protected by a river or sea wall, and a covenant was entered into by the different parties to pay their proportion of the expense of repairing the seal wall, whoever should do it; and that covenant was enforced for and against the successors of those who were parties to the deed. But in that case it

are vacant. Both parties took title from a common source and subject to a covenant, made November 9th, 1886, against the erection at any time upon any part of the tract to which the lands of the respective parties belong "of any buildings except brick or stone dwelling houses" or "any tenement, apartment or community house." On the 8th of December, 1886, the covenant was so modified as to permit the erection of churches upon the tract and to limit the period of restraint to twenty-five years. These covenants by express agreement ran with the land, and the instruments containing the same were duly recorded as conveyances in the proper office. Shortly before the commencement of this action the defendant filed plans to erect and had begun the erection upon his premises of a six-story modern apartment house, "divided into forty-two independent and separate suites of rooms or apartments, each suite containing a complete set of rooms and improvements such as are usually found in a first-class private dwelling-house."[1]

VANN, J. As the order of reversal is silent as to the ground we are required to presume that the judgment of the trial court was not reversed upon a question of fact, and that the facts as found were approved by the Appellate Division. Bomeisler *v.* Foster, 154 N. Y. 229; Petrie *v.* Trustees of Hamilton College, 158 N. Y. 458, 462; Code Civ. Pro. § 1338. As said facts find ample support in the evidence and no exception was taken to any ruling relating to evidence, the only question presented for decision is whether upon those facts the plaintiff or the defendant is entitled to judgment. Spence *v.* Ham, 163 N. Y. 220, 224; National Harrow Co. *v.* Bement & Sons, 163 N. Y. 505.

appeared that there was, according to the view of the Master of the Rolls, a common law liability, independently of that covenant, to repair the sea wall, so that it would be very different from the case of creating a new liability." Per COTTON, L.J., in Austerberry *v.* Corporation of Oldham, 1885, L. R. 29 Ch. Div. 750, 774.

In Denman *v.* Prince, 1862, 40 Barb. 213, the plaintiff brought suit to recover from the defendants their proportion of an expenditure for repairing a certain dam. The recovery was sought under an agreement which had been entered into by the plaintiff and the defendant's grantor.

MILLER, J., speaking for the court said: "The defendants took their deeds subject to the plaintiff's rights, and I think the covenant of the plaintiff's grantor, to share in the repairs, was a covenant running with the land, and by the transfer of the grantor's title to the defendants became binding upon them. 4 Kent's Com. 473; Demarest *v.* Willard, 8 Cowen, 206; Norman *v.* Wells, 17 Wend. 148; Trustees of Watertown *v.* Cowen, 4 Paige, 510; 1 Smith's Leading Cas. in Eq., H. & W.'s ed. of 1855, 116, 118, 122; Allen *v.* Culver, 3 Denio, 285. Such covenants depend upon the privity of estate, and not on privity of contract, and they run with the land when they are for the benefit of the estate, and not for a mere personal benefit. Norman *v.* Wells, 17 Wend. 136; Vyvyan *v.* Arthur, 2 Dowl. & Ryl. 670; 1 Barn. & Cress. 410; Vernon *v.* Smith, 5 Barn. & Ald. 1; Van Rensselaer *v.* Bonesteel, 24 Barb. 365."

[1] The statement of the case has been abridged.

The covenant in this case differs from the one recently under consideration by us, in substance as well as in the date when it was made. Kitching *v.* Brown, 180 N. Y. 414. In that case the covenant was made in 1873 when the modern apartment house was unknown and the promise was not to erect any "tenement house" upon the premises then in question. The covenant now before us was made in 1886 when apartment houses were not unknown, and it runs against the erection of an apartment house *eo nomine*.

Assuming, therefore, that the defendant was about to violate the covenant, the question is whether upon the facts found and approved by the courts below relating to the radical change in the situation of the property affected by the covenant, a court of equity was bound to refuse equitable relief in the form of an injunction and to leave the injured party to recover his damages in an action at law. If the granting or withholding of a permanent injunction is within the absolute discretion of the Supreme Court, the exercise of that discretion by the Appellate Division in favor of the plaintiff is beyond our power to review; but if the facts found compel the conclusion, as matter of law, that an injunction should be refused, as inequitable, the order of reversal was wrong and the judgment rendered by the trial court should be restored.

While a temporary injunction involves discretion, a permanent injunction does not when the facts conclusively show that it would be inequitable and unjust. A court of equity will not do an inequitable thing. It is not bound by the rigid rules of the common law, but is founded to do justice when the courts of law, with their less plastic remedies, are unable to afford the exact relief which the facts require. Its fundamental principle, as its name implies, is equity. It withholds its remedies if the result would be unjust, but freely grants them to prevent injustice when the other courts are helpless. It cannot set aside a binding contract, but when the effect would be inequitable owing to facts arising after the date of the agreement and not within the contemplation of the parties at the time it was made, it refuses to enforce the contract and remands the party complaining to his remedy at law through the recovery of damages.

These principles were applied by this court in an important case which we regard as analogous and controlling. Trustees of Columbia College *v.* Thacher, 87 N. Y. 311. In that case adjoining landowners in the city of New York had entered into reciprocal covenants restricting the use of their respective lands to the sole purpose of a private residence and expressly excluding "any kind of manufactory, trade or business whatsoever." After the lapse of nearly twenty years the defendant permitted a building upon his land, which was bound by the covenant, to be used for the business of a tailor, a milliner, an insurance agent, a dealer in newspapers and a tobacconist. After the commencemnt of an action by the other landowner to restrain such use an elevated railway was built and a station located in the street in front of the premises of both parties.

It was found as a fact that the "railway and station affect the premises injuriously and render them less profitable for the purpose of a dwelling-house, but do not render their use for business purposes indispensable to their practicable and profitable use and occupation. The said railway and station, however, do not injuriously affect all the property fronting on Fiftieth street and included in the said covenant, but only a comparatively small part thereof."

The trial court awarded a permanent injunction and the General Term affirmed the judgment, but the Court of Appeals reversed and dismissed the complaint on the ground that a contingency, not within the contemplation of the parties, had frustrated the scheme devised by them and rendered the enforcement of the covenant oppressive and inequitable. . . .

So long as the Columbia College case stands, the judgment appealed from cannot, for the same principle controls both. In each the changed condition was wholly owing to the lawful action of third parties, which made the allowance of an injunction inequitable and oppressive. Indeed, an injunction in the case before us would be more oppressive than in the case cited, for it is expressly found, and the finding is final here, that the proposed erection would actually increase the value of the plaintiff's premises, while the enforcement of the covenant, without benefiting any one, would cause great damage to the defendant. It is a reasonable inference from the evidence that the rent roll of the defendant's land, with such dwelling houses on it as would rent to the best advantage, would not exceed $4,500 a year, while an apartment house such as he proposes to erect would rent for over $40,000 a year.

Nineteen of the twenty-five years which bounded the life of the covenant in question have passed, and the object of the parties in making it has been defeated by the unexpected action of persons not under the control of the defendant. Under the circumstances now existing the covenant is no longer effective for the purpose in view by the parties when they made it, and the enforcement thereof cannot restore the neighborhood to its former condition by making it desirable for private residences. If the building restriction were of substantial value to the dominant estate, a court of equity might enforce it even if the result would be a serious injury to the servient estate, but it will not extend its strong arm to harm one party without helping the other, for that would be unjust. An injunction that bears heavily on the defendant without benefiting the plaintiff will always be withheld as oppressive. No injustice is done, for the damages sustained can be recovered in an action at law, and the material change of circumstances so affects the interests of the parties as to make that remedy just to both.

We think that both reason and authority require a reversal of the order of the Appellate Division, but exact justice calls for a modification of the judgment of the Special Term. As that court found that the proposed erection would cause no damage to the plaintiff, its judgment might be held a bar to an action at law unless it expressly appeared that

it was without prejudice to that remedy for the recovery of all damages sustained.

We, therefore, reverse the order appealed from and so modify the judgment of the Special Term as to declare that it is without prejudice to an action at law, and as thus modified we affirm it, without costs in this court or in the Appellate Division to either party.

Order reversed, etc.

The lower court also found as facts that at the time of entering into the covenants, the property in question was occupied exclusively by small private dwellings, and was classed as a private residential district; that the neighborhood has since become one of large apartment houses and flats or tenement houses; that the erection of the building proposed by the defendant would really increase the value of the plaintiff's property, and that the change in the neighborhood had rendered the property undesirable for private dwellings.[1]

BARROW *v.* RICHARD.

IN THE COURT OF CHANCERY OF NEW YORK, 1840.

[8 *Paige* 351.]

This was an appeal from a decision of the Vice-Chancellor of the First Circuit, overruling the demurrer of the defendants to the complainant's bill. In 1825 T. R. Mercein was the owner of a block of ground in the city of New York, between McDougal Street and Sixth Avenue, on the south side of Waverly Place, which he divided into thirty-nine building lots, and made a map of such division, and filed it in the office of the registrar of deeds. On the 22d of March, 1825, Mercein sold and conveyed five of the lots to four different persons in severalty. In each of the conveyances a condition was inserted, that the conveyance should be void if there should at any time be erected, made, carried on, permitted or suffered, upon any part of the premises so conveyed, any livery stable, slaughter-house, tallow chandlery, smith's forge, furnace, brass or other foundry, nail or other iron factory, or any manufactory for the making of glue, varnish, vitriol, ink or turpentine, or for dressing or keeping skins

[1] "The restriction against building 'within eight feet of said streets' named in the deed has reference to the line of each street as existing at the date of the deed, and is intended to establish a uniform rule as of that date, which cannot be affected by the subsequent widening or narrowing of either street by public authority, or by the fact whether a building is erected before or after such alteration of the line." Per GRAY, C.J., in Tobey *v.* Moore, 1881, 130 Mass. 448, 451.

or hides, or any distillery or brewery, or any other manufactory, trade or business whatsoever which should or might be in anywise offensive to the neighboring inhabitants. And Mercein subsequently sold more than twenty other lots in the same block to different persons; and among them the lot No. 11, subsequently purchased by the complainant, and lots Nos. 12 and 13, on which the defendants afterwards established their coal-yard. In the conveyances of all these lots, a similar provision was inserted, against the use of the lots for any noxious business, or any trade or business which might be offensive to the neighboring inhabitants; except that in these subsequent conveyances, the provision was in the shape of a mutual covenant between the grantor and grantee, instead of being in the form of a condition, as in the deeds for the first five lots.

The complainant had erected a valuble dwelling-house, of the first class, upon his lot No. 11. And the defendants had established a coal yard on the adjoining lots, 12 and 13, which the complainant insisted was offensive to the neighboring inhabitants, and was a violation of the covenants contained in the deeds of those lots from Mercein. The object of the bill, therefore, was to compel the defendants to remove their coal-yard, and for a personal injunction against the use of the lots for any noxious or offensive purpose, contrary to those covenants.[1]

The CHANCELLOR [REUBEN H. WALWORTH.] From the averments in the complainant's bill in this case, which, upon the demurrer, must be taken as true, there can be no doubt that the object of Mercein in having this restriction inserted in his conveyances to Richard and others, was to enhance the value of the lots to all the purchasers in the block, and was intended to be enforced for their benefit. In this respect the case is different from that of the Duke of Bedford relative to the buildings erecting in the British Museum gardens, cited in the opinion of the Vice-Chancellor, from the 9th London edition of Sugden on Vendors. I have not access to that edition of Sugden at present, and therefore only recollect the case as read by the counsel, upon the argument; and from the statement of it in the opinion of the Vice-Chancellor. At the time that case came before the court of chancery in England, the splendid mansion called "Southampton House," once the residence of Rachel De Rouvigny, Countess of Southampton, *"La belle et vertueuse Huguenotte,"* and afterwards of her son-in-law, the amiable and talented Lord William Russel, who was beheaded in 1683 for his alleged participation in the Rye House plot, was no longer in existence; but his descendant, the Duke of Bedford, had caused a number of other houses to be erected upon the lot upon which it formerly stood. A question therefore naturally arose, whether a covenant with Lady Russel, who was temporarily the equitable owner of Southampton House, was intended for the benefit of the subsequent owners of the land on which that mansion stood at the time the covenant was entered into. And, if I recollect right, the court offered to the duke an issue, to ascertain whether the covenant not to build upon

[1] An opinion by Vice-Chancellor MCCOUN has been omitted.

the lands to the northward of Southampton House was intended as an easement to the lands upon which the new buildings of the duke were subsequently erected or not.

In the present case, I think, no one can doubt that the object of the covenants in the deeds from Mercein was to secure all the purchasers of lots in the block against an offensive use of any other of those lots. And if lots Nos. 12 and 13 had been conveyed to the defendants, or to those under whom they claim, while Mercein was still the owner of lot No. 11, I am not sure that any technical difficulty would have arisen in the maintaining an action at law, upon the covenants of the grantees of the two first-mentioned lots, by the complainant, as the subsequent purchaser of lot No. 11, and the assignee of the covenant for an easement for the benefit of that lot. But as No. 11 was first conveyed, and the mutual covenants in the deed refer to that lot only, and not to other lots which still remained in the hands of Mercein, the subsequent purchasers from him of lots Nos. 12 and 13 would have taken their lots entirely discharged of the easement in favor of No. 11, had it not been for their covenants in their own deeds for the benefit of the "neighboring inhabitants"; that is, the owners of other lots in the block. Although the complainant could not maintain a suit at law on that covenant, in his own name, and would, perhaps, be only entitled to nominal damages if the suit was brought in the name of Mercein, this court can give full effect to the covenant, by a suit in the name of the party for whose benefit and protection the covenant was intended. See Bleecker *v.* Bingham, 3 Paige's Rep. 246.

There can be no doubt, if the allegations in the bill are true, that the use of lots Nos. 12 and 13 as a coal-yard is a clear violation of the covenants of the grantees of those lots. The language of the covenant shows that several other uses of the lots, far less offensive than this, are in terms prohibited, on the ground that they would probably be offensive to the neighborhood. The allegation in the bill on this subject, though it is a little poetical, cannot be considered a mere poetic fiction, as it is sworn to by the complainant and is admitted by the demurrer. He there states that large quantities of volatile and offensive dust and smut from the coal rise in the air, and are diffused by the wind into the premises of the neighboring inhabitants. And in spite of all their care, such coal-dust and smut not only settles upon their walks and their grass-plots, but also on their fragrant plants and flowers, "beclouding the brightness and beauty which a beneficent Creator has given to make them pleasant to the eye and cheering to the heart of man." But what must be still more offensive to the ladies of the neighborhood, "this filthy coal-dust settles upon their door-steps, thresholds, and windows, and enters into their dwellings, and into their carpets, their cups, their kneading-troughs, their beds, their bosoms, and their lungs; discoloring their linen and their otherwise stainless raiment and robes of beauty and comfort, defacing their furniture, and blackening, besmearing and injuring every object of

utility, of beauty, and of taste." Making all due allowance for the coloring which the pleader has given to this naturally dark picture, it is perfectly certain that this keeping of a coal-yard upon any of these lots is a business offensive to the neighboring inhabitants, according to the spirit and intent of these restrictive covenants.

The Vice-Chancellor was therefore right in overruling the demurrer. And the order appealed from is affirmed with costs.[1]

[1] "An instrument in the form of a covenant has been held to be a grant. Barrow *v.* Richard, 8 Paige, 351; Birdsall *v.* Tiemann, 12 How. Pr. R. 551; Keteltas *v.* Penfold, 4 E. D. Smith, 122." Per ROBERTSON, J., in Fettretch *v.* Leamy, 1862, 9 Bosw. 510, 522.

"An easement is generally, and in general most naturally and properly, created by words of grant; but words of covenant may be equivalent to a grant if such be the clear intention. Gale and Whately, Easements, 32; Washburn Easements, 34; Holmes *v.* Sellars, 3 Lev. 305; Brewster *v.* Kitchell, 1 Salk. 198; Hills *v.* Miller, 3 Paige, 254; Watertown *v.* Cowen, 4 Paige, 510; Barrow *v.* Richard, 8 Paige, 351; American Notes to 1 Smith, L. C. 143." Per RODMAN, J., in Northeet, adm'r, *v.* Cromwell, 1870, 64 N. C. 1, 12.

"Upon such a construction of the contract, no reason is apparent why the burden should not be imposed by the covenant, since, by its nature, it could have been given by a grant. Carr *v.* Lowry, 3 Casey, 257; Barrow *v.* Richard, 8 Paige, 351; Gibert *v.* Peteler, and Rowbottom *v.* Wilson, *ante;* 1 Smith Lead. Cases, 144, 165, 166, 178, 179, and cases there cited." Per BOARDMAN, J., in Van Rensselaer *v.* Albany, & S. R. R. Co., 1874, 1 Hun, 507, 509.

"The cases of Hill *v.* Miller, 3 Paige, 254; Watertown *v.* Corden, 4 Paige, 510; Barrow *v.* Richard, 8 Paige, 350, relied on here, are where the covenant created an easement either by reservation in the land granted, or by grant in other lands of the grantor." Per LACY, J., in Tardy *v.* Creasy, 1886, 81 Va. 553, 562.

"That an agreement between owners of adjacent lands, restricting the mode of its use and enjoyment, although not entered into in the form of a covenant or condition, or so framed as to be binding on heirs and assigns by virtue of privity of estate, may nevertheless create a right in the nature of a servitude or easement in the land to which it relates, which can be enforced in equity, is now well settled in this commonwealth. Whitney *v.* Union Railway, 11 Gray, 359; Parker *v.* Nightingale, 6 Allen, 341. But to establish such *quasi* servitude or easement, it must appear, either by express stipulation or necessary and unavoidable implication, that the parties intended to impose a permanent restraint on the use or mode of occupation of their respective estates. If such restrictions should be incorporated into a grant in the form of a condition or reservation, or appended to it as a covenant real, or so inserted as to carry with it a notice to all persons claiming title in the premises that the free use and enjoyment of them is to a certain extent qualified or limited, the intent to create a servitude or privilege in its nature perpetual would be clearly manifested. But where the agreement for such a right or interest in real property rests wholly in parol, or is in the form of a covenant in gross, or is entered into by a written contract separate and distinct from the deed or instrument by which the title is passed, it must contain a stipulation which in express terms pro-

PAGE *v.* YOUNG

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1871.

[106 *Massachusetts* 313.]

Bill in equity, alleging that in 1806 Henry Hill and others, owning adjoining parcels of land in Cambridge, by an agreement under seal devoted certain portions of the land to canals then or thereafter to be dug for the use of proprietors and future owners of lands abutting thereon; that among these canals was one called Broad Canal, which they located eighty feet wide, leading from low water on Charles River; that they granted to each of themselves, as owners of land abutting on the south side of Broad Canal, and to all persons holding under them, the right to pass over and through the canal with vessels, boats and rafts, and the same to lay and fasten in one tier or row to the wharves and landing-places on their respective lots, subject to removal so as always to keep a free passage through the canal; that the plaintiff, under conveyances from parties to this agreement, now owns land on the south side of Broad Canal, and has the right to the free and unobstructed use of the canal eighty feet in width; and that the defendants, who are owners of land on the canal, between the land of the plaintiff and Charles River, have driven piles into the canal, reducing its width to thirty feet, and are preparing to construct a bridge across the canal, greatly obstructing the navigation. The prayer was, that the defendants might be enjoined to interfere with the free use of the canal; and for general relief. The defendants, in their answer, denied that they were practically obstructing the canal; and joined to their answer a demurrer to the bill, on the ground that the plaintiff had an adequate remedy at law.

COLT, J. Both parties in this case claim title to the land occupied by them on the south side of Broad Canal in Cambridge, by mesne conveyances from certain persons who in 1806, being then owners of the same, and of other land in the vicinity, entered into an agreement among themselves, to devote certain portions of their land to canals, then or

vides that the right or privilege is to be a permanent restriction on the land to which it relates, or it must be so framed as to lead to the unavoidable conclusion that such was the intention of the parties; otherwise it would be destitute of the essential element of a servitude or easement designed as a perpetual burden on one estate for the use and benefit of another, and would be nothing more than an agreement for the immediate and present mode of enjoying or using the property, having relation to its situation and condition, and the purpose to which it was to be appropriated at the time when the agreement was made." Per BIGELOW, C.J., in Hubbell *v.* Warren, 1864, 8 Allen 173, 178.

For a general discussion of the whole doctrine, see notes in 47 Am. Dec. 574, and 71 Am. Dec. 716, where the authorities are collected.

thereafter to be dug for the use of the proprietors and future owners of lots abutting on the same. Bread Canal was one of those laid out under this agreement.

The plaintiff's land bounds on this canal, and the original agreement defines the extent and character of the incorporeal right to which he has thus acquired title. The defendants, as owners of land bounding on the same, are governed in their use of it by the restrictions and limitations in favor of adjoining estates, which the original owners of the whole saw fit to impose; and the court will enforce the mode and extent of enjoyment so established, in favor of any owner who is substantially injured.

By the original agreement of 1806, the width of the canal is fixed at eighty feet, and the right of free passageway for vessels and other craft, to and from the wharves and landing-places, is given to all persons who from time to time shall become the owners of lands abutting on the same and holding under the parties to it. Upon the facts agreed at the hearing, there can be no doubt that the structure erected by the defendants is a substantial injury to the plaintiff's right of way. To some extent, it hinders and obstructs navigation, and increases the expense of transportation to and from his premises. He is entitled to the relief he seeks. Schwoerer *v.* Boylston Market Association, 99 Mass. 285; Proprietors of Long Wharf *v.* Central Wharf Co. 14 Allen, 271; Parker *v.* Nightingale, 6 Allen, 341; Whitney *v.* Union Railway Co. 11 Gray, 359.

The decree must be for the plaintiff, directing the removal of the structure complained of, with a perpetual injunction against its future erection and with costs.[1] Ordered accordingly.

[1] "An easement in favor of, and for the benefit of lands owned by third persons, can be created by grant, and a covenant by the owner, upon a good consideration, to use, or to refrain from using, his premises in a particular manner, for the benefit of premises owned by the covenantor, is, in effect, the grant of an easement, and the right to the enjoyment of it will pass as appurtenant to the premises in respect of which it was created. Reciprocal easements of this character may be created upon the division and conveyances in severalty to different grantees of an entire tract, and they may be created by a reservation in a conveyance, by a condition annexed to a grant, or by a covenant, and even a parol agreement of the grantees. The right sought to be enforced here is an easement, or, as it is sometimes called, an amenity, and consists in restraining the owner from doing that with, and upon, his property which, but for the grant or covenant, he might lawfully have done, and hence is called a negative easement, as distinguished from that class of easements which compels the owner to suffer something to be done upon his property by another. Easements of all kinds may be created and exist in favor of any third person, irrespective of any privity of estate or community of interest between the parties; and in this respect there is no distinction between negative easements and those rights that are more generally known as easements as a way, etc. . . .

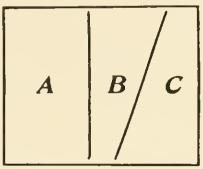
"It is of no importance whether an action at law could be maintained against the grantees of Beers, as upon a covenant running with the land and

PECK *v.* CONWAY.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1876.

[119 *Massachusetts* 546.]

Bill in equity by the owner of lot A, shown on the plan printed in the margin, to restrain the defendants, the owners of lots B and C, from building on lot B.



The case was reserved by COLT, J., upon the pleadings and the report of a Master, for the consideration of the full court, and was as follows:

Richard Ensign, on February 14, 1848, being the owner of lots A and B, and occupying lot A as a homestead, conveyed lot B, in fee simple, with general covenants of warranty, to Joseph B. Huggins, who was then the owner of lot C. The deed described the land by metes and bounds, and following the description was this clause, "with this express reserva-

binding them. Whether it was a covenant running with the land or a collateral covenant, or a covenant in gross, or whether an action at law could be sustained upon it, is not material as affecting the jurisdiction of a court of equity, or the right of the owners of the dominant tenement to relief upon a disturbance of the easements.

"The action can be maintained for the establishment and enforcement of a negative easement created by the deed of the original proprietor, affecting the use of the premises now owned and occupied by the defendants, of which they had notice, and subject to which they took title. There is no equity or reason for making a servitude of the character of that claimed by the plaintiffs in the lands of the defendant, an exception to the general rule which charges lands in the hands of a purchaser with notice with all existing equities, easements and servitudes. The rule and its application does not depend upon the character or classification of the equity's claim, but upon the position and equitable obligation of the purchaser. The language of courts and of judges has been very uniform and very decided upon this subject, and all agree that whoever purchases lands upon which the owner has imposed an easement of any kind, or created a charge which would be enforced in equity against him, takes the title subject to all easements, equities and charges however created, of which he has notice. Parker *v.* Nightingale, 6 Allen, 341; Catt *v.* Tourle, L. R. 4 Ch. App. 654; Carter *v.* Williams, 18 W. R. 593, before V. C. JAMES; Wolfe *v.* Frost, 4 Sandf. Chy. R. 72; Tulk *v.* Moxhay, *supra;* Whiting *v.* Union R. Co. 11 Gray, 359; Gilbert *v.* Peteler, *supra;* Barrow *v.* Richard, *supra;* Greene *v.* Creighton, 7 R. I. 1; Bronner *v.* Jones, 23 Barb. 153." Per ALLEN, J., in Trustees Columbia College *v.* Lynch, 1877, 70 N. Y. 440, 446, 449.

tion, that no building is to be erected by the said Joseph B., his heirs or assigns, upon the land herein conveyed."

The defendants purchased lots B. and C in 1874. Of the deeds in the chain of title from Huggins, which were all duly recorded before the defendants purchased, some mentioned or referred to the reservation in Ensign's deed, but the deed to the defendants, which contained full covenants of warranty, made no mention of it or reference to former deeds. The defendants made no examination of the records before their purchase, and had no actual knowledge of the reservation.

The plaintiff purchased lot A of Richard Ensign by deed dated April 13 and recorded April 14, 1848. This deed made no mention of privileges or appurtenances, or of the reservation in the deed to Huggins. The defendants purchased their land, paying therefor its full market value, free of incumbrances, for the purpose of building thereon. The plaintiff notified them of the restriction before they commenced building, and forbade them so to do, and, upon their proceeding to build upon the land, brought this bill.

The Master found that the greater part of the proposed building would stand upon lot B; that it would not obstruct the view from the front rooms in the plaintiff's house, and only partially obstruct the view from the rooms in the rear part of the house, and that its erection would be no appreciable damage or injury to the plaintiff's premises.

MORTON, J. Both parties derive title from Richard Ensign. The deed of said Ensign, under which, through various mesne conveyances, the defendants derive their title, conveys to Joseph B. Huggins a triangular piece of land adjoining the lot now owned by the plaintiff, "with the express reservation, that no building is to be erected by the said Joseph B., his heirs or assigns, upon the land herein conveyed." Ensign, being owner of the fee, had the right to sell his land subject to such reservations or restrictions as to its future use and enjoyment as he saw fit to impose, provided they were not contrary to public policy. The restriction in this deed that no building should be erected upon the land conveyed was one which he had a right to make, and there is no room for doubt that, if a building was erected in violation of this restriction Ensign, as long as he lived and remained the owner of the adjoining land, would be entitled to relief in equity to enforce the restriction. Parker *v.* Nightingale, 6 Allen 341; Whitney *v.* Union Railway, 11 Gray 359; Badger *v.* Boardman, 16 Gray 559.

The only question in the case is whether the plaintiff, who is the grantee of said Ensign, is entitled to the same remedy.

The reservation creates an easement, or servitude in the nature of an easement, upon the land conveyed. If this easement was created for the benefit of the adjoining lot, of which the grantor in the deed remained the owner, and not for the personal convenience of the grantor, and was intended to be annexed to such lot, it would be appurtenant thereto and would pass to a grantee thereof.

The question whether such an easement is a personal right, or is to be construed to be appurtenant to some other estate, must be determined by the fair interpretation of the grant or reservation creating the easement, aided, if necessary, by the situation of the property and the surrounding circumstances.

In this case the triangular piece of land affected by the easement was a part of a large lot owned by Ensign. He retained the remainder of the large lot for his homestead. There is no suggestion that he had other land in the vicinity which could be benefited by the restriction. It is difficult to see how he would have any interest in restricting the use of the land sold, except as owner of the house lot which he retained. The nature of the restriction also implies that it was intended for the benefit of this lot. A prohibition against building on the land sold would be obviously useful and beneficial to this lot, giving it the benefit of better light and air and prospect; this is its apparent purpose, while it would be of no appreciable advantage for any other purpose. The fair inference is that the parties intended to create this easement or servitude for the benefit of the adjoining estate. We are therefore of opinion that it was not a mere personal right in Ensign, but was an easement appurtenant to the estate which he conveyed to the plaintiff. Dennis *v.* Wilson, 107 Mass. 591; Stearns *v.* Mullen, 4 Gray 151.

It follows that the plaintiff is entitled to the relief which he seeks.

The fact that the defendants, when they took their deed, had not actual knowledge of this reservation is immaterial. They derive their title under the deed which contains it, and have constructive notice of the provisions of the deed. Whitney *v.* Union Railway, *ubi supra.*

Nor can the fact found by the Master, that the erection of the building contemplated by the defendants "would be no appreciable damage or injury to the plaintiff's premises," affect the rights of the parties. Such an act of the defendants would be against the restriction by which they are bound, and a violation of the rights of the plaintiff, of which she cannot be deprived because in the judgment of others it is of little or no damage.

Decree for the plaintiff.[1]

[1] "Another objection which has been made is that there were no reciprocal covenants from the parties interested in the rest of the land for the benefit of the purchaser of a particular portion, as it was said was the case in Whatman *v.* Gibson, 9 Sim. 196, but only this covenant by the purchaser with the owner of the rest of the land which was unsold, that the particular purchaser should be bound not to make certain erections upon the land which he had purchased, leaving it open to the owner of the unsold land to make or abandon the projected street, and to impose or not to impose upon future purchasers from him a similar condition. But I think that this is no real objection. It only amounts to this, that the defendant Douglas has covenanted with the vendor not to perform certain acts, and has not thought fit to make the vendor enter into a covenant with him to take similar covenants from future purchasers of the remaining land. . . .

"Where part of the remaining property of the original vendor has been sold

NOTTINGHAM PATENT BRICK AND TILE COMPANY *v.* BUTLER.

IN THE COURT OF APPEAL, 1886.

[*Law Reports* 16 *Queen's Bench Division* 778.]

The owner in fee of land sold and conveyed it, during the years 1865, 1866, and 1867, in thirteen lots to different purchasers, each lot being subject to covenants entered into by the purchasers, restricting the use of the land as a brickyard, and in other respects. The defendant subsequently became the purchaser of Lot 11, but the deed of conveyance to him did not contain the restrictive covenants. In 1882 the plaintiffs, a company for manufacturing bricks, contracted to purchase Lot 11 from the defendant under conditions of sale which stated that the property

to another person, who must be considered to have bought the benefit of the former purchaser's covenant, and more especially when the subsequent purchaser has entered into a similar covenant on his own part, he must be considered to have done this in consideration of those benefits, and even whether he actually knew or was ignorant that this covenant was in fact inserted in the other purchase deeds, because he must be taken to have bought all the rights connected with his portion of the land." Per Sir W. PAGE WOOD, in Child *v.* Douglas, 1854, Kay, 560, 569, 571.

"These authorities establish the proposition that, when the benefit has been once clearly annexed to one piece of land, it passes by assignment of that land, and may be said to run with it, in contemplation as well of equity as of law, without proof of special bargain or representation on the assignment. In such a case it runs, not because the conscience of either party is affected, but because the purchaser has bought something which inhered in or was annexed to the land bought. This is the reason why, in dealing with the burden, the purchaser's conscience is not affected by notice of covenants which were part of the original bargain on the first sale, but were merely personal and collateral, while it is affected by notice of those which touch and concern the land. The covenant must be one that is capable of running with the land before the question of the purchaser's conscience and the equity affecting it can come into discussion. When, as in Renals *v.* Cowlishaw, 9 Ch. D. 125, there is no indication in the original conveyance, or in the circumstances attending it, that the burden of the restrictive covenants is imposed for the benefit of the land reserved, or any particular part of it, then it becomes necessary to examine the circumstances under which any part of the land reserved is sold, in order to see whether a benefit, not originally annexed to it, has become annexed to it on the sale, so that the purchaser is deemed to have bought it with the land, and this can hardly be the case when the purchaser did not know of the existence of the restrictive covenant. But when, as here, it has been once annexed to the land reserved, then it is not necessary to spell an intention out of surrounding facts, such as the existence of a building scheme, statements at auctions, and such like circum-

was sold subject to any matter or thing affecting the same, whether disclosed at the time of sale or not, and provided that any error or omission in the particulars should not annul the sale, nor entitle the purchaser to compensation.

The existence of the restrictive covenants was not mentioned in the contract, but during the negotiations the defendant stated that there were covenants restricting the use of the land as a brickyard, but his solicitor, who was present, and to whom the plaintiff's solicitor applied for information, stated that he was not aware of any such covenants. The plaintiffs paid a deposit upon the purchase money, and having subsequently discovered that there were restrictive covenants, they claimed to rescind their contract and sued the defendant to recover the amount of the deposit.

Lord ESHER, M. R.[1] I am of opinion that the decision of WILLS, J., must be affirmed.

One fact in the case was not clearly brought before WILLS, J., but, assuming the facts to be as he considered that they were, I think his judgment was right in every particular. The first point he had to consider was, whether there were with regard to this property restrictive covenants which could be enforced by any one of the purchasers of other parts of the estate of which this property had formed part against any other. It has been argued that there are no restrictive covenants capable of being enforced in that way, because there was no covenant, either in writing or otherwise in express terms, that each covenanter—each original purchaser—would consider himself bound to the other purchasers, and there was no covenant by the original vendor. But I think that WILLS', J., view of the law on this subject is perfectly correct. In my view he is right in saying that, when an estate is put up for sale in lots, subject to a condition that restrictive covenants are to be entered into by each of the purchasers with the vendor, and the vendor is intending at that sale to sell the whole of the property, the question whether it is intended that each of the purchasers shall be liable in respect of those restrictive covenants to each of the other purchasers is a question of fact, to be determined by the intention of the vendor and of the purchasers, and that question must be determined upon the same rules of evidence as every

stances, and the presumption must be that it passes on a sale of that land, unless there is something to rebut it, and the purchaser's ignorance of the existence of the covenant does not defeat the presumption. We can find nothing in the conveyance to Sir John Millais in any degree inconsistent with the intention to pass to him the benefit already annexed to the land sold to him. We are of opinion, therefore, that Sir John Millais's assigns are entitled to enforce the restrictive covenant against the defendant, and that his appeal must be dismissed." Per COLLINS, L.J., in Rogers *v.* Hosegood, 1900, 2 Ch. 388, 407.

[1]Only a portion of the opinion of Lord ESHER is given, and the concurring opinions of Lords Justices LINDLEY and LOPES have been omitted.

other question of intention. And, if it is found that it was the intention that the purchasers should be bound by the covenants *inter se,* a court of equity will, in favor of any one of the purchasers, insist upon the performance of the covenants by any other of them, and will do so under such circumstances without introducing the vendor into the matter.

Now in the present case the property was originally put up for sale in lots, and it seems to me that the evidence is conclusive that the vendor, at the time when he first put it up to be sold by auction in lots, intended to sell the whole property, and that his intention to sell the whole was clearly published, so that every one who was present at that auction must have known that he was intending to sell the whole, and, as the purchasers were to enter into restrictive covenants, it follows that the purchasers must have known that those covenants were really intended for the benefit of each of them as against all the rest. But it is said that the whole of the property was not sold at once; some parts of it were sold at the first auction, and other parts were not sold till afterwards. That is true, and it is also true that the subsequent sales were at considerable distances of time after the first. That would be a circumstance to be taken into account in considering what was the view of the later purchasers if that was material. But it is impossible, in my opinion, to say that the mere fact that the lots were not all sold on one day can make any difference. Lapse of time is not of itself a bar to the liability of the purchasers *inter se;* it is a matter to be taken into consideration, but it is not a bar. In the present case I think the evidence is conclusive that the sale of every one of the lots was made under the original conditions, and under the authority which was given on the first occasion, when the vendor put up the whole of the lots for sale. The lots were not all sold on the first occasion only because there were not bidders for them all, but no new instructions were given to the auctioneer for the subsequent sales, no new bargain was made with him, no charges were made by him for altering any of the conditions.

There are two lines of cases to be found in the books. The first is where there has been a sale of part of a property, with no then existing intention of selling the rest, and subsequently there is a sale of another part; then, as regards the latter sale, you cannot look at the conditions of the former sale; you must look only at the conditions relating to the latter sale. The other line of cases is where the whole of a property is put up for sale (not necessarily under a building scheme), but is put up for sale in lots, subject to certain restrictive covenants; then it is a question of fact whether it was or was not the intention that the restrictive covenant should be entered into for the benefit of each of the purchasers as against all the others, and it is a most material circumstance whether the vendor reserves any part of the property for himself. If he does not reserve any part, that is almost if not quite conclusive (unless there is something contradictory) that the covenants which he takes from

the purchasers are intended for the benefit of each purchaser as against the others.

Then it is said that there is no one who could enforce these covenants. But, if all these sales were parts of the one original sale, and the covenants were entered into by each purchaser for the benefit of the other purchasers, each of them could insist on the performance of the covenants by the others.

But the case comes before us on another point of view. It is said, and I will now assume that the fact is so, that Butler was a purchaser for value without notice of the restrictions, and then it is said that, if the plaintiffs took a conveyance from him, they would not be subject to the restrictions. As at present advised I think that would be so, and that, when once there has been a purchaser for value without notice of the restrictions, the restrictions are gone, and a good title can afterwards be made free from them. But the title would then depend upon the question whether the previous purchaser did buy without notice; that must always be a question of fact and a matter of evidence, and a title depending upon evidence of matters of fact is a title which is capable of being disputed in a court of law, and, although the plaintiffs would in point of law, if the alleged fact was true, get the property free from the restrictions, yet in all probability, or almost certainly, they would be buying a lawsuit in order to get their title clear. Under such circumstances, where the rectitude of the title depends upon facts which very probably will be disputed, and are certainly capable of being disputed, a court of equity will not, as I understand, enforce the contract. Therefore, in that view also, the defendant would not be entitled to specific performance of the contract. But still, if there were nothing else in the case, I think he could not have been compelled to give back the deposit.[1]

[1] "The main ground on which the plaintiff rests his claim to equitable relief is, that the condition annexed by the original owner and grantor to his grant of the entire tract of land, of which the plaintiff and defendant now by mesne conveyances severally hold distinct parcels, constitutes a perpetual restriction on the use of the part now owned by the defendant, in the nature of a servitude or easement, on the observance of which the plaintiff, as the owner of the other part of the original parcel, has a right to insist.

"It is doubtless true that such may be the effect of a condition in a class of cases where it is apparent that the condition was annexed to a grant for the purpose of improving or rendering more beneficial and advantageous the occupation of the estate granted, when it should become divided into separate parcels and be owned by different individuals, or when the manifest object of a restriction on the use of an estate was to benefit another tract adjoining to or in the vicinity of the land on which the restriction is imposed. But, in the absence of any fact or circumstance to show such purpose or object, a condition annexed to a grant can have no effect or operation either at law or in equity beyond that which attaches to it by the rules of the common law." Per BIGELOW, C. J., in Jewell *v.* Lee, 1867, 14 Allen, 145, 149.

"Then there is a more plausible argument to this effect—that the condi-

DE GRAY *v.* MONMOUTH BEACH CLUB HOUSE CO., 1892, 50 N. J. Eq. 329, 332. Per GREEN, V. C.

The bill as originally filed by Mr. De Gray sought to enforce the covenant contained in these deeds by enjoining the building of a large house upon the club-house tract and the erection of a commodious bathing-house on the Robinson lot.

It is settled that a court of equity will restrain the violation of a covenant, entered into by a grantee, restrictive of the use of lands conveyed, not only against the covenantor but against all subsequent purchasers of the lands with notice of the covenant, irrespective of the questions whether the covenant is of a nature to run with the land or whether it creates an easement; provided, however, that its enforcement is not against public policy. Tulk *v.* Moxhay, 2 Phil. 774 (said by BRETT, L. J., in Haywood *v.* Brunswick Building Society, 8 Q. B. Div. 403, 407, to be the leading case on the subject); Mann *v.* Stephens, 15 Sim. 376; Bristow *v.* Wood, 1 Coll. 480; Coles *v.* Sims, 5 DeG., M. & G. 1; Wilson *v.* Hart, L. R. (1 Ch. App.) 468; Fielden *v.* Slater, L. R. (7 Eq. Cas.) 523; Richards *v.* Revitt, 7 Ch. D. 224; Patman *v.* Harland, 17 Ch. D. 359; Brewer *v.* Marshall, 4 C. E. Gr. 537; Winfield *v.* Henning, 6 C. E. Gr. 188; Coudert *v.* Sayre, 1 Dick. Ch. Rep. 386. . . .

This rule of equity being an encroachment on the general doctrine of the common law that the burden of a covenant does not run with the land Spencer's Case, 1 Sm. Lead. Cas.; Austerberry *v.* Corporation of Oldham, 29 Ch. D. 750, its application is not to be extended beyond the class of cases in which it has been heretofore enforced, Brewer *v.* Marshall, *supra,* at p. 546, and is to be confined to negative covenants. Heyward *v.* Brunswick Building Society, *supra;* Hall *v.* Ewin, 37 Ch. D. 74; London & S. W. Ry. Co. *v.* Gomm, *supra.*

tions are different as regards different lots; that there is more than one property; that some of the lots are altogether free from conditions; that some were in the first instance put up for sale subject to conditions and were afterwards sold free from condition; not only that, but that one of the plaintiffs actually bought a part of it free from conditions, and that it does not lie in the mouth of the plaintiffs to say that the conditions subject to which the defendant bought can be enforced. To my mind that makes not the slightest difference. It is true that there are different conditions, and there are different conditions applicable to different lots and different bunches of lots, if I may so say, and it is not only reasonable, but it is what one might expect. . . .

"In the development of a building estate judgment is required in such matters, and it certainly is against one's own common experience to find an extensive property of 100 acres laid out on the principle that only houses of a particular class shall be built all over it. . . .

"The defendants' argument on this point seems to me to be made under a misapprehension, rendered necessary perhaps by the exigencies of his position, of the circumstances under which a building estate is developed." Per KEKEWICH, J., in Collins *v.* Castle, 1887, L. R. 36 Ch. Div. 243, 253, 254.

The equity thus enforced arises from the inference that the covenant has, to a material extent, entered into the consideration of the purchase, and that it would be unjust to the original grantor to permit the covenant to be violated. . . .

The class of cases in which equity has given such relief embraces those involving restrictive covenants, entered into with the original owner, or owners, of a tract, in pursuance of a general plan for the development and improvement of the property, by laying it out in streets, avenues and lots, adopting some uniform or settled building scheme, regulating the number, location, size or style of houses, or the uses to which the buildings or property may be put. Whatman *v.* Gibson, 9 Sim. 196; Coles *v.* Sims, Kay 75, S. C., 5 De G., M. & G. 1; Western *v.* McDermott, L. R., 1 Eq. Cas., 499; S. C., 2 Ch. App. 72; Richards *v.* Rivitt, 7 Ch. D. 224; Nottingham Brick Co. *v.* Butler, 15 Q. B. Div. 261; S. C., 16 Q. B. Div. 778; Spicer *v.* Martin, 34 Ch. D. 1; S. C., 14 App. Cas. 12; Collins *v.* Castle, 36 Ch. D. 243; McKenzie *v.* Childers, 43 Ch. D. 265; Parker *v.* Nightingale, 6 Allen 341; 83 Am. Dec. 632; Linzee *v.* Mixer, 101 Mass. 512; Jeffries *v.* Jeffries, 117 Mass. 184; Hamlin *v.* Werner, 144 Mass. 397.

The action is held not to be maintainable between purchasers not parties to the original covenant, in cases in which—

(1) It does not appear that the covenant was entered into to carry out some general scheme or plan for the improvement or development of the property which the act of defendant disregards in some particular. Sheppard *v.* Gilmore, 57 L. I. Rep., N. S., Ch. 6; Dana *v.* Wentworth, 111Mass. 291; Beals *v.* Case, 138 Mass. 140.

(2) It does not appear that the covenant was entered into for the benefit of the land of which complainant has become the owner. Sharp *v.* Ropes, 110 Mass. 381; Keates *v.* Lyon, L. R., 4 Ch. App., 418; Jewell *v.* Lee, 14 Allen 145; Renals *v.* Colishaw, 11 Ch. D. 866.

(3) It appears that the covenant was not entered into for the benefit of subsequent purchasers, but only for the benefit of the original covenantee and his next of kin. Master *v.* Hansard, 4 Ch. D. 718. See Nottingham Brick Co., 15 Q. B. Div. 261; Collins *v.* Castle, 36 Ch. D. 243; Renals *v.* Colishaw, 9 Ch. D. 125.

(4) It appears that the covenant has not entered into the consideration of the complainant's purchase. Renals *v.* Colishaw, 7 Ch. D. 224; S. C., 11 Ch. D. 866; Master *v.* Hansard, *supra;* Keates *v.* Lyon, *supra.*

(5) It appears that the original plan has been abandoned without dissent, or the character of the neighborhood has so changed as to defeat the purpose of the covenant, and to thus render its enforcement unreasonable. Duke of Bedford *v.* Trustees, 2 Myl. & K. 552; Sayers *v.* Collyer, 28 Ch. D. 103; Trustees *v.* Thacher, 87 N. Y. 311; Ammerman *v.* Deane, N. Y. Ct. App. 30 N. E. Rep. 741; Page *v.* Murray, 1 Dick. Ch. Rep. 325; Roper *v.* Williams, Turn. & R. 18; Peck *v.* Matthews, L. R., 3 Eq. Cas. 515. See German *v.* Chapman, 7 Ch. D. 271. . . .

Much that is said in the opinions of the principle on which equity interferes in this class of cases is open to the criticism of KEKEWICH, J., in Collins *v.* Castle, 36 Ch. D. 243, that the statement of Mr. Justice WILLS is really a statement of the law deducible from the cases and scarcely the statement of a principle in a logical sense.

In New York relief seems to be granted on the theory that the covenant creates an easement over the lands of the covenantor for the benefit of all other lands subject to the same covenant. Trustees *v.* Lynch, 70 N. Y. 440, and the Massachusetts decisions lean in the same direction. Beals *v.* Case, 138 Mass. 140.

While cases involving light, air or view might in some respects be based on the doctrine of easements, it is not satisfactory when it comes to be applied to covenants as to uses to which buildings are to be put, nor could the covenant, if it created an easement, be suspended because a subsequent purchaser did not buy with the restrictions of the covenant in view. But, as stated, the courts in England, as well as our court of errors and appeals, have repudiated the idea that the court interferes on the ground of protecting an easement.

The equity would seem to spring from the presumption that each purchaser has paid an enhanced price for his property, relying on the general plan, by which all the property is to be subjected to the restricted use, being carried out, and that while he is bound by and observes the covenant, it would be inequitable to him to allow any other owner of lands, subject to the same restrictions, to violate it. . . .

The law, deducible from these principles and the authorities, applicable to this case, is, that where there is a general scheme or plan, adopted and made public by the owner of a tract, for the development and improvement of the property, by which it is divided into streets, avenues and lots, and contemplating a restriction as to the uses to which buildings or lots may be put, to be secured by a covenant embodying the restriction, to be inserted in each deed to a purchaser; and it appears, by writings or by the circumstances, that such covenants are intended for the benefit of all the lands, and that each purchaser is to be subject to and to have the benefit thereof; and the covenants are actually inserted in all deeds for lots sold in pursuance of the plan; one purchaser and his assigns may enforce the covenant against any other purchaser and his assigns, if he has bought with knowledge of the scheme, and the covenant has been part of the subject-matter of his purchase.

KING *v.* DICKESON.

IN THE SUPREME COURT OF JUDICATURE, CHANCERY DIVISION, 1889.

[*Law Reports* 40 *Chancery Division* 596.]

This action was brought by Henry King, claiming an injunction to restrain the defendants from building on a piece of land, part of lot 258, situate in Ramsden Road, Balham, in their possession, any building within fifteen feet of Ramsden Road, except fences not more than six feet high.

On the sale of a building estate in lots the purchaser of each lot entered into a covenant with the vendor and with the purchasers of the other lots not to build upon his lot beyond the specified building line. The purchaser of one lot mortgaged a part of his lot. The mortgagee had notice of the covenant, but no express restriction as to the use of the land was imposed on him by the mortgagor. The mortgagee afterwards foreclosed and sold the mortgaged land, part of which ultimately became vested in the defendants by purchase. The defendants, as well as the sub-purchasers through whom they claimed, took with notice of the restrictive covenant.[1]

NORTH, J. I think the case is free from doubt. [His Lordship stated the facts, and continued:] The defendants have acquired part of Lot 258, subject to the original restrictive covenant. Other lots of the estate have been conveyed to other purchasers, who, as it appears, have in many instances built on their lots houses having bay windows projecting beyond the building line.

The question for my decision is, whether the defendants who are purchasers of part of Lot 258, upon which they are proposing to build beyond the building line, can be restrained from so doing—not by the purchaser of another lot—but by the owner of the remainder of the same Lot 258. There was no agreement entered into between the plaintiff and his mortgagees as to the user of the land comprised in the mortgage, and though, no doubt, the mortgagees took the land subject to the obligations then existing in respect of it, and therefore subject to the right of the owners of the other lots to compel the observance of the restrictive covenant, there was nothing to prevent the owner of Lot 258 from building upon it in any way he pleased, provided that none of the owners of the other lots objected to his doing so. It has been suggested that the owners of the other lots have in many cases lost by reason of their conduct the right which they originally had to object to a breach of the covenant by the owner of Lot 258. If they have all lost that right the owner of that lot would be entitled to build upon it in any way he

[1] This statement of the case is taken from the head note.

pleased. It is suggested that the mortgagee of a part of Lot 258 entered into some new obligation with his mortgagor, the owner of the other part, as to the user of the mortgaged part. For that suggestion I can see no color whatever. In my opinion the owner of Lot 258 conveyed the part of it comprised in the mortgage to the mortgagee subject to all rights then existing in relation to it, but did not by implication create as against the mortgagee any new right or obligation in his own favor, and, not having created any such new right or obligation as against the mortgagee, he cannot now set it up as against a purchaser who derives title through the mortgagee. The action, therefore, fails, and must be dismissed; but this, of course, will not affect any claim which may be made by the owners of the other lots to prevent the defendants from building in contravention of the restrictive covenant.[1]

[1] "If a man by the leave of a person who is bound by a restrictive covenant as to the use of land enters into possession of the land with notice of the covenant, he will be restrained from violating that covenant. Why should not a person who enters into possession of land for his own convenience, and by the permission of a person bound by a restrictive covenant, be as much bound as a tenant from year to year? We ought to extend the principle to such a case, if our holding it so to apply is in fact an extension." Mander *v.* Falcke, 1891, 2 Ch. Div. 554, 556.

CHAPTER III.

RESCISSION, REFORMATION, AND CANCELLATION OF INSTRUMENTS.

Section 1.—Mistake.

A. Mistake of Law.

PARKE *v.* PEAKE.

In Chancery, 1577-78.

[*Choyce Cases in Chancery* 116.[1]]

John Beale, father to the plaintiff's wife, surrendered certain copyhold lands, parcel of the Manor of Ferneham, All Saints, in the County of Suff, to Richard Peake and Anne his wife (the said Anne being sole daughter and heir to the said Beale) without any words to carry an estate of inheritance but only in the *C. in liberat. est inde sesina Tenend. sibi hered. & assign. suis.* And for that it was meant by the said Beale to passe a fee-simple, and many other coppies as well in the same Mannor as Mannors adjoyned were passed in like words: Therefore decreed. the plaintiff and his heirs shall enjoy the lands from the defendant his heirs.[2]

PRINCE *v.* GREEN.

In Chancery, 1598.

[*Tothill* 123.]

A lease made to the defendant by tenant in tail, for forty years, and to commence at a time to come, void in law yet holpen in equity, and the intent of the party performed.

[1] Stevens and Haynes edition.

[2] In commenting on this case and Prince *v.* Green, *infra*, Spence says: "All these cases may indeed be referred to another head of jurisdiction, which will be noticed hereafter, namely, specifically carrying out the agreement of the parties." 1 Jurisdiction of the Court of Chancery 635.

MERRICK *v.* HARVEY.

IN CHANCERY, BEFORE THE LORDS COMMISSIONERS, 1649.

[*Nelson* 48.]

The plaintiff married a widow, and there being several accompts depending between her former husband and the defendant, who was much indebted to him, the accompt was stated, and on the 2d of November, 1639, the defendant gave bond, with sureties, for the payment of the money due on the balance.

Two days afterwards (some things being forgotten) a farther accompt was adjusted between them, and then *General Releases* were given to each other, which was not intended to release the bond: and it appearing so to the court by several circumstances, it was decreed that the said release should be set aside, and no advantage taken of it as to the bond.

LANSDOWN *v.* LANSDOWN.

IN CHANCERY, BEFORE LORD CHANCELLOR KING,[1] 1730.

[*Mosely* 364.]

There were four brothers, the second dies, and the eldest brother enters upon his lands, the youngest brother claims a title, upon which they apply to Hughes a schoolmaster, their neighbour in the country, (who often acted as an attorney) for his opinion, who, upon consulting a book called The Clerk's Remembrancer, gave it in favor of the youngest brother, because lands could not ascend; upon which the eldest brother

[1] It is quite usual to say that Lord KING lost on the Woolsack the great reputation gained as chief justice of the Court of Common Pleas. It is also said that he dozed over his cases in the latter part of his career on the bench, and that Attorney-General Yorke (later HARDWICKE) and Solicitor-General Talbot arranged the minutes of the decrees between them, "so as that strict justice might be done." It is also a fact that many of his decrees were reversed on appeal.

"Nevertheless, KING established some important legal principles, e.g., that a will of English land, though made abroad, must be made according to the formalities of English law; and that, where a husband had a legal title to his wife's personal estate, a court of equity would not help him to 'reduce it into possession' without compelling him to settle a part of it upon her, which did something to mitigate the harshness of the old law. He was the author of the act which substituted English for Latin as the language of

agreed to divide the estate with the youngest, and declared he would rather do so than go to law, though he had the right: Upon which, Mr. Hughes prepared deeds of lease and release of the moiety, which were executed by the eldest brother, and bonds of the penalty of £306 which was computed to be the value of the moiety, conditioned for quiet enjoyment of their respective shares; the youngest brother died, and the moiety descended on the defendant, the infant, his son and heir: And the Lord Chancellor decreed, that the bond, and deeds of lease and release, should be delivered up to the plaintiff, the eldest brother, being obtained by mistake and misrepresentation, and that the defendant the infant, when he came of age, should convey *nisi,* etc. and his lordship said, That maxim of law, *Ignorantia juris non excusat,* was in regard to the public, that ignorance cannot be pleaded in excuse of crimes, but did not hold in civil cases.[1]

writs and similar documents." Article on Peter Lord King in Dictionary National Biography.

King was a voluminous writer on theological subjects, and his religious views brought him into disrepute and ridicule in high church quarters. This may perhaps account in part for the criticism of him as judge. The following passage from Foss' Lives of the Judges seems to suggest it: "Lord HERVEY (Memoirs i., 281) relates that the Queen once said of him that 'he was just in the law what he had been in the gospel—making creeds upon the one without any steady belief, and judgments in the other without any settled opinion.'"

[1] For a slightly different version of this case see 2 Jac. & W. 205.

"It is to be deeply regretted that there is so much confusion and uncertainty, as it respects this important branch of equity jurisdiction. Judge STORY admits that the English elementary writers treat the subject in a very loose and unsatisfactory manner, laying down no distinct rules, when mistakes of the law are or are not relievable in equity, but contenting themselves, for the most part, with mere statements of the cases. Whether the same criticism does not apply, to some extent at least, to the learned Commentator himself, as well as to Maddock, Jeremy, Cooper, Fonblanque, Mitford, Newland, and those who had preceded him, no one, I think, will doubt who has read his fifth chapter, volume 1, Title Mistake.

"All writers on equity lay down the rule, that mere ignorance of the law is no sufficient ground for rectifying a contract; yet, they state so many exceptions, that the rule is utterly smothered and lost sight of. It is, to my mind, highly desirable that the courts would hold, if they have the power; and if not, that the legislature would enact, with Lord KING, in Lansdown *v.* Lansdown, Mosely 364, that the maxim, ignorance of the law will not excuse, applies only to criminal cases, and not to civil contracts; or that no mistake of law whatever should be corrected. Like Mr. Calhoun's and Mr. Webster's antipodal interpretations of the Federal Constitution, either would be intelligible, while all between is *terra incognita.*" LUMPKIN, J., in Wycke *v.* Greene [Greene], 1854, 16 Ga. 47.

SIMPSON *v.* VAUGHAN.

IN CHANCERY, BEFORE LORD CHANCELLOR HARDWICKE, 1739.

[2 *Atkyns* 31.]

A bill was brought by the obligor in a bond against Vaughan, the representative of Nut, who was a co-obligor with Baker.

The bond was dated the 18th of September, 1730, and filled up by Baker, one of the co-obligors, as follows:

"John Nut and Joseph Baker are held and firmly bound in the sum of £4000, for which payment justly to be made, we bind ourselves, our heirs, executors and administrators.

"The condition of this obligation is such, that if the above bounden John Nut and Joseph Baker, their heirs, etc., do well and truly pay the sum of £2000, then this obligation to be void."

It was cited in the bond that Nut and Baker were partners.

Nut died in 1732. Baker possessed all the joint effects, and five months after the death of Nut, became a bankrupt.

The plaintiff suggests by his bill, that as the bond was filled up by Baker, that omitting severally bound, was done fraudulently, or through ignorance and mistake; and therefore he ought to be relieved, either on the point of fraud, or that as the representative of Nut confesses assets by his answer, his debt ought to be satisfied out of the said assets; for the defendant, Vaughan, has set forth by his answer, that Nut, as a relation of one Hawkins, became entitled by distribution to the sum of £1200, as his share of the personal estate of Hawkins, and that Vaughan, as one of the representatives of Nut, has permitted this money to be retained by the administrator of Hawkins, to indemnify him against the plaintiff's demand on account of Nut, and by virtue of his bond.

The defendant insists that the assets of Nut are not liable, because the bond is joint, and not joint and several; and therefore Baker, by survivorship, is answerable for the whole money.

LORD CHANCELLOR: There is something new in this case; and yet, upon the general reasoning of this court, equity will extend it further than the law will do; now as to this, it cannot be laid down as an invariable rule, that the court will do it in every case.

The remedy in point of law was extinguished, as against Nut, and survived only against Baker.

The principal ingredient for the plaintiff, is, that it is not a debt in the way of trade, but is an actual loan of a sum of money, and the debt consequently arises from the contract itself, and if there is any defect in the contract, the court will resort to what was the principal intention of the parties, that they should be severally and jointly bound.

I have upon other occasions mentioned the case on the northern circuit, before Lord MACCLESFIELD: A girl, in consideration of £20, sub-

mitted herself to the pleasure of a man; he was so ungenerous afterwards as to refuse payment, and she was obliged to sue him upon his note, which, in the beginning of it, was mentioned to be for £20, borrowed and received, but at the latter end were these words, "which I promise never to pay." My Lord MACCLESFIELD held, that here is a good foundation for an *assumpsit,* upon the lending on one side, and the borrowing on the other; and the words in the conclusion of the note will make no variation, and consequently the plaintiff in the action is well entitled to recover the £20.

It is the lending of one side and the borrowing of the other, makes the strength of these cases.

As to the word partners being recited in the bond, that is rather in the nature of an addition than anything else, and no great stress to be laid upon it.

All cases of this sort must depend upon their particular circumstances.

Now here is a reasonable presumption that this bond was either through fraud, or for want of skill, made a joint, instead of a joint and several bond; for Baker, one of the obligors who filled it up, is only a tradesman, and entirely unacquainted with the common form of bonds, where money is lent to two persons; but I do not think it was a fraud in Baker, but merely a mistake, and this is a head of equity on which the court always relieves.[1]

BINGHAM *v.* BINGHAM.

IN CHANCERY, BEFORE WILLIAM FORTESCUE, M.R., 1748.

[1 *Vesey, Senior,* 126.]

An agreement was made for the sale of an estate to the plaintiff by defendant, who had brought an ejectment in support of a title thereto under a will.

The bill was to have the purchase money refunded, as it appeared to have been the plaintiff's estate.

It was insisted that it was the plaintiff's own fault to whom the title was produced, and who had time to consider it.

[1] "The case of Penn and Lord Baltimore, 1750, 1 Ves. Sr. 444, is decisive to this point. I was present at the argument half a century ago, and heard Lord HARDWICKE say, though it is not mentioned in the printed report, that if Lord Baltimore made the agreement in question under a mistake of his right to another degree of latitude, he ought to be relieved; but that he was not mistaken." Per SHIPPEN, C.J., in Levy *v.* Bank of the United States, 1802, 1 Binney, 27, 36.

"Equity failed to recognize any distinction between mistake in law and

Decreed for the plaintiff with costs, and interest for the money from the time of bringing the bill; for though no fraud appeared, and the defendant apprehended he had a right, yet there was a plain mistake, such as the court was warranted to relieve against, and not to suffer the defendant to run away with the money in consideration of the sale of an estate, to which he had no right.[1]

HUNT *v.* ROUSMANIERE, ADMINISTRATORS.

IN THE SUPREME COURT OF THE UNITED STATES, 1828.

[1 *Peters* 1.]

The appellant filed a bill on the Chancery side of the Circuit Court of the United States, for the district of Rhode Island, setting forth, that, in January, 1820, Lewis Rousmaniere obtained from him two loans of money, amounting, together, to $2,150; and, at the time the first loan was made, Rousmaniere offered to give, in addition to his notes, a bill of sale, or mortgage of his interest, in the brig Nereus, then at sea, as a collateral security for the repayment of the money. A few days after the delivery of the first note, dated 11th of January, 1820, he executed a power of attorney, authorizing the plaintiff to make and execute a bill of sale, of three-fourths of the Nereus, to himself, or to any other person; and in the event of the loss of the vessel, to collect the money which should

fact before the decision in Bilbie *v.* Lumley, 1892, 2 East, 469, when Lord ELLENBOROUGH applied the maxim *ignorantis juris non excusat* in an action for money had and received. Turner *v.* Turner, 1680, 2 Rep. Ch. 154; Lansdowne *v.* Lansdowne, 1730, 2 J. & W. 205, S. C. Mosely, 364; Bingham *v.* Bingham, *infra*. That maxim of law, *ignorantis juris non excusat*, was in regard to the public, that ignorance cannot be pleaded in excuse of crimes, but did not hold in civil cases." Per Lord Chancellor KING, in Lansdowne *v.* Lansdowne, *supra*. See also the remarks of Lord ELLENBOROUGH, in Perrott *v.* Perrott, 1811, 14 East. 423, 439, 440.

[1] "But where a person is ignorant or mistaken with respect to his own antecedent and existing private legal rights, interests, or estates, and enters into some transaction, the legal scope and operation of which he correctly apprehends and understands, for the purpose of affecting such assumed rights, interests, or estates, equity will grant its relief, defensive or affirmative, treating the mistake as analogous to, if not identical with, a mistake of fact. 2 Pom. Eq. § 849, p. 314; Reynell *v.* Sprye, 8 Hare 222; Blakeman *v.* Blakeman, 39 Conn. 320; Whelen's Appeal, 70 Penn. St. 410; Hearst *v.* Pujol, 44 Cal. 230; Morgan *v.* Dod, 3 Colo. 551; Cooper *v.* Phibbs. L. R. 2 H. L. 149; Lansdowne *v.* Lansdowne, 2 Jac. & W. 205." MONTGOMERY, J., in Renard *v.* Clink, 1892, 91 Mich. 1.

become due, on a policy, by which the vessel and freight were insured. In the power of attorney it was recited, that it was given as collateral security for the payment of the notes, and was to be void on their payment; on the failure of which, the plaintiff was to pay the amount and all expenses, and to return the residue to Rousmaniere. On the 21st of March, 1821, an additional sum of $700 was loaned, for which a note was taken, and similar power of attorney given, to sell his interest in the schooner Industry; this vessel being also still at sea.

On the 6th of May, 1820, Rousmaniere died intestate and insolvent, having paid $200 on account of the notes; and the plaintiff gave notice of his claim, to the Commissioners of Insolvency, appointed under the authority of the Insolvent Law of Rhode Island. The plaintiff in his bill alleged, that, on the return of the Nereus and Industry, he took possession of them, and offered the interest of the intestate in them, for sale; and the defendants having forbade the sale, this bill was brought to compel them to join in it.

To this bill the defendants demurred; and their demurrer was sustained in the Circuit Court; but leave was given to the plaintiff to amend. An amended bill was then filed, in which it was stated, that it was expressly agreed between the parties, that Rousmaniere was to give specific security on the Nereus and Industry, and that he offered to execute a mortgage on them. Counsel was consulted on the subject, who advised that the power of attorney, which was actually executed, should be taken in preference to a mortgage, because it was equally valid and effectual as a security, and would prevent the necessity of changing the papers of the vessels, or of taking possession of them on their return to port. These securities were, it was alleged, executed with a full belief that they would, and with intention that they should, give to the plaintiff as full and perfect security as would be given by a mortgage.

The defendants having also demurred to the amended bill, the Circuit Court decided in favor of the demurrer, and dismissed the bill; and an appeal was entered to this Court.—At the February session, 1823, this Court considered that the appellant might be entitled to the relief prayed for in equity, but the respondents were permitted to withdraw their demurrer, and to file an answer in the court below. 8 Wheat. 174. The answer of the defendants admits the loans of money, and the delivery of the promissory notes, and that but two hundred dollars were paid before the death of the intestate. The execution of the powers of attorney was also admitted, but it was denied that possession of the vessels was taken by the appellant; and they alleged their resistance of the attempt to take possession of them.

The answer also asserts ignorance of any agreement for a specific lien on the vessels, except that imported by the language of the powers of attorney; that they had heard and believed that the appellant meant to be concerned, as a partner, in the voyage of one of the vessels, which was relinquished, and that afterwards he offered to loan the money on secur-

ity; upon which the intestate offered to give a mortgage, but the appellant preferred taking the powers of attorney, to avoid inconvenience, and took the powers of attorney, by advice of counsel. The answer also states, that a bill of sale of the vessels, dated the day before the death of the intestate, by which the vessels were intended to be conveyed to one Bateman, and which the respondents state they had heard, and believed was intended to be executed on the evening of that day. The answer also alleges the insolvency of Rousmaniere, and that it existed a long time before his death; which they assert must have been known to the appellant, and that the intestate resorted to improper modes to keep up his credit.

The evidence taken in the case consisted of the deposition of Mr. Hazard, the counsel who drew the papers, and in which he stated, that they were intended by both parties to have the effect of a specific lien or mortgage, and he advised them they would have that effect; and also the deposition of Mr. Merchant, to show that the appellant admitted that the motive by which he was induced to make the loan was to compensate Rousmaniere for the disappointment sustained by his not uniting with him in a voyage of one of his vessels; and, accordingly, an agreement was made, by which the appellant was to let Rousmaniere have a sum of money, and that he was to give a bill of sale of a certain vessel; but that afterwards he refused to take the same, on account of the inconvenience and difficulties which might attend the same; and that he had consulted with Mr. Hazard, upon the subject, who told him, that he could or would draw an irrevocable power of attorney to sell, which would do as well, or words to that effect; and which was accordingly done.

The Circuit Court pronounced a decree declaring that the appellant had no specific lien or security upon either of the vessels, and no equity to be relieved respecting them, and dismissing the bill, with costs; from which decree, an appeal was entered to this court. . . .

Mr. Justice WASHINGTON delivered the opinion of the Court.—

This case was before this Court in the year 1823, and is reported in 8 Wheaton 174, and was then argued at great length, by the counsel concerned in it. After full consideration, it was decided, that the power of attorney, given by Rousmaniere, the intestate, to the appellant, Hunt, authorizing him to make and execute a bill of sale of three-fourths of the Nereus and of the Industry, to himself, or to any other person, and in the event of their being lost, to collect the money which should become due under a policy upon them and their freight; was a naked power, not coupled with an interest, which though irrevocable by Rousmaniere, in his lifetime, expired on his death.

That this species of security was agreed upon, and given under a misunderstanding, by the parties, of its legal character, was conceded, in the argument of the cause, by the bar and bench; and the second question, for the consideration of the Court, was, whether a Court of Equity could afford relief in such a case, by directing a new security, of a different

character, to be given; or by decreeing that to be done, which the parties supposed would have been effected by the instrument agreed upon? After an examination of the cases, applicable to the general question, it was stated, by the Chief Justice, who delivered the opinion of the Court, that none of them asserted the naked principle, that relief could be granted, on the ground of ignorance of law, or decided, that a plain and acknowledged mistake, in law, was beyond the reach of a Court of Equity. The conclusion, to which he came, is expressed in the following terms:—

"We find no case, which we think precisely in point; and are unwilling, where the effect of the instrument is acknowledged to have been entirely misunderstood, by both parties, to say, that a Court of Equity is incapable of affording relief."[1]

The decree was, accordingly, reversed; but the case being one in which creditors were concerned, the Court, instead of giving a final decree on the demurrer, in favor of the plaintiff, directed the cause to be remanded, that the Circuit Court might permit the defendants to withdraw their demurrer, and to answer the bill. . . .

It must be admitted, that the case, as it is now presented to the Court, is not materially variant from that which we formerly had to consider; except in relation to the rights of the general creditors, against the insolvent estate of a deceased debtor, in opposition to the equity which a particular creditor seeks, by this bill, to set up. The allegations of the bills, filed in this cause, which were, on the former occasion, admitted by the demurrer to be true, are now fully proved, by the testimony taken in the cause.

Before proceeding to state the general question, to which the facts in this case give rise, or the principles of equity, which apply to it, it will be necessary, distinctly, to ascertain, what was the real agreement concluded upon between the plaintiff and the intestate, the performance of which, on the part of the latter, was intended to be secured by the powers of attorney? Was it that Rousmaniere should, in addition to his notes for the money agreed to be loaned to him by the plaintiff, give a specific

[1] In the course of his opinion, Chief Justice MARSHALL said:

"The question for the consideration of the court is this: If money be advanced on a general stipulation to give security for its repayment on a special article, and the parties deliberately, on advice of counsel, agree on a particular instrument, which is executed, but, from a legal quality inherent in its nature, that was unknown to the parties, becomes extinct by the death of one of them, can a court of equity direct a new security of a different character to be given? Or direct that to be done which the parties supposed would have been effected by the instrument agreed on between them? . . .

"In this case there is no ingredient of fraud. Mistake is the sole ground on which the plaintiff comes into court, and that mistake is in the law. . . .

"Although we do not find the naked principle, that relief may be granted on account of ignorance of law, asserted in the books, we find no case in which it has been decided that a plain and acknowledged mistake in law is beyond the reach of equity."

and available security on the Nereus and the Industry, or, was the particular kind of security selected by the parties, and did it constitute a part of the agreement? It is most obvious, from the plaintiff's own statement, in his amended bill, as well as from the depositions appearing in the record, that the agreement was not closed, until the interview between the parties to it, with Mr. Hazard, had taken place. The amended bill states, that the specific security which Rousmaniere offered to give, was a mortgage of the two vessels, for which irrevocable powers of attorney were substituted, by the advice of Mr. Hazard, and for reasons, which it would seem, were approved of and acted upon, by the plaintiff. From the testimony of Mr. Merchant, it would appear, that the security proposed by Rousmaniere, was a bill of sale of the vessels, which the plaintiff declined accepting, for reasons of his own, uninfluenced by any suggestions of Mr. Hazard, who merely proposed the powers of attorney as a substitute for the other forms of security which had been offered by Rousmaniere. The difference between these statements is not very material, since it is apparent from both of them, that the proposed security, by irrevocable powers of attorney, was selected by the plaintiff, and incorporated into the agreement, by the assent of both the parties. The powers of attorney, do not contain, nor do they profess to contain, the agreement of the parties; but was a mere execution of that agreement, so far as it stipulated to give to the plaintiff, a specific security on the two vessels, in the mode selected and approved of by the parties, to which extent, it was a complete consummation of the agreement. Such was the opinion of this Court upon a former discussion of this cause in the year 1823, and such is its present opinion. Upon this state of the case, the general question to be decided, is the same now that it formerly was, and is that which has already been stated.

There are certain principles of equity, applicable to this question, which, as general principles, we hold to be incontrovertible. The first is, that where an instrument is drawn and executed, which professes, or is intended, to carry into execution, an agreement, whether in writing or by parol, previously entered into, but which, by mistake of the draftsman, either as to fact or law, does not fulfil, or which violates the manifest intention of the parties to the agreement, equity will correct the mistake, so as to produce a conformity of the instrument to the agreement. The reason is obvious—the execution of agreements, fairly and legally entered into, is one of the peculiar branches of equity jurisdiction; and if the instrument which is intended to execute the agreement, be, from any cause, insufficient for that purpose, the agreement remains as much unexecuted, as if one of the parties had refused, altogether, to comply with his agreement; and a court of equity will, in the exercise of its acknowledged jurisdiction, afford relief in the one case, as well as in the other, by compelling the delinquent party fully to perform his agreement, according to the terms of it, and to the manifest intention of the parties. So, if the mistake exist, not in the instrument, which is intended to give

effect to the agreement, but in the agreement itself, and is clearly proved to have been the result of ignorance of some material fact, a court of equity will, in general, grant relief, according to the nature of the particular case in which it is sought. Whether these principles, or either of them, apply to the present case, must, of course, depend upon the real character of the agreement under consideration. If it has been correctly stated, it follows, that the instrument, by means of which the specific security was to be given, was selected by the parties to the agreement, or rather by the plaintiff; Rousmaniere having proposed to give a mortgage or bill of sale of the vessels, which the plaintiff, after consideration, and advice of counsel, thought proper to reject, for reasons which were entirely satisfactory to himself. That the form of the instrument, so chosen by the plaintiff, and prepared by the person who drew it, conforms, in every respect, to the one agreed upon, is not even asserted in the bill, or in the argument of counsel. The avowed object of the plaintiff was, to obtain a valid security, but in such a manner as that the legal interest in the property should remain with Rousmaniere, so that the plaintiff might be under no necessity to take out papers at the custom-house, in his own name, and might not be subject to give bonds for the vessels, or to liabilities for breaches of law, committed by those who were intrusted with the management of them. That the general intention of the parties was, to provide a security, as effectual as a mortgage of the vessels would be, can admit of no doubt; and if such had been their agreement, the insufficiency of the instruments, to effect that object which were afterwards prepared, would have furnished a ground for the interposition of a court of equity, which the representatives of Rousmaniere could not easily have resisted. But the plaintiff was not satisfied to leave the kind of security which he was willing to receive, undetermined; having finally made up his mind, by the advice of his counsel, not to accept of a mortgage, or bill of sale, in nature of a mortgage. He thought it safest, therefore, to designate the instrument; and, having deliberately done so, it met the view of both parties, and was as completely incorporated into their agreement, as were the notes of hand for the sum intended to be secured. In coming to this determination, it is not pretended that the plaintiff was misled by ignorance of any fact, connected with the agreement which he was about to conclude. If, then, the agreement was not founded in a mistake of any material fact, and if it was executed in strict conformity with itself; we think it would be unprecedented for a court of equity to decree another security to be given, not only different from that which had been agreed upon, but one which had been deliberately considered and rejected by the party now asking for relief; or to treat the case, as if such other security had in fact been agreed upon and executed. Had Rousmaniere, after receiving the money agreed to be loaned to him, refused to give an irrevocable power of attorney, but offered to execute a mortgage of the vessels, no court of equity could have compelled the plaintiff to accept the security so offered.

Or, if he had totally refused to execute the agreement, and the plaintiff had filed his bill, praying that the defendant might be compelled to execute a mortgage instead of an irrevocable power of attorney; could the court have granted the relief specifically asked for? We think not. Equity may compel parties to perform their agreements, when fairly entered into, according to their terms; but it has no power to make agreements for parties, and then compel them to execute the same. The former is a legitimate branch of its jurisdiction, and in its exercise is highly beneficial to society. The latter is without its authority, and the exercise of it would be not only an usurpation of power, but would be highly mischievous in its consequences.

If the Court could not have compelled the plaintiff to accept, or Rousmaniere to execute, any other instrument, than the one which had been agreed upon between them, the case is in no respect altered by the death of the latter, and the consequent inefficiency of the particular security which had been selected; the objection to the relief asked for, being in both cases the same, namely, that the Court can only enforce the performance of an agreement according to its terms, and to the intention of the parties; and cannot force upon them a different agreement. That the intention of the parties, to this agreement, was frustrated, by the happening of an event, not thought of, probably by them, or by the counsel who was consulted upon the occasion, is manifest. The kind of security which was chosen, would have been equally effectual, for the purpose intended, with a mortgage, had Rousmaniere lived until the power had been executed; and it may therefore admit of some doubt, at least, whether the loss of the intended security is to be attributed to a want of foresight, in the parties, or to a mistake of the counsel, in respect to a matter of law. The case will, however, be considered in the latter point of view.

The question, then, is, ought the Court to grant the relief which is asked for, upon the ground of mistake arising from any ignorance of law? We hold the general rule to be, that a mistake of this character is not a ground for reforming a deed founded on such mistake; and whatever exceptions there may be to this rule, they are not only few in number, but they will be found to have something peculiar in their characters.

The strongest case which was cited and relied upon by the appellant's counsel, was that of Lansdown *v.* Lansdown, reported in Mosely. Admitting, for the present, the authority of this case, it is most apparent, from the face of it, that the decision of the Court might well be supported upon a principle not involved in the question we are examining. The subject which the Court had to decide, arose out of a dispute between an heir at law, and a younger member of the family, who was entitled to an estate descended; and this question, the parties agreed to submit to arbitration. The award being against the heir at law, he executed a deed in compliance with it, but was relieved against it on the principle that he was ignorant of his title.

If the decision of the Court proceeded upon the ground that the

plaintiff was ignorant of the fact that he was the eldest son, it was clearly a case proper for relief, upon a principle which has already been considered.

If the mistake was of his legal rights, as heir at law, it is not going too far to presume, that the opinion of the Court may have been founded upon the belief that the heir at law was imposed upon by some unfair representations of his better informed opponent; or that his ignorance of a legal principle, so universally understood by all, where the right of primogeniture forms a part of the law of descents, demonstrated a degree of mental imbecility, which might well entitle him to relief. He acted, besides, under the pressure of an award, which was manifestly repugnant to law, and for aught that is stated in this case, this may have appeared upon the face of it.

But if this case must be considered as an exception from the general rule which has been mentioned; the circumstances attending it, do not entitle it, were it otherwise unobjectionable, to be respected as an authority, but in cases which it closely resembles. There is a class of cases which it has been supposed forms an exception from this general rule, but which will be found, upon examination, to come within the one which was first stated. The cases alluded to, are those in which equity has afforded relief against the representatives of a deceased obligor, in a joint bond, given for the money, lent to both the obligors, although such representatives were discharged at law. The principle upon which these cases manifestly proceed, is, that the money being lent to both, the law raises a promise in both to pay, and equity considers the security of the bond as being intended, by the parties, to be co-extensive with this implied contract by both to pay the debt. To effect this intention, the bond should have been made joint and several; and the mistake in the form, by which it is made joint, is not in the agreement of the parties, but in the execution of it by the draftsman. The cases in which the general rule has been adhered to, are, many of them, of a character which strongly test the principle upon which the rule itself is founded. Two or three only need be referred to. If the obligee, in a joint bond, by two or more, agree with one of the obligors, to relieve him from his obligation, and does accordingly execute a release, by which all the obligors are discharged at law, equity will not afford relief against this legal consequence, although the release was given under a manifest misapprehension of the legal effect of it, in relation to the other obligors. So, in the case of Worral *v.* Jacob, 3 Merv. 271, where a person having a power of appointment and revocation, and, under a mistaken supposition, that a deed might be altered or revoked, although no power of revocation had been reserved, executed the power of appointment without reserving a power of revocation; the court refused to relieve against the mistake.

The case of Lord Irnham *v.* Child, 1 Bro. C. C. 92, is a very strong one in support of the general rule, and closely resembles the present, in most of the material circumstances attending it. The object of the suit was to

set up a clause containing a power of redemption, in a deed granting an annuity, which, it was said, had been agreed upon by the parties, but which, after deliberation, was excluded by consent, from a mistaken opinion, that it would render the contracts usurious. The court, notwithstanding the omission manifestly proceeded upon a misapprehension of the parties as to the law, refused to relieve by establishing the rejected clause. It is not the intention of the court, in the case now under consideration, to lay it down, that there may not be cases in which a court of equity will relieve against a plain mistake, arising from ignorance of law. But we mean to say, that where the parties, upon deliberation and advice, reject one species of security, and agree to select another, under a misapprehension of the law as to the nature of the security so selected, a court of equity will not, on the ground of such misapprehension, and the insufficiency of such security, in consequence of a subsequent event, not foreseen, perhaps, or thought of, direct a new security, of a different character, to be given, or decree that to be done which the parties supposed would have been effected, by the instrument which was finally agreed upon.

If the court would not interfere in such a case, generally, much less would it do so in favour of one creditor, against the general creditors of an insolvent estate, whose equity is, at least, equal to that of the party seeking to obtain a preference, and who, in point of law, stand upon the same ground with himself. This is not a bill asking for a specific performance of an agreement to execute a valid deed for securing a debt; in which case, the party asking relief, would be entitled to a specific lien; and the court would consider the debtor as a trustee, for the creditor of the property on which the security was agreed to be given. The agreement has been fully executed, and the only complaint is, that the agreement itself was founded upon a misapprehension of the law, and the prayer is to be relieved against the consequences of such mistake. If all other difficulties were out of the way, the equity of the general creditors to be paid their debts equally with the plaintiff would, we think, be sufficient to induce the court to leave the parties where the law has placed them. The decree is to be affirmed, with costs.

CANEDY *v.* MARCY.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1859.

[13 *Gray* 373.]

Bill in equity, under Statute 1856, c. 38, by the eight heirs-at-law of John Canedy, to reform certain deeds, under which the defendant claimed title to real estate of said John, who died intestate in 1835. Said heirs, in 1836, 1837, and 1845, respectively made deeds of their "undivided eighth parts of the real estate where the deceased last lived, except

the widow's right of dower," and their grantee conveyed to one, who in 1848 conveyed to the defendant in fee the tract of land in question, with full covenants of warranty, "except the right of dower to the widow, and my right in the same."

SHAW,[1] C. J. It appears perfectly well proved, if it is competent to prove it for such purpose by parol evidence, and we think it is, that the oral contract was, that the grantor was to convey, and the grantees to take, two thirds of the entire premises of which the intestate died seised, and to except the entire third part of the premises in which the widow particularly had dower, though it had not been assigned to her to hold in severalty; that it was so understood by the conveyancer employed to draw the deeds; that he intended so to draw it, and supposed that he did. But it further appears from his testimony, that he used the words which he intended, but believed the description was such as not to include the reversion in the dower.

It also appears that the defendant, when he obtained his title from his grantor, knew that the grantor claimed the two thirds only, exclusive of the reversion in the dower, and that he considered that to be the extent of his title, and at times made proposals for the purchase of the reversion of some of the heirs, until within a year or two, since which he has denied their right, and refused to correct the mistake.

1. The first question is, whether here was any mistake. Of this we think there can be no doubt, if the intention of the parties was, that this reversion should not pass. The conveyance was of the interests of the heirs in the estate described, except the widow's right of dower. This carried the whole estate subject to the exception. The widow's right of

[1] "The value of a decision is estimated by the character of the court, or of the judge who delivered the opinion, or by both. These vary much in the courts of the United States. Without being invidious or undertaking to name other courts of high standing, there are many things in the history and character of the Supreme Judicial Court of Massachusetts which entitle its reported decisions for the last hundred years to great consideration. But a decision often has a merit apart from the standing of the court in which it is made, owing to the high character of the judges of the court, or of the judge who delivered the opinion. Opinions delivered by such judges as MARSHALL, TANEY, KENT and SHAW have a value apart from the courts in which they were delivered. Even the dissenting opinions of these men and their *obiter dicta* have weight in the minds of lawyers who have a just estimate of their character, which they cannot give to many courts of last resort of acknowledged ability. After all, the convincing power of the opinion or decision in a reported case must depend very largely on the force of the reasoning by which it is supported, and of this every lawyer and every court must of necessity be his and its own judge." Letter of Mr. Justice SAMUEL F. MILLER to Hon. John F. Dillon, and reprinted in Dillon's Laws and Jurisprudence of England and America, p. 263.

To this admirable and delightful book the serious-minded student is referred.

dower was a freehold estate for her own life in one third, and the residue included both the two thirds in possession, and the reversion in the dower. Such was the legal effect of the description adopted.

2. We are therefore satisfied by the evidence that these deeds were made by the mistake of the scrivener, in preparing deeds which excepted only the widow's right of dower; when, under the authority given him, and to accomplish his own intention, he should have so drawn the deeds part assigned, or reserved to be assigned to the widow, as her dower.[1]

3. We are aware that a deed is very strong evidence of the intent of the parties, and at law cannot be questioned, but must be taken to be conclusive. But where, in equity, mistake of the parties is expressly charged and put in issue, equity will permit it to be inquired into, and, upon strong and satisfactory proof, to be corrected. The evidence must make it clear. Here we are of opinion that it is proved by such evidence, that the mistake was made and that the deeds did not conform to the oral contract, which they were intended to carry into effect. It is no answer to say that the scrivener used the words which he intended to use. It is the mistake of the parties to the deeds which we are to inquire into; and if they were misled by a misplaced confidence in the skill of the scrivener, it can hardly be said to be a mistake of law and not of fact on their part.

But we are of opinion that courts of equity in such cases are not limited to affording relief only in case of mistake of fact; and that a mistake in the legal effect of a description in a deed, or in the use of technical language, may be relieved against, upon proper proof. Hunt *v.* Rousmaniere, 1 Pet. 1; Gillespie *v.* Moon, 2 Johns. Ch. 596; Stedwell *v.* Anderson, 21 Conn. 139; Oliver *v.* Mutual Commercial Marine Ins. Co., 2 Curt. C. C. 299.

There are authorities also, especially the opinion of Chancellor KENT in Johnson's Chancery Cases, that such proof may be made by parol evidence. Gillespie *v.* Moon, just cited. Adams on Eq., Amer. ed., 168 note.

4. The court are of opinion that the defendant be required to execute and deliver to the plaintiffs, their heirs and assigns, a deed of release and quitclaim of all his right, title and interest in the reversion of one undivided third part of the estate, and that he and all persons claiming by, through or under him, be enjoined and prohibited from taking or claiming any right, title or interest in such reversion, against the plaintiffs or any persons claiming by, through or under them.

Decree accordingly.[2]

[1] "But it is earnestly and ably argued, that there is a wide difference between the reformation of a contract, drawn by a scrivener, under instructions from the maker, and the correction of a paper, framed by the party himself. We confess, candidly, that we are unable to comprehend the distinction. That the proof will be more difficult in the one case than the other, I can readily perceive." LUMPKIN, J., in Wycke *v.* Greene, 1854, 16 Ga. 47.

[2] Accord: Marsh *v.* McNair, 1888, 48 Hun. 117. See also Lee Jamieson *v.* Per-

FOWLER *v.* BLACK.

IN THE SUPREME COURT OF ILLINOIS, 1891.

[136 *Illinois Reports* 363.]

This was a suit in chancery, brought in the Circuit Court of La Salle County by Charles Fowler, assignee of Alonzo S. Black, an insolvent, to obtain a construction of a certain deed executed by Samuel Black and Clarinda Black, his wife, to Alonzo S. Black, purporting to convey to the grantee an estate in certain lands therein described, and also to remove a cloud from the title to said land.

The material parts of the deed were as follows: "The.....parties of the first part.....do.....convey.....the remainder of all of the following described premises:.....when it shall happen upon the death of the parties of the first part or the survivor of them,

cival, 1892, 85 Iowa 639, where a note, which was intended to bind only the corporation, rendered the officers liable, so where the parties intended a broader liability than the reading of the contract showed an equitable defence to that effect is allowed under the New York Code of Civil Procedure. Pitcher *v.* Hennessey, 1872, 48 N. Y. 415. The court said at page 423: "Parties to an agreement may be mistaken as to some material fact connected therewith, which formed the consideration thereof or inducement thereto, on the one side or the other; or they may simply make a mistake in reducing their agreement to writing. In the former case, before the agreement can be reformed, it must be shown that the mistake is one of fact, and mutual; in the latter case it may be a mistake of the draftsman, or one party only, and it may be a mistake of law or of fact. Equity interferes in such a case to compel the parties to execute the agreement which they have actually made. Sometimes it happens that parties agree, as in the case above cited from Peters, to carry out their agreement by an instrument which, by their mistake of the law, will not effectuate their intention. In such a case equity will not reform the instrument, or substitute another instrument which will, in law, give effect to their intention, because they adopted and agreed upon the particular instrument, and equity will not compel them to execute an agreement which they never agreed to execute, and thus make an agreement for them. But in this case the parties intended, according to the answer, to reduce their parol agreement to writing, and to embody it in the instrument; and either because they or their draftsman did not understand the force of language, or because some language which they intended should have been inserted in the instrument was omitted by mistake, their intention was not carried into effect, and the instrument failed to embody their agreement.

It is claimed on the part of the plaintiff that if the mistake occurred because both parties misunderstood the meaning of the terms "risk of navigation," both parties believing that these terms would include the risk in question, then no reformation of the contract can be had. This claim is not well founded. When parties have made an agreement, and there is no allegation of any mistake in it, and in reducing it to writing, they, by mistake, either because they did not understand the meaning of the words used,

—to have and to hold the said remainder unto said party of the second part and his assigns for and during the natural life of said party of the second part, and upon his death, then unto his heirs and their assigns forever, it being the true intent and meaning of this indenture to reserve a life estate in the above described premises to said parties of the first part and the survivor of them, and to convey the remainder, upon the death of such survivor, to the said party of the second part, to have and to hold only during his natural life, and upon the death of said party of the second part said premises to be held in fee simple by his heirs and their assigns forever."

* * * * *

BAILEY, J.:

Clarinda Black, William G. Black, and Samuel A. Black appeared and answered, and also filed their cross bill, in which they allege, in substance, . . . that on or about the 30th day of June, 1875, the said Samuel Black and Clarinda Black, his wife, went to a conveyancer and instructed him to prepare a deed to be executed by them and each of them in and by which they should reserve the said real estate to them and to the survivor of them for life, and convey to the said Alonzo S. Black a life estate only in said land, said life estate to begin on the death of said Samuel Black and Clarinda Black, and to convey the said real estate in fee simple to the said children of Alonzo S. Black at his death; that, under the instructions so given, the deed in controversy was drawn, and the grantors, being aged and not versed in the use of the language necessary to complete and effectuate their intentions, well supposed and believed that said deed would give entire effect to their intentions as above set forth; that Samuel A. Black was then an infant of the age of eight years and totally unacquainted with the proper wording of deeds conveying real estate; that said assignee insists that said deed conveyed no title whatever to said William G. and Samuel A. Black, but that it conveyed to Alonzo S. Black the title to said land in fee, subject only to a life estate in the grantors; that if said deed did not by its terms and language effectuate the intentions of the grantors as above set forth, the failure to make said deed convey in apt terms the fee simple title to William G. Black and Samuel A. Black was through the mistake of the conveyancer in not making use of apt words to express the intent and desire of said grantors, and as said grantors directed and instructed said conveyancer to do.

* * * * *

The question remains whether the allegations of the cross bill, taken as true, warranted the court below in reforming the deed. It sufficiently

or their legal effect, failed to embody their intention in the instrument, equity will grant relief by reforming the instrument, and compelling the parties to execute and perform their agreement as they made it; and it matters not whether such a mistake be called one of law or of fact. Oliver *v.* The Mutual Commercial Ins. Co., 2 Curtis 277.

appears from said allegations that the grantors in said deed intended to reserve to themselves and the survivor of them a life estate in said land, and to convey to Alonzo S. Black a life estate therein, to commence in possession at the death of the survivor of said grantors, with remainder in fee to Samuel A. and William G. Black. The case then made is, in substance, that said grantors, with the foregoing intention, went to a conveyancer and instructed him to prepare such a deed as would carry their said intention into effect; that under such instructions the deed in question was drawn, and they, being aged and not versed in the use of the language necessary to complete and effectuate their intention, supposed and believed that said deed would accomplish that result; that said assignee now insists that said deed conveyed no title to Samuel A. and William G. Black, but that it conveyed the fee to Alonzo S. Black, subject only to the life estates of the grantors; that if said deed does not carry into effect the intention of said grantors, the failure to make it convey the fee simple title to Samuel A. and William G. Black was through the mistake of said conveyancer in not using apt words to express the intent and desire of the grantors, as they directed and instructed him to do. The mistake now insisted upon, though not specifically stated in the cross bill, consisted in the use of the word "heirs" instead of "children," and the court decreed the reformation of the deed by substituting the word "children" for the word "heirs" wherever it occurs in the instrument.

There is no pretense that said grantors, at the time they executed said deed, were not fully aware of its terms and language, or that they were in any way deceived, misled or otherwise imposed upon, or subjected to any undue or improper influence. It is not claimed that they did not read the deed before executing it, and the legal presumption that they did so must therefore prevail. It must be assumed then as a fact as to which there can be no dispute, that the grantors, when they executed the deed, knew that the word "heirs" was used and that the word "children" was not used. Nor is it claimed that the conveyancer or any other person gave them any advice as to the legal effect of the word thus employed, or as to whether the deed would give effect to their intentions or not.

It is clear then that the mistake complained of is not a mistake as to any fact, but simply as to the meaning and legal effect of the word "heirs" when used in a conveyance of the title to land. This, manifestly, is purely a mistake of law. The general rule, subject, it is true, to certain exceptions, is, that courts of equity will not lend their aid to relieve against mere mistakes of law. Mr. Justice STORY, in discussing the rule and its exceptions, after analyzing and reviewing at considerable length the leading decisions bearing upon the question, reaches the conclusion that the rule is relaxed in cases where there is a total ignorance of title founded in a mistake of a plain and settled principle of law, and in cases of imposition, misrepresentation, undue influence, misplaced confidence or surprise. "But," says the learned author, "it may be safely

affirmed, upon the highest authority, as an established doctrine, that a mere naked mistake of law, unattended by any such special circumstances as have been above suggested, will furnish no ground for the interposition of a court of equity." 1 Story's Eq. Juris. secs. 137, 138.

The general rule above laid down has been frequently recognized and enforced by this court. Thus, in Sibert v. McAvoy, 15 Ill. 106, a bill was filed to reform a contract after the complainant had made certain unsuccessful attempts to enforce it at law, it being alleged in the bill that a mistake had been made in its phraseology by the person employed to write it. In denying the complainant relief, this court said: "If he misconstrued the contract as written, that was a mistake of law and not of fact, and for such mistakes equity can grant no relief. It is where parties intended to insert words in a contract which were by accident omitted, that equity can reform the contract by inserting them, or by expunging words they did not intend to have inserted. If the words are written as the parties intended they should be written, or supposed they were written, when they signed the contract, no matter how much they may be mistaken as to the meaning of those words, no relief can be granted either at law or in equity. The construction of words is a matter of law. The insertion of words is a matter of fact. It is for mistakes of fact alone that contracts may be reformed."

In Goltra v. Sanasack, 53 Ill. 456, the complainants' father, in his lifetime, purchased certain lands and had them conveyed by the vendor to his wife and her heirs. After his death, the complainants, who were his children by a former wife, filed their bill to reform said deed, alleging that their father intended to have said lands conveyed to his wife and his said children, and supposed that the grantor had so conveyed them, but that, contrary to such intention, the conveyance was in fact made to said wife and her heirs. In denying the relief thus prayed for, we said: "The rule is inflexible that a mistake or misapprehension of law is never relieved against or corrected. If a party designs to and performs an act under a mistaken view of the law affecting the transaction, he is held to the obligation incurred. As a matter of necessity, all persons are presumed to know and act in view of the law, and the maxim is that ignorance of the law excuses no one." Many other decisions may be referred to in which the rule under consideration is discussed in its various aspects, among which are the following: Broadwell v. Broadwell, 1 Gilm. 599; Beebe v. Swartwout, 3 id. 162; Shafer v. Davis, 13 Ill. 395; Campbell v. Carter, 14 id. 286; Gordere v. Downing, 18 id. 492; Wood v. Price, 46 id. 439; Sands v. Sands, 112 id. 225; Bonney v. Stoughton, 122 id. 536.

It would thus seem to be an inevitable conclusion from the authorities, that the case made by the cross bill is one upon which a court of equity can grant no relief, and that the decree of the court below reforming said deed is erroneous.[1]

[1] For a discussion of the legal propositions involved in the preceding cases

COOPER *v.* PHIBBS.

IN THE HOUSE OF LORDS, 1867.

[*Law Reports,* 2 *English & Irish Appeals* 149.]

Lord CRANWORTH.[1] My Lords, this is an appeal against a decree of the Lord Chancellor of Ireland, of the 14th of June, 1865, dismissing a cause petition which had been filed by the appellant on the 9th of April, 1864, pursuant to the Chancery Regulation Act of 1850.[2] The object of the petition was to be relieved from an agreement dated on the 14th of October, 1863, by which the petitioner agreed to become tenant to the respondent Phibbs, for three years, of the salmon fishery of Ballysadare, in the County of Sligo. The ground of the relief asked was, that the petitioner had entered into an agreement in mistake as to his rights. He thought that the fishery belonged to the other respondents, for whom Phibbs acted as trustee; but he was in truth himself the owner of the fishery as tenant therof in tail.[3]

The consequence was that the present appellant, when, after the death of his uncle, he entered into the agreement to take a lease of this property, entered into an agreement to take a lease of what was, in truth, his own property—for, in truth, his fishery was bound by the covenant, and belonged to him, just as much as did the lands of Ballysadare;

of this section and their application to a complicated and interesting state of facts see Griswold *v.* Hazard, 1891, 141 W. S. 260.

In Pullen *v.* Ready, 1743, 2 Atk. 587, 591, Lord HARDWICKE said: "It is said they might know the fact, and yet not know the consequence in law; but if parties are entering into an agreement, and the very will out of which the forfeiture arose is lying before them and their counsel, while the drafts are preparing, the parties shall be supposed to be acquainted with consequence of law as to this point, and shall not be relieved under a pretence of being surprised with such strong circumstances attending it."

[1] "Cranworth [born Rolfe] was a man of high personal character and strong common sense. He was a sound lawyer, and an acute and patient judge. . . . Few men enjoyed greater personal popularity. Lord CAMPBELL declares 'there never lived a better man than Rolfe.'" Article on Rolfe in Dictionary of National Biography.

[2] 17 Ir. Ch. Rep. 73. In the course of his judgment, Brady Lord Chancellor of Ireland said: "The object of this cause petition is to relieve Edward Henry Cooper from the consequences of an act done by him while in ignorance of his true position with respect to this fishery, done by him in derogation of his rights while acting under the influence of a mistake. . . . No doubt a mistake in point of law may be corrected both in this court and in a court of law. This is now perhaps sufficiently established, though it was for some time a subject of controversy in courts of law"; but his Lordship remarked that this power of correction would not be exercised except where equity and good conscience required it, and his Lordship finally came to the conclusion that no valid ground for relief was established in this case.

[3] So much of the opinion as relates to the question of title has been omitted.

therefore. he says, I entered into the agreement under a common mistake, and I am entitled to be relieved from the consequence of it.

In support of that proposition he relied upon a case which was decided in the time of Lord HARDWICKE, not by Lord HARDWICKE himself, but by the then Master of the Rolls, Bingham *v.* Bingham, where that relief was expressly administered. I believe that the doctrine there acted upon was perfectly correct doctrine; but even if it had not been, that will not at all show that this appellant is not entitled to this relief, because in this case the appellant was led into the mistake by the misinformation given to him by his uncle, who is now represented by the respondents. It is stated by him in his cause petition, which is verified, and to which there is no contradiction, and in all probability it seems to be the truth, that his uncle told him, not intending to misrepresent anything, but being in fact in error, that he was entitled to this fishery as his own fee simple property; and the appellant, his nephew, after his death acting on the belief of the truth of what his uncle had so told him, entered into the agreement in question. It appears to me, therefore, that it is impossible to say that he is not entitled to the relief which he asks, namely, to have the agreement delivered up and the rent repaid. That being so, he would be entitled to relief, but he is only entitled to this relief on certain terms, to which I will presently advert.

Lord WESTBURY. The result,[1] therefore, is, that at the time of the agreement for the release which it is the object of this petition to set aside, the parties dealt with one another under a mutual mistake as to their respective rights. The petitioner did not suppose that he was, what in truth he was, tenant for life of the fishery. The other parties acted upon the impression given to them by their father, that he (their father) was the owner of the fishery, and that the fishery had descended to them. In such a state of things there can be no doubt of the rule of a court of equity with regard to the dealing with that agreement. It is said *ignorantia juris haud excusat;* but in that maxim the word *jus* is used in the sense of denoting general law, the ordinary law of the country. But when the word *jus* is used in the sense of denoting a private right, that maxim has no application.[2] Private right of ownership is a matter of

[1] So much of the opinion as relates to the question of title has been omitted.

[2] "With regard to the objection that the mistake (of any) was one of law, and that the rule *ignorantia juris meminem excusat* applies, I would observe upon the peculiarity of this case, that the ignorance imputable to the party was of a matter of law arising upon the doubtful construction of a grant. This is very different from the ignorance of a well-known rule of law. And there are many cases to be found in which equity, upon a mere mistake of the law, without the admixture of other circumstances, has given relief to a party who has dealt with his property under the influence of such mistake. Therefore, although when a certain construction has been put by a court of law upon a deed, it must be taken that the legal construction was clear, yet the ignorance, before the decision, of what was the true construction, cannot, in my opinion,

fact; it may be the result also of matter of law; but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights the result is that that agreement is likely to be set aside as having proceeded upon a common mistake. Now, that was the case with these parties—the respondents believed themselves to be entitled to the property, the petitioner believed that he was a stranger to it, the mistake is discovered and the agreement cannot stand.

be pressed to the extent of depriving a person of relief on the ground that he was bound himself to have known beforehand how the grant must be construed." Per Lord CHELMSFORD, in Earl Beauchamp *v.* Winn, L. R. 6 H. L. 223, 224. Compare the language of the same learned judge [Lord CHELMSFORD] in Directors of Midland Gt. Western Railway *v.* Johnson, 1858, 6 H. L. 789, 810.

In that case the petitioner asked that a fund not legally due him under the terms of the contract in question be awarded him on the ground that the agent of the company had dealt with him on the basis of his ownership of the fund and that he had made certain expenditures on that theory. Relief was granted by the Lord Chancellor of Ireland, but Lord CHELMSFORD said in reversing the decision on appeal: "Mistake is undoubtedly one of the grounds for equitable interference and relief; but then it must be a mistake not in matters of law, but a mistake of facts. The construction of a contract is clearly matter of law; and if a party acts upon a mistaken view of his rights under a contract, he is no more entitled to relief in equity than he would be in law."

"A misrepresentation of law is this: When you state the facts, and state a conclusion of law, so as to distinguish between facts and law. The man who knows the facts is taken to know the law; but when you state that as a fact which no doubt involves, as most facts do, a conclusion of law, that is still a statement of fact and not a statement of law. Suppose a man is asked by a tradesman whether he can give credit to a lady, and the answer is, 'You may, she is a single woman of large fortune.' It turns out that the man who gave that answer knew that the lady had gone through the ceremony of marriage with a man who was believed to be a married man, and that she had been advised that that marriage ceremony was null and void, though it had not been declared so by any court, and it afterward turned out they were all mistaken, that the first marriage of the man was void, so that the lady was married. He does not tell the tradesman all these facts, but states that she is single. That is a statement of fact. If he had told him the whole story and all the facts, and said, 'Now, you see, the lady is single,' that would have been a misrepresentation of law. But the single fact he states, that the lady is unmarried, is a statement of fact, neither more nor less; and it is not the less a statement of fact, that in order to arrive at it you must know more or less of the law.

"There is not a single fact connected with the personal status that does not, more or less, involve a question of law. If you state that a man is the eldest son of a marriage, you state a question of law, because you must know that there has been a valid marriage, and that that man was the first-born son after the marriage, or, in some countries, before. Therefore, to state it is not a representation of fact seems to arise from a confusion of ideas.

"It is not the less a fact because that fact involves some knowledge or rela-

LAWRENCE *v.* BEAUBIEN.

IN THE COURT OF APPEALS OF SOUTH CAROLINA, 1831.

[2 *Bailey* 623.]

Debt upon bond, the condition of which was for the payment of $3,500. The jury found a special verdict, the facts of which were: That the bond in question was that of the defendant. That Abraham Isaacs, of Beaufort, had, by will, left his property, personal and real, to the defendant, who was not at the time a naturalized citizen. That the defendant was advised by counsel that he could not hold the real estate devised, as to which the deceased was intestate, and which passed to Samuel F. Isaacs, his son. That thereafter Samuel F. Isaacs executed a deed of trust of all his right, title, and interest in the land to Alexander Corrie, in trust for the defendant, in consideration of the bond before mentioned. That the bond was afterwards assigned to the present plaintiff. That since this time the defendant has been naturalized, and that the legislature, upon application, has released to him all the rights of the State in the land, no objection thereto being offered by Samuel F. Isaacs.

The court held that the bond was executed under a mistake of the law, but with full knowledge of the facts, and gave judgment for plaintiff.

The defendant appealed, and moved to set aside judgment for plaintiff, with liberty to enter judgment for defendant.

JOHNSON, J. No question has been raised as to what were the rights of Samuel F. Isaacs and the defendant in the real estate devised by Abraham Isaacs to the latter, and for the price of which the bond, on which this suit is founded, was given; and it is very clear that under the rule in Vaux *v.* Nesbit, 1 McC. Ch. 352, the land was liable to escheat, but that the defendant, although an alien, was entitled to take under the devise, and to hold until office found; so that Samuel F. Isaacs had no interest in it, either presently or prospectively. The defendant therefore acquired nothing by his release, and he, Samuel F. Isaacs, parted with no right, nor suffered any loss; and if we add to this the circumstance that the defendant acted upon the advice of counsel learned in the law, we shall have no difficulty in coming to the conclusion assumed in the argument, that he purchased in the mistaken belief that he himself

tion of law. There is hardly any fact which does not involve it. If you state that a man is in possession of an estate of £10,000 a year, the notion of possession is a legal notion, and involves knowledge of law; nor can any other fact in connection with property be stated which does not involve such knowledge of law. To state that a man is entitled to £10,000 consoles involves all sorts of law. Therefore this is a statement of fact, and nothing more; and I hold the argument to be wholly unfounded which maintained that it was a statement of law." Sir GEORGE JESSEL, M.R., in Eaglesfield *v.* Marquis of Londonderry, 1876, L. R. 4 Ch. D. 693, 702.

had no interest in the land, but that, on the contrary, the fee was in Samuel F. Isaacs by descent. The question then arises, whether this contract can be enforced against him; or to put it abstractly, whether one is bound by a contract entered into under a mistaken deduction of law from facts which were known to him, by which he acquired nothing, and the party contracted with parted with no right, nor suffered any loss.

If this proposition is to be considered with reference to the rules of morality, there could be no diversity of opinion about it. The plaintiff seeks in this action to recover that which, of natural right, belongs to the defendant. It is a universal principle, founded in reason, that no one is entitled to have or retain that which *ex æquo et bono* belongs to another; a principle found in every code, and circumscribed in its application only by positive rules founded on the convenience and necessities of mankind; and when rightly understood, says Sir Henry Finch, the very maxims and principles of the positive law will yield to it as to a higher and more perfect law. Finch's Law, b. 1, c. 3.

In the inquiry whether this principle is opposed in its application to the case under consideration by any other conflicting principle, or positive rule, we are met with the maxim, *ignorantia juris non excusat,* which, it is insisted on behalf of the plaintiff, covers the precise ground, and supersedes it. To allow one to shelter himself from the punishment due to crime, or to excuse a wrong done to, or right withheld from, an individual under a pretended or even real ignorance of the law, would uproot the very foundation of society; and in this we see the reason and propriety of the maxim, and the fitness of its application. But there is certainly nothing in the principle which authorizes its application in a manner calculated to effectuate a wrong; and unless the principle, *ex æquo et bono,* is erroneous, clearly it would so operate if applied to this case. If it is to be regarded as a mere arbitrary rule, and to take effect according to the terms in which it is expressed, it is equally evident that it was designed as one of the means of attaining right, and preventing wrong. The very necessity for an excuse presupposes that some wrong has been done, or some right withheld. He that has done neither needs no excuse, for he is already justified, so that, whether the rule is interpreted according to its letter or spirit, its application is limited to those cases in which redress is sought for a wrong done, or a right withheld.

The propriety, and necessity, of its application, as the means of enforcing the obligation of contracts is, to my mind, an utter perversion of the use for which it was designed; for that is sufficiently attained by other rules of equal obligation framed for the express purpose. Amongst these, that which has the strongest analogy to that contained in the maxim, is that which provides that no one shall ever aver against his own deed; but that is founded on a very different principle. The uncertainty of contracts and the temptations to perjury incident to the

substitution of facts depending on slippery memory, for those reduced to writing, are the foundation of this rule, and it would seem to furnish itself a sufficient security against all abuses, without the aid of *ignorantia juris non excusat.* And yet this rule, whilst it is imperative in the interpretation of contracts, is made to promote the great ends of justice by letting in proof that the most solemn contract was obtained by fraud, or duress, or other corrupt and illegal means; and I am utterly unable to conceive of any solid foundation for the exclusion of proof that the consideration was founded in a mistake of law. All the difficulty and confusion which have grown out of the application of the maxim appear to me to have originated in confounding the terms ignorance and mistake. The former is passive, and does not presume to reason, and unless we were permitted to dive into the secret recesses of the heart, its presence is incapable of proof; but the latter presumes to know when it does not, and supplies palpable evidence of its existence. Hence it was well remarked by Lord ROSSLYN, in Fletcher *v.* Tollet, 5 Ves. 14, "that ignorance is not mistake."

The case in hand furnishes, I think, materials for an apt illustration of this distinction. The case of Vaux *v.* Nesbit had been recently decided when this contract was entered into, and the rule established by it was not generally known to the profession. The defendant did not act of his own head, or confide in his own judgment, but sought the advice of counsel, who instructed him that the land descended to Samuel F. Isaacs, notwithstanding the will; and upon the faith of this advice he gave the bond sued on. Now I hazard little in affirming that no one who reasons correctly will doubt: 1. That the defendant did not intend this bond as a gratuity to Samuel F. Isaacs; nor, 2. That, acting upon the mistake of his counsel, he did intend it as the price of the fee simple of the land. The proof of the mistake is then clearly made out; but if he had acted of his own head, and confiding in his own unassisted judgment, proof of his ignorance would have been impracticable, and his contract might have been set down to the account of a compromise of a doubtful right, or the improvident investment of money on a speculating bargain; and in either view he would have been bound.

Having premised this much, I will proceed to notice a few of the leading cases of the very many that have been referred to in the argument. That of Bilbie *v.* Lumley, 2 East, 469, is the first, I believe, in which the rule was broadly laid down, that if one paid money to another, voluntarily, with a full knowledge of all the facts of the case, he could not recover it back on the ground of his ignorance of the law. I attach no importance to the circumstance that there the action was to recover back money paid, and not, as here, to enforce a contract founded upon a mistake of law; for without intending to enter into the inquiry, whether there is or is not a difference between the two cases, I incline to think that there is none in principle, for, in general, the

same principle which furnishes a protection from loss, supplies also the remedy for a wrong. But the manner in which that case went off is calculated to lessen its authority as a precedent. Lord ELLENBOROUGH superseded the argument of counsel by inquiring whether any case could be found in which it had been ruled otherwise; and his own is summed up in the loose expression, that there is no saying to what extent the excuse of ignorance might not be carried, if it were allowed. If his lordship intended to be understood as using the term ignorance as distinguished from mistake, then there would be much ground for the apprehension of abuse, if it were allowed as an excuse; and this because it is not susceptible of proof. But if the term is to be understood as identical with mistake, there is no cause of alarm, for that is susceptible of as direct and satisfactory proof as any other matter of fact which can enter into a case. His lordship's conclusion, therefore, fails; and if this case stood alone, its authority might well be questioned. Nor do I think it derives much support from the case of Brisbane *v.* Dacres, 5 Taunt. 143. GIBBS, Justice, it is true, enters fully into the doctrine, and maintains the principle with some show of reasoning; but that is met, and I think more than refuted, by the able argument of CHAMBRE, Justice, drawn from the authority of decided cases, *dicta* of learned judges and the still greater authority of natural reason. And Sir JAMES MANSFIELD, Chief Justice, whilst he yields to the authority of Bilbie *v.* Lumley, evidently puts the case itself upon the ground that, *ex æquo et bono*, the defendant was entitled to retain the money. So, also, HEATH, Justice, denied that the fact of ignorance had been made out, and predicates his opinion on the ground that the law was known to the defendant, and that he took upon himself to decide whether it was best for him to pay the money, or dispute the point with his superior officer, and was concluded by his own judgment.

In Shotwell *v.* Murray, 1 Johns. Ch. 512, and Lyon *v.* Richmond, 2 Id. 56, Chancellor KENT seems to have adopted the cases referred to, as authority upon the point; but neither of these cases turned upon the precise point. In the first, the mistake was in relation to a collateral matter; and the last was *judicium redditum in invitum.*

These are the leading cases on that side of the question, and I will now proceed to notice those on the other. That of Lansdown *v.* Lansdown, Mosely, 364, is the first in the order of time. That case was this: the second of four brothers died seised of land, and the eldest entered upon it; but the youngest having also claimed it, they applied to a schoolmaster, one Hughes, who often acted as an attorney, for his opinion; and he, upon consulting his books, gave an opinion in favor of the youngest, on the ground that lands could not ascend; upon which the eldest brother, rather than go to law, agreed to divide the estate, and deeds were prepared and executed accordingly, and the Lord Chancellor KING decreed that the deeds should be delivered up and canceled, as having been obtained by mistake and misrepresentation. If this case be

law, there can be no question of its application to the case in hand. Their analogy is so striking as to render them almost identical, and it is worthy of remark, that although it is now more than a century since it was decided, it does not appear to have been directly overruled. It does not appear, indeed, to have been drawn into the discussion either in Bilbie *v.* Lumley, or in Brisbane *v.* Dacres.

The principle of it, however, seems to have been fully sustained by the Master of the Rolls, sitting for the Lord Chancellor, in Bingham *v.* Bingham, 1 Ves. sen. 126. There, on a bill to have the purchase money paid for an estate which belonged to the plaintiff refunded, on the ground of mistaken law, it was decided for the plaintiff with costs; "for though," observes the Master of the Rolls, "no fraud appeared, and the defendant apprehended he had a right, yet it was a plain mistake, such as the court was warranted to relieve against, and not to suffer the defendant to run away with the money, in consideration of the sale of an estate to which he had no right."

Besides these cases of direct authority, there is an almost endless variety of *dicta* of the most learned judges, utterly irreconcilable with the different rule. Thus, in Farmer *v.* Arundel, 2 W. Bl. 825, Lord C. J. DE GREY says, that "when money is paid by one man to another on a mistake, either of fact or of law, or by deceit," assumpsit lies to recover it back. And so in Bize *v.* Dickason, 1 T. R. 286, Lord MANSFIELD lays down the rule broadly, that "where money is paid under a mistake, which there is no ground to claim in conscience," it may be recovered back in assumpsit. In short, it is difficult to turn to any book of authority in which you will not find the principle of the rule broadly laid down, under some form or other.

In Hunt *v.* Rousmaniere, 8 Wheat. 215, Chief Justice MARSHALL remarks, that "although we do not find the naked principle, that relief may be granted on account of ignorance of law, asserted in the books, we find no case in which it has been decided that a plain and acknowledged mistake in law is beyond the reach of equity." And, in remarking on the case of Lansdown *v.* Lansdown, he observes, that although objectionable in other respects, "yet, as a case in which relief has been granted on a mistake in law, it can not be entirely disregarded." And, although the case of Hunt *v.* Rousmaniere ultimately turned upon another question, see 1 Pet. 1, it shows very clearly the opinion of that great jurist.

Cases of this sort, and *dicta* supporting this view, might be multiplied to an almost unlimited extent. That has already been done by Mr. Evans, the learned translator and editor of Pothier's Treatise on Obligations; and to his able argument I refer, as a conclusion on this difficult subject. See 2 Evans' Pothier, App. 269.

The alternative then is presented of following these, or the cases of Bilbie *v.* Lumley, and Brisbane *v.* Dacres. The solid foundation on which the former are based, as I have before endeavored to demonstrate, in my judgment greatly outweighs the narrow-minded policy on which

the latter are founded; and, for myself, I have no hesitation in coming to the conclusion that contracts founded on a plain and palpable mistake of the law, from a known state of facts, and capable of proof, ought not to be enforced.

In considering this question I have followed the example of the counsel on both sides, in assuming that the fact of a mistake in law, on the part of the defendant, was ascertained; and that clearly is the necessary inference from the facts ascertained by the verdict. We are not, however, at liberty to draw any inference from a special verdict, but every fact not ascertained by it is supposed not to exist. It is possible that the defendant might have known the law, although his counsel was ignorant of it. The presumption, to be sure, is otherwise; but the case must go back to the circuit court in order that that fact may be ascertained in due form, either by special or general verdict.

Two other questions have been raised in the course of the argument, of which it is perhaps necessary to take some notice. The first is, that this bond was given as the price of the compromise of a doubtful right. The second, that it was entered into for the purpose, and had the effect, of preventing a competition between the defendant and Samuel F. Isaacs in an application to the legislature to release the right of escheat. It is enough to remark of both, generally, that they not only do not appear in the special verdict, but they are directly opposed to the necessary conclusion ascertained from the facts. The defendant conceded the right of Isaacs, and his object was to buy the land; so that neither a compromise nor removing competition could have entered into it.

The motion for leave to enter up judgment for the defendant is refused, and a *venire de novo* awarded.

O'NEALL, J., concurred.

HARPER, J., having been of counsel for the defendant, gave no opinion.

New trial ordered.[1]

[1] See note to this case 23 Am. Dec. p. 164.

"If any relief can be had in such a case, it must be upon the ground of a distinction between an actual mistake of law . . . and a mere ignorance of which was applicable to the party of the case, as known to both parties." Per Chancellor WALWORTH, in Champlin *v.* Laytin, 1836, 6 Paige, 189, 202; this doctrine has, however, been squarely repudiated in Gauls *v.* Enrange, 1871, 47 N. Y. 57.

"There is a clear and practical distinction between ignorance and mistake of the law. Much of the confusion in the books, and in the minds of professional men, upon this subject, has grown out of a confounding of the two. It may be conceded, that at first view, the distinction is not apparent; but it is insisted that upon close inspection it becomes quite obvious. It has been ridiculed as a quibble, but we shall see that it has been taken by able men, and acted upon by eminent courts. Ignorance implies passiveness; mistake implies action. Ignorance does not pretend to knowledge, but mistake assumes to know. Ignorance may be the result of laches, which is criminal; mistake

GEE *v.* SPENCER.

IN CHANCERY, 1681.

[1 *Vernon* 32.]

Release set aside by reason of the misapprehension of the party.

A man possessed of a lease for three lives of the rectory of Orpington, in Kent, devised the rectory by his last will; but that being void, it came to his three daughters as co-heirs and special occupants. There being a suit touching this rectory in chancery, the husband of one of the daughters fearing to be in law, and being made to believe, that he should be forced to pay costs, released the arrears that should be coming to him for his share of the rectory to the other sisters, who were to bear the charge of the suit; his share of the arrears amounted to £1,000.

This release was set aside, and Luxford's Case cited that a misapprehension in the party shall avoid his release. Reg. Lib. 1681, A. fol. 246. The bill in this case was filed by the widow of the person executing the release, and who was one of the three daughters and co-heirs, against one of the other daughters and co-heirs, and the defendant agreed to pay the costs. It appearing to the court that the release was obtained by fraud and circumvention. *Feme covert* heir-at-law, and her husband being drawn in to enter into articles for supplying the defect of a surrender of a copyhold to the use of the will, whereby they were devised to the plaintiff, plaintiff not allowed to carry them into execution in regard the defendants were not apprized of their interest. Preston & Ux. *v.* Wasey & Ux., Pre. Chan. 76. Vide also Jarvis & Ux. *v.* Duke, ante 19, and cases cited in not. there. The principle seems to be that mistakes and misapprehensions in the drawing (and *a fortiori* in the executing) of deeds, form as much a head of relief in equity as fraud and imposition. Simpson *v.* Vaughan, 2 Atk. 33; Langley *v.* Brown, ibid. p. 203.[1]

argues diligence, which is commendable. Mere ignorance is no mistake, but a mistake always involves ignorance, yet not that alone. The difference may be well illustrated by the case made in this record. If the plaintiff, the administrator, had refused to pay the distributive share in the estate which he represented, to the children of his intestate's deceased sister, upon the ground that they were not entitled in law, that would have been a case of ignorance, and he would not be heard for a moment upon a plea, that being ignorant of the law he is not liable to pay interest on their money in his hands. But the case is, that he was not only ignorant of their right in law, but believed that the defendants were entitled to their exclusion, and acted upon that belief, by paying the money to them. The ignorance in this case of their right, and the belief in the right of the defendants, and action on that belief, constitute the mistake." Per NISBET, J., in Culbreath *v.* Culbreath, 1849, 7 Georgia, 64. This distinction, however, seems to-day confined to the courts of South Carolina and Georgia.

[1] So when one of the parties to the mistake is in a position of authority—as a husband—relief has been granted. Boyd *v.* De La Montague, 1878, 73 N. Y.

BLAKEMAN *v.* BLAKEMAN.

IN THE SUPREME COURT OF CONNECTICUT, 1872.

[39 *Connecticut Reports* 320.]

Bill in equity for the correction of a deed of land, so as to make it embrace a right of way over the adjoining land of the grantor; brought to the Court of Common Pleas of Fairfield County, and tried, on a general denial, before BREWSTER, J. The court found the following facts:

498; see also Hall *v.* Otterson, 1894, 52 N. J. Eq. 522; but see Osborn *v.* Thurlmaster, 1893, 90 Virginia, 311. The same rule is applicable to relations between attorney and client. See Langstaffe *v.* Fennish, 1805, 10 Vesey, 405; as when the mistake has been induced by the defendant, however innocently, it is a ground for relief. Wilding *v.* Sanderson, L. R. 1897, 2 Ch. 534, 550; Stewart *v.* Kennedy, 1890, 15 App. Cases, 75. Obviously if the mistake has been induced by improper conduct it will be relieved. Berry *v.* American Central Insurance Co., 1892, 132 N. Y. 42. "Assuming that the general rule excludes equitable relief for such a mistake, when it is one of law pure and simple, and no other elements are present . . . it is equally well settled that when there is a mistake of law, and either position fraud on the other, or inequitably unfair and deceptive conduct, which to confirm the mistake and conceal the truth, it is the right and duty of equity to award relief." Per FINCH, J., in Haviland *v.* Willets, 1894, 141 N. Y. 35.

"*Ignorantia legis non excusat* is a maxim of the common law, founded not only in expediency or policy, but in necessity. If ignorance of law could be admitted in judicial proceedings, as a ground of complaint, or of defence, courts would be involved and perplexed with questions incapable of any just solution, and embarrassed by inquiries almost interminable, until the administration of justice would become in effect impracticable. There would be but few cases in which one party or the other would not allege it as a ground of exemption; and the extent of the legal knowledge of each individual suitor, not his acts or words, would be the material fact on which judgments would be founded. The fact itself is incapable of proof by evidence of the character demanded in courts of justice. It is really insoluble, for it is in its very nature rather matter of conjecture, or mere inference, than of fact. The maxim prevails in a court of equity, as it does in a court of law. Jones *v.* Watkins, 1 Stew. 18; Dill *v.* Shahan, 25 Ala. 694; Gwynn *v.* Hamilton, 29 Ala. 233. But there are exceptions to its operation; or, rather, there are cases in which it is not rigidly enforced. If the ignorance or mistake of law is induced by fraud, or imposition, or undue influence, or an abuse of confidence springing out of peculiar relations existing between the parties, the application of the maxim is relaxed. 1 Story's Equity, §§ 111-38; Haden *v.* Ware, 15 Ala. 149." Per BRICKELL, J., in Hardigree *v.* Mitchum, 1874, 51 Ala. 151, 153.

See also Clark *v.* Clark, 1896, 55 N. J. Eq. 814, where a complainant, who entered into an arbitration agreement in ignorance that the defendant's demand was barred by the Statute of limitations, was relieved on the ground that the defendant's attorney had dealt with him in a manner to confirm him in his mistake and effect a concealment of the truth.

The respondent was for several years prior to October 11, 1865, owner in fee of the premises described in the petition, between which premises and other land of the respondent was a lane leading out of the highway, bounding the premises on the east, and running west from the highway.

On the 11th of October, 1865, the respondent conveyed to the petitioner by warranty deed the premises described in the petition. The deed conveyed the land "with the privileges and appurtenances thereof," but did not in terms convey the right of way through the lane.

Before the deed was delivered to him, the petitioner insisted that a clause containing a grant of a right of way through the lane should be inserted, which the respondent refused to do, saying that the right of way was a privilege which had always belonged to the place, and that the words "privileges and appurtenances" in the deed conveyed the right of way through the lane.

The petitioner then, believing that the deed conveyed a right of way in fee, accepted the same, paid the respondent $900, which was the price agreed, and went into possession of the premises.

The lane had been used for many years as the only way to go to and from a barn standing near it on the premises deeded to the petitioner.

The right of way through the lane did not pass by the deed, the respondent being at the time of the sale the owner of both the servient and dominant estates. Both of the parties knew at the time of the execution of the deed, and during the making of the contract, that the respondent was the owner of the estates, dominant and servient, but both the parties were ignorant of the legal effect of such ownership on the right of way.

There was no fraud on the part of the respondent proved or claimed. The right of way is worth to the respondent one hundred and fifty dollars.

Both parties supposed at the time the deed was given that it conveyed a right of way through the lane, and the petitioner would not have taken the deed and paid the sum which he did but for his belief that a right of way in fee was conveyed by the deed. The respondent did not intend to make any express grant of the way in fee by the deed, or any warranty thereof binding on himself and his heirs, but repeatedly refused to so convey.

It appeared from the conversation of the parties at the time of the execution of the deed, and from other conversations before and after, and from the papers drawn up and executed, that there was in the mind of the respondent some distinction between a grantor's liability in regard to a way appurtenant, and a way expressly granted in a deed; the former way, he supposed, passed by the deed; the latter he was unwilling, and did not intend to grant. This distinction was not made known to the petitioner in any other way than by the above facts.

BUTLER, C. J. The petitioner purchased and the respondent sold the tract of land in question for a consideration which covered a right of

way through the lane, and which would not have been paid for the land alone. It does not expressly appear, but I think it is fairly to be implied, that there had been an appurtenant right of way, which had ceased by operation of law. The respondent represented to the petitioner that such a way still existed and would pass by virtue of the clause in relation to privileges and appurtenances in the deed, and the petitioner took the deed relying upon the truth of that representation. Both parties were mistaken then in relation to the fact of the existence of the way—a mutual mistake. There was no mistake as to the legal effect of the deed, for it would have conveyed the appurtenant way, if in existence, and in fee, if such a way could be conveyed in fee.

The law is so that an appurtenant right of way cannot exist where both tracts are owned by the same person. Of this the parties were ignorant, and the effect of the union of the estates and the destruction of the way thereby did not enter into their contemplation. The respondent sold then, and the defendant bought, an extinct thing, both supposing it to be existent, and both ignorant that from the nature of the case, and as matter of law, the object could not exist. There was not here a mistake as to the legal effect of a deed, but a mistake as to the existence of a part of the subject-matter of it. Nor was there a mistake as to the nature and operation of any known or contemplated principle of law operative upon the contract. There was superadded to the mistake of fact ignorance of a principle of law which, if known and contemplated, would have prevented the mistake under which the parties acted.

We think the petitioner was entitled to relief and the Court of Common Pleas is so advised.

In this opinion the other judges concurred.[1]

[1] In Bentley *v.* Whittemore, 1867, 18 N. J. Eq. 366, a preferential assignment was made, in New York of lands in New Jersey. The assignment, while valid in New York, was void in New Jersey. The assignees conveyed the land in question to complainant, who paid off and canceled the mortgage in the belief that he was acquiring a valid title. Complainant asked to have the mortgage reinstated for his benefit on the ground that it was canceled by mistake. Chancellor ZABRISKIE used the following language in refusing such reinstatement: "Courts of equity have power to correct mistakes, and protect from the consequences of them. It is one of the well-established heads of equity jurisdiction, and this court has frequently exercised this power in the case of mortgages canceled by mistake. But it is only mistakes as to fact that entitle to this relief. It is well settled, that this court will not relieve for a mistake as to the law. . . . Although a mistake as to the law of a foreign State is considered a mistake of fact in most cases, yet when a non-resident enters into a contract to be performed in another State, or relating to lands in a foreign State, he is held to know the law of such State, and in that case the mistake is one of law. Besides, Bentley, who seeks the relief, and paid the mortgages and canceled them by mistake, was a resident of this State." See also Tyson *v.* Passmore, 1845, 2 Pa. St. 122.

ROGERS *v.* INGHAM.

IN THE COURT OF APPEALS, 1876.

[*Law Reports*, 3 *Chancery Division* 351.]

John Ingham, by his will, bequeathed the residue of his estate to W. Taylor and W. Ingham upon trust to divide the same between his children and their children as therein mentioned. He died in 1847, and his will was proved by W. Taylor and W. Ingham. In 1866 Mary Rogers, one of the testator's children who had under the will an estate for life in one-fourth of the estate, died, leaving her surviving two children, Martha Rogers and R. R. Rogers, and also Thomas Wheatley, husband and administrator of Hester Wheatley, another child who had died in the lifetime of Mary Rogers. W. Ingham, who had survived W. Taylor, paid the interest in that one-fourth of the estate for some time equally between Martha Rogers and R. R. Rogers, being of opinion that the share of Hester Wheatley had gone to them as survivors, and after the death of R. R. Rogers he paid the interest to Martha Rogers as surviving. W. Ingham then died, and J. W. Ingham took out letters of administration to his estate. J. W. Ingham took the opinion of counsel on the will, and was advised that the share of Hester Wheatley did not survive, but had become vested in her and passed to her husband as administrator, and consequently that the interest had been paid to Martha Rogers in error. Her solicitors took the opinion of another counsel, and wrote to the solicitors of J. W. Ingham as follows:

"We have taken an opinion on this matter, and may as well state it confirms the opinion of your counsel, but whether our client will be satisfied or not with it we cannot say. It is certainly a very great disappointment to her, and will be very hard indeed should Mr. Ingham and Mr. Wheatley insist on making the deductions you propose. Surely Mr. Wheatley will not look for the whole of the arrears of interest being paid to him. You must admit it is a very hard case as far as Mrs. Rogers is concerned. Will you kindly see your clients and write us what they are inclined to do, and we will endeavor to bring the matter to a conclusion at the end of the week."

The solicitors of Mr. Ingham, however, made out an account of the whole estate, debiting Martha Rogers with interest as paid to her in mistake, making £274 16s. 7d. as due to her from the estate of John Ingham. Some more letters as to the accounts passed, and on the 2d of July, 1873, a check for £274 16s. 7d. was sent for Martha Rogers, and the receipt was acknowledged by her solicitors. At the same time £454 15s. 3d. was paid to Thomas Wheatley as the share of Hester Wheatley, with the arrears of interest paid to Martha Rogers as by mistake.

On the 14th of June, 1875, Martha Rogers filed her bill against J. W. Ingham and Thomas Wheatley, stating the will of W. Ingham, and submitting that on the true construction of the will the share did not vest in Hester Wheatley, but passed to R. R. Rogers (to whom Martha Rogers was administratrix) and Martha Rogers as surviving, and praying that Thomas Wheatley might be ordered to repay the same with interest.

The suit came on for hearing before Vice-Chancellor HALL on the 13th of January, 1876.

JAMES, L. J. I am of opinion that the judgment of the Vice-Chancellor ought to be affirmed.

In arriving at that conclusion I entirely put aside anything that has been said about any supposed or conditional consideration connected with the matter. It really is to be looked at as between the two persons who alone are now in litigation before us, that is, the plaintiff on the one part, and Wheatley on the other part; and the greater portion of the argument seems to me to be disposed of by this consideration, that there really is no question of trust, trust estate, or trust money to be dealt with. When a trustee, by the direction or with the authority of his *cestui que trust*, pays money to a third person, no matter under what claim of right or under what circumstances, it is exactly the same as if the *cestui que trust* had received the money from the trustee, and had herself paid it to that person. It is simply a question of money paid by the lady, or by the lady's direction, out of money of hers which the trustee had in hand to a person who said that he had a claim to the money.

That being so, it is reduced, as it appears to me, to a mere action for money had and received, and it is the same as if A, through a third person, had paid money to B, thinking that B was entitled to it, B thinking also that he was entitled to it; there having been, as it is now said, a mistake of law which was common to both parties. No authority whatever has been cited to us in support of the proposition that an action for money had and received would lie against a person who has received money from another, with perfect knowledge of all the facts common to both, merely because it was said that the claim to the money was not well founded in point of law. Of course, cases of that kind must have continually occurred, and yet no case has been produced in which a suit of this kind has succeeded. And really when it is treated as the common case of money paid to B under a mistake, the law on the subject was exactly the same in the old Court of Chancery as in the old courts of common law. There were no more equities affecting the conscience of the person receiving the money in the one court than in the other court, for the action for money had and received proceeded upon equitable considerations. Here the money has got into the hands of one person, and he received it honestly, with no mistake on his part, and no mistake on the part of the lady or of the trustee, the intermediate hand through whom the money passed and by whom it was actually paid.

I have no doubt that there are some cases which have been relied on, in which this court has not adhered strictly to the rule that a mistake in law is not always incapable of being remedied in this court; but relief has never been given in the case of a simple money demand by one person against another, there being between those two persons no fiduciary relation whatever, and no equity to supervene by reason of the conduct of either of the parties.

It is said that there have been two cases of that kind. In Bingham *v.* Bingham, 1 Ves. Sen. 126, a man was held to be entitled to get his money back when he had paid it for a conveyance of his own land from another person. It was held in that case that he was entitled to recover back the money because he had not the consideration for which he had bargained. The other case is Davis *v.* Morier, 2 Coll. 303, where the relation of trustee and *cestui que trust* existed between the parties; but when the facts of that case come to be looked into, the person who received the whole income of the fund on trust to apply the same properly, and who was the trustee, retained to himself all except £500 a year, and it appeared that the £500 a year was not all that he ought to have paid to the *cestui que trust* and that being so the Vice-Chancellor, KNIGHT BRUCE, directed an inquiry; first, as to whether he had retained more than he ought to have retained, and secondly, under what circumstances and whether the other *cestui que trust* had in any manner assented to such retainer, that is to say, had acquiesced in it so as to show whether they had given it up. Therefore there was there a question of a *cestui que trust* against a trustee, which trustee, no doubt under a mistake, had retained trust money in his own possession

That is the nearest case that I have been able to find to the case now before us, but that case is far from establishing the proposition contended for. If that proposition were true in respect to this case it must be true in respect to every case in the High Court of Justice where money has been paid under a mistake as to legal rights, and it would open a fearful amount of litigation and evil in the cases of distribution of estates, and it would be difficult to say what limit could be placed to this kind of claim, if it could be made after an executor or trustee had distributed the whole estate among the persons supposed to be entitled, every one of them having knowledge of all the facts, and having given a release. The thing has never been done, and it is not a thing which in my opinion is to be encouraged. Where people have a knowledge of all the facts, and take advice, and whether they get proper advice or not, the money is divided and the business is settled, it is not for the good of mankind that it should be reopened by one of the parties saying: "You have received your money by mistake, I acquiesced in your receipt of it under that mistake, and, therefore, I ask you to give it to me back." I am of opinion, therefore, that the decision of the Vice-Chancellor is perfectly correct and ought to be affirmed.

MELLISH, L. J. I am entirely of the same opinion. There is no doubt as to the rule of law that money paid with a full knowledge of all the facts, although it may be under a mistake of law on the part of both parties, cannot be recovered back; and I think it is equally clear that, as a general rule, the Court of Equity did not in such cases interfere with the courts of law. Nothing, in my opinion, would be more mischievous than for us to say that money paid, for instance, under a mercantile contract, according to the construction which the parties themselves put upon that contract, might, years afterward, be recovered, because, perhaps, some court of justice upon a similar contract gave to it a different construction from that which the parties had put on it. I think there is no doubt that the rule at law is in itself an equitable and just rule which is not interfered with by courts of equity; but, on the other hand, I think that, no doubt, as was said by Lord Justice TURNER, "This court has power (as I feel no doubt that it has) to relieve against mistakes in law as well as against mistakes in fact," Stone *v.* Godfrey, 5 D. M. & G. 90; that is to say, if there is any equitable ground which makes it, under the particular facts of the case, inequitable that the party who received the money should retain it.

Now, is there any such ground in this case? It appears that there was a trustee in possession of a fund which belonged either to the plaintiff or to the defendant. All the facts were perfectly well known; the trustee was in communication with both parties; both parties were well aware that the question was then to be decided; the plaintiff's attention and the attention of the plaintiff's legal advisers were called to all the facts and circumstances; she took advice upon the point, and she and her advisers being all of them aware that if she had not assented to the view that the trustee took, the natural consequence would be that the money would have been paid into court under the Trustee Relief Act, and that she would have been obliged to have the question then decided. Therefore, having all the facts before her, and before her solicitors, and being advised, she thinks it better for her not to contest the matter, but to allow it to be settled in that way; and there is no doubt that she was advised properly. Thereupon the money was divided, and, of course, would not be paid into court, and the matter would not be litigated. Then the question is, whether a person who has acted in this way is now entitled, because she has changed her mind, to litigate this question, which before she had been advised and had determined not to litigate. It seems to me that it would be contrary to the ordinary rule of law; and that the defendant is entitled to say, "I received this money believing it to be my own; the person by whose direction it was paid was the counterclaimant against me; she knew all the facts, and elected at the time not to litigate the question, and therefore I have received the money just as if the question had been determined in open court." In my opinion, it would be most unsafe to estates in general if we were to hold in a case of this kind that money paid under those circumstances could be got back;

I agree, therefore, with the Lord Justice in thinking that the judgment of the Vice-Chancellor ought to be affirmed.

BAGGALLAY, J. A. I am of the same opinion, and I merely wish to add that while I give a general assent to the passage in the judgment of Lord BROUGHAM, which has been referred to in the course of the argument, in which he expressed himself to the effect that cases might arise in which it would be the duty of the court to relieve against an error of law, I do not think that the present is a proper case for the application of such a principle.

JAMES, L. J. The appeal will be dismissed with costs.[1]

NAYLOR *v.* WINCH.

IN CHANCERY, BEFORE SIR JOHN LEACH, V.C.,[2] 1824.

[1 *Simons & Stuart Chancery,* 555.]

By the will of John Winch, dated 8th of March, 1796, the plaintiff became entitled to an annuity of £600. By an indenture of March 8th, 1798, an annuity was assigned to trustees in trust for the plaintiff for life with certain remainders over.

In 1809, the trustees under the marriage settlement filed a bill against the executors of the will suggesting that the plaintiff claimed to be entitled to the annuity not for her life only, but absolutely.

In March, 1812, it was agreed between the plaintiff, her husband, the trustees, and the surviving executor, (the other executor being then dead), that upon a proper investment being made in the public funds of

[1] "I apprehend it is now settled that, when money has been paid or a conveyance executed in ignorance of a point of law, relief may be granted." Per Lord Chancellor BRADY, in Cooper *v.* Phibbs, 1865, 17 Ir. Ch. Rep. 73, 82.

See also Livesey *v.* Livesey, 1827, 3 Russ. 287; and Daniele *v.* Sinclair, 1881, L. R. 6 App. Cas. 181.

So when a man has bound himself to pay more than he is legally liable,

[2] The following contemporary verses call attention to the slowness of ELDON and the excessive rapidity of Vice-Chancellor LEACH:

> In equity's high court there are
> Two sad extremes, 'tis clear;
> Excessive slowness strikes us there,
> Excessive quickness here.
>
> Their source, 'twixt good and evil, brings
> A difficulty nice;
> The first from Eldon's *virtue* springs,
> The latter from his *vice*.

Great Britain for answering the annuity of £600, the suit instituted in 1809 should be terminated and the bill dismissed. Accordingly a deed dated the 23d of March, 1812, between the plaintiff and her husband of the first part, the trustees of the settlement of 1808 of the second part, and the surviving executor of the third part, was prepared and duly executed by all parties. This deed, after reciting the various circumstances already mentioned, recited that "doubts were entertained respecting the true construction and effect of the testator's will in certain contingencies."

The bill went on to state that a certain adjustment had been reached by the terms of which the annuity was to be invested in certain funds of which the plaintiff was to receive the income during her life, and in consideration of which she waived any right she might have.

The Vice-Chancellor, (after stating the facts of the case):

If a party, acting in ignorance of a plain and settled principle of law, is induced to give up a portion of his indisputable property to another under the name of compromise, a court of equity will relieve him from the effect of his mistake. But where a doubtful question arises, such as this question of construction upon the will of the testator, it is extremely reasonable that parties should terminate their difference by dividing the stake between them, in the proportions which may be agreed upon. In this bill it is generally alleged that the plaintiff was fraudulently drawn into this deed. But that allegation is totally unsupported by evidence; and on the contrary it is proved, by the defendant the executor, that the transaction of the compromise proceeded upon great deliberation on the part of the plaintiff, her husband, and her trustees; and that the deed was settled on behalf of all parties, by one of the most respectable names in the profession, the late Mr. Shadwell.

Where a compromise of a doubtful claim is entered into fairly, and with due deliberation and upon consideration, a court of justice cannot inquire into the supposed adequacy or inadequacy of the consideration. Where is it to find a scale for determining the true measure of adequacy?

under a mistake as to his liability, equity has afforded relief. Fitzgerald *v.* Peck, 1823, 4 Litt. 125, 126, but when parties enter a contract under an interpretation of a decision which is thereafter reversed, no relief will be afforded. Kenyon *v.* Welty, 1862, 20 California 637.

"A subsequent decision of a higher court, in a different case, giving a different exposition of a point of law from the one declared and known, where a settlement between parties takes place, cannot have a retrospective effect and overturn such settlement. . . . Every man is to be charged at his peril with a knowledge of the law. And to permit a subsequent judicial decision . . . to open or annul everything that has been done for years before, under a different understanding of the law, would lead to the most mischievous consequences. Fortunately for the peace and happiness of society there is no such pernicious precedent to be found." Per Chancellor KENT, in Lyon and Brockway *v.* Richmond, 1816, 2 Johns. Ch. 51, 59.

If a court is in such a case to be governed by its judicial opinion upon the rights of the parties, then, to him who by that opinion is held to be entitled to the whole property, no consideration can be really adequate which is less than the whole, and no compromise can ever bind the successful claimant. It is for this reason, and because I consider it to be wholly immaterial for the purpose of deciding upon the validity of the deed of compromise, that I do not give any opinion upon the arguments by which the counsel for the plaintiff assert her claim to the perpetual annuity. It is enough to support this deed, that there was a doubtful question and a compromise fairly and deliberately made upon consideration; and the actual rights of the parties, whatever they might be, cannot affect the question.[1]

B. Mistake of Fact.

BLEVERHASSET *v.* FULLER.

In Chancery, 1594-95.

[*Tothill* 131.]

The plaintiff makes a lease of land to the defendant with a meaning, that all woods growing thereupon should be excepted, saving for necessary botes, but by mistaking of the clerk, in putting in (hereinafter excepted) where there was no exception afterwards excepted: whereupon the defendant cuts down the woods, yet ordered to be stayed.

[1] In Hill *v.* Wheeler, 1887, 37 Minn. 522, where both plaintiff and defendant received the same legal advice mutually quit-claimed land to one another, and the court held that the compromise having been entered into in good faith would not be disturbed because the sequel showed that the parties had been incorrectly advised.

See also Mitchell, J., in Perkins *v.* Trinka, 1883, 30 Minn. 241, 243: "Neither is it any defense that it was afterwards judicially determined that tax deeds of this form are void. Where parties whose rights are questionable and doubtful, and who have equal means of ascertaining what their rights are, come together and settle these rights among themselves, a court must enforce the agreement to which they may fairly come at the time, although a judicial decision should afterwards be made showing that these rights were different from what they supposed them to be, or showing that one of them really had no rights at all, and so nothing to forego."

In Allcard *v.* Walker, 1896, 2 Ch. D. 369, the court, while relieving the plaintiff from an agreement entered into under mistake of law, made the relief conditioned upon the possibility of restoring the *status quo* of the date of the agreement.

NELSON *v.* NELSON.

IN CHANCERY, BEFORE LORD KEEPER COVENTRY, 1629.

[*Nelson* 7.]

The defendant being tenant of the manor of H. was employed by the plaintiff to purchase the same for him, which he, the said defendant, agreed to do; but, contrary to the said agreement, he purchased the same in his own name, but was afterwards persuaded to let the plaintiff into the purchase, which was done by deed mutually executed between them; but in that deed there were several omissions of many things comprised in the purchase-deed, and thereupon the plaintiff exhibited his bill for relief against the said omissions, and accordingly it was decreed.

THIN *v.* THIN.

IN CHANCERY, BEFORE THE LORD COMMISSIONERS, 1650.

[1 *Reports in Chancery*, 162.]

The bill is to have lands settled according to a marriage agreement and to supply a defect in a conveyance of 15 Car. 1, made pursuant to the said agreement, the deed being since miscarried and lost, which deed contained a revocation of uses limited in former deeds, in which deed of 15 Car. these words, viz: "Shall stand and be seized," are not mentioned, for want whereof the defendant at a trial of law in ejectment got a verdict.

The plaintiff insisted, that if by the defect in the said deed the estate intended to the plaintiff should be avoided, that the said former settlements would be wholly revoked, and the plaintiff left altogether unprovided for contrary to his father's intentions and the agreement aforesaid.

This court upon perusal of precedents and advising with the judges (the case being of weight), are fully satisfied that the said deed

For a lengthy and interesting discussion of the subject of the recission and reformation of contracts on account of mistake of fact and law, the student is referred to Trigg *v.* Read, 5 Humph. 529. This was rather an unusual case on its facts, being a bill for the specific performance of a contract of recission which was alleged to have been made under the influence of mistake. The opinion, which is too long to permit of reproduction in this volume, digests the cases admirably, and makes copious extracts from the leading text-writers on equity jurisprudence.

was not voluntary or unduly obtained, but pursuant and in order to the marriage agreement, and was made on just and good considerations of marriage, although it be not so expressed in the deed, and of natural affection and settlement of an estate on his posterity, and no fraud therein.

And this court is of opinion, that it cannot stand with equity or justice that the said conveyance made with intent to advance the plaintiff's marriage should destroy the former legal settlements, whereby he stood provided for, and leave him totally destitute and no ways provided for through want of those words, "Shall stand and be seized," in the said deed, which, if wanting, might be probably omitted by the negligence or slip of the clerk that engrossed it; and, therefore, this court is of opinion that the plaintiff ought to be relieved in equity, and decreed the plaintiff and his heirs of his body according to the limitation of the said deed, shall, notwithstanding the omission of the aforesaid words, "Shall stand and be seized," in the said deed, and notwithstanding any act done by the defendant, enjoy against the defendant, his heirs, etc., as well as if the said words had been perfectly in the said deed, and the said defect not happened therein; and the said defendant, his heirs, etc., to take no advantage of the said omission.[1]

BAKER *v.* PAINE.

In Chancery, before Lord Chancellor Hardwicke, 1750.

[1 *Vesey, Senior,* 456.]

The plaintiff, captain of an India ship, Ante, 317, by articles of agreement, bargained and sold to defendant, all his chinaware and merchandise which he brought home in his last voyage; covenanting that he was the real proprietor and had a right to sell, and should allow, deduct or pay to defendant all the customs, duties, allowances and charges, that should be taken out of the said bargained premises. Those allowances amounted in the whole to forty-six and a half per cent. paid to the company on the captain's private trade in respect of warehouse room, etc., or of the duties to the crown. Two ships having been taken on return home, the goods happened to sell for a much higher price than they had agreed on. The captain brought this bill, for an account of what was due on this contract.

The material question was, whether the plaintiff ought to bear all deductions and allowances, that were to be made, to the extent only of that

[1] Accord: Garnan *v.* Fox, 1674, Rep. Temp. Finch 172; so under similar circumstances the word heir has been supplied. Baildon *v.* Church, 1606, Tot. 131; Goodfellow *v.* Morris, 1618, Tot. 131.

sum he was to receive on his private contract with defendant, or whether he was to bear it on the whole price the goods should sell for at the company's sale by inch of candle?

Plaintiff's counsel admitted the articles, as penned, were against him so as to oblige him to pay on the whole sum, but the real contract and intent was that he should pay the forty-six and a half per cent. only on the price he was to receive by his private contract with defendant, who should bear the deduction on the surplus price for which the goods sold, because that was all profit to himself; and it appeared by the minutes and the calculations made by themselves at the time, that this was contrary to the intent, and a mistake by the drawer: which is a head of relief in this court; and to this parol evidence was offered to be read.

Objected to for defendant; for by this means the mere allegation of mistake will let in parol evidence in contradiction to any agreement, and defeat written acts.

Lord Chancellor. How can a mistake in an agreement, be proved but by parol evidence? It is not read to contradict the face of the agreement which the court would not allow, but to prove a mistake therein, which cannot otherwise be proved: it may therefore be read.

It is impossible to say this case is free from obscurity: and every case of this kind will be attended with some. Plaintiff may be entitled to a decree for account; but it must be according to what was his real agreement. To be sure it is very extraordinary, that an agreement should be made for sale of goods, which goods must by law be sold at another public sale to ascertain the real price; and that the more the goods sold for, and the greater profit the buyer should make, the less the seller should receive for those goods. Such an agreement might indeed be made; but it is extraordinary; though it is not likely to happen, yet possibly the goods sell so high, that the seller might be obliged to pay money out of his pocket beside losing the whole price of the goods. It is admitted there is a mistake, by drawing it so as that an action of covenant would lie: and then the question is, whether equity would relieve? But I do not think the drawer of the articles has pursued the intent of the minutes in other parts besides the inserting of the word "pay." In the minutes it is not said, that all shall be charged on the bargained premises which imports the goods sold, but charges, etc., that may be taken out of the produce of the said chinaware: which is an ambiguous expression, not so determinate as the other; as it might refer to the account the parties made up themselves, which was to be regulated *de novo;* and this is a great variation in the words and sense. Then I am of opinion, these minutes must be taken to be the agreement of the parties; and if any material variation (as is admitted for defendant) the articles must be rectified. The question then is, what is the true sense of the minutes?

All contracts of this kind depend on the usage of trade, and are so allowed, not only in this but in common law courts. On mercantile contracts relating to insurances, etc., courts of law examine and hear

witnesses, of what is the usage and understanding of merchants conversant therein; for they have a style peculiar to themselves, which is short yet is understood by them, and must be the rule of construction. The material evidence to afford a rule from facts and usage would be to show how the accounts had been made up, and the allowance made by the captain on one side, and the buyer or dealer in china on the other. And the plaintiff has proved by several witnesses; the amount of which is, that suppose the captain previous to the sale agrees to sell part of his private trade for £100, on which all the charges amount to £50, the seller is to pay that £50, but if the sale should amount to £200, the buyer usually pays the advance: whereas the evidence on the part of defendant amounts to nothing in this case, not swearing to a question of fact, what allowances, or in what manner accounts are made up (which is material) but only to the form and expression of the contract.

As to the objection of the risk; it is truly said, in all contracts of risk, that is no reason to vary or put a different construction on the agreement; which must be taken at the time; but here that argument is not *ad idem;* for the risk in this case is not at all to be applied to the deductions or allowances; which was a known and certain charge of 46 and a half per cent.

The minutes must be taken to be the agreement; the articles are not penned agreeably thereto; therefore the minutes ought to be expounded according to the usage of trade; which is proved to be, as plaintiff insists; defendant's evidence proving nothing of the fact.[1]

ALLEN *v.* HAMMOND.

IN THE SUPREME COURT OF THE UNITED STATES, 1837.

[11 *Peters,* 63.]

Mr. Justice M'LEAN delivered the opinion of the court.

This suit in chancery is brought before this court by an appeal from the decree of the circuit court for the district of Rhode Island.

The bill was filed in the circuit court by the appellee, to compel the appellant to deliver up to be cancelled, a certain contract, on the ground of its having been given through mistake.

In the year 1830, the appellee being the sole owner and master of the

[1] Section 1856 of the California Code of Civil Procedure: "No evidence of the terms of the agreement [shall be admitted] other than the contents of the writing, except in the following cases: 1. Where a mistake or imperfection of the writing is put in issue by the pleadings . . ."

So where a deed conveyed more or less than was intended, equity will give

brig Ann, of Boston, while on a voyage from New Orleans to Madeira, and thence to the coast of Africa, was illegally captured, off the Western Islands, by a part of a Portuguese squadron. Notice of the capture was given to the American government, but the vessel and cargo were condemned.

Such remonstrances were made by the American government, that on the 19th day of January, 1832, the claim of the appellee was admitted, to the amount of thirty-three thousand and seven hundred dollars, by the Portuguese government.

On the return of the appellee to the United States, he executed a power of attorney to the appellant, which is stated to be irrevocable; authorizing him to prosecute his claim against the government of Portugal. And on the 27th of January, 1832, the parties entered into a contract, under seal, in which Hammond agreed to pay Allen ten per centum on all sums which he should recover, up to eight thousand dollars, and thirty-three per cent. on any sum above that amount, as commissions. And Allen agreed to use his utmost efforts to recover the claim.

Allen had effected an insurance on the brig for the voyage in which it was captured, and so soon as he heard of the capture, he made representations of the fact to the Secretary of State, at Washington. This was not only sanctioned by Hammond, but from his correspondence with Allen, he seems to have placed great confidence in his disposition and ability to serve him.

There are a great number of facts which are proved in the case, and contained in the record; but it is unnecessary to state them, as they can have no direct bearing on the principal, and indeed the only question in the cause.

It appears that eight days before the agreement was entered into by the parties, the Portuguese government admitted the claim of Hammond, one-fourth of which was shortly afterwards paid. And the question arises, whether an agreement, entered into under such circumstances, ought to be delivered up and cancelled.

No one can read the contract without being struck with the large sum that Hammond is willing to pay on the contingency of recovering his claim. Allen was to receive as a compensation for his services, a sum little below the one-third of the amount recovered. This shows, in the strongest point of view, that Hammond could have entertained but a remote prospect of realizing his claim; and indeed it would seem, when

relief. See Bush *v.* Hicks, 1875, 60 N. Y. 298; Cox *v.* Ellsworth, 1886, 18 Neb. 664; Wilcox *v.* Lucas, 1876, 125 Mass. 21; Critchfield *v.* Klein, 1888, 39 Kansas 721; Smith *v.* Greeley, 1843, 14 N. H. 378; Tillis *v.* Smith, 1895, 108 Ala. 264; or where marriage settlements do not express the intention of the parties. Langley *v.* Furlong, 1758, 1 Dick. 315; Uvedale *v.* Halfpenny, 1723, 2 P. Wms. 151; Kentish *v.* Newman, 1715, 1 P. Wms. 235; or where a mistake is made in calculating an annuity. Carpmael *v.* Powis, 1846, 10 Beav. 36.

the circumstances of the case are considered, that he could have had little or no ground to hope for success.

His vessel and cargo had been condemned; the Portuguese government was in an unsettled state, and its finances in the greatest confusion and embarrassment.

In his vessel and cargo Hammond appears to have lost his entire property; and this very naturally threw him into despondency, and induced him to agree to pay nearly one-third of his demand to an agent who might, by possibility, recover it. He no doubt supposed, that by interesting his agent so deeply in the claim, he would secure his sympathies and his utmost exertions. And the prospect was, if the claim, or any part of it, should be obtained, it would be the work of time, and of great effort.

Allen is not chargeable with fraud in entering into the contract, or in using the most persevering efforts to get possession of the instalment paid.

That the contract was entered into by both parties, under a mistake, is unquestionable. Neither of them knew that the Portuguese government had allowed the claim. Can a court of equity enforce such a contract? Can it refuse to cancel it? That the agreement was without consideration is clear. Services long and arduous were contemplated as probable, by both parties, at the time the contract was executed. But the object of pursuit was already attained. No services were required under the contract, and for those which Allen had rendered to Hammond prior to it regular charges seem to have been made.

It is true the amount of services required by the agent, was uncertain. He took upon himself this contingency; and had not the claim been allowed by the Portuguese government, until after the contract, he would have been entitled to his commissions, however small his agency might have been, in producing the result. This, it may be supposed, was a contingency within the contemplation of the parties at the time of the contract; so that, unconnected with other circumstances, the smallness of the service rendered could have constituted no ground on which to set aside the contract.

But no one can for a moment believe that Hammond intended to give to his agent nearly ten thousand dollars, on the contingency of his claim having been allowed at the time of the contract. And it is equally clear that his agent under such a circumstance had no expectation of receiving that, or any other amount of compensation. The contract does not provide for such a case; and it could not have been within the contemplation of either party. Services were made the basis of the compensation agreed to be paid; but the allowance of the claim superseded all services in the case.

The equity of the complainant is so obvious, that it is difficult to make it more clear by illustration. No case, perhaps, has occurred, or can be supposed, where the principle on which courts of equity give relief, is

more strongly presented than in this case. The contract was entered into through the mistake of both parties; it imposes great hardship and injustice on the appellee, and it is without consideration. These grounds, either of which in ordinary cases is held sufficient for relief in equity, unite in favour of the appellee.

Suppose a life estate in land be sold, and at the time of the sale, the estate has terminated by the death of the person in whom the right vested; would not a court of equity relieve the purchaser? If the vendor knew of the death, relief would be given on the ground of fraud; if he did not know it, on the ground of mistake. In either case, would it not be gross injustice to enforce the payment of the consideration.

If a horse be sold which is dead, though believed to be living by both parties, can the purchaser be compelled to pay the consideration?

These are cases in which the parties enter into the contract, under a material mistake as to the subject-matter of it.

In the first case the vendor intended to sell, and the vendee to purchase a subsisting title, but which in fact, did not exist; and in the second, a horse was believed to be living, but which was in fact dead.

If in either of these cases, the payment of the purchase money should be required, it would be a payment without the shadow of consideration; and no court of equity is believed ever to have sanctioned such a principle. And so in the case under consideration; if Hammond should be held liable to pay the demand of the appellant, it would be without consideration.

There may be some cases of wager, respecting certain events, where one of the contingencies had happened at the time of the wager, which was unknown to both parties, and which was held not to invalidate the contract. Of this character is the case of the Earl of March *v.* Pigot, 5 Burr. 2802. But the question in that case arose upon the verdict of a jury, on a rule to show cause, etc.; and Lord MANSFIELD says; "the nature of the contract, and the manifest intention of the parties, support the verdict of the jury (to whom it was left without objection), that he who succeeded to his estate first, by the death of his father, should pay to the other without any distinction, whether the event had or not, at that time, actually happened."

In 1 Fonblanque's Equity, 114, it is laid down, that where there is an error in the thing for which an individual bargains, by the general rules of contracting, the contract is null, as in such a case the parties are supposed not to give their assent. And the same doctrine is laid down in Puffendorff's Law of Nature and Nations, b. 1, c. 3, sec. 12.

The law on this subject is clearly stated, in the case of Hitchcock *v.* Giddings, Daniel's Reports, 1; where it is said, that a vendor is bound to know that he actually has that which he professes to sell. And even though the subject-matter of the contract be known to both parties to be liable to a contingency; which may destroy it immediately; yet if the contingency has already happened, the contract will be void.

By the decree of the circuit court, on the payment of the amount, including interest, which is due from the appellee to the appellant, he is required to deliver up to be cancelled the agreement entered into on the 27th of January, 1832, which leaves the parties as they were before the contract; and as we consider the decree just, and sustained by principle, it is affirmed.[1]

PAINE *v.* UPTON.

IN THE COURT OF APPEALS, 1882.

[87 *New York Reports* 327.]

This action was brought to obtain a deduction from the sum secured by a bond and mortgage given for a portion of the purchase price of a farm, on the ground of a deficiency in and mutual mistake as to the quantity of land.

The facts are sufficiently stated in the opinion.

ANDREWS, Ch. J. We are not left in this case to ascertain the facts from the evidence, or to determine whether the evidence supports the facts found by the trial judge.

The evidence is not contained in the record, and the case comes here on the findings alone. The facts, as found, are therefore conclusively settled, and the only question is whether, upon those facts, the plaintiff is entitled to relief. The defendants, other than Mary A. Upton and Alexander Pomeroy, were owners, as tenants in common, of a farm in Monroe County formerly owned by their father, James Upton, commonly known as his homestead farm. James Upton died in December, 1868. The defendant Mary Upton is his widow, and the defendant

[1] Accord: Hitchcock *v.* Giddings, 1817, 4 Price 135; Scott *v.* Coulson, L. R. [1903] 2 Ch. Div. 249. So where an agent innocently makes a contract when his agency has been revoked, the contract has been annulled at the instance of the third party, Scruggs *v.* Driver's Executors, 1857, 31 Ala. 274; and in an action on a contract based in a supposed judgment the defendant was allowed to plead that no judgment ever existed, Gibson *v.* Pelkie, 1877, 37 Mich. 380; Ladd *v.* Charles and Tompkins, 1854, 5 Fla. 395, where both parties thought that the grantor was possessed of more than he actually had. U. S. *v.* Charles *et al*, 1896, 74 Fed. 142, a carrier contracts with the government to carry the mail between two places, in one of which the post office had been discontinued.

See Riegel *v.* American Life Insurance Company, 1893, 153 Pa. St. 134, where the planitiff was relieved against an exchange of insurance policies made in ignorance of the death of the insured.

As to a distinction between ignorance and mistake of fact, see opinion of Chancellor KENT, in Penny *v.* Martin, 1820, 4 Johns. Ch. 566.

Pomeroy is one of the executors of his will. A few weeks prior to February 28, 1872, the defendants offered the farm for sale. This led to a negotiation between the plaintiff and the defendants for the purchase and sale of the farm. The plaintiff went upon and examined the farm, and its external boundaries were correctly pointed out to him. At the onset of the negotiation the plaintiff asked the defendants how much land there was in the farm, and at what price they would sell it. They informed him that the farm contained two hundred and twenty acres and upward, and that they had asked for the same $150 an acre, but would sell it for $33,000. At the same time they exhibited to the plaintiff a printed description, describing the farm by metes and bounds in three parcels; one parcel was described as containing one hundred and ninety-one and fifty-one-hundredths acres, more or less, another as containing thirty acres, more or less, and a third as containing one acre, making in the aggregate two hundred and twenty-two and fifty-one-hundredths acres. The plaintiff declined to purchase the farm at the price fixed by the defendants, but made a counter offer of $30,000, which the defendants declined. But on the 28th of February, 1872, the negotiation was concluded by an agreement for the sale of the farm to the plaintiff for the sum of $31,687, and written articles were entered into between the parties in which the farm was described, in general terms, as the homestead farm of the late James Upton, on the lots named, "containing about two hundred and twenty-two acres of land, be the same more or less." The articles provided that the purchaser should assume a mortgage on the premises, and pay the balance of the purchase money in instalments, and secure the part which should remain unpaid at the time of the execution of the deed by his bond and a mortgage on the premises. The deed was to be executed April 2, 1872, and was executed and delivered at that date, and at the same time a mortgage was executed by the plaintiff, as provided in the articles. The deed described the farm in three parcels, as in the printed description exhibited to the plaintiff.

The plaintiff on the purchase of the farm, took possession, and has ever since occupied it. About nine months after the deed was given his suspicion was excited of the accuracy of the representation of quantity made by the defendants, and upon investigation it was ascertained that the farm, instead of containing two hundred and twenty acres and upward, contains only two hundred and six and thirty-five-one-hundredths acres, there being a deficiency in reference to the quantity which the defendants represented it to contain of more than thirteen acres, the value of which, at the average price per acre paid for the farm, upon the assumption that it contained two hundred and twenty acres, would be $1,953.93.

The trial judge found that all the parties believed, during the negotiation for the sale of the farm, and at the time of executing the contract and deed, and until about nine months after the making of the deed, that

the farm did in fact contain two hundred and twenty acres of land and upward, and that such negotiation and agreement were had and executed on both sides upon the basis of such common belief and understanding, and that all the parties were mutually mistaken in the belief that the farm contained at least two hundred and twenty acres. The judge further found that James Upton, prior to 1865, owned and occupied as part of his homestead farm the first parcel described in said deed, and also another parcel adjoining it of about twenty acres, making together one hundred and ninety-one and one-half acres. In that year he sold the small parcel. After his death the unsold part was mortgaged as containing one hundred and ninety-one and one-half acres, and the mistake was perpetuated in the subsequent descriptions of the farm.

The precise question presented is, whether, upon the facts found, the plaintiff is entitled to an abatement from the bond and mortgage given for the purchase money proportionate to the deficiency of acreage in the farm.

It is to be observed that the facts affirmatively show a mutual mistake of the parties in respect to the quantity of land, which commenced with the commencement of the negotiations for the sale of the farm, and pervaded the whole dealing from that time until the transaction was consummated by the giving of the deed and the execution of the mortgage. This mistake, moreover, was as to an essential and material element of the contract. In the absence of any finding of special facts and circumstances, the natural presumption is that in a sale of agricultural land the element of quantity enters into the transaction, and affects the consideration agreed to be paid. But in this case it is plain that the representation of quantity was deemed material by the parties. The sale was perhaps not technically a sale by the acre. But the starting point of the negotiation was an inquiry by the purchaser as to the quantity of land in the farm, and the gross sum originally asked was fixed by the sellers by reckoning the land at $150 an acre, not counting any surplus there might be over two hundred and twenty acres. The price finally agreed upon was also fixed upon the supposition that the farm contained at least two hundred and twenty acres. This is a necessary inference from the finding, that the parties acted upon the assumption that the farm contained that number of acres, and that the contract was made and executed upon this basis. It is also very material that the misconception under which the plaintiff labored in respect to the number of acres was induced by the untrue, although not fraudulent, representation of the defendants.

Leaving out of view for the present the words "more or less" in the contract, and looking at the contract as still executory, and as if these words had been omitted, the facts found would present a clear case for the interposition of equity. The case of Hill *v.* Buckley, 17 Ves. 394, is a leading case on the subject, and has been repeatedly referred to with approval. It was a bill filed by a vendee against a vendor, for specific

performance of a contract for the sale of land for a gross sum, with an abatement for deficiency in the number of acres stated in the contract. The relief was granted upon equitable terms, and in the course of his opinion the Master of Rolls (Sir WILLIAM GRANT) said: "When a misrepresentation is made as to quantity, though innocently, I apprehend the right of the purchaser to be to have what the vendor can give, with an abatement out of the purchase money for so much as the quantity falls short of the representation." And he adds, "that is the rule generally; as, though the land is neither bought nor sold professedly by the acre, the presumption is that in fixing the price regard was had on both sides to the quantity which both suppose the estate to consist of." But the right of a purchaser under such a contract to have a corresponding abatement of the purchase money exists as well after the execution of the deed as before, where the mistake was not known when the deed was executed. This relief has been frequently granted, Shovel *v.* Bogan, 2 Eq. Cas. Abr. 688; Quesnel *v.* Woodlief, 2 Hen. & Mumf. 173, note; Couse *v.* Boyles, 3 Gr. Ch. 212; Darling *v.* Osborne, 51 Vt. 148. The court, in granting such relief, does not make a new contract for the parties, but simply conforms the nominal agreement to the real one. The vendor cannot in justice be permitted to defeat the vendee's right to a reformation of the contract, or to an abatement from the purchase money, by the plea that if he had known of the deficiency he might, nevertheless, have exacted the same price. When the quantity is an essential element of the contract the presumption is, as stated by Sir WM. GRANT, that the price was fixed by both parties with reference to it, and in this case it is a reasonable presumption that if the true quantity of land had been known, the purchase price would have been reduced by an amount corresponding with the deficiency in the land.

The contract in this case is distinguishable from the one in Hill *v.* Buckley in the circumstance that the words "more or less," annexed to the statement of quantity, and it is a pertinent inquiry whether, if the contract was still executory, the introduction of these words would defeat the right of the plaintiff to relief, notwithstanding the conceded misrepresentation of the defendants, and the mutual mistake of the parties as to the quantity of land. We are relieved from the necessity of examining the authorities elsewhere, with a view of determining whether under such circumstances the presence of these words in an executory contract for the sale of land is a bar to equitable relief, by the decision of this court in Belknap *v.* Sealey, 14 N. Y. 143. It was there held that the introduction of the words "more or less," following the enumeration of the number of acres, was no obstacle to relief in equity upon the ground of mistake. The authorities in this State were carefully reviewed in the able opinion of COMSTOCK, J., and it was satisfactorily shown that the cases supposed to have a bearing adverse to this view were of two classes: first, cases where the question was one of construction, purely in a court of law, and not one of mistake in a court of equity; and second, cases

where relief was denied on the ground that it appeared from the words "more or less" and the extrinsic circumstances, that the risk of the quantity was one of the elements of the contract. The court said that those words in a contract or conveyance of land do not import a special engagement that the purchaser takes the risk of the quantity, and that while their presence may render it more difficult to prove such a mistake as will justify the interference of equity, they are not equivalent to a stipulation that the mistake, when ascertained, shall not be ground of relief. The conclusion in Belknap *v.* Sealey is founded, we think, upon the most obvious equity. It is not a satisfactory answer to the claim for relief against a mistake in the quantity of land contracted to be sold, embraced within given boundaries, to say that the statement of the number of acres is mere matter of description. It is true that such a statement, following a description by boundaries, does not amount to a covenant that the land contains that quantity, but it is quite another question whether equity will not relieve a purchaser when both parties supposed the statement to be true, and the bargain was made upon that belief—and it turns out that the quantity is less—and the mistake materially affected the consideration. It was said in Belknap *v.* Sealey, that the primary purpose of these words is to indicate that all the land within the boundaries specified is included in the contract or deed, and is intended to pass to the purchaser. They are also intended to cover small discrepancies between the actual quantity and that stated in the contract or deed, and no inference of mistake would arise from a small discrepancy merely. But where the difference is material, and the mistake is confessed, or satisfactorily proved, there would seem to be no violation of principle in granting relief. It must be conceded, upon the authority of Belknap *v.* Sealey, that if the contract for the sale of the farm in question was still executory, the plaintiff, upon the facts found, would be entitled to equitable relief.

The point remaining to be decided is, whether the acceptance of the deed and the giving of the bond and mortgage barred the antecedent right of the plaintiff to have the mistake corrected. It cannot be denied that this claim finds some support in the observations of judges, but no case has been called to our attention, nor have we found any, where the point has been so adjudged. The suggestion, in some of the cases, that by the acceptance of a deed containing the words "more or less," or "by estimation," in connection with the statement of quantity, the purchaser is concluded from obtaining relief on the ground of mistake, appears to have been founded upon an inference from the language used in Sugden on Vendors, Vol. 1, p. 526. The distinguished author of that work, referring to the general subject, says: "Where the contract rests *in fieri*, the general opinion has been that the purchaser, if the quantity be considerably less than it was stated, will be entitled to an abatement, although the agreement contain the words 'more or less,' or 'by estimation.'" It will be perceived that the writer does not say that after a con-

veyance such relief cannot be granted, but the language has been sometimes regarded as implying this. It seems to us, however, that this is a misconception of the author's meaning. In the paragraph preceding the one quoted the author had stated that "where the lands in a conveyance are mentioned to contain so many acres 'by estimation,' or the words 'more or less' are added, if there be a small portion more than the quantity the vendor cannot recover it; and if there be a small quantity less, the purchaser cannot obtain any compensation in respect of the deficiency." This language clearly implies that in case of a considerable and material discrepancy in quantity, relief could be had after a conveyance. The paragraph just quoted is followed by a reference to a case referred to in the Anonymous Case, 2 Freeman 107, in these words: "A case is said to have been decided where a man conveyed his land by the quantity of one hundred acres, were it more or less, and it was not above sixty acres; but the purchaser had no relief, because it was his own laches." This language is immediately followed by the language first quoted, upon which the defendants rely to establish the proposition that relief against mistake as to quantity, when the words "more or less," or equivalent words, are used, can only be granted before a conveyance, and when the contract of sale is *in fieri*. Mr. Sugden, as will be noticed, uses very guarded language in referring to the case cited in Freeman, speaking of it as a case said to have been decided, and Judge STORY, in Stebbins *v.* Eddy, 4 Mason 418, referring to the same case, remarks that Mr. Sugden thinks the case open to much observation. The case is doubtless in conflict with many authorities in holding that the words "more or less" covered so large a deficiency. The statement by Mr. Sugden in the subsequent paragraph, that the general opinion was that relief could be granted where the contract was *in fieri*, was not, we think, intended to imply that in his opinion relief could only be granted before a conveyance; but was designed, by bringing into view the principle upon which courts proceed in respect to contracts to convey, to discredit the doctrine of the unreported case immediately before referred to, in which the conveyance had been executed.

Considering the question on principle, we can perceive no solid ground for affirming the jurisdiction of a court of equity in the one case and denying it in the other. The general jurisdiction of a court of equity to set aside, or to reform, written instruments in cases of fraud or mistake, is not limited to executory contracts. Such a limitation, as was said by ROBERTSON, Ch. J., Harrison *v.* Talbot, 2 Dana 258, would be irreconcilable with an obvious and pervading principle of justice. It is doubtless true that the annulling or reforming of executed transactions is an exercise of supreme judicial power. The power should be exercised with great caution, and when invoked on the ground of mistake a plain case should be made before it is exerted. But these are considerations which address themselves to the Chancellor in the exercise of the jurisdiction; they ought not to prevent the interference of equity when the proper occasion

for interference arises. The granting or refusing of equitable relief on the ground of mistake may depend, to some extent, on the fact whether the contract is executory or executed. The court might very well refuse the specific performance of a contract for the sale of land, in respect to which a mistake is alleged, and leave the party to his remedy at law, when it would not interfere if the contract had been executed. But it cannot, we think, be maintained upon principle that where a mistake is admitted or proved, the fact that the title has passed and the purchase money has been paid or secured, precludes the court, on the mistake being discovered, from granting relief. The consummation of the transaction in ignorance of the mistake, without laches on the part of the party injured, gives to the other party no immunity from making recompense, nor does it deprive the court of the power to remedy the injustice. In this case no laches can be imputed to the plaintiff. He could not ascertain the mistake from seeing the external boundaries of the farm, and he had a right to rely upon the representation of the defendants. The cases of Quesnel *v.* Woodlief, 2 Hen. & Mumf. 173, and Darling *v.* Osborne, 51 Vt. 148, are direct authorities in support of the conclusion we have reached, and it is also supported by the case in this court of Wilson *v.* Randall, 67 N. Y. 338.

The order of the General Term should be affirmed, and the plaintiff should have judgment absolute on the stipulation.

All concur.

Order affirmed and judgment accordingly.

OKILL *v.* WHITTAKER.

IN CHANCERY, BEFORE LORD CHANCELLOR COTTENHAM, JULY 14, 1847.

[2 *Phillips* 338.]

The plaintiffs were trustees for sale of, amongst other property, certain leasehold premises, which they held under a demise executed in 1755, for a term of three lives and twenty-one years; and in March, 1836, they put the leaseholds up to auction under particulars of sale in which they were advertised to be sold "for the remainder of a term of twenty-one years, which commenced on or about the 3d of December, 1823," the plaintiffs being then under the impression that the last survivor of the lives had died about that time, although the last life did not in fact drop until March, 1835. The property not having been sold at the auction, they agreed a few days afterward to sell it under the same description to one Whittaker for £300; and by an indenture dated the 22d of March, 1835, after reciting the indenture of demise, and "that

the last survivor of the lives died on the 3d of December, 1823, when the term of twenty-one years commenced; and that the plaintiffs had agreed with Whittaker for the sale thereof to him for £300 for the residue then unexpired of the lease;" it was witnessed that, in consideration of the said sum of £300, the plaintiffs, in exercise of the said power, etc., assigned the premises to Whittaker, "to hold the same for all the residue then to come and unexpired of the said term of twenty-one years granted by the said lease, and which term commenced on or about the 3d of December, 1823."

The purchase money was duly paid, and Whittaker took possession of the premises, and remained in such possession till his death in 1842, when they passed to the defendants, his executors. In 1845 the plaintiffs filed this bill, alleging that they had lately discovered their mistake as to the time when the last life dropped, and praying that, under the circumstances, it might be declared that Whittaker was in equity only entitled to the premises for the residue of a term of twenty-one years, computed from the 3d of December, 1823, and that the defendants might be decreed to re-assign them, and to account for the rents as from the 3d of December, 1844.

The defendants, by their answer, admitted that the last surviving life did not in fact drop until March, 1835, but they stated their belief that Whittaker had attached very little importance to the precise length of time the lease had to run, having bought, as they believed, with a view to obtain a renewal, which, though not a matter of right, would, in all probability, be obtained. It was, however, proved on the part of the plaintiffs, by the agent who had negotiated the sale of Whittaker, that, in the discussion of the terms, the latter inquired particularly how much of the lease remained unexpired, and that, in the written proposal signed by Whittaker to be submitted to the plaintiff, these words, "there being eight years from December next," were inserted at the express request of Whittaker himself. It was also in evidence that the fair price of the property on that supposition would have been about £294 but, for the longer period, £495 at least.

Vice-Chancellor KNIGHT BRUCE having, at the hearing, dismissed the bill with costs, the plaintiffs appealed.

Mr. Anderdon and Mr. Hall, for the appeal, contended that, upon the principle on which money paid by one party to another under a mutual misapprehension or ignorance of facts, Kelly *v.* Solari, 9 Mees. & W. 54; Bell *v.* Gardiner, 4 Man. & Gr. 11, the court would relieve the plaintiffs in this case, as had been done in Bingham *v.* Bingham, 1 Ves. 126; Calverley *v.* Williams, 1 Ves. 210; Stapylton *v.* Scott, 13 Ves. 425; Willan *v.* Willan, 16 Ves. 72; Grieveson *v.* Kirsop, 5 Beav. 283; Tyler *v.* Beversham, Ca. t. Finch, 80.

The Lord Chancellor, without hearing the other side, said: It is impossible on this bill to give any relief. It goes far beyond any of the cases that have been cited. The plaintiffs do not ask to rescind the tran-

saction altogether; nor could they; for, after ten years' occupation and expectation of the benefit of renewal, it would be impossible to restore the purchaser to his original situation. What they say is, that the contract was improperly executed by the assignment, and they ask that what remains of the term after the expiration of the eight years may be reassigned. But what is that, but to call upon this court to decree specific performance of a contract with a variation? For the thing that both the vendor agreed to sell and the purchaser to buy, was the residue of the term, and not a portion of the residue.

Suppose a party proposed to sell a farm, describing it as "all my farm of 200 acres," and the price was fixed on that supposition, but it afterward turned out to be 250 acres, could he afterwards come and ask for a reconveyance of the farm, or payment of the difference? Clearly not; the only equity being that the thing turns out more valuable than either of the parties supposed. And whether the additional value consists in a longer term or a larger acreage is immaterial.

Some of the cases cited were cases in which the parcels in the deed embraced more than the parties intended to deal with. But the misfortune of this case is that here the plaintiffs did intend to sell all the remaining interest in the lease, but by their own mistake they misdescribed what that interest was. I cannot distinguish such a case from that of a bill to compel specific performance with a variation; for the object of the bill is to introduce a new term: either to make the purchaser pay more, or to make him a trustee of the rest of the term. That cannot be done.

The appeal must be dismissed with costs.

LAWRENCE *v.* STAIGG.

IN THE SUPREME COURT OF RHODE ISLAND, 1866.

[8 *Rhode Island* 256.]

AMES, C. J. The facts stated and proved in this case are that the plaintiff arranged for sale and sold, through the agency of Alfred Smith, a well-known real estate agent in Newport, a portion of a certain farm belonging to the plaintiff, called the Ochre Point Farm, in said Newport. That Smith, who had the sole direction and control of said sale, in the summer of 1862 employed a surveyor by the name of Samuel S. Minot, reputed for his skill, to survey the portion of said farm to be sold into lots, and measure and plot the same, to be sold by one Swinburn, by auction. That among the lots so measured and plotted was lot No. 1, on

the plot of said lots, set down as containing 43,918 feet to high water, by mistake of said surveyor, when in truth and in fact, said lot contained, in its true area to high water, 55,680 feet. That said lot was sold by auction, through mistake, to the defendant, and by him bought, as containing said area of 43,918 feet, instead of its true area of 55,680 feet, at five and one-quarter cents per square foot, and upon receiving a conveyance from the plaintiff of said lot, the defendant paid his said agent, Smith, the sum of $755.69, and delivered to him a mortgage for the payment of a note of $1,550, in three years, with interest, the area and price of said lot being adjusted by and according to said mistake. The bill prays that the sale, made as above, by mutual mistake as to area, may be rescinded, the consideration being returned to the defendant and the land reconveyed by him to the plaintiff.

We are clearly of opinion that this equity demanded of the defendant is due, under the facts, to the plaintiff, there being no doubt that the sale and conveyance were made under a mutual mistake, as to the area sold, and the price justly to be computed as the price of the lot. No fault or neglect in the matter is fairly imputable to the plaintiff, who employed an agent to arrange the sale of his farm, of skill and good repute. This agent, for the purpose of surveying, measuring and plotting the lots to be sold, including lot No. 1, sold under the above mistake to the defendant, employed a skilful civil engineer, who in performing his duty, fell into the mistake above stated, which has caused the parties to contract and execute their contract of sale, contrary to the design and against right, as due to and from both parties. The sale, like that in Leslie *v.* Thompson, 9 Hare 268, was made according to the report of a surveyor, which was incorrect, and the contract, was as in that case, entered into under a mistaken conception of the amount of the property comprised in the particulars embraced in the report. There is no pretense, under the facts proved, that the plaintiff designed or expected to sell lot No. 1 in the mass or lump, or that the defendant designed or expected to buy it in that mode. The designation of the number of feet in the tract, with the price per foot at which it was sold, negatives any such presumption. In the exercise of its jurisdiction over the subject of such a mistake, the court will require, what it finds in this case, full and satisfactory proof of the mistake, and will be of little value, if it can suppress only positive frauds, and leave a material mistake, like the one in this case, innocently made, to work an intolerable mischief, contrary to the intention of the parties. As we have already had occasion to repeat, in the language of Judge STORY: "It would be to allow an act originating in innocence to operate ultimately as a fraud, by enabling the party who receives the benefit of the mistake to resist the claims of justice, under the shelter of a rule framed to promote it." Story's Eq. Juris. 15, 155, 156; Allen *v.* Browne, 6 R. I. Rep. 396-7.

According to the well-settled principles of equity jurisprudence applicable to such a subject, we must rescind the contract and sale entered

into and arranged by mistake in a substantial particular, and which, if suffered to remain, will work a fraud upon the plaintiff, unless the same be conformed to the truth and fact in the particular complained of. Let a decree be entered up rescinding the above sale as entered into by mutual mistake, the plaintiff returning the consideration by him received from the defendant, and receiving from him a full release in consideration thereof and of all loss and expense incurred by him from the plaintiff in said lot No. 1, but let the title of the defendant in No. 1, remain without such rescission, provided he shall forthwith pay, as the master may report, the cash sum due, and deliver the additional note secured by mortgage upon the property sold to the defendant, calculating the amount of such additional sum, adjusting the same and the amount of such additional note and mortgage to the true price, free from the above mistake; let Francis B. Peckham, Jr., Esq., be appointed a master in this case to compute the above amounts, and fix the time for adjusting the payment of the same between the parties, as he shall find the facts in this case may require, and report upon the same to the court. . . . .

At the March term 1866 the cause was again submitted to the court.

DURFEE, J. . . On a review of the case, we still entertain the opinion that the plaintiff sold and the defendant bought the lot, supposing that the figures on the plot correctly represented the number of feet which the lot contained, or, in other words, under a mutual mistake in that regard. The plaintiff contends that if such is our opinion we must rescind the conveyance, and that we cannot allow the defendant to keep the lot on payment of an additional *pro rata* compensation, for that would be to make a new contract for the parties.

We do not take this view of the case. The sale was, we think, understood to be a sale of the entire lot as plotted, for a price to be computed at the rate of five and one-quarter cents per square foot on the number of feet in the lot. The mistake was, that both parties supposed the figures on the plot correctly represented the number of feet in the lot, and accordingly computed the price at too small an amount. Now the aim of the court, in giving relief for a mistake, is to put the parties, as nearly as possible, in the situation they would have been in but for the mistake; and there can be no doubt that, in this case, that aim will be better accomplished by rectifying the price than by annulling the conveyance. The contract here has been executed, and where the contract has been executed the court is slow to rescind it, even for causes which would be thought to warrant its rescission had it remained *in fieri*, Belknap, *v.* Sealey, 4 Kernan 143. And certainly, where the mistake is of such a nature that it can be corrected and justice done the party asking relief by its correction, it would be unreasonable to resort to the more extreme remedy of a rescission. To afford relief in this milder form is not to make a new contract for the parties, but simply to refuse to set aside the contract which they have made for themselves, under a mistake, pro-

vided the party profiting by the mistake will do a more perfect equity by correcting the same.

The cases which have been cited by the plaintiff, as showing that rescission is the proper remedy, are cases where another remedy would not do justice to the party seeking relief. They are, for the most part, suits by purchasers who had been led into purchases of land by mistake as to its quality or quantity, which, but for such mistakes, they would not have made. Such is the suit of Belknap *v.* Sealey, 2 Duer 570, which is especially relied on by the plaintiff. The suit, in that case, was by the purchaser, and in the Court of Appeals, to which it was finally carried, the rescission decreed by the Superior Court was confirmed, on the ground that the contract was yet executory—that there was a misrepresentation, though not fraudulent, of the quantity of the land, and that the mistake went to the essence of the contract, 4 Kernan 143. But no case has been cited where a conveyance of land has been set aside at the suit of the vendor for a mistake, when it affected only the price to be received by him and where it could be rectified by awarding him an additional price.

In the case of Barnes *v.* Gregory, 1 Head, Tenn. R. 230, the plaintiff had sold the defendant a tract of land at $35 per acre, and had conveyed it by deed, describing the same and estimating it to contain thirty acres. The tract did, in fact, contain forty-five acres, and the court awarded the plaintiff a ratable compensation for the excess over the estimate. In Horn *v.* Denton, 2 Sneed, Tenn., R. 125, a similar remedy was administered in relief of a similar mistake. These cases are in point as precedents for the case before us, and they were, we think, well decided, according to the analogies which govern courts in administering equitable relief.[1]

BATES *v.* DELAVAN.

IN THE COURT OF CHANCERY OF NEW YORK, 1835.

[5 *Paige* 299.]

Defendant contracted with complainant to convey to him defendant's title to certain premises, the defendant agreeing to satisfy two possible claims upon the property. Complainant paid defendant $780 and gave him three notes for $500 each. Defendant gave complainant a quit-claim deed and special covenants against the two claims already referred to. One of these claims was later prosecuted to judgment against complain-

[1] See Weaver *v.* Carter, 1839, 10 Leigh 37; Belknap *v.* Sealey, *supra;* Cochrane *v.* Willis, 1865, L. R. 1 Ch. App. 58; Colyer *v.* Clay, 1843, 7 Beav. 188.

ant for nine-fourteenths of the property conveyed. Complainant now files his bill asking for rescission of the contract of purchase and for the surrender of his notes.

WALWORTH, C. As a general rule, a court of equity will not decree the specific performance of a contract of sale, if the vendor cannot make a good title, although the contract has made no provision as to covenants of warranty to be inserted in the conveyance. An exception to that rule, however, exists where, by the contract of sale, the vendee expressly assumes the risk as to the title, or agrees to take such a title as the vendor is able to give. It does not appear to be clearly settled how far, or in what cases, this court will interfere to rescind a contract of sale, after it has been consummated by the execution of the conveyance, without any covenants of warranty, where there is no fraud, but where both parties were under a mistake as to the title of the vendor. By the civil law, an action of redhibition, to rescind a sale and to compel the vendee to take back the property and restore the purchase money, could be brought by the vendee, wherever there was error in the essentials of the agreement, although both parties were ignorant of the defect which rendered the property sold unavailable to the purchaser for the purposes for which it was intended. This principle of the civil law appears to have been followed in the courts of some of our sister States; and the case of Hitchcock *v.* Giddings, 4 Price's Rep. 135, must have been decided, by Chief Baron RICHARDS, on the same principle. I agree, however, with the learned commentator on American law, that the weight of authority, both in this State and in England, is against this principle, so far as a mere failure of title is concerned; and that the vendee, who has consummated his agreement by taking a conveyance of the property, must be limited to the rights which he has derived under the covenants therein, if he has taken the precaution to secure himself by covenants of warranty as to the title, see Simpson *v.* Hawkins, 1 Dana's Kent. Rep. 305. And where he has neglected to take such covenants, and there is no fraud or misrepresentation in the case, he has no remedy to recover back the purchase money, upon a subsequent failure of title. 2 Kent's Com. 2d ed. 473. In the present case, the fact that the complainant has taken a mere quit-claim deed of the right and title of the defendant in the premises, with special covenants against the claims of two particular individuals only, authorizes the conclusion that it was understood and agreed between the parties that the vendee should assume the risk of the title, in regard to the claims of all other persons.

The failure of the title as to an undivided portion of the premises, by the successful assertion of a claim against which the defendant had agreed to indemnify the complainant, would have been sufficient to enable the latter to resist the making of a decree for a specific performance, upon a bill filed by the vendor. But it does not follow from this that the complainant may rescind the whole contract, which has been in part consummated, by the execution of the conveyance and the payment

of a part of the purchase money. There are many cases in which the court will not lend its aid to compel a specific performance of an executory agreement, in which it would not feel itself authorized to interfere, by decreeing that an executed contract should be rescinded. Where a vendor has agreed to convey the whole premises, and it is found that he can only perform his agreement as to an undivided part thereof, the court will not compel the purchaser to accept a partial performance, when it is evident that he will be injured by the partial failure. The party who is unable to perform his agreement in full, has, in general, no equitable claim to the interposition of the court in his behalf, if the adverse party prefers to rescind the contract in toto. But a vendor, who has only covenanted to warrant or indemnify the purchaser against a claim upon a part of the premises, can perform his covenant, by paying such indemnity, according to the spirit of the agreement contained in the conveyance. In such a case, if the vendee wishes to secure to himself the right to rescind the whole contract upon the breach of the covenant of warranty as to a part only, he should have a special provision to that effect inserted in the deed. The complainant, therefore, is not entitled to a decree for a return of the purchase money which has been paid; the amount of the notes being more than sufficient to cover the nine-fourteenths of the premises as to which the covenant of warranty extended. But as the defendant has offered to give up the notes to be cancelled, under the direction of the court, a decree must be entered to that effect, upon the complainant's releasing all claim against the defendant on the covenants of warranty contained in the deed, and releasing to the defendant the interest, if any, which he acquired in the nine-fourteenths, under the original conveyance from the defendants.

The defendant, having succeeded as to the only matter which was really in controversy between the parties in this cause, is entitled to the costs of his defence.[1]

[1] Successfully to resist specific performance of a contract to purchase real estate for defect of title "there must be at least a reasonable doubt as to the vendor's title—such as affects the value and would interfere with its sale to a reasonable purchaser, and thus render the land unmarketable. A defect in the second title may, under certain circumstances, furnish a defence to the purchaser. But there is no inflexible rule that a vendor must furnish a perfect record or paper title." Hellreigell *v.* Manning, 1884, 97 N. Y. 56, 60.

"If there be no fraud, and no covenants taken to secure the title, the purchaser has no remedy for his money, even in a failure of title. This is the settled rule at law, First *v.* Raymond, 1804, 2 Caines, 188, and I apprehend that the same rule prevails in equity." Per Chancellor KENT, in Abbott *v.* Allen, 1817, 2 Johns. Ch. 519; S. C. 7 Am. Dec. 554, note; see also Barkhamsted *v.* Case, 1825, 5 Conn. 528; Banks *v.* Walker, 1845, 2 Sandf. Ch. 344; Tallman *v.* Green, 1850, 3 Sandf. N. Y. Sup. Ct. Rep. 437; Story's Equity Juris. § 779; Patton *v.* Taylor, 1897, 7 How. U. S. 132.

It is believed that this subject as well as the failure of title to chattels can best be studied in connection with Quasi-Contracts.

WHITTEMORE *v.* FARRINGTON.

IN THE COURT OF APPEALS OF NEW YORK, 1879.

[76 *New York* 452.]

The facts sufficiently appear in the opinion.

RAPPALLO, J. It appears from the findings that in November, 1873, the plaintiff and defendant made a verbal agreement for an exchange of lands, under which agreement the plaintiff, with the consent of the defendant, entered into possession of the lands which he, the plaintiff, was to receive, and made valuable improvements thereon. In December, 1873, the plaintiff performed his part of the agreement by delivering to the defendant deeds of the lands which the defendant was to receive under the agreement. These deeds contained covenants of warranty, and at the time of delivering them the plaintiff stated that he should expect a warranty deed of the land which the defendant was to convey. The judge finds that by the verbal agreement of exchange the defendant was bound to convey a good title free from incumbrances, and that, having accepted warranty deeds from the plaintiff, knowing that the plaintiff understood the agreement to be that each was to give a warranty deed to the other, and the plaintiff having acted on that understanding, the defendant was bound by the agreement as the plaintiff understood it. This is, in substance, a finding that the defendant agreed to give a warranty deed. In January, 1874, as is found by the judge, the defendant sent by mail to the plaintiff a quit-claim deed, which the plaintiff returned by mail for a verbal correction, at the same time requesting a warranty deed. The correction was made by the defendant and the same deed returned to the plaintiff, the defendant declining to give a warranty deed. The judge further finds that the plaintiff, then supposing and believing, and having good reason and being induced by the defendant to suppose and believe, that the deed conveyed a good and perfect title, and that there were no incumbrances on the premises, accepted said deed and had it recorded, and has ever since continued in possession of the premises through his tenants and has made valuable permanent improvements thereon.

After the delivery and acceptance of the quit-claim deed it was discovered that, at the times of making the agreement for the exchange and of the delivery of the deeds, the premises conveyed by the defendant were subject to a mortgage, unknown to both parties, which was and still is a lien upon said lands, and the object of this action is to compel the defendant to undo the transaction or discharge that mortgage. The trial judge decided that the plaintiff was not entitled to a judgment rescinding the transaction. He also held that the plaintiff was required by law to examine for himself, or to insist upon such covenants as would fully

protect him in regard to the title, and that, having received and accepted the quit-claim deed, he must be deemed to have done so in full satisfaction and performance of the parol agreement. But he further held that, under the circumstances of the case, the plaintiff was entitled to relief in equity from the legal effect of his acceptance of the quit-claim deed, and to have a specific performance of the parol agreement adjudged and decreed, and he awarded judgment that the defendant execute and deliver to the plaintiff a deed with covenants of warranty and against incumbrances, or that he remove the mortgage as a lien on the property.

This is in substance a judgment reforming the deed by inserting therein covenants of warranty and against incumbrances, unless the defendant discharge the mortgage.

The grounds upon which this conclusion is based are, as stated by the learned judge in his findings, that the defendant delivered the quit-claim deed and the plaintiff accepted it under a mutual mistake of facts, viz.: in ignorance of the fact that the mortgage existed and was a lien upon the mill property, and the plaintiff believing, and having good reason from the acts of the defendant to believe, that such deed conveyed a good title, and that there was no incumbrance thereon, and being guilty of no negligence in not examining the title.

It must be observed that in this case the element of fraud is entirely wanting. The judge in his findings states in one place that the plaintiff acts of the defendant so to believe; but the only act of the defendant referred to in the findings in support of these statements is that at the time of the agreement for the exchange the defendant, who had just previously purchased the premises at a foreclosure sale, told the plaintiff that he would have the referee's deed made out to plaintiff, and represented that to be the best title he could have. The only evidence in the case touching this point is that the defendant proposed to have the referee's deed made out to plaintiff, saying that a sheriff's deed was the best kind of a deed, as nothing could go behind it. Nothing else appears to have been said between the parties touching the title or incumbrances until months after the quit-claim deed had been accepted and after the incumbrance had been discovered. The judge expressly finds that at the time of the delivery of the deed neither party had any knowledge or information of any incumbrance upon the property, but both believed that the quit-claim deed conveyed a perfect title. Under these findings no question of fraud can arise in the case.

The question is then reduced to this: A party who, under a verbal agreement for the conveyance to him of lands, is entitled to insist upon a good title and a deed with covenants, pays the consideration and is then tendered a deed without covenants. He demands a deed with covenants, and this is refused. He then accepts the deed without covenants, and, believing the title to be clear, records it, and continues to occupy and improve the property. An incumbrance unknown at the time to both parties is afterwards discovered. Both parties are innocent

of any fraud. It is conceded that no legal liability rests upon the grantor in such a case. Bates *v.* Delavan, 5 Paige 300, 307; Burwell *v.* Jackson, 9 N. Y. 535.

In the absence of fraud or covenants a purchaser takes the title at his own risk. Then do the facts stated entitle the plaintiff to any equitable relief? We think not. The theory of the judgment is that the acceptance of the quit-claim deed in performance of the contract of exchange may be set aside on the ground of mistake, and the contract treated as still executory, and a new performance in a different manner be decreed. The theory is ingenious, but is not founded upon any legal precedent or principle. In the first place, there was no mistake as to the character of the deed which was tendered and accepted. The grantee knew that by accepting it he took the risk of any defect in the title which might be discovered. He was not led into accepting it by any deception or suppression on the part of the grantor. Secondly, the delivery and acceptance of the deed constituted a full execution of the prior parol contract. The title to the land passed under the deed and the original contract was merged in it. After a contract has been thus fully performed there can be no jurisdiction in equity to decree a second performance. In a proper case equity has jurisdiction, on the ground of mistake, to reform the instrument or deed by which a prior contract has been executed or performed, but to authorize the exercise of this jurisdiction there must have been a mutual mistake as to the contents of the instrument sought to be reformed, or else mistake on one part and fraud upon the other.

Where both parties are innocent of fraud and both know the character and contents of the instrument, it cannot be reformed in equity merely on the ground that one of the parties would have exacted, and would have been entitled to exact, a different instrument had he been acquainted with facts rendering it to his interest to do so, or which, if he had known them, would have caused him to reject the instrument which he accepted. It is beyond the power even of a court of equity to make contracts for parties. The jurisdiction to reform written instruments in cases free from fraud is exercised only where the instrument actually executed differs from what both parties intended to execute and supposed they were executing or accepting, and this mistake will be corrected in equity only on the clearest proof, and then only by making the instrument conform to what both parties intended. But an instrument or covenant, the nature and contents of which are fully comprehended by both parties at the time of its execution, cannot be altered in its terms by the court. See Wilson *v.* Deen, 74 N. Y. 531, and authorities there cited. If the decision of the trial court in this case can be sustained, any purchaser of lands who accepts a deed without covenants may have recourse against his grantor for a subsequently discovered incumbrance or defect in the title, provided he can show that under his contract of purchase he might have insisted on a deed with covenants, and that he believed the title to be clear when he accepted one without covenants. If the grantor

and grantee had both intended that this deed should contain covenants, and supposed at the time of its delivery that it did contain them, but through a mistake of the scrivener they had been omitted, the court might insert them. But no such case is made out here.

The order of the General Term should be affirmed and judgment absolute rendered against the plaintiff on his stipulation, with costs.

All concur, except EARL, J., not voting.

Judgment affirmed.

KOWALKE *v.* MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY.

IN THE SUPREME COURT OF WISCONSIN, 1899.

[100 *Wisconsin* 472.]

On October 26, 1896, plaintiff was injured by jumping from defendant's street car in an emergency, so as to make its liability for injuries probable. On the day following, the plaintiff's husband applied to defendant for settlement of the damage, stating that she was pregnant. Accordingly, the defendant's surgeon secured the attendance of her family physician, who made a cursory examination, which disclosed only slight bruises, and soreness naturally resulting therefrom. They also learned that she was having a slight uterine hemorrhage, and the question of her pregnancy was raised, and an examination to ascertain that fact proposed by defendant's surgeon. She repudiated the fact of pregnancy, stating that she was sure, from certain symptoms, that nothing of the sort existed, and refused peremptorily to submit to examination either by the two physicians or by her own family physician. . . . The defendant's surgeon returned at evening, when the plaintiff's husband was at home, and then a settlement was negotiated, and the plaintiff, with her husband, signed a full release of the defendant "of all claims and demands for damages or otherwise which I now have or can have by reason of jumping from (described car)." Plaintiff's hemorrhage continued intermittently until about the 8th of November, when she suffered a miscarriage.

DODGE, J. The circuit court's finding of entire absence of anything like fraud perpetrated by the defendant or its representative upon the plaintiff is certainly not antagonized by the preponderance of the evidence. Indeed, the conduct of the defendant's physician seems to have been in accordance with the most scrupulous rules of professional and contractual ethics. He refrained from visiting the plaintiff for examination until he had secured, at the company's expense, the attendance of her regular physician. He at no time assumed to treat her, or in-

trude upon the relations between her and her attending physician. He refrained from any negotiation for settlement until he could meet her in company with her husband. The judgment, however, proceeds exclusively upon what is termed by the court below "a mistake of fact," which is predicated upon the fourth finding, that both she and the defendant's physician "believed" she was not pregnant.

To formulate an accurate and practically applicable definition of the mistake of fact which will warrant rescission of a contract has been apparently well-nigh the despair of law writers. Indeed, no definition or general rule has been invented which is sufficient or accurate, except by immediately surrounding it with numerous exceptions and qualifications more important than itself. This is not surprising, in view of the fact that the whole doctrine is an invasion or restriction upon that most fundamental rule of the law, that contracts which parties see fit to make shall be enforced, and in view of the further consideration that one or both of the parties is often, if not usually, ignorant or forgetful of some facts, thoughtfulness of which might vary his conduct.

The most philosophical definition we have found is that presented by Pomeroy, Eq. Jur. § 839: "An unconscious ignorance or forgetfulness of the existence or nonexistence of a fact, past or present, material to the contract." This definition contains several elements, each of which, as above suggested, must be explained and qualified in its practical application. Thus, the ignorance must be unconscious; that is, not a mental state of conscious want of knowledge whether a fact which may or may not exist does so. Kerr, Fraud & M. 432. This idea is involved in, and furnishes a reason for, the exception pointed out by DIXON, C. J., in Hurd *v.* Hall, 12 Wis. 112, 127, on authority of Kelly *v.* Solari, 9 Mees. & W. 54, viz.: Where a party enters into a contract, ignorant of a fact, but meaning to waive all inquiry into it, or waives an investigation after his attention has been called to it, he is not in mistake, in the legal sense. These limitations are predicated upon common experience, that, if people contract under such circumstances, they usually intend to abide the resolution either way of the known uncertainty, and have insisted on and received consideration for taking that chance.

Akin to the rule that the ignorance must be unconscious, though going still further as an exception, is the other rule, that ignorance must not be due to negligence, although there be no actual suspicion with reference to the fact in question. Pomeroy, Eq. Jur. § 856; Kerr, Fraud & M. 406; Hurd *v.* Hall, 12 Wis. 126; Conner *v.* Welch, 51 Wis. 431. The last case is a good illustration. A mortgagee took a new mortgage, and released an old one, on the understanding that his new lien took the place of the old, in ignorance of existence of a subsequent judgment against the mortgagor. The court held that, because he had some knowledge of the latter's embarrassed condition, it was negligence not to have investigated as to judgments, and refused, notwithstanding the mistake, to rescind the transaction and reinstate his former lien.

Passing the requirement that the fact as to which mistake is made must be either past or present,—for it is obvious that the coming into existence of any future fact must at the time of contracting have been understood to rest in conjecture, and the contingency thereof to have been assumed by both parties,—another essential element of the definition is that the fact involved in the mistake must have been as to a material part of the contract, or, as better expressed by Mr. Beach (Mod. Eq. Jur. §§ 52, 53), an intrinsic fact; that is, not merely material in the sense that it might have had weight if known, but that its existence or non-existence was intrinsic to the transaction,—one of the things actually contracted about. As, in the familiar illustration of the sale of a horse, the existence of a horse is an intrinsic fact. Another partial expression of this requisite, adopted by Mr. Pomeroy (Eq. Jur. § 856), is as follows: "If a mistake is made as to some fact which, though connected with the transaction, is merely incidental, and not a part of the very subject matter or essential to any of its terms, or if the complaining party fails to show that his conduct was in reality determined by it, in either case the mistake will not be ground for relief, affirmative or defensive." The last part of this statement is adopted in Klauber *v.* Wright, 52 Wis. 303, 308; Grymes *v.* Sanders, 93 U. S. 55, 60.

Some illustrative cases of this aspect of the subject may serve to elucidate. The damaged condition of a ship at sea, as to which both parties to her sale are ignorant, held merely a collateral circumstance, and not an intrinsic fact. Barr *v.* Gibson, 3. Mees. & W. 390. Financial condition of a debtor is not intrinsic to a compromise and release of his debt, so that mistake thereon will justify rescission. Dambmann *v.* Schulting, 75 N. Y. 55, 63. Ignorance of declaration of peace, greatly enhancing value of merchandise, will not justify rescission of sale. Laidlaw *v.* Organ, 2 Wheat. 178. Sufficiency of security for a debt purchased as part of firm assets, not intrinsic. Segur *v.* Tingley, 11 Conn. 134, 143. Certain United States bonds had been extended, and, as a result, were commanding premium in market. Held not "of the essence" of a sale at par, both parties being ignorant as to both extension and premium. Sankey's Ex'rs *v.* First Nat. Bank, 78 Pa. St. 48, 55. One who had built a mill partly on land of another purchased of that other two lots, both parties supposing them to include the mill, which, however, was found to be on a third lot. Court refused to rectify, holding that the contract related to purchase and sale of the lots named, and that, though presence of mill on one of them might have been an important consideration, it was not the fact as to which they contracted, not intrinsic to the transaction. Webster *v.* Stark, 78 Tenn. 406. Fact that a specific tract of land contains less than supposed, not affecting identity of thing purchased, is not "of the very subject matter of the sale." Thompson *v.* Jackson, 3 Rand. (Va.), 507.

The foregoing is the principle on which is founded the rule well stated by Mr. Kerr (Fraud & M. 433), as follows: "Care must be taken

in distinguishing cases where the parties are under a mutual mistake as to the subject matter of a contract from cases where there is no doubt as to the subject matter, but the one has in fact sold more than he thought he was selling, and the other got more than he expected,"—illustrating by sale of a leasehold having longer to run than supposed. Okill *v.* Whittaker, 1 De Gex & S. 83.

A further limitation upon the maxim, *ignorantia facti excusat,* especially applicable to cases like the present, is that, where parties have entered into contract based upon uncertain or contingent events, purposely as a compromise of doubtful claims arising from them, in absence of any bad faith, no rescission can be had, though the facts turn out very differently from the expectation of either or both of the parties. In such classes of agreements the parties are presumed to calculate the chances, receive compensation therefor, and assume the risks. Pomeroy, Eq. Jur. § 855; Beach, Mod. Eq. Jur. § 43, 56; Continental Nat. Bank *v.* McGeoch, 92 Wis. 286, 313. It is too obvious to require more than statement that, if parties fairly agree to abide uncertainty as to past or as to future events, they must do so. Kercheval *v.* Doty, 31 Wis. 476.

Applying the definitions and rules of law above set forth, with their qualifications, to the facts of this case, it is clearly apparent that if there was a mistake, in the sense in which that word is used in the law, the fact as to which such mistake existed was not an intrinsic one,—it was not of the subject matter of the contract. There was no mistake or misunderstanding as to the acts of the defendant, nor as to the injuries which the plaintiff had received. The effect of those injuries was, of course, problematical and conjectural. That very uncertainty entered into the compromise made, and was the consideration of a certain sum on one side, and the surrender of any larger sum on the other. The elements of the contract of settlement were: first, whether defendant was liable; and, secondly, what amount, in view of all the contingencies, should be paid and received in satisfaction of such liability, and the question of the plaintiff's condition, whether pregnant or not, was merely a collateral question. It was no part of the injury caused by defendant, nor anything for which damages should be paid. At most, it was but one of the surrounding conditions which might or might not increase the effect of the injuries. It is probably true, in the great majority of personal injury cases, that the effect which the injuries received may have, as to time of disability, *quantum* of suffering, and the like, may be modified by the physical or mental condition of the injured party. For example, a predisposition to rheumatism would be a condition likely to enhance the subsequent effects of an injury,—especially a dislocation or other injury to a joint. A disturbed condition of the system might prevent the reuniting of a broken bone, otherwise practically certain. A predisposition to nervous troubles might vastly multiply the effects of a slight spinal injury. So that if the mere ignorance of such surrounding conditions can suffice to render ineffective a settlement, because after events indicate

that the amount paid is inadequate, few compromises of the damages from personal injury could be relied on. Compromise is highly favored by the law, and any rule or doctrine by which the fair meeting of the minds of the parties to that end, in the great majority of cases which arise in human affairs, must fail to be permanent or effectual to settle their rights, is contrary to the whole spirit of the law, and should not be adopted. The question in each such case is, Did the minds of the parties meet upon the understanding of the payment and acceptance of something in full settlement of defendant's liability? If they did, without fraud or unfair conduct on either side, the contract must stand, although subsequent events may show that either party made a bad bargain, because of a wrong estimate of the damages which would accrue. Seeley *v.* Citizens' T. Co. 179 Pa. St. 334, 338; Homuth *v.* Metropolitan St. R. Co., 129 Mo. 629; Klauber *v.* Wright, 52 Wis. 303, 314.

In the case at bar there can be no question but that the agreement reached was for full settlement of all defendant's liability for damages resulting from the accident. The written agreement unambiguously asserts such intention, and there is no claim that plaintiff did not so understand it. She might well enter on such a compromise, for every advantage of knowledge as to the injuries received, and as to their probable effect, was with her. She had the benefit of her own observation, and the counsel of her customary physician, while defendant had but the opportunity of observing a single brief examination of her person, and that much less complete than was requested, in which its physician was necessarily subject to be deceived by simulated symptoms or exaggerated statements. In addition to all which, the settlement cast upon the plaintiff a share of the contingencies of an underestimate of damages, while she assumed none in case an overestimate had been made. All charges for medical attendance by reason of her injuries were assumed by defendant, and it might with some reason claim that it should not pay those due to the miscarriage, since plaintiff gave the most vehement assurances against any such event. But both parties have treated this obligation as one to be performed by defendant, notwithstanding the unexpected enhancement thereof. On the other hand, no promptitude of recovery or overestimate of the injury was, by the agreement, to cause a return of any of the consideration paid.

It may be noted here that plaintiff nowhere suggests that she would not have made this settlement, had she been aware of her pregnancy; and, under this branch of the law of mistake, it is laid down that it must clearly appear that the contract would not have been made, had the fact been known. This is a material consideration. Enhancement of her damage was by no means certain to result from the fact of pregnancy. Indeed, the only evidence on the subject was against the probability of any such effect. We cannot say that she would not have been willing to accept this settlement, and assume the contingency, even had

she known the fact of her condition. And, even if the fact were one intrinsic to the transaction, still it is essential to the extreme remedy of rescission of a deliberate contract that plaintiff prove clearly that she would not have executed, had she known the truth. Klauber *v.* Wright, 52 Wis. 303; Grymes *v.* Sanders, 93 U. S. 55.

If, however, the fact of pregnancy had been one intrinsic to the contract, the question remains whether such mistake was made with reference thereto as avoids that contract. The court below finds that a mistake existed as to that fact. So far as this is a finding of fact, we shall accept it as conclusive in the light of the evidence; but whether it is such a mistake as justifies rescission of a deliberately executed agreement is a question of law, and present before us for decision. We have already pointed out the distinction between the "unconscious ignorance" required to accomplish this result, and the mental state of consciousness of ignorance whether the fact exists or not,—where as DIXON, C. J., phrases it, her attention being called to the subject, she waived any investigation of it, and elected to proceed without inquiry into it. It seems clear that the plaintiff was—indeed, that both parties were—in the latter mental condition. The plaintiff had passed, by about a week, the proper period of her menstruation. She was a woman of intelligence and experience, already the mother of three children. She necessarily knew that the question of her condition was one of uncertainty. Her conclusion thereon, however firm, was necessarily but a conclusion from various facts, circumstances, and symptoms, some of which, at least, suggested existence, instead of nonexistence, of the suspected state. It was but a balancing of probabilities. The finding, indeed, is that the parties believed not that they were ignorant; and plaintiff's own testimony makes it apparent that the situation was little more than a state of doubt, with a belief that the probability was negative. She says: "I had bruises and was flowing. I was not positive I was pregnant. I told them I was not. The doctors went all over the case, and made inquiries, and at last it was agreed, they were not sure I was in the family way, and they agreed that Dr. Golley should take care of me." In a case of doubt like this, if the doubtful fact is material, parties may compromise and include the uncertainty among those covered by the settlement; they may refuse to settle until the uncertainty is removed, or they may settle everything else, and expressly omit therefrom the specified contingency. If they go on and make settlement in terms complete, they will be presumed to have intended the apparent effect of their acts. Any other presumption would be contrary to the truth, in the great majority of instances, and defeat the real intention of the parties, and we have no doubt it would do so here. It seems to us that both parties had in mind the possibility of pregnancy, and yet that both intended what they said by their written agreement, namely, to pay and accept in compromise and discharge of all defendant's liability a present sum of money and payment for any medical attendance rendered neces-

sary by the injuries. The defendant has performed that agreement on its part, and plaintiff must be held to abide it on hers.

Trial by jury having been waived, except as to amount of damages, it is proper for this court to apply the law to the facts established in the court below. Those facts are that plaintiff, understandingly and without fraud, executed the release set forth, and that no such mistake of fact as warrants rescission of that contract appears. As a result, judgment should have gone for the defendant.

By the Court.—The judgment is reversed, and the cause remanded to the circuit court with directions to enter judgment for defendant.

CHICAGO & NORTHWESTERN RY. CO. *v.* WILCOX, 1902, 116 Fed. 913.—SANBORN, C. J. There is another reason why she is not entitled to a decree in this suit. It is that if the doctor made this statement, and if she believed it, these facts would not sustain a cause of action for rescission. It is a mistake as to the existence of past or present fact material to a contract, and that alone, that will warrant its rescission on the ground of mistake. Conceding, for the moment, that the doctor and the agent told the complainant that there was no doubt that she would be well in a year; that she believed this statement; that she relied upon it, and that she has never recovered,—still these facts do not establish a mistake of fact which will warrant the avoidance of a solemn agreement of settlement. The mistake which they established was a mistake in prophecy, in opinion regarding the happening of a future event on the part of the doctor and of the agent, and a mistake in belief as to what the future had in store for her on the part of the complainant. The future duration of the disability, the future effects of the injury, were not matters of fact, but matters of conjecture, of opinion, of belief. The only material facts which conditioned the contract of compromise were the injury which the complainant had received and the acts of the railway company which caused it. These the complainant knew as well on the day she signed the release as she has ever known them. The future duration and the ultimate effects of the injury were unknown and unknowable future events, a mistake concerning which was a mere mistake of opinion or of belief, and not a mistake of fact. When the complainant signed her release, she knew that her hip had been broken, that the break was a bad one, that the neck of the femur was fractured, and that the injury had been caused by the sudden start of the passenger car in which she was standing. These were all the material facts conditioning her agreement of settlement. If she believed that she would be well in a year, she could not have failed to know that there could be no certainty that this belief was well founded. It is common knowledge, with which all must be charged, that the future effects of a broken bone are uncertain, contingent upon many conditions, and unknowable.

The physical and mental condition of the sufferer, the state of his vital organs, his age, his habits of life, the character and temperament of his nervous system, and many other conditions that it is impossible to enumerate or even to conceive, inevitably affect the duration and the character of his disability, and the amount of his suffering. Ignorance of the duration of the disabilities and of the ultimate effects of the injuries always exist where compromises are made before a complete recovery is effected. The cases are doubtless rare where the duration of the disability corresponds with the prophecy of the physician or with the belief of the parties when settlements are made. But compromises and releases are not voidable on this account, for the reason that the parties to them know the uncertainty of these future events, and by the very fact of settlement before they develop agree to take the chances of their effects. Their mistakes relative to the future duration of the disabilities and the future effects of the personal injuries that form the subjects of their contracts are mistakes of belief, and not of fact, and form no basis for the avoidance of their contracts. Such was the mistake under which the complainant labored. It was a mistake in the opinion of the doctor and in the belief of his patient with reference to unknowable future events. It was not a mistake of a past or of a present fact, and it presents no ground for a rescission of this release.

PAGET *v.* MARSHALL.

IN THE SUPREME COURT OF JUDICATURE, CHANCERY DIVISION, 1884.

[*Law Reports,* 28 *Chancery Division* 255.]

BACON, V. C. In all these cases on the law of mistake it is very difficult to apply a principle, because you have to rely upon the statements of parties interested and upon not very accurate recollections of what took place between them. But the law I take to be as stated this morning by Mr. Hemming. If it is a case of common mistake—a common mistake as to one stipulation out of many provisions contained in a settlement or any other deed that upon proper evidence may be rectified—the court has the power to rectify, and that power is very often exercised. The other class of cases is one of what is called unilateral mistake, and there, if the court is satisfied that the true intention of one of the parties was to do one thing and he by mistake has signed an agreement to do another, that agreement will not be enforced against him, but the parties will be restored to their original position and the agreement will be treated as if it had never been entered into. That I take to be the clear conclusion to be drawn from the authorities.

The case before me is in a very narrow compass. The plaintiff had

taken the lease of a site from the Goldsmith's Company upon a contract to build upon it a very valuable and commodious structure. He did so and his plans are in evidence; it is quite clear what his intention was. He built two separate ground-floor tenements, Nos. 49 and 50, to be let to two separate tenants. He kept a third, No. 48, including ground and first floors, intending to occupy it himself, and the fourth part, that colored blue on the model, he had to let when the negotiation commenced with the defendant. So that the subject in dispute is beyond all question. The two shops, Nos. 49 and 50, were separate and distinct things—as separate as if they had been in some other street—and the third, No. 48, was equally separate and distinct—built by the plaintiff for his own occupation and for carrying on his own business, and constructed so that those objects might be conveniently performed by him. To that end he built on the ground floor of No. 48 a staircase communicating with the first floor of No. 48, and he partitioned off the first floor of No. 48 so that in its turn it became just as distinct a building—just as distinct a tenement—as Nos. 49 and 50, and the purpose was distinct. Then, the part colored blue (which included the whole first floor of the block except that of No. 48 and all the upper floors without any exception), being still available and the plaintiff willing to let it, he constructed a staircase which led from the street past the first floor of No. 48 and landed upon the blue part, I will call it—that is sufficient description—no communication whatever either in fact being made or according to the evidence ever intended to be made between the ground or first floor of No. 48 and the part colored blue. That was the state of things when these parties met to negotiate. The partition which effectually severed the first floor of No. 48 from the part colored blue had been completely settled and arranged. The defendant on his first visit looked over all that was then to let, ascertained what the plaintiff meant to let, saw the first floor over No. 48, said that it would make a very handsome warehouse, but knew at the same time that it was not to be let, because, to use his own expression in his own evidence, the plaintiff told him "we mean to use that for ourselves." That is the evidence which the defendant has given on this occasion. He says that he was satisfied to some extent with what he looked at and desired to acquire it, but he must have a packing room. He could not mean the first floor; that which he said was a magnificent warehouse could not be a packing room—it could not in the nature of things—and he does not say that that was in his mind; still he insists more than once on the necessity of having a packing room. I am mentioning these facts in order to ascertain, as it is my duty to do, what I must take to be proved to have been the intention of the parties when they entered into the negotiation. He asks for a packing room. The brother goes with him down into a cellar—a cellar under No. 48, in the basement of No. 48—they look about there, and the brother comes in and says, "You cannot have it." No wonder, because there can be no access to it but from the floor of No. 48; and that went off.

Now, it would be impossible for me to connect, and there was a very faint attempt made to connect, the necessity which was present in the defendant's mind to have a packing room with the magnificent first floor, which he now says he had in his mind when he was present. The statement about putting up the inscription by no means encourages any such notion. The defendant desired to advertise to the public by means of a large inscription on the front of that which was to be his the trade which he was carrying on. He wished also to have a similar inscription over No. 48. That was resisted. It was the subject of discussion between them; the reason it was resisted was explained to him: "If we granted you that it would look as if you were carrying on your business in our warehouse;" but they said that, in order to accommodate him, they would be willing to insert a tablet containing his name and business, provided it did not interfere with the architectural decorations of No. 48. These facts are beyond all question. Both parties are agreed. Then the plaintiff writes a letter in which he offers to let, among other things, the first floor of No. 48. This is answered very readily by the defendant, who accepts the offer. Instructions are sent to the solicitors—instructions consisting only of this letter. Mr. Marten made a point that the plaintiff, in his pleadings, said they had no other instructions. They must have had some other instructions. I should read the word "other" used by him in the pleadings as meaning no different instructions, no variation in form otherwise from the words that appear in the letter. Then the lease is prepared and executed in accordance with the letter, including the first floor of No. 48.

Under these circumstances, the facts being as I have stated, am I, because the lease has been executed under seal, demising to the defendant that which the plaintiff never meant to let him have, that which the defendant says he knew at one time the plaintiff intended to keep for himself, that which he has never claimed at any period prior to the letter—am I to say that the agreement is to be held to be irrevocable? It would be against every principle that regulates the law relating to mistakes, and it would be directly at variance with the proved facts in this case. On the evidence, it looks very like a common mistake. The defendant, it is true, says in his defence that he took it on the faith that the first floor of No. 48 was intentionally included in the letter of the 13th of November, 1883. Certainly he never said so until it is said in the defence, which I am looking at now; but he has not said so in his evidence. He has never said that he intended to take that. The argument addressed to me has been this: "The separation of No. 48 and the blue is effected solely by means of a brick-on-end partition, and that is easily removed." People building brick-on-end partitions do not mean them to be easily removed, unless there is some purpose to remove them, and here, using the defendant's own evidence on this occasion, at that time the partition was effectually finished, and the defendant knew that the plaintiff intended to reserve it for his own use in his own business. The law

being such as I have said, it is not necessary to say anything about how easily you can make holes in a partition and how you can knock down a partition; you can pull down the front of a house with equal ease if you have proper appliances and proper workmen to do it. The way it is forced on my attention is the reason why the partition was first made, why it was found to be in existence when the defendant first inspected it, why he knew from that time as well as he knows now that it never was the intention of the plaintiff that he should have that "magnificent" room which formed one of two rooms which constituted the business place intended by the plaintiff for his own use, and to which the access was made by one staircase communicating with nothing but the upper room.

But without being certain, as I cannot be certain on the facts before me, whether the mistake was what is called a common mistake—that is, such a common mistake as would induce the court to strike out of a marriage settlement a provision or limitation—that there was to some extent a common mistake I must in charity and justice to the defendant believe, because I cannot impute to him the intention of taking advantage of any incorrect expression in this letter. He may have persuaded himself that the letter was right; but if there was not a common mistake it is plain and palpable that the plaintiff was mistaken, and that he had no intention of letting his own shop, which he had built and carefully constructed for his own purposes.

Upon that ground, therefore, I must say that the contract ought to be annulled. I think it would be right and just and perfectly consistent with other decisions that the defendant should have an opportunity of choosing whether he will submit, as the plaintiff asks that he should submit, to have the lease rectified by excluding from it the first floor of No. 48, whether he will choose to take his lease with that rectification, or whether he will choose to throw up the thing entirely; because the object of the court is, as far as it can, to put the parties into the position in which they would have been if the mistake had not happened. Therefore I give the defendant an opportunity of saying whether he will or will not submit to rectification. If he does not, then I shall declare that the agreement is annulled. Then we shall have to settle the terms on which it should be annulled. The plaintiff does not object, if the agreement is annulled, to pay the defendant any reasonable expenses to which he may have been put by reason of the plaintiff's mistake; but it must be limited to that. I should like, if it be convenient for counsel or for the parties, to have an answer to the proposition I have made, in order that that may be fully before the persons whom it interests. I may say that I can find no reason for a reduction of the rent. I listened attentively to what Sir John Ellis said and to what Mr. Farmer said, and I cannot but think that the rent of £500, if the lease is rectified, ought not, with any show of justice, to suffer any reduction.

Marten, for the defendant, agreed to strike out the first floor of No. 48 from the lease, the lease in other respects standing as it was executed.

BACON, V. C. Then the decree will be, the defendant electing to have rectification instead of cancellation of the lease, let the lease be rectified by omitting from it all mention of the first floor of No. 48. Then as to the costs of the action, the plaintiff is not entitled to costs, because he has made a mistake, and the defendant ought not to have any costs, because his opposition to the plaintiff's demand has been unreasonable, unjust, and unlawful.[1]

HERRON *v.* MULLEN.

IN THE COURT OF ERRORS AND APPEALS, 1898.

[56 *New Jersey Equity* 839.]

On appeal from a decree advised by Vice-Chancellor STEVENS, who delivered the following opinion:

On August 23d, 1894, the complainant, Mullen, executed to the defendant, Herron, a deed for land in Trenton for the consideration of $4,000. The deed declared that the premises were conveyed subject to two mortgages, the first for $1,600 and the second for $2,000, which mortgages, it was stipulated, "the party of the second part hereby agrees" to assume and pay, together with all interest now due thereon, "as part of the consideration for this conveyance." On June 10th, 1895, the

[1] See Whitworth *v.* Lowell, 1901, 178 Mass. 43 where "in a suit in equity to reform a contract to furnish steam piping for a building of five floors, it appeared that the plaintiff was invited to bid for the contract and to 'make price on piping without tanks and elevator pumps and with' and to 'make price on complete plant' and to 'make price on plant without heating system above the second floor.' The plaintiff made a bid as follows: 'For the whole building, $3,719; for the building below the three top floors, $2,854; and without the tanks and pump, $2,260.' The defendant then drew a form of offer, which plaintiff signed, and also the defendant, as follows: 'I propose to install in your building a complete system of piping in accordance with the plans and specifications. The price for the above is $2,260. I further agree to install all the work above the second floor for the sum of $965, this sum being deducted from the total cost for the whole building, if not done.'"

The plaintiff performed the work and furnished the material for piping for power and heating purposes in said building except in the three top floors in accordance with the specifications and his agreement, and the defendant paid him on account thereof the sum of $1,000, leaving $295 still due according to the defendant's contention. Plaintiff, on the other hand, insisted that the $965 should be deducted from $3,719, and that therefore according to the true meaning of the contract, $1,260 was due him.

The plaintiff sought to have this contract declared ambiguous, and to have it reformed in accordance with his construction of his original bid. Held, that the original bid was ambiguous and the contract as signed was not, but meant that the plaintiff would do the piping of the entire building for $2,260, and would do it without the three upper floors for $965 less, making the price for the piping of the two lower floors $1,295. Reformation was refused.

grantee, Herron, sold the property to one Phillips, but in this deed there was no clause of assumption.

Shortly after a foreclosure suit was instituted by the first mortgagee on the $1,600 mortgage, the second mortgagee being made a party, and on a degree of sale therein the property was sold to a stranger for $1,000.

Mullen now brings this suit against Herron to compel him to perform his agreement of assumption and joins the first and second mortgagees as parties. Herron defends on the ground that the assumption claim was inserted by mistake.

Marsh *v.* Pike, 10 Paige 595, and Cubberly *v.* Yager, 15 Stew. Eq. 289, are precedents justifying the form of action. The only question is whether the defendant is bound. On the authority of Green *v.* Stone, 9 Dick. Ch. Rep. 387, I think he is and that the complainant is clearly entitled to the relief he prays. There is not the least evidence that the mistake was mutual, consequently there can be no reformation. The weight of the evidence is that even if Herron did not know that the deed contained the clause of assumption when he accepted it (and it is not clear on the evidence that he did not), he knew of it before he conveyed to Phillips. He is not entitled to the remedy of rescission because he has incapacitated himself from returning the property.

Per Curiam. Decree affirmed, for the reasons given in the Court of Chancery.[1]

For affirmance—COLLINS, DEPUE, DIXON, GARRISON, GUMMERE, LIPPINCOTT, LUDLOW, VAN SYCKEL, ADAMS, BOGERT, HENDRICKSON, KRUEGER, NIXON, VREDENBURGH—14.

For reversal—None.

[1] In Sells *v.* Sells, 1860, 1 Drew. & Sma. 42, Vice-Chancellor KINDERSLEY said: "The position of the parties was therefore this: Mr. Sells did not understand the effect of the additional clause, and did not intend it. But what was the position of Mrs. Sells? Captain Ward was acting for her as her friend and adviser: he and Mrs. Sells both understood it to be the intention of her husband to settle his after-acquired property, though Mrs. Sells did not understand that she was to take a first life estate to her separate use.

"We have, therefore, here a new case, of a mistake not mutual. Now, I quite agree in the principle stated in the case before the Vice-Chancellor WOOD. You cannot, I think, correct an instrument made in consideration of marriage, except on evidence of the mistake of both parties. The wife is bargaining for herself and her children; and the question always is, What is the contract on which the marriage took place? Here, so far as the wife's contract and understanding are concerned, the contract is the settlement as it stands, though the husband did not understand that it would affect his property.

"In the absence of authority, I think I should be establishing a very dangerous precedent if I were to hold the mistake of one of the parties sufficient for rectifying a settlement.

See also Andrews *v.* Andrews, 1889, 81 Me. 337.

C. STATUTE OF FRAUDS.

KEISSELBRACK *v.* LIVINGSTON.

IN THE COURT OF CHANCERY OF NEW YORK, BEFORE CHANCELLOR KENT, 1819.

[4 *Johnson's Chancery,* 144.]

The Chancellor. This is a bill for the specific performance of an agreement in writing, to execute a lease for lives, "containing the usual clauses, restrictions and reservations contained in the leases given by the defendant." The agreement was made and executed in 1803, with William Fritz, who was in possession of the land, and continued thereon, until he assigned his right and interest, under that agreement, to the present plaintiff, in 1805, who took possession, with the knowledge and consent of the defendant, and has remained in possession ever since, and paid the rent down to 1813. The defendant, in August, 1814, offered to the plaintiff a lease with a provision in it, that upon every sale of the demised premises, one fifth of the purchase or consideration money, should be taken by the defendant to his own use. The bill states that such a lease was offered and refused, and charges that the parties agreed and declared, at the time of the execution of the agreement in writing, in 1803, that no such quarter or fifth sales should be demanded or paid.

The defendant does not, in direct and clear terms, deny any such agreement, that the farm should be exempt from quarter or other sales, but denies "any other or different contract than the one set forth." By contract, here he evidently means the agreement in writing; and he says, further, that the parol agreement is falsely charged, but it is not stated wherein, or to what extent; and as to the validity of any such agreement, he pleads the statute of frauds.

The only material point in this case is, whether the lease to be given, should or should not contain a reservation of one fifth of the money on every sale, to the defendant, and his heirs and assigns.

The testimony taken in the cause establishes, beyond all doubt, the parol agreement as charged, and that the writing, if it requires a different construction and operation, has been so far drawn and executed in mistake. The three witnesses (George Amaigh, William Fitz and John Loomis), establish the fact most clearly, and I am not at liberty to discredit witnesses who are unimpeached. The only question is as to the competency of the proof.

The statute of frauds does not appear to me to have any bearing upon this case. The agreement for the three life lease is in writing, and it has been partly performed by possession taken and transferred, and rent

paid. The right of the plaintiff rests upon the contract in writing, and the only inquiry is, whether there is not a mistake in the generality of the expression, that the lease was to contain the "usual clauses," etc., and whether the parties did not intend an exception in respect to the quarter sales. There is no doubt of their declared intention to make such an exception, at the time the agreement was drawn; and I am induced to think that the writing is, and ought to be, susceptible of amendment and correction, in that particular. This is not an undertaking to supply a defective agreement by parol proof, or to construe it, by resorting to previous negotiations and conversations between the parties. It is making the writing speak what the parties intended it should speak, when they executed it; and I see no objection to the admission of parol proof in this case, that would not equally apply to every case of an attempt to correct, by parol proof, a mistake in a deed.

This is a peculiar case, in which parol proof is necessary, at all events, to give meaning and effect to that part of the writing which refers to the usage of the defendant, in drawing his leases. The reference is to a matter of fact, since what are usual clauses in his leases, must be shown by proof, *dehors* the instrument. The agreement was not, in the first instance, perfect, without reference to matters of fact, *aliunde*. Parol proof is let in by the agreement itself, in order to settle the terms of the lease; and that being the case, there is less objection, in principle or policy, to carry the parol proof so far as to show what was the actual understanding of the parties, at the time, as to those terms. The Master of the Rolls stopped short of relief, in the case of Woollam *v.* Hearn, 7 Ves. 211, where a mistake was alleged, because he said there was no precedent for allowing parol proof to correct a mistake, in favour of a plaintiff, seeking specific performance of an agreement. He admitted, however, that the proof before him made out the plaintiff's case, and that it would have been received as sufficient to refuse relief, if the defendant had sought a specific performance. I am not sufficiently instructed, at present, to admit the soundness of this distinction, which holds parol evidence admissible to correct a writing as against, but not in favour of a plaintiff, seeking specific performance[1] of a contract. Lord HARDWICKE does not appear to have been aware of any such distinction, in the two cases to which Sir WM. GRANT refers. Lord THURLOW rejected parol proof in the case of Irnham *v.* Child, 1 Bro. 82, when offered by plaintiff seeking performance of an agreement, and at the same time seeking to vary it by parol proof, but he went upon general grounds, applicable to such proof as coming from either party. And why should not the party aggrieved by a mistake in the agreement, have relief as well where

[1] "If this had been a bill brought by this defendant for a specific performance, I should have been bound by the decisions to admit the parol evidence, and to refuse a specific performance. But this evidence is offered, not for the purpose of resisting, but of obtaining a decree: First, to falsify the written agreement; and then to substitute in its place a parol agreement, to be ex-

he is plaintiff, as where he is defendant? It cannot make any difference in the reasonableness and justice of the remedy, whether the mistake was to the prejudice of one party or the other. If the court has a competent jurisdiction to correct such mistakes (and that is a point understood and settled), the agreement when corrected, and made to speak the real sense of the parties, ought to be enforced, as well as any other agreement perfect in the first instance. It ought to have the same efficacy, and be entitled to the same protection, when made accurate under the decree of the court, as when made accurate by the act of the parties. The one case illustrates the other—*res accendent lumina rebus.*

But without pursuing this point further, at present, it is sufficient to observe, that we are obliged, by the particular terms of this agreement, to deal with written and parol proof, to ascertain the clauses, and restrictions, and reservations that were intended. The written agreement rests for its consideration and performance, partly upon the aid of the parol proof. And such proof being let in, by the contract itself, it may, upon the very principle admitted by the agreement, be applied to correct any mistake manifestly shown to exist in the general and unqualified terms of that part of the written agreement which depends for its explanation upon external proof.

I shall, accordingly, direct a specific performance of the agreement as corrected by the proof, and shall award costs, as was done by Lord HARDWICKE, in Bingham *v.* Bingham, 1 Ves. 126, in a decree correcting a mistake.

Decree accordingly.

ecuted by the court. Thinking, as I do, that the statute has been already too much broken in upon by supposed equitable exceptions, I shall not go further in receiving and giving effect to parol evidence, than I am forced by precedent." Per Sir WILLIAM GRANT, M.R., in Woollam *v.* Hearn, 1802, 7 Ves. Jr. 211, 219.

"The Court of Equity has, from a very early period, decided that even an Act of Parliament shall not be used as an instrument of fraud; and if in the machinery of perpetrating a fraud an Act of Parliament intervenes, the Court of Equity, it is true, does not set aside the Act of Parliament, but it fastens on the individual who gets a title under that act, and imposes upon him a personal obligation, because he applies the act as an instrument for accomplishing a fraud. In this way the Court of Equity has dealt with the Statute of Frauds, and in this manner, also, it deals with the statute of wills." Per Lord WESTBURY, in McCormick *v.* Grogan, 1869, L. R. 4 H. L. 82, 97.

See also the opinion of Chancellor KENT, in Gillespie *v.* Moon, 1817, 2 Johns. Ch. 585.

GLASS v. HULBERT.

In the Supreme Judicial Court of Massachusetts, 1869.

[102 *Massachusetts Reports* 24.]

Wells, J. The plaintiff purchased certain lots of land of the defendant, received a deed, and paid the whole amount of the purchase money. This suit is brought for relief or redress in several particulars, dissimilar in character, but all connected with the alleged oral contract of purchase. He complains that during the negotiation the defendant pointed out, as a part of the tract of land to be conveyed, about 17 acres of meadow land which were not, in fact, embraced in the deed actually made. The relief prayed for was that the defendant may be required to convey to the plaintiff the portion of the tract which was, by fraud or mistake, omitted from the conveyance.

When the proposed reformation of an instrument involves the specific enforcement of an oral agreement within the Statute of Frauds, or when the term sought to be added would so modify the instrument as to make it operate to convey an interest or secure a right which can only be conveyed or secured through an instrument in writing, and for which no writing has ever existed, the Statute of Frauds is a sufficient answer to such a proceeding, unless the plea of the statute can be met by some ground of estoppel to deprive the party of the right to set up that defence. Jordan *v.* Sawkins, 1 Ves. Jr. 402; Osborn *v.* Phelps, 19 Conn. 63; Clinan *v.* Cooke, 1 Sch. & Lef. 22.

The fact that the omission or defect in the writing, by reason of which it failed to convey the land or express the obligation which it is sought to make it convey or express, was occasioned by mistake or by deceit and fraud, will not alone constitute such an estoppel. There must concur also some change in the condition or position of the party seeking relief by reason of being induced to enter upon the execution of the agreement, or to do acts upon the faith of it as if it were executed, with the knowledge and acquiescence of the other party, either express or implied, for which he would be left without redress if the agreement were to be defeated.

The principle on which courts of equity rectify an instrument so as to enlarge its operation or to convey or enforce rights not found in the writing itself, and make it conform to the agreement as proved by parol evidence on the ground of an omission, by mutual mistake, in the reduction of an agreement to writing, is, as we understand it, that in equity the previous oral agreement is held to subsist as a binding contract, notwithstanding the attempt to put it in writing, and upon clear proof of its terms the court compel the incorporation of the omitted clause, or the modification of that which is inserted, so that the whole

agreement, as actually intended to be made, shall be truly expressed and executed. Hunt *v.* Rousmaniere, 1 Pet. 1; Oliver *v.* Mutual Commercial Insurance Co., 2 Curtis C. C. 277. But when the omitted term or obligation is within the Statute of Frauds there is no valid agreement which the court is authorized to enforce, outside of the writing. In such case relief may be had against the enforcement of the contract as written, or the assertion of rights acquired under it contrary to the terms and intent of the real agreement of the parties. Such relief may be given as well upon the suit of a plaintiff seeking to have a written contract, or some of its terms, set aside, annulled or restricted, as to a defendant resisting its specific performance. Canedy *v.* Marcy, 13 Gray 373; Gillespie *v.* Moon, 2 Johns. Ch. 585; Keisselbrack *v.* Livingston, 4 Johns. Ch. 148.

Relief in this form, although procured by parol evidence of an agreement differing from the written contract, with proof that the difference was the result of accident or mistake, does not conflict with the provisions of the Statute of Frauds. That statute forbids the enforcement of certain kinds of agreement without writing, but it does not forbid the defeat or restriction of written contracts, nor the use of parol evidence for the purpose of establishing the equitable grounds therefor. The parol evidence is introduced, not to establish an oral agreement independently of the writing, but to show that the written instrument contains something contrary to or in excess of the real agreement of the parties, or does not properly express that agreement. Higginson *v.* Clowes, 15 Ves. 516; Clowes *v.* Higginson, 1 Ves. & B. 524; Squier *v.* Campbell, 1 Myl. & Cr. 459, 480.

But rectification by making the contract include obligations or subject-matter, to which its written terms will not apply, is a direct enforcement of the oral agreement, as much in conflict with the Statute of Frauds as if there were no writing at all. Moale *v.* Buchanan, 11 Gill & Johns. 314; Osborn *v.* Phelps, 19 Conn. 63; Elder *v.* Elder, 1 Fairf. 80. In Parkhurst *v.* Van Cortlandt, 14 Johns. 15, 32, it is said that, "where it is necessary to make out a contract in writing no parol evidence can be admitted to supply any defects in the writing." Per THOMPSON, C. J. Such rectification, when the enlarged operation includes that which is within the Statute of Frauds, must be accomplished, if at all, under the other head of equity jurisdiction, namely, fraud. Irnham *v.* Child, 1 Bro. Ch. 92; 1 Story Eq., § 770a; Davies *v.* Fitton, 2 Drury & Warren 225; Wilson *v.* Wilson, 5 H. L. Cas. 40, 65; Manser *v.* Back, 6 Hare 443; Clarke *v.* Grant, 14 Ves. 519; Clinan *v.* Cooke, 1 Sch. & Lef. 22.

The fraud most commonly treated as taking an agreement out of the Statute of Frauds it that which consists in setting up the statute against its performance, after the other party has been induced to make expenditures, or a change of situation in regard to the subject-matter of the agreement, or upon the supposition that it was to be

carried into execution, and the assumption of rights thereby to be acquired, so that the refusal to complete the execution of the agreement is not merely a denial of rights, which it was intended to confer, but the infliction of an unjust and unconscientious injury and loss. In such case the party is held, by force of his acts or silent acquiescence, which have misled the other to his harm, to be estopped from setting up the Statute of Frauds. Hawkins *v.* Holmes, 1 P. W. 770; Parkhurst *v.* Van Cortlandt, 1 Johns. Ch. 274; s. c., 14 Johns. 15; Browne on St. of Frauds, § 437 *et seq.;* Fry on Spec. Perf., §§ 384-388; Caton *v.* Caton, Law Rep. 1 Ch. 137, 147; s. c. Law Rep. 2 H. L. 127. In the last-named case it is said that "the right to relief in such cases rests not merely on the contract, but on what has been done in pursuance of the contract." Per Lord Chancellor CRANWORTH. See also 1 Story Eq. § 759. But the present case, as we have already seen, does not come within the principle of this ground of equitable relief.

Fraud, which relates only to the preparation, form and execution of the writing, is sufficient to vitiate the instrument so made. It may be set aside either in equity or at law. If it is made to include land not the subject of the actual sale it is inoperative as to such land, and the fraud may be shown, for the purpose of defeating its recovery, in an action at law. Walker *v.* Swasey, 2 Allen 312, and 4 Allen 527; Bartlett *v.* Drake, 100 Mass. 174. It has been questioned whether any other effect can be given to such fraud than to defeat the operation of the instrument altogether, and whether a court of equity can reform by giving it a narrower operation, as modified by parol proof, in a case within the Statute of Frauds. Attorney-General *v.* Sitwell, 1 Y. & Col. Exch. 559. The difficulty is that if the fraud vitiates and defeats the instrument, then the modified agreement to be enforced must be that which is proved by parol evidence, and this seems to violate the statute. But the instrument in such case is not void. It is voidable only, and that not at the election of the party who committed the fraud. He is not entitled to control the extent of the effect that shall be given to his fraudulent conduct, and it is not for him to object that the fraud is availed of only to defeat the rights, which he has secured by fraud, beyond what he is fairly entitled to by the terms of the real agreement between the parties. When those are separable, and the nature of the case will admit of it, the court may enforce the written contract in accordance with its terms, giving relief against the fraudulent excess, or the clause improperly inserted. Parol testimony, used to defeat a title or limit an interest acquired under a written instrument, or to convert it into a trust, does not necessarily conflict with the Statute of Frauds. It has been held that an absolute deed may in this mode be converted in equity into a mortgage. Washburn *v.* Merrill, 1 Day 140; Taylor *v.* Luther, 2 Sumner 228; Jenkins *v.* Eldredge, 3 Story 181, 293; Morris *v.* Nixon, 1 How. 118; 4 Kent Com., 6th ed., 143. Whether this can be done in Massachusetts has not yet been decided. Newton *v.* Fay,

10 Allen 505. But if it were to be so held it would not be upon the ground of enforcing a parol agreement to reconvey, but upon the ground that such an agreement, together with proof that the deed was given and accepted only as security for a debt, made out a case of fraud or trust which would warrant a decree vacating the title of the grantee, as far as he attempted to hold contrary to the purposes of the conveyance. In such cases the court acts upon the estate or rights acquired under the written instrument, and within the power over that instrument which is derived from the fraud or other ground of jurisdiction. But when it is sought to extend that power to interests in land not included in the instrument, and in relation to which there is no agreement in writing, the case stands differently. Fraud may vitiate the writing which is tainted by it, but it does not supply that which the statute requires. It may destroy a title or right acquired by its means, but it has no creative force. It will not confer title. In the absence of a legal contract by the agreement of the parties, it will not establish one, nor authorize the court to declare one, by its decree.

This distinction is illustrated by the analogous rule in regard to implied trusts. Gen. Sts. c. 100, § 19. Parol evidence may charge the grantee of lands conveyed with a resulting or implied trust, which equity will enforce. But such evidence will not create a trust in lands already held by an absolute title.

We apprehend that in most instances where fraud, occasioning a failure of written evidence of an agreement, or particular stipulation, has been held to take the case out of the Statute of Frauds, there was some fact of prejudice to the party, or change of situation consequent upon the fraud, which was regarded as sufficient to make up the elements of an equitable estoppel.

That which moves the court to a decree to enforce the agreement is not the artifice by which the execution of the writing has been evaded, but what the other party has been induced to do upon the faith of the agreement for such a writing. It is not that deceit, misrepresentation or fraud of itself entitles a party to an equitable remedy, but that equity will interfere to prevent the accomplishment of the fraud which would result from the enforcement of legal rights contrary to the real agreement of the parties. Indeed, the fraud which alone justifies this exercise of equity powers, by relief against the Statute of Frauds, consists in the attempt to take advantage of that which has been done in performance or upon the faith of an agreement, while repudiating its obligations under cover of the statute. When a writing has been executed the courts allow the fraud or mistake, by which an omission or defect in the instrument has been occasioned, to defeat the conclusiveness of the writing, and open the door for proof of the real agreement. But the obstacle of the Statute of Frauds to the enforcement of obligations, or the security of rights not expressed in the instrument, remains to be removed in the same manner as if there were no writing.

Phyfe *v.* Wardell, 2 Edw. Ch. 47; Moale *v.* Buchanan, 11 Gill & Johns. 314. The power to reform the instrument is not an independent power or branch of equity jurisdiction, but only a means of exercising the power of the court under its general jurisdiction in cases of fraud, accident and mistake.

We are aware that the limitation which we have undertaken to define has not been uniformly observed or recognized.

Notwithstanding contrary decisions and *dicta,* we are satisfied that, upon principle, the conveyance of land cannot be decreed in equity by reason merely of an oral agreement therefor, against a party denying the alleged agreement and relying upon the Statute of Frauds, in the absence of evidence of change of situation or part performance creating an estoppel against the plea of the statute. This rule applies as well to the enforcement of such an agreement by way of rectifying a deed as to a direct suit for its specific performance. We are satisfied also that this is the rule to be derived from a great preponderance of the authorities. Whitchurch *v.* Bevis, 2 Bro. Ch. 559; Woollam *v.* Hearn, 7 Ves. 211; 2 Lead. Cas. in Eq. 3d Am. ed., notes (414), Am. notes, 691; Townsend *v.* Stangroom, 6 Ves. 328; Beaumont *v.* Bramley, Turner & Russell 41; see also 11 Gill & Johns. 314, 19 Conn. 63, and 1 Fairf. 80, already cited above; Adams Eq. 171, 172; Churchill *v.* Rogers, 3 T. B. Momr. 81; Purcell *v.* Miner, 4 Wallace 513.[1]

[1] "The defendant further claims that the verbal negotiations being within the Statute of Frauds, and the plaintiff having made no improvement on the premises, the plaintiff cannot claim the land, but is confined to relief in damages. The case of Glass *v.* Hulbert, 102 Mass. 24, is relied upon by the defendant to sustain this theory. That case was a bill in equity filed by the purchaser of a lot of land, after taking the deed and paying the price, seeking relief on several grounds, and among others, because, during the negotiations for the sale of the lot, the defendant represented that it included land which it did not include, and under that misrepresentation the plaintiff agreed to make the purchase; and it was held, in reference to the additional land, that no decree could be made for its conveyance in the absence of any evidence to estop the defendant from pleading the Statute of Frauds, and that the only relief was by an action for damages. In the case cited no possession was taken under the deed of the land excluded, so that in one of its most material and important characteristics it differs entirely from the case at bar. Nor does it appear that in Massachusetts the Statute of Frauds contains a provision to the effect that nothing contained therein shall be construed to abridge the powers of a court of equity to compel the specific performance of agreements in cases of part performance of the same, as is the case here. See 2 R. S. 135, § 10.

"In the opinion of the learned judge, after referring to the case of Smith *v.* Underdunck, 1 Sandf. Ch. 579, and stating that the decision rests upon the fact of possession by the plaintiff of the entire premises, including the part for which the bill was brought, and which, together with the contract, was admitted by the demurrer, and therefore the question of the Statute of Frauds did not arise, it is said: 'That the purchaser has been let in possession in pur-

McDONALD *v.* YUNGBLUTH.

IN THE UNITED STATES CIRCUIT COURT, S. D., OHIO, W. D., 1891.

[46 *Federal Reporter* 836.]

SAGE, J. The testimony in this cause sustains the averments of the bill that, shortly prior to the date of the deed hereinafter mentioned, the respondents, John Yungbluth and Stephen Yungbluth, Jr., entered into an oral agreement with the complainants to convey to them, by general warranty deed, a tract of land lying in the City of Cincinnati, Hamilton County, Ohio, and in that part of the city known as "Columbia," the same being on the bank of the Ohio River, and known as the "Yungbluth Bros.' Coal Elevator Property," containing in all about 3.26 acres; in consideration whereof complainants were to assume and pay $18,000 indebtedness of said John and Stephen Yungbluth, evidenced by their promissory notes, upon which complainants were indorsers, and, in addition, to furnish to said respondents $5,000 worth of coal; the total consideration being $3,000.

The deed, which was executed January 25, 1890, conveyed only a portion of said tract, containing 1.74 acres of land. The bill charges that said respondents fraudulently, knowingly, and wilfully conveyed the 1.741 acre tract instead of the entire tract aforesaid. It is further averred that complainants were ignorant of the fraud practiced upon them, and of the fact that the deed conveyed only a portion of the property contracted for, until it was left for record on the day of its execu-

suance of a parol agreement has been generally recognized as sufficient to take it out of the statute.' In a subsequent portion of the opinion the rule is laid down that, upon principle, a conveyance of land cannot be decreed in equity by reason of a mere oral agreement, in the absence of evidence of a change of situation, a part performance creating an estoppel against the plea of the statute, thus making an exception when possession has been taken under the deed. The marked difference between the cases cited and the one at bar is of such a character that the former could scarcely be considered as an authority applicable to the latter. In the case of Glass *v.* Hulbert, above cited, some of the authorities in this State are commented upon and criticised, and it is conceded that the doctrine attempted to be defined has not been universally recognized or observed. In fact, it is quite clear that the authorities in this State are in a contrary direction, and the uniform current of decisions has been to entertain jurisdiction and grant relief in such cases as not being within the prohibition of the Statute of Frauds. At a very early period in the history of equity jurisprudence of this State it was held that equity relieves against a mistake as well as fraud, and in Gillespie *v.* Moon, 2 J. Ch. 585, where the verbal agreement was to sell 200 acres, and 250 was erroneously included in the conveyance. The grantee took possession, and a decree was granted directing a reconveyance of the excess. The learned Chancellor KENT remarks: 'It would be a

tion, and the consideration had passed; and that, relying upon the good faith of the respondents, they believed that the deed correctly described the entire tract known as the "Elevator Property." Upon discovering that it did not describe the entire tract, they demanded of respondents a further conveyance, according to the terms of the oral agreement, which they refused, and still refuse, to execute.

These charges are made out by the evidence, and the complainants are entitled to a decree for a further conveyance as prayed, unless the points made upon the law of the case for the respondents are well taken. These are as follows:

1. It appears from the evidence that the title to the portion of the tract not conveyed was not in said respondents, but in their mother, Johanna Yungbluth, who was no party to the deed executed, nor to the agreement claimed. That is all true, but it is also true, as is established by the evidence, that the legal title was and is in Johanna Yungbluth, in trust for her sons, said John and Stephen, Jr., and subject to their direction and control, and that by the terms of the agreement they undertook to secure a transfer from her, and convey the entire tract to complainants. Johanna Yungbluth is a party respondent, and, if the equity of the cause is with the complainants, there can be no doubt of the power of the court to make a decree compelling her to convey, either directly to complainants or to her sons, and that they then convey to complainants, as they agreed to do.

2. It is agreed that the relief prayed for cannot be granted, for the reason that it would be the enforcement of a contract relating to real estate which was never reduced to writing, and that there has been no such part performance as to take the case out of the statute of frauds; citing Glass *v.* Hulbert, 102 Mass. 24, which directly sustains the propo-

great defect in what Lord ELDON terms "the moral jurisdiction of the court" if there was no relief for such a case.' In Glass *v.* Hulbert, *supra*, it is conceded that the principle maintained by Chancellor KENT was fully established, but an attempted distinction was said to exist because the relief sought and granted was by way of restricting, and not by enlarging the operation of the deed. The principle is the same, and equally applicable to both cases, as is apparent from the discussion of the cases by the Chancellor in Gillespie *v.* Moon, *supra*. Besides, the subsequent decisions in this State distinctly hold that the same principle was applicable where the conveyance or agreement did not include all the land which was intended. Wiswall *v.* Hall, 3 Paige, 313; De Peyster *v.* Hasbrouck, 1 Kern. 582; Welles *v.* Yates, 44 N. Y. 525; Kisselbrack *v.* Livingston, 4 J. C. R. 144. In the case at bar the plaintiff took possession under the deed, with the knowledge of the defendant, and has ever since held possession of the same, and, within the cases last cited, was entitled to the relief demanded. The case clearly was not within the statute, as there was sufficient performance to bring it within the well-settled rule that partial performance takes a parol agreement out of the Statute of Frauds. Malins *v.* Brown, 4 Comst. 410; Lobdell *v.* Lobdell, 36 N. Y. 327; 2 R. S. 535, § 10." MILLER, J., Beardsley *v.* Duntley, 69 N. Y. 577, 582-584.

sition stated, as do Elder *v.* Elder, 10 Me. 80; Osborn *v.* Phelps, 19 Conn. 63; Westbrook *v.* Harbeson, 2 McCord, Eq. 112, and Best *v.* Stow, 2 Sandf. Ch. 298, and the English cases therein cited.

It does not appear from the bill that the agreement was oral, but that fact is fully developed in the testimony. The statute is not pleaded by the respondents, but they rely upon May *v.* Sloan, 101 U. S. 231, and Dunphy *v.* Ryan, 116 U. S. 491, 6 Sup. Ct. Rep. 486, which hold that, where an agreement for the sale of lands, alleged in a bill in equity praying for specific performance, is denied by the answer, the defendant, where there is no written evidence of such agreement, may, at the hearing, insist on the statute of frauds as effectually as if it had been pleaded. That is no new rule. It is to be found in the text of Sugden on Vendors and Purchasers, and it is supported by a long list of authorities cited in a foot-note to section 511 of Browne on Frauds. But the respondents in this cause do not deny making an agreement to convey to complainants their coal-elevator property. On the contrary, they expressly admit that they did make such an agreement, and then deny that that property embraced or included any more than was conveyed by them to complainants, and they go on to aver that they have fully performed their agreement. The court finds that, as a matter of fact, they have not performed their agreement, and that they have dealt fraudulently with the complaints. In this state of pleading and of fact, how can it avail them to appeal to the statute of frauds?

But, aside from this, let us look at the matter, treating the cases in 101 U. S. and in 116 U. S. and 6 Sup. Ct. Rep. and in 102 Mass. as in point, and we shall find that the overwhelming weight of authority is against the ruling in Glass *v.* Hulbert. The complainants in this case have not been put in possession under the deed delivered to them. They have paid the $18,000, which they agreed to assume, and for which they were, prior to the agreement, liable as indorsers. But that was not part performance. The question is, where the contract for a conveyance of land must be in writing to be enforceable, and the contract is oral, and the deed fraudulently so made as to omit part of the tract included in the contract, has a court of equity the power, notwithstanding the statute of frauds, to afford relief by a decree for a conveyance in accordance with the oral contract? The supreme court of Massachusetts in Glass *v.* Hulbert, says "No!" Chancellor KENT, in Gillespie *v.* Moon, 2 Johns. Ch. 596, says that it would be a great defect in what Lord ELDON terms the "moral jurisdiction" of the court if there was no relief for such a case. Justice STORY also was of the opinion that the relief could be granted. See Story, Eq. Jur. § 161, and cases cited. Pomeroy, in his work on Contracts, (Specific Performance), at section 264, declares that the preponderance of judicial authority in this country, by courts and jurists of the highest character, is that where, by reason of fraud, the written instrument fails to express the actual agreement, whether the variation consists in limiting the scope of the writing or in enlarging it so as to embrace

land omitted through mistake or fraud, relief may be granted by making the writing conform to the agreement, although the agreement was oral, and of the class required by the statute of frauds to be in writing. Numerous authorities are cited in a foot-note in support of this view. To the same effect see Murray *v.* Dake, 46 Cal. 648, and cases there cited, and Hitchins *v.* Pettingill, 58 N. H. 386, reviewing Glass *v.* Hulbert, and citing a large number of cases to the contrary. See, also, cases cited in note 4 to section 85, Adams, Eq., (8th Ed.,) and Beardsley *v.* Duntley, 69 N. Y. 580, which also comments upon and disapproves Glass *v.* Hulbert. See Flagler *v.* Pleiss, 3 Rawle, 345; Blodgett *v.* Hobart, 18 Vt. 414; Moale *v.* Buchanan, 11 Gill & J. 314; Worley *v.* Tuggle, 4 Bush, 182; Provost *v.* Rebman, 21 Iowa, 419; Hunter *v.* Bilyeu, 30 Ill. 228; Durant *v.* Bacot, 13 N. J. Eq. 201, and Wyche *v.* Greene, 16 Ga. 49. So in Ohio. Davenport *v.* Scovil, 6 Ohio St. 459; Ormsby *v.* Longworth, 11 Ohio St. 653. The weight of authority clearly determines this question in favor of the complainants.

3. It is contended that complainants are not in a position to seek relief, because if deceived, it was by reason of their own negligence and default in failing to examine their deed before accepting it. The insurance cases cited recognize this rule, and apply it to the case of one signing an application for a policy, but it has no application here. Such were the relations to the parties, so close the friendship of the complainants for the respondents, and so entire their confidence and trust in them, as disclosed by the evidence, that the respondents ought not now to be allowed to plead that the complainants were not on their guard, watching to prevent a fraud which they should have suspected.

Let there be a decree for the complainants, with costs.

D. Negligence as a Defence.

HITCHINS *v.* PETTINGILL.

In the Supreme Court of New Hampshire, 1876.

[58 *New Hampshire Reports* 3.]

Bill in equity for the reformation of a deed. The court found that the plaintiffs bought a farm of the defendants, and paid for it; that a part of the farm containing ten acres, included in the bargain and paid for, was, by the fraud of the defendants, not included in the deed; and that the plaintiffs, by the exercise of ordinary care, would have discovered the fraud when the deed was made. The question whether the plaintiffs are entitled to relief was transferred by the Circuit Court.

SAWYER, J. If the ten acres had been omitted in the deed by a mutual mistake, the plaintiffs would have been entitled to relief, notwithstanding their failure to exercise ordinary care in examining the deed and ascertaining whether the contract was accurately put in writing. The rule *caveat emptor* applies to the making of the contract of purchase—the negotiations, the agreement, the inducements upon which the purchaser acts, the grounds on which the minds of the parties meet, but not to the formal, clerical process of giving the purchaser written evidence of the completed bargain. Monroe *v.* Skelton, 36 Ind. 302.

On the facts stated, the plaintiffs are entitled to a decree requiring the defendants to give them a deed of the ten acres.

PLACER COUNTY BANK *v.* FREEMAN AND BELL.

IN THE SUPREME COURT OF CALIFORNIA, 1899.

[126 *California* 90.]

Appeal from a judgment of the Superior Court of Placer County and from an order denying a new trial. R. C. RUST, Judge Presiding.

The facts are stated in the opinion.

CHIPMAN, C. Plaintiff alleges that defendants delivered to plaintiff, at its date, their certain bill of exchange reading as follows:

"500.00. Auburn, Cal., Dec. 17, 1896.

"At sight, pay to the order of Placer County Bank five hundred dollars, value received, and charge the same to the account of Bell & Freeman.

"To E. S. Dreyer & Co., Chicago."

That the same was presented for payment to the drawee December 23, 1896, and payment was refused and notice of non-acceptance was duly given to defendants, but they have not paid the same. Defendants deny any indebtedness, and as a separate defense pleaded want of consideration, and set up certain facts in effect showing that they signed the draft believing it to be a receipt only for the money, as to which the findings are substantially as pleaded by defendants. The trial was by the court without a jury. The court found that one Graves was indebted to Bell & Freeman each in the sum of two hundred and fifty dollars, and being then in Chicago, where he resided, and desiring to transmit the money to them, he drew his check upon Dreyer & Co. in favor af the plaintiff; that to make payment to plaintiff Graves requested Dreyer & Co. to, and they did, send the following telegram:

"Chicago, Ill., Dec. 17, 1896.

"To Placer County Bank, Auburn, Cala.:

"We hold five hundred dollars subject your draft for Bell & Freeman.

"E. S. Dreyer & Co.,
"Bankers."

That plaintiff received the telegram, and on the same date paid to Freeman said sum, and Freeman gave plaintiff a receipt acknowledging payment; about fifteen minutes later, Nichols, plaintiff's cashier, who had made the payment, called Freeman back and handed to him the instrument set forth in the complaint, and informed him the former receipt was insufficient, and requested him to sign the said instrument for Bell and himself as and for an additional receipt to evidence said payment, and that Freeman signed the same, not knowing it was a draft upon Dreyer & Co., but believing it simply an additional receipt; that the draft was presented and dishonored December 23d, and, at the time the draft was signed by Freeman for defendants, there was no money on deposit with Dreyer & Co. subject to defendants' draft, but said money was deposited subject to the order of the plaintiff, and these facts were known to plaintiff at that time. It is further found that no consideration passed from plaintiff to defendants, or either of them, for said draft.

As conclusion of law, the court found that plaintiff, by the payment, accepted the said telegraphic order, and, in so doing, acted as the agent and trustee of Dreyer & Co., and not of defendants, or either of them. Judgment went for defendants, from which and from the order denying motion for a new trial plaintiff appeals. It is claimed that the findings and decision are not supported by the evidence.

It appears from the evidence that Graves had entered into engagements with Bell & Freeman in a transaction relating to the purchase of a mine, and it became necessary that he should pay them five hundred dollars on December 17th. He placed the amount in the hands of Dreyer & Co. to be transmitted to plaintiffs through the Placer County Bank at Auburn, where Bell & Freeman were. Mr. Wallace, at Auburn, had been acting, as he testified, "as agent between Mr. Graves and Bell & Freeman in relation to this transaction." He had informed Graves of the necessity for sending this money. Mr. Berger, of Dreyer & Co., drew the dispatch and signed it for the firm, and Graves sent it. Mr. Wallace was expecting the remittance, and went to the Placer County Bank to learn if it had been received, and being told there was money there for Bell & Freeman, he sent Freeman to the bank. Prior to the sending of this telegram the Placer County Bank had no relations with Graves or the Chicago bank, or with Bell & Freeman, so far as appears from the evidence. The Placer County Bank was brought into the transaction by this message. The finding that the money was on deposit with Dreyer & Co., subject to the order of plaintiff, and not subject to defendants' draft, is not sustained by the evidence, for the reason that it clearly appears

that the money was there on deposit, as the telegram showed and as was the undisputed fact, for Bell & Freeman, and not for plaintiff, though for the purposes of the transmission it was made subject to plaintiff's draft. Dreyer & Co. had no money belonging to plaintiff, but they had five hundred dollars left there to be transmitted for Bell & Freeman. There is some conflict in the evidence as to what occurred in getting the money into the hands of Bell & Freeman.

Nichols testified: "That telegram, at first reading, I took for a direct order to pay money from Chicago, and I took Freeman's receipt for that amount; I gave him five hundred dollars, and took his receipt. It was signed W. A. Freeman. He then went out, and, upon examination of the telegram afterward, as to the meaning of it, I saw that it was not an order, but merely a notification that there was money in Chicago with E. S. Dreyer & Co." He then testifies that he called Freeman back and told him that he (Nichols) "would have to change the advice in order to get the money." He testified: "I didn't say anything to him about signing a receipt. I said I wanted him to change it; that the paper I had wouldn't do. I don't know whether he read the paper he signed; he had opportunity to do so; I cautioned him particularly to sign it 'Bell & Freeman,' according to the telegram. He raised no objection and went out. That was the last of it." Upon cross-examination, he testified that he supposed the draft of the Placer County Bank would have been paid, accompanied by the receipt for the money, by Bell & Freeman; but that it would not have been the proper way to do. Freeman's version as to the payment of the five hundred dollars and giving a receipt in the first instance does not differ materially from Nichols', but as to the second paper, signed "Bell & Freeman," he testified that he did not examine it or read it, although he says he could have done so; that he supposed it was a receipt and did not know it was a draft; that he understood Nichols to call him back to sign a receipt, and that when he signed the paper nothing was said about a draft. He further testified: "Had I known that instrument was a draft, I would not have signed a draft for Mr. Bell. I might have signed one for myself." It was admitted of record "that in these matters defendant Freeman acted as, and was, the agent of defendant Bell." On rebuttal Nichols testified: "I told him he would have to change the paper in order to collect the money in Chicago. I said nothing about a receipt. I don't think I mentioned the name of the draft, but I said I would have to have a different paper to collect the money in Chicago." It appears that on December 23d, when the draft reached Chicago, Dreyer & Co. had suspended business, and a receiver was in charge, and for this reason the draft was not paid.

No question of fraud or undue influence, or the existence of any confidential relations between plaintiff and defendants is presented or claimed by defendants to arise either from the pleadings or the evidence. Defendants' position is stated in their brief as follows: "We do not ask the court to correct a draft and hold it to be a receipt, but we do ask the

court to hold that the draft was given without consideration, and that it was obtained by the bank, and was expressly understood by both parties to be for the better evidencing the payment of the money to defendants, so that plaintiff could the more readily obtain its money from the Chicago bank, to whom it had given the credit."

We do not think there was lack of consideration for the only reason urged, to wit, that the defendants had already received the money and receipted for it. The draft was part of the same transaction, and as much consideration existed for it as for the receipt. The evidence is that plaintiff had no interest in the matter beyond the usual exchange, and, as we have seen, the money was deposited at Chicago to be sent to defendants. Nor do we think plaintiff was the agent of the Chicago bank in the sense urged by defendants, and as the court found in its conclusions of law. It is true the telegram was authority for the plaintiff to draw on Dreyer & Co., but with the direction that it was for "Bell & Freeman;" plaintiff had no authority to draw otherwise. Plaintiff was as much the agent of defendants as of Dreyer & Co.

The real question in this case we think is: Should defendants, in view of all the undisputed facts, be permitted to avoid the consequences of their voluntary acts? Obviously, the loss in the transaction, by the plainest considerations of justice, ought not to fall upon plaintiff, and we think the rules of law call upon us so to hold. The principle governing the case has been applied many times and under a great variety of circumstances. It it this: Where a person enters into an obligation with another upon an equal footing—*i. e.*, where he does so free from any fraud practiced upon him, and not being under any undue influence, and there are no relations of confidence and trust, and the means of knowledge are equally open to both, and he executes the instrument without reading it or having it read to him, and without exercising the means of knowledge open to him—neither the courts of law nor courts of equity will relieve him from the effects of his folly. Judge STORY, in his Equity Jurisprudence, section 200a, quotes the rule from Kent's Commentaries as follows: "The common law affords to everyone reasonable protection against fraud in dealing; but it does not go to the romantic length of giving indemnity against the consequences of indolence and folly, or a careless indifference to the ordinary and accessible means of information." Among other cases found in our reports upon the question are: Hawkins *v.* Hawkins, 50 Cal. 558; Senter *v.* Senter, 70 Cal. 619; Metropolitan etc. Assn. *v.* Esche, 75 Cal. 513; Crane *v.* McCormick, 92 Cal. 176.

The judgment and order should be reversed.

HAYNES, C., and COOPER, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are reversed.

MCFARLAND, J., TEMPLE, J., HENSHAW, J.

BANTA *v.* VREELAND ET AL.

IN THE COURT OF CHANCERY OF NEW JERSEY, 1862.

[15 *New Jersey Equity Reports* 103.]

The Chancellor [GREEN]. The bill is filed to foreclose two mortgages upon the same premises. The first was given by Jacob C. Vreeland to Conrad Vreeland, dated the 13th of March, 1844, for $300, and assigned to the complainant by the executor of the mortgagee. The second was given by Jacob C. Vreeland to the complainant, dated December 10, 1851, for $628.11. In regard to the second mortgage there is no dispute. The first mortgage was cancelled of record and the bond and mortgage surrendered by the complainant to the defendant on the 17th of October, 1860. The bill, which was filed a few days after the cancellation, alleges that this cancellation of the mortgage was made by the complainant under a mistaken apprehension that the mortgage had been satisfied, when in truth it had not. The truth of this averment constitutes the material inquiry in the cause.

Was that mortgage debt ever paid?

It is certainly a remarkable circumstance, the effect of which can be overcome only by very clear evidence, that the complainant himself believed and acknowledged that the mortgage was satisfied and assented to its cancellation. But the mistake, I think, is satisfactorily accounted for. He was an aged man and manifestly very ignorant of business. There had been a proposal at one time to take up the mortgage in question by giving another. He had held notes for a part of the indebtedness. He was under no mistake in regard to the amount due him. For that he relied upon the memorandum given him by the defendant. At no time did he admit that the whole amount, as now claimed, was not due. His mistake was in regard to the securities which he held for the debt. He supposed that the entire debt was covered by the last mortgage or by notes. This is very clearly shown to be a mistake.

The sole question raised upon the pleadings and evidence is, whether the mortgage is a subsisting lien upon the mortgaged premises. The evidence upon this point leaves no room for doubt.

Equity will relieve where an instrument has been delivered up or cancelled through fraud or mistake. Miller *v.* Wack, Saxton, 204; Trenton Banking Company *v.* Woodruff, 1 Green's Ch. R. 117; 1 Story's Eq. Jur. § 167.

It is urged on the part of the defendant that to entitle a party to relief on the ground of mistake it must be of such a fact as he could not by reasonable diligence have obtained knowledge of. If otherwise, it is culpable negligence, against which equity will not relieve, 1 Story's Eq. Jur. § 146; Dacre *v.* Carr, 2 Green's Ch. R. 513.

The principal is usually applied in relieving against contracts entered into under a mistake, though it is doubtless susceptible of a wider application. The present case, however, does not fall within the operation of the principle. The complainant received no consideration for the act—the defendant gave none. The complainant entered into no engagement from which he asks relief. Under a mistaken impression that the mortgage was satisfied, he consented to its cancellation. It is clearly against conscience that the defendant should avail himself of the mistake to escape the payment of an honest debt.

The complainant is entitled to a decree for the mortgage debt.

KINNEY *v.* ENSMINGER.

IN THE SUPREME COURT OF ALABAMA, 1888.

[87 *Alabama* 340.]

SOMERVILLE, J. The bill is filed by the appellee, Ensminger, to reform a land deed recently executed to the appellants, and also the notes given for the purchase money, so as to make the papers show on their face that a vendor's lien was retained, in accordance with what is alleged to have been the mutual agreement between the contracting parties. An injunction was prayed and granted, staying the threatened sale of the land in the meanwhile, it appearing that the purchase money notes were not yet due, and that the defendants were insolvent. The appeal is taken from an interlocutory decree of the Chancellor overruling a demurrer to the bill, and refusing to dissolve the injunction.

If the facts alleged in the bill are true, the case is clearly brought within the jurisdiction of chancery, under the equity head of reformation of written instruments on the ground of mistake or fraud, unless the failure of the complainant to inform himself as to the contents of the deed and notes be such culpable negligence as to bar him of his remedy in a court of conscience. The bill avers a distinct agreement between the parties, that the deed and notes should show on their face a retention of a vendor's lien, and that the omission of this stipulation from these papers was through the fraudulent collusion of the defendants and one Harrison, who, as real estate agent, negotiated the sale as attorney in fact of the complainant. Berry *v.* Sowell, 72 Ala. 14; 2 Pom. Eq. Jur. §§ 870, 1375; 3 Brick. Dig. 358. §§ 379 *et seq.*

The bill, in our opinion, shows no such culpable negligence on the part of the complainant as to bar his right to seek correction of the mistake sought to be rectified. It is not every negligence that will operate to bar in such cases, as is sometimes inaccurately asserted. "It would be

more accurate to say," observes Mr. Pomeroy, in discussing this subject, "that where the mistake is wholly caused by the want of that care and diligence in the transaction which should be used by every person of reasonable prudence, and the absence of which would be a violation of a legal duty, a court of equity will not interpose its relief." 2 Pom. Eq. Jur. § 856. After adding that each instance of negligence must depend largely upon its own circumstances, he further says: "The conclusion from the best authorities seems to be, that the neglect must amount to the violation of a positive legal duty. The highest possible care is not demanded. Even a clearly established negligence may not, of itself, be sufficient ground for refusing relief, if it appears that the other party has not been prejudiced thereby." Ib. § 856.

While courts will act on this principle in granting relief, they will do so with great caution, so as not to unduly encourage the want of ordinary prudence, on the part of persons signing important papers, in making examination or inquiry as to their contents. Watts *v.* Burnett, 56 Ala. 340. And generally an unexplained signing, without excuse for neglecting to read, or to make inquiry, and without any fraud, deceit or misrepresentation being practiced on the maker or grantor, by which he was induced to execute the paper, is not ground for relief, or defense to an action on this paper. Cannon *v.* Lindsey, 85 Ala. 198; Dawson *v.* Burrus, 73 Ala. 111; Pacific Guano Co. *v.* Anglin, 82 Ala. 492; Burroughs *v.* Pacific Guano Co., 81 Ala. 255; Kennerty *v.* Etiwan Phosphate Co., 53 Amer. Rep. 669; Murrel *v.* Murrel, 49 Amer. Dec. 664. Especially is this true where the rights of an innocent third person are involved, or the subject of the transaction is commercial paper, which is not this case. Montgomery *v.* Scott, 30 Amer. Rep. 1.

The complainant's illiteracy and inability to understand the English language, coupled with his probable confidence in his trusted agent, Harrison, who acted for him in negotiating the sale, are *prima facie* sufficient, under the facts of this case, to acquit him of such culpable negligence, in failing to be informed as to the contents of the deed and notes, as would prevent him from obtaining relief in a court of equity.

The bill is not wanting in equity, and there was no error in refusing to dissolve the injunction on this ground. The demurrer to it was also correctly overruled.

Affirmed.

E. Lapse of Time.

HALL *v.* OTTERSON.

In the Court of Chancery, 1894.

[52 *New Jersey Equity Reports* 522.]

February 25, 1858. Otterson and his wife, for a nominal consideration executed a deed conveying the premises in controversy, being a farm at Morestown, N. J., to James E. Gowen on various trusts.

By the provisions of this deed, Mrs. Otterson intended to secure to herself the right to appoint by will the persons to whom she wished the property ultimately to go, and, if she failed so to do, that her husband by will might do the same, and, in the event of their both dying intestate, or without making such appointment, the premises should go to her heirs at law.

But, through the insertion of the words "or the survivor of them," power was given to her husband to defeat this intention, by revoking the trust deed in case he survived his wife. Mrs. Otterson died without a will; her husband exercised his power of revocation in 1864, and demanded and obtained a conveyance of the property by the trustee Gowen. Mr. Otterson failed to make a will meeting the requirements of the statute. As a result the event has happened on which the heirs of the wife were to have the estate, but through the mistaken insertion of the words "or the survivor of them," the property devolves upon the creditors of the husband. Under all the circumstances of the case the court finds that the trust deed of February 25, 1858, cannot stand in a court of equity.

It was, however, made in 1858, and Mrs. Otterson died in 1863, and the bill was not filed until 1891—28 years after the execution of the deed—and the defendants set up the Statute of Limitations, and also claimed that the complainant, by delay, had lost any right she might otherwise have to attack the conveyances; and, further, that by her inaction, with the knowledge that James Otterson, Jr., was exercising acts of ownership by the sale and conveyance of portions of the estate, and its improvement by the purchasers, she had so far given her acquiescence to the original transaction that she could not now dissent therefrom in a court of equity.

The court held that the Statute of Limitations had not run against the complainant at law.

Green, V. C.:

The present is a suit purely of equitable cognizance. It is founded on that breach of equity jurisdiction which relieves against mistake. As

to its subject-matter she would be remediless at law. The case does not fall within the principle that equity applies the bar of the statute to cases where there is both legal and equitable remedy for the same cause of action. Kane *v.* Bloodgood, 7 Johns. Ch. 90, 118; Smith *v.* Wood, 42 N. J. Eq. 569, 7 Atl. 881; Kirkpatrick *v.* McElroy, 41 N. J. Eq. 555, 7 Atl. 647; 13 Am. & Eng. Enc. Law, tit. "Limitation of Actions," p. 675, and notes. This defense must rest, therefore, solely on the application of those rules relating to acquiescence and laches, which the court has always recognized, altogether outside of and independent of the Statute of Limitations. They are the fruit of the maxim that "equity aids the vigilant, not those who slumber on their rights." The Chancellor has forcibly stated the rule, its reason, and the consequences attendant on its disregard, in Van Houten *v.* Van Winkle, *supra.* The defenses of laches and acquiescence are cognate, but not correlative. They both spring from the cardinal rule that "he who seeks equity must do equity." "Acquiescence," however, properly speaking, relates to inaction during the performance of an act. "Laches" relates to delay after the act is done. Lord COTTENHAM, in Duke of Leeds *v.* Amherst, 2 Phil. Ch. 117, says of the use of the term "acquiescence": "If a party having a right stands by and sees another dealing with property in a manner inconsistent with that right, and makes no objection while the act is in progress, he cannot afterward complain. That is the proper sense of the word 'acquiescence.'" And thus it is that in such a case an equitable estoppel is raised. Acquiescence here might properly be applied in favor of purchasers to the inaction of the complainant while James Otterson, Jr., was selling portions of the property, and those purchasers were spending money in its improvement. "But," says THESIGER, L. J., in De Bussche *v.* Alt, 8 Ch. Div. 286-314, "when once the act is completed, without any knowledge or assent upon the part of the person whose right is infringed, the matter is to be determined on very different legal considerations. A right of action has then been vested in him which at all events, as a general rule, cannot be divested without accord and satisfaction or release under seal. Mere submission to the injuries for any time short of the period limited by statute for the enforcement of the right of action cannot take away such right, although, under the name of 'laches,' it may afford a ground for refusing relief under some peculiar circumstances." "Now, the doctrine of laches in courts of equity," says Sir BARNES PEACOCK, in Petroleum Co. *v.* Hurd. L. R. 5 P. C. 221, at 293, "is not an arbitrary or technical doctrine. When it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or when, by his conduct and neglect, he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterward to be asserted, in either of these cases lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just,

is founded upon mere delay, that delay, of course, not amounting to a bar by any statute of limitation, the validity of that defense must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are the length of the delay and the nature of the acts done during the interval which might effect either party, and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy."

In the adjustment of these scales of justice it is a controlling consideration whether the delay has been without valid excuse; not an excuse in law, but one which would have led a person reasonably to act as the party charged with laches has. A person cannot be deprived of his remedy in equity on the ground of laches, unless it appears that he had knowledge of his rights. As one cannot acquiesce in the performance of an act of which he is ignorant, so one cannot be said to neglect the prosecution of a remedy when he has no knowledge that his rights have been invaded, excepting, always, that his want of knowledge is not the result of his own culpable negligence. It is not a little difficult to determine what knowledge is necessary to place the party in the position of negligently delaying his action. The Chancellor, in Van Houten *v.* Van Winkle, *supra,* says: "After he has been informed of facts and circumstances which apprise him of the wrong." The court, in O'Neill *v.* Hamill, Beat. 618, says: "Of her being fully apprised of her rights." In Petroleum Co. *v.* Hurd, *supra,* it is described as "sufficient knowledge of the fact constituting the title to relief." That it must be something more than knowledge of the mere facts which have transpired, or papers which may have been executed, is shown by *In re* Garnett, 31 Ch. Div. 1, which was an action brought by two ladies who had themselves executed releases to their aunt. This was done in 1859. The aunt died in 1879. The action was not commenced until 1883 to set aside the releases. The act attacked was the act of themselves, and of course they were not ignorant of it. COTTON, L. J., Page 16, says: "But here, on the evidence, these ladies never knew, until after the death of their aunt, that they had any rights which they were giving up—any rights beyond those which were stated on the face of that deed, in respect of which they had re-received those sums." In Savery *v.* King, 5 H. L. Cas. 666, the father had a life estate in certain lands, with remainder to his sons in tail male. He was indebted to S., his solicitor, more than £9,000, which was secured by policies of insurance on his life. In 1835 it was arranged between the father, the solicitor, and the eldest son, who had only just come of age, and who was living with his father, that a disentailing deed should be executed, and that the father and son should then execute a mortgage for £10,000, with a power of sale; the differences in the amount of the former incumbrances and mortgage being made up by further advances; there being also a reduction in the rate of interest, and the policies of insurance being assigned to the elder son for his use. The son had no other advice than from his father's solicitor, who was also mortgagee.

The father afterward borrowed more money from the solicitor, repayment of which was secured by charges on the estate, executed by both father and son. With part of that money other property was purchased for the son. The original property was afterward put up for sale, to discharge all the incumbrances, and was bought in, and ultimately purchased, by the solicitor, who was the mortgagee. The bill to set aside these transactions was not filed until 1847—14 years after the disentailing deed was made. It will be noted that in this case the son, who was the plaintiff, participated in the execution of the papers, which he sought to set aside, and must therefore have had knowledge of the facts. CRANSWORTH, L. C., at 666, says, on the question as to the plaintiff being barred by lapse of time: "His bill was filed in March, 1847. That was about twelve years after the date of the mortgage, and eight or nine years after the sale. I cannot think that this delay makes any difference in the case. There is no reason whatever to suppose that Richard (the son) was guilty of any unreasonable delay, or indeed of any delay at all after he had become aware of his right to question the validity of the mortgage; and in those circumstances, even if the delay had been much greater than it was, there would have been nothing to impugn his title to relief. Savery, the solicitor, must be considered substantially to have represented to Richard that the mortgage was valid, and so, consequently, that the sale was binding on him. He cannot, therefore, complain that Richard acted on his representations till, after the lapse of several years, he discovered it to be erroneous." We have here stated, as an excuse for delay, that the complainant had been misled by the defendant. See, also, Buckingham *v.* Ludlum, 37 N. J. Eq. 137-148.

Mrs. Hall says that she first heard that her sister, Mrs. Otterson, had executed this deed of conveyance after her death; that Mr. Otterson then told her that her sister had given him the farm; and that he immediately went on, and said: "Whoever shall outlive me will see that I have never done you or your children any injustice." She was at the time a member of the Otterson family, making her home with them when her sister died, and continuing to live there for some time thereafter. The same diligence is not required between members of the same family as between strangers. Laver *v.* Fielder, 9 Jur. (N. S.) 190. After Mrs. Hall's husband's death, Otterson became her legal adviser, attended to her business, and continued not only on terms of friendship, but of confidence, during his life. She had every reason to, and did, put entire trust and reliance in him and his representations, and there is no reason to think, from the facts as they appear, that her confidence was misplaced. The unwitnessed will, dated May 20, 1887—24 years after his wife's death—demonstrated, I think, that he really intended to carry out Mrs. Otterson's purpose that this property should go to the children of the complainant. But it is urged that she had constructive, if not actual, notice from the record of the transfer of the Ottersons to Gowen, and from Gowen to Mr. Otterson. The deed of trust, however,

was not put upon record until January, 1864—6 years after its date, and nearly one year after Mrs. Otterson's death, and contemporaneous with the conveyance from Gowen, trustee, to Otterson. It does not appear definitely when the statement that his wife had given him the property was made by Otterson to Mrs. Hall, but the fair construction of the evidence is that it was soon after her sister's death. But I do not think she was negligent in failing to make an examination of the record. Not only is it probable that, at the time it was put on record, she was acting under the promises of Otterson, but, if she had any knowledge whatever of legal rights, she knew that, independent of the deed, Otterson was entitled, as tenant by the curtesy, to continue in possession of the property. These defendants stand in Otterson's shoes. They cannot urge, as a bar to the complainant's right of action, a delay in commencing suit, if it has been occasioned by the acts or representations of him under whom they claim. They come into court and insist that it is equitable that the complainant should, after a delay of many years, prosecute her claim; but, if he whom they represent has been the cause of this procrastination, this appeal to the equitable denial of this court does not lie in their mouths. With his announcement to Mrs. Hall that her sister had given him the farm, he makes her the promise that puts her vigilance to sleep, and it is in consequence of his representations that she has remained inactive; and herein this case differs from Wilkinson *v.* Sherman. It is said that it would be inequitable to permit this suit to be maintained, because, during the complainant's delay in bringing it, witnesses have died and testimony has been lost. But it appears to me that Mr. Otterson has been himself guilty of laches in this regard. He, being a lawyer of distinction, must be assumed to have known that the law cast upon him the burden of proof hereinbefore indicated. It was within his power, by suit, to have perpetuated the testimony necessary to establish the deed as a valid gift, as well as within hers either to have perpetuated the testimony necessary, or to have brought suit to annul it; and he cannot invoke her delay in that regard as a bar to her action because, during the interval, he has been deprived of testimony lost to him by his own neglect. I am of opinion that these conveyances, so far as they relate to property not conveyed by James Otterson, Jr., in his lifetime, should be set aside.

F. Against Whom Relief will be Given.

BELL *v.* CUNDALL.

In Chancery, before Lord Chancellor Hardwicke, 1750.

[*Ambler* 102.]

Bill to rectify a mistake in the body of a common recovery of a copyhold estate, suffered at a Court Baron, for the manor of Rippon, in 1706, as entered on the record, where the name of the vouchee was inserted instead of that of the tenant, and so *vice versa,* there appearing in the margin of the record a note of the then Steward's own handwriting, in which the names of the parties were properly ascertained. It appeared on the pleadings, that the remainder man, upon the foot of the mistake in the recovery, had got possession of the estate, and had sold it for a valuable consideration.

Upon opening the cause by the plaintiff's counsel, Lord Hardwicke, C., declared he could not relieve, especially after such length of time; and in case he was to do it, it would be on payment of all the defendant's purchase money, for it cannot be intended but that the plaintiff knew of the mistake, and the defendant was a purchaser for a valuable consideration without notice. There is no instance where this court has amended any mistake in such a recovery,[1] but in the Common Pleas it is often done.

Bill dismissed.

WADSWORTH *v.* WENDELL.

In the Court of Chancery of New York, before Chancellor Kent, 1821.

[5 *Johnson's Chancery* 224.]

The Chancellor. The plaintiff sets up an equitable right to lot No. 11, in Solon, in the County of Cortlandt. The original patentee was John Thomas, a soldier in the New York regiment of artillery, in the revolutionary war; and the patent to him for the lot was dated July 9th, 1790. His right commenced with the concurrent resolution of the legislature, of the 27th of March, 1783, and was confirmed by subsequent acts of the legislature. The act of the 11th of May, 1784, directed letters

[1] Accord: Garrison *v.* Crowell, 1887, 67 Tex. 626 (deed contained more land than was originally intended by the parties) nor will a mortgage be reformed so as to include land in the hands of a *bona fide* purchaser. Toll *v.* Davenport, 1889, 74 Mich. 386; see further Snyder *v.* Grandstaff, 1898, 96 Va. 473.

patent to issue to the officers and soldiers entitled under the concurrent resolution of 1783, and that the military bounty lands be laid out in the manner therein prescribed. The act of the 28th of February, 1789, directed the commissioners of the land office to lay out these lands into townships, and the townships into lots, and then to proceed to ballot for each soldier's lot. In this inchoate state of the military rights, the above patentee, on the 5th of September, 1789, (having then an equitable right, but no legal title), sold quit-claimed, and confirmed all his "right, title, claim, and demand," to the said lands, to the plaintiff, by a conveyance, purporting to be a deed in fee, and to be given for a valuable consideration, but which had no seal affixed to it. After this conveyance, the act of 6th April, 1790, was passed, giving letters patent for the military bounty lands, an operation as and from the 27th of March, 1783, so as to be deemed to have vested a title in the grantees from that time; and it declared that "all grants, bargains, sales, devisees, or other dispositions," made by the grantees, or their heirs or assigns, of the said lands so to be granted, between the 27th of March, 1783, and the date of the letters patent, should be good and effectual, as if the letters patent had been granted on the 27th of March, 1783.

Thomas, the soldier, it then to be deemed, by the force of this last statute, to have been legally seized of the lot in question, when he sold to the plaintiff, by an instrument intended to be valid, but by mistake or ignorance, not competent to convey an estate in fee, at law, according to the decision of the Supreme Court. The conveyance, however, was equally valid as if the soldier had been seized in fee at the time of making it; and though it be a defective conveyance, for want of a seal, yet it created such an equity as to bind the lands in the hands of the soldier and of his heirs. The only point in the case is whether subsequent purchasers from Thomas were also bound by that equity, in consequence of the deposit of that conveyance, under the acts of 8th of January, 1794, and 27th of March, 1794.

I think it is a clear point, that Thomas was bound by the conveyance to the plaintiff, and that it passed all his right and interest in equity. It was not intended to be an agreement only to convey, but an actual present conveyance of all his right and title; and, in equity, it did pass it. The omission to affix a seal was a mere mistake, contrary to the intention of the parties; for the instrument concluded with these words: "In witness whereof, I have hereunto set my hand and seal." It also contained a covenant, for further assurance, and that he would at any time thereafter, at the request, cost, and charges of the plaintiff, his heirs and assigns, make, seal, and execute any reasonable act, conveyance, and assurance in the law, for the perfect granting, quit-claiming, and confirming all his right, title, and demand to the lands aforesaid. Thomas and his heirs could have been compelled to have executed a more perfect conveyance, and one competent to have passed the legal title to the plaintiff. But he, afterwards, in 1796, conveyed his legal title, by a deed

in fee, to Preston, under whom the defendants claim; and the question is, whether Preston, and all holding under him, were not chargeable with notice of the equity of the plaintiff.

The act of 8th of January, 1794, directed, "that all deeds and conveyances heretofore made and executed, or pretended so to be, of and concerning, or whereby any of the said lands might be any way affected in law or equity, should, on or before the 1st of May, 1794, be deposited in the clerk's office, etc., and if not, that they should be adjudged fraudulent and void, against any subsequent purchaser or mortgagee, for a valuable consideration; and all deeds and conveyances thereafter to be made, were to be recorded, or to be adjudged fraudulent and void, against any subsequent purchaser or mortgagee, for a valuable consideration, whose deed should be first recorded, etc. The time for depositing the deeds was afterwards prolonged to the 1st of May, 1795; and it appears in proof, that the conveyance to the plaintiff was duly deposited, in pursuance of the act, on the 27th of April, 1795, and was afterwards duly approved, on the 8th of March, 1799, and the identity of the soldier is perfectly ascertained.

The deposit of these conveyances was intended by the legislature to be notice to all subsequent purchasers of their existence and contents, and the deposit of them would have been, in a degree, useless, if it was not intended to operate as notice. The deposit, as to all deeds and conveyances made prior to the act, was intended as a substitute for the prior registry of them, and to be, from the date of the deposit, equivalent to the recording of them. It was the policy of that statute to place all the military titles upon record, and by another revision in it, all future conveyances of any of these lands were to have priority, according to the registry of them. The words of the act were comprehensive enough to embrace the case of the plaintiff's conveyance, for it reached to every instrument of or concerning these lands, and whereby these lands might be affected, in law or equity. Deeds and conveyances, any way affecting the title prior to that day, were to be deposited, and deeds and conveyances thereafter were to be recorded; and the omission to deposit in the one case, and the omission to record in the other, equally avoided the conveyance as against subsequent purchasers, without notice, whose deeds were first recorded. There was no space of time left, in which the files and records in the clerk's office were not to contain the test of the title; and I cannot entertain a doubt, that the deposit was intended to be, and was, in judgment of law, as effectual notice to purchasers in the one case, as the record of subsequent deeds was notice in the other.

It is settled, (Johnson *v.* Stagg, 2 Johns. Rep. 510; Frost *v.* Beekman, 1 Johns. Ch. Rep. 298; Parkist *v.* Alexander, ib. 389), that the registry of a mortgage under the mortgage act, is notice to all subsequent purchasers and mortgagees; and the same construction ought to be given to the act above referred to, for the case is within the same reason and policy.

When, therefore, Preston purchased of Thomas, and when Matthews purchased of him, they were each of them chargeable with notice of the conveyance of Thomas to the plaintiff, and of its contents. They, therefore, took, subject to that equity, equally with Thomas himself, or with his heirs; and in the words of Ch. B. EYRE, in Morse *v.* Faulkner, 1 Anst. 14: "It is clear, that where there is an agreement to convey, or a defective conveyance by a person then actually having title, that would be such an equity as would bind the lands in the hands of the heir." So, a defective conveyance has been held good against a subsequent voluntary grantee. Martin *v.* Seamore, 1 Ch. Cas., 176. But what is more to the point, a defective conveyance of copyhold, which was void in law for want of being presented in due time, was made good against a subsequent purchaser, with notice of the prior defective surrender, and the subsequent purchaser was decreed to pay the debt which the defective surrender was intended to secure, by way of mortgage, or else to surrender the legal estate. Jennings *v.* Moore, 2 Vern. 609. Assuming the subsequent purchasers in the present case under Thomas, to have had notice of the conveyance to the plaintiff, that case is in point; and it was decided by Lord Chancellor COWPER, in 1708. We find a similar decision a century afterwards, in the recent case of Daniels *v.* Davison. 17 Vesey, 433. In this latter case, Lord ELDON decreed specific performance of a contract against a subsequent purchaser, with notice of the equitable title of the plaintiff. He was charged only with constructive notice, and was to be considered as a purchaser, subject to the plaintiff's equity; and such a conveyance from the purchaser was decreed, as the master should settle. In short, the doctrine is too well established, and is too just, in itself, to admit of any doubt: and it being entirely clear that the equitable title was in the plaintiff when Preston purchased of the soldier, and that the deposited conveyance was, by the force and operation of the statute, notice of its contents to every subsequent purchaser, it follows, as a necessary consequence, that the plaintiff is entitled to a conveyance from the defendants of all the right and title to the lot which they held as trustees, under the will of David Matthews.

I shall, accordingly, decree, that the defendants, within forty days after the service of a copy of the decree, release and convey to the plaintiff, in fee, all the right and title derived to them as trustees under the will of David Matthews, deceased, to the said lot No. 11, in Solon, by a proper and valid deed in law, to convey such right and title, the form of which is to be settled by a Master, at joint expense, if the parties or their counsel cannot otherwise agree upon the same; and that no costs of this suit be charged by either party as against the other.[1]

Decree accordingly.

[1] For a further discussion of the subject of notice and the question as to whether a judgment creditor is a purchaser for value, see Rhodes *v.* Outcult, 1871, 48 Miss. 367.

G. Election of Remedies.

SANGER *v.* WOOD.

In the Court of Chancery of New York, before Chancellor Kent, 1818.

[3 *Johnson's Chancery,* 416.]

The plaintiffs, in their bill, alleged that the defendant, as their agent, negotiated the sale of certain land in which the plaintiffs and defendant were jointly interested to Jones and Merrick, November 30, 1814. The defendant represented to the plaintiffs that the vendees could not possibly pay for the land, and under this impression, the plaintiffs signed a tentative memorandum of sale of their interests to the defendant, September 4, 1815. This sale, however, was conditioned on the failure of the previous sale, and "if the sale to Jones and Merrick could be enforced, it is [was] to be."

Later on Jones took over the obligations of Jones and Merrick, and was able to offer good security for the substantial performance of the original contract of sale. Nevertheless, the defendant failed to disclose this to the plaintiffs, but called upon them to carry out the agreement of September 4, 1815, on the ground that the contract with Jones and Merrick had failed. Accordingly, April 29, 1816, the plaintiffs released their interests in the land in question to the defendant. Afterwards, while still in ignorance of the concealment practiced by the defendant, for payments due under the contract of release of April 29, 1816. The plaintiffs discovered the fraudulent concealment of the defendant a few days before going to trial in this suit, which they nevertheless prosecuted to judgment.

The Chancellor. If the plaintiffs had done nothing to affirm the contract of the 29th of April, 1816, after the agreement between the defendant and W. Soulden & Co. had come to their knowledge, I should have been strongly inclined to relieve them from that contract. It is true, the allegation of fraud, and of any direct and authorized agency, on the part of the defendant, is denied in the answer; and we have no other proof in the case but such as the answer and the documents mentioned in the pleadings afford. But, from those documents, I am induced to think, the defendant was bound to have disclosed to the plaintiffs, in April, 1816, his prior dealings with Soulden, as well as the new agreement with Jones, of the January preceding. The relationship between the parties arising under the original contract of 1812, and the agency which the defendant, in fact, assumed in the management and disposition of the entire interest of all the parties, imposed upon him

the duty of a frank and full disclosure of the whole case, when the parties came to a final conclusion of their concern, in April, 1816. If the contract, of the 4th of September preceding, had been definite and absolute, then the defendant would not have been under any obligation to disclose his subsequent negotiations with Jones and with Soulden, who came in to assist Jones. But that contract of sale was not absolute, for it was expressly declared, that in case the sale to Jones and Merrick could be enforced, it was to be, and the contract in that case to be void. The plaintiffs ought to have been informed what Jones had since done, and what Soulden had since promised, so that they might have exercised their judgment on the question, whether the original agreement could have been enforced, and how far the substitution of Soulden & Co. was a mere continuation (as I think it was) of the original agreement.

For these reasons, I should have been inclined to have relieved the plaintiffs. The case, however, as it appears before me, is not of a very gross kind, or one presenting claims for any extraordinary indulgence. In my opinion, the plaintiffs may justly be considered as having elected to take their remedy at law under the contract of April, 1816. The bill states, that the plaintiffs sued at law under that last contract, and which was, of course, in affirmance of it; and that, a few days before the trial at the Madison circuit, they discovered the fraud now set up as a ground to rescind that contract. And yet, notwithstanding that discovery, they go to trial in the suit on that contract, and take a verdict for the moneys due from the defendant under it, and, afterwards, judgment is entered up by them on that verdict; and, in April last, they even apply to this court for leave to take out execution at law on the judgment so recovered. The last motion was, indeed, made on the ground that it might not prejudice their rights in this suit, but I am induced to think they had already waived those rights by their previous proceedings. The suit at law, and the action here, are inconsistent with each other, since the one affirms, and the other seeks to disaffirm, the contract in question. It is probable the amount of the judgment may have been already collected, and the plaintiffs could not, for a moment, be permitted to keep the moneys recovered under that contract, if they should succeed in their bill to have it annulled. In a case where the remedies sought are so absolutely repugnant to each other, the plaintiffs ought to have made their election at once, after they came to the knowledge of the facts. If they meant to have disannulled the contract of April, 1816, then it was vexatious, as well as useless, to have gone on to a trial, and judgment and execution. They had no right to try the experiment how much they could recover at law under the contract, (for the bill admits the suit at law was brought upon that agreement,) before they elected to waive it, and then retaining their verdict and entering judgment at law, apply to this court to set the contract aside. This proceeding would be giving the plaintiffs a double advantage, and is unreasonable and inadmissible.

Any decisive act of the party, with knowledge of his rights and of

the fact, determines his election in the case of conflicting and inconsistent remedies. If he take out a commission of bankruptcy, he cannot sue the bankrupt at law, for that would be again superseding the commission. *Ex parte* Ward, 1 Atk. 153; *ex parte* Lewes, 1 Atk. 154. So, charging a party in an execution at law after a commission issued, is an election to take the remedy at law, and the party must abide by it. *Ex parte* Warder, 3 Bro. 191; *ex parte* Cator, 3 Bro. 216. So, again; if a party seeks relief in equity by bill waiving a forfeiture at law, though he fail in obtaining relief, he cannot afterwards insist on the forfeiture at law. 1 Sch. & Lef. 441.

There cannot be any doubt of the principle, that equity will not relieve a party fully apprised of his rights, and deliberately confirming a former act. The doctrine has been again and again declared. 3 P. Wms. 294, note E., etc.; 1 Atk. 344; 1 Ball & Beatty, 340. And I consider the going to trial in the action at law, and especially the entry of judgment afterwards upon the verdict, as a decided confirmation of the settlement in April, 1816.

I shall, accordingly, dismiss this bill; but from the opinion which I have formed upon the merits of the transaction, I am not willing to charge the plaintiffs with costs, and I shall, consequently, dismiss the bill without costs.[1]

Order accordingly.

H. Amount of Proof Required.

SOUTHARD, appellant, *v.* CURLEY, et al., respondents.

In the Court of Appeals of New York, 1892.

[134 *New York*, 148.]

Parker, J. This action was instituted for the purpose of recovering the damages which the plaintiff claims to have sustained by reason of a breach by the defendants of the following agreement:

"September 10, 1889.

"I, C. H. Southard, of Baldwin, Queens County, N. Y., agree to sell to John J. Curley and J. M. Brosnan, of Rockaway Beach, L. I., said

[1] Accord: Washburn *v.* Gt. Western Ins. Co., 1873, 114 Mass. 175; Steinbach *v.* Relief Insurance Co., 1879, 77 N. Y. 498; Merrill *v.* Wilson, 1887, 66 Mich. 232; so the bringing of a suit for specific performance is an affirmance, Coddington *v.* Wells, 1883, 59 Tex. 49; and the voluntary dismissal of a bill for cancellation has been held an affirmance, Kerby *v.* Kerby, 1881, 57 Md. 345. "The fatuous claim of a remedy," it has been said, "that never existed is not such an election as to bar the right kind of an action." Barnsdall

County and State, all [here follows a description of the property in question], for the sum of thirty-one thousand dollars, to be paid at 30 or 60 days from date of this agreement; and I hereby acknowledge the receipt of check of one hundred dollars from John J. Curley and J. M. Brosnan, both of Rockaway Beach, N. Y.

"C. H. SOUTHARD.

"Signed and delivered in the presence of
"J. M. BROSNAN and
"JOHN CURLEY."

The property described in the agreement was a portion of the Mammoth Hotel at Rockaway Beach.

The answer averred the purchase of the building by the plaintiff of the owners of the land on which the building was located; the securing of an option by the defendants to purchase the premises from the owners within a given period; their desire to secure an option for the purchase of so much of the hotel buildings as remained standing, and that the agreement which they in fact made with the plaintiff was to pay him $100 for an option to purchase the building within 30 or 60 days for the sum of $31,000, but the defendant Brosnan, in the haste of drafting the memorandum of agreement, omitted to insert that the sale was optional with the defendants.

The answer demanded, among other relief, that the writing be so reformed as to express the true meaning of the parties.

No exception was taken to the charge of the court, but the plaintiff requested the court to charge "that the burden of proof is on the defendants to satisfy the jury beyond a reasonable doubt that there was a mutual mistake in the case," and the exception taken to the refusal of the court to charge as requested is now assigned for error.

It is a rule of the criminal law that the guilt of the accused must be fully proved; that neither a preponderance of evidence nor any weight of preponderant evidence is sufficient for the purpose, unless it generate full belief of the fact, to the exclusion of all reasonable doubt.

But a distinction has always been recognized and maintained between criminal and civil cases in respect to the degree or quantity of evidence necessary to support a judgment.

But it is urged that in an action brought to reform a written contract, on the ground that owing to a mistake it fails to express the agreement which the parties to it actually made, the courts have at last adopted the rule of criminal actions that the evidence must be such as to estab-

v. Waltemeyer, 1905, 142 Fed. 415; Morris *v.* Rexford, 1859, 18 N. Y. 552, 557. "The doctrines," it has been said, "that any act in affirmance of a contract after discovery of fraud, defeats the right of rescission is not necessarily applicable to an action for damages founded in fraud." N. Y. L. I. Co. *v.* Chapman, 1890, 118 N. Y. 288. See also Emma, etc., Co. *v.* Emma, etc., Co. of N. Y., 1880, 7 Fed. 401.

lish the mistake beyond a reasonable doubt. That such was not always the rule is conceded, but it is claimed that the later adjudications have settled the rule in accordance with the appellant's contention.

In Story's Eq. Juris., Vol. 1, § 157, the doctrine is stated as follows: "Relief will be granted in cases of written instruments only when there is a plain mistake, clearly made out by satisfactory proofs. It is true that this, in one sense, leaves the rule somewhat loose, as every court is still left free to say what is a plain mistake and what are proper and satisfactory proofs. But this is an infirmity incident to the very administration of justice, for in many cases judges will differ as to the result and weight of evidence, and consequently they may make different decisions upon the same evidence. But the qualification is most material, since it cannot fail to operate as a weighty caution upon the minds of all judges, and it forbids relief whenever the evidence is loose, equivocal or contradictory, or it is in its texture open to doubt or to opposing presumptions."

Judge REDFIELD in his revision has added to section 157 (Story's Eq. Juris., 11th ed.) the following: "The proof must be such as will strike all minds alike as being unquestionable and free from reasonable doubt. The distinction here attempted to be defined in regard to the measure of proof is much the same which exists between civil and criminal cases."

Mr. Pomeroy, in his work on Eq. Juris., Vol. 2, § 859, reaches the same conclusion. He says "the authorities all require that the parol evidence of the mistake and of the alleged modification must be most clear and convincing, in the language of some judges the strongest possible, or else the mistake must be admitted by the opposite party; the resulting proof will be established beyond a reasonable doubt."

We have examined all the authorities cited by Judge REDFIELD and Mr. Pomeroy in support of the rule which they have attempted to deduce from them, as well as those cited by the appellant.

It would hardly be proper in this connection to attempt a review of them all, but we have selected from different jurisdictions a number of cases which are fairly representative as to the expressions made use of by the courts touching the degree or quantity of proof essential to support a decree reforming a written instrument on the ground of mistake.

Lord HARDWICKE, in Henikle *v.* Royal Exchange Assior. Co., 1 Vesey Sr. 317, said: "There ought to be the strongest proof possible."

In Gillespie *v.* Moon, 2 Johns. Chan. 585, Chancellor KENT remarks: "Does it satisfy the mind of the court?"

Fry on Spec. Perf., 2 Am. ed.: "The proof must be clear, irrefragable, and the strongest possible."

Bold *v.* Hutchinson, 5 De Gex., M. & G., 558: "If it is perfectly palpable that there has been a mistake the court will correct it. The question before me is whether I am satisfied that a settlement has been made in error."

Coale *v.* Merryman, 35 Md. 382: "The evidence must be such as to satisfy the mind of the court."

Lyman *v.* Little, 15 Vt. 576: "Equity will not correct a mistake in a written instrument except on clear and undoubted testimony."

Miner *v.* Hess, 47 Ill. 170: "It must leave little, if any, doubt."

Stockbridge Iron Co. *v.* Hudson Iron Co., 102 Mass. 45: "The proof that both parties intended to have the precise agreement set forth inserted in the deed, and omitted to do so by mistake, must be made beyond a reasonable doubt." In laying down this rule the court did not refer to other adjudications.

Sawyer *v.* Hovey, 3 Allen 331: "The mistake must be made out according to the understanding of both parties by proof that is entirely exact and satisfactory."

White *v.* Williams, 48 Barb. 222: "The relief will not be granted except when the mistake is very plain and operates contrary to the intention of the parties."

Little *v.* Webster, 16 N. Y. S. R. 107: "The evidence should be strong and conclusive, and in some cases it has been held should be beyond all reasonable doubt. But perhaps this expression is too strong. There must be at least very conclusive evidence that by mistake the contract does not represent the intention of the parties."

Simmons Creek Coal Co. *v.* Doran, 142 U. S. 417-435: "But to justify such reformation the evidence must be sufficiently cogent to thoroughly satisfy the mind of the court." [1]

The quotations made indicate a universal agreement that a contract shall not be reformed on loose, contradictory, and unsatisfactory evidence; a settled determination that when a mistake is alleged it must be clearly established by satisfactory proofs, or the contract will stand as made. But in giving expression to the necessity of observing such caution some judges have employed conservative language, others extreme; a difference doubtless due to the fact that the question before the court for discussion in the different cases was not what is the abstract rule as to the degree or quality of the evidence required, but rather whether the particular evidence under consideration justifies a reformation. While in a few instances apparently unconsidered expressions may be found to the effect that the mistake must be established beyond a reasonable doubt, so may a variety of other expressions, differing in form but equally well supported, be found, such as: "It must be proved as much to the satisfaction of the court as if admitted;" "the proof must be clear, irrefragable, and the strongest possible;" or "there must be a

[1] The learned judge also cited among others: United States *v.* Monroe, 1830, 5 Mason 572; Andrews *v.* Essex Fire Marine Ins. Co., 1822, 3 Mason 6; Tufts *v.* Larned, 1869, 27 Iowa 330; Nevins *v.* Dunlap, 1865, 33 N. J. 676; Mead *v.* Westchester F. & Co., 1876, 64 N. Y. 413; Newton *v.* Holley, 1857, 6 Wis. 592; Linn *v.* Barkey, 1855, 7 Ind. 69; Boardman *v.* Davidson, 1869, 7 Alb. Pr. N. S. 439.

plain mistake established by satisfactory proofs." A situation which suggests that we heed the caution of FOLGER, J., in Taylor *v.* Mayor, etc., 82 N. Y. 17: "It is not always well to take particular phrases and sentences from an opinion and read them as giving the core of the judgment." The same thought was expressed in Hastings Nat. Bank *v.* Hibbard, 48 Michigan 457: "It must always be remembered that general language in legal discussions is to be construed with its surroundings, and cannot be dealt with in the abstract."

Bearing in mind these admonitions as we examine the opinions alluded to, we reach the conclusion that they do not require us to declare that this strong rule of criminal procedure has become a part of the practice in civil actions. Certainly this need not be done, in view of the many authorities which, both before and since Judge STORY penned the rule that "relief will be granted in cases of written instruments only when there is a plain mistake clearly made out by satisfactory proofs," have asserted the same doctrine in terms or in substance.

We think the refusal to charge as requested was not error.

The judgment should be affirmed.

All concur except FOLLETT, Ch.J., dissenting.

Judgment affirmed.[1]

SECTION 2. FRAUD, MISREPRESENTATION, CONCEALMENT.

A. NATURE AND ESSENTIALS OF FRAUD.

JOHN DE BRAMPTON *v.* JOHN SEYMOUR.

IN CHANCERY, 1386.

[*Selden Society, Select Cases in Chancery, No.* 2.]

To my most honoured Lord, the Chancellor of England,

Showeth your clerk John de Brampton, rector of the church of S. Dunstan in the West in London, that whereas he delivered to John Seymour, attorney, on the first day of June last, a release, on condition that he should have delivered to the said John de Brampton that same day 20 marks sterling or two bonds, the one being a bond for £40 made to

[1] See opinion of Chancellor KENT in Lyman *v.* United Insurance Company, 1817, 2 Johns. Ch. 630.

As to the form in which relief by way of reformation is given, see Stock *v.* Vining, 1858, 25 Beav. 235; White *v.* White, 1872, L. R. 15 Eq. 247; Andrews *v.* Andrews, 1889, 81 Me. 337; Smith *v.* Eliffe, 1875, L. R. 20 Eq. 666.

Gunnora Horn of London, deceased, whose executor is John, son of Nicholas Horn of London, and the other for £12 made to the said John Seymour in the name of the said John Horn, together with a letter of attorney sealed with the seal of the said John Seymour, and the will of the said Gunnora Horn, which (documents) the said John Seymour had in his keeping on that same day, as it was agreed that same day between the said John, son of Nicholas Horn of London, to whom the duty of the said bonds ought to and does belong, and the said John Seymour, then his attorney, the which agreement was made between them in the great Hall at Westminster; and John Seymour, maliciously and falsely scheming to deceive the said John de Brampton, showed him 20 marks in gold in his hand, and demanded from him the said release, which John de Brampton gave him, hoping to have received the 20 marks, as was agreed, and not suspecting any fraud or ill device. But John Seymour, after he had received the release from John de Brampton, would not deliver to him the 20 marks, nor the bond for £40, nor the letter for attorney, nor the will aforesaid, but doth retain them, to the destruction of the estate of the said John de Brampton and contrary to the said agreement, and notwithstanding that he hath been required by the said John de Brampton to make restitution of the release, or of the bond, the letter of attorney and the will abovesaid. May it please your noble lordship to cause the said John Seymour to come before you in the Chancery on a certain day to be fixed by you to say why he should not deliver the said release, or the bond, letter of attorney and will abovesaid to the said John de Brampton, or to say why he should not be condemned by you to the said John de Brampton in the said £52 contained in the said two bonds, together with the costs incurred and to be incurred by the said John de Brampton in the matter, since the agreement was made within the jurisdiction of the Chancery.[1]

[1] The exact ground for appeal to the Chancellor in this case seems to be, as here stated, that the agreement was made within his jurisdiction, namely, within the royal palace of Westminster; but the two equitable doctrines of *fraud* and *specific performance* are given in the bill as grounds for relief. I do not think the fact that the defendant was an attorney is of any significance here; attorneys were hardly yet considered to be officers of the court to the extent of giving the chancellor common law jurisdiction in all matters relating to them. Note of Mr. William Paley Baildon to the case.

WHITTINGHAM *v.* THORNBURGH, ET AL.

IN CHANCERY, 1690.

[2 *Vernon,* 206.]

The defendant Thornburgh in March, 1689, caused a policy of insurance to be drawn for the ensuring the life of one Edward Harwell for a year, and left it at one Samuel Luplon's office, to get subscriptions at £5 per cent premium; and to draw in the plaintiffs and others to underwrite the policy, procured one Marwood, a near neighbor of Harwell's to underwrite £100; and he giving out he knew Harwell healthy and like to live, and the plaintiffs relying on such information, underwrote the policy. Whittingham for £100, the other four for £50 apiece. Harwell soon after died.

It appearing that Thornburgh had no estate or interest that depended on Harwell's life; that Marwood's subscription was only colorable to draw in others, and that Harwell was in a languishing condition; though Marwood affirmed and pretended he was his neighbor and a healthful man, and the plaintiff having on the first discovery of the contrivance offered to return the premium, and published the fraud to prevent others from being drawn in; and the defendants intending to get a very large subscription, having by a like contrivance, got between £1,000 and £2,000, on making the life insurance on the life of William Sweeting, the court therefore decreed the policy of insurance to be delivered up to be cancelled, and a perpetual injunction against the verdict thereon obtained at law, and the plaintiffs their full costs both at law and in this court, and the money received for the premium to go in part of their costs.[1]

SMITH, APPELLANT, *v.* RICHARDS, APPELLEE.

IN THE SUPREME COURT OF THE UNITED STATES, 1839.

[13 *Peters* 26.]

On appeal from the Circuit Court of the United States for the Southern District of New York.

In the Circuit Court for the Southern District of New York a bill was filed by Guy Richards for the purpose of rescinding a contract made by the appellee with William R. Smith for the purchase of a part of the

[1] And on the same principle De Costa *v.* Scandret, 2 P. Wms. 170. As to the state of the common law on this head, Wilson *v.* Ducket, 3 Burr. 1361. Et vide Ryan *v.* Macmath, 3 Br. Ch. Rep. 15. Park on Insurance, 5 Ed. p. 216, 18.—Mr. Raithby's note.

Goochland gold mine, in the State of Virginia, the contract being alleged to be fraudulent. It was agreed by the counsel for the parties that a decree should be entered in the Circuit Court *pro forma,* against the complainant, and accordingly, on the 22d of April, 1837, a decree was entered, rescinding and annulling the contract in relation to the purchase of the Goochland mine, ordering that it be given up to said Guy Richards; that the appellant Smith repay all moneys advanced by said Guy Richards upon said contract, and upon the promissory notes made by complainant and delivered to the defendant, so far as said notes had been paid by complainant, etc. From this decree an appeal has been prayed and allowed to this court.

Mr. Justice BARBOUR delivered the opinion of the court.

This case comes before us by appeal from the decree of the Circuit Court for the Southern District of New York.

It was a suit in equity, brought by the appellee against the appellant to set aside a contract for fraud.

It is an ancient and well established principle that whenever *suppressio veri* or *suggestio falsi* occur, and more especially both together, they afford a sufficient ground to set aside any release or conveyance.

This ancient principle, thus expressed with so much sententious brevity, is laid down in terms somewhat more comprehensive, and having a direct bearing on the present case, by a modern text writer on equity.

In 1 Maddock's Chancery 208, it is thus stated. If, indeed, a man, upon a treaty for any contract, make a false representation, whether knowingly or not, by means of which he puts the party bargaining under a mistake upon the terms of bargain, it is a fraud, and relievable in equity. The doctrine thus laid down is almost in the very words used by the Chancellor in the case of Neville *v.* Wilkinson, with the exception of the words "whether knowingly or not," and the part of the proposition embraced by these words is founded upon the case of Ainsley *v.* Medlicot, which fully sustains Mr. Maddock. In this latter case the following strong language is used: "No doubt, by a representation a party may bind himself just as much as by an express covenant. If knowingly he represents what is not true, no doubt he is bound. If without knowing that it is not true, he takes upon himself to make a representation to another, upon the faith of which that other acts, no doubt he is bound, though his mistake was perfectly innocent."

But the doctrine is laid down with more comprehensiveness and precision by a still more modern writer on equity, who gives us, in the distinct form of propositions, what he considers the result of the various cases on the subject, and marks with particularity the modifications which belong to it.

In 1 Story's Equity 201-202 it is thus stated: "Where the party intentionally or by design misrepresents a material fact, or produces a false impression in order to mislead another, or to entrap or cheat him,

or to obtain an undue advantage of him, in every such case there is a positive fraud in the truest sense of the terms; there is an evil act with an evil intent, *dolum malum, ad circumveniendum.* And the misrepresentation may be as well by deeds or acts as by words; by artifices to mislead as by positive assertions."

Whether the party thus misrepresenting a fact knew it to be false, or made the assertion without knowing whether it were true or false, is wholly immaterial, for the affirmation of what one does not know or believe to be true is equally in morals and law as unjustifiable as the affirmation of what is known to be positively false. And even if the party innocently misrepresents a fact by mistake, it is equally conclusive, for it operates as a surprise and imposition on the other party. Or, as Lord THURLOW expresses it, in Neville *v.* Wilkinson, "it misleads the parties contracting on the subject of the contract."

The author of the treatise last cited thus states the modifications of the doctrine:

The misrepresentation must be of something material, constituting an inducement or motive to the act, or omission of the other, and by which he is actually misled to his injury.

In the next place, the misrepresentation must not only be in something material, but it must be in something in regard to which the one party places a known trust and confidence in the other. It must not be a mere matter of opinion, equally open to both parties for examination and inquiry, and where neither party is presumed to trust to the other, but to rely on his own judgment.[1]

The doctrine of these text writers is illustrated by the cases in the

[1] "It is first insisted that the statement as to the value of the lands . . . even mere matter of opinion and belief, and that no action can be maintained upon them if false. If they were such no liability is created by the utterance of them; but all statements as to value of property sold are not such. They may be, under certain circumstances, affirmations of fact. When known to the utterer to be untrue, if made with the intention of misleading the vendee, if he does rely upon them and is misled to his injury, they avoid the contract. And when they are fraudulently made of particulars in relation to the estate which the vendee has not equal means of knowing, and when he is induced to forbear inquiries which he would otherwise have made, and damage ensues, the party guilty of the fraud will be liable for the damages sustained." Per FOLGER, J., in Simar *v.* Canaday, 1873, 53 N. Y. 298.

A distinction is brought out frequently in the books in comparing two old cases: if the owner of an estate affirms that it will let for a certain sum, Harvey *v.* Young, 1602, Yelv. 20, no action will lie; but if he says it is let for a certain sum, the purchaser is cheated, Risney *v.* Selby, 1703, Salk. 211, thought it was objected that the plaintiff was overcredulous in taking the defendant's word. And see generally Babcock *v.* Case, 1869, 61 Pa. St. 427; Marsh *v.* Falker, 1869, 40 N. Y. 562, explaining Bennett *v.* Jackson, 1860, 21 N. Y. 238; Arkwright *v.* Newbold, 1881, L. R. 17 Ch. Div. 301; Smith *v.* Land and House Property Co., 1884, L. R. 28 Ch. Div. 7.

books, some of which present very strong applications of it, for it is held to extend not only to the parties to the contract, but also to others, who, from gross negligence, are guilty of misrepresentation. Thus, for example, in the case of Pearson *v.* Morgan, where A, being interested in an estate in fee, which was charged with £8,000 in favor of B, was applied to by C, who was about to lend money to B, to know whether the £8,000 was still a subsisting charge on the estate. A stated that it was, and C lent his money to B accordingly. It appeared afterward that the charge had been satisfied, yet it was held that the money lent was a charge on the lands in the hands of A's heirs, because he either knew or ought to have known the fact of satisfaction, and his representation was a fraud on C. 1 Ver. 136.

Of a similar character was the case of Hobbs *v.* Norton, where one entered into an agreement for the purchase of an annuity, charged on the lands of a third person, and was encouraged in the course of the transaction by the latter, who suggested his own title, and it afterward appeared that such title was of a nature to have enabled the owner to avoid the annuity; yet he was, as to the purchaser, held under an obligation to confirm it.

Cases of this class present the principle in its strongest aspect, because in these cases the parties making the representation were bound by it to prevent a loss to others, although they themselves derived no advantage from it; whereas, in those instances in which the parties to the contract made the representation, they would receive benefit to the amount of the loss which the misrepresentation would produce to the other party, who acted on the faith of it; if the court did not relieve against it.

This principle has been adopted in the courts of our own country. In Fulton's executors *v.* Roosevelt, 5 John. Ch. Rep. 174, the case was this: Fulton was induced by the representations of Roosevelt, that he had discovered a valuable coal mine on the bank of the Ohio River, to contract for the purchase of a tract of land, stated by Roosevelt to embrace the mine; and besides giving to Roosevelt $4,400, Fulton covenanted to pay him $1,000 annually for twenty years, but the annuity was to cease if after the mine was faithfully worked by Fulton it should not produce at least $12,000, etc. And the land was accordingly conveyed to Fulton. It appeared that there was no coal mine within the boundaries of the land conveyed, although there was coal adjoining it, in the bed of the river, which was navigable, deep, and rapid; but the working of the mine, if practicable, would be very hazardous, expensive and unprofitable. The contract on the part of Fulton was held to be founded in mistake and misrepresentation, and Roosevelt was perpetually enjoined from bringing any suit against Fulton to recover the annuity agreed to be paid him.

In that case the Chancellor says: Whether the defendant made the statements in his letter to Fulton through mistake, or under the de-

lusions of his own imagination, or by design, I am not able to say. It is sufficient for the decision of this case that the representations are not supported, but are contradicted by proof, and that the claim of the annuity, upon such a state of the case, is unconscientious and unjust. And this decree was affirmed in the Court of Errors. 2 Cowen 129.

In the case of McFerran *v.* Taylor & Massie, 3 Cranch 281, in this court, the court after remarking that there was a material misrepresentation, and that the defendant had contended that it originated in mistake, not in fraud, say: From the situation of the parties and of the country, and from the form of the entry it was reasonable to presume that this apology is true in point of fact; but the court does not conceive that the fact will amount to a legal justification of the person who has made the misrepresentation. He who sells property of a description given by himself is bound to make good that description, and if it be untrue in a material point, although the variance be occasioned by a mistake, must still remain liable for that variance.

The principles of these cases we consider founded in sound morals and law. They rest upon the ground that the party selling property must be presumed to know whether the representation which he makes of it is true or false. If he knows it to be false, that is fraud of the most positive kind; but if he does not know it, then it can only be from gross negligence, and in contemplation of a court of equity, representations founded on mistake, resulting from such negligence, is fraud. 6 Ves. 180-189; Jeremy 395-386. The purchaser confides in it upon the assumption that the owner knows his own property and truly represents it; and, as was well argued in the case in Cranch, it is immaterial to the purchaser whether the misrepresentation proceeded from mistake or fraud. The injury to him is the same, whatever may have been the motives of the seller.

We will next inquire whether the misrepresentation in this case comes up to the rule which has been laid down. In the first place, it must be of matters of fact; and it has been argued by the appellant's counsel that the letter of the 21st of January, 1833, did not profess to state matters of fact, but to express opinions. It is certainly true that matters of opinion between parties dealing on equal terms, although falsely stated, are not relieved against, because they are not presumed to mislead or influence the other party, when each has equal means of information. But we consider the representation in this case not the expression of opinion, but the statement of facts. The appellant, in giving a description of a mine in Virginia, which he desired to be exhibited to the appellee in New York, says that one hundred feet on the vein had been developed, which proved to be very rich, much richer than anything yet discovered in the United States. That the surface was rich in gold; that the formation was quite wide, and in one place twelve feet; that the veins were disseminated throughout the whole formation,

in threads of from two to six inches wide; and that there was ore from the mine that would without doubt give several hundred pennyweights of gold to the hundred pounds. Now, as to one of these statements, beyond all question it is a matter of fact; we mean the one which describes the width of the formation and veins.

Having made a personal examination, he declares the formation to be wide, gives the actual width in one place, and then the width of the veins, in terms not of conjecture, but of the most positive assertion. He gives their dimensions by feet and inches. This statement, then, comes up to the standard of mathematical certainty. And even in regard to the others, he does not profess to speak of them from conjecture, but speaks of them as they are, without qualification. Take, for example, this: The surface is rich in gold. Not that he thinks it will turn out to be rich, but that it is rich. It was argued that there was no standard by which to decide what quantity of gold would justify calling it rich. There is none by which it can be decided with mathematical certainty, but the law does not require it. Suppose that a seller was to describe to a distant purchaser a tract of land as being rich, and it were proven to be poor or very poor. Can it be that a court of equity would not give relief in such a case? The certainty in the one case is as great as in the other, and the misrepresentation as to richness must be proven in each case by the evidence of those who understood the quality of the one or the other.

In the next place the misrepresentation must be of something material, constituting an inducement or motive to the appellee to purchase, and by which he has been actually misled to his injury.[1]

[1] "I do not agree with my noble and learned friend who last addressed you, that in order to set the contract aside the parties must appear to have been induced entirely to enter into it by false representation. I say if the parties are induced fraudulently in any way, although they may have other reasons for entering into the contract, if the strong grounds which prevailed on them to enter into the contract were fraudulent representation, that will give an action in a point of law for deceit, and that I should hope would be considered as a sufficient ground in a court of equity to set aside such contract." Per Lord WYNFORD, in Attwood *v.* Small, 1838, 6 Cl. F. 232, 502.

"No better rule can be given for deciding the question than this: if the fraud be such that, had it not been practised the contract could not have been made or the transaction completed, then it is material to it, but if it be shown or made probable that the same thing would have been done in the same way, if the fraud had not been practised, it cannot be deemed material." Per MILLER, J., in McAleer *v.* Horsey, 1871, 35 Ind. 439, 452. That to have been deceived, the party must believe the statements, see Bowman *v.* Carithers, 1872, 40 Ind. 90. That the false inducements need not be the sole inducements to the contract, see Hicks *v.* Steavens, 1887, 121 Ill. 186.

"I think it is safe to say that it is impossible to frame a definition of fraud which will accurately define it in all of its multitudinous forms, but I think it may be said with equal safety that no deception or artifice will be

Now, in our opinion, that is emphatically the case in the suit before us. The mine, we think, not only constituted a motive, but the sole motive to the purchaser; he was induced to purchase an interest at a high price, in that which has turned out to be worthless, and he has therefore been misled greatly to his injury.

It must, in the next place, be in something in which the one party places a known trust and confidence in the other.

Nothing could be stronger than the confidence here, because the appellee had never seen the mine, and the appellant knew it; the appellee had seen the letter of description and specimens, and the appellant knew that he had; the appellee confided in the truth of the appellant's representation and his skill in mines and in mining operations, and the appellant knew that he did.

But it has been earnestly contended at the bar that whatever might be the effect of misrepresentation in cases in which there was nothing to countervail it, that in this case, at least, it cannot avail the appellee, on account of the particular character of the contract.

We think we may safely lay down this principle, that wherever a sale is made of property not present, but at a remote distance, which the seller knows the purchaser has never seen, but which he buys upon the representation of the seller, relying on its truth, then the representation, in effect, amounts to a warranty; at least that the seller is bound to make good the representation. No part of the reasoning of the cases which we have been reviewing applies to such a case; they proceed upon the idea that where the subject of the sale is open to the inspection and examination of the buyer, it is his own folly and negligence not to examine. Chancellor KENT, in the second volume of his Commentaries, 484-485, has justly said that the law does not go to the romantic length of giving indemnity against the consequences of indolence and folly, or a careless indifference to the ordinary and accessible means of information. We think that this imputation cannot be made with any propriety against the appellee. The subject of the purchase was several hundred miles from him; he had never seen it; the seller knew that he had never seen it; in this situation he made a representation, both by

considered an actionable fraud so as to be the proper subject of judicial redress, which has not been a cause of injury or prejudice to the party wishing redress. A misrepresentation or concealment which has not been the means of producing damages or injuries is not within the cognizance of human tribunals, for they do not sit for the enforcing of word obligations or correcting unconscientious acts which are followed by no loss or damage." Marsh *v.* Cook, 1880, 32 N. J. Eq. 262, 266.

"Of course one buying what the seller represents to him is whiteacre, relying upon such representation when the property so purchased is in fact blackacre, fails to get the thing for which he contracted, and hence may rescind without showing actual pecuniary loss." Per CASSODAY, J., in Potter *v.* Taggart, 1883, 59 Wis. 1, 13.

description in his letter and by the exhibition of specimens; the appellee bought upon the faith of that representation, and the appellant knowing that the appellee had read the letter and seen the samples; finally, the appellee had a double confidence in the appellant, first in his integrity, and, secondly, in his skill in mining; and the appellant admits his belief that the appellee had this double confidence in him.

If, under these circumstances, the seller were not bound by his representation, we know not in what cases we ought to apply the well-known and excellent maxim, *"fides servanda est."* We have now compared the cases, and upon principle have shown that they do not apply to this. But we will conclude our opinion by referring to a case later than all those which we have been examining, the reasoning of which is conclusive, as we think, in favor of the view which we have taken. It is the case of Shepard *v.* Kain, 5 Barn. & Al. 240. It was a case for the breach of warranty as to the character of a ship. The advertisement for the sale of the ship described her as a copper-fastened vessel, but there were subjoined these words: "The vessel, with her stores, as she now lies, to be taken with all faults, without allowance for any defects whatever." It appeared at the trial that the ship when sold was only partially copper-fastened, and that she was not what was called in the trade a copper-fastened vessel. It appeared also that the plaintiff, before he bought her, had a full opportunity to examine her situation.

The court said the meaning of the advertisement must be that the seller will not be responsible for any faults which a copper-fastened ship may have. Suppose a silver service sold with all faults, and it turns out to be plated: can there be any doubt that the vendor would be liable? With all faults must mean which it may have consistently with its being the thing described. Here the ship was not a copper-fastened ship at all, and therefore the verdict was right. This case decides that even where the plaintiff had a full opportunity of examination, the term, all faults, did not exempt the seller from liability for any defect but what was consistent with its being the thing described, and, in effect, that the description amounted to a warranty. In the case before us, where the appellee had no opportunity for examination (and in that respect the case is much stronger in his favor than the one just cited), the terms of the sale, in our opinion, put upon the appellee no hazard or risk but those which were consistent with the mine being such as it was described; that those terms in no degree exempted him from liability for misrepresentation; but if the mine had been such as described, that then they would have exempted him from any liability for failure in its anticipated produce.

It may be that the appellant made the representation under the influence of delusion, but it is sufficient, to decide this case, for us to know that the representation was untrue in material parts of it. The decree of the Circuit Court is affirmed with costs.

Mr. Justice STORY dissenting. In this case I have the misfortune to differ from a majority of my brethren. The bill seeks to set aside and rescind an executed contract upon the ground of gross premeditated fraud, the contract being confessedly one of great hazard and founded in speculation. The answer fully and pointedly denies every allegation of fraud and insists upon the most perfect good faith. The decree, by rescinding the contract, affirms the material charges of fraud stated in the bill. After a careful consideration of the evidence in the record, my opinion is that there is no just foundation for or proof of these charges. I do not propose to review the evidence, though I take a very different view of it from what has been expressed in the opinion delivered by my brother BARBOUR; and there are many facts and circumstances which have struck my mind with great force which, I regret to find, are not deemed of equal importance by my brethren. I am not willing, by my silence, to sanction imputations upon the appellant which cast so deep a shade upon his character, which the record shows has hitherto been without stain or reproach. In my opinion, the appellant stands acquitted of fraud, the victim, if you please, of a heated and deluded imagination, indulging in golden dreams; but in this respect he is in the same predicament with the appellee, and none other.

Mr. Justice MCLEAN dissented, stating that he agreed altogether with Mr. Justice STORY.

Mr. Justice BALDWIN dissented, both as to the facts and the law, as stated in the opinion of the court, delivered by Mr. Justice BARBOUR.

On apeal from the Circuit Court of the United States for the Southern District of New York. This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of New York, and was argued by counsel. On consideration whereof it is adjudged and decreed by this court that the decree of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs.

Note.—The counsel for the appellant afterward presented a petition, praying for a rehearing of this case, but the court unanimously overruled the application.[1]

[1] Act also may be fraudulent. Sorell *v.* Hicks, 1863, 2 Youngs & C. 46. See as to selling lots by a map, MacCall *v.* Davis, 1867, 56 Penn. St. 431. And see Denny *v.* Hancock, 1890, L. R. Ch. App. 1.

PULSFORD *v.* RICHARDS.

IN CHANCERY, BEFORE SIR JOHN ROMILLY, M. R., 1853.

[17 *Beavan* 87.]

A right to make a foreign railway was conceded to Cubite and the four defendants, and the grant was partly obtained through the influence and exertions of Cubite, whose name was inserted for the benefit of the defendants. The defendants agreed to appoint Cubite their agent for the construction, etc., of the line, and in consideration of such services, to pay him £4 per cent. on the outlay. After this they issued a prospectus for the formation of a company, proposing to transfer the grant and all benefits to the company (subject to a stated reservation to themselves); but they omitted to mention anything respecting the contract with Cubite. The plaintiff took shares on the faith of the prospectus, and afterward sought to return them and set aside his contract, on the ground of misrepresentations in the prospectus.

The projectors of the railway retained 4,000 shares for themselves, but did not state the fact in their prospectus.

The Master of the Rolls. This suit is instituted by the plaintiff, for the purpose of obtaining the declaration of the court, that the proceedings of the defendants, as directors of the West Flanders Railway, so far as relate to the raising of the capital of the company, by issuing shares, are fraudulent and void as between them and the plaintiff, and for the relief consequential upon that declaration; which relief would involve the payment, by the defendants to the plaintiff, of the sums paid for deposit and calls on these shares, with interest thereon, the plaintiff on his part returning the shares thus taken, and accounting for the interest on such deposit and calls, and for the dividends which he has received on them. The ground on which this relief is asked is that principle of equity which declares, that the wilful misrepresentation of one contracting party, which draws another into a contract, shall, at the option of the person deceived, enable him to avoid or enforce that contract. I think it convenient, in the present case, to state my view of this principle of equity, before applying it to the facts of this case as they appear to me to be established by the evidence in the cause.

The basis of this, as well as of most of the great principles on which the system of equity is founded, is the enforcement of a careful adherence to truth, in all the dealings of mankind. The principle itself is universal in its application to these cases of contract. It affects not merely the parties to the agreement, but it affects also those who induce others to enter into it. It applies not merely to cases where the statements were known to be false by those who made them, but to cases where statements, false in fact, were made by persons who believed them to be true, if in

the due discharge of their duty, they ought to have known, or if they had formerly known and ought to have remembered, the fact which negatives the representation made. A strong illustration of this is to be found in the case of Burrowes *v.* Lock, 10 Ves. 470; and in my opinion (as I held in the case of Money *v.* Jorden, 15 Beav. 372), this principle applies to all representations made, on the faith of which other persons enter into engagements, so that whether the representation were true or false, at the time when it was made, he who made it shall not only be restrained from falsifying it thereafter, but shall, if necessary, be compelled to make good the truth of that which he asserted.

The results, however, which flow from the application of this principle differ materially in different cases. In the case where the false representation is made by one who is no party to the agreement, entered into on the faith of it, the contract cannot be avoided, and all that equity can then do is to compel the person who made the representation to make good his assertion, as far as this may be possible. In cases, however, where the false representation is made by a person who is a party to the agreement, the power of equity is more extensive; there the contract itself may be set aside, if the nature of the case and condition of the parties will admit of it, or, the person who made the assertion may be compelled to make it good. The distinction between the cases where the person deceived is at liberty to avoid the contract, or where the court will affirm it, giving him compensation only, are not very clearly defined. This question usually arises on the specific performance of contracts for the sale of property; and the principle which I apprehend governs the cases, although it is, in some instances, of very difficult application, and leads to refined distinctions, is the following, viz., that if the representation made be one which can be made good, the party to the contract shall be compelled or may be at liberty to do so; but if the representation made be one which cannot be made good, the person deceived shall be at liberty, if he please, to avoid the contract. Thus, if a man misrepresent the tenure or situation of an estate, as if he sell an estate as freehold which proves to be a copyhold or leasehold, or if he describes it as situate within a mile of some particular town, when, in truth, it is several miles distant, such a misrepresentation, as it cannot be made true, would, at the option of the party deceived, annul the contract. But if the property be subject to incumbrances concealed from the purchaser, the seller must make good his statement and redeem those charges; and even in the cases where the property is subject to a small rent not stated, or the rental is somewhat less than it was represented, the court does not annul the contract, but compels the seller to allow a sufficient deduction from the purchase money. It does so on this principle:—that, by this means, he in fact makes good his representation, and that the statement made was not such as, in substance, deceived the purchaser as to the nature and quality of the thing he bought. With respect to the character or nature of the misrepresentation itself, it is clear, that it may be positive or negative; that

it may consist as much in the suppression of what is true as in the assertion of what is false; and it is almost needless to add that it must appear, that the person deceived entered into the contract on the faith of it. To use the expression of the Roman law (much commented upon in the argument before me), it must be representation *"dans locum contractui,"* that is, a representation giving occasion to the contract: the proper interpretation of which appears to me to be, the assertion of a fact on which the person entering into the contract relied, and in the absence of which, it is reasonable to infer, that he would not have entered into it; or the suppression of a fact, the knowledge of which, it is reasonable to infer, would have made him abstain from the contract altogether.

Having stated these principles, the effect of their application to the present case remains to be considered. I entertain no doubt, that the persons who take shares on the formation of a company and the directors who form it are contracting parties, to whom the principles I have stated are applicable. I am also of opinion, that the prospectus issued by the directors is the representation *quæ dat locum contractui.* The plaintiff and defendants stand in this relation of shareholder and directors. The representation which created it was a prospectus issued on the 5th June, 1845. What therefore in my opinion I have to consider in the present case is, whether the prospectus so issued contained such misrepresentation or suppression of existing facts, as, if the real truth had been stated, it is reasonable to believe that the plaintiff would not have entered into the contract, that is, that he would not have taken the shares which were allotted to him, and those which he purchased in the course of that year. For this purpose what passed subsequently to the issuing of the prospectus has, in my opinion, no bearing on the question, except so far as it may throw light upon the acts of the defendants in issuing the prospectus and of the plaintiff in taking shares upon the faith of it.[1]

B. Presumption of Fraud from Subject of Contract.

HALL *v.* POTTER.

In the House of Lords, 1695.

[*Shower's Parliament Cases* 76.]

Appeal from a decree of dismission in the Court of Chancery: The case was thus; that Thomas Thynne Esq., having intentions to make his addresses to the Lady Ogle, gave a bond of £1,000 penalty to the respondent's husband to pay £500 in ten days after his marriage with the Lady Ogle; the respondent assisted in promoting the said marriage,

[1] The court considered, that the duties to be performed by Cubite were im-

which afterwards took effect; soon after the said Thynne was barbarously murdered; and about six years after Mr. Potter brought an action upon this bond against the appellants, as executors of Mr. Thynne, and proving the marriage, recovered a verdict for the £1,000. Thereupon the appellants preferred their bill in Chancery to be relieved against this bond, as given upon an unlawful consideration; the defendants by their answer acknowledge the promotion of that marriage to be the reason of giving the bond. Upon hearing the cause at the Rolls, the court decreed the bond to be delivered up, and satisfaction to be acknowledged upon the judgment. The respondent petitioned the Lord Keeper for a rehearing; and the same being reheard accordingly, his Lordship was pleased to reverse that decree, and ordered the respondents to pay principal, interest and costs, or else the bill to stand dismissed with costs.

And it was argued on behalf of the appellants, that this bond ought in equity to be set aside, for that even at the common law, bonds founded upon unlawful considerations appearing in the condition were void; that in many instances, bonds and contracts that are good at law, and cannot be avoided there, are cancelled in equity: That such bonds to matchmakers and procurers of marriage are of dangerous consequence, and tend to the betraying, and oftentimes to the ruin of persons of quality and fortune: And if the use of such securities and contracts be allowed and countenanced, the same may prove the occasion of many unhappy marriages, to the prejudice and discomfort of the best of families; that the consideration of such bonds and securities have always been discountenanced, and relief in equity given against them, even so long since as the Lord COVENTRY'S time, and long before; and particularly in the case of Arundel and Trevilian; between whom the fourth of February, 11 Car. 1. was an order made in these, or the like words: "Upon the hearing and debating of the matter this present day in the presence of the counsel learned, on both sides, for and touching the bond or bill of £100, against which the plaintiff by his bill prayeth relief. It appeared that the said bill was originally entered into by the plaintiff unto the defendant for the payment of £100 formerly promised unto the said defendant by the plaintiff, for the effecting of a marriage between the plaintiff and Elizabeth his now wife, which the said defendant procured accordingly, as his counsel alleged. But this court utterly disliking the consideration whereupon the said bill was given, the same being of dangerous consequence in precedent, upon reading three several precedents,

portant and indispensable and that he was peculiarly fitted for them: that there was no evidence of the value of his services, but assuming the remuneration to be excessive and exorbitant, still that it did not furnish a ground for annulling the contract, though it might possibly be a reason for charging the directors. The Court likewise held that retention of the 4,000 shares was no ground for annulling the contract.

The projectors of the railway retained 4,000 shares for themselves, but did not state the fact in their prospectus.

wherein this court hath relieved others in like cases, against bonds of that nature, thought not fit to give any countenance unto specialties entered into upon such contracts: It is therefore ordered and decreed, that the said defendant shall bring the said bill into this court, to be delivered up to the plaintiff to be cancelled." Then 'twas further urged, that the appellants had once a decree at the Rolls to be relieved against the bond in question, upon consideration of the said precedent in the time of the said Lord COVENTRY and others; and of the mischiefs and inconveniences likely to arise by such practices, which increase in the present age, more than in the times when relief was given against such bonds; and therefore 'twas prayed that the decree might be reversed.

On the other side it was urged, that the consideration of this bond was lawful; that the assisting and promoting of a marriage at the parties request, was a good consideration at law, in all times, to maintain a promise for payment of money: That this bond was voluntary, and the party who was obligor was of age and sound memory; that here was no fraud or deceit in procuring it; that Chancery was not to relieve against voluntary acts; that here was a great fortune to be acquired to the appellant's testator by the match; that here was assistance given; that the persons were both of great quality and estate, and no imposition or deceit on either side in the marriage: That it might be proper to relieve against such securities, where ill consequences did ensue; yet here being none, and the thing lawful, and the bond good at law, the same ought to stand; that here are no children, purchasers or creditors to be defeated; that there are assets sufficient to pay all; and consequently there can be no injustice in allowing this bond to remain in force; that it was the expectation of the respondent, without which she would not have given her service in this matter; and that it was the full meaning of the appellant's testator to pay this money, in case the marriage took effect; that there was a vast difference between supporting and vacating a contract in Chancery; that tho' Equity perhaps would not assist and help a security upon such a consideration, if it were defective at law; yet where it was good at law, and no cheat or imposition upon the party, but he meant (as he had undertaken) to pay this money, and was not deceived in his expectation, as to the success of the respondent's endeavours, 'twould be hard in Equity to damn such a security, and therefore 'twas prayed that the decree should be affirmed.

It was replied that marriages ought to be procured and promoted by the mediation of friends and relations, and not of hirelings; that the not vacating such bonds, when questioned in a Court of Equity, would be of evil example to executors, trustees, guardians, servants, and other people having the care of children. And therefore 'twas prayed that the decree might be reversed, and it was reversed accordingly.[1]

[1] Accord: Arleston *v.* Kent, 1620, Toth. 27; Arundel *v.* Trevillian, 1634, 1 Ch. Rep. 87. See also Duval *v.* Wellman, 1891, 124 N. Y. 156; Smith *v.*

DEBENHAM *v.* OX.

IN CHANCERY, BEFORE LORD CHANCELLOR HARDWICKE, 1749.

[1 *Vesey Senior* 276.]

The bill was for delivering up a bond given by the plaintiff to the defendant's wife, in consideration that she would make use of the influence and power she had over Thomas Yerle, the plaintiff's grandfather an old man of eighty-two, that he should dispose of his whole estate for the plaintiff's benefit, and give security that he would not alter the will he made in the plaintiff's favor.

For plaintiff. It was insisted, that such bonds ought not to be encouraged in equity; being upon a consideration contrary to the policy of the law, and like marriage brocage bonds.

For defendant. A bond is not rescindable merely because gratuitously given; for a voluntary bond may create a debt, unless some fraud. Marriage brocage bonds are inconvenient to the public on this foundation, that these contracts should be made on other motives than those of interest, and are almost rescindable of course in equity. In Beckley *v.* Newland, 2 P. Wms. 182, though a kind of partition treaty of a man's estate before his death, it was carried into execution.

Bruning, 1700, 2 Vernon, 392, where money paid on a "marriage brokage" bond was recovered.

In Cole *v.* Gibson, 1750, 1 Ves. sr. 503, 506, Lord HARDWICKE restates the question of public policy in the following forcible language:

"To be sure this court has been extremely jealous of any contract of this kind made with a guardian or servant, especially with a servant, in respect of the marriage of persons over whom they have an influence (and has been justly so; nothing tending more to introduce improper matches); and by rules established, not regarding whether the match is proper or no, if brought about by a marriage-brocage contract, sets it aside; not for the sake of the particular instance or the person, but of the public, and that marriages may be on a proper foundation: therefore, though a proper match, as it was in Hall *v.* Potter, Show. Parl. Ca. 76, yet for the sake of the mischief that would be introduced, and to prevent that influence which servants more especially would gain over young ladies, the court sets it aside: and if that was the nature of the contract, I do not know, that subsequent confirmations have been permitted to stand in the way of the relief sought. I will not say, there may not be such a confirmation or release given, as may release the remedy of the party; for it is hard to say that in a court of equity, a man having a right of action or suit to be relieved in equity, and knowing the whole of the case, may not release that, on whatever consideration it arises, so far as regards himself: but it must be applied to that particular case, doing it with his eyes open, and knowing the circumstances."

On the question of confirmation, see the leading case of Morse *v.* Royal, 1806, 12 Ves. 355, per Lord Chancellor Erskine.

LORD CHANCELLOR. This is new in specie; there being no case of a bond by way of reward for influence over another person's estate for the benefit of the obligor. As to the bond itself, it is admitted to be given without any consideration: and that, which is insisted on, would be going further than the policy of the law will admit, which ought not therefore to prevail; especially as the grandfather from his age was probably weak, and thence more liable to such influence. I remember a passage in Tully of a will obtained by doing complaisant and flattering offices about a person, Blanditiis, etc., Beckley *v.* Newland, 2 P. W. 182, is different; the contract there being framed on a contrary principle to this, viz. the avoiding all undue influence. Yet this is not like marriage brocage bonds; which proceed on another ground, that nothing inconsistent with the open contract on marriage should be done.

But as to costs: the defendant ought not to pay them. Indeed there is hardly a case of a bond set aside for fraud or improper consideration, but it ought to be with costs, from the bad ingredient; but this differs; the plaintiff himself being *particeps criminis;* so that if it had not been for the ingredient of public policy, he could hardly have come here for relief. In all those cases the court sets them aside, not for the party's sake, but for the benefit of the public: as a marriage brocage bond; or a bond by the husband to return part of the wife's portion to her father, without the privity of the husband's relations; or on the other hand a contract to give back part of the estate. In all this, the husband has done wrong, and is *particeps criminis;* yet because the objection, that infects the bond, arises from public consideration, the court will relieve; yet in several cases have not given costs: that is where the husband himself has come to be relieved against what he has done with his eyes open. And here the plaintiff himself solicited to give this bond, and got it prepared: the bond therefore was given upon due consideration, which ought to receive no countenance in a court of equity, and should be delivered up. But by reason of the part the plaintiff himself appears to have had, no costs on either side.

BOSANQUETT *v.* DASHWOOD.

IN CHANCERY, BEFORE LORD CHANCELLOR TALBOT, 1735.

[*Cases Tempore Talbot* 37.]

The plaintiffs being assignees under a commission of bankruptcy against the two Cottons, brought their bill against Dashwood the defendant, as executor of Sir Francis Dashwood, who had in his lifetime lent several sums to the Cottons, the bankrupts, upon bonds bearing £6 per cent. interest, being the then legal interest, and had taken ad-

vantage of their necessitous circumstances, and compelled them to pay at the rate of £10 per cent., to which they submitted, and entered into other agreements for that purpose; and so continued paying £10 per cent. from the year 1710 to the year 1724.

It was decreed at the Rolls that the defendant should account; and that for what had been really lent, legal interest should be computed and allowed; and what had been paid over and above legal interest should be deducted out of the principle at the time paid; and the plaintiffs to pay what should be due on the account: and if the testator had received more than was due with legal interest, that was to be refunded by the defendant, and the books to be delivered up.

Lord Chancellor [TALBOT]. There is no doubt of the bonds and contracts therein being good: but it is the subsequent agreement upon which the question arises. It is clear that more has been paid than legal interest. That appears from the several letters which have been read, and which prove an agreement to pay £10 per cent., and that from Sir Francis Dashwood's receipts; but whether the plaintiffs be entitled to any relief in equity, the money being paid, and those payments agreed to be continued, by several letters from the Cottons to Sir Francis Dashwood, wherein are promises to pay off the residue, is now the question.

The only case that has been cited that seems to come up to this, is that of Tomkins *v.* Bernet, 1 Salk. 22, which proves only, that where the party has paid a sum upon an illegal contract, he shall not recover it upon an action brought by him. And though a court of equity will not differ from the courts of law in the exposition of statutes; yet does it often vary in the remedies given, and in the manner of applying them.

The penalties, for instance, given by this act, are not to be sued for here; nor could this court decree them. And though no *indebitatus assumpsit* will lie, in strictness of law, for recovering of money paid upon an usurious contract; yet that is no rule to this court, which will never see a creditor running away with an exorbitant interest beyond what the law allows, though the money has been paid, without relieving the party injured. The case of Sir Thomas Meers, heard by the Lord HARCOURT, is an authority in point, that this court will relieve in cases, which, though perhaps strictly legal, bear hard upon one party. The case was this: Sir Thomas Meers had in some mortgages inserted a covenant, that if the interest was not paid punctually at the day, it should from that time, and so from time to time, be turned into principal, and bear interest: upon a bill filed, the Lord Chancellor relieved the mortgagors against this covenant as unjust and oppressive. So likewise, in the case of Broadway, which was first heard at the Rolls, and then affirmed by the Lord KING, an express authority that in matters within the jurisdiction of this court it will

relieve, though nothing appears which, strictly speaking, may be called illegal. The reason is, because all those cases carry somewhat of fraud with them. I do not mean such fraud as is properly deceit; but such proceedings as lay a particular burden or hardship upon any man: it being the business of this court to relieve against all offences against the law of nature and reason: and if it be so in cases which, strictly speaking, may be called legal, how much more shall it be so, where the covenant or agreement is against an express law (as in this case) against the Statute of Usury, though the party may have submitted for a time to the terms imposed on him? The payment of the money will not alter the case in a court of equity; for it ought not to have been paid: and the maxims of *volenti non fit injuria* will hold as well in all cases of hard bargains, against which the court relieves, as in this. It is only the corruption of the person making such bargains that is to be considered; it is that only which the statute has in view; and it is that only which entitles the party oppressed to relief. This answers the objection that was made by the defendant's counsel, of the bankrupts being *particeps criminis;* for they are oppressed, and their necessities obliged them to submit to those terms. Nor can it be said in any case of oppression, that the party oppressed is *particeps criminis;* since it is that very hardship which he labors under, and which is imposed on him by another, that makes the crime.[1] The case of gamesters, to which this has been compared, is no way parallel; for there, both parties are criminal: and if two persons will sit down and endeavor to ruin one another, and one pays the money, if after payment he cannot recover it at law, I do not see that a court of equity has anything to do but to stand neuter: there being in that case no oppression upon one party, as there is in this. Another difficulty was made as to the refunding: but is not that a common direction in all cases where securities are sought to be redeemed, that if the party has been overpaid, he shall refund? Must he keep money that he has

[1] "The rule is, *in pari delicto, patior est conditio defendentis:* and there are several other maxims of the same kind. . . . But where contracts or transactions are prohibited by positive statute, for the sake of protecting one set of men from another set of men, the one, from their situation and condition, being liable to be oppressed or imposed upon by the other, there the parties are not *in pari delicto;* and in furtherance of these statutes the person injured, after the transaction is finished and completed may bring his action and defeat the contract. For instance, by the statute of usury, taking more than five per cent. is declared illegal, and the contract void; but these statutes were made to protect needy and necessitous persons from the oppression of usurers and moneyed men, who are eager to take advantage of the distress of others; whilst they, on the other hand, from the pressure of their distress, are ready to come into any terms, and, with their eyes open, not only break the law, but complete their ruin. Therefore the party injured may bring an action for the excess of interest." Per Lord MANSFIELD, in Browning *v.* Morris, 1778, Cowp. 790, 792.

no right to, merely because he got it into his hands? I do not determine how it would be, if all the securities were delivered up; this is not now before me. I only determine what is now before the court; and is the common direction in all cases where securities are sought to be redeemed.[1]

And so affirmed the decree, etc.

C. Presumption of Fraud from Situation of Parties.

STONEHOUSE *v.* STANSHAWE and others.

In Chancery, in the Reign of King Henry VI.

[1 *Calendars of Proceedings in Chancery* xxix.]

To my ryght revend Lord and ryght Worshipfull Fader in God Chaunceler of England:

The complainant alleged that he stood seized in fee tail, of certain lands in Stonhous and Kyngestanley parcell in demene and parcell in reversion; that one "Thomas Tounesende falsely disceyvably and sotilly, by comaundment ymagenacion covyn and confederacye of Robert Stanshawe and also Robert Baker of Wotton Underregge Nicholas Daunt and . . . [at] Seynt Bartholomewe last passed at Stonehous," and "seying

[1] Accord: Fanning *v.* Dunham, 1821, 5 Johns. Ch. 122. In the absence of a statute to the contrary, "this represents the general view. Heacock *v.* Swartwout, 28 Ill. 291, 1862; Sutphen *v.* Cushman, 35 Ill. 186, 1864. For the rule applied in cases where the mortgagor is defendant, see Kuhner *v.* Butler, 11 Ia. 419, 1861; Union Bank *v.* Bell, 14 Oh. St. 200, 1863; Snyder *v.* Griswold, 37 Ill. 216, 1865. Compare Hunt *v.* Acre, 28 Ala., N. S., 580, 1856." Note to Kirchwey's Cases on Mortgages, 233.

For the effect of a statute upon the right of recovery and the relief granted, see Williams *v.* Fitzhugh, 1868, 37 N. Y. 444; Marvin *v.* Mandell, 1878, 125 Mass. 562; Gist *v.* Smith, 1880, 78 Ky. 367. As to whether a transaction tainted with usury may be split up, so as to permit recovery, see Shaw *v.* Carpenter, 1881, 54 Vt. 155.

In discussing the effect of the Statute of Limitations upon usurious payments the Court said, in Albany *v.* Abbott, 1881, 61 N. H. 157, 159: "Every time the plaintiffs paid the defendant usury, a cause of action accrued, Breckenridge *v.* Churchill, 3 J. J. Marsh. 15, against which the statute immediately commenced to run, Rushing *v.* Rhodes, 6 Ga. 228; Davis *v.* Converse, 35 Vt. 503, and consequently the plaintiffs can only recover the illegal interest actually paid as such within six years next before the commencement of this suit."

that my wif was owte iiij myle fro myn hous . . . and I no counfort ne counsaill havyng with me seyde to me for it is to yowe right hevy to be yowre sel" and so induced him to go with them promising "good conseyll and counford, and there ye shull ete venyson," and also suggesting that he take with him a bag "for ye shall have venyson right y nowe with yowe; and thereupon y borwid a bagge of my fermourys suster;" that, on the journey, while in the wode called Larder, "the said Thomas made me swere to ensele all thynges that Robert Stanshawe wolde bedde me do;" that "afterwards he made me drynke ale and wyne and he tolde me hyt was wyne of Surre where Sarsons dwelleden [*i.e.* Syria where Saracens dwell], and bade me drynke ynow therof, and y shull be the better ever whiles that y lyve and owte of my selfe the bargeyn was made such as hem lust, and ther they made he selee God wot y wyst ner what, and money they made take with me; and this untrewe Thomas carried me with his owne hors hame to Stanhous ayen. And y sayde 'Huree I hadde be with Robert Stanshawe, that cursed be the tyme that ever y come ther,' and weled and weped and made much sorrow; 'for ther when I was dronke, they made me to seall a dede, I fere me last hyt be all myn londes:[1] . . . and so my wyff and I had full evrt rest that nyght."

After alleging other transactions of a similar kind, the bill concludes: "Like it to your noble Lorschip to consyder the gyle disceyte covyn ymaginacion and the matures above declared; and that I myght havyn hadde and yet may have on C[li] for the reversion of the lond of Stonhous and Kyngestanley m . . . am of grete age that my discression many tymes and for the most part ys passed away fro me; and that the bargain that I was made g[a]unte to Robert Stanshawe was when I was owte of mysylff, and also with owte my wyff, frende or eny con . . . mony ayen which is redy and always hath be. And the sayde Robert Stanshawe to delyver me ayen all my charturs and evidence, which he and his toke of myn; and to anulle as well the seide knowliche before the chiff Baron, and al . . . heyres to have and rejoice all my londes and rentes a bove seyde, as fully and as holy as I hadde hem before the seyd bargeyn made; and that y may make attorneys to serve in my name as well to fore the Kyng and his counseill as in, . . ."[2]

[1]No answer to this bill nor any other proceedings in the case have yet been found; it is probable, however, that the plaintiff did not succeed in this application to the Chancellor, for it appears by the *Inquisitio post mortem* of Robert Stenshaw, the defendant, that at the time of his death, in the twelfth year of King Edw. IV., lands in Stonehouse and Kings-Stanley were part of his extensive possessions in the County of Gloucester.—Commissioners' note.

[2]"Mere excitement from the use of intoxicating liquors is not such drunkenness as will enable the party to avoid his contracts; such excitement and drunkenness must be excessive and absolute so as to suspend the reason and create impotence of mind at the time of entering into the contract.

"It is objected that absolute drunkeness must mean complete insensibility,

BATTY *v.* LLOYD.

IN CHANCERY, BEFORE LORD KEEPER NORTH, 1682.

[1 *Vernon* 141.]

The defendant had agreed with the plaintiff, who was to have an estate fall to her after the death of two old women, to give her £350 in consideration of being paid £700 at the death of the two women, and the plaintiff was to secure this £700 on a mortgage of her reversionary estate.

It happened that both women died within two years afterward. And now the bill was to be relieved against this bargain. *Sed non allocator;* though the case of Nott and Hill was cited where relief was given in such a case as this, the plaintiff in that case being prevailed upon through his necessities.

Lord Keeper. I do not see anything ill in this bargain. I think the price was the full value, though it happened to prove well. Suppose these women had lived twenty years afterward; could Lloyd have been relieved by any bill here? I do not believe you can show me any such precedent. What is mentioned of the plaintiff's necessities is as in all other cases. One that is necessitous must sell cheaper than those who are not. If I had a mind to buy of a rich man a piece of ground that lay near mine, for my convenience, he would ask me almost twice the value; so where people are constrained to sell, they must not look to

and that this instruction was misleading. A man may, however be absolutely drunk without being dead drunk." Per BAKEWELL, J., in Cavender *v.* Waddingham, 1878, 5 Mo. Ap. 457, 465.

To the effect that the intoxication must be so complete as to deprive the party of any understanding of the effects of his acts, see Lightfoot *v.* Hun, 1839, 3 Y. & C. 586; Johnson *v.* Phifer, 1877, 6 Neb. 401; Bates *v.* Ball, 1874, 72 Ill. 108. "'The having been in drink is not any reason to relieve a man against any agreement gained from him in those circumstances; for this would encourage drunkenness: *Secus.* If through the management or contrivance of him who gained the deed, etc., the party from whom such deed has been gained, was drawn into drink." Per Sir JEKYLL, in Johnson *v.* Medlicott, 1734, cited in 3 Peere Williams, 131.

To the effect that voluntary intoxication will avoid a contract, see the able discussion by PRENTISS, J., in Barrett *v.* Boxton, 1826, 2 Aikens 167. Accord: Prentice *v.* Achorn, 1830, 2 Paige 30. Some of the early English cases would seem, however, to hold, otherwise, Cory *v.* Cory, 1747, 1 Vesey Sr. 19. "Although he who is drunk is for the time *non compos mentis*, yet his drunkenness does not extenuate an offense or turn it to his advantage. But it is a great offence in itself, and therefore aggrevates his offence and doth not derogate from the act which he did during that time, and that as well as in any case touching his life, his lands, his goods or anything that concerns him." 4 Coke, Rep. 125.

have the fullest price, as in some cases that I have known, where a young lady that has had £10,000 portion payable after the death of an old man or the like, and she in the meantime becomes marriageable, this portion has been sold for £6,000 present money, and thought a good bargain, too. It's the common case; pay me double interest during my life, and you shall have the principal after my decease.

EARL OF ARDGLASSE *v.* MUSCHAMP.

In Chancery, before Lord Keeper Guilford, 1684.

[1 *Equity Cases Abridged, C. pl.* 1, 169.]

A., for £300, granted to the defendant B. a rent charge of £300 *per ann.* out of lands in Ireland of £1000 *per ann.* to hold to B. and his heirs, to commence from the first Michaelmas or Lady-day, after the death of A. without issue male, with a proviso, if the said A. had any issue male, who should attain the age of twenty-one years, the grant should be void; A. died without issue; and on a bill to be relieved against this rent charge, the court decreed a reconveyance or lease thereof on payment of £300 and interest: it appearing in the cause by proof, that A. was young and necessitous, and had lived an idle dissolute life, and that the debaucheries, in which B. was often a companion with him, would soon end his days; that he made his bargain without the advice of any friends or counsel of his own; and that he was utterly incapable of getting children, as appeared by the oaths of his surgeons.

NOTT *v.* HILL.

In Chancery, before Lord Chancellor Jeffreys, 1687.

[2 *Vernon,* 26.]

The plaintiff being entitled to an estate-tail after the death of his father in lands, which if in possession, were worth to be sold about £800 and being cast off by his father, and destitute of all means of livelihood, did in 1671, for £30 paid, and £20 per annum secured to be paid to him during the joint lives of him and his father, absolutely convey his remainder in tail to the defendant Hill's father, and his heirs. The plaintiff's father lived ten years after this conveyance; and then the plaintiff brought his bill to be relieved against this conveyance, charging

that it was intended only as a security; and though there was no proof to that purpose, and the deed absolute; and though Hill would have lost all, if the plaintiff had died in his father's lifetime, yet upon the first hearing of this cause, the 24th of June, 34 Car. 2, the Lord NOTTINGHAM decreed a redemption. The 18th of May, 35 Car. 2, the Lord NORTH upon a rehearing dismissed the bill; and that dismission not being signed and inrolled, the 27th of May, 1687, the Lord Chancellor ordered a rehearing; and now upon the rehearing declared, he took it to be an unrighteous bargain in the beginning; and that nothing happening afterwards would help it; and so discharged the Lord NORTH's order, and confirmed Lord Chancellor NOTTINGHAM's decree.[1]

BUTLER *v.* HASKELL.

IN THE COURT OF CHANCERY OF SOUTH CAROLINA, 1816.

[4 *Desaussure,* 650.]

DESAUSSURE, J., delivered the decree and judgment of the court.

This cause was argued with great zeal and ability by the counsel on both sides, to the great assistance of the court. As the case involved the discussion of many difficult points, and a vast property depended upon the decision, an unusual length of time has been taken by the judges in making up their opinions. In forming my own judgment, I have gone deliberately over all the documents and all the evidence, and I have examined all the decided cases quoted by the bar. I have also reflected on the arguments of the counsel, and deliberated long on the opinion

[1] To relieve expectant heirs was a favored practice of early Chancery. Barney *v.* Beak, 1682, 2 Chancery Cases 136; Berney *v.* Pitt, 1686, 2 Vernon 14; and the burden of showing adequacy of price is on the purchaser, per Lord ELDON, in Davis *v.* the Duke of Marlborough, 1819, 2 Swanst. 113.

One of the reasons for giving the relief is said to be the maintenance of parental authority. Twisleton *v.* Griffith, 1716, 1 Peere Williams 310. See opinion of Lord HARDWICKE, in Bernardiston *v.* Lingood, 1740, 2 Atkyns 133. For the usage in the civil law see "*Senatus Consultum Macedonianum*" Dig. Lib. XIV. Tit. 6, and the Star Chamber used to punish such traffic. See the opinion of Lord NOTTINGHAM, in Berney *v.* Fairlough, 1680, cited in Earl of Chesterfield *v.* Janssen, 1750, 2 Vesey 139; Woodhouse *v.* Denity, cited in Hudson's Treatise of the Court of Star Chamber, published in 2 Hargrave's *Collectanea Juridica* 111.

See following cases, explaining and commenting upon Chesterfield *v.* Janssen, Gwynne *v.* Heaton, 1778, 1 Bro. Ch. Cas. 1 per Lord THURLOW; Aylesford *v.* Morris, 1873, L. R. 8 Ch. App. 484; Beynon *v.* Cook, 1875, L. R. 10 Ch. App. 389; Nevill *v.* Snelling, 1880, L. R. 15 Ch. Div. 679.

pronounced by the circuit judge who tried the cause. The result has been a very clear and full conviction, which I shall proceed to state.

This suit was instituted by the complainants, who are the present appellants, and who are alleged to be ignorant and necessitous men, in an humble condition of life, against the defendant, who is stated to be an intelligent man, of great skill in the management of business, and of high standing and influence in society. The object of it is to set aside certain contracts, for the sale of a large property, at a very inadequate price, on the ground that these contracts were obtained from them by the superior judgment and skill of the defendant, acting upon their ignorance and distress, when they were under the pressure of necessity. And also on the ground, that the defendant having been employed by the complainants and others, at a great price, to prosecute and establish their claims to the property in question, was their agent, enjoyed their confidence, obtained important information relative to their rights, and then obtained from them the contracts for the sale thereof on the inadequate terms complained of.

It appeared in evidence that the complainants were all in very narrow circumstances, illiterate and ignorant. One of them could not write his name; another of them was addicted to drink, and none of them were experienced in business. There was no pretence, however, of idiocy, or such extreme weakness in any of them, as to amount to legal incapacity to contract. They lived in the neighborhood of the defendant's country residence, and they appeared to have had high confidence in him. The defendant himself was a man of judgment and experience, of considerable property, and of weight and consideration in society.

It appears that there were nine of the Butler family, brothers and sisters, who learned some time in the year 1801, that they were related to a Miss Margaret Butler, who was an idiot, possessed of a considerable estate near Georgetown, at the distance of nearly one hundred miles from them. George Butler, one of the brothers, who appears to have been the most intelligent among them, was employed to make inquiries into the nearness of their relationship to the idiot, and into the probability of establishing their claims. He seems to have acquired some information, and to have discovered some important witnesses; but he was ignorant of the proper method of proceeding, and was discouraged by the little satisfactory progress he made in pursuing the claims.

In this state of discouragement two of the claimants met the defendant, and entered into conversation with him respecting their claims, and the little success which had attended their exertions to establish them. The defendant thereupon advised them to employ some skilful person, who should be competent to manage the business, and bring it to a happy issue. The family seem to have been so much influenced by his advice, that they resolved to pursue it: and as they knew no person so competent as he was, and in whom they had so much confidence, they

determined to employ him in their behalf. Accordingly they applied to him, and after some negotiation an agreement was entered into, by which the claimants agreed to allow him a tenth part of what might be recovered of Miss Butler's estate, for his services in establishing their claims.

The first paper presented to the view of the court was a letter from George Butler and George Barsh (who had married one of the sisters), to the defendant, dated the 4th of February, 1804, in which they request him to act as the agent of the claimants, for the purpose of perpetuating the evidence they were able to produce to establish their relationship to Peggy Butler of Waccamaw. They stated that they had been about two years flattered with the prospect of being heard before a court, and permitted to prove their relationship, but without effect. They added that their witnesses were very old, and they apprehended that further delay would endanger the loss of the property, which they stood much in need of; and they urged the defendant to lose no time in proceeding on their behalf.

The defendant says in his answer to the bill, that he agreed to the proposition; and on the 9th of April, 1804, a paper was signed by George Butler, Charles Butler, and William Butler, which calls itself a memorandum of an agreement made between them and the defendant, though it was not signed by him. This paper was in the handwriting of the defendant, and recites that whereas E. Haskell had rendered them certain services, they have agreed to compensate him for them by transferring to him and his heirs, whenever they or their heirs should come into possession of the estate in question, one-tenth part of all the estate of Peggy Butler, to which they should be entitled; and they promised to execute such writings as might be required to give effect to the agreement: the said Haskell first paying one-tenth part of all the charges which might accrue in establishing them the lawful heirs of the said estate.

The defendant then went to Charleston, and had some communication with some agents formerly employed, and made some inquiries on the subject of the estate. On his return into the country, he entered into agreements with four of the Butlers for the purchase of their claims on the estate. One of the agreements was with Charles Butler, dated the 23d of June, 1804, in which (after reciting that it was believed that the said Charles Butler, and his brothers and sisters, were as near, or the nearest of kin of Peggy Butler of Waccamaw, and that they would inherit the whole or part of her estate—but as this was uncertain, or, if true, it might be many years before the decease of Peggy Butler, and before any of them might get possession of her estate—and that he, being of opinion that in his circumstances it would be more for his interest and happiness to take a certain sum in hand, than to take the risks and delays), it was agreed that he, the said Charles Butler, should sell to E. Haskell all his rights, or those which his heirs might hereafter have, in and to the said estate, real and personal; and he promised to

execute proper deeds to perfect the conveyance to said Haskell and his heirs, on condition that he should pay to the said Charles, on or before the first day of January then next ensuing, the sum of $200, and deliver him three African negro slaves, about fourteen years old; and on the said Haskell's getting possession of the estate, then he should pay to the said Charles $2,000 more, which should be in full, without any expense to the said Charles in prosecuting the claim. This paper also noted, that the said E. Haskell was made acquainted with an agreement made by and between the Butlers, that in the event of the death of one or more of them before the death of Peggy Butler, the heirs or assignees of the deceased should have an equal proportion of all the property inherited by the survivors. This paper was signed by Charles Butler and E. Haskell, and witnessed by George Butler and W. J. Myddleton. A memorandum was added, signed by George, James and Thomas Butler, acknowledging the agreement respecting the survivorship, and consenting to Charles Butler's transferring his rights to E. Haskell.

There are receipts endorsed on the agreement, from June, 1804, till July, 1805, for successive payments of the $200, and of the three negroes; and on the 1st of March, 1813, for Major Haskell's obligations for $2,000, signed by the executor of Charles Butler, who was dead.

James Butler on the 23d of June, and Thomas and William Butler on the 9th of July, 1804, entered into precisely similar agreements with Major Haskell, for the sale of their respective shares at the same price; on each of which was endorsed similar consent of some of the brothers, and with nearly similar receipts.

The strength of the charge alleged by the complainants in their bill lies here—that the defendant being the agent of the Butlers, possessed of all their information and papers, had opportunities of making discoveries relative to their prospects of establishing the rights of the complainants; and that availing himself of his knowledge, and of their entire confidence in him, and profiting by their necessities, he made purchases from them of their rights at most inadequate prices. The answer of the defendant, admitting the agency and the purchases from the complainants, denies that he got perfect knowledge of the nature and extent of the estate, and of the rights of the complainants in his character of agent; and that at the time he purchased the shares of four of the Butlers, he had not procured any further information on the subject from the time he had agreed to become the agent; that all the information he possessed he got from the brother, George Butler; that he had made no new discoveries, and the testimony had not been perpetuated at the time of his purchases. There appears to be some discrepancy between some part of this answer and the agreement to allow the defendant a tenth part of what might be recovered of the estate of Peggy Butler: for that paper recites, that the allowance of a tenth is agreed to be given on account of certain services rendered by the defendant to the complainants. What could those services have been, since the testimony was not yet per-

petuated, but some essential discoveries as to their rights, and the proofs in support of them? If this were not the case, and the answer states it so, then the language of the agreement is incorrect, and the great premium of a tenth part of the estate recovered might be impeached; as was done in a case where similar services were said to be rendered, by the party's assisting a poor and necessitous man in deducing his pedigree, and supporting his claims to an estate. See Proof *v.* Hines, Cas. Temp. Talbot, p. 3. And nothing can show in a more striking light the entire confidence reposed by the Butlers in the defendant, and their ignorance and want of capacity, than their signing a paper, drawn up by the defendant in April, 1804, reciting that he had rendered them services in relation to the Butler estate, for which they agree to allow him a tenth of their rights, though the amount was totally unknown to them, (but believed to be very considerable), when the defendant himself states in his answer, that as late as June and July, 1804, he had made no discoveries, knew no more than what they had communicated to him, and had not perpetuated the testimony, consequently had rendered no essential services. Another strong mark of the confidence reposed in the defendant by the complainants is their signature of the agreement for the sale of their interests in the estate, drawn up by the defendant, without any legal adviser on their part, which has always been considered unfavorable to such contracts. See 2 P. Wms. 205, and 2 Schoales and Lefroy, 474. The reasons assigned in the deed for the sale are very unusual and seem to indicate a suspicion that some excuse was requisite for so great an inequality. It is alleged that their claims were uncertain, and that many years might elapse before they could get the benefit of them, and that it was better for them to have a certain sum in hand, than to run the risks and endure the delays they must do. These expressions inserted in the agreements by the defendant indicate that the complainants were greatly discouraged in their hopes by the clouds thrown over them by some means; and it is not wonderful that they were discouraged, when a gentleman of intelligence and judgment, after being employed some months as an agent to investigate their rights, and to take measures to establish them, returns to them without having made any discoveries, and without giving them any encouragement. In this frame of their minds he becomes the purchaser, at a most inadequate price. It is to be lamented that judicious witnesses were not present at the discussion and settlement of the terms of the contracts. The witnesses do indeed prove the regular and voluntary execution of the deeds or papers; but they do not prove the discussions and representations which led to them. And this is unfavorable to the defendant; for the rule is quite clear, that in all cases of this kind, where a great advantage is gained in a contract by an agent from his principal, the proof lies on him to show that the transactions were perfectly fair and pure. See 6 Vesey, 276; 9 Vesey, 369; 12 Vesey, 240.

It must be remembered in the consideration of this question, that the

rules at law and in equity are quite distinct. That eminent Chancellor, Lord HARDWICKE, says expressly, that this court will relieve against presumptive frauds; so that equity goes farther than the rule of law: for there fraud must be proved, and not presumed only—and that to take an advantage of a man's necessity is as bad as to take advantage of his weakness—1 Atk. 352; and Lord Chancellor ELDON agrees with him. He says, though there had been a strong inclination in Westminster Hall, in the time of Lord MANSFIELD, persuaded to it by Judge BULLER, to say that whatever is equity ought to be law, this has been reformed by Lord KENYON—and that the clear doctrine of Lord HARDWICKE and all his predecessors was, that there are many instances of fraud that would affect instruments in equity, of which the law could not take notice. See 1 Vesey and Beames, 98.

It was insisted that the defendant had not sought or solicited the complainants, but that they had pressed the sale on him; and this was relied upon as a circumstance of much weight: more especially as it was said that offers were made to others of a similar nature.

The proofs were not very distinct on this point, except as it related to one of the brothers; and another of them swore that he was requested by the defendant to desire his brother to come to him, and sell him his share. But if the proofs had been unequivocal, it would not have been very conclusive; for the offers to sell it to others at low prices might be the effect of their necessities.

A good deal of stress was laid upon the signatures of some of the brothers to the deeds by which the complainants agreed to transfer their rights to the defendant, either as witnesses, or as expressing their approbation of the bargain and the terms. And it was insisted that this was clear evidence of the fairness of the transaction. If these men had been intelligent or judicious men, this evidence would have had great weight: but they were generally illiterate, and they were all discouraged and hopeless; and their judgment upon the subject before them does not seem to be entitled to the high consideration attempted to be given to it. But certainly it does give the impression that they apprehended no fraud was practicing on their brothers who were selling their rights.

Again, great reliance was placed on the fact that the defendant had refused to purchase the share of John Butler, another of the brothers, who offered to sell his share at about the same price which the others got, as evidence that the defendant did not consider the bargain a great one: and undoubtedly it is presumptive evidence of that. But it is susceptible of the view taken of it on the other side, that by refusing to make this purchase, the defendant expected to give a coloring of fairness to his other purchases, the great inadequacy of which might otherwise bring them into suspicion. On which of these principles the defendant acted, it is impossible for us to determine with absolute certainty—that must be left to the Searcher of Hearts.

It was further urged, that if the defendant had not become the pur-

chaser at the price he gave, others might and probably would have purchased at even lower rates. But I do not conceive that because others might have availed themselves of the necessities or doubts of the Butlers, to obtain an unconscientious bargain from them, this would form any excuse for the defendant, more especially clothed as he was with the character of an agent.

We will now proceed to consider whether the great inadequacy of the price alone, or coupled with other circumstances, does not furnish a ground from which the court is bound to infer, that the bargain was too unconscientious to be supported in a court of equity? That the inadequacy was very considerable appears from the comparison of the price agreed to be given, and the amount of the value of the estate, and the shares the Butlers were entitled to. The defendant was to pay to the amount of $1,200 for each share purchased, at all events, and $2,000 in case of success. The amount of the estate, by the defendant's exhibit "H" was $219,853, not including some expectancies. The defendant makes various deductions, which reduce the value of each share of the nine surviving Butlers to about $11,372. My view of it would make each share worth, independent of the defendant's transactions with them, about $12,636: to which some additions were to be made, which would make each share worth from $13,000 to $14,000. This exceeds the price to be paid for each share more than fourfold. Great inadequacy of price has everywhere been considered an evidence of unfairness in the contract, so as to induce the courts of justice to look upon such transactions with a very jealous eye. By the civil law, a sale was declared to be void if the property was sold for less than one-half its value. The French code civil has adopted the Roman rule, but enlarged its limits a little. The seller may obtain a recision of the contract of sale of real estate, not made at public auction, if the property was not sold for five-twelfths of its value, even though he had expressly renounced, in the contract of sale, the action for the recision. See 4th Vol. Cod. Civ., p. 370; Loi Relative a la Vente. Ch. 6 Sec. 2. Neither the English nor the American legislators have thought it advisable to lay down any precise rule on the subject. It has been left, perhaps wisely, to the experience of the courts of justice to apply the great principles of equity to each case, according to its particular circumstances; and thus gradually to form a practical system of pure justice. And the courts have never decided, as a broad principle, that mere inadequacy of price, unconnected with direct fraud or imposition, or concealment, or advantage taken of extreme weakness, or great necessity, should be a distinct and independent ground of vitiating contracts. But the courts have said, that the inadequacy may be so gross as to furnish strong, and even conclusive, presumption of fraud; and that in this way the grossness of the inadequacy may avoid the sale.

In comparing the inadequacy existing in the case under our consideration with the degrees of inadequacy existing in the decided cases, it seems

to come completely within that degree of gross inadequacy which furnished the presumption, and vitiated the contracts. And I should therefore feel obliged by the authorities to pronounce, that the inadequacy was too great to be borne by a court of justice. But there can remain no doubt, when to a most gross inadequacy it is added, that the complainants were uneducated and ignorant men, in very narrow and even necessitous circumstances, dealing in business out of their depth, with a very intelligent and experienced man, in whom they had great confidence. I am not aware of any case, containing this combination of circumstances, in which relief has not been given by the court. It will be seen, on an examination of the authorities, that the risk run by the defendant, and which was much relied upon to support the contract, has not been held to be sufficient for that purpose.

Before I go into a short examination of the decided cases, I will remark, that there is a distinction made between the cases of young heirs selling expectancies and of other persons, which I am not disposed to support. It is said that the former are watched with more jealousy, and more easily set aside than others, on principles of public policy. This was certainly true at first; but the eminent men who have sat in chancery have gradually applied the great principles of equity, on which relief is granted, to every case where the dexterity of intelligent men had obtained bargains at an enormous and unconscientious disproportion, from the ignorance, the weakness, or the necessities of others, whether young heirs or not. This just principle, the safeguard of society, and the tutelary genius of the court, watching over the imbecile and the needy, I adopt in all its extent. It is proper that there should be a perfect accordance between the principles of the contracts of the citizen, and the great principles of constitutional liberty which they enjoy. The former should be as pure as the latter are liberal and extensive. The only solid foundation for the liberty of the country is the virtue of the citizen.

Let us proceed to examine the decided cases, and see their application to the one under our consideration. The first that I shall notice is that of Berney *v.* Pitt, 2 Vernon 14. The plaintiff was a young man entitled to a great estate on the death of his father, who was tenant for life. He got in debt, and borrowed £2,000 of the defendant, and entered into two judgments, of £5,000 apiece, defeasanced that if the plaintiff outlived his father, and paid the defendant £5,000 the defendant should vacate the judgment: and if the plaintiff did not outlive his father, the money should not be repaid. The father lived four years; and complainant filed a bill to be relieved against the judgments, upon the payment of the £2,000 and interest. The bill complained of fraud, and of the defendant working upon the plaintiff when in distress. Relief was given on the ground of its being an unconscionable bargain, though there was no proof of any practice used by the defendant, or any on his behalf, to draw the plaintiff into this security. See, too, 1 P. Wms. 313.

In the case of Knott *v.* Hill, 2 Vern. 27, it was decided, that the sale

of an estate in remainder by a son who was in necessity, was void on account of the gross inadequacy, though the purchaser would have lost all if the son had died first. The decree was affirmed on a rehearing, the Lord Chancellor declaring it was an unrighteous bargain in the beginning, and that nothing could help it.

In the case of Wiseman *v.* Beake, 2 Vern. 121, relief was granted against a bargain on account of gross inadequacy, though the purchaser was to lose all if the seller did not survive his uncle, and get his estate. Wiseman was 40 years old, and an experienced man; and an offer had been made to relinquish the bargain, which he had refused. The court said, that when he had spent the money, then a specious offer was made to relinquish the bargain on payment of the money advanced, with interest, which at that time it was impossible for him to do.

So, too, relief was given in the case of James *v.* Oades, 2 Vern. 402, and of Ardglass *v.* Muschamp, 1 Vern. 237. In the latter case the contingency relied upon, in support of the bargain, was held to be of no importance in such a case.

In the case of Stanhope *v.* Toppe, 2 Bro. P. C. 183, Lord Chancellor MACCLESFIELD gave relief against an advantageous bargain obtained by Stanhope from a person of weak understanding, though there was no direct proof of fraud; and the answer denied all fraud: and the decree was affirmed on appeal.

In Twisleton *v.* Griffith, 1 P. Wms. 310, Lord Chancellor COWPER set aside a contract, by which the defendant had got a good bargain from a young man who sold the reversion of an estate tail, his father being tenant for life, and an old man. The hazard run of losing the money paid, in case of the son's dying before his father, was not allowed to have any influence in the cause.

In the case of Curwen *v.* Miller, Lord Chancellor KING set aside a contract, on which an heir about 27 years of age borrowed £500 on condition to pay £1,000 if he survived his father and father-in-law. It was said the bargain being hawked about, only shewed the necessities of the party. See note C in 3 P. Wms. 292.

Lord Chancellor TALBOT gave relief in Bosanquet *v.* Dashwood, in Forrester's Reports 37, though the party had submitted to the imposition from necessity for fourteen years. In that case, several decisions by Lord Chancellors HARCOURT and KING were referred to, in which it was declared, that relief would be given against all offences against the law of nature and reason.

The case of Proof *v.* Hines, Forrester p. 3, was a very important one. The plaintiff was a poor illiterate man, who was supposed to be entitled to part of an estate; and he applied to the defendant to assist him in making out his pedigree, and getting such proofs as were necessary to make out his title to the estate. They advanced some small sums, and took some pains in the affair; and a bond for £1,000 was given, payable after the estate should be recovered. Lord Chancellor TALBOT in giving

relief said, that the bond was obtained from the plaintiff when under necessity, and that the plaintiff's poverty is not to be omitted in such a case.

In Baugh *v.* Price, decided in the exchequer, and reported in 3 Wilson 320, relief was given, and actual conveyances set aside, though the inadequacy did not exceed one-half the value. This is a very important case.

In giving relief against a contract for the sale of a remainder in tail, made by the remainderman, who was in necessitous circumstances, at a very low rate, Lord Chancellor HARDWICKE said, that though the buyer might lose his money, if the remainderman died before the tenant for life, this risk was immaterial; it was common in such transactions. Barnardiston *v.* Lingard, 2 Atk. 133.

In Walmsly *v.* Booth, 2 Atk. 25, Lord HARDWICKE gave relief against a bond obtained by an attorney from his client in distress, and reversed his first decree.

In the great case of Chesterfield *v.* Janssen, 1 Atk. 301, Lord Chancellor HARDWICKE made many important observations, explaining the doctrines of this court. He said that the court relieves against all kinds of fraud; —that frauds may either be *dolus malus,* a clear and express fraud, or fraud may arise from circumstances, and the necessity of the person at the time. And there are also hard, unconscionable bargains, which have been construed fraudulent; and this court will relieve against presumptive fraud. To take advantage of another man's necessity, is equally bad as taking advantage of his weakness. Fraud is presumed from the circumstances and condition of the parties; weakness and necessity on one side, and extortion and avarice on the other—and merely from the intrinsic unconscionableness of the bargain.

The court had previously given relief in the cases of Clarkson *v.* Hanway, 2 P. Wms. 203; Lawley *v.* Hooper, 3 Atk. 278.

We come now to the important case of Gwynne *v.* Heaton, decided by Lord THURLOW. See 1 Bro. C. C. p. 1. By this decision, the grant of a reversionary rent charge, after the death of the plaintiff's father, who was old and infirm, upon unreasonable terms, was set aside; though it was contended for the defendant, that he was not a dealer in such transactions, and was invited into the bargain, and the terms deliberately settled by the plaintiff with his friends; the same terms having been offered to other persons:—also, that Gwynne was not an expensive young man, following his pleasures; and this was not like the case of a young man dependent on his father—that there was a contingency too, by which the defendant might have lost all his advances; and that the disproportion was not enormous—for if the father had lived seven years, there could not have been any pretence of such inequality as the court would relieve against. So that it was reduced to the single question, whether this agreement was upon such an adequate consideration that this court will set it aside on that ground alone, there being no pretence of imposition. But all these reasons were urged in vain, as it appeared that the

consideration was grossly inadequate, being, as was stated, three or four for one. The Lord Chancellor said, the ground for relief was gross inequality—that the charges of fraud and oppression were not proved—that the vendor made the offer to the purchaser, who accepted it in the very shape it was offered, and did not labor to lower the terms. There was no confidence subsisting between the seller and the buyer; there was no misleading the judgment of the vendor, nor tampering with his poverty. On the other hand, said the Lord Chancellor, the terms are so very grossly inadequate, as to deserve all that has been said to be necessary to the setting the bargain aside. To set aside a conveyance, there must be an inequality so gross, strong, and manifest, that it must be impossible to state it to a man of common sense without producing an exclamation at the inequality of it. The Chancellor then proceeds to take a masterly view of the decided cases, in which he shows that inadequacy alone cannot, as mere inadequacy, be made a ground for setting aside a contract; yet it was, when very gross, a mark of fraud, and in that way would operate to vitiate the bargain. That was the ground in Sir Thomas Mear's case, cited in Forrester, p. 40. The case of Nott *v.* Hill was clear of fraud, except what arose from the inequality. Lord HARDWICKE treated gross inequality as a mark of fraud in many cases. Curwen *v.* Miller was clear of direct fraud; but the bargain was set aside, though the inequality was only two to one. In modern cases it is admitted, that the owners of reversionary interests are as complete to dispose of them as the owners of other interests, but with this qualification—that there is a policy in justice, protecting the person who has the expectancy, and reducing him to the situation of an infant against the effects of his own conduct. The court avows the disability, but not the length to which it disables. Its being hawked about is not an objection to the relief; it only shows the necessity the vendor was under.

In the case of Gartside *v.* Itherwood, 1 Bro. C. C. 558, Lord Chancellor THURLOW again gave relief against a bargain obtained from a man of weak intellects, by his agent, on inadequate considerations, though the party came for relief seven years after the transactions. He said it used to be held, that a contract ought not to be set aside merely for inequality in the bargain, or merely upon the ground of the weakness of the person selling; but the court has since gone further. Inadequacy is the basis of the relief; the thing to be inferred from the inadequacy is fraud—it is evidence of fraud; but for that purpose it must be gross.

In Heathcoat *v.* Paignon, 2 Bro. C. C. 167, a purchase of an annuity was set aside, on the inadequacy, the purchaser having given only two-fifths of the value. There was no appearance of distress. The Chancellor said that mere inadequacy, as a distinct ground, was scarcely sufficient. But there was a difference between that and evidence arising from inadequacy. Lord Chancellor REDESDALE in remarking on this case said, he did not think that mere inadequacy was a sufficient ground to impeach a contract, unless very gross. 2 Schoales and Lefroy, 395. In a note to

the case of Heathcoat *v.* Paignon, that of Herne *v.* Mears is stated, in which it appears that an inadequacy of half the value, and the distress the seller was in, induced the court to set aside the contract. See 2 Bro. C. C. 176, 177.

In Underhill *v.* Horwood, 10 Vesey 211, the Lord Chancellor ELDON stated, that if the terms are so extremely inadequate, as to satisfy the conscience of the court that there must have been imposition, or that species of pressure on the party's distress, which, in the view of this court, amounts to oppression, the court will order the instrument to be delivered up.

In Mortloke *v.* Buller, 10 Vesey, 292, Lord Chancellor ELDON refused to decree specific execution of a contract for the sale of land, where the inadequacy did not exceed half the value, though there was no imputation on the conduct of the buyer; but the agent of the vendor had not communicated to him the survey and valuation, which would have shown him the true value.

Lord ALVANBY refused to decree specific execution of a contract in a case clear of all fraud, where the inadequacy was very gross, being about half the value. Day *v.* Newman, 10 Vesey 300.

In Tilley *v.* Peers, decided in the Court of Exchequer, and stated by Sir SAMUEL ROMILLY, 10 Vesey 301, the Chief Baron said, that laying out of consideration all circumstances of fraud, the court, upon the mere consideration of its being so hard a bargain, will not enforce it. Baron THOMPSON said the plaintiff could not be assisted by the court, the consideration not being one-third of the value.

In Morse *v.* Royal, 12 Vesey 355, though the Chancellor refused to set aside the contract, on the peculiar circumstances, said that gross inadequacy will go a great way to constitute fraud. In that case the vendor was anxious to sell and pressed it on the purchaser. An intelligent relation of the vendor, and a trustee, concurred in the transaction. The seller was not ignorant, weak or necessitous. There was no imputation on the buyer. There had been long acquiescence, and a confirmation made on receiving an additional price; and the buyer was dead, who might have explained many things. Yet Lord Chancellor ERSKINE barely sustained the transaction, and expressed his regret that the rule of policy had not barred more absolutely contracts between trustees and their *cestui que trust,* as well as it did in some other cases, such as attornies and clients, trustees selling to themselves, etc.

In Lowther *v.* Lowther, 13 Vesey 103, Lord Chancellor ERSKINE agrees with his predecessors, that gross inequality is strong evidence of fraud. The disproportion was about six to one in that case.

In Pickett *v.* Loggon, 14 Vesey, 214, 224, 243, Lord Chancellor ELDON gave relief to the plaintiffs, and set aside the agreements, and the formal conveyances, and even a fine, conveying the estate to the defendant, upon the ground of gross inadequacy of price, (about one-fifth of the value,) and the vendors being in distress, ignorant of their real interests and

its value, and not properly protected by counsel, though a great lapse of time had occurred. In this case the answer denied, that the plaintiffs were drawn in by any advantage taken of their ignorance or distress; and denied that the defendant was possessed of any information which was withheld from the plaintiffs. The defendant also relied on the risk ran of losing the whole purchase, if a nearer heir should appear; and it was known that one formerly existed, though he had not been heard from for many years. But this was not allowed to be any reason against the relief, according to Lord HARDWICKE'S opinion in Barnardiston *v.* Lingood, 2 Atk. 133. The evidence in Pickett *v.* Loggon stated that the deeds were read and explained to the plaintiffs by the attornies, and they were made to understand the nature and value of the property. But they were in great poverty and distress; they were very ignorant people; and though some description of the property was given in the deeds, it was not as full as it should have been. The price being so inadequate, the Chancellor had no difficulty in giving the relief sought. This case is one of the most important that ever was decided; and has great weight in settling and illustrating the doctrine as gradually developed by a series of authorities. It has also many features of resemblance to the case now under our consideration.

Purcell *v.* Macnamara, 14 Vesey 91, 110, was decided by Lord Chancellor ELDON, and afterwards by Lord Chancellor ERSKINE assisted by the Master of the Rolls, on a rehearing. It was decreed that absolute deeds of conveyance should be set aside, in bargains of great inadequacy, on the nature of the deeds themselves, and the circumstances under which they were obtained, from feeble persons reposing confidence in the defendants.

The case of Murray *v.* Palmer, 2 Schoales and Lefroy 474, decided by Lord REDESDALE, is in concurrence with the preceding cases. In that case the Chancellor decided that the conveyance of property obtained from a woman, in ignorance of the extent of her rights, and upon a misrepresentation of the circumstances of the property, should be set aside; though she was of full age, had consulted her friends, and had their assent; and she had received the interest on the purchase money for twelve years. The deed was prepared by the purchaser.

After this long examination of the decided cases, which form precedents to assist our judgment, I come now to the results, and the application of them.

I consider the result of the great body of the cases to be, that wherever the court perceives that a sale of property has been made at a grossly inadequate price, such as would shock a correct mind, this inadequacy furnishes a strong, and in general a conclusive, presumption, though there be no direct proof of fraud, that an undue advantage has been taken of the ignorance, the weakness, or the distress and necessity of the vendor: and this imposes on the purchaser a necessity to remove this violent presumption by the clearest evidence of the fairness of his con-

duct; and the relief is given by the court, either by refusing to enforce the contract, or by setting it aside altogether, according to the circumstances of the case. The relief is extended not only to young heirs selling their expectancies; but to all who are weak, or necessitous, or not perfectly conusant of their rights, whether selling expectancies or absolute estates; more especially where the purchaser is very intelligent and acute, and avails himself of his superiority in an unreasonable manner. And the answer of the defendant denying fraud in the transaction, though entitled to much weight, is by no means conclusive; but the court gives relief on strong counter testimony, or on the great intrinsic evidence of gross inadequacy, coupled with other circumstances, such as weakness or necessity in the seller, confidence reposed in the buyer, etc. And the decided cases further shew that the hazard run by the buyer of losing what he advances on some contingency, does not prevent the court from giving relief; nor have specious offers to rescind the bargain, when the injured party could not refund the money, blinded the eyes of the court to the real nature of the transaction.

In the case under our consideration, we have seen that the price was grossly inadequate; at least ten for one of the money actually paid on the risk, (if indeed there were any risk,) and four for one of the whole sum to be paid when the estate should be recovered. This inadequacy is greater than in many of the cases in which the court gave relief.

Upon the whole, after long and mature deliberation, my opinion is firmly made up that the inadequacy in this case was so gross, and the ignorance and necessities of the parties selling their rights so great, that the court is bound to set aside the contract.

There is also another ground of very great importance in this cause, on which I rely in forming my judgment. The defendant was, at the very time of his purchase of the rights and interests of the complainants, their agent and trustee, to take care of those very interests, and support those rights, for which he was to receive a very large compensation.

It is quite unnecessary to multiply authorities to prove that his agency made him a trustee. It is laid down as an universal maxim in Legard & Hodges, 1 Vesey, Jun., 478, by Lord Chancellor THURLOW, that wherever persons agree concerning any particular subject, that, in a court of equity, raises a trust, as against the party himself, and any claiming under him voluntarily or without notice.[1]

The application of the doctrine of these cases, to which our reason assents, is conclusive on the case we are to decide upon. The Butlers thought themselves legally bound to go on and complete their ruinous bargain, and therefore signed these papers, which are called confirmations; but which do not come under that character, as stated by the judges; for they were not aware that the original acts and contracts were im-

[1] The balance of this admirable case dealing with the fiduciary relations existing between agent and principal is omitted for lack of space. The student is, however, recommended to read it in full in the original report of the case.

peachable, and from which they could be released. The papers executed were a mere completion of the original agreements by which they thought themselves bound; and not new and substantive acts of voluntary confirmation. Their ignorance and their necessities remained in full force.

I am, therefore, obliged to say that they were not bound by these last deeds any more than by the first.

The few cases in which confirmations have been allowed to prevail have been cases of the greatest fairness and deliberation, where very intelligent men, fully aware of their rights and of their title to relief, have nevertheless thought proper to confirm contracts impeachable in their character, or of very doubtful character. And this after the necessity which led to the first bad bargain had ceased: such were the cases of Cole *v.* Gibbons, 3 P. Wms. 290; Chesterfield *v.* Janssen, 1 Atk. 314 to 354; Morse *v.* Royal, 12 Vesey, 355, and some others. But these have no similarity to the case under our consideration.

Upon the whole, after a very long and laborious examination, and after the maturest deliberation, my judgment is clear that the complainants are entitled to relief, both on principle and on the authority of the decided cases; because the inadequacy of price in these contracts was so gross as to shock the conscience and raises that violent presumption against the correctness of the transaction which amounts to intrinsic evidence. This coupled with the ignorance of the complainants, their necessitous situation in life and their want of full and correct information of their rights, and of the value of the property, makes a case of the highest claim to relief. Again, the defendant was the agent of the vendors to support and establish their claims to the estate; and if the agent is allowed to become the purchaser at all under any circumstances, from the *cestui que use* it is of the most imperious obligation on him to show that the purchase was perfectly fair in all respects, and is not liable to any sort of objection. But he has not done this, for the objections of gross inadequacy of price, ignorance and necessity on the part of the vendor, and skill on the part of the purchaser, are made with irresistible force by the principals against their agent, the purchaser. And finally, this very strong case is not weakened by the acts relied upon by the defendant as confirmations; for the ignorance and necessity of the complainants remained, and they were not aware that the contracts could be impeached, and that they could be relieved—what they did was in compliance and submission to the original contracts.

HENRY W. DESAUSSURE.

We concur in the foregoing opinion, on all the grounds and in all the views which it has taken of this case,

THOMAS WATIES,
WILLIAM DOBEIN JAMES.

It is therefore ordered and adjudged that the decree of the Circuit Court be reversed.

And it is further ordered and adjudged that the agreements and deeds

executed by William, Thomas, James and Charles Butler for the sale, transfer and conveyance of their shares of the estate of Margaret Butler be and the same are hereby declared to be null and void, set aside and cancelled.

It is further ordered and adjudged that the defendent do account with the complainants before the Commissioner of Orangeburg District for all the moneys received by him from the estate of Margaret Butler on account of the said shares with interest and pay over the same to the complainants, after deducting one-tenth part thereof, conformably to the original agreement. And that the defendant do also deliver over to the complainants, or their representatives, such negroes, bonds, notes, or other property as he has received on account of the said shares, and account for the hire of the negroes with a similar deduction.

And that in accounting before the commissioner the defendant shall be allowed credit for the sum of three thousand two hundred dollars, advanced or paid by him to each of the said Butlers, with interest thereon from the time of the payments.

And that the defendant be also allowed credit in his account, proportionately, for all just expenditures and disbursements in the prosecution of the claims of the said Butlers, under the direction of the court, or by consent of parties, and the costs and counsel fees paid to the solicitors.

The costs of this suit to be paid by the defendant.

HENRY W. DESAUSSURE,
THOMAS WATIES,
WILLIAM DOBEIN JAMES.[1]

[1] In SUMMERS v. GRIFFITHS, 1866, 35 Beav. 27, 31, Lord ROMILLILY, M. R., said: The state of the case, as put by the defendant himself is, that an old woman of the age of eighty-nine, in distress for money, and having a doubt about the title to the property, comes to him and asks to buy it at one-fourth or one-fifth of its value, and that she, having no species or legal assistance of any sort, makes that offer to him. He assents and buys it at that amount, having at the time in his hands the title to her property, and knowing or having the means of knowing exactly what her title was, and having told her at first that she could make no title to it, or that if she was entitled to it her husband probably had had the property, and that she had then had thirty years' uninterrupted possession of the rent charge. Thereupon he buys the property for one-fourth its value. This is the most favorable mode of stating the case, and I am then asked to say that if the matter were fresh, this is a transaction which can be supported, and the only reason urged why it can be supported is that the bill charges fraud. No person, I think, has been more strict than I have been in endeavoring to repress the improper uses of the word "fraud" in regard to transactions which are neither of an improper nor of an immoral character—I mean immoral in the sense of taking advantage of a person who does not know what the value of his property is. I do not understand the distinction on the subject taken in the case of Harrison v. Guest. There appears to me to be distinct fraud in this case, and on that ground I am of opinion that the plaintiff is entitled to recover.

D. Fiduciary Relations and Undue Influence.

DAVOUE *v.* FANNING.

In the Court of Chancery of New York, before Chancellor Kent, 1816.

[2 *Johnson's Chancery* 252.]

The plaintiff is an infant daughter of Frederick Davoue, deceased, who, by his last will, bequeathed to her, and her sister Ann, (one of the defendants, and wife of the defendant Fanning), $5,000 each, "to be paid out of the bulk of the property," when they should become of age, or marry. The testator directed, that so much of his real estate, as should be necessary to furnish the sums he had therein before bequeathed to his children, should be sold at public auction, when his children should attain to full age, etc., and the remainder of his real estate to be leased or rented, by his executors.

The bill charged, that the defendant Fanning, the sole acting executor, pretending that the personal estate was insufficient to pay the debts and legacies, sold a lot of ground, in New York, though he had no authority by the will to do so, and that he caused the same to be purchased by Hedden, the defendant, for himself, or in trust for his wife, the said Ann, which was not lawful, and to the injury of the plaintiff; and that since the sale, Fanning, the defendant, had caused buildings to be erected on the lot, and, on the 25th of August, 1815, mortgaged the property to the defendant Ashfield, to secure $3,000, payable in one year, which sum was borrowed towards paying the expense of the buildings. The bill prayed, that the sale of the lot might be set aside, and the premises resold, etc.

The answer stated, that there was not property enough to pay the debts and legacies; and that Fanning was the sole acting executor of the testator, and that he caused the lot to be sold at auction, as, he alleged, he had authority to do, under the will. That to secure to the defendant Ann her legacy, for her and her children, independent of her husband, she and her husband requested the defendant Hedden to attend the sale at auction, and purchase the lot for her, if it should be sold for less than $4,000; that the defendant Hedden attended the sale, and bought the lot for $3,800, for the said Ann; and the answer denied, that the defendant Fanning had any other or further concern in the purchase, which the defendants insisted was correct and proper, and in no way injurious to the plaintiff. That the defendant Fanning, as sole acting executor, on the 29th of July, 1815, executed a deed for the lot to Hedden, in trust for the sole and separate use of the defendant Ann, and to be at

her own disposal. That Fanning received no money or other consideration, but only, as executor, credited the $3,800 dollars on account of the legacy due to his wife. That the defendant Ann has erected the buildings on the lot, and she and Hedden, and the defendant Fanning, in her behalf, mortgaged the premises to the defendant Ashfield, for $3,000, payable in one year from the 25th of August, 1815, for which they gave their joint bond; that the whole of the money borrowed was applied towards the cost of the buildings, and that about $2,500 dollars still remains due for the expenses of the buildings. The defendants insisted that the mortgage was valid, and ought first to be paid, and the residue of the moneys due ought to be charged on the lot, if the sale should be rescinded; or if the defendant Fanning is to be responsible for the sums due, the defendant Ann ought to hold the property; but that if the property is resold, so much of the proceeds as belong to her ought to be appropriated for her separate use, etc.

The cause came on to be heard, on the bill and answer.

The Chancellor. 1. The first question arising upon this case is, whether the sole acting executor, who was the defendant Henry Fanning, was authorized under the will, without the direction of this court, to sell any part of the real estate.

If all the executors named had the power by the will, then the sole acting executor has the power by the statute, N. R. L. vol. 1, p. 366, on the neglect or refusal of the rest of the executors to act.

The will directs that the real estate be sold at public vendue, when it shall become necessary to raise money for the legacies, or when all the children are of age; but it does not say expressly who shall sell, though I think, as Lord HARDWICKE did in a case somewhat similar, Black *v.* Willer, 1 Atk. 420, that it is a very reasonable construction, that the power was given to the executors. It seems almost impossible to mistake the testator's meaning on this point. He directed that an inventory of the real and personal estate should be taken by the executors; that they were to give the younger children such education as they should think proper; that the legacies of £2,000 to each of the seven children, were to be paid out of "the bulk of the estate," as they should respectively become of age; and that if the executors should find that "the estate" fell short of the legacies, they were to make a deduction and apportionment, according to a rule prescribed. The testator then adds, "I will and direct, that so much of my real estate as shall be necessary to furnish the sums which I have heretofore bequeathed to my children, shall be sold at public vendue, when they shall attain the full age to possess the same, and the remainder of my real estate to be leased or rented by my executors; and that when my youngest child shall have attained unto full age, that then all my real estate and property, not otherwise disposed of, be sold, etc., and the proceeds, with the amount of the personal property, be divided among the children," etc.

It is to be observed, that the will directs that the personal property

be immediately sold, and the proceeds put at interest, etc., but it is equally silent as to the persons who are to sell it.

The object of the power to sell was to raise money for the legacies, which it is, of course, the duty of the executor to discharge; and the will regulates the sale, by declaring it to be at public auction, which it would not have done, if it was intended that the sale should not be made by the constituted agents of the will, but under the directions of this court. Indeed, taking the whole will together, I think it is a very necessary conclusion, that the executors were the persons intended by the testator to execute the power to sell.

2. The next and principal point in the case is, whether the plaintiff is not entitled to set the sale aside, because the executor, by a previous arrangement, suffered the property to be purchased in for his wife, and executed a deed in pursuance of the sale in trust for her.

It is contended on the part of the defendants, that this sale is not open to objection, inasmuch as it was at public auction, and *bona fide,* and for a fair price, and the purchase was not made for the benefit of the executor himself, but for the benefit of his wife, who was one of the *cestui que trusts,* having an interest in the land. But I am of opinion that these circumstances do not vary the application of the general rule.

The executor, in selling a part of the estate to raise a particular legacy, was acting as a trustee for all those who were interested in the estate under the will, and not exclusively for the benefit of his wife, whose particular legacy he was raising. The plaintiff and all the other children, had an equal interest with the defendant's wife that the property should be sold to the best advantage, because the greater the price, the greater would be the dividend of the residuary estate. They were all equally *cestui que trusts* of the executor; for he was charged with the duty of applying the proceeds of the estate to their use, and of eventually selling the whole real estate for distribution among them. If, in selling a part of the estate, in the meantime, for a legacy to his wife, he could become the purchaser on her account, or constitute an agent for that purpose, the temptation to abuse of trust would be great and dangerous. Whether a trustee buys in for himself or his wife, the temptation to abuse is nearly the same. Though the money he was raising was to go to the wife, it was no reason why he should be permitted to buy in for her the estate itself, when the plaintiff and others had also legacies to be raised out of the estate, and were equally entitled to their share of what should be remaining. His interest here interfered with his duty. *Emptor emit quam minimo potest; venditor vendit quam maximo potest.* Indeed, the very fact that the executor was, in that instance, exercising the general powers of his trust for the benefit of his wife, was peculiarly calculated to touch and awaken the suggestions of self-interest. The case, therefore falls clearly within the spirit of the principle, that if a trustee, acting for others, sells an estate, and becomes himself interested in the

purchase, the *cestui que trust* is entitled to come here, as of course, and set aside that purchase, and have the property re-exposed for sale.

I consider this to be a sound and settled doctrine of the court. But as the point is extremely important, and has been long and greatly agitated, it will be safer, and certainly more satisfactory to the parties, that I should not only lay down the rule, but look into the authorities on which it is supported.

The earliest case I have met with, containing any full recognition of the principle, that a trustee cannot act for his own benefit on a subject connected with the trust, is that of Holt *v.* Holt, in the 22 Car. II., 1 Ch. Cas. 190, where it was held, by the Lord Keeper BRIDGMAN, assisted by the judges, that if an executor in trust renewed a lease, it should be for the benefit of the *cestui que trust*. The next case that occurs was that of Keech *v.* Sanford, before Lord Ch. KING, in 1726. 3 Eq. Cas. Abr. 741. A lease of the profits of a market was devised to a trustee, in trust for an infant; before the expiration of the term, the trustee applied to the lessor for a renewal for the infant's benefit, which he refused, because he could not distrain, but must rest singly on covenant, which the infant could not make. The trustee then took a lease to himself, and the chancellor decreed, that the lease should be assigned to the infant, and that the trustee should be indemnified from the covenants in the lease, and the trustee account for the profits since the renewal. He said he must consider it a trust for the infant, "for if the trustee, on refusal to renew, might have a lease to himself, few trust estates would be renewed to *cestui que trusts;* and though it might seem hard that the trustee was the only person of all mankind who might not have the lease, yet it was very proper that the rule should be strictly pursued, and not in the least relaxed, for it was very obvious what would be the consequence of letting trustees have the lease on refusal to renew to *cestui que trusts.*"

If we go through all the cases, I doubt whether we shall find the rule and the policy of it laid down with more clearness, strictness, and good sense. This decision has never been questioned; and that a trust results on the renewal of an infant's lease, has since been regarded as a familiar point, 1 Bos. & Pull. 376.

The general principle was first brought before Lord HARDWICKE, in Davison *v.* Gardner, in 1743, and the rule was admitted with rather more relaxation than is tolerated at this day, if we can only rely upon the account of this MS. case, as it is variously stated in some of the elementary compilers. 1 Cruise's Dig. 551. Sugden's Law of Vendors, 436. The case was a purchase of a *feme covert* of her interest in a brewhouse. She acted at the time as a *feme sole* in respect to her separate estate, and the defendant, who purchased of her, was her trustee. The chancellor would not set aside the sale, because she received the full value, and the purchase was fair. I do not know that this case differs, in this respect, from the later decisions, for they all allow a trustee to purchase from

the *cestui que trust,* under very special and guarded circumstances, amounting to a fair and distinct dissolution of the trust connection between them, at the time of the purchase. Lord HARDWICKE observed, that the court always looks with a jealous eye at a trustee purchasing of his *cestui que trust;* and he would not permit any purchase, by a trustee, during the minority of the *cestui que trust;* but he said, that where there was a decree for the sale of the trust estate, and an open auction by the master, or a public sale, by proclamation, in the country, there the court had permitted a trustee to purchase, by refusing to set aside the sale, when all other circumstances were fair. I apprehend these latter *dicta* are clearly overruled, and that whether the cestui que trust be an infant or an adult, and whether the sale be public or private, the trustee is equally disabled from becoming a purchaser of the trust estate. The next case before Lord HARDWICKE was that of Whelpdale *v.* Cockson, in 1747. 1 Vesey, 9. 5 Vesey, 682, S. C. That was a bill by a creditor against the defendants, as executors and trustees. The answer admitted a purchase at auction of part of the estate, and the chancellor would not suffer it to stand, as he said he knew the dangerous consequence, and that it was not enough for the trustee to say you cannot prove any fraud, for it is in his own power to conceal it. He therefore ordered the creditors to elect, whether they would abide by the purchase; and declared, that if a majority elected not to abide by it, he would order a resale by the master.

This case corrects the inaccurate *dictum* in the preceding one, that a sale at auction took away the objection, and it lays down the rule, and the remedy, in clear and precise terms. The only thing to be objected to in the report of the case is, that the remedy should be made to depend upon the will of a majority of the *cestui que trusts;* for this is not only questioned in the latter cases, but seems contrary to the settled rights of parties, for one *cestui que trust* has not power to control or give away the right of another.

The case of Fox *v.* Mackreth, which arose before Lord THURLOW, in 1788, 2 Bro. 400, 6 Vesey 627, 9 Vesey 247, and underwent long and great discussion, is important only to show the solidity and value of the principle, that a trustee cannot be permitted to purchase, even of his adult *cestui que trust,* unless he has first fairly discharged himself from his office of trustee, and placed himself in circumstances to make a fair contract. This is the same doctrine which has been intimated by Lord HARDWICKE, in Ayliffe *v.* Murray, 2 Atk. 59. But in Whichcote *v.* Lawrence, 3 Vesey, 740, Lord ROSSLYN seems to have spoken with a carelessness and latitude of expression, which has given occasion to much criticism in the subsequent cases. An estate was conveyed to trustees, to sell for the benefit of creditors; the estate was put up at auction, and the defendant (one of the trustees) purchased two lots, for which he received deeds from the other trustees, and he afterwards resold his lots at a profit. The bill was by three only of the numerous creditors, praying

that the trustee might account for the profit he had so made, and it was so decreed, with costs. It is to be observed, that relief was here granted to a minority of the creditors, and it is not the decree, but the observations of the chancellor, that are deemed inaccurate. He said the trustee had here made a profit, and he did not recollect a case, in which the mere abstract rule came distinctly to be tried, abstracted from the consideration of advantage made by the purchaser. That the proposition was not true, that where the trustee to sell was the purchaser, the sale was, *ipso jure,* null. That the real sense of the proposition was, that the trustee to sell should not gain any advantage by being himself the person to buy. That he is not to be permitted to gain profit by the execution of the trust; that unless the advantage be made, the purchase will never be questioned, and that it was not true as a naked proposition, that a trustee cannot buy of his *cestui que trust.*

The objection to most of these observations is, that they do not place the question on the true principle. However innocent the purchase may be in the given case, it is poisonous in its consequences. The *cestui que trust* is not bound to prove, nor is the court bound to judge, that the trustee has made a bargain advantageous to himself. The fact may be so, and yet the party not have it in his power, distinctly and clearly, to show it. There may be fraud, as Lord HARDWICKE observed, and the party not able to prove it. It is to guard against this uncertainty and hazard of abuse, and to remove the trustee from temptation, that the rule does and will permit the *cestui que trust* to come at his own option, and without showing actual injury, and insist upon having the experiment of another sale. This is a remedy which goes deep, and touches the very root of the evil. It is one which appears to me, from the cases which have been already cited, and from those which have been already cited, and from those which are to follow, to be most conclusively established.

In Campbell *v.* Walker, 5 Vesey, 678, 13 Vesey, 600, Lord ALVANLEY, then master of the rolls, declared that the rule necessarily existed to this extent. That was a devise of real estate to the trustees to sell. They sold at auction, and bought in a part for themselves, at a fair price. There was no proof that the purchase was at an undervalue, or that the sale was not *bona fide* and regular. The bill was in behalf of residuary legatees, then infants, to have the sale set aside, and the lands resold. It was accordingly so decreed; and the master of the rolls said, that the rule did go to the extent, that the *cestui que trust* had a right to set aside the purchase, and have the estate resold, if he chose to say, in any reasonable time, that he was not satisfied with it. The trustee purchases subject to that equity. He buys with that clog. The only way for a trustee to purchase safely, if he is willing to give as much as any one else, is by filing a bill, and saying, so much is bid, and I will bid more, and the court will then examine into the case, and judge whether it be advisable to let the trustee bid. In that way the court will divest

him of his character of trustee, and prevent all the consequences of his acting both for himself and for the *cestui que trust.* In no other way, as he observed, could the trustee become the purchaser, without being liable to be called upon to give up his purchase. It is impossible to know whether any advantage has been gained by the purchase, or whether the trustee did all he ought to have done. In that very case, he still retained the land, the defendants were still trustees, and if the plaintiffs elected to have the premises resold, they must be resold.

When this cause was, afterwards, brought before Lord ELDON, on the Master's report of the sale, the infants recovered their costs; and he observed, that a trustee for sale could not contract with the *cestui que trust,* until he had distinctly and honestly removed himself from the relation of trustee, which could not have been done, in that case, as the *cestui que trusts* were infants. He said that a sale by auction made no solid difference, as the auctioneer was an agent employed by the vendor.

It appears to me, that the observations of Lord ALVANLEY, in the above case, illustrate the true rule and the reason of it, in a forcible and perspicuous manner; yet it would seem that he acted in direct contradiction to his own opinion, for he first directed an inquiry, by a master, whether a resale would be for the benefit of the infants. This was shaking the principle itself. There was hazard in the inquiry, and it was far from checking such sales. Lord ELDON expressed his disapprobation of the inquiry; and it was certainly an instance of surprising inconsistency between the reasoning and the conclusion.

Lord ROSSLYN, in the case *ex parte* Reynolds, 5 Vesey, 707, seemed to adopt the true rule, that a trustee cannot purchase without being exposed to a resale. In that case, the assignee of a bankrupt purchased at auction the estate of the bankrupt, under the commission, and the chancellor ordered the estate to be set up again, and that if it did not sell for more than he gave, the purchase was to stand.

I proceed next to the decisions by Lord ELDON, which are uniform in support and vindication of the rule. They leave no possible doubt on the subject. Thus, in the case *ex parte* Lacey, 6 Vesey, 625, the assignee of a bankrupt was purchaser of part of his estate, and the chancellor declared, that when a trustee undertakes to manage for others, he undertakes not to manage for his own benefit; that he cannot buy until, by a new contract with his *cestui que trust,* he has stripped himself of his character of trustee; but even this new contract is watched with infinite and the most guarded jealousy, because he may have acquired information, as trustee, which the court cannot be certain he has communicated to the *cestui que trust.* He disavows the interpretation of Lord ROSSLYN, that the trustee must make advantage. Whether he makes advantage or not, if the connection does not satisfactorily appear to be dissolved, it is in the choice of the *cestui que trust,* whether or not he will take back the property. The ground of the rule is, that though you may see, in a particular case, that he has not made advantage, it is impossible to ex-

amine sufficiently, in ninety-nine cases out of a hundred, whether he has made advantage or not.

In this case another sale was ordered, and the premises were directed to be put up at the price the assignee gave, and if no more was bid, the purchase was to stand.

In another case, *ex parte* Hughes, 6 Vesey, 617, Lord ELDON thought, that a creditor of the bankrupt, or any agent of the sale, was within the reason of the rule, and could not be permitted to bid; and in this case he ordered the property to be set up for resale, at the price the creditor gave, together with the amount of his *bona fide* and substantial improvements, which were to be allowed him, and that if the property sold for more he should be paid for his improvements out of the purchase money, and if not, that he should be held to his purchase. This rule of setting aside the purchase by the trustee, at the option of the *cestui que trust,* and of directing a resale, upon the condition that the property produces a better price, was afterwards adopted by Sir WM. GRANT, in Lester *v.* Lester, 6 Vesey, 631, and he said the rule was so established in Lord THURLOW's time.

The case *ex parte* James, 8 Vesey, 337, contains a still further illustration and confirmation of the rule. It was there applied to a purchase, at auction, by a solicitor to the bankrupt commission, who was considered, as well as the assignees, to come within the mischief to be prevented; and he explicitly declared, that he did not proceed upon the ground of undervalue or want of fairness in the purchase, but upon the general principle. This case is deserving of notice, in another respect, for it may be considered as overruling the *dictum* or decision of Lord HARDWICKE, that a majority of the *cestui que trusts* was sufficient to ratify the purchase of the trustee; for Lord ELDON declared, that the solicitor was not entitled to hold the land against the consent of any of these persons entitled to the surplus of the estate. He had said, also, in another place, 6 Vesey, 625, that he held that opinion of Lord HARDWICKE to be erroneous.

In the case *ex parte* Bennett, 10 Vesey, 385, Lord ELDON went again, and at large, into the policy, the necessity, and the authority of the principle which we are considering. I need not repeat the argument, though I think that, in that case, he dwelt upon the subject with uncommon interest and vigor of decision. He applied the rule once more to the solicitor to a commission of bankruptcy, and to the commissioner purchasing for himself or for another. To permit either to bid, would be applying the information acquired by their trust to their own benefit. He said it was settled, that it was not requisite to show that the trustee had made any advantage by the purchase. If a trustee can buy in an honest case, he may in a case having that appearance, but which, from the infirmity of human testimony, may be grossly otherwise; and yet the power of the court would not be equal to detect the deception. Human infirmity will rarely permit a man to exert against himself that provi-

dence which a vendor ought to exert, in order to sell the estate most advantageously for the *cestui que trusts,* and which a purchaser is at liberty to exert for himself, in order to purchase at the lowest price. If the trustee cannot bid for himself, he cannot, on the same principle, bid for another. The distinction of its being a weaker temptation, is too thin to form a safe rule of justice. The decree there was, also, that the expense of the lasting repairs and substantial improvements, made subsequent to the purchase, should be added to the purchase money, and the estate put up again at the accumulated sum.

In Randall *v.* Erington, 10 Vesey 423, the sale was fair, and the purchase by the trustee at auction, for a full price; but he had subsequently sold a part, at some profit, and the court opened the sale at the request of the *cestui que trust,* as to the parts not sold, and held the trustee to account for the profit on the part he had sold.

It remains only to observe, that during the time that Lord ERSKINE presided in the Court of Chancery, he gave the most unequivocal sanction to these doctrines, and declared that they were founded on the clearest principles of equity, and the general security of contracts. Morse *v.* Royal, 13 Vesey 355; Lowther *v.* Lowther, 12 Vesey 95. He went so far as to say, that there was so much difficulty in supporting a purchase by a trustee, even from his *cestui que trust,* and it required to be guarded with so much jealousy, that it would have been better to have interdicted it altogether. Indeed, no person could have expressed himself in stronger language, as to the delicacy and danger of such purchases, than Lord ELDON himself did on repeated occasions. Coles *v.* Trecothick, 9 Vesey 234; *Ex parte* Bennett, 10 Vesey 385.

It is proper to observe here, that this whole chancery doctrine has received the entire approbation and sanction of the Supreme Court of Pennsylvania, 3 Binney 54, 4 Binney 43. Those decisions come with the more force, and are the more applicable as authority, when we consider that the court is obliged, from the necessity of the case, (as they have no chancery tribunal), to study, adopt and apply equity principles more freely, and more liberally, than is usual in courts of law.

The same doctrine has also been recognized in our own courts. The Supreme Court, in Jackson *v.* Van Dalfsen, 5 Johns. Rep. 43, admit it to be a well-settled rule in equity, that a trustee, or agent to sell, shall not, himself, become the purchaser; and they very properly refer the remedy of the *cestui que trust* in such cases to the cognizance of chancery. The doctrine underwent much discussion in this court, and finally in the Court of Appeals, in Munro and others *v.* Allaire, 2 Caines's Cases in Errors 183. Allaire was one of the executors of Benjamin Palmer, deceased, with power to sell the real estate, and he purchased of Mary Palmer, the widow and devisee, and, also, one of the executors, her right in the whole estate. She subsequently to this purchase, conveyed her right to Munro and Sniffin, and a bill was filed by Allaire for a specific performance of his agreement with Mary Palmer, and for a more

perfect assurance and conveyance of her right. The purchase was charged to have been fairly made, after long consultation, in which she was assisted by a friend; and that Allaire gave a full price, and more than had been previously offered by another. To this bill Mary Palmer filed a demurrer, which was overruled in this court, and she was ordered to answer. From this decretal order an appeal was brought, and the decree, overruling the demurrer, was reversed in the Court of Appeals, in 1796.

This decree of the court, in the last resort, assumed the doctrine of the general disability of the trustee to purchase from the *cestui que trust*. It was not intended to be understood, I presume, of an absolute, unqualified disability, such as Lord ERSKINE was willing to adopt; for there were circumstances relied upon, in this case, to show that neither Mary Palmer nor her friends, were acquainted with the nature or extent of the rights she undertook to convey. The case may, therefore, be considered as establishing only the general doctrine in Fox *v.* Mackreth, and in the other cases which I have noticed. But I allude to the case as containing a full recognition of the general rule, that a trustee to sell cannot, himself, purchase. The only opinion given in the Court of Errors, (at least, the only one published), is that of Mr. Justice BENSON, in which the rule is laid down in these broad and general terms: "It is a principle," he says, "that a trustee can never be a purchaser; and I assume it as not requiring proof, that this principle must be admitted, not only as established by adjudication, but also as founded in indispensable necessity, to prevent that great inlet of fraud, and those dangerous consequences which would ensue, if trustees might themselves become purchasers, or if they were not, in every respect, kept within compass. Although it may, however, seem hard that the trustee should be the only person of all mankind who may not purchase, yet, for very obvious consequences, it is proper the rule should be strictly pursued, and not in the least relaxed."

We cannot but notice the precision and accuracy with which the rule, and the reason of it, are here stated; but the rule appears to be much weakened in the subsequent part of the opinion.

He makes a distinction to show that the rule thus laid down is not to be understood in an absolute, unqualified sense. A trustee, it is said, is never to be assisted in this court, by giving effect to such a purchase; but it does not follow that chancery is bound, in every case, and of course, to annul such a purchase, on the application of the *cestui que trust*. His words are, "That it is not, in every instance, indispensable that all the *cestui que trusts* should agree to waive the implied fraud; it may be sufficient for a majority, or such other number, or proportion of them, to agree, as that, according to the circumstances of the case, it may be presumed there was no fraud in fact."

It appears to me with great submission, that the learned judge has, in these observations, wounded the true principle which he had before so

clearly declared. I presume he was misled by the case of Welpdale *v.* Cookson, in which Lord HARDWICKE held that a majority of the *cestui que trusts* were sufficient to establish the purchase, whether the minority were consenting or not, and which case had been repeatedly questioned, and, in practice, overruled. But this is not all. He seems to think the court are only to be satisfied that there was no fraud in fact, whereas it has been, again and again, decided, and the principal pervades the whole body of the cases, that the inquiry is not whether there was, or was not, fraud in fact. The purchase is to be set aside, at the instance of the *cestui que trust,* and a resale ordered, without weighing the presumption of fraud, on the ground of the temptation to abuse, and of the danger of imposition inaccessible to the eye of the court.

In addition to these cases in our own courts, I may refer to the statute which prohibits a sheriff, or other officer to whom an execution is directed, from purchasing at the sale under it. This is in affirmance of the same general rule; and the other statute, which allows a mortgagee, selling under a power, to purchase in the land, provided the sale be, in every other respect, regular and fair, does, by that very exception, recognize the existence of the rule in all other cases.

There is one case more on this subject too important to be omitted; that of The York Buildings Company *v.* Mackenzie, which was decided in the English House of Lords in 1795, on appeal from the Court of Sessions in Scotland, 8 Bro. P. C. by Tomlins. App.

That case is a complete vindication of the doctrine I am now to apply; and considering the eminent character of the counsel. For the appellants, J. Mansfield, J. Mackintosh, R. Dundas; for respondent, J. Scot, Wm. Grant, W. Adam, who were concerned, and who have since filled the highest judicial stations, and the ability and learning which they displayed in the discussion, it is, perhaps, one of the most interesting cases, on a mere technical rule of law, that is to be met with in the annals of our jurisprudence.

The appellants were an insolvent company, and their estates were sold by order of the Court of Sessions, at a public judicial sale, to satisfy creditors. The course at such sales is to set up the property at a value fixed upon by the court, which is called the upset price, and which is founded on information procured by the common agent of the court, who has the management of all the outdoor business of a cause. The respondent here was the common agent in that cause, and he purchased for himself, at the upset price, no person appearing to bid more, and the sale was confirmed by the court; and in the course of eleven years' possession, he had expended large sums for building and improvements. There was no question as to the fairness and integrity of the purchase. But the object of the appellant was to set aside the sale, and have the estates sold anew, on the ground that the respondent, being the common agent in court, in behalf of all parties, to procure information and attend the sale, was in the nature of a trustee, and so disabled to purchase.

The reasons of the House of Lords for setting aside the sale are not given, and we are not left to infer them from the argument upon which the appeal was founded.

The appellants contended, that the common agent was under a disability to purchase, arising from his office; that the rule was founded in reason and nature, and prevailed wherever any well-regulated administration of justice was known; that the disability rested on the principle which dictated that a person cannot be both judge and party, and serve two masters; that he who is intrusted with the interest of others, cannot be allowed to make the business an object to himself, because, from the frailty of nature, one who has power will be too readily seized with the inclination to serve his own interest at the expense of those for whom he is entrusted; that the danger of temptation does, out of the mere necessity of the case, work a disqualification; nothing less than incapacity being able to shut the door against temptation, where the danger is imminent, and the security against discovery great; that the wise policy of the law had, therefore, put the sting of disability into the temptation, as a defensive weapon against the strength of the danger which lies in the situation; that the parts which the buyer and seller have to act, stand in direct opposition to each other in point of interest; and this conflict of interest is the rock, for shunning which the disability has obtained its force, by making that person, who has the one part intrusted to him, incapable of acting on the other side.

Several cases were referred to in the civil law, showing clearly, that the same principle had a deep and firm foundation in that system, and was most extensively applied, as for instance, to guardians, tutors, curators, procurators, judicial officers, and all other persons who, in any respect, as agents, had a concern in the disposition and sale of the property of others, whether the sale was public or private, judicial or otherwise. The passages to this purpose are to be found in the Digest, lib. 18 tit. 1 ch. 34 s. 7. and lib. 18 tit. 1. ch. 46 and in lib. 26. tit. 8 ch. 5. sec. 2.

The counsel for the respondent admitted the general principle, and contented themselves with denying its application, holding that the common agent was not to be considered, in that case, and in respect of that sale, in the character of seller or trustee.

But the House of Lords thought otherwise, and set aside the sale, ordering the purchaser to account for the rents and occupation in the meantime, with a liberal allowance to him for his permanent improvements. This decision certainly carried the doctrine to its full extent, and it may be considered as a high and authoritative sanction given to the reasoning which accompanied the appeal.

I shall, accordingly, set aside this sale, upon the usual terms.

The following decree was entered:

"This cause being admitted by the counsel for the respective parties, upon the bill and answer, and the same being duly considered, and it appearing to the court, that though the said Henry Fanning, as sole

acting executor, etc., had authority, under the will, to sell the lot of land in the pleadings mentioned, to raise the legacy due to his wife; yet inasmuch as he caused the said lot, on such sale, to be purchased in for the benefit of his wife exclusively, it is ordered, etc., that the said sale to the defendant Hedden, in trust for the wife of the defendant Fanning, be set aside, and vacated, upon the following conditions, viz.: that the said lot be re-exposed to sale, at public auction, by the defendant Henry Fanning, with the concurrence and agency of one of the masters of this court, on giving four weeks' notice of the time and place of sale, in two of the daily papers printed in the City of New York. That the said lot be put up at the sum of $9,600, being the amount of the former sale, together with the principle and interest of the mortgage since charged thereon, and of the debts incurred for substantial improvements, and if the said lot, with the improvements thereon, shall not sell for more than the said sum of $9,600, the sale heretofore made shall, in all respects, stand confirmed; but if the said lot shall sell beyond that sum, then the former sale shall be held to be vacated, and the defendant Henry Fanning, as acting executor aforesaid, together with the said master shall execute a deed in fee to the purchaser, on receiving the consideration money, which moneys shall be received by the said master, and forthwith thereafter brought into court, to be subject to its further disposition; and the question of costs, and all further questions, are, in the meantime, reserved." [1]

[1] See also opinions of Lord CHELMSFORD, in Tate *v.* Williamson, 1866, L. R. 2 Ch. A. C. 55, 60, and of HAND, J., in Cowee *v.* Cornwell, 1878, 75 N. Y. 91, 99, and of TURNER, L.J., in Rhodes *v.* Bate, 1866, L. R. 1 Ch. A. C. 252, 258. Similar principles cover the dealings of an assignee in bankruptcy with the estate; see opinion of Lord ELDON in *Ex parte* James, 1803, 8 Vesey, 337, 349. Nor can a judge who orders the sale be a purchaser. Walton *v.* Torrey, 1841, Harrington's Michigan Chancery Reports, 259; nor can a trustee purchase through a third party, Davoue *v.* Fanning, 1816, 2 Johns. Ch. 252 nor as the agent of another, North Baltimore Building Association *v.* Caldwell, 1866, 25 Maryland, 420. See further Gibson *v.* Barber, 1888, 100 North Carolina, 192. As to a purchase by a mortgagee with a power of sale, see Martinson *v.* Clowes, 1882, 21 Ch. Div. 857; Palmer *v.* Young, 1895, 96 Ga. 246; Alexander *v.* Hill, 1889, 88 Alabama, 487; Bohn *v.* Davis, 1889, 75 Texas, 24. In some jurisdictions the rule that the mortgagee cannot purchase has been changed by statute.

The principles contained in the above cases have been held not to apply where the transaction is not connected with the subject of the trust. Knight *v.* Majoribanks, 1849, 2 Mc. & G. 10; or where a trustee has ceased to act. Munn *v.* Burgess, 1873, 70 Ill. 604. For a discussion of the extent that a trustee must divest himself of his office, see *In re* Bole's and British Land Company's contract [1902] L. R. 1 Ch. 244. "Upon the question as to a purchase by a trustee from the *cestui que trust*, I agree the *cestui* may deal with his trustee so that the trustee may become the purchaser of the estate. But though permitted, it is a transaction of great delicacy, and which the court

ASHTON *v.* THOMPSON.

IN THE SUPREME COURT OF MINNESOTA, 1884.

[32 *Minnesota* 25.]

Plaintiff brought this action in July, 1879, in the district court for Ramsey County against her mother Susan L. Thompson and her uncle Horace Thompson, who had been her guardians, to set aside a settlement and a transfer of property made by her to the former fourteen months after she became of age, and for an accounting.

BERRY, J.[1]

While we have endeavored to duly consider all that was urged by counsel, we have come to the conclusion that the case lies in a comparatively narrow compass, and may fairly and justly be determined by the application of a few well-settled rules of equity. To these we will mainly confine ourselves, without consuming time or space in taking up the positions of counsel in detail.

Upon grounds of public policy, or, as it is otherwise expressed, of public utility, equity exercises a salutary jurisdiction in setting aside donations of property made to a donee who stands in some confidential or fiduciary relation to the donor. The relief granted in such cases rests upon a general principle applicable to all relations in which dominion is exercised by one person over another. Dent *v.* Bennett, 4 Mylne & Cr. 269; 1 Story's Eq. Jur. §§ 307, 308; Rockafellow *v.* Newcombe, 57 Ill. 186. The confidential relation of parent and child, and the fiduciary relation of guardian and ward, are among those in which such relief is frequently granted. Equity looks with special jealousy upon donations from a child to a parent when made recently after the child comes of age, or while he is under the constant and immediate influence of the

will watch with the utmost diligence; so much that it is very hazardous for a trustee to engage in such a transaction. . . . As to the objection to a purchase by the trustee, the answer is that a trustee may buy from a *cestui* provided there is a distinct and clear contract, ascertained to be such after a jealous and scrupulous examination of all the circumstances that the *cestui* intended the trustee should buy; and there is no fraud, no concealment, no advantage taken, by the trustee of information acquired by him in the office of trustee. I think it is a difficult case to make out wherever it is contended that the exception prevails." Per Lord ELDON, in Coles *v.* Trecothick, 1804, 9 Vesey 234, 244, 245. See also Clark *v.* Swaily, 1762, 2 Eden 134; Marshall *v.* Stevens, 1847, 8 Humphreys 159.

[1] GILFILLAN, C.J., and DICKINSON, J., did not hear the argument or take part in the decision of this case.

The facts of the case are omitted and one part of the opinion of the court is given.

parent (as, for instance, residing with him) or while his property is in the parent's possession or control. Wright *v.* Vanderplank, 8 De Gex, M. & G. 133; Baker *v.* Bradley, 7 De Gex, M. & G. 597; Bergen *v.* Udall, 31 Barb. 9; Taylor *v.* Taylor, 8 How. 183; 2 Pom. Eq. Jur. § 961. Donations from a ward to his guardian are regarded with still greater jealousy where the circumstances are such as to give the guardian an ascendency over the ward, for here the natural and mutual ties and obligations between parent and child are wanting, and the position of the guardian is fiduciary. Hylton *v.* Hylton, 2 Ves. Sr. 547; Hatch *v.* Hatch, 9 Ves. 292, and note; Fish *v.* Miller, Hoff. Ch. 267; 2 Pom. Eq. Jur. § 962. Whether the donation be from a child to a parent or by a ward to his guardian, if the donor is so placed as to be subject to the control or influence of the donee, the *onus* is on the parent or guardian (as the case may be) to show that "the transaction is righteous." Gibson *v.* Jeyes, 6 Ves. 266; Hoghton *v.* Hoghton, 15 Beav. 278, 299. In such cases the undue influence is, on grounds of public policy, *prima facie* presumed from the peculiar relations subsisting between the parties. Archer *v.* Hudson, 7 Beav. 551; Hylton *v.* Hylton, *supra;* Hatch *v.* Hatch, *supra;* Kerr on Fraud and Mistake, 178, 179; Williams *v.* Powell, 1 Ired. Eq. 460; Chambers *v.* Crabbe, 34 Beav. 457; Garvin *v.* Williams, 44 Mo. 465; Todd *v.* Grove, 33 Md. 188; Berdoe *v.* Dawson, 34 Beav. 603; Huguenin *v.* Baseley, 2 Lead. Cas. Eq., 556, and notes; 2 Pom. Eq. Jur. §§ 961, 962. Substantially the same rules are applied to the case of an ex-guardian, where, notwithstanding the termination of the formal fiduciary relation between him and his ward, he still retains his dominion in fact and his position of influence as respects the ward or his property. This is especially true where the donations called in question are made while (even after his majority) the ward continues to reside with the ex-guardian, or the ex-guardian continues to retain possession or control of the ward's property. Hylton *v.* Hylton, *supra;* Hatch *v.* Hatch, *supra;* Pierse *v.* Waring, 1 P. Wms. 121, note; 1 Story Eq. Jur. § 317; 2 Pom. Eq. Jur. § 961. In all these cases where the law infers from the relations of the parties the probability of undue influence on the part of the party having dominion or ascendency over another, it requires that the influence in fact exercised shall be exerted for the benefit of the person subject to it, and not for the benefit of the party possessing it, otherwise the donations will be promptly set aside. Hoghton *v.* Hoghton, *supra;* Cooke *v.* Lamotte, 15 Beav. 234. These principles govern the case at bar, and uphold the conclusions of law found by the trial court.

The defendant sustained a double relation to the plaintiff: First, the confidential relation of parent; second, the fiduciary relation of guardian. The plaintiff resided with the defendant as a member of her family, and under her habitual influence and control at the time of the transactions of October 18, 1876, when plaintiff was a little over 20 years old, and up to September, 1877. The agreement of June 26, 1877, was executed by plaintiff, and on her part performed, while she was a member of the de-

fendant's family, wholly dependent upon her for support, and under her habitual influence and control, and while she held in her possession and control the entire property which plaintiff had inherited from her father, and had bestowed upon her as a pure gift, unsupported by any consideration. In fact, with the exception of her momentary possession of the check before mentioned, the plaintiff never had any possession or control of any part of her inheritance until after the execution and performance of the agreement of June 26, 1877. By that agreement the transactions of October 18, 1876, were overhauled, and a portion of the plaintiff's inheritance restored to her; but nevertheless defendant retained, took, and held a considerable part thereof, of the value of several thousand dollars, in addition to the check of $6,482.95, all for no consideration other than the release of a dower right of the value of $2,000. That the transaction of October 18, 1876, was a "righteous" one, and ought ever to have been consummated or be permitted to stand, is hardly claimed. That it ought to be set aside is manifest upon the plainest principles of equity.

Upon the findings of fact, the case is clearly one of the use of undue influence by the plaintiff in obtaining that which she ought not to have, and should not be permitted to retain. The facts hardly present the case of a family settlement, such as are referred to by defendant's counsel. There was no dispute as to legitimacy,—no ground for any controversy or difference of opinion as to the plaintiff's rights as her father's heir. These latter were explicitly and definitely fixed by statute. Nor was there any family settlement, or attempt at one, in the sense of making provision for other members of the family, defendant excepted. See Chambers *v.* Crabbe, 34 Beav. 457; 1 Story Eq. Jur. § 309a.

Defendant's counsel have laid much stress upon the fact, as they claim it, that defendant, in the transaction of June, 1877, had the benefit of competent and independent advice. The court has found the fact otherwise, and we are not prepared to say that the finding is not sustained by the testimony. But if this were not so, and the fact was that the plaintiff had competent and independent advice in the premises, the question would still remain whether, she and her property being under the dominion and control of the defendant, the plaintiff acted under the advice, or under influence of the defendant unduly and improperly exerted for her own advantage. An analogous remark would be applicable to plaintiff's knowledge and appreciation of her rights, and of what she was doing. As remarked by Lord ELDON, p. 300, the crucial question in cases of this kind "is not whether she knew what she was doing, had done, or proposed to do, but how the intention was produced; whether all that care and prudence was placed around her, as against those who advised her, which, from their situation and relation with respect to her, they were bound to exert in her behalf." Huguenin *v.* Baseley, 14 Ves. 273; Hoghton *v.* Hoghton, *supra.*

The order refusing to vacate the decision below and to grant a new trial is affirmed.

E. Duress.

THOMAS DE YORK *v.* THOMAS DE CROP.

Chancery, 1337.

[*Selden Society Reprints, Select Cases in Chancery, No.* 134.]

To the Chancellor of our Lord the King,

Prayeth Thomas de York, that whereas he knoweth how to work by the science of alchemy and to make silver in plate, and hath done so in the presence of worthy folk of London, and the silver hath been assayed by the goldsmiths of the same City, and found gold, there came one Thomas Crop of London, grocer, and made himself known to the said Thomas de York, so much so that he got him to carry his instruments and his elixir to his (Crop's) house, and got him to work in his house before him; and when the said Thomas Crop perceived the science thereof, wishing to have the said Thomas de York in danger, he, by collusion between himself and others of the City, imprisoned the said Thomas de York in the house of the said Thomas Crop in London, and there made him sign a bond in 100 marks to the said Thomas Crop, as on an account rendered (?), and afterwards another bond for the like sum and in the same form; and thus, by virtue of these bonds, the said Thomas Crop hath caused the said Thomas de York to be arrested and imprisoned in Newgate, and detaineth his elixir and his other instruments and other goods and chattels, to the value of £40; whereof the said Thomas de York prayeth for God's sake that (the Chancellor) will be pleased to order his deliverance and to make the said Thomas Crop come with the elixir and the instruments aforesaid, so that he (the plaintiff) may work and prove his science before them (? the Council) or any others whom it may please the King to assign, and that the false bonds may be cancelled.

Indorsed. Before the King and the Great Council.

Let the Mayor of London, Sir Robert de Scarborough and Sir William Scot, or two of them, be assigned to sit in S. Martin's (?), and inquire as to the truth of the things contained in the said petition, and (hear?) and terminate the trespass, and further to do what the law demands; and, if the said Thomas de York shall find good and sufficient surety to sue this matter diligently, and to remove the said Thomas de York (back) to prison in case he cannot prove his contention, let him have a writ to the same Justices to let him to bail on the surety aforesaid.

MANERIGHT *v.* ROBERTS.

IN CHANCERY, 1612-13.

[*Tothill* 170.]

A man relieved against his own deed, the same being gotten by threats and practice, though the same be vested in an infant, and the purchaser to become bound in recognizance to assure it, when, etc.

COSSART & DUTRIE *v.* SOTHON, ET UX.

IN CHANCERY, BEFORE LORD KEEPER COWPER, 1705.

[2 *Vernon* 497.]

One Costell having made several wills, and therein devised £600 to a French, and the like sum to a Dutch church; but after his decease there being no will to be found, defendant Sothon, his nephew and next of kin, applied to the prerogative for administration; but being opposed there by the relations, who were named executors, in one or more wills made by Costell, the cause, whether the defendant should have administration or not, depended eighteen months in the prerogative. At last the defendant was told, he should have administration; but that it was expected, he should give bond to pay the £300 to each of the said churches. The bond is read in open court, and then sentence is pronounced. After this the relators appealed to the delegates, and there the sentence was confirmed.

The original bill was to have the benefit of the bond, or note given for the payment of the £300 to each church; and the cross bill was to have the bond or note delivered up to be cancelled, as being unduly gained.

Lord Keeper. The question is, whether the bond was given freely and voluntarily, or by compulsion; if by force or terror, though not so as to make it *per dures,* it ought to be set aside, or at least not carried into an execution. A judge may fairly mediate an accommodation; but not put terms upon pronouncing sentence, or giving judgment. *Nulli vendemus, nulli differemus, justitiam,* says *magna charta.*

There being proofs in the cause, that there were such wills once made; and likewise it appearing by the proofs, that the testator had afterwards changed his mind, thereupon the Lord Keeper declared, he was not satisfied to decree a performance or execution of the bond, nor to set it aside; and dismissed both bills, leaving the relators to their remedy at law. Reg. Lib. 1704. A. fol. 342.

BROWN *v.* PIERCE.

IN THE SUPREME COURT OF THE UNITED STATES, 1868.

[7 *Wallace* 205.]

Error to the Supreme Court of Nebraska Territory.

The prayer was, that the deed might be declared void, and Pierce be decreed to reconvey, and for general relief.

The bill was taken *pro confesso* as to all the defendants, except Morton, who answered.

The court below declared Brown's deed void, and decreed a reconveyance from Pierce to him, and that neither Morton nor Weston had any lien on the premises. Morton now brought the case here for review.

Mr. Justice CLIFFORD delivered the opinion of the the court.

Representations of the complainant were, that on the tenth of August, 1857, he acquired a complete title to the premises described in the bill of complaint, under the pre-emption laws of the United States, and that thereafter, on the same day, he was compelled, through threats of personal violence and fear of his life, to convey the same, without any consideration, to the principal respondent. Framed on that theory, the bill of complaint alleged that the first-named respondent was at that time a member of an unlawful association in that Territory, called the Omaha Claim Club, and that he, accompanied by three or four other persons belonging to that association, came to his house a few days before he perfected his right of pre-emption to the land in question, and told the complainant that if he entered the land under his pre-emption claim, he must agree to deed the same to him, and added, that unless he did so, he, the said respondent and his associates, would take his life; and the complainant further alleged, that the same respondent, accompanied as before, by certain other members of that association, came again to his house on the day he perfected his pre-emption claim, and repeated those threats of personal violence, and did other acts to intimidate him, and induce him to believe that they would carry out their threats if he refused to execute the deed as required.

Based upon those allegations, the charge is that the complainant was put in duress by those threats and acts of intimidation, and that he signed and executed the deed, and conveyed the land by means of those threats and certain acts of intimidation; and through fear of his life and without any consideration; and he prayed the court that the conveyance might be decreed to be inoperative and void, and that the grantee might be required to reconvey the same to the complainant.

Two other persons were made respondents, as claiming some interest in the land in controversy. Pierce, the principal respondent, and

Weston, one of the other respondents, were non-residents, and were served by publication pursuant to the rules of the court and the law of the jurisdiction. They never appeared, and failing to plead, answer, or demur, and due proof of publication in the manner prescribed by law having been filed in court, a decree was rendered as to them, that the bill of complaint be taken as confessed. Nations et al. *v.* Johnson et al., 24 Howard, 201.

Morton, the other respondent, appeared and filed an answer, in which he alleged that the principal respondent, on the twenty-eighth of August, 1857, and for a long time before, was the owner in fee of the premises; that he was informed, and believed, that the complainant entered upon the land as the tenant of the principal respondent [Pierce], and that he was prosecuting this suit in violation of the just rights of all the respondents; that the principal respondent wanted to borrow money, he, the respondent before the court, loaned him a large sum, and accepted bills of exchange for the payment of the same, drawn to the order of the borrower of the money, and which were indorsed by the drawer; that the bills of exchange not having been paid when they became due, he brought suit against the drawer and indorser, and recovered judgment against him for three thousand one hundred dollars; that the judgment so recovered is in full force and unsatisfied, and that the same is a lien on the premises described in the bill of complaint.

No answer, from any knowledge possessed by the respondent, is made to the allegation that the complainant acquired a complete title to the land under the pre-emption laws of the United States, nor to the charge contained in the bill of complaint, that the deed was procured by threats of personal violence amounting to actual duress. On the contrary, the answer alleged that the respondent before the court was an utter stranger to all those matters and things, and that he could not answer concerning the same, because he had no information or belief upon the subject.

Proofs were taken by the complainant, and they show, to the entire satisfaction of the court, that all the matters alleged in the bill of complaint, and not denied in the answer, are true, and the conclusion of the court below was, that the complainant acquired a complete title to the land under his pre-emption claim, and that the deed from him to the principal respondent was procured in the manner and by the means alleged in the bill of complaint.

Nothing is exhibited in the record to support any different conclusion, or to warrant any different decree, unless it be found in one or the other of the first two defences set up in the answer.

First defence is, that the principal respondent, on the 28th of August, 1857, and long before that time, was the owner in fee of the premises; but neither that part of the answer, nor any other, denied that the complainant acquired a complete title to the land, as alleged in the bill of complaint, nor set up any defence in avoidance of those allegations, nor

made any attempt to present any defence against the direct charge, that the deed under which the respondent claimed title was procured from the complainant through threats of personal violence and by means of duress. Indefinite as the allegation of title is, the answer must be construed as referring to the title under the deed in controversy, as it is not pretended that the respondent ever had any other, and, if viewed in that light, it is in no respect inconsistent with the conclusion adopted by the Supreme Court of the Territory.

Such an indefinite allegation cannot be considered as presenting any sufficient answer, either to the alleged title of the complainant or to the charge made in the bill of complaint.

Briefly stated, the second defence set up in the answer is, that the respondent was informed and believed that the complainant entered upon the land as a tenant, but the time when the supposed entry was made is not alleged, nor are the circumstances attending the entry set forth, nor is any reason assigned why the allegations were not made more definite, nor is there any fact or circumstance alleged which shows or tends to show that there was any prior owner to the land, except the United States, nor that the respondent ever pretended to have any other title to the same than that derived from the complainant.

Viewed in any light, those allegations must be regarded as evasive and insufficient; and they are not helped by the omission of the complainant to file the general replication. Those parts of the answer being laid out of the case as insufficient to constitute a defence, the conclusion is inevitable that the title to the land was in the complainant as alleged, and that he parted with it through threats of personal violence and by duress, and without any consideration.

Argument to show that a deed or other written obligation or contract, procured by means of duress, is inoperative and void, is hardly required, as the proposition is not denied by the respondent. Actual violence is not necessary to constitute duress, even at common law, as understood in the parent country, because consent is the very essence of a contract, and, if there be compulsion, there is no actual consent, and moral compulsion, such as that produced by threats to take life or to inflict great bodily harm, as well as that produced by imprisonment, is everywhere regarded as sufficient, in law, to destroy free agency, without which there can be no contract, because, in that state of the case, there is no consent.

Duress, in its more extended sense, means that degree of constraint or danger, either actually inflicted or threatened and impending, which is sufficient, in severity or in apprehension, to overcome the mind and will of a person of ordinary firmness. Chitty on Contracts, 217; 2 Greenleaf on Evidence, 283.

Text-writers usually divide the subject into two classes, namely, duress *per minas* and duress of imprisonment, and that classification was uniformly adopted in the early history of the common law, and is generally

preserved in the decisions of the English courts to the present time. 2 Institutes, 482; 2 Rolle's Abridgment, 124.

Where there is an arrest for an improper purpose, without just cause, or where there is an arrest for a just cause, but without lawful authority, or for a just cause, but for an unlawful purpose, even though under proper process, it may be construed as duress of imprisonment; and if the person arrested execute a contract or pay money for his release, he may avoid the contract as one procured by duress, or may recover back the money in an action for money had and received. Richardson *v.* Duncan, 3 New Hampshire, 508; Watkins *v.* Baird, 6 Massachusetts, 511; Strong *v.* Grannis, 26 Barbour, 124.

Second class, duress *per minas,* as defined at common law, is where the party enters into a contract (1) For fear of loss of life; (2) For fear of loss of limb; (3) For fear of mayhem; (4) For fear of imprisonment; and many modern decisions of the courts of that country still restrict the operations of the rule within those limits. 3 Bacon's Abridgment, title "Duress," 252.

They deny that contracts procured by menace of a mere battery to the person, or of trespass to lands, or loss of goods, can be avoided on that account, and the reason assigned for this qualification of the rule is, that such threats are held not to be of a nature to overcome the mind and will of a firm and prudent man, because it is said that if such an injury is inflicted, sufficient and adequate redress may be obtained in a suit at law.

Cases to the same effect may be found also in the reports of decisions in this country, and some of our text-writers have adopted the rule, that it is only where the threats uttered excite fear of death, or of great bodily harm, or unlawful imprisonment, that a contract, so procured, can be avoided, because, as such courts and authors say, the person threatened with slight injury to the person, or with loss of property, ought to have sufficient resolution to resist such a threat, and to rely upon the law for his remedy. Skeate *v.* Beale, 11 Adolphus & Ellis, 983; Atlee *v.* Backhouse, 3 Meeson & Welsby, 642; Smith *v.* Monteith, 13 Id. 438; Shepherd's Touchstone, 6; 1 Parsons on Contracts, 393.

On the other hand, there are many American decisions, of high authority, which adopt a more liberal rule, and hold that contracts procured by threats of battery to the person, or the destruction of property, may be avoided on the ground of duress, because in such a case there is nothing but the form of a contract, without the substance. Foshay *v.* Ferguson, 5 Hill, 158; Central Bank *v.* Copeland, 18 Maryland, 317; Eadie *v.* Slimmon, 26 New York, 12; 1 Story's Equity Jurisprudence, 9th ed., 239; Harmony *v.* Bingham, 12 New York, 99; S. C., 1 Duer, 229; Fleetwood *v.* New York, 2 Sandford, 475; Tutt *v.* Ide, 3 Blatchford, 250; Astley *v.* Reynolds, 2 Strange, 915; Brown *v.* Peck, 2 Wisconsin, 277; Oates *v.* Hudson, 5 English Law and Equity, 469.

But the case under consideration presents no question for decision

which requires the court to determine which class of those cases is correct, as they all agree in the rule that a contract procured through fear of loss of life, produced by the threats of the other party to the contract, wants the essential element of consent, and that it may be avoided for duress, which is sufficient to dispose of the present controversy.[1] 2 Greenleaf on Evidence, 283; 1 Blackstone's Commentaries, 131.

Next question which arises in the case is whether the judgment set up by the appellant creates a superior equity in his favor over that alleged and proved by the appellee.

Express decision of this court is that the lien of a judgment constitutes no property in the land, that it is merely a general lien securing a preference over subsequently acquired interests in the property, but the settled rule in chancery is, that a general lien is controlled in such courts so as to protect the rights of those who were previously entitled to an equitable interest in the lands, or in the proceeds thereof.

Specific liens stand upon a different footing but it is well settled that a judgment creates only a general lien, and that the judgment creditor acquires thereby no higher or better right to the property or assets of the debtor, than the debtor himself had when the judgment was rendered, unless he can show some fraud or collusion to impair his rights. Drake on Attachments, § 223.

Correct statement of the rule is, that the lien of a judgment creates a preference over subsequently acquired rights, but in equity it does not attach to the mere legal title to the land, as existing in the defendant at its rendition, to the exclusion of a prior equitable title in a third person. Howe, petitioner, 1 Paige's Chancery 128; Ells *v.* Tousley, ib. 283; White *v.* Carpenter, 2 Paige 219; Buchan *v.* Sumner, 2 Barbour's Chancery 181; Lounsbury *v.* Purdy, 11 Barbour 494; Keirsted *v.* Avery, 4 Paige's Chancery 15.

Guided by these considerations, the court of chancery will protect the equitable rights of third persons against the legal lien, and will limit that lien to the actual interest which the judgment debtor had in the estate at the time the judgment was rendered. Averill *v.* Loucks, 6 Barbour 27. Decree affirmed.

[1] For an excellent statement of the origin of duress in equity, see Galusha *v.* Sherman, 1900, 105 Wis. 263. It would seem that originally the imprisonment to avoid a contract must in itself have been illegal. Anonymous, 1672, 1 Levinz 68; it would seem, however, that a contract can be avoided if the arrest is made without just cause and for motives that the law does not sanction, Osborne *v.* Robins, 1867, 36 N. Y. 365; or without lawful authority, Stepney *v.* Lloyd, 1598, Cro. Eliz. 647; or under lawful authority with cause for an improper purpose, *Semble* Richardson *v.* Duncan, 1826, 3 N. H. 386; Fillman *v.* Ryon, 1895, 168 Penn. St. 484; Hackett *v.* King, 1863, 6 Allen 58; Insurance Company *v.* Kirkpatrick, *et al*, 1895, 111 Alabama, 456. See also Adams *v.* Irving National Bank, 1889, 116 N. Y. 606. To make out the defence of duress of imprisonment it must appear that the party's action has been in-

THE TOWN OF SHARON *v.* GAGER AND ANOTHER.

IN THE SUPREME COURT OF ERRORS OF CONNECTICUT, 1878.
[46 *Connecticut* 189.]

Bill for the foreclosure of a mortgage; brought to the Superior Court in Litchfield County.[1]

D. J. Warner and D. T. Warner, with whom was C. F. Sedgwick, for the petitioners.

1. Julia Gager, the mortgagor, is not found by the committee to have been incompetent or insane, but on the contrary to have been a person of average native powers, and of more than average culture and refinement. Clearly from the facts found it does not appear that at the time of executing the mortgage she was under *duress per minas*. To constitute *duress per minas* the threats of injury must be offered to the party executing the deed, and not to a third party. A surety cannot plead the duress of his principal. 1 Parsons on Cont., 393, note v; 1 Swift Dig. 311; Smith *v.* Rowley, 66 Barb. 502. In the last case cited, and similar to the one at issue, A, charged by B with embezzling from him, C, the wife of A, at his request and upon an understanding with B that he would refrain from prosecuting her husband, executed a conveyance of real estate to him (B), and this without any other compulsion or duress than that arising out of the circumstances of the case. Held that this did not amount to legal duress. Where a party threatened with arrest and imprisonment by legal process, when in fact no ground existed for a criminal arrest, gave a note for a just claim, it was held that the threats were no defence, and did not constitute duress. Knapp *v.* Hyde, 60 Barb., 80. As appears from the finding Miss Gager had ample time to consider the matter of giving a mortgage. 1st. She was informed by Samuel Gager of the facts of his own defalcation and the request of Mr. Chapman; 2d. She was again informed by Chapman of the same matters; and 3d. Still later in the presence of Sedgwick she solemnly executed the deed according to law without objection and of her own free act and deed.

2. There was a sufficient consideration for the deed. It was clearly Mr. Chapman's duty to secure the debt due the town from Samuel Gager. He requested Samuel to lay the facts before his aunt, and he did so fully, and thereby he impliedly requested her to assist him in the matter, she being the only member of the Gager family, as found by the committee, having property and who could secure the debt. It was cer-

fluenced by the restraint. . . . The question is one of fact, whether he was coerced or acted willingly." Per COOLEY, J., in Fuller *v.* Green, 1872, 26 Mich. 70.

[1] The statement of the case is omitted, as the facts appear sufficiently in the first paragraph of the opinion.

tainly a proper thing for the selectman, after he was informed by Samuel that he had seen her and told her the facts in the matter, to personally make the same request of her. He practiced no fraud upon her. It certainly was true that Samuel was a defaulter, and although Chapman was honestly mistaken as to the extent of Samuel's liability to punishment, yet it is true that his body was liable to attachment and imprisonment, he being a public officer. Gen. Statutes, 460, sec. 28. The burden rests upon the respondents to show that there was any fraud upon the part of Chapman. This they failed to do, as the committee reports none. Forbearance to institute legal proceedings is a good consideration. By the execution of the mortgage Samuel was saved from the disgrace of having an execution levied upon his body and suffering imprisonment. 1 Swift Dig. 189; 1 Parsons on Cont. 440, 443; Chitty on Cont., 33; Pratt *v.* Humphrey, 22 Conn. 322.

3. The deed was not absolutely void for want of consideration, or on account of duress, but only voidable. Mere threatening a lawsuit is no duress. 1 Parsons on Cont. 395; 3 Washb. R. Prop., book 3, ch. 4, sec. 1, art. 25; Evans *v.* Gale, 18 N. Hamp. 401. The petitioners claim that Julia Gager, by the recitals in her two mortgage deeds to Bartram and Church respectively, both executed subsequently to the mortgage in question, stating that the Bartram and Church mortgages were subject to the mortgage deed to the town of Sharon, ratified and confirmed in the most solemn manner her former act in executing the mortgage to the town, and is estopped by these recitals from avoiding the deed on account of duress, or want of consideration. A party executing a deed is estopped by the recital of a particular fact in that deed to deny the fact. 1 Swift Dig. 621; 2 Parsons on Cont. 789. Where a person executed a deed while incompetent from disease, but acquiesced in it when he had recovered, it was held that this amounted to a confirmation. Jones *v.* Evans, 7 Dana. 96.

C. B. Andrews, for the respondents.

1. Miss Gager at the time she executed and delivered the mortgage was not a free agent. She was under duress. She was coerced into giving the deed. The facts found clearly show this. Where the party in such a case is not a free agent and is not equal to protecting himself, the court will protect him. This is the constant rule in equity. 1 Story Eq. Jur. § 234; Crowe *v.* Ballard, 1 Ves. Jr. 215, 220; Hawes *v.* Wyatt, 3 Brown Cha. 158. Equity will set aside a contract entered into by a party in extreme distress, whenever there are any circumstances of oppression, fraudulent advantage or imposition attendant upon it. Smith's Manual of Equity 69; Snell's Eq. 395; Gould *v.* Okeden, 3 Brown P. C. 560; Wood *v.* Aubrey, 3 Madd. Ch. 417; Pickett *v.* Loggon, 14 Ves. 215; Beasley *v.* Magrath, 2 Sch. & Lef. 31; Evans *v.* Llewellyn, 1 Cox 340; Boyse *v.* Rossborough, 6 H. L. Cas. 2, 49; Williams *v.* Bayley, L. Reps. 1 H. L. Cas. 200. If deeds are obtained by the exercise of undue influence over a person whose mind is not a

safe guide to his actions, it is against conscience for him who has obtained such a deed to derive any advantage from it. That a court of equity will interpose in such a case, is among its best settled principles. Harding *v.* Wheaton, 2 Mason 378, 386; Harding *v.* Handy, 11 Wheat. 125; Whelan *v.* Whelan, 3 Cowen 537, 572; Fermor's Case, 3 Coke 77, 78.

2. The subsequent deeds cannot be regarded as a confirmation unless it is shown that she was aware of the invalidity of the first one, and that she had independent advice concerning them. Hoxie *v.* Home Ins. Co., 32 Conn. 21, 40; Kempson *v.* Ashbee, L. Reps., 10 Ch. App. 15; Allore *v.* Jewell, 94 U. S. Reps. 512.

3. But giving the petitioners the most favorable construction which they can claim under the finding, the transaction between Chapman and Miss Gager was an arrangement to stifle a prosecution. Public policy will not permit the petitioners to reap any advantage from such an arrangement. Walbridge *v.* Arnold, 21 Conn., 424.

PARDEE, J. An elderly woman, feeble in body, of an excitable temperament, and habitually relying upon the judgment of others in matters of business, is informed by her nephew, who had been reared in the family of which she was a member, and to whom she was greatly attached, that he was a defaulter to the town; this announcement is presently followed by a declaration from Mr. Chapman, the selectman, that the nephew had exposed himself to a criminal prosecution and punishment in the state prison, and that, unless she immediately secured the town against loss, criminal proceedings would on that day be instituted against him. He left her greatly agitated in her mind, and within about half an hour returned with an attorney and offered the mortgage in question for her signature. She signed it without time for deliberation, and without the advice of counsel or friends.

The finding makes it certain that Mr. Chapman believed, and intentionally produced in the mind of Miss Gager the belief, that her nephew had exposed himself to a criminal prosecution; that such prosecution would be immediately commenced unless she executed the mortgage; that the execution of the mortgage would stifle it; and that he knew that she executed it for that purpose solely. For reasons of public policy a court of equity will refuse to enforce a contract of suretyship entered into under such circumstances.

In Williams *v.* Bayley, 1 L. R., Eng. & Irish Appeals, House of Lords 200, one Bayley obtained money from the plaintiffs by forging his father's name. Upon discovery they insisted (though without any direct threat of a prosecution), on a settlement, to which the father was to be a party; he consented, and executed an agreement to make an equitable mortgage of his property. Held, that the agreement was invalid. The Lord Chancellor said: "But here was a pressure of this nature. We have the means of prosecuting, and so transporting, your son. Do you choose to come to his help and take on yourself the amount

of his debts, the amount of these forgeries? If you do, we will not prosecute; if you do not, we will. That is the plain interpretation of what passed. Is that, or is it not, legal? In my opinion, my lords, I am bound to go the length of saying that I do not think it is legal." Lord CHELMSFORD said: "The defence of the bankers being rested entirely on these two grounds, as I have already said, in my opinion this negotiation proceeded upon an understanding between the parties that the agreement of James Bayley to give security for the notes would relieve William Bayley from the consequences of his criminal act; and the fears of the father were stimulated and operated on to an extent to deprive him of free agency, and to extort an agreement from him for the benefit of the bankers. It appears to me therefore that the case comes within the principles on which a court of equity proceeds in setting aside an agreement where there is inequality between the parties, and one of them takes unfair advantage of the situation of the other, and uses undue influence to force an agreement from him." Lord WESTBURY said: "What remained, then, as a motive for the father? The only motive to induce him to adopt the debt, was the hope that by so doing he would relieve his son from the inevitable consequences of his crime. The question therefore, my lords, is, whether a father appealed to under such circumstances to take upon himself an amount of civil liability, with the knowledge that, unless he does so, his son will be exposed to a criminal prosecution, with the certainty of conviction, can be regarded as a free and voluntary agent? I have no hesitation in saying that no man is safe, or ought to be safe, who takes a security for the debt of a felon, from the father of a felon, under such circumstances. A contract to give security for the debt of another, which is a contract without consideration, is, above all things, a contract that should be based upon the free and voluntary agency of the individual who enters into it. But it is clear that the power of considering whether he ought to do it or not, whether it is prudent to do it or not, is altogether taken away from a father who is brought into the situation of either refusing, and leaving his son in that perilous condition, or of taking on himself the amount of that civil obligation."

The petitioner says that Mr. Chapman erred in his belief that the default of the nephew was punishable as an offence. This being so, the deed has no better foundation than a mistaken belief as to facts, produced by the erroneous statement made and persisted in by the agent of the town, and therefore it should be set aside.

In Davies *v.* London & Provincial Marine Ins. Co., L. Reps. Chancery Div., Vol. 8, 469, the officers of a company, believing that the retention of money by one of their agents amounted to a felony, directed his arrest. Certain friends of his came to the officers of the company and proposed to deposit a sum of money by way of security for any deficiency. On the same day the company was advised that the acts of the agent did not amount to felony, and the directions for the arrest were withdrawn.

Later in the day the friends of the agent had a second interview with the officers of the company, and agreed to deposit a sum of money as security for his defaults, no mention being made of the withdrawal of the directions for the arrest. The sum of money was afterwards deposited with trustees on an agreement for the security of the company. Held that the change of circumstances ought to have been stated to the intending sureties, and that the agreement must be rescinded and the money returned to the sureties. FRY, J., said: "But I do think that the contract of suretyship is, as expressed by Lord WESTBURY in Williams *v.* Bayley, L. R., 1 H. L. 200, one which should be based upon the free and voluntary agency of the individual who enters into it. I think that principle especially applicable here, because there is no consideration in this case, as in many cases of suretyship, for the contract so entered into; and therefore I think, to use the language of Lord ELDON in Turner *v.* Harvey, Jac. 169, it is a contract in respect of which a very little is sufficient. Very little said which ought not to have been said, and very little not said which ought to have been said, would be sufficient to prevent the contract being valid. It is one, furthermore, in which I think that everything like pressure used by the intending creditor will have a very serious effect on the validity of the contract; and the case is stronger where that pressure is the result of maintaining a false conclusion in the mind of the person pressed."

We advise the Supreme Court to dismiss the petition.

In this opinion the other judges concurred.[1]

[1] See Davies *v.* The Insurance Company, 1878, L. R. 8 Ch. Div. 469; and Foley *v.* Green, 1885, 14 R. I. 618, where a mother secured the cancellation of a bond and mortgage which she had given to protect her son from a charge of embezzlement. See, as in accord with the principal case, Harrington *v.* Grant, 1881, 54 Vt. 236; Daniels *v.* Benedict, 1892, 50 Fed. 347; but see Kahn *v.* Walton, 1889, 46 Ohio State, 195; Atwood *v.* Fisk, 1869, 101 Mass. 363. For a further discussion of this subject see on the question the admirable case of The City National Bank of Dayton *v.* Kushworm, 1894, 88 Wis. 188. So where a grantor has under duress conveyed in fraud of creditors, equity will grant a reconveyance, Anderson's Administrators *v.* Meredith, 1885, 82 Ky. 564; Austin *v.* Winston, 1806, Va. 1 H. & M. 32; 3 American Decisions 583; Bump, Fraudulent Conveyances, 2d edition, 422. For interesting discussions of this doctrine in its relation to quasi-contracts, see Osborne *v.* Williams, 1811, 18 Vesey, 379; Ford *v.* Harrington, 1857, 16 N. Y. 285; Schoener *v.* Lissaner, 1887, 107 N. Y. 111; Hinsdill *v.* White, 1861, 34 Vt. 558; or where fraud has been used, see Webb *v.* Fulchiri, 1843, 3 Iredell's L. R. 485; Catts *v.* Phelan, 1844, 2 How. U. S. 376; *In re* Arnold, 1904, 133 Fed. 789.

F. MISREPRESENTATIONS AND MISCONDUCT OF DEFENDANT.

EDWARDS *v.* McLEAY AND OTHERS.

IN CHANCERY, BEFORE SIR WILLIAM GRANT, M. R., 1815.

[*George Cooper's Chancery* 308.]

In May, 1811, the defendants representing themselves to be seised or entitled in fee-simple, or to have full power and authority to dispose of the fee-simple and inheritance of a messuage, stables, coachhouse, lands, and hereditaments, at Clapham, contracted to sell the same to the plaintiff for £5,390; and by indentures of the 24th and 25th May, 1811, the same were conveyed to him. The plaintiff afterwards laid out a considerable sum of money in repairs upon the house and premises. Soon after the completion of the purchase, he discovered that part of the forecourt, and of the driving-way or road leading up to the house, together with the whole of the ground upon which the coachhouse and stables stood, had been formerly part of Clapham Common; and were in 1781, enclosed and taken from the Common. The bill charged that the defendants were aware of the above circumstance, and not having disclosed the same to the plaintiff, were guilty of a gross fraud and imposition upon him, and that the plaintiff could not have discovered it from the abstract; and the bill therefore prayed that the contract might be declared void; and that the defendants might be compelled to repay to the plaintiff his purchase money, and what he had laid out on the premises with interest.

The case was argued by Mr. Leach and Mr. Spranger for the plaintiff, and by Mr. Hart and Mr. Shadwell for the defendants. It had stood a considerable time for judgment, and on the above day, the Master of the Rolls gave a written judgment as follows:

This is a bill of rather an unusual description. It is brought by the purchaser of an estate, who has had a conveyance made to him, for the purpose of setting aside the sale, and getting back his purchase money, on the ground of an alleged misrepresentation with regard to the title to a part of such estate.

It cannot certainly be contended that by the law of this country, the insufficiency of a title, even when producing actual eviction, necessarily furnishes a ground for claiming restitution of the purchase money. By the civil law it was otherwise. By our law a vendor is, in general, liable only to the extent of his covenants. But it has never been laid down, that on the subject of title, there can be no such misrepresentation as will give the purchaser a right to claim a relief to which the covenants do not extend. In the case of Urmston *v.* Pate, there was no ingredient of fraud. Both parties misapprehended the law. The vendor had no knowl-

edge of any fact which he withheld from the purchaser. In the case of Bree *v.* Holbech, Dougl. Rep. 630, it did not at all appear that the party knew that the mortgage which he assigned was a forgery. Lord MANSFIELD says, "if he had discovered the forgery, and had then got rid of the deed as a true security, the case would have been very different." And the plaintiff had leave to amend his replication, in case upon inquiry, the facts would support a charge of fraud.

Whether it would be a fraud to offer as good a title which the vendor knows to be defective in point of law, it is not necessary to determine. But if he knows and conceals a fact material to the validity of the title, I am not aware of any principle on which relief can be refused to the purchaser. What then is the case made by this plaintiff? He states that the vendors represented themselves to be seized or entitled in fee-simple, or to have full power and authority to dispose of the fee-simple and inheritance of the whole and every part of the premises offered to him for sale without exception, as to any part whatsoever thereof; whereas, in truth there was a considerable part of those premises to which the vendors had no title, or at least no other title than was derived from a possession, from about the year 1781, of what had been a portion of the waste or common of the Manor of Clapham. He asserts that the vendors knew that the part in question was an enclosure from the Common—that they did not disclose the fact to him, and that he could not discover it from the abstract. He also asserts that this part of the purchased premises is material to the convenient enjoyment of the rest.

The defendants admit that they did make such representation as is stated, with respect to the whole of the premises—they say they do not believe that any of those premises ever did compose part of the Common; but supposing the fact to be otherwise, they deny that such fact was within their knowledge. They admit that no such fact appeared on the abstract, and they also admit the part in dispute to be material to the convenient enjoyment of the rest of the premises sold.

The points then on which the parties are at issue, are only these two. Was this at any time a part of the Common? Was it known by the defendants so to have been? I say these are the only two points, because I do not find it asserted in the answer, that, supposing the ground in question to have been really taken from the Common, the defendants have acquired, or have any means of making, a good title to it.

As to the first, I think it very fully proved, that down to about the year 1781, this piece of ground made a part of the Common. Whether a little sooner or a little later is not very material; but it seems sufficiently ascertained, that it was in that year that Mr. Thornton, the then owner of the house bought by the plaintiff, for the first time separated this spot from the rest of the Common. According to the usual progress of an encroachment it was first enclosed with a slight fence or low paling, a passage across it being left open; the fence or paling was afterwards raised; and finally the whole encroachment was surrounded

with a brick wall. On the other side it is not attempted to be shewn, that, prior to the year 1781, this ground was in any way appurtenant to the adjoining house, or had been in the exclusive occupation of any person whatever.

Then as the second point there is a considerable body of evidence, partly direct and partly circumstantial, tending to shew that Mr. Prescott, one of the vendors, and who acted for the rest, must have known that this had been Common, and had at different times been claimed by the parish as such.

What is the result of all this evidence? Not indeed that Mr. Prescott knew, of his own knowledge that this had been part of the Common, or that he had with his own eyes seen the encroachment made, but that he had so much information on the subject as made it altogether improper and unfair to represent to a purchaser, as it is admitted he and the other vendors did, that they were seised or entitled in fee simple, or had full power and authority to dispose of the fee simple and inheritance of the whole and every part without exception of the premises, which they offered to the plaintiff for sale.

The only other objection which the defendants make to the relief sought by the bill is that the plaintiff is premature in his application, inasmuch as it has not yet been evicted, and may perhaps never be evicted. But I apprehend that a court of equity has quite ground enough to act upon, and that it ought now to relieve the plaintiff from the consequences of the fraud practised upon him. It may be true that the Commoners are barred by having acquiesced for more than twenty years in the inclosure. But the Lord will not be conclusively barred till sixty years shall have elapsed. I have already observed that the defendants do not pretend that there is any circumstance from which a title in them can be inferred, supposing the fact established that this made part of the Common. Though the Lord may never assert his right, is the plaintiff to be compelled to remain for twenty-five years longer in a state of uncertainty whether on any day during that period he may not have the convenience of his habitation entirely destroyed. I apprehend the court is bound to relieve him from that state of hazard into which the misrepresentation of the defendants has brought him.

There must therefore be a degree for setting aside the sale, and repaying the purchase money with costs. The defendants must likewise pay to the plaintiff all the expenses he has been put to, relative to the sale; and he must have an allowance for any money he laid out in repairs during the time he was in possession.[1]

[1] On appeal before Lord ELDON, his lordship said: "Having read the pleadings, I am entirely of opinion the decree is substantially right. . . . The case reverses itself into this question, whether the representation made to the plaintiff was not, in the sense in which we use the term, fraudulent? I am not apprised of any such decision, but I agree with the Master of the Rolls that if one party makes a representation which he knows to be false, but the false-

SLAUGHTER'S ADMINISTRATOR *v.* GERSON.

IN THE SUPREME COURT OF THE UNITED STATES, 1871.

[13 *Wallace* 379.]

Appeal from the Circuit Court for the district of Maryland.

This was a suit in equity to enforce the lien of two mortgages upon two steamers. The case was thus:

On the 12th of July, 1864, one Slaughter, since deceased, purchased of the complainant, Gerson, a steamboat named the George Law, for the consideration of $40,000. Of this sum he paid $15,000 in cash, and for the balance gave to Gerson his bond, conditioned to pay the same in two instalments of $12,500 each in three and six months thereafter. To secure the payment of these sums he at the same time executed to Gerson two mortgages, one upon the steamboat which he purchased, and the other upon a steamboat named the Chester, which he formerly owned. The first instalment on the boat not being paid at its maturity, the present bill was filed to enforce the mortgages by a sale of the steamboats, and the application of the proceeds to the demand of the complainant.

The answer of the defendant admitted the execution of the bond and mortgages, but set up, as a defence to their enforcement, that they were obtained from him by misrepresentation and fraud, and set forth the particulars in which such alleged misrepresentation and fraud consisted.

The substantial averments in this respect were these: That the defendant had established a line of steamboats from Baltimore to various landings on Chester River, on the Eastern Shore of Maryland, and landings on tributaries to that river; that the most important of these landings was at Queenstown; that no boat drawing more than three and one-half feet of water could reach the wharf at this place except in case of an extraordinary high tide; that he purchased the George Law of the complainant for this route, upon a representation that it drew only this number of feet when fully laden; that this representation was false and fraudulent, and that the steamer, when placed on the route, grounded upon her first trip in five feet or water; and that, so soon as precise information was obtained of this fact, the defendant called upon the complainant to cancel the contract, offering at the same time to return the steamboat purchased, but the complainant refused to comply with this proposition.

hood of which the other party had no means of knowing, this court will rescind the contract. In principle, therefore, the decree is right." Edwards *v.* McLeay, 1818, 2 Swans. 287, 288.

Mr. Justice FIELD delivered the opinion of the court.

A large amount of evidence was taken in this case bearing upon the averments in the answer of misrepresentation and fraud on the part of the complainant; and it is, in many respects conflicting. But the rules of law applicable to cases of alleged misrepresentation by a vendor with respect to property sold are well settled, and render of easy solution the questions upon which this case must turn.

The misrepresentation which will vitiate a contract of sale, and prevent a court of equity from aiding its enforcement, must not only relate to a material matter constituting an inducement to the contract, but it must relate to a matter respecting which the complaining party did not possess at hand the means of knowledge; and it must be a misrepresentation upon which he relied, and by which he was actually misled to his injury. A court of equity will not undertake, any more than a court of law, to relieve a party from the consequences of his own inattention and carelessness. Where the means of knowledge are at hand and equally available to both parties, and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of these means and opportunities, he will not be heard to say that he has been deceived by the vendor's misrepresentation. If, having eyes, he will not see matters directly before them, where no concealment is made or attempted, he will not be entitled to favorable consideration when he complains that he has suffered from his own voluntary blindness, and been misled by overconfidence in the statements of another. And the same rule obtains when the complaining party does not rely upon the misrepresentations, but seeks from other quarters means of verification of the statements made, and acts upon the information thus obtained.

The facts disclosed by the uncontradicted testimony of both parties bring this case clearly within the principle here stated. Previous to the execution of the contract of purchase, and with the view of examining the steamboat, the defendant went from Baltimore to New York, taking with him his son, who subsequently became captain of the boat, and two ship carpenters, and a square to measure her draught of water. Whilst there every opportunity was given him to examine the boat with his carpenters, and a most thorough and careful examination was made by them. On two occasions they measured the draught of the boat, and they witnessed her speed by accompanying her on one of her trips. The owner went with them to the boat on their arrival in New York, and told them to look for themselves, and to go anywhere they pleased about her. If, under these circumstances, the defendant did not learn everything about her, and ascertain her true draught, it was his own fault, and it would be against the plainest principles of justice to allow him to set up, in impeachment of the validity of his contract, loose statements respecting the draught before its execution, even though they were false in point of fact.

In Atwood *v.* Small, 6 Clark & Finelly, 232, a case which received

great consideration in the House of Lords, the defendant had sold to the complainants, constituting a company of numerous persons, certain freehold and leasehold property, including mines and ironworks, and had made certain statements respecting the capabilities of the property. The purchasers, not relying upon these statements, deputed some of their directors, together with experienced agents, to ascertain the correctness of his statements. These persons examined the property and works and the accounts kept by the defendant, receiving from him and his agents every facility and aid for that purpose, and they reported that the defendant's statements were correct. Upon a bill filed to rescind the contract, on the ground of fraud, the House of Lords decided that the contract could not be rescinded, reversing, in that respect, the decree of the Court of Exchequer, not merely because there was no proof of fraud, but because the purchasers did not rely upon the vendor's statements, but tested their accuracy; and, after having knowledge, or the means of knowledge, declared that they were satisfied of their correctness, holding that if a purchaser, choosing to judge for himself, did not avail himself of the knowledge, or means of knowledge, open to him or to his agents, he could not be heard to say he was deceived by the vendor's representations, the doctrine of *caveat emptor* applying in such case, and the knowledge of his own agents being as binding as his own knowledge.

The doctrine, substantially as we have stated it, is laid down in numerous adjudications. Where the means of information are at hand and equally open to both parties, and no concealment is made or attempted, the language of the cases is, that the misrepresentation furnishes no ground for a court of equity to refuse to enforce the contract of the parties. The neglect of the purchaser to avail himself, in all such cases, of the means of information, whether attributable to his indolence or credulity, takes from him all just claim for relief.

We have thus far assumed that the evidence in the case before us discloses false representations on the part of the vendor, but justice to him requires us to say that the evidence is insufficient to warrant this conclusion. The vendor stated to the purchaser that he was not a steamboat man, meaning evidently, from the context, that he was not familiar with the particulars in regard to which the purchaser desired information, and referred him to the statements of the captain, at the same time inviting him and his party to examine the boat in every particular. The measurement made by one of his carpenters showed that the boat drew four feet and six inches of water at midships whilst lying unloaded at the dock. The measurement by the other carpenter showed that the boat then drew, forward and aft, three feet and six inches, and both of these measurements were reported to the defendant, and the latter was accompained by the declaration that the boat drew too much water for his purpose. The captain of the boat also took the defendant on to the dock, by which the boat was lying, and pointed out to him that she was coppered three feet and nine inches from the keel, and that she then

showed only three inches out of water, and, of course, that she then drew, forward and aft, unloaded, three feet and six inches. The purchase was thus made by the defendant, with his eyes open, after every opportunity had been afforded him for the inspection of the vessel.

Decree affirmed.[1]

[1] In Hicks *v.* Stevens, 1887, 121 Ill. 186, the court said in a careful opinion: "When a party ignorant of the real facts, and having no ready means of information, makes a purchase or enters into a transaction, as to the subject-matter of which representations have been made which are material, the law will presume, as a matter of fact, that he relied on them. Redgrave *v.* Hurd, 20 L. R. Ch. D. 1; Nichols' case, 3 DeG. & J. 387; Fishback *v.* Miller, 15 Nev. 428; Benjamin on Sales 4th Am. Ed. 465, note b.

"If false representations are made as to matters of fact, and the means of knowledge are at hand, and equally available to both parties, and the purchaser, instead of resorting to them trusts the vendor, the law, as a general rule, will not relieve him from his own want of ordinary prudence. Cooley on Torts, 487. This is the case where the property is tangible and is at hand, and subject to inspection. But a different rule obtains when the property is at a remote distance, or where the property right is intangible, and the falsity of the representations cannot be detected by inspection. In Smith *v.* Richard, 13 Pet. 26, it is held that when a sale is made of property, but at a remote distance, which the purchaser knows that the seller has never seen, but which he buys upon the representation of the seller, relying on its truth, such representation, in effect, must be deemed to amount to a warranty, or at least that the seller is bound to make it good. Cooley on Torts, 488; Maggart *v.* Freeman, 27 Ind. 531; Lester *v.* Mahan, 25 Ala. 445."

In Farnsworth *v.* Duffner, 1891, 142 U. S. 43, Mr. Justice BREWER, in delivering the opinion of the court, said: "This is a suit for the rescission of a contract of purchase, and to recover the moneys paid thereon, on the ground that it was induced by the false and fraudulent representations of the vendors. In respect to such an action it has been laid down by many authorities that, where the means of knowledge respecting the matters falsely represented are equally open to purchaser and vendor, the former is charged with knowledge of all that by the use of such means he could have ascertained. In Slaughter's Administrator *v.* Gerson, 13 Wall. 379, 383, this court said: 'Where the means of knowledge are at hand and equally available to both parties, and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of these means and opportunities, he will not be heard to say that he has been deceived by the vendor's misrepresentations. If, having eyes, he will not see matters directly before them, where no concealment is made or attempted, he will not be entitled to favorable consideration when he complains that he has suffered from his own voluntary blindness, and been misled by overconfidence in the statements of another. And the same rule obtains when the complaining party does not rely upon the misrepresentation, but seeks from other quarters means of verification of the statements made, and acts upon the information thus obtained.' See also Southern Development Co. *v.* Silva, 125 U. S. 247; Farrar *v.* Churchill, 135 U. S. 609. In Ludington *v.* Renick, 7 West Va. 273, it was held that 'a party seeking the rescission of a contract, on the ground of misrepresentations,

FAIRCHILD, APPELLANT, *v.* McMAHON, RESPONDENT.

IN THE COURT OF APPEALS OF NEW YORK, 1893

[139 *New York* 290.]

Appeal from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made July 22, 1892, which affirmed a judgment in favor of defendant entered upon a decision of the court on trial at Special Term.

This action was brought for the foreclosure of a mortgage.

The facts, so far as material, are stated in the opinion.

O'BRIEN, J. The plaintiff sought to foreclose a mortgage assigned to her, before the commencement of the action, executed and delivered by the defendant upon certain real estate of which she was the owner, subject to other mortgage liens, and bearing date April 30th, 1890, for $1,500, payable one year from date, with semi-annual interest. The mortgage was given to one Joseph H. Cain, with whom the negotiations and transactions which resulted in its execution and delivery were had, or with agents acting for him or in his interest. The defense is fraud practiced upon the defendant, by means of which she was induced to make and deliver the mortgage and the accompanying bond. The

must establish the same by clear and irrefragable evidence; and if it appears that he has resorted to the proper means of verification, so as to show that he in fact relied upon his own inquiries, or if the means of investigation and verification were at hand, and his attention drawn to them, relief will be denied.' In the case of Atwood *v.* Small, decided by the House of Lords, and reported in 6 Cl. and Finn, 232, 233, it is held that 'if a purchaser, choosing to judge for himself, does not avail himself of the knowledge or means of knowledge open to him or to his agents, he cannot be heard to say he was deceived by the vendor's representations.' And in 2 Pomeroy's Equity Jurisprudence, section 892, it is declared that a party is not justified in relying upon representations made to him—'1. When, before entering into the contract or other transaction, he actually resorts to the proper means of ascertaining the truth and verifying the statement. 2. When, having the opportunity of making such examination, he is charged with the knowledge which he necessarily would have obtained if he had prosecuted it with diligence. 3. When the representation is concerning generalities equally within the knowledge or the means of acquiring knowledge possessed by both parties.'

"But if the neglect to make reasonable examinations would preclude a party from rescinding a contract on the ground of false and fraudulent representations, *a fortiori* is he precluded when it appears that he did make such examination, and relied on the evidences furnished by such examination, and not upon the representations."

A view contrary to the principal case is well stated in Wilson *v.* Carpenter, 1895, 91 Va. 183: "When the seller has made a false representation, which,

facts to sustain this defense are stated with considerable detail, the substance of which, in brief, is as follows:

On the 9th of April, prior to the execution of the mortgage, the defendant, through her husband acting for her, entered into an agreement with Cain to exchange real estate. Each owned a house and lot incumbered by mortgage, the equity of redemption in which was to be conveyed to the other, and the agreement was actually carried out by the execution and delivery of proper conveyances. The mortgage in question was executed and delivered in pursuance of this agreement. It is alleged, in substance, that one Yoran, the plaintiff's son, was the principal actor in the transaction and the real party to be benefited. That though the record title to the real estate to be conveyed to the defendant was in Cain, yet his title was nominal, as his name was simply used by Yoran in the purchase of the property and in the negotiations for its sale to the defendant and in the conveyance. It is then charged in substance that Yoran, Cain and their broker, and another broker employed by and acting for the defendant's husband, her agent, conspired together to cheat and defraud the defendant by false and fraudulent representations concerning the value and condition of the house which the defendant by the agreement was to receive in exchange for her property, and which she subsequently conveyed, and that, in reliance upon the truth of the statements, she, through her husband, entered into and executed the agreement and made the exchange. It is further averred that upon discovery of the fraud the defendant offered to rescind the whole transaction. The courts below have sustained the defense, and the charges of fraud and other facts alleged by the defendant are found by the learned trial judge to be substantially true. The testimony upon the issues of fact was very con-

from its nature, might induce the buyer to enter into the contract on the faith of it, it will be inferred that the buyer was induced thereby to contract, and it does not rest with him to show that he, in fact, relied upon the representation. In order to displace this inference, the seller must prove either that the buyer had knowledge of facts which showed the representation to be untrue, or that he expressly stated in terms, or showed by his contract, that he did not rely upon the representation, but acted upon his own judgment.

"Nor is the buyer deprived of his right to relief because he had the means of discovering that the representation was false. Redgrave *v.* Hurd, 20 Ch. Div. 1, quoted in Benj. Sales, p. 499."

In Turner *v.* Houpt, 1895, 53 N. J. Eq. 526, PITNEY, V.C., after a careful and painstaking examination of the authorities, said: "I think the true rule to be deduced from the cases is that where a positively false and fraudulent descriptive statement has been made by the vendor, and an examination of the premises has been made by the purchaser before the contract was entered into, such examination by the purchaser can only avail the vendor as evidence more or less cogent, according to the circumstances, that the purchaser did not, in fact, rely in any material degree upon such false representation, but is not conclusive on that point."

flicting, but after considering it with all the circumstances we are unable to say that any of the findings material to the defense and challenged by exception are without support, and, therefore, feel concluded by them as to the facts.

There are one or two questions of law, however, that should be noticed. One of the false representations made by Yoran and his broker to the defendant's husband, as appeared from the findings, which was relied upon, and which influenced her action in making the exchange and giving the bond and mortgage in suit, and upon which the finding of fraud is based, was that the house and lot transferred to the defendant in the exchange was worth $15,000. That Cain had just purchased it at the price of $12,000 from the executors of the deceased owners, who were compelled to sell at a price below the real value, and that such was the consideration expressed in the deed to him from the executors as would appear from the record in the county clerk's office.

It is further found that the defendant's husband, before entering into the transaction, did examine the deed in the clerk's office under which Cain took the title, and that it appeared from the same that the consideration was $12,000, and that the defendant and her husband believed the statement. That while it was true that the consideration stated in the deed was $12,000, it was not true that the real consideration paid was that sum, but, on the contrary, the fact was that about twenty-four days before the transaction Yoran had purchased the property for $7,000, which was its true value, and had taken the deed in the name of Cain, expressing a fictitious consideration for the purpose of deceiving investors, and that the defendant had procured the consideration to be falsely stated in the deed. This finding raises the question whether a false statement, deliberately made by a party about to sell property to the party about to purchase it, with respect to the price which he had paid for it to a former owner, is a sufficient basis upon which to predicate a finding of fraud, when the statement is relied upon by the party to whom made.

It has been held that a false statement by a vendor to a vendee concerning the value of property about to be sold will not sustain an action for fraud, but the vendee in such cases must rely on his own judgment. Ellis *v.* Andrews, 56 N. Y. 83.

It may be that the rule in such cases would be different if the purchaser was prevented by any act or artifice of the seller from exercising his judgment in ascertaining the value.

But the question here is not one arising out of a representation as to value. The representation was with respect to a fact which might, in the ordinary course of business, influence the action and control the judgment of the purchaser, namely, the price paid for the property about to be sold by the vendor, within less than a month prior to the transaction; and so we think that a false statement with respect to the price paid under such circumstances, which is intended to influence the

purchaser and does influence him, constitutes a sufficient basis for a finding of fraud.

It was so held in Sandford *v.* Handy, 23 Wend. 260, where a new trial was granted to the plaintiff in an action of this character on the ground that proof of such representations was improperly excluded at the trial. Ch. J. NELSON, delivering the opinion of the court (p. 269), said:

"I am also inclined to think that any misrepresentation as to the actual cost of the property is a material fact, and naturally calculated to mislead the purchaser. . . . Misrepresentation as to the cost of an article stands somewhat on the same footing. It is a material fact, which not only tends to enhance the value, but gives to it a firmness and effect beyond the force of mere opinion.

"The vendor is not bound to speak on the subject, but if he does, I think he should speak the truth."

The same principle received the sanction of the court in Van Epps *v.* Harrison, 5 Hill 63, and is apparently recognized in Smith *v.* Countryman, 30 N. Y. 655; Hammond *v.* Pennock, 61 id. 151, and Goldenbergh *v.* Hoffman, 69 id. 326.

There is another question in the case as to how far these statements as to the cost of the property made by a broker employed by Yoran can bind the plaintiff or Cain, her assignor. But it sufficiently appears that Yoran used Cain's name in the transactions with his consent, and that he also employed the broker to sell the property or negotiate the agreement for an exchange. All persons who acted for or in the name of Cain, or with his consent, in bringing about the transaction must now be deemed to be his agents, and as he accepted the fruits of their efforts in this regard and took the title to the bond and mortgage, which was a part of the result of their negotiations, and transferred them to the plaintiff, all the methods employed by either Yoran or his broker to procure the agreement for an exchange and the mortgage in suit are imputable to the person in whose name they acted, and who voluntarily received the securities thus procured. He could not, even though innocent, receive a mortgage thus procured and at the same time disclaim responsibility for the fraud by means of which the defendant was induced to deliver it. Krumm *v.* Beach, 96 N. Y. 398. The findings imply that the broker was the general agent of Cain, and as such his statements bound his principal, and those findings are sustained by the evidence.

The plaintiff took no other or different title to the bond and mortgage than Cain had. The record discloses no estoppel or other principle of equity which can protect the plaintiff against any defense which might have been urged if the securities had remained in the hands of the original parties.

We have examined the other exceptions in the case, and as they do not present any question requiring discussion or any error that affects the judgment, it should be affirmed with costs.

All concur.

Judgment affirmed.

WAINSCOTT, RESPONDENT, *v.* THE OCCIDENTAL BUILDING AND LOAN ASSOCIATION, APPELLANT.

IN THE SUPREME COURT OF CALIFORNIA, 1893.

[98 *California* 253.]

Appeal from a judgment of the Superior Court of Placer County, and from an order denying a new trial.

The facts are stated in the opinion.

SEARLS, C. This is an action for the rescission of certain conveyances and instruments connected therewith, growing out of an exchange of property owned by plaintiff in the County of Placer, for a tract of land with vineyard thereon, etc., owned by defendant, situated at Sonoma, in the County of Sonoma. The action is based upon false and fraudulent representations of defendant and its agents, whereby plaintiff is averred to have been defrauded. Plaintiff had judgment, from which and from an order denying a new trial defendant prosecutes an appeal. The first point made by appellant is that the complaint does not allege, and the court does not find, that the plaintiff was damaged, and hence that the findings do not support the judgment. In view of the doctrine enunciated by elementary writers, and fully concurred in by the courts of probably every State of the Union, it will be readily admitted on all hands that "courts of justice do not act as mere tribunals of conscience to enforce duties which are purely moral, and involving no pecuniary or tangible injury. Falsehood, fraud, and deceit are not to be commended, but so long as their practice only involves a question of morals, the duty of their extirpation rests elsewhere than in the courts; but when they are made use of in the business transactions of life to accomplish a fraudulent purpose, as against those having a right to rely upon their truthfulness, and who do so rely and are thereby deceived and injured, courts intervene to redress the wrong and injury. The reproof of the moral delinquency is but an incident, an attending circumstance, of the paramount object, viz., the redress of the injury. It is said in such cases: "If any pecuniary loss is shown to have resulted, the court will not inquire into the extent of the injury; it is sufficient if the party misled has been very slightly prejudiced, if the amount is at all appreciable." Pomeroy's Equity Jurisprudence, § 898, and cases cited.

Does the complaint and findings of the court show that plaintiff was damaged?

Damage is defined to be "loss, injury, or deterioration, caused by the negligence, design, or accident of one person to another in respect to the latter's person or property." Black's Law Dict., tit. "Damage." The plural of the word "damages" signifies a compensation in money for a loss or damage. This action is not one to recover damages, a money com-

pensation. Doubtless, if plaintiff has a cause of action he could have affirmed the contract and sued for damages. He has however, elected to seek a cancellation for the injury, the damage, sustained.

A reference to a portion only of the findings, which follow substantially the allegations of the complaint, but are in some respects more full and explicit, will, it is thought, suffice to settle the question of damage.

1. Defendant was and since December, 1888, had been the owner of the property conveyed to plaintiff.

2. In May, 1890, its agent represented to plaintiff that he, as agent, but without disclosing his principal, had authority to dispose of the property for one Pickett, who lived upon the land as a tenant of defendant, and who wished to sell by reason of his advanced age.

3. That the tract contained forty-three acres, when in fact it contained but thirty-seven acres, a street being included in the enclosure.

4. That thirty-eight acres were set out in a vineyard with foreign varieties of grapes; that eight tons per acre was not an uncommon yield of grapes from these vines per annum; that the vines are healthy and free from phylloxera; that the place had yielded an average income for ten years of two thousand two hundred dollars per year, over and above all expenses, whereas the truth was that the vineyard had not produced more than eighteen to twenty tons of grapes per annum for several years; the vines had been attacked by phylloxera and other pests until three-fourths of them were dead, and the gross annual income had, for the last five or six years, gradually decreased from one thousand dollars to six hundred dollars, which was little more than the expense of cultivation; that the vineyard was practically valueless, and had been leased to Pickett for the year 1890, who received the whole crop for taking care of the vineyard.

5. These and other statements were false, and known by defendant to be so when made, and were made with intent to deceive and defraud plaintiff. The latter relied upon their truthfulness, and was deceived and defrauded thereby into agreeing to purchase and in purchasing the property.

It is hard to realize, in the face of these facts, that the plaintiff was not injured to the extent of many thousand dollars. The injury is shown to the court by the complaint and findings, and, although the technical word "damage" is not used, the record is replete with apt expressions of like import and significance. We find nothing in the cases cited under this head in conflict with the views expressed. Wainwright *v.* Weske, 82 Cal. 193, passed off upon the sufficiency of the complaint, and the court held in substance: 1. That treated as an action to rescind a contract, it was fatally defective in not showing an offer on the part of plaintiff to return certain money received by the plaintiff from defendant. 2. That viewed as an action to recover damages, it was lacking in several elements essential to a recovery.

He who would recover damages in a court of law must set forth in an

orderly manner the facts showing his right to recover, and the amount to which he is entitled, to the exclusion of every presumption to the contrary. In such an action the damages are the essential thing. In an action to rescind, upon the ground of fraud, the fraud is the essential thing, and while it must be coupled with loss, injury, damage, the precise amount of such damage is of secondary importance. Had plaintiff, in Wainwright *v.* Weske, averred a tender of the money received by him, and demanded the return of his notes and property, his complaint would have contained sufficient to entitle him to rescission of the agreement. Morrison *v.* Lods, 39 Cal. 385; Bailey *v.* Fox, 78 Cal. 398; Marriner *v.* Dennison, 78 Cal. 202; Purdy *v.* Bullard, 41 Cal. 444, differed in essential particulars from the case in hand.

The second position taken by appellant is that no matter what representations are made in reference to the character and value of property by a vendor, if the purchaser visit the property itself, it being land, prior to the sale, and makes a personal examination of it touching those representations, he will be presumed to rely, not upon the representations, but upon his own judgment in making the purchase. Farrar *v.* Churchill, 135 U. S. 609, sustains the proposition contended for, but in the same connection it is proper to say that this rule must be taken subject to the proviso that the vendor does nothing to prevent his investigation from being as full as he chooses. Southern Development Co. *v.* Silva, 125 U. S. 259.

The findings show that on May 5, 1890, plaintiff with an employee of defendant's agent visited the vineyard, but that at that time the vines, except a few acres of Tokays, were not sufficiently developed for any person, not an expert vineyardist, to learn their condition, except by close and critical examination, or by inquiring of those who knew their condition; that plaintiff was prevented by the deceit and misrepresentations of the employee from making a critical or close examination of the vineyard, and from speaking to or inquiring of the former owner (who was on the premises at the time), and who well knew the facts, it being represented that the former owner's wife was opposed to leaving the place, and if the plaintiff talked to her she was liable to break up the trade, and much more tending to satisfy and prevent any examination. At a later period, and before the deeds were executed, similar artifices were resorted to with good effect to prevent plaintiff from again visiting the vineyard as he desired to do, and that, too, when an examination would have demonstrated the worthless condition of the vines.

Taken all in all, it is not made to appear that defendant should escape from the effect of the judgment. The offer to rescind was full and complete, and included a return of everything to which the defendant was entitled.

The rules applicable to cases of this character are succinctly stated by FULLER, C.J., in Southern Development Co. *v.* Silva, 125 U. S. 250, as follows: "That defendant has made a representation in regard to a

material fact. 2. That such representation is false. 3. That such representation was not actually believed by the defendant on reasonable grounds to be true. 4. That it was made with intent that it should be acted on. 5. That it was acted on by complainant to his damage; and 6. That in so acting on it the complainant was ignorant of its falsity, and reasonably believed it to be true."

These rules, properly construed, exclude such statements as consist merely of the expression of opinions or judgment honestly entertained, and, save in exceptional cases, also opinions and statements of vendor in respect to value.

Tested in the light of these propositions, the judgment and order appealed from are correct and should be affirmed.

VANCLIEF, C., and HAYNES, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

MC FARLAND, J., FITZGERALD, J., DEHAVEN, J.

Hearing in bank denied.

G. FRAUDS ON THIRD PARTIES.

GALE *v.* LINDO.

IN CHANCERY, BEFORE LORD CHANCELLOR JEFFREYS, 1687.

[1 *Vernon* 475.]

The case was that when a marriage was treating between one Gringer, and the sister of William Pitman, the woman not having so great a portion as the man insisted upon, she prevails with her brother Pitman to let her have £160 to make up her portion, and gave him bond for repayment of it; and thereupon the marriage was had: and the husband, who knew nothing of the bond, died without issue, and his wife survived him, and afterwards died having made her will, and the plaintiff executor. William Pitman the brother dies, and makes the defendant his executor, who put the bond in suit against the plaintiff, as executor of the widow, to recover back the £160 and thereupon he brings his bill to be relieved.

For the defendant it was insisted, that although this might be a fraud, as against the husband or any issue of his, who were to have the benefit of the marriage agreement; yet the husband being dead, and there being no issue, this bond is good against the woman herself, and by consequence against her executor, there being no creditors in the case, or any deficiency of assets pretended.

LORD CHANCELLOR. You admit the husband might have been relieved on a bill brought by him and his wife; that which was once a fraud, will be always so; and the accident of the woman's surviving the husband will not better the case. Decreed the bond to be delivered up, and a perpetual injunction against it.

Quare. If the condition of the bond had been, that in case the woman survived her husband, that she should repay it, whether she could have been relieved?[1]

LILES *v.* TERRY AND WIFE.

IN THE COURT OF APPEALS, 1895.

[*Law Reports,* 2 *Queen's Bench* (1895) 679.]

Appeal from the judgment of CHARLES, J., without a jury.

The action was brought to set aside a deed dated October 18, 1892, and made between the plaintiff Jane Liles of the one part, and John Frederick Terry (the male defendant) of the other part, whereby the plaintiff, in consideration of the natural love and affection she had toward Mary Rose Terry (the female defendant), assigned to the said J. F. Terry two leasehold houses in the parish of St. Mary, Newington, subject to the payment of the rent and performance of the covenants under the lease, in trust to pay the rents and profits to the plaintiff during her life, and after her death to her sister, Francis Hogg, widow (who had died before the action was brought), during her life, and after her death upon trust for the said Mary Rose Terry, for her separate use and benefit absolutely.

The facts were as follows:

The male defendant was a solicitor. The female defendant was his wife and the niece of the plaintiff. It appeared that the plaintiff, who was a spinster of about seventy-seven years of age, had been engaged in litigation with respect to property of which the houses assigned by the deed in question formed part, and had said that she would leave the houses by will to Mrs. Hogg, the female defendant's mother, for life, and after her death to the female defendant, if the male defendant would act as her solicitor in the matter without making any charge, and he had accordingly so acted. Subsequently the plaintiff saw the male defendant, and told him that she desired to make her will. On October 18, 1892,

[1] For cases based on analogous principles, see Payton *v.* Bladwell, 1684, 1 Vernon, 240; Redmond *v.* Redmond, 1685, 1 Vernon, 348.

"It is laid down as a rule in equity that where a son, without the privity of the father, or parent treating the match, gives a bond to return or refund any part of the portion, it is void." Per Lord Chancellor COWPER, in Kemp *v.* Coleman, 1708, 1 Salk. 156.

she went to a boarding house in London, at which the male defendant was then staying, for the purpose of executing her will. The defendant then produced a will which he had caused to be prepared, and she executed it. By this will, which did not mention the houses in question, the plaintiff, after bequeathing certain legacies, devised and bequeathed the residue of her real and personal property to her four nieces. The male defendant then produced the deed in question and asked her to sign it, which she did. She stated in her evidence that she asked what it was, and he told her that it was a separate deed for the two houses; and that she then said that she did not understand why it was not all in one paper. She further stated that she was not asked whether she would have independent professional advice in the matter, and that the deed was not read over or its contents explained to her, and that she was not told that the deed was irrevocable, and did not understand it to be so. On the other hand, a witness named Pearson, an architect, unconnected with the parties, who was staying at the boarding house and was present when the deed was executed, was called for the defendants, and stated that the male defendant told the plaintiff that one of the documents which he had brought was a will, and the other a deed, and explained the effect of them to her, and that she then signed them, and said she was glad the matter was settled. The male defendant was not able to give evidence at the trial on account of his mental condition. It was contended for the plaintiff at the trial that the deed was invalid, being a voluntary conveyance in favor of the wife of the assignor's solicitor; and further, that, even if it were not a voluntary conveyance, such a conveyance was invalid, the assignor not having had independent professional advice in making it.

The learned judge came to the conclusion upon the evidence that there was nothing to show any undue influence or unprofessional conduct on the part of the male defendant; that the plaintiff had had the matter thoroughly explained to her, and that her intention was to have it carried out by the deed she executed. He held, on the authority of Price *v.* Jenkins, that the assignment was not voluntary, because it imposed on the assignee a liability in respect of the rent of the premises and the covenants in the lease; and that, there having been nothing in the nature of undue influence or deception, but the whole matter having been fully and fairly explained to the plaintiff, who in the learned judge's opinion thoroughly understood what she was doing, and did it with the intention of benefiting her niece, the deed was not invalid. He therefore gave judgment for the defendants.

Lord ESHER, M. R. In this case the question appears to me to be whether by virtue of a definite rule of equity, the court is bound to set aside this conveyance which has been executed by the plaintiff. I take the facts in truth to have been, and the learned judge appears to me to have found, that the plaintiff, when she signed this deed, intended to do so with the effect of making an assignment of this property in favor of

her niece, the wife of the solicitor, and that she knew that she could not afterward alter it and intended to bind herself irrevocably by it. I think the learned judge has found, and I believe it to be the truth, that the difference between a deed which would have that effect and a will which would be revocable was fairly and fully explained by the solicitor to her before she executed the deed, so that she did precisely what she intended to do, and that no undue influence whatever was exercised over her. Although that was the case, and although she executed the deed, as I believe, not with the intention of benefiting the solicitor, whom in point of law it did not benefit, but with the exclusive intention of benefiting her niece, yet, as I understand the doctrine laid down by the courts of equity on the subject, there is a positive rule of equity to the effect that, because the solicitor who acted in relation to the execution of the deed was the husband of the plaintiff's niece, and the plaintiff had not the advice of an independent solicitor, therefore the gift which the plaintiff intended to make for the benefit of her niece was invalid; or in other words, according to the authorities by which the rule of equity on the subject is determined, there is in such a case a legal presumption of undue influence by the solicitor which cannot be met or rebutted by any evidence. It appears to me that that is the rule on the subject which has been laid down in the cases to which we have been referred, such as Rhodes *v.* Bate, L. R. 1 Ch. 252. I must submit to that rule. I own that I think it unfortunate that such a rule should have been laid down, because in particular instances it may work great injustice; and I do not think that a hard and fast rule which may work such injustice ought to be the rule of law in the matter. But I feel bound by the authorities to hold that there is such a rule in equity. On that ground only, and believing the facts as found by the learned judge to be the truth of the matter, I think the female defendant must lose the benefit which the plaintiff, her aunt, intended to confer upon her, and this appeal must be allowed.

LOPES, L. J. I have come to the same conclusion. I am sorry to differ from any view expressed by the Master of Rolls, but I must differ from his comment on the rule of equity on this subject. I cannot consider it an unfortunate rule. It appears to me to be a hard and fast rule which is founded on public policy. In exceptional cases it may possibly work hardship; but in the generality of cases it is in my opinion highly beneficial, and I should regret to see it altered. I think the cases establish the rule that such a gift as this made by a client to his solicitor, whilst the relation of solicitor and client, or any influence arising from it exists, is invalid. The relation of solictor and client must be entirely at an end before such a gift can be validly made. I do not think that evidence of any explanation by the solicitor of the document or any assistance given by him to enable the client to understand the effect of it is of any avail to prevent the application of this general rule. What the solicitor ought in such a case to do is to suggest to the client that in order to make the gift effectual the client should procure independent professional advice.

I will not refer to the authorities that have been cited at length. The judgment of TURNER, L. J., in Rhodes *v.* Bate, L. R. 1 Ch. 252, at p. 257, seems to me to show that the rule on the subject is inflexible. He says: "I take it to be a well-established principle of this court, that persons standing in a confidential relation toward others cannot entitle themselves to hold benefits which those others may have conferred upon them, unless they can show to the satisfaction of the court that the persons by whom the benefits have been conferred had competent and independent advice in conferring them." In the view I take it is unnecessary to discuss the effect of the evidence in this case. I am not prepared, however, to say that I should come to the same conclusion as the Master of the Rolls as to the effect of it; but that is immaterial, because we are acting on the rule which I have mentioned. It appears to me clear from the cases that no distinction can be recognized between a gift made to a solicitor himself and one made to his wife. It is obvious that a solicitor might benefit largely by a gift to his wife, and there would be a similar temptation to exercise undue influence in respect of such a gift. The wife might make over the property to him the day after it had been given to her. For these reasons I think this appeal must be allowed.

KAY, L. J. I must say with deference that I cannot agree with the view expressed by the Master of the Rolls with regard to the rule of equity on this matter. It appears to me to be a rule of public policy of great importance that, while a person is under the influence or presumed influence of another person in consequence of a confidential relation between them, that other person cannot accept from him a gift of any kind, unless it is shown to have been made with competent independent advice, which I take to mean independent advice of a professional nature. The rule on the subject is laid down by Lord ERSKINE in Wright *v.* Proud, 13 Ves. 136, thus: "So, independently of all fraud, an attorney shall not take a gift from his client, while the relation subsists; though the transaction may be not only free from fraud, but the most moral in its nature." Lord ELDON, dealing with the same subject in Hatch *v.* Hatch, 9 Ves. 292, says: "This case proves the wisdom of the court in saying it is almost impossible in the course of the connection of guardian and ward, attorney and client, trustee and *cestui que trust* that a transaction shall stand purporting to be bounty for the execution of antecedent duty." It may be observed that there is a slight difference between these two statements of the rule. In the earlier case it is said that an attorney shall not take a gift from his client; whereas Lord ELDON says it is almost impossible that the transaction shall stand. But what was said by TURNER, L. J., in Rhodes *v.* Bate, L. R. 1 Ch. 252, seems to explain this slight difference between the two statements. He there says that in the case of merely trifling gifts the court would not interfere to set them aside upon the mere fact of a confidential relation and the absence of proof of competent and independent advice. But with regard to all other gifts he lays it down as a strict rule that "persons standing in a confidential relation

toward others cannot entitle themselves to hold benefits which those others may have conferred upon them, unless they can show to the satisfaction of the court that the persons by whom the benefits have been conferred had competent and independent advice in conferring them." I cannot conceive a wiser rule than this, or one more calculated in most cases to ensure the observance of justice and equity between parties in such a confidential relation. It applies to the case of trustee and *cestui que trust,* to that of guardian and ward, and pre-eminently to that of a solicitor and his client, who is necessarily so much under the influence of his solicitor. A solicitor to whom such a gift is offered ought to know the rule on the subject; and, being of necessity in a position which renders him liable to so much suspicion, he ought to inform his client that he should not make such a gift without independent advice, and that the client should not carry out the matter through him as solicitor, but should go to another solicitor. If he chooses to act himself in the matter, I think there is an imperative rule that such a gift is invalid. In this case the gift was to the solicitor's wife, and not to the solicitor himself; but the decision of the Court of Exchequer in the case of Goddard *v.* Carlisle, 9 Price 169, which has never been disputed, lays it down that there is no difference for this purpose between a gift to a man's wife and one immediately to himself, if the gift to the wife be effected by undue influence on the part of the husband. The principle is that, while the confidential relation exists, it is impossible to rebut the presumption of undue influence unless the donor had competent and independent advice. This presumption exists as much when the gift is made to the wife as when it is made to the solicitor himself.

I confess I do not take the same view of the evidence in this case as the Master of the Rolls. It appears that the plaintiff had given a previous intimation that, in consequence of work having been done for her gratuitously by the solicitor, she intended to leave these houses to his wife—that is to say, to leave them by a will, which is a revocable instrument. All that such a statement would amount to is that her then present intention was to make that revocable instrument in favor of the solicitor's wife. Having instructed him to make a will, she has an interview with him for the purpose of signing the will; and he then brings forward a deed, which she had given him no instructions to draw, disposing of those houses in favor of his wife. The plaintiff says that she asked why one document would not do, and that she never understood that the deed was not a revocable instrument. The solicitor himself was at the time of the trial in a state of mind that precluded him from being called as a witness; but there was the evidence of another person who was present when the deed was executed. He was not a friend of the plaintiff, but merely happened to be present. He was called for the defendants. He did not say that the plaintiff was told that the deed would be irrevocable; all he said was that the deed was explained to her. If I had been the judge, I should have come to the conclusion that

she never did know the difference in this respect between a deed and a will. I do not think that it is to be presumed that this old lady had that knowledge, unless the matter was explained to her. All this took place when she went to sign a will; and I do not think it was clearly shown that she understood the effect of what she was doing. I do not, however, base my judgment on any such consideration. Assuming that she did know what she was doing, I think the rule of equity is that under the circumstances she must be presumed to have been acting under undue influence. I do not think that the learned judge below in determining this case paid sufficient regard to the rule of equity which I have mentioned, and which I must say commands my strongest respect and approval. For these reasons I think this appeal should be allowed.

Appeal allowed.

If a debtor will collude with some of his friends in fraud of his creditors, and the friend break trust with him, this court will not punish the breach; yet Greene and Cotterell's case to the contrary (*fraus non est fallere fallentem*). But two doctors and I took order in such a case between Woodford and Multon, Mich. 42 and 43 Eliz., by our report, that the goods so conveyed in fraud should be transferred to the benefit of the creditors. —ANONYMOUS, Cary, 18.[1]

COPIS *v.* MIDDLETON.

IN CHANCERY, BEFORE SIR THOMAS PLUMER, V.C., 1817.

[2 *Maddock's Chancery* 410.]

The Vice-Chancellor. This is a bill by creditors, calling for an account of real and personal estate, and seeking to set aside a sale to the defendant John Knott, for fraud, as between the vendor, John Knott deceased, and the vendee, the defendant John Knott. The bill was filed so long ago as 1793, the sale being twenty-five years ago. I have carefully looked into all the pleadings,—the evidence,—the decree,—the Master's report,—and all the circumstances of the case. The first question to be considered, is, whether this bill has brought all the necessary parties before the court. According to the answer of the defendant John Knott, it appears, that he mortgaged the estate, the purchase of which this bill seeks to set aside, to Dr. Sanden, for £2,000, which mortgage remains undischarged; and that the title deeds of the estate are in the hands of Dr. Sanden.

[1] See also the early case of Naylor *v.* Baldwin, 1680, Reports in Chancery, 130, in which Lord Keeper COVENTRY set aside a deed in fraud of creditors.

Dr. Sanden then is greatly interested in supporting the title of his mortgagor, the defendant John Knott. All the title deeds are in his custody. It does not appear whether they were produced or proved on the hearing of the cause. Sanden ought to have been made a party. It was necessary to see the title deeds, in order to decide the point between the parties.

Supposing, however, all proper parties are before the court, the next question is, whether this bill contains proper charges. The vendor nor the vendee complain of the contract, but only these creditors; and the only mode in which they can invalidate the contract, is upon the Stat. of 13th of Eliz. c. 5.

Is this then a case within that statute? What is it that is charged and put in issue in this case? The bill stating certain facts, charges, that John Knott deceased, after the decease of his father, publicly advertised for sale the estate, Great Broad Leaze, part of the estate devised to him by his father; and that the same was sold to a *bona fide* purchaser. That sale is not impeached, but the plaintiffs call for an account of the proceeds. That estate was not sold by public sale, since only £3,600 being bid, it was not then sold, but was afterwards sold by private contract for £4,000. John Knott deceased, had reason therefore to conclude, that he could sell more advantageously by private contract than by public sale. He afterwards, in 1792, sells Stoney Farm to the defendant. The bill states it was sold, "in a clandestine manner, for £2,000, which he applied to his own use; but that the premises were worth a great deal more money; and that said sale was fraudulent, as against the creditors of the said John Knott, and ought to be set aside." The plaintiffs therefore rely upon relationship, insolvency, and inadequacy of price, as grounds upon which they seek to set aside the contract. It does not appear that John Knott, the vendor, expected his death when he sold the estate, and though in fact he did die soon after the sale, it does not appear how he died, whether by accident, or otherwise. The bill is loosely drawn. If the fact were, that the sale was made in contemplation of a speedy dissolution, that fact should have been charged in the bill. It is then said he was his nephew. Is there any fraud in selling to a nephew? He might sell to him. If on account of his relationship, he sold it for less than he would have done to another, it might be material; but if he treated with him as he would have done with a stranger, the contract is valid. Where the deed states, as in many cases, the consideration to be love and affection, that is material; but it is not charged or put in issue, that the circumstance that the vendee was his nephew, had any effect upon the contract. The estate had been let to the father of the nephew, and afterwards his widow held it for fourteen years; and they improved it, the estate being dilapidated when they took it. The buildings and mill, etc., were repaired by the father and his wife, and on the faith and expectation held out that the estate would finally become theirs. They were disappointed by the will, by which it was given from them; and it was

natural they should wish to become the purchasers. The vendee was the customary heir of the vendor, but not his general heir. By the will of the vendor, the favourite object of his bounty appears to have been his brother, and there is no proof that the vendee was any particular favourite. Fraud cannot be imputed, merely by stating that a man has sold to his nephew. But then it is said, the vendor was insolvent. There is no charge that he knew he was insolvent, and that he made the sale on that account. A person may be insolvent without knowing it. Was this vendor known to be in a state of insolvency? Did the nephew know it? By his answer he swears he did not know of his insolvency. The will of the vendor, as stated in the bill, was made after the sale to the defendant, and is not like the will of an insolvent person. The bill states that John Knott, "being well entitled to said devised estates remaining unsold by him, and being seised of other real estates, and possessed of a considerable personal property, duly made his will, etc." By this will, made after the sale, he disposes of his real estates to his brother, and makes other dispositions, as a man of property would do. But that at his death, it seems, he was found to be insolvent. If he was so, he kept it a secret, at least it was not known to his nephew. It is then said, the estate was sold at a great inadequacy of price. Is the mere selling an estate for less than its value, to be considered as a fraud upon creditors? That would be an alarming doctrine. Most vendors of estates are indebted, and from necessity are often obliged to sell for the most they can get. If such a sale were void, as against creditors, a purchaser ought not only to have an abstract of the vendor's title, but an abstract of the vendor's circumstances; and he must be examined like a bankrupt. All that is stated in the bill, is, that the estate was worth "a great deal more money than it was sold for." Can creditors say, "you sold by private contract, but if you had sold by a public sale you might have got more; and therefore the sale as to us is void." That cannot be a ground for setting aside a contract. It cannot be allowed to creditors, especially after a great lapse of time, to make such an objection. Was it known to the vendor and vendee, that the estate was worth considerably more than it sold for? The bill has no such charge, but merely states, that the property "was worth a great deal more than it sold for." Suppose he had sold it by public auction, it might still have been bought for less than its value. Merely selling an estate for less than its value, can never of itself be considered as a fraud, though, under some circumstances, it may be considered as evidence of fraud. There is the evidence of land surveyors, as to the value of the estate when sold, showing that the estate was worth much more than it sold for; but everybody knows how easy it is to obtain such exaggerated valuations. These then are the circumstances under which it is sought to set aside this sale, upon the 13th of Eliz. c. 5. The preamble of that act is, "For the avoiding and abolishing of feigned, covinous and fraudulent feoffments, etc., as well of lands and tenements, as of goods and chattels, etc., devised and

contrived of malice, fraud, covin, collusion or guile, to the end, purpose and intent to delay, hinder or defraud creditors and others of their just and lawful actions, suits, debts, etc., not only to the let or hinderance of the due course and execution of law and justice, but also to the overthrow of all true and plain dealing, bargaining, and chevisance between man and man, without which, no commonwealth or civil society can be maintained or continued." A conveyance therefore, to be affected by this act, must be shown to be "feigned, covinous and fraudulent," and made with "an intent to delay, hinder, or defraud" creditors. But if this case were held to be within the statute, it would be "the overthrow of all true and plain dealing, bargaining, and chevisance between man and man;" for as a purchaser cannot know the circumstances of the vendor, it would prevent "all dealing, bargaining, and chevisance between man and man," and counteract the object of the statute. The statute, in order to prevent this inconvenience, has, by the sixth section provided, that the act shall not extend to any conveyance upon good consideration, and *bona fide* to any person, not having at the time of such conveyance or assurance, any manner of notice or knowledge of such covin, fraud or collusion. A conveyance therefore cannot be invalidated by this act, if there has been a *bona fide* purchaser. The bill states insolvency, relationship and inadequacy, but does not expressly charge that the defendant is not a purchaser for a valuable consideration. To bring the case within the statute, the purchase must not have been *bona fide* and without notice. This cause went to issue, and witnesses were examined. What was the evidence as to the value of the estate? The surveyors only state their opinion. They state, that in 1792, the land was worth, to rent, 50s. or 52s. an acre; that is a pretty large rent for land near Chichester. They say the value of the land is increased by irrigation, occasioned by the overflowing of the water used by the mill; but there is no proof that the water would overflow, if the mill was properly used. They calculate the value of the land at thirty-two years purchase, but that is an extravagant calculation. There is no proof that the land could have been sold at so many years purchase. Then the mill, etc., were valued in the improved state they were, without any consideration of what had been expended on them. The vendee, it is proved, laid out £500. They ought to have been valued in the condition they were in when the sale took place. The decree only directs an enquiry of expenses on the land previous to the sale. It turns out, on the Master's report, that the whole valuation of this land proceeded on a mistake, for the fact appears to be, that the vendor was only entitled by three-fourths of this estate. There is, therefore, no evidence what three-fourths of the estate were worth. But then it is said, though the conveyance turns out to be invalid, as to one-fourth of the estate, yet that is proof a fraud was intended; since the purchaser, if he intended to make a *bona fide* purchase, would have looked into the title, and not doing so, evidences the fraud in the transaction. If that were evidence of fraud, it should have been charged in the bill, and the

attention of the vendee drawn to it; and he might have given a satisfactory answer. The facts which have transpired, have taken away all the effect which the evidence might have had, as to value. If the court were to proceed, it must be upon fresh evidence, as to the value of the estate. Is then the court, at the distance of twenty-five years, to direct the Master to inquire what was the value of three-fourths of this property? Length of time is certainly no bar to a fraud, and the delay in the suit might have been avoided by the defendant, if he had urged it on, but he stood only on the defensive, and it was the duty of the creditors to accelerate the suit. I think I should not do right, after such a lapse of time, to direct an inquiry before the Master. It is difficult to say what was the object of the decree in 1796. The inquiries directed are not easily to be explained. It is said, that whatever the result of the inquiries, directed to be made before the Master, were, the sale was void; but would the court have made such a decree, if in all events, the sale was to be considered as void?

It has been much pressed as an abstract point, that an insolvent person selling to a relation for an inadequate price, is a fraud, and that the conveyance is in all such cases void, under the stat. of the 13th Eliz. c. 5.

I have already observed somewhat on that point. The stat. 13th Eliz. c. 5, was made in favour of creditors, the stat. of the 27th Eliz. c. 4, in favour of purchasers. Under both statutes the owner of lands has a qualified, not an absolute right. He may sell, but he cannot give; he must, according to a common proverb, "be just before he is generous." A volunteer for a meritorious consideration, for love and affection, is not sufficient. The expression, "good consideration," in the statute, means a valuable consideration (see Twyne's Case, 3 Rep. 81b), as money, marriage, etc. To constitute a fraud, as against creditors, it is sufficient to prove that the gift was voluntary. The statute does not deprive a man of the power of selling his estate, or doing what he pleases with the purchase money. It was the creditors' fault that they did not proceed against their debtor. If on the one hand there is a fair sale, out and out, it is valid. In Upton *v.* Bissett, Cro. Eliz. 444, OWEN, J., said, "he was at the making of the statute of Eliz. wherein special care was taken that there should not be any words which should extend to purchasers." The difficulty, in most cases, has been, to say what is a sufficient consideration within the statute. The court has not been very particular as to the sufficiency of the consideration, if the contract was *bona fide*. Vide, Nunn *v.* Ladbrooke, 8 T. R. 521. In Stephens *v.* Olive, 2 Bro. C. C. 90, it was held, a deed of separation, in which the trustees indemnified the husband against the wife's future debts, was a valuable consideration, and took the case out of the statute. It was uncertain what the debts, if any, would amount to, but still it was considered as a sufficient consideration to answer the words of the statute.

In King *v.* Brewer, cited in the note to Stephens *v.* Olive, ib. p. 93, in note, the same doctrine was acted upon. In those cases the court thought

the mere liability of the trustees to pay the future debts of the wife, was a valuable consideration.

In Doe *v.* Routledge, Cowp. 705, there was a gross fraud. Lord MANSFIELD says, "The consideration of £200, which is to support it as a deed for a valuable consideration, compared with the real value of £2,000, shows it to have been no purchase at all, but a gift." "It was a gross fraud." Mr. J. Aston, an excellent lawyer, says, in that case, "A great deal has been said upon the construction of the statute 27 Eliz. c. 4, whether there should be a full as well as a *bona fide* consideration. It has been said, that a *bona fide* consideration is not sufficient—but it is; and the consideration need not be full; for a mortgage is a good consideration, though never a full one."

In Mathews *v.* Feaver, 1 Cox p. 278, the Master of the Rolls says, "If the conveyance had been made without any consideration, it would certainly have been void under the statute; and I am of the same opinion where the consideration is entirely inadequate." In that case, the inadequacy was excessive, and the conveyance held to be fraudulent.

In Jones *v.* Marsh, Forr. 64, S. C. MS., the Lord Chancellor thought the inadequacy of the consideration ought not to be nicely scrutinized.

In Basset *v.* Nosworthy, Finch. 102, the Lord Chancellor says, "in purchases, the question is not whether the consideration be adequate, but whether 'tis valuable, for if it be such a consideration as will make the defendant a purchaser within the statute of Eliz. and bring him within the protection of that law, he ought not to be impeached in equity."

In Herne *v.* Meers, 1 Vern. 465, there was great undervalue, and young Cox was outlawed and had absconded. Only between three and four years' purchase for the estate was given, and the purchaser was a trustee of the estate, and knew of the outlawry and absconding, and purchased at that undervalue, *pendente lite*. That case, therefore, is no authority in favour of the plaintiff.

Mere inadequacy of price to invalidate a contract, must, *per se,* be so excessive as to be demonstrative of fraud. In Griffith *v.* Spratley, 1 Cox 383. And see Collier *v.* Browne, ib. p. 4, a sailor indebted, contracted with a broker for an annuity for a very inadequate consideration; and Chief Baron EYRE expresses, with great ability, his view of the effect of inadequacy of price. He says, "The case has been much rested upon this, that the satisfaction received is so grossly inadequate to the real value, that it is impossible to resist the inference of fraud which arises on that inadequacy; or, if possible, to make inadequacy of consideration of itself a distinct principle of relief in equity; but I know of no such principle. The common law knows no such. The consideration, more or less, supports the contract. Common sense knows no such principle. The value of the thing is what it will produce, and admits of no precise standard. It must be in its nature fluctuating, and will depend upon ten thousand different circumstances. One man in the disposal of his property may sell it for less than another would; he may sell it under a

pressure of circumstances, which may induce him to sell it at a particular time. Now, if courts of equity are to unravel all these transactions, they would throw everything into confusion, and set afloat all the contracts of mankind. Therefore, I never can agree that inadequacy of consideration is in itself a principle upon which a party may be released from a contract which he has wittingly and willingly entered into. It may indeed be a strong evidence of fraud where the transaction is such as to be inconsistent with the sober manner of a man's conducting his affairs."

Lord ELDON, also, the greatest judge in this country, says, in Coles *v.* Trecothick, 9 Ves. 246, S. C. MS.: "Unless the inadequacy of price is such as shocks the conscience, and amounts in itself to conclusive and decisive evidence of fraud in the transaction, it is not itself a sufficient ground for refusing a specific performance." In Underhill *v.* Harwood, 10 Ves. 219, S. C. MS., he reiterates the same doctrine.

On these grounds, I am of opinion the plaintiffs have not made out a case to set aside this contract, which was executed so long ago. This would be my opinion if there were all the necessary parties to this suit, which there are not.

Bill dismissed without costs.[1]

[1] The statute, 13 Eliz. C. 5, against fraudulent conveyances applied to contingent liabilities. Gannard *v.* Eslava, 1852, 20 Alabama, 732, 743; hence to sureties, Bay *v.* Cook, 1863, 31 Ill. 337, 342; Massi *v.* Lavine, Michigan, 1905, 102 N. W. 665. As between the parties the principle in *pari delicto, potior est conditio defendentis* applies. See Proseus *v.* McIntyre, 1849, 5 Barb. 424; Stephens *v.* The Heirs of Harrow, 1868, 26 Iowa, 458; Sweet *v.* Tinslar, 1867, 52 Barb. 271. By analogy the courts have worked out the same results in cases where the conveyance is made to defeat the purposes of a statute. Leggett *v.* Dubris, N. Y. 1835, 5 Page Ch. 114; Redington *v.* Redington, Ireland, 1794, 3 Ridgway 106; Miller *v.* Davis, 1872, 50 Mo. 572; Demarest *v.* Wright, 1892, 29 Florida 223; or to avoid taxation, Cox *v.* Wightman, 1875, reported in Nichols *v.* Machine Co., 1882, 27 Hun 202. In Monahan *v.* Monahan, 1904, 59 Atlantic 169, the court ordered a reconveyance where the plaintiff lent money and then had the loan secured by a mortgage running to his son, in order to defeat taxation, upon the narrow ground that where the plaintiff is not required to make out his own fraud, he may have relief. Where a parent, however, pays the consideration for property conveyed to a child, the presumption is that the child takes it beneficially; Christy *v.* Courtney, 1850, 13 Beavan 96; and this presumption must be rebutted by proof of the parent's other intention. Dana *v.* Dana, 1891, 154 Mass. 491. Where a compository is made by a debtor with his creditor, a secret agreement between the debtor and creditor whereby the latter is benefited at the expense of the other creditors, may be cancelled, it seems, at the instance of another creditor. See 2 Pommeroy's Equity Jurisprudence § 967, or of the debtor upon the grounds of public policy. Pendleburg *v.* Walker, 1841, 4 Y. & C. 424; Cullingworth *v.* Lord, 1839, 2 Beavan 385. But a mere intention of the bankrupt to pay some of his creditors in full after his discharge is not sufficient to avoid the agreement. Argall *v.* Cook, 1875, 43 Conn. 160.

II. Necessity of Restitution.

REYNOLDS *v.* WALLER'S HEIR AND ADMINISTRATOR.

Court of Appeals of Virginia, 1793.

[1 *Washington* 164.]

The appellees instituted this suit in the High Court of Chancery, in order to recover back certain warrants, and the interest received upon them, also warrants for about 5,000 acres of land, which their testator had obtained for his services during the war, and which had been unfairly purchased from him by the appellants, for the trifling consideration of £20, at a time when the testator was intoxicated with liquor and incapable of contracting. The purchase was made by Valentine, on account of himself and Reynolds, the latter of whom, afterwards became the sole proprietor, by purchase from the former of the whole interest. The fraud, was clearly proven to the satisfaction of the Chancellor, who decreed; that Reynolds should restore to the plaintiff, the military certificate received by him from the auditor, for the pay, and depreciation of pay due to Waller, with interest thereon from the 1st of January, 1782; or if that certificate could not be restored, to deliver to the plaintiff other certificates, of the same kind, and of equal value, with like interest. And (part of the land warrants having been assigned by Reynolds, to Waller, in his lifetime,) the court directed an issue, to ascertain what damages the plaintiff had sustained, by the intestate's not receiving the military land warrant, for the remainder of the land, to which he was entitled.

From this decree an appeal was prayed.

The President [Pendleton] delivered the opinion of the court.

A more palpable imposition was never practised, or better established, than in this case. Reynolds, though not a party in the fraud, was nevertheless, a partner with the person who committed it, and therefore answerable.

The decree, so far as it annuls the contract, is therefore right: it is also right in the relief afforded, as to the land.

As to the certificates, the relief granted is not exceptionable, so far as it compels restitution of them in specie, or others of equal value, in case, the identical certificates cannot be returned. But, if he can do neither of these things to compel him to purchase at market, or to pay in specie, the nominal amount of the certificates, is in our opinion improper. The true period, at which to estimate their value, (in case the certificates cannot be restored,) is that, at which the cause is tried—this is not like the case of Groves and Graves, which was a contract to deliver a certificate at a future day; after the day had passed, the party who was to have received the certificate, not being compellable to accept it, was entitled to its value on that day. But in this case there was no contract. The bill is, for a

specific restitution of the certificates fraudulently obtained, and therefore, if the appellant had at any time offered to restore them, or will now do so, the other party must receive them, or its value; of course, the present value ought to be the rule of compensation, if the certificates themselves cannot be restored.

The opinion and decree, was entered in the following words, viz., "There is no error in so much of the decree, as sets aside the contract, pretended to have been made by Edward Valentine, with Edward Waller, deceased, for the purchase of the latter's claim on the public, for pay and depreciation, and a bounty in lands, nor in the relief afforded, so far as it relates to the land. But, that the said decree is partly improper, and in some instances defective, so far as it respects the certificates, for the pay and depreciation. It is therefore decreed and ordered, that so much of the said decree, as sets aside the contract for the purchase, and directs the mode of relief as to the land, and costs, be affirmed, and that the residue of the said decree be reversed. And this court, proceeding to make such decree as to that part so reversed, as the said High Court of Chancery should have pronounced, it is further ordered and decreed, that the appellant restore to the appellee, the military certificate or certificates received by him from the auditor for public accounts, the 4th day of April, 1785, for the pay and depreciation of pay, due to the said Edward Waller, amounting to £283, 16s., 7d., or if those certificates cannot be restored, that he deliver to the appellee other certificates, of the same kind, and of equal value, if such he hath, to be ascertained, by an examination before the Master Commissioner of the said court, on the oath of the appellant upon interrogatories; but if not, then, that he pay to the appellee, the present specie value of such certificates, to be ascertained by the said commissioner, or by a jury, if either party shall require it. That the appellant also account before the said commissioner, for the specie value of all interest arising on the said certificate, as the warrants for such interest were worth, at the time he, or his assignee received, or might have received the same; and pay the amount thereof in specie to the appellee, discounting therefrom, the sum of £20, paid for the purchase, on the 23d of December, 1784, with interest thereon from that day, until the money shall appear to have been repaid, by the receipt of interest as aforesaid."[1]

In THACKRAH v. HAAS, 1886, 119 U. S. 499, 501, Mr. Justice GRAY, delivering the opinion of the court, said:

The complaint in the present case is in the nature of a bill in equity

[1] In the interesting case of Wigglesworth v. Steers, 1806, 1 Hen. & M. 71, upon the authority of the principal case, it was held that a contract may be avoided by the legal representation of a party thereto, on the ground of his having been drunk when it was made, although such drunkenness was not occasioned by the procuration of the other party.

against a mining corporation, a bank, and two individuals, alleging that while the plaintiff was in such a state of intoxication as not to be in his right mind or capable of transacting any business or entering into any contract, the defendants, knowing his condition, fraudulently extorted from him for the sum of $1,200 a transfer to one of those persons, for the benefit of the other and of the bank, of his interests, worth $80,000, in shares to that amount in mining corporation, and praying for a cancellation of the transfer, for a sale of enough of the interests transferred to repay the $1,200, for the issue of the rest by the mining company to the plaintiff, for the restoration to him by the other defendants of any certificates in their hands, and for an account and an injunction. It cannot be doubted that this was such a case of fraud as entitled him to relief in equity. 2 Pomeroy's Eq. Jur. §§ 914, 949.

The complaint further alleges, and the demurrer admits, that the greater part of this sum of $1,200 was retained by the bank and applied to the payment of a debt previously due to it from the plaintiff, and (it would seem before he recovered from his intoxication) the rest of that sum was applied by his wife to the payment of his small debts, and he had no means available to raise money to repay the $1,200 except the interests in the mining company, which he had been induced by the defendants' fraud to make a transfer of. The plaintiff, without any fault of his, being unable to repay the consideration of the fraudulent transfer, equity will not require him to do so as a condition precedent to granting him relief, but will make due provision, in the final decree, for the repayment of that sum out of the property recovered. Reynolds *v.* Wallar, 1 Wash. Va. 164; Allerton *v.* Allerton, 50 N. Y. 670; s. c., more fully stated in Harris *v.* Equitable Assurance Society, 64 N. Y. 196, 200.

Judgment reversed, and case remanded for further proceedings in conformity with this opinion.

BROWN *v.* NORMAN.

IN THE SUPREME COURT OF MISSISSIPPI, 1888.

[65 *Mississippi* 369.]

COOPER, C. J., delivered the opinion of the court.

The appellee exhibited his bill in the Chancery Court of Lawrence County to cancel a conveyance of certain lands and personalty made by him in October, 1885, to the appellant, on the ground that it was procured by fraud and deceit. The defendant demurred to the bill, and, his demurrer being overruled, he appealed.

It appears by the bill that prior to October, 1885, the appellant was a member of the firm of Mangum, Brown & Butler, doing business in the

town of Wesson, in Copiah County. At that time the said firm was insolvent, owing debts to the amount of $12,000, and having assets only to the value of $5,000. A day or two before the bargain between the appellee and appellant, Brown and Mangum went from the town of Wesson to the residence of appellee, which was some ten miles in the country, and proposed to him to purchase Brown's interest in said firm, representing to him that the firm was in a solvent and prosperous condition, and that its total liabilities did not exceed $4,000, while its assets were not less than $16,000, and exhibited to him false and fraudulent statements which they had prepared for the purpose of deceiving him as to the condition of the firm. The appellee was a farmer, having no knowledge of mercantile affairs, and, believing Brown and Mangum to be honest and truthful men (he having known them for many years), relied upon the representations and bargained for Brown's interest in the firm, giving him in exchange therefor his farm and the personal property thereon (at the valuation of $3,100) and paying in cash $500, and made a deed conveying the property to Brown.

In addition to the price paid by appellee, he assumed liability for the existing debts of the firm. After this contract had been made, the name of the firm was changed to Mangum, Butler & Co., the appellee being the Co. The new business was carried on until March, 1886, at which time Mangum, at the instance of the creditors of Mangum, Brown & Butler, exhibited his bill in the Chancery Court of Copiah County for the dissolution of the firm and administration of its assets on the ground of the insolvency of said firm of Mangum, Brown & Butler. On his petition a receiver was appointed, who took possession of the entire assets and applied them, under the direction of the court, to the payment of the debts of the said firm, there being an insufficient amount to pay the debts in full. The bill charges that the appellee did not discover the insolvency of the firm of Mangum, Brown & Butler until "shortly before" Mangum instituted his proceedings for dissolution and administration. The bill in this cause was exhibited in August, 1886, more than five months after the appointment of the receiver in the proceedings instituted by Mangum.

The complainant stated in his bill that by reason of the proceedings by Mangum, and the administration of the firm assets by the Chancery Court, he could not offer to restore the defendant to the position he had occupied before the contract was made, but that in fact the property had been applied as the rights of the other partners required and as was contemplated by the contract between the complainant and defendant.

The grounds of demurrer are:

1. That since the *status quo* cannot be restored, a rescission cannot be decreed, but that complainant must resort to an action at law for the deceit practiced upon him.

2. The complainant having failed to rescind presently upon the discovery of the fraud ratified and affirmed the contract.

3. That complainant having failed to promptly notify the defendant of the proceedings by Mangum, and by permitting the property to be administered in a suit to which he was a party, affirmed the contract.

4. That complainant having access to the books of the firm, and the opportunity of discovering the fraud, was guilty of negligence and laches in not having pursued his inquiries within a short time after the sale, and must be treated as having known of the fraud at the time when by diligence he might have discovered it, and that by remaining in possession after that time he affirmed the contract.

It will be noticed that the objections to the relief asked resolve themselves into two classes: 1. That there can be no rescission because the *status quo* cannot be restored; and 2. That the conduct of the complainant, after he knew or should have known of the fraud, is in law a ratification of the contract.

In decisions in actions at law arising from attempted rescissions of contracts for the sale or exchange of personal property, the language of the courts is almost uniform in declaring that the defrauded party, in order to maintain his suit, must have restored or tendered to restore whatever was received by him under the contract, because of the principle that the contract must be rescinded in toto if at all, the plaintiff not being permitted to retain a benefit under an indivisible contract which he repudiates. But even in actions at law there are exceptions to the rule. If the thing received by the defrauded party be of no value, Fitz *v.* Bynum, 55 Cal. 459, or if by reason of the act of the fraudulent party a return be rendered impossible, Masson *v.* Bovet, 1 Denio. 69, 43 Am. Dec. and notes; Hammond *v.* Pennock, 61 N. Y. 145, a return or tender is unnecessary.

So, also, where by natural causes or reasonable use the value of the property is diminished, and perhaps where it is necessarily destroyed in discovering the fraud, the fraudulent party must receive it in its depreciated condition. Baker *v.* Lever, 67 N. Y. 304; Gatling *v.* Newell, 9 Ind. (Tanner) 574.

And, if the *bona fide* buyer has expended work, money, or material in the improvement of the property before discovering the fraud, he may restore the property and recover for the work and labor, money or matrial put upon it. Farris *v.* Ware, 60 Me. 482.

In the two latter classes of cases there is a restitution of the thing itself to the fraudulent seller, but the *status quo* is not restored; for in the one case he receives the property back less valuable than it was, and in the other, he takes it improved in value; but possibly improved in a manner or to an extent he would not have desired, but he is nevertheless chargeable with the value of the improvement.

In many of the cases for rescission in equity, language is used from which it might be inferred that precisely the same principles govern in suits in equity that are applied to determine the right of the party to sue at law. In actions, whether at law or equity, usually both of the ques-

tions presented by this record are involved, viz., whether there had been a restoration of the *status quo,* and whether there has been ratification by the plaintiff after knowledge of the fraud. It is evident that ratification goes to the very root of the controversy, and if that be shown, whether in a court of law or of equity, the plaintiff must fail. It is therefore true that in investigating and determining that question, the rule should be the same in equity as in law. But there is this marked distinction between suits at law for the recovery of the consideration paid, after rescission by plaintiff and bills in equity for rescission. The plaintiff at law must have the legal title to the thing sued for, if it be a chattel or a legal right to the sum demanded, at the time of the institution of his suit. If he has parted with his property by reason of the fraud of the buyer, or if, being buyer, he had parted with his money by reason of the fraud of the seller, the legal title or right has passed out of him and into the other party. The contract is not void, but voidable only, and it must be avoided to reinvest him with his legal title or right to sue. Since the law permits him to reacquire this legal right, by his own act, it puts upon him the necessity of restitution of the thing received by him as a condition of the exercise of the right to avoid the contract. From necessity, the law knows nothing of compensation, but requires restoration of the thing received, for to permit the plaintiff to determine what would be just compensation would be to make him judge in his own case.

But in equity the complainant does not necessarily rescind and sue; he may sue for rescission. He is required to restore the consideration, not however as a condition of acquiring the right to sue, but because of the equitable maxim that he who seeks equity must do equity. Mr. Pomeroy thus states the rule: "In administering these remedies, pecuniary as well as equitable, the fundamental theory upon which equity acts is that of restoration, of restoring to the defrauded party primarily, and the fraudulent party as a necessary incident to the positions they occupied before the fraud was committed, assuming that the transaction ought not to have taken place, the court proceeds as though it had not taken place, and returns the parties to that situation. Even in such cases the court applies the maxim, he who seeks equity must do equity, and will thus secure to the wrongdoer, in awarding its relief, whatever is justly and equitably his due." 2 Pom. Eq. § 910.

In Neblett *v.* McFarland, 92 U. S., it is said: "The court proceeds on the principle that, as the transaction ought never to have taken place, the parties are to be placed as far as possible in the situation in which they would have stood if there had never been any such transaction."

Other writers upon equity jurisprudence deduce the right of the defendant to have restoration of his property from the maxim of equity that imposes doing equity upon the complainant as a condition upon which he secures relief. Adams' Equity, 191; Story's Eq. Jur., § 693.

Where the complainant has a plain and adequate remedy at law, and the condition of the parties has been so radically changed that it is diffi-

cult to put the defendant into as good position as before the sale, and the complainant has had substantially the benefits contracted for, the misrepresentation being as to a part only of the subject-matter, for which recovery of damages would be full relief, many cases may be found in which the court of equity has declined to interfere. But an examination of the cases discloses the fact that the most vigorous announcement of the rule, requiring the restoration of the *status quo,* is to be found in *dicta,* or in cases in which there has been ratification after discovery of the fraud.

In Pintard *v.* Martin, 1 S. & M. Ch. 126. and Johnson *v.* Jones, 13 S. & M. 580, relief was denied upon the ground that the complainants had ratified after knowledge of the fraud. What was said upon the other branch of the case seems to have been uncalled for, and to have been only incidentally remarked. The annotator of Adams' Equity cites, in addition to these cases, the following other decisions: Garland *v.* Bowling, Hemg. 710; Coppedge *v.* Threadgill, 3 Sneed 517; Skinner *v.* White, 17 John 357; Clay *v.* Turner, 3 Bibb.

(It is curious to note how far they fall below supporting the proposition they are cited to sustain.)

In Garland *v.* Bowling, the court held, first, that the evidence failed to support the allegation of fraud, and, therefore, the complainant could not recover; but it also appeared that the complainant did not seek to rescind the contract. What he attempted to do was to enjoin a judgment at law recovered for the price of the property sold (slaves), and to retain the slaves. Coppedge *v.* Threadgill was a case in which a sale of land was set aside; but the court had neglected to require the complainant, a married woman, to restore the cash she had received. The Supreme Court held that her coverture did not relieve her of the obligation to refund, and reversed the cause, that a decree might be entered to that effect. Skinner *v.* White, 17 Johns., was a case in which there had been a rescission by the act of both parties, and the only question was as to the extent of the liability of one of the parties to the contract. In Clay *v.* Turner, 3 Bibb, the court refused either to specifically enforce a contract at the suit of one of the parties, or to rescind it at the suit of the other. On the subject of rescission the court said that the matter complained of was not material under the terms of the contract; and, besides, that the complainant had speculated upon the chances of getting a paying bargain through a series of years, and sought relief, not because of the want of capacity in the other party to convey, but because he found, after a long time, it would be better to rescind. A review of these cases illustrates how unreliable the work of the average annotator is often found to be.

Let us now refer to cases in which the specific question has been raised and passed on by courts of equity.

In Barker *v.* Walters, 8 Beav. 92, and Jervis *v.* Berridge, L. R., 8 Ch. Appeal Cases, demurrers had been interposed to bills seeking rescission,

on the ground that no offer was made to restore the *status quo*. It was held that it was unnecessary to do so, since the court, on final hearing, would require the complainant to do equity. In the latter case, Lord SELBORNE said: "Upon principle there appears to be no good reason why a plaintiff in equity, suing upon equitable grounds, should be required, on the face of his bill, to submit to those terms which the court at the hearing may think it right to impose as the price of any relief to which he may be entitled."

In Savery *v.* King, 5 House of Lords 627, the party seeking rescission had disposed of the part of the property received by him (a policy of insurance), and on this branch of the case Lord CRANWORTH said: "The one remaining question is as to the terms on which relief ought to be given. With respect to the mortgage it is plain that Richard must, as far as possible, put Savery in the condition in which he must have been if no such mortgage had been made, and if his security had rested solely on the life of his father, and the several policies of insurance. One of the eleven policies of insurance was sold by Richard in January, 1846; it is impossible, therefore, as to that policy to restore Mr. Savery exactly to the position in which he stood in 1835; but he cannot be heard to complain of this, for by the arrangement he had made or concurred in, he had led Richard to suppose that all the policies had become his own, and that he might deal with them as he thought fit; indeed, he himself suggested a sale of one or more of them as a step which it might be advisable for Richard to take. All, therefore, which can be done, as to the policy which was sold, is to charge Richard in account with Mr. Savery with the sum which it produced, together with interest from the time when it was sold."

In Warner *v.* Daniels, Woodb. & M., the court directed in decreeing a rescission that the complainant should redeliver to the defendant the property received (certain shares in an incorporated company), but that if it should appear that he had disposed of any of the shares then that he should restore the value thereof with interest.

In Myrick *v.* Jacks, 33 Ark. 425, the court said: "It is no objection that complainant cannot put Jacks entirely in *statu quo* on rescission. The change in condition of the property was brought about by persuasion to accomplish a transaction in which Jacks was a party, and before the fraud was discovered, and by the action of complainant in a matter she did not understand. When courts cannot place parties wholly in *statu quo*, they are not thereby precluded from granting relief against fraud. They may proceed to do so as nearly as possible, and make compensation." See, also, Gatling *v.* Newell, 9 Ind. 574; Crosland *v.* Hall, 33 N. J. Eq. 111.

In Ogden *v.* Thornton, 30 N. J. Eq. 573, the court finding itself unable to rescind the contract because the fraud occurred after the conveyance, remanded the cause in order that the bill might be amended, so as to enforce a lien upon the property for the price at which it had been valued;

the defendant by his fraud having prevented the complainant from receiving what he contracted she should have.

Upon principle and authority we think it immaterial that the *status quo* cannot be literally restored. The defendant by the grossest fraud seduced complainant to exchange his farm for mere moonshine. What he professed to give was in fact of no value to himself or to any one else; he simply placed complainant in a position to be rendered insolvent; for by his purchase he secured nothing, except what should remain of the partnership assets after payment of debts, and the firm being hopelessly insolvent this right was of no value. It may also be noted that from the very moment of the execution of the contract it was impossible for the defendant to be placed in *statu quo,* either by the act of complainant or by both his act and the consent of the defendant. The defendant had been a member of a partnership, and his act in selling his interest therein was a dissolution of the firm; he could not again become a member without the assent of Mangum and Butler, over whom neither the defendant nor complainant had control. By his own act therefrom a restoration of the *statu quo* was made impossible.

Nor do we think the record discloses ratification by inaction.

The complainant owed the defendant no duty to investigate the condition of the firm; he had the right to rely upon the truth of the representations made by the defendant, and all that was required was that he should act when he discovered the fraud of which he was the victim.

In Rawlins *v.* Wickham, 3 DeG. & Jones 304, the complainant had been inveigled into an insolvent compartnership by false representations of its condition, and acted as a partner for five years, and then having discovered the fraud, exhibited his bill for rescission and for an account, and his right to rescind was upheld. See, also, Smith *v.* Smith, 30 Vt. 139, which was an action at law, successfully defended by the party defrauded, founded on facts strikingly similar to those involved here. It is held both at law and in equity that delay alone, before the discovery of the fraud, will not bar the right to rescind. Notes to Bryant *v.* Isburgh, 74 Am. Dec. 655.

The dissolution of the new firm of Mangum, Butler & Co. by the appointment of a receiver in a suit to which the defendant was not a party does not, we think, preclude complainant of his right to rescind. It was not at his instance that the proceeding was instituted, and at last it is but the subjecting of defendant's property for the payment of his own debts.

The demurrer was properly overruled and the decree is affirmed.[1]

[1] In Thomas *v.* Beals, 1891, 154 Mass. 51, the court said, per HOLMES, J.: "There was no necessity for an offer to return the consideration before the bill was brought. A bill in equity is not like an action at law, brought on the footing of a rescission previously completed; for instance, to replevy a horse which was obtained by a fraudulent exchange, and to which the plaintiff has no right unless he has restored what he has received, Thayer *v.* Turner, 8 Met.

I. Laches, Acquiescence, Ratification.

LACON *v.* BRIGGS.

In Chancery, before Lord Chancellor Hardwicke, 1744.

[3 *Atkyns* 105.]

The bill was brought to be let in as a creditor on Lord Bradford's estate, under a direction in a former cause.

The plaintiff, administrator *de bonis non* to his father, who was steward or attorney to Henry Earl of Bradford, from the year 1710 to 1717, insists that his father had several large sums of money due to him, but knowing Lord Bradford's aversion to business, did not care to press him to settle accounts, especially as Lord Bradford, who was Lord Lieutenant of the County of Salop, had promised to make him a clerk of the peace. The defendant, Sir Hugh Briggs, executor of Lord Bradford, insists upon the statute of limitations.

Mr. Attorney-General counsel for the plaintiff, argued that supposing the statute of limitations is run, yet that my Lord Bradford's will creating a trust of his real estate, for the payment of his debts has taken it out of the statute; for notwithstanding the plaintiff may be barred at law, yet in equity it is a debt in conscience, and the will is in the nature of a new assumpsit.

Lord Chancellor. An account is demanded at second hand by the representative of a house steward, and it has been insisted that there is an open one between him and his lord. I am of opinion that if I should de-

550. The foundation of this bill is that the rescission is not complete, and it asks the aid of this court to make it so. It is objected that at least the bill ought to offer restitution. We are aware that in many cases an offer to do equity has been held necessary. But in the case at bar the court has power to impose equitable conditions upon the relief granted the plaintiffs."

But in Rigdon *v.* Walcott, 1892, 141, Ill. 649, the court held that the fact that the party to a contract who has been defrauded has disposed, in whole or in part, of what he has received before becoming aware of the fraud practised on him, or his inability, by reason of his financial situation or want of means, to raise the amount of the consideration received for the purpose of making a tender, after having spent it, will not exempt him from the operation of the rule requiring such tender in order to a rescission; that a party seeking by bill in chancery to set aside a sale or surrender of a contract held by him will not be excused from tendering back the consideration received by him, by an offer or an amended bill, to set off such demand as he may have against the sum paid him for the transfer of the contract, when the facts alleged do not show that the plaintiff can be placed in *statu quo* by the final decree.

cree an account to be taken in this case, I should make one of the worst precedents that a court of equity can make for disturbing the peace of families. It is a demand clearly barred by the statute of limitations, both in law and equity. The defendant in his answer admits that Mr. Dovey might tell him who was the executor of Lacon after the death of the Earl of Bradford, that there was such an account depending, and money due to Lacon. But then Sir Hugh Briggs very cautiously confines his belief of the debt to the information of Dovey, and at the same time insists on the statute.

Now there must be a direct admission of a debt to take it out of the statute of limitations; though there have been several cases at law where this has not been held sufficient, unless it is likewise attended with an express promise to pay; but that may be rather too hard. What the executor says here is only his personal belief, and notwithstanding he insists on the statute of limitations in behalf of his testator. For if a man says that a creditor told him there was something due, he may give credit to it from the opinion he has of his veracity; and yet if he insists on the statute, that will notwithstanding be a bar to the demand.

The second question is on the trust created on the real estate of the Earl of Bradford. It is very true where there is a trust of a real estate for payment of debts it has been held to revive debts which have been barred by the statute of limitations, and that they are entitled to be paid as well as the other creditors. But I have often wondered how this rule at first prevailed, and judges have always grumbled at it, though it is now established in equity. *Vide* Lord Stafford's Case, in the House of Lords, February 7, 1727.

It has been truly said that where real estate has been affected by such stale debts it is a plain and clear case, and not be charged in so loose a manner as this is, with a debt that must depend upon an account to be taken.

There is no evidence of any demand, or settling accounts in the lifetime of the steward, nor of any demand or request to settle the account from the death of the steward to Lord Bradford's death, which is seventeen years. It is not probable any thing could be due to Mr. Lacon; all that is pretended is that Dovey, his executor, had the admission of one of the trustees that it was a just debt. The court in such a case as this ought to presume satisfaction from length of time, because it cannot be imagined if anything was really due to Lacon, that he would have been quiet under it. The court would lay the party under such difficulties in taking this account that it would be unequitable to direct it upon no other grounds, but from the latitude and extensive construction which courts of equity have put upon trusts on lands for payment of debts. Besides, as Lacon was a domestic steward, there must have been several large sums of money received and paid, without any writing or vouchers between Lord Bradford and Lacon. Therefore it is impossible to direct

an account without injustice being done to the defendants in taking the account.

Upon all the circumstances then, and after such great length of time, I am of opinion that this bill ought to be dismissed; and it has been truly said that it will be charity to the parties not to direct such an account; but in consideration of Sir Hugh Brigg's admission, that on the information of Dovey, he did believe there might be a balance to Lacon, I will dismiss the bill without costs.

ALDEN *v.* GREGORY.

IN CHANCERY, BEFORE LORD CHANCELLOR NORTHINGTON, 1764.

[2 *Eden* 280.]

The Lord Chancellor. This bill is brought to set aside a conveyance made by Brown, who was devisee in trust and guardian of the children of Alden, who was owner of this Barbican plantation in Jamaica, and who devised it to his executors to be sold. And it also prays an account of the rents and profits from the time of the defendants coming into possession, waiving all retrospective accounts. The title is derived by the deed of the 16th of September, 1723, to Brown and the children of Alden, and from thence regularly to the plaintiffs, supposing that deed to be void as having been unduly obtained by fraud and imposition.

Upon the state of the case, and the plaintiff's proofs, three questions were stated by Mr. Wedderburne upon which the merits depended, and which were adopted and argued as such by the defendant's counsel.

The first was whether there was any imposition or fraud in the original conveyance? And I am of opinion that there was the grossest imposition and deceit that ever came before this court. The estate is proved to have been let by Mr. Beckford, the guardian to the defendant Mrs. Gregory, then Miss Chaplin, for three years at £600 sterling, for that part alone which was the plantation; besides the pen, or farm, which was let for above £200 currency. And the defendants in possession have not controverted this statement of the value by a title of evidence. The negroes were charged in 1723 to the poll tax at 159, which at the rate of £25 each amounts to the sum of £3975, besides all other stock and utensils. The *cestui que trusts* were still in the consideration of this court under Mr. Brown, their guardian, and Mr. Chaplin, their agent, with whom neither of them had settled any account, nor had either of them given the wards (still continuing such) any information respecting the estate. For the mother and two daughters were, as he swears by his answer, at different times his servants; and the son educated by

him at school, and afterwards put apprentice to a milliner; and that he never settled any accounts with them, and could not, Chaplin never having settled any accounts with him. This was the case of Brown, the vendor to Chaplin, not under a title derived by purchase from his *cestui que trusts,* but under the original will of Alden. His deeds were set aside, and proper accounts directed.

What was the case of Chaplin? *Habes confitentem reum.* His conveyance speaks now he is no more. Chaplin, the agent in trust for the children, offers £2750 for the estate, and all arrears of rent, sum and sums of money, goods and chattels, debts, duties and demands, and other things whatsoever, which Brown as devisee, or executor in trust, might claim; which was accepted by Brown and the children as the best price that could be obtained for the said estate. If £2750 be the best price, why add anything further? But this consideration it was feared would not give a color. Before the consideration, therefore, is closed a release is thrown in of Chaplin's demand on account of the management of the estate, upon which he was indebted to them at least in the sum of £1,100. Chaplin, not content with this, gets a general release from Brown, consisting of downright falsehood, and winds up the whole with a release of the demands which he had on them for remitting the produce of their own rents and profits.

Happy for these abused, gulled, deluded people that there is a court of equity in Great Britain, out of the hurricanes and more tempestuous morals of Jamaica!

The next question is in effect, whether delay will purge a fraud? Never while I sit here. Every delay arising from it adds to the injustice and multiplies the oppression.

The third question is whether the defendant can cover himself as a purchaser for valuable consideration? I think there is no pretence for it. He married a wife, taking under the fraud, with actual notice in her of a suit pending.

SMITH *v.* CLAY.[1]

IN CHANCERY, BEFORE LORD CHANCELLOR CAMDEN, 1767.

[3 *Brown's Chancery* 633, 639.]

Printed in Vol. 1, p. 379.

[1] In Gresley *v.* Mousley, 1859, DeGex & Jones, 78; the court held that a person selling an estate under circumstances which entitle him in equity to have the sale set aside has a devisable interest in the estate and that conveyance to a solicitor may be set aside even two years after the solicitor's death and eighteen after that of the client. In the course of his opinion, Lord Justice TURNER commented as follows upon the principal case:

ELLISON, SURVIVOR, *v.* MOFFATT AND OTHERS.

IN THE COURT OF CHANCERY OF NEW YORK, BEFORE CHANCELLOR KENT, 1814.

[1 *Johnson's Chancery* 46.]

The plaintiff filed a bill, in 1809, against the defendants, as the executors, heirs and devisees of Thomas Moffatt, deceased, for an account, stating an agreement under seal dated in April, 1769, between John and William Ellison and the testator, by which they agreed to furnish the testator with a store of goods, which he was to sell on certain terms; and the agreement was to continue for three years. In April, 1772, the agreement was renewed for six years, and it was unexpired when the American revolutionary war broke out, in 1775, and interrupted the business. The parties lived in the County of Orange. J. and W. Ellison took the goods remaining unsold and the books. The object in taking the books was said to be to prevent the debts being paid in continental money. They returned them to Moffatt, at the end of the war, and after some of the debts had been collected by J. and W. Ellison. Moffatt died in 1805, and in October, 1808, the books were redelivered to the plaintiffs by the executors. By the books it appeared that the testator had received debts as late as in the year 1791. The bill charged that the executors had offered to pay $2,500, which was refused.

The answer stated that the executors were unable to state an account, having no books nor vouchers for that purpose; that they were ready

"Lord CAMDEN in Smith *v.* Clay, 3 Bro. C.C. 639, speaking generally of the effect of length of time in Courts of Equity, says this: 'A Court of Equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands where the party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence. Where these are wanting the court is passive and does nothing; laches and neglect are always discountenanced, and, therefore, from the beginning of this jurisdiction, there was always a limitation to suits in this court.' And again, he says: '*Expedit reipublicae ut sit finis litium*' is a maxim that has prevailed in this court in all times without the help of an Act of Parliament; but, as the court has no legislative authority, it could not properly define the time of bar by a positive rule, to an hour, a minute, or a year. It was governed by circumstances. These are principles which, as it seems to me, are not limited in their application to the case which called forth the expression of them, but apply generally to all cases. I refer to them more particularly because, in the argument before us, an attempt was made to limit the time beyond which the court would not interfere in a case of this description; and I think that, independently of statutory limitation, either express, or analogous where analogy applies, no such limit of time can be imposed."

to deliver over the bonds, notes, etc., which were in their hands, when required; that the executors did make such an offer of payment in satisfaction of the plaintiff's demand; but that it was made under a belief that nothing was due, and with a view to purchase peace, and to avoid the expense of litigation with rich men, which the estate of the testator was unable to bear; and they insisted on the staleness of the demand, and that it was barred by lapse of time.

The CHANCELLOR. The parties lived in the same county, and without accounting for the delay, the plaintiff suffered a period of twenty-six years to elapse, from the termination of the American war to the time of filing his bill. The offer made by the executors being for peace, and without any recognition of the justness of the demand, and being rejected by the plaintiff, cannot affect the question.

It would not be sound discretion to overhale accounts, in favor of a party who has slept on his rights for such a length of time; especially against the representatives of the other party, who have no knowledge of the original transactions. It is against the principles of public policy to require an account after the plaintiff has been guilty of so great laches.

The bill must be dismissed on the ground of the staleness of the demand; but without costs.[1]

CROWE *v.* BALLARD.

IN CHANCERY, BEFORE LORD CHANCELLOR THURLOW, 1790.

[1 *Vesey* 215.[2]]

Lord Litchfield by his will, dated 1774, left Robert Crowe a legacy of £1000, payable at the death of Lady Litchfield, and died 1776, Lady Litchfield being then sixty-nine years of age. Two or three months after his death, Ballard was applied to by Dr. Sealey, Crowe's tutor, and soon after by Crowe himself, then in France, to raise money for him

[1] In Murray *v.* Farland, 1818, 3 Johns. Ch. 569, 586, the same learned Chancellor said:

"In Ray *v.* Bogart, 2 Johns. Cas. 432, the Court of Errors confirmed a decree of this court, dismissing a bill for an account, by reason of delay and lapse of time, and the death of parties, and the probable loss of papers, though the real *laches* in that case was only for eleven years. The case of Sturt *v.* Mellish, 2 Atk. 610, is a strong one to show the unwillingness of the court to decree an account, when the transactions have become obscure and entangled by delay and time. There is no certain and definite rule on the subject. Each case must depend upon the exercise of a sound discretion arising out of the circumstances."

[2] Same case in 2 Cox 253; 3 Bro. Ch. 117.

by the sale of this legacy, which he undertook to do, and soon after represented that he could not get any person to give more for it than £350, to which terms Crowe, being in great distress, agreed; and accordingly executed an assignment of the legacy to Toft in September, 1777, and according to the answer £310 was actually advanced by the defendant (though he represented Toft as the purchaser) in different payments by small sums, some to Crowe's order, some to those of his brother, and some to Doctor Sealey, all between October, 1777, and March, 1778. Out of this sum £49 was disputed; defendant representing it to have been paid to Sealey, which was denied. In 1780, when Lady Litchfield was seventy-two, and was considered as dying, Crowe applied to Ballard for the purpose of repurchasing this legacy, and then found that he was the real purchaser, and that Toft was only his trustee. Ballard agreed to this proposal, upon condition that Crowe and his brother would enter into a *post obit* bond to pay him the sum of £1800 three months after the death of their father, then aged sixty-three. They consented, and such bond was accordingly given, reciting that it was in consideration of a debt of £900. Soon after the death of the father in 1782 a new bond for that sum, with five per cent. interest was entered into by them upon the application of Ballard. This bond was really executed in 1783, but was antedated. In 1787 Crowe and his brother offered to pay Ballard the money originally due with interest, which he refused, and brought an action on the bond; upon which, in May, 1783, the bill was filed praying that an account might be taken between plaintiff and defendant of money paid by the latter to Robert Crowe, or to his order, and that upon payment of the money appearing to be due, defendant might be decreed to deliver up the bond; and for an injunction to restrain him from suing on the bond.

Lord Chancellor [THURLOW]. The case lies in a very narrow compass. A young man, under a tutor, paid by his father £100 a year, and himself allowed £200 a year by his father, falls into distress and applies to Ballard to raise money. The only fund he could propose for that purpose was this legacy, payable at the death of Lady Litchfield, then sixty-nine. He applies to Ballard to get this disposed of, who undertakes to sell for him; and now pretends he took pains for that purpose. In his answer, which is better drawn than his depositions, he lets that fall in general expressions; but by the evidence it appears that he represented it to Browne, whom he employed to find a purchaser, as a very hazardous adventure. Browne then goes round with these instructions; and all he gets from those he applies to is, that it is very hazardous, and they will not engage in it. Under the notion of hazard, all the persons he applies to refuse to take any share in it, and then he buys it himself. If this court does not keep up the tenor of its rule of protection in these cases the consequence of going half way is only making them pay for cheating it. Here he bought it at a price so outrageously low that it deserves no other name than that of a rank fraud. You cannot talk of the com-

putation being that of compound interest; it must be so, and that is the rate at which it would be sold, if sold fairly; and the difference of the price of its real value and that given is the difference which the danger of its being set aside in a court of justice imposes. For the same reason he did not mention that he had himself bought it. As to the money that he did advance, I do not know what to say to it, whether he did advance it or not, or whether by the order of Crowe or not. The whole is but £310 including the £49, the payment of which is denied by Sealey; consequently there is £40 of it which he never pretended to have advanced, and £49 the payment of which is contradicted; and the manner in which he advanced it, renders it as griping and as pressing a transaction as possible. Then, while the father was alive, he got the two sons into a *post obit* bond, of which the whole consideration is that I have mentioned. Then as to the confirmation; I have attended formerly to the reason of that word "confirmation," and have been at a loss for the principle, upon which the courts have spoken of such transactions as these, subsequent to the demand arising, as a confirmation. I know if a gentleman of honor and fortune feels himself bound in honor by the circumstances of a bargain, however disadvantageous, not to rescind it, and knowing the case, declares when of full age, not under the terror of distress, that he thinks proper to give a new bond; the circumstance of an honorary engagement attended with money actually advanced, is sufficient to maintain the possessor of the new bond. But if a man gives a new bond under an idea that the old one may be enforced against him, at what time is that a confirmation? If he was poor or distressed, or under an influence of terror, it was not a confirmation; why not? Because he was not in a situation to be master of himself. If he does not appear to have been delivered from that specific apprehension, he was still acting under the influence of that supposition, which has no existence in fact, and which only drives him to double hatch the fraud, a quaint expression, which I do not go upon. What I go upon is, that the second bond was not given freely, but upon a consideration that in his mind carried with it a value it ought not, and was derived from a fraudulent consideration. The case mentioned by Mr. King, the circumstances of which I do not pretend to recollect well, might have gone upon an argument like this. Norris was tenant in tail, and was for a long time in affluent circumstances, and ruined himself long subsequent to this; and therefore there was no impression to induce him to pay the interest, but that he had got himself into a situation from which he did not know how to relieve himself. Therefore all these deeds must be set aside; and an account taken; and what appears due upon the account to the plaintiff must be paid to the plaintiff; and what to the defendant must be paid to the defendant; and the defendant must pay the costs.[1]

[1] In the leading case of Morse *v.* Royal, 1806, 12 Ves. 355, 373, Lord ERSKINE said:

"As to the doctrine of confirmation, it stands upon several authorities;

BULLI COAL MINING CO. *v.* OSBORNE AND ANOTHER.

IN THE HOUSE OF LORDS, 1899.

[*Law Reports* (1899) *Appeal Cases* 351.]

Appeal from the Supreme Court of New South Wales.

Lord JAMES OF HEREFORD. It appeared that on February 1, 1854, the Crown granted to John Alexander Watt fifty-one acres of land near Bulli Illawarra. By several conveyances the said fifty-one acres of land, known as "Watt's Grant," became vested in Henry Osborne, whose personal representatives are the present respondents. Henry Osborne died in 1858. Early in 1873 the appellants, who were working coal in land adjoining to Watt's Grant, found that their workings were approaching the boundary between the two properties, and so informed the then trustees of Henry Osborne's will, and entered into negotiations with them for the purpose of obtaining a lease of Watt's Grant. These negotiations fell through, but the appellants, proceeding secretly with their workings, en-

where a man, having been defrauded, with complete knowledge chooses to come again in contact with the person who defrauded him; abandons his right to abrogate the contract; and enters into a plain, distinct transaction of confirmation. But when the original fraud is clearly established by circumstances, not liable to doubt, a confirmation of such a transaction is so inconsistent with justice, so unnatural, so likely to be connected with fraud, that it ought to be watched with the utmost strictness, and to stand only upon the clearest evidence; as an act, done with all the deliberation, that ought to attend a transaction, the effect of which is to ratify that, which in justice ought never to have taken place.

"As to the effect of length of time, where there is no bar by the Statute of Limitations, a Court of Equity will never lay down as a general proposition, that though the fact, that imposition has been practised, is established, the party is too late; and by the accident of the death of the person, who might have contradicted him, shall be deprived of his right to relief. The true operation of length of time is by way of evidence; and, acknowledging the rule as to dealings between a trustee and the *cestuy que trust*, and, that the transaction should be more narrowly watched than in the case of strangers, yet it is to be examined according to the rules of evidence; standing upon the external principles of justice; and recognized by the whole theory and practice of the law of England."

And see the careful opinion of Lord Justice JAMES in Moxon *v.* Payne, 1872, L. R. 8 Ch. App. 881, holding that fraud cannot be condoned unless there be full knowledge of the facts and of the rights arising out of those facts, and the parties are at arm's length; that an agreement rendered inoperative by a collateral fraudulent agreement cannot be made valid by the abandonment of the collateral agreement, and that agreements, though prepared by an independent solicitor, may be set aside if that one of the parties for whom the solicitor is acting is under the undue influence of the other party.

tered upon Watt's claim, and between the years 1878 and 1880 removed the coal from under some fourteen acres of such land. The trespass was distinctly shown upon the appellants' own working plan. It was committed underground, and committed wilfully. Until the workings by the Bellambi Coal Company, under their lease of May, 1893, brought to light the fact that a trespass had been committed by the appellants, the respondents and their predecessors were ignorant of the appellants' wrongful working, and had no reason to suspect that any had occurred.

Upon these facts the courts below have come to the conclusion that no laches can be attributed to the respondents in not discovering the existence of the wrongful workings by the appellants—a conclusion with which their Lordships entirely concur.

Accepting, however, for the purposes of argument the findings of the Chief Judge, the learned counsel for the appellants contended that the Statute of Limitations was an answer to the respondents' claim. Their argument was to this effect: Granted, they said, that the trespass was intentional—as indeed most trespasses were—that circumstance of itself was no answer to the plea of the statute. To use the language of ALDERSON, B., Hunter *v.* Gibbons, 1 H. & N. 459, 465, there was "no distinction between trespasses underground and upon the surface." It constantly happened, as one of the learned judges observed in the case of the Imperial Gas Light and Coke Co. *v.* London Gas Light and Coke Co., 10 Ex. 39, 42, that the owner of a coal mine takes coal from an adjoining mine, and by fraud prevents its being found out for more than six years. "Yet that," adds the learned judge, "is no answer to the Statute of Limitations." Clearly it was no defence at law. Why, then, should it be a defence when the claim is put forward in a court of equity? The foundation of the claim must be the same wherever the injured party may seek redress. At law he sues for damages in an action of trespass. If he comes into a court of equity, still it is in respect of the trespass that he claims compensation. There being, therefore, a concurrent jurisdiction at law and in equity in respect of the very same wrong and the very same cause of action, the statute is as binding in equity as it is at law in accordance with the views expressed by the House of Lords in the well known case of Knox *v.* Gye, L. R. 5 H. L. 656, 674. If, indeed, the respondents had been able to make out a case of what PALLAS, C.B., Barbur *v.* Houston, 14 L. R. Ir. 273, terms "active or aggressive concealment," that might have been a different matter. Possibly relief might then have been had in accordance with the principles to be deduced from the case of Gibbs *v.* Guild, 9 Q. B. D. 59, and similar cases. But nothing of the kind was suggested here. The appellants have taken the respondents' coal. Be it so. They have done nothing more. That is the beginning and the end of their offending. It cannot be said that they have done anything actively to prevent the respondents or their predecessors in title finding out what they did.

Such was the contention of the appellants' counsel, but their Lordships

are unable to accede to it. It seems to ignore the nature and character of the act of which the respondents complain, and to disregard the principles on which courts of equity proceed in dealing with fraud.

It will not be out of place to cite a passage from the judgment of Lord HATHERLEY, in Livingstone *v.* Rawyards Coal Co., 5 App. Cas. 25, 34, before the House of Lords. The House was there dealing only with the measure of damage in the case of underground trespass. But in pointing out the distinction between a case of fraud and a case of inadvertence Lord HATHERLEY uses very plain language, and his remarks may be useful in clearing the ground. "There is no doubt," said his Lordship, "that if a man furtively and in bad faith robs his neighbor of property and, because it is underground, is probably not for some time detected, the Court of Equity in this country will struggle, or, I would rather say will assert its authority, to punish fraud by fixing the person with the value of the whole of the property which he has so furtively taken, and making him no allowance in respect of what he has so done as would have been justly made to him if the parties had been working by agreement, or if, as in the present case, they had been the one working and the other permitting the working through a mistake. The courts have already made a wide distinction between that which is done by the common error of both parties, and that which is done by fraud."

In the present case the coal was taken furtively. No one can deny that it is a fraud to rob your neighbor furtively of his property, or that a Court of Equity ought to give redress for such a wrong. "This court," as Lord HARDWICKE, (Chesterfield *v.* Jansen, 1750, 2 Ves. Sen. 125) presiding in a court of equity, observed, "has an undoubted jurisdiction to relieve against every species of fraud." Where the remedy is given on the ground of fraud Lord WESTBURY, (Rolfe *v.* Gregory, 1865, 4 D. J. & S. 576, 579) pointed out that "it is governed by this important principle that the right of the party defrauded is not affected by lapse of time, or, generally speaking, by anything done or omitted to be done so long as he remains without any fault of his own in ignorance of the fraud which had been committed."

The Statute of Limitations has really no application to a case such as this. Courts of equity are not within the words of the statute, which only apply to certain legal remedies, though they are, as it has been said, within its spirit and meaning. The way in which the statute came to be applied in proceedings in equity is explained by Lord CAMDEN, in his judgment in Smith *v.* Clay, 1767, 3 Bro. C. C. 639, n., which was published from his Lordship's own notes. "A court of equity," he says, "which is never active in relief against conscience or public convenience" always refused its aid to stale demands. As, however, it had no legislative authority, it could not define exactly the time of bar. It was governed by circumstances. But as often as Parliament prescribed a limit to proceedings at law the Court of Chancery adopted that rule and applied it to similar cases in equity. "For," he adds, "when the Legisla-

ture had fixed the time at law it would have been preposterous for equity, which by its own proper authority always maintained a limitation, to countenance laches beyond the period that law had been confined to by Parliament." Now it has always been a principle of equity that no length of time is a bar to relief in the case of fraud, in the absence of laches on the part of the person defrauded. There is, therefore, no room for the application of the statute in the case of concealed fraud, so long as the party defrauded remains in ignorance without any fault of his own.

The contention on behalf of the appellants that the statute is a bar unless the wrongdoer is proved to have taken active measures in order to prevent detection is opposed to common sense as well as to the principles of equity. Two men, acting independently, steal a neighbor's coal. One is so clumsy in his operations, or so incautious, that he has to do something more in order to conceal his fraud. The other chooses his opportunity so wisely, and acts so warily, that he can safely calculate on not being found out for many a long day. Why is the one to go scot-free at the end of a limited period rather than the other? It would be something of a mockery for courts of equity to denounce fraud as "a secret thing," and to profess to punish it sooner or later, and then to hold out a reward for the cunning that makes detection difficult or remote.

There is very little direct authority on the particular point which was urged with so much ingenuity at the bar. Indeed, the case of the Ecclesiastical Commissioners for England *v.* North Eastern Ry. Co., 4 Ch. D. 845, before MALINS, V.-C., was cited as the only reported case in which the account was carried back beyond the period prescribed as a bar by the Statute of Limitations. And their Lordships are compelled to say that they are unable to rely on the decision in that case. It is very difficult to follow the reasoning of the learned Vice-Chancellor. His Honor said distinctly, "there was no improper intention." He held that what was done "was done under a mistake." Yet the defendants were visited with all the pains and penalties of fraud. The account was carried back beyond the six years; the measure of damages was in accordance with the severest rule ever applied. The ground of the decision seems to have been that, although there was no moral fraud—no fraud in fact—yet "for the purposes of the statute the breaking of bounds into a neighbor's colliery must be considered a fraudulent act." There is no foundation for that proposition. Underground trespass may be committed in good faith without any sinister intention, or it may be committed under circumstances which would render the wrongdoer liable to a prosecution for felony. Every case must depend upon its own circumstances. There is nothing in principle, or in authority, or in the exigencies of public policy, to require that the same measure of justice or injustice should be meted out to all transgressors alike, ignorant or wilful, innocent or fraudulent.

In all or almost all the other cases cited at the bar the court held that fraud was not established. But Sir JOHN ROMILLY, in Dean *v.* Thwaite, 21 Beav. 622, and FRY, J., in Trotter *v.* Maclean, 13 Ch. D. 574, expressed their opinion that fraud would or might be an answer to the plea of the statute. In Dean *v.* Thwaite, 21 Beav. 622, where the learned Master of the Rolls held that the evidence of fraud was not conclusive, His Honor made these observations: "The case of fraud alleged, and the only fraud that I think would justify the court in coming to a conclusion that the coal gotten before that period"—that is, before the period of limitation—"ought to be accounted for is that the defendant had intentionally taken the plaintiffs' coal and had concealed the fact, and during the process had taken steps to prevent the plaintiffs discovering it." If those observations are to be construed to mean that in His Honor's opinion something more was required beyond taking the coal furtively, their Lordships are unable to agree in them. But they think that is not the fair meaning of the passage cited, which must be understood as applied to the alleged facts of the case on which His Honor was then commenting. In Trotter *v.* Maclean, 13 Ch. D. 574, FRY, J., remarks that the period of limitation imposed by the statute of James ought to apply to proceedings in the Chancery Division in respect of a trespass, unless there was some equitable ground for repelling the application of the statute. "Such an equitable ground," he adds, "has in many cases been found in fraud. When fraud or any other equitable circumstance exists undoubtedly the statute will not apply." It may be observed that in Trotter *v.* Maclean, 13 Ch. D. 574, no fraud was suggested beyond the fraud that lies in the secrecy of wilful trespass underground, and that the plaintiffs failed to prove in that case that the trespass was wilful.

Their Lordships are, therefore, of opinion that the Statute of Limitations cannot be set up as a bar in the present case, and they think that this conclusion is not opposed to any authority.

BADGER *v.* BADGER.

IN THE SUPREME COURT OF THE UNITED STATES, 1864.

[2 *Wallace* 87.]

Badger died in 1818, leaving a widow and ten children, one of whom only was of age at that time; the others being minors, of different ages. One of them came of age in 1824; another in 1828; a third in 1831; a fourth in 1834; a fifth in 1835; a sixth in 1837. The eldest son, Daniel Badger, took administration on the estate in 1819, an uncle being joined with him; and soon after filed an inventory of the estate, its debts and

liabilities. In 1820, having settled one administration account, the administrators obtained leave from the court to sell certain portions of the real estate. None of these proceedings were the subject of question.

In 1827, they filed a further account, which had indorsed upon it what purported to be the written approval of the widow and heirs, the latter acting by their guardians. By this account they claimed credit for several thousand dollars, alleged to have been advanced for the estate, and in 1830 got leave from court to sell as much real estate as would pay this balance. Public sale of the real estate was accordingly made; when it was bought by a friend of Daniel Badger, the administrator, and soon afterwards conveyed to him. The widow died in 1855, aged 74.

In 1858, James Badger, a son and heir, whose age did not appear, further than from the fact of the father's death in 1819,—and one of the persons who by his guardian, now dead, had approved of the account of 1827,—filed a bill against his brother Daniel,—administrator as aforesaid,—in the Circuit Court for the Massachusetts District, charging that the account of 1827 was false and fraudulent; that the real estate had been sold beneath its value, and bought in for his said brother, the administrator; that before this purchase he had silenced the objections of some of the heirs who opposed the sale by purchasing their shares; and had forged, or fraudulently procured the signature of the widow, his mother; and in this way had obtained license from the court to sell. The bill alleged, that "the fraudulent acts and doings of the said Daniel were unknown to the complainant and his coheirs, until within five years last past," and prayed an account, etc.

The answer of Daniel Badger, the defendant, denied the allegations of the bill generally; and, on the last point, denied "that the complainant, or any of the said heirs-at-law of said intestate, did not have personal knowledge of all acts and doings of said Daniel (the administrator), in reference to the sale and purchase of these estates until within five years."

There was much testimony from different members of the family; the charges of the bill being more or less supported by the evidence of heirs who had sold out what rights they had to James Badger, the complainant below. Some of the witnesses testified that Daniel, the defendant, who bore his father's name exactly, had often declared that, being the oldest son and bearing the paternal name, he was entitled to all the property. One of the witnesses was a daughter, born in 1807.

The court below dismissed the bill as being stale. On appeal the question was, whether this was rightly done?

Mr. Justice GRIER delivered the opinion of the court.

The numerous cases in the books as to dismissing a chancery bill because of staleness, would seem to be contradictory if the *dicta* of the chancellors are not modified by applying them to the peculiar facts of the case under consideration. Thus, Lord ERSKINE, in an important case once before him, says: "No length of time can prevent the unkennelling of a fraud." And Lord NORTHINGTON, in Alden *v.* Gregory, 2 Eden 285,

with virtuous indignation against fraud, exclaims: "The next question is, in effect, whether delay will purge a fraud? Never—while I sit here. Every delay adds to its injustice and multiplies its oppression." In our own court, Mr. Justice STORY has said, Prevost *v.* Gratz, 6 Wheaton 481: "It is certainly true that length of time is no bar to a trust clearly established; and in a case where fraud is imputed and proved, length of time ought not, on principles of eternal justice, to be admitted to repel relief. On the other hand, it would seem that the length of time during which the fraud has been successfully concealed and practiced, is rather an aggravation of the offence, and calls more loudly upon a court of equity to give ample and decisive relief."

Now, these principles are, no doubt, correct, but the qualifications with which they are stated should be carefully noted:

1st. The trust must be "clearly established."

2d. The facts must have been fraudulently and successfully concealed by the trustee from the knowledge of the *cestui que trust.*

The case of Michoud *v.* Girod, cited by the appellant's counsel, is an example of the class in which the concealment of the fraud was the aggravation of the offence. The facts of the case were "clearly established" by records and other written documents, and the court were not called on to found their decree on the frail memory or active imaginations of ancient witnesses, who may not be able, after a great lapse of time, to distinguish between their faith and their knowledge, between things seen or heard by themselves, and those received from family or neighborhood gossip, or upon that most unsafe of all testimony, conversations and confessions,—remembered or imagined,—partially stated or wholly misrepresented. The fraudulent concealment was also clearly established. The heirs, who lived in Europe, were deceived by the false representations of the executor, and kept in total ignorance of the situation and value of the estate, having no other information on the subject than that communicated to them by him. The delay was not the consequence of any laches in the heirs, but was caused by the successful fraud of the executor, and was but an aggravation of the offence.

But the case before us has none of the peculiar characteristics of those to which we have referred. For more than twenty-five years the widow and heirs have acquiesced in this sale, and it is more than thirty since the administration account was settled, which is alleged to have been fraudulent. The guardian of the complainant, who approved the account is dead; the widow died in 1855. Two of the heirs were of full age in 1831, and the others afterwards. This bill was filed in 1858. The bill does not state the age of complainant. But at the time of filing his bill, he must have been over forty years of age.

The whole transaction was public, and well known to the widow and the heirs, and their guardians. The purchase of the estate by the administrator could have been avoided at once, if any party interested disapproved of it. There was not and could not be any concealment of the

facts of the case. The complainant claims as assignee of his elder brothers and sisters, and uses them as witnesses to prove the alleged fraud after a silence of over thirty years. They attempt to prove the signature of their mother to the documents on file in the court to be forged, and this after the death of the mother, who lived for twenty-eight years after the transaction without complaint or allegation either that her signature was fraudulently obtained or forged. A daughter, who was twenty-three years of age when this sale was made, and had full knowledge of the whole transaction, after near thirty years' silence, now comes forward to prove that her concurrence and assent was obtained by fraud; and now, after the death of the guardian and the mother, who could have explained the whole transaction, the aid of a court of chancery is demanded to destroy a title obtained by judicial sale, after the parties complaining, with full knowledge of their rights, have slept upon them for over a quarter of a century.

Now, the principles upon which courts of equity act in such cases, are established by cases and authorities too numerous for reference. The following abstract, quoted in the words used in various decisions, will suffice for the purposes of this decision:

"Courts of equity, in cases of concurrent jurisdiction, consider themselves bound by the statutes of limitation which govern courts of law in like cases, and this rather in obedience to the statutes than by analogy.

"In many other cases they act upon the analogy of the like limitation at law. But there is a defence peculiar to courts of equity founded on lapse of time and the staleness of the claim, where no statute of limitation governs the case. In such cases, courts of equity act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, refuse to interfere where there has been gross laches in prosecuting the claim, or long acquiescence in the assertion of adverse rights. Long acquiescence and laches by parties out of possession are productive of much hardship and injustice to others, and cannot be excused but by showing some actual hindrance or impediment caused by the fraud or concealment of the parties in possession, which will appeal to the conscience of the chancellor.

"The party who makes such appeal should set forth in his bill specifically what were the impediments to an earlier prosecution of his claim; how he came to be so long ignorant of his rights, and the means used by the respondent to fraudulently keep him in ignorance; and how and when he first came to a knowledge of the matters alleged in his bill; otherwise the chancellor may justly refuse to consider his case, on his own showing, without inquiring whether there is a demurrer or formal plea of the statute of limitations contained in the answer."

The bill, in this case, is entirely defective in all these respects. It is true, there is a general allegation, that the "fraudulent acts were unknown to complainant till within five years past," while the statement of his case shows clearly that he must have known, or could have known, if he had

chosen to inquire at any time in the last thirty years of his life, every fact alleged in his bill. That his mother was entitled to dower in the land if the sale was set aside, was no impediment to his pursuit of his rights, while her death may have removed the only witness who was able to prove that his complaint of fraud was unfounded, and that it was by the consent and desire of the family that the property was kept in the family name by the only one who was able to advance the money to pay the debts of the deceased; a fact fairly to be presumed from her silence and acquiescence for twenty-four years.

The court below very properly dismissed this bill, and refused to examine into accounts settled by the courts with the knowledge of all parties concerned, and commencing forty years and ending thirty years ago, and to grope after the truth of facts involved in the mists and obscurity consequent on such a lapse of time.

If a further reason were required for affirming this decree, it might be found in the statute of Massachusetts, declaring that "actions for land sold by executors, administrators, or guardians, cannot be maintained by any heir or person claiming under the deceased or intestate, unless the same be commenced within five years next after the sale. But we prefer to affirm the decree for the reasons given, without passing any opinion on the effect of this statute.

Decree affirmed with costs.[1]

RUCKMAN *v.* CORY.

IN THE SUPREME COURT OF THE UNITED STATES, 1888.

[129 *United States* 387.]

Mr. Justice HARLAN delivered the opinion of the court. About the year 1855 or 1856, W. D. Bowers executed to the appellee Cory his bond in writing for the conveyance of certain lands in Mason County, Illinois, the consideration being the sum of one thousand dollars, payable in two

[1] In Rabe *v.* Cross, 1893, 51 N. J. Eq. 40, after deciding that a corporation holds its property as the trustee of its stockholders, and that they like any other *cestui que trust* has a right to have the trust property honestly managed and preserved from waste and misappropriation, the court said that equity discourages laches and neglect and requires those who seek its aid to act in good faith and with reasonable diligence, and that, therefore, a stockholder must apply promptly for an injunction to protect his stock against the consequences of an act not prohibited, but in excess of power; that he cannot wait to speculate upon the chances, but must come before the act of which he complains has become the foundation of rights or equities which must be overthrown to extend relief to him, and finally that summary relief will not be extended to a suitor whose conduct, before he asks for relief, has been such as to prevent equity being done.

equal instalments on the first day of October, 1857, and 1858, with ten per cent. interest from the date of sale. Cory went into possession under the purchase on or about May 1, 1856, during which year he prepared and sowed in wheat about seventy-five acres. In 1857 he erected a house on the premises, and, before the wheat crop of that year was cut, he moved into it with his family. During the next year he prepared for cultivation forty additional acres. He has cultivated, more or less, these lands ever since he first took possession of them. All the improvements thereon, including fencing, as well as the taxes (except those for the year 1880) were regularly paid by him.

On the first day of October, 1858, Bowers and wife conveyed the land to Elisha Ruckman, of New Jersey, who was a first cousin of Cory and a man of large means. This was the first time Bowers had heard of Ruckman. Until the delivery of the above deed he knew of no one except Cory in the transaction for the sale of the lands.

On the 24th of April, 1862, Ruckman, by deed executed in New Jersey, conveyed the lands to Margaret Hopping, a single woman, to whom, at a subsequent date, January 25, 1864, he was married. Some time after their marriage, but at what time does not appear, Ruckman and his wife separated; and they were living apart when she brought in the court below an action of ejectment against Cory for the recovery of the lands. In that action—the date of the commencement of which is not shown by the record—she obtained a verdict and judgment; but Cory elected to take, and did take, as of right, a new trial, as provided for in the statutes of Illinois. Rev. Stats. Ill. c. 45. Thereupon he instituted the present suit against Mrs. Ruckman (her husband having died) for the purpose of obtaining a decree requiring her to convey to him, by sufficient deed, all her right, title and interest in these lands. The claim for such relief is rested by the plaintiff upon these grounds: That the lands were purchased by him from Bowers, and paid for (except as to a small part of the price stipulated) with money borrowed for that purpose from Ruckman; that without knowledge or request of Ruckman, and solely for the purpose of securing him in the payment of the amount so loaned, he caused Bowers to make the conveyance directly to Ruckman; that although such conveyance was absolute in form, it was intended to be, and was only to operate as, a security for the debt due from him to Ruckman; that the latter, without his knowledge or consent, and without a good or valuable consideration to sustain it, made the deed of 1862 to Margaret Hopping; that only recently, namely, by said action of ejectment, did she assert any title under the deed to her; that his debt to Ruckman, on account of the borrowed money, has long since been discharged in full; and that, nevertheless, the defendant refused to convey to him, and was inequitably prosecuting her action of ejectment for possession.

The court below gave the plaintiff the relief asked by him.

1. The contention that the plaintiff has a plain, adequate and com-

plete remedy at law cannot be sustained. It is not certain that he can successfully defend the action of ejectment. Besides, only a court of equity can compel the surrender of the legal title held by the defendant and invest the plaintiff with it.

2. Nor has the plaintiff been guilty of any such laches as would close the doors of a court of equity against him. He was in the peaceful occupancy of the premises for some years prior to any assertion of title upon the part of the defendant under the deed of 1872. If he had not been all the time in the possession of the premises, controlling them as if he were the absolute owner, the question of laches might be a more serious one for him than it is. The bringing of the action of ejectment was, so far as the record shows, the first notice he had of the necessity of legal proceedings for his protection against the legal title held by defendant. As proceedings to that end were not unreasonably delayed, we do not perceive that laches can be imputed to him. Laches are rather to be imputed to the defendant, who, although claiming to have been the absolute owner of the lands since 1862, took no action against the plaintiff until the ejectment suit was instituted. Mills *v.* Lockwood, 42 Illinois, 111, 118. "Laches," the Supreme Court of Illinois has well said, "cannot be imputed to one in the peaceable possession of land for delay in resorting to a court of equity to correct a mistake in the description of the premises in one of the conveyances through which the title must be deduced. The possession is notice to all of the possessor's equitable rights, and he need to assert them only when he may find occasion to do so." Wilson *v.* Byers, 77 Illinois, 76, 84. See also Barbour *v.* Whittock, 4 T. B. Mon. 180, 195; May's Heirs *v.* Fenton, 7 J. J. Marsh, 306, 309.

3. Reference is made to the depositions of several witnesses, including the plaintiff who testified in his own behalf, in which are detailed statements made by Ruckman, at different times after 1862, in reference to the title to these lands. This evidence, it is contended, and properly so, was incompetent under the well-established rule that "a grantee in a deed is not affected with the declarations of the grantor made after the execution and delivery of the deed, unless, with full knowledge of such declarations, he acquiesces in or sanctions them." Higgins *v.* White, 118 Illinois, 619, 624; Steinbach *v.* Stewart, 11 Wall. 566, 581; Winchester and Partridge Mfg. Co. *v.* Creary, 116 U. S. 161, 165. But the question remains, whether the decree cannot be sustained by such evidence in the record as is competent and relevant. We think it can. At any rate, after a careful sifting of the proof, and giving due weight to all the facts and circumstances that may properly be considered, we do not see our way clear to disturb the decree.

There are no other questions in the case that we deem it necessary to notice.

The decree is affirmed.

CALHOUN ET AL. *v.* MILLARD.

IN THE COURT OF APPEALS OF NEW YORK, 1890.

[121 *N. Y.* 69.][1]

Printed in Vol. 1, p. 358.

SECTION 3. ILLEGALITY.

WHALEY *v.* NORTON, ET AL.

IN CHANCERY, BEFORE SIR JOHN TREVOR, M. R., 1687.

[1 *Vernon* 483.]

The bill was to be relieved against a bond and judgment, defeazanced for the payment of £400 to the defendant; and the bill charged, that whereas the security recited £400 to have been lent and paid by the defendant to the plaintiff, that in truth the money was never really lent or paid: the defendant by answer confessed, that the £400 was not lent or paid by her, and that it was never meant or intended so to be, and that it was the mistake of the scrivener in making the security after that manner, for that the £400 thereby intended to be secured was the free gift of the plaintiff unto the defendant.

The truth of the case was, that the defendant was for some time kept by the plaintiff, and this £400 was given her upon that account; but of that no notice was taken in the bill, and the counsel for the defendant

[1] "It still remains to be considered whether, short of such ratification or adoption, the plaintiff can be held to have by his conduct in any way precluded himself from taking the present proceedings. The term 'acquiescence' which has been applied to his conduct is one which was said by Lord COTTENHAM, in Duke of Leeds *v.* Earl of Amherst, 2 Ph. 117, 123, ought not to be used; in other words, it does not accurately express any known legal defense, but if used at all it must have attached to it a very different signification, according to whether the acquiescence alleged occurs while the act acquiesced in is in progress or only after it has been completed. If a person having a right, and seeing another person about to commit, or in the course of committing, an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterward be heard to complain of the act. This, as Lord COTTENHAM said in the case already cited, is the proper sense of the term acquiescence, and in

insisted, that it being a free gift, no equity could relieve against it; and cited the case of Bourman and Uphill, which was this very case in point, and the equity laid in the bill the same, *to wit,* that it purported to be a security for money lent; whereas no money was really lent or paid: and the court would not relieve in that case, though the gift was upon the like account; and the case of Peacock and Mainklin was also cited.

The Master of the Rolls said, that there would be a difference in these cases between a contract executed and executory; and that this court would extend relief as to things executory, which if done, it may be might stand: but as this case was, he saw no ground to relieve the plaintiff, nothing appearing to him, but it was a free and voluntary gift, without anything of *turpis contractus:* and in case it had been so, yet we know that Adam was punished, though tempted by Eve; because he would be tempted. But if it had been charged in the bill, that the defendant was a common strumpet, and she commonly dealt and practised after that sort, and used to draw in young gentlemen, in such case he thought it reasonable that the court should relieve; and the plaintiffs had, in this cause, proved as much; but the defendant's counsel opposed the reading to that matter, by reason it was not charged in the bill, nor in the issue in the cause; so they prayed liberty to amend their bill, and to charge that special matter, paying the costs of that day, and of the depositions taken in the cause.

HILL *v.* SPENCER.

IN CHANCERY, BEFORE LORD CHANCELLOR CAMDEN, 1767.

[*Ambler* 641.] [1]

Thomas Hill, who kept an oilshop in London, and when about twenty-seven years old became acquainted with the defendant Spencer, who was a common prostitute, and was proved to have been so for seven years before. He provided a lodging for her, and continued criminal familiarity with her for two years, to his death, during which time he paid for

that sense may be defined as quiescence under such circumstances as that assent may be reasonably inferred from it, and is no more than an instance of law of estoppel by words or conduct. But when once the act is completed without any knowledge or assent upon the part of the person whose right is infringed, the matter is to be determined upon very different legal considerations. A right of action has then vested in him which, at all events as a general rule, cannot be divested without accord and satisfaction, or release under seal. Mere submissions to the injury for any time short of the period

[1] The case is reported more fully in Blunt's edition of Ambler, note N.

her lodgings, which were at three different places, and allowed her two guineas a week. Her name was Chamber, but upon her going to be kept by Hill, she changed her name to Spencer; and Hill passed by the same name, and gave out to the person where she lodged, that he was her husband. It appeared in evidence, that after she went to be kept by Hill, she lay with one Perry, who was an acquaintance of Hill's. That some time before his death, Hill offered to give her £1,000, which she refused, saying, it would hurt him to draw it out of trade; and that Hill thereupon resolved to make a provision for her, and gave a bond, conditioned to pay her £50 a year for her life, and paid her down the first quarter's interest immediately. That talking of his brother upon the occasion, he said, he was sure his brother would not after his death dispute any provision he should make for the defendant. Upon the death of Hill, which happened soon afterwards, his brother paid two quarters of the annuity, and then refusing to pay any more, filed this bill, for an injunction to prevent defendant proceeding at law, and to have the bond delivered up.

It was argued for the plaintiff, that the court distinguishes between a bond given in case of a seduction, which is considered as *præmium pudoris,* and a bond given to a common prostitute. That the court does not in the latter case require evidence of actual fraud, but proceeds upon principles of public utility, and presumes that common prostitutes are full of arts and designs; and such presumption is made from general principles of policy, to discourage the offence. That the court will set aside marriage brocage, bonds, etc., upon the same reasoning. That there is evidence of her unfaithfulness to Hill, by being familiar with Perry. And the case of Whaley *v.* Norton, 1 Vern. 483, and Matthew *v.* Hanbury, 2 Vern. 187 were cited. In the last of these cases the court thought the case much stronger for relief, where the bill was brought by the executor, than where it was brought by the party himself.

On the other side it was argued, that this was not the case of a raw, unexperienced young man, nor of a doating old man; nor was it in the case of a bill brought to augment assets, for the sake of creditors, Hill having left considerably to the plaintiff, his brother. That there was no evidence of fraud in obtaining the bond: on the contrary, it was the voluntary act of Hill, out of gratitude for an act of generosity of the defendant in refusing the £1,000. That it was too much to say Hill could not make a provision for her. That no principles of equity refrain a person of an immoral character from receiving a bounty that Perry's evidence was not to be regarded; a single instance of prostitution after

limited by statute for the enforcement of the right of action cannot be divested without accord and satisfaction, or release under seal. Mere submission to the injury for any time short of the period limited by statute for the enforcement of the right of action cannot take away such right, although under the name of laches it may afford a ground for refusing relief under peculiar circumstances." Per Lord THESIGER, in DeBussche *v.* Alt, 1878, L.R. 8 Ch. Div. 286, 314.

she went to be maintained by Hill. That it was not to the reputation of Perry to disclose it, which he was not obliged to do; and probably it was with the knowledge of Hill, with whom he was intimate.

Lord CAMDEN, Chancellor:

I am clear in my opinion, that the plaintiff is not entitled to relief. The cases which have been determined against securities give to common prostitutes went upon the circumstances of the securities being given previous to the cohabitation; a consideration which being *turpis* in its nature, the court has relieved against them. In this case, the bond was not given for a consideration, but was voluntary. Hill had resort to her for near two years before he gave her the bond. Past service could not be a consideration at Law, and nothing was stipulated for the future. There is no principle in equity which says a man may not give a voluntary bond to a common prostitute: it would be going but a little further to say, he could not give her money without her being liable to be called upon for it. There is no circumstance of fraud in this case; and I do not think, that in the case of a voluntary bond, the obligee being a common prostitute is of itself a sufficient ground for relief. As to Perry's evidence, I lay no weight on the act of familiarity with him. He appears to have been intimate with Hill; was the person that first introduced Hill to the defendant; and probably was in partnership with Hill in the maintaining her, or at least his familiarity with her was known to Hill.

Dismiss the bill.

BENYON *v.* NETTLEFOLD.

IN CHANCERY, BEFORE LORD CHANCELLOR TRURO,[1] 1850.

[3 *MacNaughton & Gordon* 94.]

In this case the Vice-Chancellor of England having on the 2d July, 1849, allowed a general demurrer put in by the defendant William Nettlefold to the plaintiff's bill, a report of which will be found in the 17th vol. of Mr. Simon's Reports, page 51, the plaintiff Samuel Yate Benyon now appealed to the Lord Chancellor.

The bill, which was filed on the 12th June, 1849, and to which the demurring party and John Phillips Beavan were defendants, stated that in the month of December, 1847, the plaintiff indiscreetly executed a certain indenture, which was fully set out in the bill.

[1] Of Wilde, later Lord Chancellor TRURO, Lord Chief Justice TENTERTEN once said that he had "industry enough to succeed without talent, and talent enough to succeed without industry." On this accession to the Woolsack, after a lifetime devoted to the common law, he needed both qualities. "Notwith-

By this indenture, dated the 14th December, 1847, and made between the plaintiff of the first part, Caroline Nettlefold, spinster, of the second part, and the defendants of the third part, after reciting that the plaintiff, being minded and desirous to make a provision for C. Nettlefold, had lately agreed with the defendants to grant an annuity or yearly sum of £200 to be paid to C. Nettlefold, free from taxes and clear of all other deductions whatsoever, for and during the natural life of C. Nettlefold: it was witnessed, that, in pursuance of the said agreement and in consideration of 10s., the plaintiff granted unto the defendants, their executors, administrators and assigns, for and during the natural life of C. Nettlefold, one annuity or clear yearly sum of £200 to be paid half yearly, it being declared that the defendants should pay the said annuity unto C. Nettlefold for and during her natural life for her separate use independent of any husband she might at any time marry, and that without power of anticipating, charging, and assigning or incumbering any future payments thereof, and that the receipt alone of C. Nettlefold should be good and valid whether she should be covert or sole to the defendants for the payment of the said annuity or any part thereof; and the plaintiff covenanted in the usual way with the defendants for the due payment of the annuity; and the indenture contained the usual provisions for the appointment of new trustees by C. Nettlefold, and for the indemnity of the trustees; and also a proviso that if it should at any time happen that C. Nettlefold should become a bankrupt or take the benefit of any act for the relief of insolvent debtors, the grant and every thing therein contained should cease, determine, and become absolutely void.

The bill then contained the following statements: That the said indenture is valid on the face thereof, and that the consideration for the same as stated and appearing by the said deed is free from legal objection; however the plaintiff shows, and the fact is, that the consideration for the said deed was a prospective illicit cohabitation and improper connection subsequently had between the plaintiff and the said C. Nettlefold, and that the said deed is invalid; and the plaintiff shows that, after the execution of the said deed, the plaintiff, seeing the impropriety of the said connection, and finding himself duped, broke off and discon-

standing his age and inexperience of equity business, he proved a competent chancellor; but his success was achieved at the cost of intense study—his judgments were invariably written, and his health suffered in consequence." Article on Wilde, Thomas, Dictionary National Biography.

Of the value of these judgments Foss says "that only one was appealed from, and though many of them were reversals of decisions of the Vice-Chancellors, that one was affirmed."

In the Victorian Chancellors, 1906, Vol. 1. p 455, the learned author, J. B. Atlay, Esq., says: "The roll of the Chancellors of England contains more illustrious names, but none that recalls a more honorable career or a finer character than that of Thomas Wilde."

tinued the same altogether. And the bill, after setting out applications made to the plaintiff for payment of the annuity, and his refusal to comply with such applications, proceeded as follows: That the said defendants well knew that the consideration for which the said deed was executed by the plaintiff was immoral and illegal; nevertheless the said W. Nettlefold hath recently, without any previous communication with the said J. P. Beavan and contrary to his wishes, commenced an action at law in her Majesty's Court of Common Pleas in the joint names of the said W. Nettlefold and J. P. Beavan to recover an half-year's annuity upon the said deed alleged to have become due on the 1st of January, 1849; and the plaintiff hath put in a plea to the said action to the effect that the said deed was executed and delivered by the plaintiff to the said W. Nettlefold and J. P. Beavan in consideration of the said C. Nettlefold then agreeing with the plaintiff unlawfully and immorally to cohabit and commit fornication with the plaintiff and for no other value or consideration whatever; that, in order to enable the plaintiff to prove the truth of his said plea and defend the said action, it is necessary that the defendants should discover and set forth, whether the said indenture of the 14th December, 1847, was not executed by the plaintiff for some immoral consideration, and whether or not in consideration and in contemplation of a prospective or contemplated cohabitation or immoral connection between the plaintiff and the said C. Nettlefold, and whether at and before the execution thereof, it was not agreed, understood, or implied that a future illicit cohabitation or immoral connection was to take place between the plaintiff and the said C. Nettlefold; and the said defendants ought to set forth the real, true, and *bona fide* consideration for the said deed, and the full and true particulars of all and every the consideration given for the same, and whether an illicit cohabitation and immoral connection did not afterwards take place between the plaintiff and the said C. Nettlefold; and that the said defendants ought also to set forth whether at or shortly previous to the execution of the said deed some discussion or disagreement had not arisen between the plaintiff and the said C. Nettlefold, respecting some alleged and pretended marriage of the said C. Nettlefold and whether frequent communications and correspondence and interviews did not take place between the plaintiff and the defendants and the said C. Nettlefold respecting the execution of the said deed, and the particulars and effect thereof; and whether the said defendants have not had conversations with each other and the said C. Nettlefold and others, in which they have admitted the immoral consideration given for the said indenture and the matters hereinbefore alleged and that the plaintiff had been duped.

The bill prayed that the defendants might make a full and true discovery of all and every the matters aforesaid, and might in the meantime be restrained from proceeding in the said action, and from commencing any other proceeding at law against the plaintiff touching the matters aforesaid.

The Lord Chancellor. It seems to me that this demurrer must be overruled, both on principle and authority. The plaintiff coming here for discovery, one question which has been raised by the defendant is, whether the matter referred to as a ground of defence is a good defence at law or not. This point I think is quite clear, and therefore cannot consent, on the suggestion that it may be open to doubt, to send it for the determination of a Court of Law. It is competent to any one who is sued at law on a deed, to show that it is founded on an invalid consideration; this is laid down in Collins *v.* Blantern, 2 Wils. 341, and other cases. The bill in the present case states with sufficient clearness the defence proposed to be set up; and, showing that there is a good defence at law, it seeks discovery with respect to it, the defence being that the consideration for the deed on which the plaintiff is sued is an immoral consideration. Any objection therefore to the discovery founded on the alleged insufficiency of the allegations in the bill must, I think, fail.

A good deal has been said as to the principle to be applied to cases of this kind, and as to how far a defence of the nature just referred to should be favoured. It must, however, be remembered that the law in sanctioning such a defence does not do so out of favour to the party urging it, but on the grounds of public policy; namely, that those who violate the law must not apply to the law for protection. It is very easy to see the evil which would arise from allowing bonds in cases similar to the present; and that there is a wide difference between a man binding himself to make a compensation for the enjoyment of such an intercourse as that which comes under notice here, and from upholding contracts made in contemplation of such intercourse. Past seduction and cohabitation are not a good consideration to support a grant of an annuity. Beaumont *v.* Reeve, 8 Q. B. 483; 18 Jur. 284; 15 L. J. Q. B. 141; Smyth *v.* Griffin, 14 L. J. Ch. 28. A contract to grant an annuity, in consideration of the discontinuance of cohabitation and of the release of an alleged promise of marriage, is enforceable in equity. Keenan *v.* Handley, 2 De G., J. & S. 283; 10 Jur. N. S. 906; 12 W. R. 1021; 10 L. T. N. S. 800. See Shenk *v.* Mingle, 13 Serg. & R. 29; Hicks *v.* Gregory, 8 C. B. 378; Jennings *v.* Brown, 9 M. & W. 496. It is also of great importance to public morality that those entering into such contracts should not in any way be made subjects of sympathy and pity. It is not, however, necessary to deal with this view of the matter, as the authorities are quite sufficient to decide the case.

It is said that the court will not afford relief against a bond of the description referred to; but I need not enter into this question, as it is only used as the foundation for the next position; namely, that this court will not in a like case grant discovery. Now, however, similar bills for relief and discovery and for discovery alone may be, yet there is in many respects a clear distinction between discovery and relief, and among others in that with which we have to do in the present case. The defen-

dant here is seeking to keep from the Court of Law facts which the plaintiff in equity alleges are necessary for his defence, and necessary for the Court of Law to know, in order to a due performance of its duty. Suppose this had been the case of the party coming for relief here instead of at law; the defendant would clearly have been entitled to discovery, and he is equally entitled in aid of his defence at law. As the case of Franco *v.* Bolton, 3 Ves. 368, was read in the argument, sufficient attention was not paid to the concluding sentence of the judgment, which explains why the discovery was not there given; it was because the discovery sought would have exposed the party to penalties. All the cases show that though a bill for discovery and relief founded on a contract such as that under consideration might have been demurrable, yet that to a bill for discovery alone a demurrer would not lie.

There is in the bill here no allegation as to which the defendant by answering could subject himself to any penalty. The case is that of a bond given to a trustee for a woman, the transaction being an arrangement with the woman for future illicit cohabitation, and the woman by her trustee now seeking to enforce the bond at law. Even if the trustee knew the real nature of the agreement upon which the bond was given, who can say that being a trustee under these circumstances would expose him to any penalty?

When a defendant is sued at law, and has a good defence founded on the illegal nature of the contract, he has a right to a discovery to establish that defence unless there are special circumstances of exemption. There are none such in this case, and the demurrer must therefore be overruled.[1]

AYERST *v.* JENKINS.

IN CHANCERY, BEFORE LORD SELBORNE, C., 1873.

[*Law Reports,* 16 *Equity Cases* 275.]

July 7. Lord SELBORNE, L. C.[2] Mr. William Hardinge, a widower of mature age, having agreed with Isabella Buckton, the sister of his deceased wife, to cohabit with her under color of a fictitious marriage (both parties must be taken to have known that a real marriage was impossible, and there is no suggestion of fraud, deceit, or mistake on

[1] If, however, the unlawful purpose appear on the face of the instrument, relief has been refused. Smyth *v.* Griffin, 1843, 13 Simons 245. See also Batty *v.* Chester, 1842, 5 Beavan 103; Sismey *v.* Eley, 1849, 17 Simons 1; Ayerst *v.* Jenkins, 1873, 16 Equity Cases 275.

In note to the principal case a classified list of the cases on this unsavory subject is given, pp. 100-101.

[2] The statement of facts has been omitted.

either side), transferred, on the 16th of September, 1861, into the names of trustees named Buckton and Downes, certain shares belonging to him in the Alliance Marine Assurance Company and the London Chartered Bank of Australia, upon trusts declared by a contemporaneous deed, to which the settler, the trustees, and the lady were parties. These trusts were in effect for the immediate, absolute, and unconditional benefit of the lady, without any power of revocation; the income being secured to her for her separate use, in the event of any future coverture, and no provision being made, in that or any other event, for children. The lady is described in this deed as a spinster; it is voluntary on the face of it; the expressed motive being that Mr. Hardinge, "being desirous of making a settlement and provision for her," had proposed and agreed to assign and transfer the shares upon these trusts. The lady was previously informed by Mr. Hardinge of his intention to make this settlement; but she states in effect (and there is no evidence of the facts beyond her statements) that he did so some months after the cohabitation had been agreed upon; that there was no bargain or contract between them for any settlement; that she regarded it as a free and voluntary gift; and that it was not offered by him, nor accepted or understood by her, as binding her to the fulfilment of the promise of cohabitation previously made. She also produces a paper, written by Mr. Hardinge in her presence and communicated by him to her, after their agreement to live together and some time before the date of the deed. This document purports to contain instructions to Mr. Hardinge's solicitor to prepare a "deed of gift" to the lady of all his property, with provisions for any children who might be born of his connection with her in the event of her marrying after his death. In this paper she is described as "I. B. co. ca. Mrs. H.," meaning, evidently, "Isabella Buckton, commonly called Mrs. Hardinge." These instructions, however, were not acted upon, unless it ought to be presumed that they in some unexplained manner resulted in the execution of the deed of the 16th of September, 1861, of which the subject-matter was much more limited and the provisions materially different.

Two days after the date of the deed Mr. Hardinge and his sister-in-law went through the form of a marriage ceremony, and they lived together till his death, which happened four months afterward. The lady has ever since enjoyed the full benefit of these trusts; and in April, 1870, she married a Mr. Jenkins without any settlement, doubtless relying on the provision so made for her. The present plaintiff became the legal personal representative of Mr. Hardinge in 1866, and in January, 1872, he filed this bill in that character (not on behalf of creditors, for no creditors of Mr. Hardinge are alleged to exist), seeking to set aside the deed, as founded on an illegal consideration, and therefore void, and asking for a transfer, "if necessary," of the shares from the surviving trustee, Mr. Downes. The question which I have to decide is whether he is entitled to this relief.

In the first place, it has been argued that, even if Mr. Hardinge himself could not have maintained such a suit, his legal personal representative is entitled, under these circumstances, to do so; and for this position Matthew *v.* Hanbury, 2 Vern. 187, decided in the time of the Lords Commissioners TREVOR, RAWLINSON and HUTCHINS is cited. But what is reported to have been said on this point in Matthew *v.* Hanbury (if it is correctly reported, which may reasonably be doubted) is, after all, a mere *dictum*, not necessary to the decision. No support is given to such a doctrine by any later authority, and I hold it to be erroneous and contrary to law.

Would, then, Mr. Hardinge himself have been entitled to set aside this deed, if he had come into court for that purpose, upon evidence similar to that now produced, and after an equal lapse of time?

It was said that he might do so, because it is contended to be the duty of this court to discourage, on the ground of public policy, by all possible means, fictitious marriages between persons within the prohibited degrees of consanguinity or affinity. But I am not aware of any law which has imposed that particular duty on this court. So far as the power of moral censorship is committed to any of the courts of this country, it belongs, not to this but to a different jurisdiction. The policy of the law (and, therefore, of this and every other court in the realm) is, no doubt, opposed to all immorality and to all unlawful cohabitation; but the equitable doctrines applicable to such cases do not depend upon, and do not vary with, the species or degree of immorality in each particular case. The law matrimonial contents itself with making marriage between persons standing in certain relations to each other absolutely impossible, without attaching special penalties to the abuse by those persons of religious or other forms of ceremonies.

Most of the older authorities on the subject of contracts founded on immoral consideration are collected in the note to Benyon *v.* Nettlefold, 3 Mac. & G. 100. Their results may be thus stated: 1. Bonds or covenants founded on past cohabitation, whether adulterous, incestuous, or simply immoral, are valid in law, and not liable (unless there are other elements in the case) to be set aside in equity. 2. Such bonds or covenants, if given in consideration of future cohabitation, are void in law, and therefore, of course also void in equity. 3. Relief cannot be given against any such bonds or covenants in equity if the illegal consideration appears on the face of the instrument. 4. If an illegal consideration does not appear on the face of the instrument, the objection of *particeps criminis* will not prevail against a bill of discovery in equity in aid of the defence to an action at law. 5. Under some (but not under all) circumstances, when the consideration is unlawful, and does not appear on the face of the instrument, relief may be given to a *particeps criminis* in equity.

In the cases of this class there has been no actual transfer of property from the obligor or covenantor to the obligee. The contract has always

remained *in fieri:* the bond or covenant conferred a mere right of action, and conferred that right only if there was a good and lawful consideration, which, in the absence of evidence to the contrary, the law would presume from an instrument under seal. If the consideration is unlawful there is no legal obligation; and if the proof of such illegal consideration depends on extrinsic evidence, and does not appear on the face of the instrument, a court of equity may, for that reason, give relief, upon the principle explained by Lord COTTENHAM in Simpson *v.* Lord Howden, 3 My. & Cr. 97.

In the present case relief is sought by the representative, not merely of a *particeps criminis,* but of a voluntary and sole donor, on the naked ground of the illegality of his own intention and purpose; and that, not against a bond or covenant or other obligation resting *in fieri,* but against a completed transfer of specific chattels, by which the legal estate in those chattels was absolutely vested in trustees, ten years before the bill was filed, for the sole benefit of the defendant. I know no doctrine of public policy which requires or authorizes a court of equity to give assistance to such a plaintiff under such circumstances. When the immediate and direct effect of an estoppel in equity against relief to a particular plaintiff might be to effectuate an unlawful object, or to defeat a legal prohibition, or to protect a fraud, such an estoppel may well be regarded as against public policy. But the voluntary gift of part of his own property by one *particeps criminis* to another is in itself neither fraudulent nor prohibited by law; and the present is not the case of a man repenting of an immoral purpose before it is too late, and seeking to recall, while the object is yet unaccomplished, a gift intended as a bribe to iniquity. If public policy is opposed (as it is) to vice and immorality, it is no less true, as was said by Lord TRURO in Benyon *v.* Nettlefold, 3 Mac. & G. 102, that the law, in sanctioning the defense of "*particeps criminis,*" does so "on the grounds of public policy, namely, that those who violate the law must not apply to the law for protection." It is a maxim of law not opposed to any equity, that "*in pari delicto melior est conditio possidentis*"; and it is a principle of equity, that long delay in seeking to rescind a transaction originally voidable, on the faith of which other persons have irrevocably made their arrangements in life, may operate as a bar to relief.

A dictum of Lord Chancellor CAMPBELL in Coulson *v.* Allison, 2 D. F. & J. 525, and a decree of Vice-Chancellor STUART in Wootton *v.* Wootton, were cited at the bar as authorities for the proposition that a completed transfer of property, like that now in question, ought to be set aside on grounds such as those relied upon by the plaintiff in this case. But Lord CAMPBELL'S words had reference to a supposed state of things very different from that with which I have to deal; and the same observation applies to Wootton *v.* Wootton, which was the case of a mutual settlement, made on the occasion of one of these fictitious marriages, from which both parties desired, or were at least willing, to be relieved. It

may be that the door of this court is not closed against persons repenting of such an unlawful connection, and desirous of extricating themselves from fetters which, if relief were refused, might practically bind them to it. But in a case presenting no such circumstances, I think it consistent with all sound principle, and with all authority, to recognize the importance of the distinction between a completed voluntary gift, valid and irrevocable in law (as I hold the transfer of these shares to the defendant's trustees to be), and a bond or covenant for an illegal consideration, which has no effect whatever in law. In Whaley *v.* Norton, 3 My. & Cr. 97, 1 Vern. 483, the Master of the Rolls said "that there would be a difference in these cases between a contract executed and executory, and that this court would extend relief as to things executory, which, if done, it may be might stand." In Matthew *v.* Hanbury, 3 Mac. & G. 102, 2 Vern. 187, 188, a case already referred to the same principle was, by implication, recognized, the court saying that "whereas the trustees had declared a special trust for a particular purpose, as to one of the debts, that will not avail, there being no proof that the testator was privy thereunto, or directed such trust." And in Rider *v.* Kidder, 2 D. F. & J. 525, 10 Ves. 366, Lord ELDON asked whether there had been any case upon the distinction between a recompense for past, and a provision for future cohabitation, "where the court, finding the woman in actual possession of the property, has upon that ground taken it out of her hands. The distinction," he added, "upon the doctrine of *præmium pudicitiæ* has prevailed in the case of restraining her from enforcing a security. But I doubt whether there is any instance of taking the property out of her hands, except as to creditors." And Lord ELDON'S final decision in that case proceeded upon grounds irreconcilable, in my opinion, with the supposition that he would have granted any relief if the stock there in question had been proved by evidence to have been transferred into the joint names of the transferor and his mistress, with the intention of making the man a mere trustee for the woman, and vesting in her the immediate and absolute beneficial interest.

My judgment upon the whole of this case is adverse to the plaintiff. There is no legal ground on which the efficacy of the transfer of the shares in question can be disputed: and, so far as equitable considerations enter into the case, they appear to me to be in favor of the defendant. The bill must be dismissed with costs.

ANDERSON & TILLEY *v.* MONCRIEFF.

In the Court of Chancery of South Carolina, 1810.

[3 *Desaussure's Equity* 124.]

The complainants, who are London merchants, charge that on the 6th of October, 1799, they consigned by the schooner Phœbe, captain Walsh, forty-five negroes from the Island of Bance, on the coast of Africa, to William M'Leod, to sell the said negroes at the Havanna to the best advantage, remit the net proceeds to the said Andersons, at that time in London. That the said negroes were received and sold by the said William M'Leod, but when or for what price they are ignorant, never having received any accounts thereof from the said William M'Leod, in his lifetime, nor any part of the proceeds of the sales, excepting $2,571.43, remitted on account by M'Leod by a bill of exchange, and the further sum of $4,154.10, paid by M'Leod to William Miller, of Charleston, a creditor of John Tilley, who had attached the monies of the said Tilley in the hands of William M'Leod, which two sums amounted to $6,715.43, so that the said M'Leod is a debtor for the difference between $6,715.63, and the amount of sales of the forty-five negroes. That the complainants could never obtain from M'Leod any account of the net sales of the negroes. That he died on the A. D. 18, intestate, and letters of administration were granted to the defendant, John Moncrieff, who has been applied to for an account of the said sales, and to pay over unto the complainants, which he has refused, alleging that he has no books or papers that discover what they sold for. Whereas the complainants apprehended that if the prices cannot be fixed by any proof in the possession of the defendant, they are entitled to the highest average prices which similar negroes produced about the time when these were sold, which may be easily ascertained. Complainants pray that defendant may be made to answer and to discover all the property of his intestate, and the appropriation thereof, unless he admits the sufficiency of assets to satisfy their demands, and praying subpœna, the bill concludes as usual.

The Court [per Chancellor Desaussure] delivered the following decree:

The case made by the pleadings, in this cause, is an important one, and I have given it the best consideration in my power.

There can be no doubt where the justice of the case lies, whilst the distinctions of property, and of right and wrong in relation to it, subsist among men. The funds in the hands of the deceased Mr. M'Leod, were unquestionably the property of the complainant, and came there by a high act of confidence. In justice he and his representatives were bound to pay it.

But it is alleged by the defendant, that whatever may have been the moral obligation, the complainants were not entitled to recover from the defendant; because the money in question arose from a shipment of negroes made in October, 1799, from the coast of Africa, to Mr. M'Leod, in Charleston, at a time when the importation of negroes, into this State, was made illegal by the acts of Assembly then in force, prohibiting such importation, and confiscating the negroes; and that courts of justice will not enforce illegal contracts, nor aid parties in recovering under them.

The position laid down by the defendant's counsel is certainly true in general, that courts of justice will not enforce illegal contracts, nor assist parties in recovering under them. The cases of insurance on illegal voyages, and other examples, have been cited and relied upon in support of this doctrine. But all the cases cited are where attempts are made to recover under the illegal contract itself, as in the instance of insurances, where the suit is brought to recover against the insurer on the illegal policy.

The counsel endeavored to give application to this set of cases, by insisting that this was a contract, whereby Mr. M'Leod undertook, by receiving the negroes, to sell them and be accountable for the proceeds; and that this contract being contrary to law, was void and could not be enforced in our courts.

I cannot, however, think that these decisions have any application to this case. This is a mere agency. It was so understood by the parties in the course of the trade whilst it was legal. But suppose it to be a contract, what is it? That defendant would receive a cargo of negroes, and sell them, and receive the money for the complainant. All this he has done: it is completed. But the defendant says, I will not pay you the money which I have received on your account, because the whole transaction is illegal, as the law prohibited the importation of negroes. The complainant files this bill to compel the payment. The suit is not brought to recover a cent, out of the defendant's pocket, of his own money; it is to make him pay money which he has received as the agent, and for the use, of the complainant. It would be monstrous that the defendant should be permitted to keep the money; and the decided cases, following the principles of abstract justice, shew that where an illegal transaction has taken place, the agent, who has received the money on the part of the principal, shall not shelter himself from the payment of it to his principal under the pretence of the illegality of the original transaction. I will not say that there may not be cases, where the transaction may involve so much moral guilt, that courts of justice would not suffer themselves to be polluted with them directly or indirectly. But I do not think that this is one of those cases; or that it differs from the decided cases on this point. The principal one is that of Tennent and Elliott, in 1 Bes. & Puller, p. 3. There it was solemnly decided that Elliott, a broker, who had received money to the use of

Tennent, his employer, on an illegal policy of insurance, which the underwriters paid, on the loss occurring, shall not be allowed to set up the illegality of the contract as a defence in an action brought by Tennent, for money had and received. This was also decided in the case of Farmer *v.* Russel and another, 1 Bos. & Puller, p. 298.

I think these cases were rightly decided, and are applicable to the case now under consideration, thinking, as I do, that the defendant was a mere agent, and that this is not an attempt to enforce an illegal contract under the sanction of the court; but a suit brought for the recovery of money received by defendant, for the complainant, though founded on a transaction originally illegal.[1]

LEONARD *v.* POOLE.

IN THE COURT OF APPEALS OF NEW YORK, 1899.

[114 *New York* 371.]

This action was for an accounting.

For the purpose of carrying out their contract Keene, Washington Butcher's Sons and D. & N. G. Miller furnished large sums of money to E. A. Kent & Co., with which they from time to time, between August 13, 1879, and January 31, 1880, bought and sold, on the produce exchanges of New York and Chicago, futures and options in lard; and also bought large quantities of lard, some of which was, from time to time, sold. The sales of options, futures and of lard were made, in a way, to and for the purpose of causing the price of lard to fall, so as to enable the pool to purchase it at satisfactory prices, withdraw it from the market, and thereby greatly increase the market price. Many purchases and sales were made upon the approval of James R. Keene, N. G. Miller and Henry C. Butcher, or a majority of them, but many were made by E. A. Kent & Co. without such approval, and upon their own judgment.

During the period covered by these transactions E. A. Kent & Co. from time to time delivered to James R. Keene statements of the purchases and sales made for the parties interested. Many of the purchases and sales entered upon these statements were not descriptive of actual transactions, but described alleged sales by themselves to themselves; and purchases by themselves from themselves, upon which alleged transactions commissions were charged, which facts were not disclosed by the statements or in any other way. January 31, 1880, the defendants furnished

[1] The rest of the Chancellor's opinion, dealing with another point, has been omitted.

said Keene with a summary statement of the alleged transactions, which showed $133.09 due from them to him (aside from a difference in interest), and February 6, 1880, they sent him a check for this amount, and February 9, 1880, they sent him a check for $127.95, the alleged difference in interest. These checks were retained and collected, but were not accepted in settlement. The court found that the statements were fraudulent, and that a much larger sum was due Keene from the defendants than was shown by their statements; but that the parties having engaged in an unlawful conspiracy, the court would not adjust their differences, and dismissed the complaint, with costs.

FOLLETT, Ch. J. When the transactions out of which this action arose were being carried on the statutes of this State provided that if two or more persons conspire to commit any act injurious to trade or commerce, each of them is guilty of a misdemeanor. 2 R. S. 692, § 8, subd. 6. The same provision is contained in the Penal Code, section 168. The scheme entered into by the parties to the contract of August 13, 1879, was in indictable misdemeanor. 2 R. S. 692, § 8; People *v.* Fisher, 14 Wend. 9; Hooker *v.* Vandewater, 4 Denio, 349; Stanton *v.* Allen, 5 id. 434; Arnot *v.* Pittston & Elmira Coal Co., 68 N. Y. 558, 565; Morris Run Coal Co. *v.* Barclay Coal Co., 68 Penn. St. 173. The scheme which the parties to the contract for a time pursued, and sought to consummate, was identical with the one described in the contract, and equally criminal. That Keene, Washington Butcher's Sons and D. & N. G. Miller agreed to engage, and actually engaged, in an unlawful plot to advance the price of lard cannot be successfully denied, and the courts of this State will not entertain an action to adjust their differences. This proposition is well settled; and we do not understand that the learned counsel for the appellant gainsays it, nor does he assert that the rule would not be applicable to a case arising between those parties and out of these transactions. The learned counsel for the appellant insists that Kent & Co. were not principals, but were mere agents for the principals, and that they cannot avoid payment upon the ground that the transactions were illegal. When persons knowingly promote and participate in carrying out a criminal scheme they are all principals, and the facts that one of the parties acts, in some respects, in subordination to the others, and is to profit less than the others, or not at all, by the consummation of the scheme, does not render such person less a principal.

This rule is elementary, and does not require elaboration or the citation of authorities. Throughout the period covered by the transactions these defendants bought and sold lard and futures and options in lard, and actively engaged in the attempt to carry out the unlawful enterprise. If, at the close of their transactions, Keene and his associates had been found to be owing Kent & Co., we think it very clear that the illegality of the enterprise would have been a perfect defense to an action brought by Kent & Co. to recover the sum due. Bartlett *v.* Smith, 13 Fed. Rep. 263; Cobb *v.* Prell, 15 id. 774; Irwin *v.* Williar, 110 U. S. 499. In the

case last cited Mr. Justice MATTHEWS, in speaking for a unanimous court, said: "In Roundtree *v.* Smith, 108 U. S. 269, it was said that brokers who had negotiated such contracts, suing not on the contracts themselves, but for services performed and money advanced for defendant at his request, though they might under some circumstances be so connected with the immorality of the contract as to be affected by it, they are not in the same position as a party sued for the enforcement of the original agreement. It is certainly true that a broker might negotiate such a contract without being privy to the illegal intent of the principal parties to it which renders it void, and in such a case, being innocent of any violation of law, and not suing to enforce an unlawful contract, has a meritorious ground for the recovery of compensation for services and advances. But we are also of the opinion that when the broker is privy to the unlawful design of the parties, and brings them together for the very purpose of entering into an illegal agreement, he is *particeps criminis,* and cannot recover for services rendered or losses incurred by himself on behalf of either in forwarding the transaction." 110 U. S. 509. Several cases have been cited holding that money or property deposited with a third person, which was derived from or through an unlawful enterprise, may be recovered; and that the illegality of the transaction out of which the money or property arose cannot be successfully asserted as a defense by a mere agent or depositary. This rule is well settled, but it is not germane to this case. Other cases are cited holding that when the parties to an illegal transaction having accounted, as between themselves, and agreed that a definite sum belongs to each, that an action may be maintained upon the accounting or new promise, and the sum, once admitted to be due, recovered. Admitting these cases to be well decided, they do not aid the appellant. These parties have had no accounting. No admission has been made that a specified sum is due to any one of them. No promise has been made since the completion of the illegal scheme upon which a recovery is sought. On the contrary, this action is for an accounting between the parties. It is alleged in the complaint that the amount which the plaintiff is entitled to recover is unknown, and can only be ascertained by an investigation of the illegal transactions between the parties. The judgment prayed for is: "That an account may be taken of all the dealings and transactions, purchases and sales of land made and conducted by said defendants E. A. Kent & Co., under the agreement hereinbefore mentioned," etc.

The relief sought would require the court to investigate all of the various transactions of these parties, from the beginning to the end of their unlawful enterprise, and adjust the differences between them. This is precisely what courts have always refused to do. The fraud which the trial court found was practised by these defendants upon their associates cannot be too strongly condemned, but courts are not organized to enforce the saying that there is honor among law-breakers, and the desire to punish must not lead to a decision establishing the doctrine

that law-breakers are entitled to the aid of courts to adjust differences arising out of, and requiring an investigation of, their illegal transactions.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

BROOKS *v.* MARTIN.

THE UNITED STATES SUPREME COURT, 1863.

[2 *Wallace* 70.]

Mr. Justice MILLER, stating the facts of the case, as he proceeded, and showing that the different parts were proved by the testimony, delivered the opinion of the court to the following effect:

We think that, in point of fact, the allegation of the answer,—that the traffic in which this firm engaged was the buying up of soldiers' claims, before any scrip or land warrants were issued, and not the purchase and sale of bounty land warrants and scrip,—is true. We have as little doubt that the traffic was illegal. Undoubtedly, the main object of the ninth section of the act of February 11, 1847, was to protect the soldier against improvident contracts of the precise character of those developed in this record. It was a wise and humane policy, and no court could hesitate to enforce it, in a case which called for its application. If a soldier, who had thus sold his claim to Brooks, Field & Co., had refused to perform his contract, or to do any act which was necessary to give them the full benefit of their purchase, no court would have compelled him to do it, or given them any relief against him. And if they had, by any such means, got possession of the land warrant or scrip of a soldier, no court would have refused, in a proper suit, to compel them to deliver up such land warrant or scrip to the soldier. Or if Brooks, after the signing of these articles of partnership, had said to Martin, "I refuse to proceed with this partnership, because the purpose of it is illegal," Martin would have been entirely without remedy. If, on the other hand, he had said to Martin, "I have bought one hundred soldiers' claims, for which I have agreed to pay a certain sum, which I require you to advance according to your agreement," Martin might have refused to comply with such a demand, and no court would have given either of his partners any remedy for such a refusal. To this extent go the cases of Russell *v.* Wheeler, 17 Massachusetts 281; Sheffner *v.* Gordon, 12 East 304; Belding *v.* Pitkin, 2 Caines 149, and the others cited by counsel for appellant, and no further.

All the cases here supposed, however, differ materially from the one now before us. When the bill in the present case was filed, all the claims of soldiers thus illegally purchased by the partnership, with money ad-

vanced by complainant, had been converted into land warrants, and all the warrants had been sold or located. The original defect in the purchase had, in many cases, been cured by the assignment of the warrant by the soldier after its issue. A large proportion of the lands so located had also been sold, and the money paid for some of it, and notes and mortgages given for the remainder. There were then in the hands of defendant, lands, money, notes, and mortgages, the results of the partnership business, the original capital for which plaintiff had advanced. It is to have an account of these funds, and a division of these proceeds, that this bill is filed. Does it lie in the mouth of the partner who has, by fraudulent means, obtained possession and control of all these funds, to refuse to do equity to his other partners, because of the wrong originally done or intended to the soldier? It is difficult to perceive how the statute, enacted for the benefit of the soldier, is to be rendered any more effective by leaving all this in the hands of Brooks, instead of requiring him to execute justice as between himself and his partner; or what rule of public morals will be weakened by compelling him to do so? The title to the lands is not rendered void by the statute. It interposes no obstacle to the collection of the notes and mortgages. The transactions which were illegal have become accomplished facts, and cannot be affected by any action of the court in this case.

In Sharp *v.* Taylor, 2 Phillips's Ch. 801, a case in the English Chancery, the plaintiff and defendant were partners in a vessel, which, being American built, could not be registered in Great Britain, according to the navigation laws of that kingdom. Nor could the owners, who were British subjects, residing in England, have her registered in the United States. They undertook to violate the laws of both countries by having her falsely registered in Charleston, South Carolina, as owned by a citizen and resident of that place. In this condition, she made several trips, which were profitable; and the defendant, colluding with Robertson, the American agent in whose name the vessel had been registered, refused to account with plaintiff for his share of the profits, or to acknowledge his interest in the ship. When plaintiff brought his suit in Chancery in England, the defendant set up the illegality of the traffic, and the violation of the navigation laws of both governments, as precluding the court from granting any relief, on the same principle that is contended for by the defendant in the present case. It will be at once perceived that the principle is the same in both cases, and that the analogy in the facts is so close that any rule on the subject which should govern the one ought also to control the other. The case was decided by Lord Chancellor COTTENHAM and from his opinion we make the following extracts: "The answer to the objection appears to me to be this,—that the plaintiff does not ask to enforce any agreement adverse to the provisions of the act of Parliament. He is not seeking compensation and payment for an illegal voyage. That matter was disposed of when Taylor (the defendant) received the money; and the plaintiff is now only seeking payment for

his share of the realized profits. . . . As between these two, can this supposed evasion of the law be set up as a defence by one against the otherwise clear title of the other? Can one of two partners possess himself of the property of the firm, and be permitted to retain it, if he can show that, in realizing it, some provision or some act of Parliament has been violated or neglected? . . . The answer to this, as to the former case, will be, that the transaction alleged to be illegal is completed and closed, and will not be in any manner affected by what the court is asked to do between the parties. . . . The difference between enforcing illegal contracts, and asserting title to money which has arisen from them, is distinctly taken in Tenant *v.* Elliot, 1 Bosanquet & Puller 3, and Farmer *v.* Russell, id. 29, and recognized and approved by Sir WILLIAM GRANT, in Thomson *v.* Thomson, 7 Vesey 473.

These cases are all reviewed in the opinion of this court in the case of McBlair *v.* Gibbes, 17 Howard 232, and the language here quoted from the principle case is there referred to with approbation. We are quite satisfied that the doctrine thus announced is sound, and that it is directly applicable to the case before us.[1]

[1] See a criticism of this case by Mr. Justice PECKHAM in McMullin *v.* Hoffman, 1899, 174 U. S. 639, 666. In Planters' Bank *v.* Union Bank, 1872, 16 Wall. 483, 499, STRONG, J., at page 469, explained the distinction drawn in the principal case as follows: "But when the illegal purpose has been consummated . . . when the proceeds of the sale have been actually received . . . the court is there not asked to enforce an illegal contract. The plaintiffs do not require the aid of any illegal transaction to establish their case. It is enough that the defendants have in hand a thing of value which does not belong to them."

The cases seem in dispute as to the right of one partner to recover from another the proceeds of an illegal business. When the transaction is *malum in se*, there is no doubt that a recovery should be refused, the Highwayman's Case, Vol. 1, p. 279. It would seem, however, that when the completed transaction was merely *malum prohibitum*, relief should be had either by an accounting, Sharp *v.* Taylor, 1848, 2 Phill. 801; Cook *v.* Sherman, 1882, 20 Fed. 167; Manchester & Lawrence R. R. *v.* Concord R. R. 1889, 66 N. H. 100; Pfeuffer *v.* Maltby, 1881, 54 Tex. 454; or by an action sounding in Quasi-Contra, Wann *v.* Kelly, 1881, 5 Fed. 584; Robison *v.* McCracken, 1892, 52 Fed. 726; Gilliam *v.* Brown, 1870, 43 Miss. 641; McDonald *v.* Lund, 1896, 13 Wash. 412; *contra*, Goodrich *v.* Houghton, 1892, 134 N. Y. 115.

In the jurisdiction last cited, denying a recovery, the court suggests that relief might be given were the partnership legal in its inception. See Woodworth *v.* Bennett, 1871, 43 N. Y. 273; or if there had been a formal accounting, see Leonard *v.* Poole, *supra*. These distinctions seem founded on the following dictum of MELLOR, J., in Taylor *v.* Chester, 1869, L. R. 4 Q. B. 309, 314: "The true test of determining whether or not the plaintiff was in *pari delicto* is by considering whether the plaintiff could make out his case, otherwise than through the medium and by the aid of illegal transaction." The suggestion appears untenable, as it is the duty of the court to take cognizance of any illegality on its own motion. Claflin *v.* U. S. Credit Co.,

ATWOOD & CURRANT *v.* FISK AND ANOTHER.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1869.

[101 *Massachusetts* 363.]

AMES, J. A note given in consideration of a composition of felony, or of a promise not to prosecute for a crime of a lower degree than a felony, is illegal, and cannot be enforced by the promisee against the promisor. And it makes no difference that, of various elements making up the entire consideration, a part, and even the larger part, was legal and valid. If part of the consideration was illegal, the effect upon the note would be the same as if the whole were illegal. The plaintiffs insist that the notes referred to in their bills of complaint fall within this rule of law.

But it has also been settled that the law will not aid either party to an illegal contract to enforce it against the other, neither will it relieve a party to such a contract who has actually fulfilled it, and who seeks to reclaim his money or whatever article of property he may have applied to such a purpose. The meaning of the familiar maxim, *in pari delicto potior est conditio defendentis,* is simply that the law leaves the parties exactly where they stand; not that it prefers the defendant to the plaintiff, but that it will not recognize a right of action, founded on the illegal contract, in favor of either party against the other. They must settle their own questions in such cases without the aid of the courts. In the somewhat quaint language of Lord Chief Justice WILMOT in Collins *v.* Blantern, 2 Wils, 350, "all writers upon our law agree in this; no polluted hand shall touch the pure fountains of justice. Whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of a court to fetch it back again; you shall not have a right of action when you come into a court of justice in this unclean manner to recover it back. *Procul, o procul este, profani!*" In this respect the rule in equity is the same as at law. Equity follows the rule of the law, and will not interfere for the benefit of one such party against a *particeps criminis.* The suppression of illegal contracts is far more likely in general to be accomplished, by leaving the parties without remedies against each other. And so the modern doctrine is established, that relief is not granted where both parties are truly *in pari delicto.* 1 Story Eq. § 298; Claridge *v.* Hoare, 14 Ves. 59.

1896, 165 Mass. 501; Richardson *v.* Buhl, 1889, 77 Mich. 632, 651; Wright *v.* Rindskopf, 1877, 43 Wis. 344. It is submitted that the true reason for allowing a recovery in this class of cases is that it is more consonant with sound public policy than to permit one partner, by the plea of illegality, to appropriate to his own use money which has been given him to turn over to his associate. See the opinion of PIERREPONT, C.J., in Baldwin Bros. *v.* Potter, *supra.*

There is no reason why equity should be able to grant relief upon principles different from those recognized in courts of law. If the plaintiffs were occupying the position of defendants, and if the cases before us were actions brought to recover the amount of the notes in question, they could avail themselves of the maxim above referred to by way of defence. But they do not stand in that position. They are themselves invoking the aid of the court in its equity jurisdiction, to relieve them from a contract which they allege to be illegal. They are actors, or plaintiffs, and apparently are in a position in which the maxim in question can be invoked and relied upon on the other side. If the notes were founded on an illegal consideration, why should the court lend its process to aid one party to the illegality, rather than the other? What superior equities, in that view of the case, have these plaintiffs over the defendants? We see no such inequality in position, or abuse of advantages, as to entitle them to the aid of the court on the ground of public policy. If there has been a composition of a felony, or a suppression of a criminal prosecution, the plaintiffs were parties to it as well as the defendants, and it may perhaps be argued that the plaintiffs have had the benefit of the alleged corrupt agreement, and are merely seeking to be relieved from its inconveniences. They are seeking not to get back money paid under an illegal contract, but to recall notes and securities which they have given under such a contract, a distinction which is too slight to make much difference in the substantial equities of the case. Worcester *v.* Eaton, 11 Mass. 375.

We see no occasion for the interference of the court, as prayed for, upon any view of the case. If the bookkeeper embezzled the funds of his employers, he not only committed a crime, but he also incurred a debt. This debt he was legally and morally bound to pay, and the defendants had a right to make use of all lawful and proper means to enforce its payment or to obtain security. The rule of the common law, that all civil remedies in favor of a party injured by a felony are either merged in the higher offence against public justice, or suspended until after the termination of a criminal prosecution against the offender, is no part of the law of Massachusetts. Boston & Worcester Railroad Co. *v.* Dana, 1 Gray 83. The fact that the debt grew out of a breach of trust, and had its origin in fraud and criminality, is not a reason, as a matter of law, for bestowing upon the debtor any peculiar privileges or exemptions. If the supression of a criminal prosecution was one of the considerations for the contracts made and securities given by the plaintiffs, they can avail themselves of that fact as a defence in any suit at law against them upon such contracts. They are in no danger of losing the benefit of that defence in consequence of any transfer of the notes to a third person. Some of the instalments were overdue and unpaid, and for that reason no indorsee could so hold them as to deprive the plaintiffs of their defence. As to the exercise by the mortgagees of the power of sale given by the terms of the mortgagees, it cannot be difficult for the plaintiffs to see

that any purchaser at such sale should be fully notified (if notice should be thought necessary) of all grounds of objection to the notes and mortgages, and of their intention to contest any title which such purchaser shall venture to buy at the sale. It is well settled that all defences (except the statute of limitations) that can be made against the notes, can also be made against the mortgages. Vinton *v.* King, 4 Allen 562.

Whether the evidence reported can be said to prove the alleged illegality in the contract is a question which we have not found it necessary to decide, or even to consider. In any view that can be taken of that question, the plaintiffs are not in a position to claim the equitable relief prayed for, and therefore, in each case, the bill is dismissed, with costs for the defendants.[1]

[1] See the elaborate judgment in Kahn *v.* Walton, 1889, 46 Oh. St. 195, in which court held, citing and relying upon the principal case, that a plaintiff basing his cause of action upon an illegal or immoral act has no standing in a court of equity, and that where both parties have been engaged in an unlawful transaction the court will neither lend its active aid to the one party to get rid of the securities taken upon such transaction, nor assist the other party in retaining them, but will leave both to their strict legal rights.

The opinion of the court and the dissenting opinions examine the question in the light of reason and authority.

For instances of an unlawful contract (not involving moral turpitude) and of *ultra vires* acts of corporations where the transaction is repudiated and resort is had to equity, see Pullman Palace Car Co. *v.* Central Transp. Co., 1894, 65 Fed. 158; McCutcheon *v.* Merz Capsule Co., 1896, 71 Fed. 787.

INDEX TO VOLUME II.

Acid, contract to purchase exclusively from plaintiff, 90.
Actor, contract to perform services as, 107.
Acquiescence, laches, ratification, 754-772.
Administrator, must join heir of testator in suit against vendor, 414.
Affidavit, sufficient memorandum under statue, 167.
Agent, representations bind principal, 234.
    Signature of, to bind principal within the statute of frauds, 194.
Amount of proof required to cancel, reform or rescind an instrument, 646.
Assignee, of vendee sued by assignee of vendor, 482.
    Of vendee sued by vendor, 481.
    Of vendee sues assignee of vendor, 477.
    Of vendee sues vendor, 473, 476.
    Of vendor sued by assignee of vendee, 477.
    Of vendor sued by vendee, 471, 472.
    Of vendor sues assignee of vendee, 482.
    Of vendor sues vendee, 479.
Author, suit to compel performance of contract to write plays, 87.
Award, not to put in suit an obligation, 54.
    Specifically enforced, 53, 54.
    To compel taking of fine and deed, 55.
    To convey land at price to be fixed by arbitrators later, 56.
    To seal mutual acquittances, 53.
Bankruptcy, effect on relief, of bankruptcy of plaintiff, 311.
Bankrupt's conveyances fraudulent, 737, note 744.
Baseball, contract to play baseball, 119.
Brandy, contracts relating to sale of, 123.
Building contracts, contract to build on defendant's land, 76, 82.
    To compel building of house, 64, 65.
    To construct railroad, 65.
Burden of loss, burning of house, who bears, 450, 453, 454.
    Destruction of subject-matter, 448.
    Destruction of subject-matter, who takes insurance money, vendor or vendee, 455, 458.
    Dropping of one of two lives in a lease, 450.
    For waste under contract of sale, 424.
Cancellation, against whom given, 640.
    Amount of proof required for, 646.
    of instrument by mistake, relieved against, 632.
    of instrument for mistake of pre-existing fact upon which parties relied, 582.
Chattels, contracts for sale of timber, 21.
    Contract to purchase acid exclusively from plaintiff, 90.
    Contract to supply coal to plaintiff only, 111.

Contract to supply fish refuse exclusively to party for manufacturing purposes, 114.
of peculiar value, contract to deliver, 37, 41.
Suit to prevent breach of contract to supply plaintiff exclusively, 92.
Children, services by adopted children to take contract with real parent out of operation of statute of frauds, 219.
Services by, effect on oral contract with parent, under the statute of frauds, 217.
Choses in action, assignment of debts enforced, 14.
Coal, contract to sell to plaintiff only, 111.
Compromise, as effected by mistake, 576.
Concealment, by lessee, the lessor resisting performance, 248.
Effect of, 244.
By vendee, the vendor resisting performance, 251.
By vendor, the vendee resisting performance, 244, 245.
Conditions precedent, must be performed, 308, 317.
Where defendant causes plaintiff's default, 350.
Consideration, difference between consideration for the contract, and purchase price under the contract, 157.
Mutual promises sufficient, 155.
Want or inadequacy of, 154, 160.
Construction contracts, to build a railroad, 65.
To install lighting plant, 83.
Contracts, affirmative, 37, 38.
Between vendee and a testator, suit being against devisee, 155.
Binding on the defendant only, 131.
By married women, 137.
Concerning sale of brandy, 123.
Continuous, enforcement of, 22.
Court must be able to enforce, 28.
Covenant to repair in lease, 70, 73.
Enforcement of contracts in consideration of marriage, 193.
Enforcement of contract under seal, 157.
For personal services, 85, 87, 89, 96, 107, 110, 116, 119.
Imposing penalties, 121, 123.
In contemplation of marriage, time when memorandum should be made, 167.
In contemplation of marriage, time when memorandum should be signed within the statute, 170.
In which the plaintiff has option, 140, 144.
Made by an infant, 133, 136.
Necessity of seal under the statute, 161.
Not enforced when decree could be broken as soon as made, 29.
Not to betray trade secrets, 26, 124.
Not to carry on offensive trade, 29.
Not to engage in business, 18.
Not to engage in trade, 126.
Not to plow, 121.
One party only bound, 130.
Personal contracts not assignable, 465, 468.
Relating to partnership, 30.

Signed by vendee only, 129.
Specific performance of, is discretionary, 33.
To be enforced must be certain, fair, and just, 21.
To build house, 64, 65.
To carry out an award, 53, 54.
To construct railroad, 65.
To convey copyholds, 154.
To deliver chattels of peculiar value, 37, 41.
To deliver a picture, 41.
To execute a mortgage, 58, 162.
To install lighting plant, 83.
To insure, 31.
To lease a mine with option, 144.
To lend money, 60.
To maintain railway station, 76.
To make a lease, 133, 189.
To make voluntary settlements, 154.
To perform services as an actor, 107.
To play baseball, 119.
To purchase acid from plaintiff only, 90.
To purchase shares of stock, 44.
To report legal proceedings, 89.
To sell good will, 124.
To sell land, 33, 62, 131.
To sell mortgages, 148.
To sell patent, 46, 48, 147.
To sell stock, 148.
To serve as a manager of a manufacturing concern, 110.
To sing, 85, 96, 116.
To supply coal to plaintiff only, 111.
To supply fish refuse to plaintiff only, 114.
To supply patent medicines exclusively to plaintiff, 92.
To write plays, 87.
Where a fiduciary relation exists, 37, 40.
Where subject-matters are complicated, 31.
Conversion, contract for purchase after will made, does land go to heir or devisee, 405.
Contract to sell, and afterwards specific devise of property, 409.
Time of, under contract of sale, 400, 402, 423.
Copyholds, covenant to convey, 154.
Covenant, conditional, to sell, when enforced, 157.
Restrictive, whether must touch and concern the land, 489.
concerning kind of buildings, 496.
concerning its running with the land, 486.
concerning use of personal property, 500.
may arise by mutual covenants, 521.
may be imposed according to a plan of improvement, 530.
must be for benefit of land, not personal, 501, 504.
must be restrictive to be enforced, 515, 527.
need not be mutual, 501.
not enforced where conditions have changed, 517.

where not mentioned in defendant's deed, but he had notice, 527.
not to carry on particular kind of trade or business, 521.
not to open up quarry on land retained, 504.
not to sell sand from land granted, 508.
summary of situations under which binding, 534.
to build, maintain, and use in specified way, a canal, 525.
to buy beer from grantor only, 493.
where there is a general plan, sales may be made at different times, 530.
Conveyances of bankrupt, 737, note 744.
Damages, impracticability of, as ground of jurisdiction, 18.
Inadequacy of, as ground of jurisdiction, 14, 17.
Where from lapse of time no specific performance, 352.
Where slight, from violation of restrictive building covenant, 511.
Debts, assignment of, enforced, 14.
Defect, effect on relief where not latent, 231.
In the title, the quantity, or the quality of the estate, 360, 400.
Defence of negligence to cancellation, reformation, and rescission, 627, 634.
Defences, matters of, 129-400.
See Consideration, want of.
Defect in title, the quantity or quality of the estate.
Fraud, misrepresentation, concealment.
Hardship.
Lapse of time and laches.
Mistake.
Mutuality.
Plaintiff in default.
Statute of frauds.
Devisee, suit against, by vendee on contract between latter and testator, 153.
Donee, possession by, as part performance, 193.
Suit by, against administrator of donor, 193.
Donor, suit against administrator of, by donee put in possession, 193.
Dower, right of widow of vendee to dower in estate contracted for by husband, 417.
Drunkenness, as ground for restitution and as excuse for failure to restore consideration, 745, 747.
Duress, 706-717.
In law and equity, 708, note, 712.
Election of remedies, 644.
"Equitable" easement, covenant must touch and concern the land, 489.
Covenant not to build an apartment house, 517.
not to build beyond a certain line or beyond a certain height, 484, 511.
not to build on land conveyed, 527.
not to carry on a particular kind of trade or business, 521.
not to open quarry on land retained, 504.
not to sell from land taken, 508.
to build, maintain, and use in a specified way, a canal, 525.
to build only certain kind of buildings, 496, 501.
to buy beer from grantor only, 493.
to carry stone from quarry over particular railroad, 489.
to use only in certain way, 486.

Where matter might have been subject of true easement, 484.
Expenditures, enforcement of oral contract, unenforceable under statute, after expenditures, 160.
Nature of, to take contract out of statute, 160.
Under promise of new lease, while holding possession under old lease, 201.
Expenditures and possession, sufficient to take contract out of operation of statute, 198, 200.
Fiduciary relations as basis of fraud, 690.
Contracts involving, 37, 40.
Fish refuse, contract to supply, 114.
Fraud, by tenant in concealing true value of lands from his new landlord and so securing a too favorable lease, 225.
Concealing the defendant's true interest, 224.
Easily presumed in cases of expectancies, 673.
Fiduciary relations, fraud presumed in, 690.
From misrepresentation and misconduct of defendant, 718, 732.
Gross inadequacy of price as evidence of, 227.
Injury from, need not fall upon defendant in order to defeat specific performance, 228.
Its nature and essentials, 650-663.
Misrepresentation, concealment, 224-253, 650.
on third parties, 732-744.
Presumed from situation of parties, 670-689.
Presumed from subject of contract, 663-670.
Fraudulent conveyances of bankrupt, 737, note 744.
General plan, restrictive covenants imposed in pursuance to a general plan, 530.
Goodwill, contract for sale of, 124.
Hardship, 285-308.
Contract tending "to discouragement of honest industry," 285, 293
Insufficient that plaintiff merely has advantage, 298.
Loss of half purchase money to defeat specific performance, 285.
Mere inadequacy, though great, will not be an answer to a bill for specific performance, 286.
Time at which it must exist, 300.
When the public convenience is controlling, 304.
When circumstances of case have changed, 308.
Where contract has been made with inexperienced person, 306.
Where cost to defendant may overweigh advantage to plaintiff, 294.
Where occasioned by acts of the plaintiff, 296.
Where performance would cause forfeiture, 288.
Where the result of the defendant's own act, 290.
Heir, may be compelled to convey all his right to property under contract to sell made by his ancestor, 412.
Necessary party in suit by administrator against the vendor, 414.
of vendee, must be joined with personal representative in suit by vendor, 409.
of vendor, must join personal representative in suit against vendee, 411.
House, contract to build, 64, 65.
Husband, affirmance that wife will convey, effect on performance of contract by him, 392.

Ignorance or forgetfulness of existence or non-existence of a fact, 603.
Ignorantia juris non excusat, applies to public not to private law, 540, 559.
Illegality of contract, 775-795.
Improvements, making of, to take contract out of statute, 202, 204, 205.
Value of, considered, when question of taking contract out of operation of statute, 204.
Improvements and possession, to take contract out of statute, 202, 204, 205.
Incidents of specific performance, 400-465.
Infant, suit to enforce contract by, 133, 136.
Injunction, contracts imposing penalties, 121, 123.
Contracts not to divulge trade secrets, 124.
Contracts not to engage in trade, 126.
Contract to sell good will, 124.
To compel making of repairs, 73.
To enforce contract for playing baseball, 119.
To enforce contract to supply coal to plaintiff only, 111.
To enforce contract to supply fish refuse to plaintiff only, 114.
To prevent breach of contract to act as manager of a business concern, 110.
To prevent breach of contract to perform as actor, 107.
To prevent breach of contract to report legal cases, 89.
To prevent breach of contract to sing, 85, 96, 116.
To prevent breach of contract to supply patent medicines exclusively to plaintiff, 92.
To prevent breach of contract to write dramatic plays, 87.
To restrain defendant from breaking contract to purchase acid exclusively from plaintiff, 90.
To restrain defendant from buying fish refuse from party under contract to furnish same to plaintiff only, 114.
Insurance, contracts to insure, 31.
Insurance money, who takes, vendor or vendee, 455, 458.
Interest, rents, and profits, who takes when vendee in default, 428, 432.
who takes when vendor in default, 434, 441, 444.
Intoxication as a ground for remedy in Chancery, 670, notes, 671, 672.
Judgment creditor, rights of, against vendor, 461, 462.
Laches, acquiescence, ratification, 754-772.
Application of statute of limitations where laches found, 353.
Lapse of time and laches, 327-360.
time how regarded in equity, 327-341.
Lapse of time in reformation, cancellation, rescission, 635.
Law reporter, suit to compel performance of contract to report legal cases, 89.
Land, contract to convey, 11, 13, 33, 129, 130, 137, 140, 155.
Contract to purchase, 131.
Exchange of, statute of frauds applies, 206.
Suit by vendor on contract to convey, 62.
Lease, agreement to execute, 133, 182, 189, 200.
Contract to lease with option, 144.
Covenant to repair, 70, 73, 79.
Dropping of one of two lives, who bears loss, 450.
Lessee, misrepresentation by, to lessor, 248.
Suit against, by lessor, to compel acceptance of lease, 189.

Suit by, against lessor, on covenant to repair, 70.
Suit by assignee of, against lessor, on covenant to repair, 73, 79.
Suit by, on contract to lease mining property, with option, 144.
Suit by, to compel execution of lease, 133.
Lessor, suit against, by assignee of lessee, on covenant to repair, 73, 79.
Suit against, by lessee, on covenant to repair, 70.
Suit against, on contract to lease mining property with option in lessee, 144.
Suit against, to compel execution of lease, 133.
Suit to compel lessee to accept, 189.
Lighting plant, contract to install, 83.
Litigation, probability of, as affecting the title, 365.
Loan, agreement to make, 60.
Manager, contract to serve as manager of manufacturing concern, 110.
Marketability of title, probability of litigation, 365.
Marriage, contracts in consideration of, 193.
Contracts in contemplation of, when memorandum should be made to satisfy statute, 167.
Contracts in contemplation of, when memorandum should be signed to satisfy statutes, 170.
Marriage settlements, 193.
Married women, effect of husband's promise to convey wife's interest, 387, 395.
Suit by, on contracts made by them, 137.
Maxim, ignorantia juris non excusat applies to criminal or public law, not to mistake of other law, 540.
Memorandum, essentials of, to satisfy the statute, 172, 177, 181.
Time of signing to satisfy statute, 170.
Mine, contract to lease, giving option, 144.
Misconduct of defendant and misrepresentation as ground of fraud, 718, 732.
Misrepresentation and misconduct of defendant as ground of fraud, 717, 732.
Misrepresentation, By agent of vendor, the defendant, 236.
By lessee to lessor, 248.
By vendor, 231, 232, 234, 238, 240, 241.
Concerning condition of mineral property to be leased, 248.
Concerning health of a surviving life in a lease, 246.
Concerning quality and location of land, 232.
Concerning small or immaterial matters, 234, 236.
Effect of carelessness of purchaser, 231.
Effect of innocent misrepresentations, 239.
Effect of, on contract and rights of parties under it, 241.
In printed particulars, 238.
Its nature and consequences, 651, et seq.
Plaintiff must "be liable to no imputation," 237.
Seller describing land as described to him by third party, 232.
Statement of agent, 234.
Vague and indefinite misrepresentations, effect of, 238.
What sufficient to defeat bill for specific performance, 239, 240.
Mistake, 253-285, 539-615.
and ignorance of law distinguished, 562.
Bidding at auction where sale under altered terms, of which bidder had no notice, 274.

By vendor's bidder, concerning the character in which a third party was bidding, 276.
Effect of clerical error in footing up figures, 279.
Effect of subsequent oral agreement, 266.
Effect of, where the intention of the parties to the contract clearly shown, 259.
in drawing deeds is relieved against, 568.
in written instrument may be shown by parol, 580.
Intentional omission of terms under misapprehension as to their effect if inserted, 256.
Introduction of parol evidence to correct, 262.
Mistake of antecedent, legal right is treated as mistake of fact, and relieved against, 543.
Mistake of fact, 579-615.
Resulting from omissions in deed will be cured, 579-80.
Vitiates agreement made in reliance upon it, 582.
Mistake of law, 539-578.
of foreign law is treated as mistake of fact, note 571.
of law, effect of, 268.
of law and fact analysed and distinguished by Sir George Jessel, note, 561-563.
of law, history of doctrine, note, 543-4.
Mistake of legal effect of instrument not relievable, 544, 555.
Mistake, omission of stipulated term from written contract, 253, 255.
of vendor as to amount of land in plot sold, 281.
of scrivener will be relieved in proper case, 552.
Party bidding on one lot thinking it was another, 272.
Party buying on his own knowledge without examining plans, 277.
Where contract as written does not express intention of either party, 259.
Where mutual and gross, 385.
Money, agreement to lend, 60.
Mortgages, agreements to assign, 148.
Agreement to execute, 58, 162.
Mutual and unilateral mistake, 610.
Mutual mistake as to granting of land *relievable*, 586, 597.
Mutuality, 129-154.
Contract signed by one party only, 129.
In contracts by infants, 133, 136.
In contracts with married women, 137.
In option contracts, 144.
In suits by seller against purchaser, 147, 148.
Of the remedy, 131.
Negative contracts, enforcement of, 87-129.
Negligence as a defence to cancellation, reformation, rescission of instrument, 627-34.
Necessity of restitution, 745-753.
Option, by terms to be exercised after death, 402.
In lease for years, exercised after death, 400.
Plaintiff under no obligation to perform, 140, 144.
When with plaintiff, 130.

Parol evidence, let in to show intent of parties to a written agreement, 616.
When admissible to correct mistakes. See "Mistake."
Part payment, before statute passed, 179.
Effect of, to take case out of statute, 160, 162, 180, 181, 182, 184.
under oral contract to advance money on a mortgage to be given, 162.
Part performance, by part payment, 160, 179.
Delivery of possession as part performance, 188.
Personal services as, 210, 217, 219.
What acts will amount to, within meaning of statute, 162, 164, 196.
Parties, see "Assignee," "Vendee," "Vendor."
Administrator of vendee, must join heir in suit against vendor, 414.
Against whom relief of cancellation, reformation, and rescission will be given, 640-643.
Heirs and executors of deceased vendor should be joined by vendee, 415.
Heirs and personal representatives of vendor should join against vendee, 411.
In what capacity one must sign contract, to be bound under contract, 166.
Signature by, without seal, sufficient under the statute, 161.
Vendor should join heirs, and personal representatives of vendee, 409.
Restrictive covenants, adjoining property owners, 525.
Covenantee against covenantor, with no relation of grantor and grantee, 496.
Executor of grantor against a sub-grantee, 508.
Grantee against devisee, 483.
Grantor against a sub-grantee, 486.
Grantor against a sub-grantee with notice, 493.
Obligee against assignee of obligor, use of personal property, 500.
Prior grantee against subsequent grantee, 521.
second grantee against city that acquired by eminent domain, 484.
subsequent grantee against a grantee of a prior grantee, 511, 527.
sub-grantee against a subsequent vendee of grantor, 504.
sub-grantee against his grantee upon whom no condition had been imposed in sale, 537.
subsequent grantee of part of estate, against prior grantee of another part, 501.
who necessary, for violation of a restrictive covenant applying to land laid out under a plan, 511.
Partnerships, enforcement of contracts concerning, 30.
Patent, contract to sell, 46, 48, 147.
Patent medicines, suit to prevent breach of contract to supply plaintiff exclusively, 92.
Payment and possession, as part performance, 194, 197.
Penalties, contracts imposing, 121, 123.
Payment of, as affecting specific performance, 121, 123.
Performance with compensation, 370-400.
Personal property, chattels of peculiar value, contract to deliver, 37, 41.
Contract to purchase debts enforced, 14.
Contract to purchase from plaintiff exclusively, 90.
Contract to sell coal to plaintiff only, 111.
Contract to supply fish refuse, 114.
Contracted to be sold, after will made, 408.

Restrictive covenant as to use, 500.
Sale of timber, 21.
Suit to prevent breach of contract to supply plaintiff exclusively, 92.
Personal representatives of vendee must be joined with heir, on suit by vendor, 409.
of vendor must join heir in suit against vendee, 411.
Personal services, by adopted child, as affecting, under statute of frauds, an oral contract with real parent, 219.
By children to take contract out of operation of statute, 217.
Contracts to perform, 85, 87, 89, 96, 107, 110, 116, 119.
Effect of, on operation of statute of frauds on contract, 210.
Plaintiff in default, 308-326.
As to separate agreement, 320.
Effect of bankruptcy of, 311.
in immaterial infractions of a restrictive building covenant, 511.
Merely formal matter not regarded, 321.
Non-compliance with condition precedent, 308, 317.
What is sufficient tender, 323.
When literal performance not required, 313.
Where unable to convey what was contracted for, 310.
Plowing, injunction to restrain as waste, 121.
Possession, by donee under a gift as part performance, 193.
Sufficient to take case out of the statute, 188.
Possession and expenditures, sufficient to take contract out of statute of frauds, 198, 200.
Possession and improvements, to take contract out of statute, 202, 204, 205.
Possession and payment as part performance, 194, 197.
Presumption of fraud from situation of parties, 670-689.
from subject of contract, 663-670.
Principal, when bound by signature of agent, 194.
Profits, rents, and interests, who takes when vendee in default, 428, 432.
Who takes when vendor in default, 434, 441, 444.
Professional services, suit to compel obligee to perform contract for, 85, 87, 89, 96, 107, 110, 116, 119.
Proof requisite to cancel, reform, or rescind instrument, 646.
Purchase money, gift of receipt for, by vendor to vendee, does not make vendee a volunteer, 155.
Purchaser, carelessness of, effect on his right to relief, 231.
Suit against, by seller of patent, 147.
Quality of estate, defects in, 371, 374, 377, 387, 392, 395.
defects in, vendee is plaintiff, 387, 392, 395.
vendor is plaintiff, 371, 374, 377.
Quantity of estate, defect in, 370, 375, 376, 379, 383, 385, 386, 396.
defects in, vendee is plaintiff, 379, 383, 385, 386, 396.
vendor is plaintiff, 370, 375, 376.
Railroad, contract to construct, 65.
Contract to maintain station, 76.
Ratification, acquiescence, laches, 754-772.
Reformation, against whom given, 640.
Amount of proof required for, 646.
Reformation of deed defended on ground of negligence in grantee, 633.

Reformation of deed so as to include a right of way, 569.
Remedies, election of, 644.
Remedy, must be mutual, 131, 136.
Rent, payment of as part performance, 190, 193.
Payment of increased rent to take contract out of statute, 201.
Rents, interests and profits, who takes when vendee in default, 428, 432.
Who takes when vendor in default, 434, 441, 444.
Repair, covenant to, in lease, 70, 73, 79.
Rescission, against whom given, 640.
Amount of proof required for, 646.
of contract sought for ignorance or forgetfulness of existence or non-existence of a fact, 603.
Rescission, reformation, cancellation of instruments, 539-795.
Restitution, necessity of, 745-753.
Restraint of trade, contracts tending to restrain, 87-129.
Rights for and against third persons, 465-538.
Seal, effect of seal, 157.
Necessity of, to bring contract within the statute, 161.
Seller, suits by, against purchaser, 147, 148.
Signature, in what capacity one must sign to be bound under contract, 166.
of agent to bind principal, 194.
of parties, sufficient without seal, under the statute, 161.
Singers, suits to compel specific performance of contracts to sing, 85, 96, 116.
Specific performance, cases illustrating the early jurisdiction, 9-11.
Contract binding on defendant only, 131.
Contract by an infant, 133, 136.
Contracts enforced indirectly when not directly enforceable, 73.
Contract giving option, 140, 141.
Contracts imposing penalties, 121, 123.
Contracts in consideration of marriage, 193.
Contract not to divulge trade secrets, 124.
Contract not to engage in trade, 126.
Contract not to plow, 121.
Contracts relating to partnerships, 30.
Contract relating to sale of brandy, 123.
Contract signed by vendee only, 129.
Contract to assign mortgages, 148.
Contract to be enforced, must be certain, fair and just, 21.
Contract to build on defendant's land, 82.
Contract to build house, 64, 65.
Contract to build railroad, 65.
Contract to carry out an award, 53, 54.
Contract to convey copyhold, 154.
Contract to execute mortgage, 58.
Contract to execute a lease, 133, 162, 189.
Contract to install lighting plant, 83.
Contract to lease a mine, with option, 144.
Contract to lend money, 60.
Contract to maintain railway station, 76.
Contract to perform services as an actor, 107.
Contract to play baseball, 119.

Contract to sell goodwill, 124.
Contract to sell land, 131.
Contract to serve as manager of manufacturing concern, 110.
Contract to purchase acid from plaintiff only, 90.
Contract to purchase patent, 147.
Contract to render personal services, 85, 87, 89, 96, 107, 110, 116, 119.
Contract to report legal proceedings, 89.
Contract to sell patent, 46, 48.
Contracts to sell stock, 44, 148.
Contracts to sing, 85, 96, 116.
Contract to supply coal to plaintiff only, 111.
Contract to supply fish refuse to plaintiff only, 114.
Contract to supply patent medicines exclusively to plaintiff, 92.
Contract to write dramatic plays, 87.
Contract under seal, 157.
Contracts with married women, 137.
Covenant to repair in lease, 70, 73, 79.
Decree must be such that it cannot be broken as soon as made, 29.
Development and general principles, 1-37.
Extent of jurisdiction, 1-87.
Court assuming jurisdiction, will give full relief, 31.
Court must be able to enforce, 28.
Not granted, if damages adequate, 41.
Party may plead himself out of court, 41.
Remedy is discretionary, 33.
Suit by vendor to enforce contract to purchase, 62.
Voluntary settlements, enforcement of, 154.
Where contract not under seal, and the statute is pleaded, 161.
Where part payment under oral contract, 160.
Where subject matters are complicated, 31.
Station, suit to compel maintenance of, by vendor against vendee, 76.
Statute of frauds, 160-224.
and variation of written agreement by parol evidence to show that land not included in instrument was meant to pass, 619-627, and notes to principal cases.
Contract signed by one party only, 129.
Performance of personal services to take contract out of operation of statute, 210, 217, 219.
What will take a contract out of statute, 206.
Statute of limitations, operation where laches found, 353.
Relief not dependent upon, 357.
When applied, 355.
Stock, contracts to sell, 44, 148.
Subject matter, burden of loss when one of two lives in a lease drops, 450.
Destruction of, burden of loss, 448.
Destruction of house, burden of loss, 450, 453, 454.
Destruction of, who takes insurance money, vendor or vendee, 455, 458.
"Teaming," contract not to carry on teaming business, 126.
Tenant, continuing in possession as a part performance, 190.
Possession by tenant as part performance within the statute, 189.
Tender, what is sufficient, 323.

Third parties, fraud on, 732-744.
Timber, contracts for sale of, 21.
Time, as affecting unilateral contracts, 348.
Damages, where from lapse of time no specific performance, 352.
Effect of tender of defective title, 345.
How regarded in equity, 327, 328, 329, 330, 336, 337, 341.
Of making memorandum to satisfy the statute, 167.
Where defendant causes plaintiff's default, 350.
When not fixed by contract, how determined, 343.
Title, marketability of, 360, 361, 365.
Tax title and building restrictions alleged as being defects in title, 377.
Trade, contract not to engage in, 126.
Contracts restraining, 18, 123.
Offensive, agreement not to carry on, 29.
Secrets of, agreement not to divulge, 26, 124.
Trustees, suit to compel execution of agreement made by a cestui, 133.
Undue influence presumed in fiduciary relations, 703.
Unilateral mistake, and rectification, 610, 614.
Vendee, Assignee of, sued by assignee of vendor, 482.
Assignee of, sued assignee of vendor, 477.
Assignee of, sued by vendor, 481.
Assignee of, sues vendor, 473, 476.
Concealment by, effect of on suit for specific performance, 251.
Heirs and personal representatives should join against vendor, 411.
in default, who takes interests, rents, and profits, 428, 432.
Should join heirs and executors of deceased vendor in suit on contract, 415.
Sued by assignee of vendor, 479.
Sued by vendor on contract signed by vendee only, 129.
Sued by vendor to compel performance of contract to maintain railway station, 76.
Sues devisee, on contract of testator with vendee, 155.
Sues assignee of vendor, 471, 472.
Sues to enforce contract which did not bind him, 131.
Sues vendor, 140, 157.
on contract to build on conveyed land, 76, 82.
Suing on contract with husband and wife, when there is knowledge at time of contract of wife's interest, 395.
Vendor, assignee of, against assignee of vendee, 482.
Assignee of, sued by assignee of vendee, 477.
Assignee of, suing vendee, 479.
Assignee of, suit against by vendee, 471, 472.
Concealment by vendee, in suit against, 251.
In default, who takes rents, interests, profits, 434, 441, 444.
Misrepresentation by, 231, 232, 234, 238, 240, 241.
Must join heirs and personal representatives of vendee, 409.
Rights of judgment creditor against, 461, 462.
Suing assignee of vendee, 481.
Suit against by assignee of vendee, 473, 476.
Suit against by vendee, 140, 157.
Suit against, by vendee not bound by contract, 131.

Suit by, against vendee, to compel performance of contract to maintain railway station, 76.
Suit by, against vendee on contract to build on conveyed land, 76, 82.
Suit by, to compel vendee to perform, 62.
Suit on contract signed by vendee only, 129.
Voluntary settlements, enforcement of, 154.
Volunteers, enforcement of agreements by, 154, 155.
Waiver, what amounts to, of restrictive building covenant, 511.
Wall, contract to build on defendant's land, 82.
Waste, injunction to restrain waste in plowing, 121.
Who must bear loss, on land contracted to be sold, 424.
Widow, of deceased vendee, her right to dower in land contracted for by husband before death, 417.
Will, lands contracted for after will made, who takes, 405.
Personalty contracted to be sold after will made, 408.