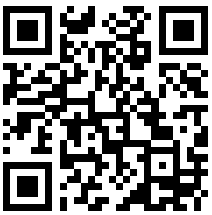

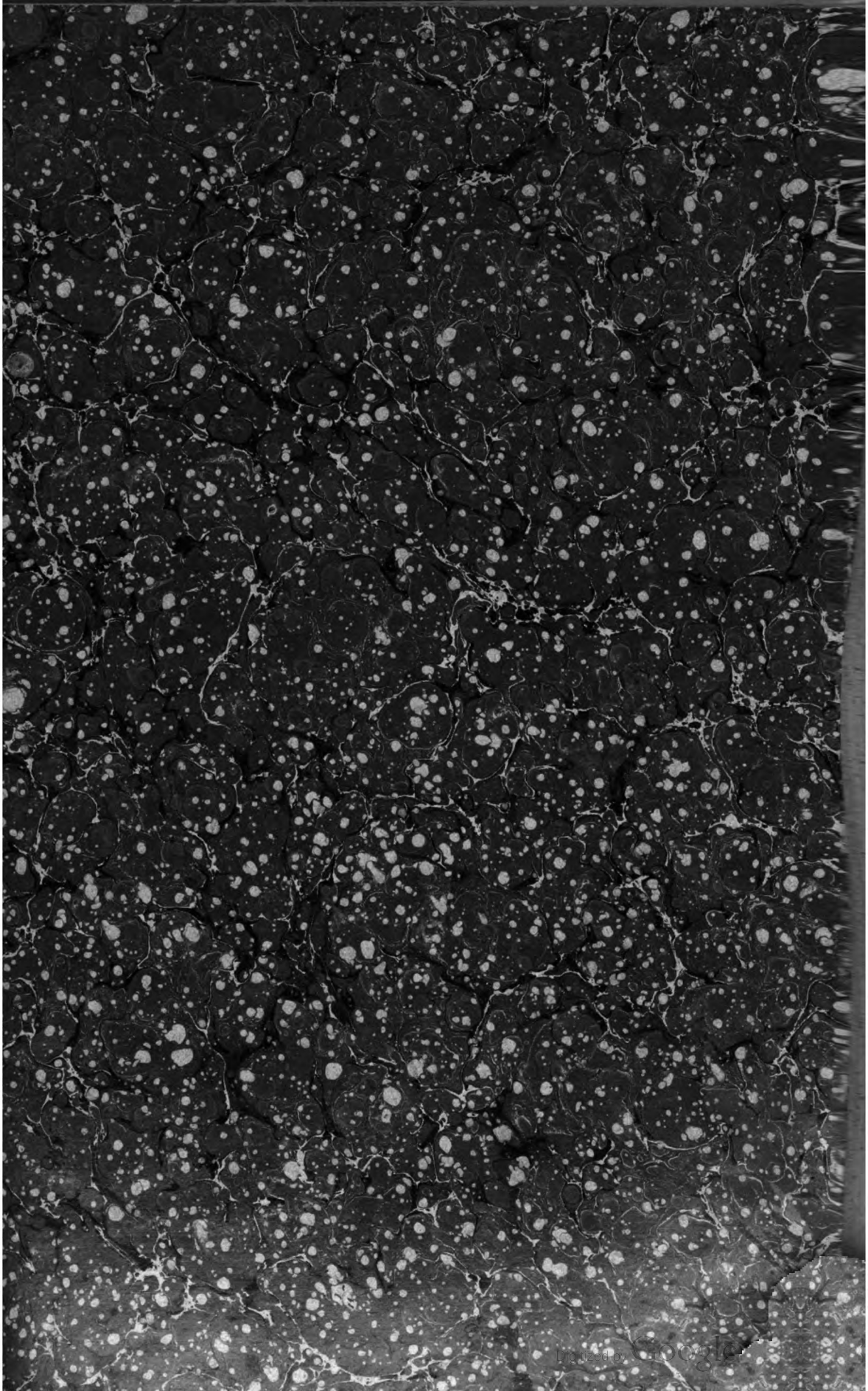

# ILLUSTRATIVE CASES

UPON

# EQUITY JURISPRUDENCE

BY

NORMAN FETTER

Author of a Handbook on Equity Jurisprudence

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# CASES REPORTED.

# CASES

ON

# EQUITY JURISPRUDENCE.

Following the Arrangement of Fetter's Equity Jurisprudence.

In re SAWYER et al.

(8 Sup. Ct. 482, 124 U. S. 200.)

Supreme Court of the United States. Jan. 9, 1888.

Petition for writ of habeas corpus.

This was a petition for a writ of habeas corpus, in behalf of the mayor and 11 members of the city council of the city of Lincoln, in the state of Nebraska, detained and imprisoned in the jail at Omaha in that state by the marshal of the United States for the district of Nebraska, under an order of attachment for contempt, made by the circuit court of the United States for that district, under the following circumstances: On September 24, 1887, Albert F. Parsons presented to the circuit judge a bill in equity against said mayor and councilmen, the whole of which, except the title, the address, and the signature, was as follows:

"Your petitioner is, and for more than fifteen years last past has been a citizen of the United States, and a resident and citizen of the state of Nebraska, and as such citizen has been and is entitled to the equal protection of the laws, and to life, liberty, and property; nor could he be deprived thereof without due process of law, nor denied the same within the jurisdiction of the United States or of the state of Nebraska.

"On the —— day of April, 1886, this complainant was duly and legally elected to the office of police judge of the city of Lincoln, in Lancaster county, Nebraska, and soon thereafter did duly qualify and enter into the discharge of his duties as such police judge; and ever since, and yet at this time, complainant has held and exercised all the functions and performed all the duties of the said office; and for the last six months and more all of the respondents except the said Andrew J. Sawyer have been and yet are the duly elected, qualified, and acting councilmen of the said city, and the said Sawyer has been and yet is the duly elected, qualified, and acting mayor of the said city. On the —— day of August, 1887, and for a long time prior thereto, there was a certain ordinance in the said city, in full force, relating to the removal from office of any official of the said city, and which said ordinance provided that no officer of said city should be put upon trial, for any offense charged against him, except before all the members of the said city council. On the —— day of August, 1887, one John Sheedy, Gus. Saunders, and A. J. Hyatt filed in writing with the city clerk of said city certain charges against this complainant, charging this complainant with appropriating the moneys of the said city, and a copy of which is hereto attached and made a part hereof; [1] and said mayor thereupon referred the said matter to a committee of only three of the members of the said council, to make a finding of fact and law upon the said charges; and said committee of three caused a notice to be served upon your complainant, requiring him to appear and defend himself before them; and complainant did appear before said committee, and then objected to the jurisdiction of the said committee, that they had no right or authority to render a verdict of the fact against him, or give judgment of law upon the said charges, or to hear or determine the said trial; and thereupon the said committee reported back the said charges to said mayor and council, that the said committee, under the charter to the said city, had no right or authority to render a verdict or judgment upon the said charges. But the said Sheedy and Saunders, who are, and for more than ten years have been, common gamblers in the said city, and are men of large wealth and influence in said city council, at once and on the —— day of August, 1887, and long after said complaint against this complainant had been filed, and long after said committee had reported back to said mayor and city council that they had no right, power, or authority to hear said trial, or to render either verdict or judgment in said proceedings, did procure the passage of another and different and ex post facto ordinance, granting to the said committee of three, instead of the council of twelve members, as by said ordinance required, the right and power to try the facts as alleged in said charges, and make a report thereon, and, if in their judgment they saw fit, to report to said mayor and city council that the office of the police judge should be declared vacant, and that the said mayor should fill the office of the said police judge, now occupied by your complainant, with some other person. And after the passage of this ex post facto law, said committee of three assumed jurisdiction to render a verdict of fact, and to hear and determine the said charges, and add thereto a conclusion of law, and notified this complainant to again appear and defend himself before the said committee; and this complainant then and there again objected to the jurisdiction of said committee to make any finding of facts against him, or to render any judgment or report thereon, upon the ground that said new ordinance was ex post facto and that said committee had no jurisdiction.

"On the nineteenth day of September, 1887, the said committee, having heard before themselves, denying to complainant a trial to a jury, and the evidence for the prosecution of the said action by certain gamblers and pimps, no material evidence for the prosecution be-

[1] To the Honorable Mayor and Council of the City of Lincoln: Your petitioners, John Sheedy and A. Saunders, respectfully represent to this honorable body, that they are citizens and resident taxpayers of the city of Lincoln, and your petitioners would further represent that on the thirteenth day of July, 1887, they employed a skillful accountant, one M. M. White, a resident and taxpayer of this city, to examine into the dockets and files and reports of A. F. Parsons, police judge of this city of Lincoln, to learn whether said A. F. Parsons, police judge, was making true and proper statements to the city of the business done by him as police judge, and to further ascertain whether or not said A. F. Parsons, police judge, had turned over to the

ing offered to them otherwise, did render a finding of fact against this complainant, and recommending to said mayor and city council that the office of police judge should be declared vacant, and that the said mayor should fill the said office by the appointment of some other person than complainant, and found that said ordinance was not ex post facto; and the said mayor and city council have set the matter for final vote on Tuesday, the twenty-seventh day of September, 1887, and threaten and declare that on the said day they will declare the office of the said complainant vacant, without hearing or reading the evidence taken before said committee, and appoint some other person to fill the same, and which report untruthfully states that all their evidence is filed therewith, and fraudulently so to suppress a certain book offered in evidence by complainant, which book is in the handwriting of said Gus. Saunders, and which is done to favor and aid and protect said gamblers, and to fraudulently obtain the removal of complainant from his said office.

"This complainant says that all of the said proceedings, trial, verdict, and other acts and doings of the said city council, and the ordinance approved ——, as well as the said ordinance approved August ——, 1887, were and are illegal and void, and contrary to and in conflict with and prohibited by the constitution of the United States, whereby, among other things, it is provided that no person shall be deprived of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction equal protection of the law, nor be adjudged of or tried for any offense by an ex post facto law; and complainant says that forasmuch as by the constitution of the United States it is provided that no person shall be deprived of life, liberty, or property without due process of law, and that in all criminal prosecutions the accused shall have the right of process to compel the attendance of witnesses in his behalf, and a speedy trial by an impartial jury of the county in which the offense is alleged to have been committed, and that no ex post facto law shall be passed, and that all of said rights shall remain inviolate, but such rights being denied by said ordinance and proceedings aforesaid to this complainant, he has been and is and is threatened to be deprived of such rights without due process of law, and that the same is ex post facto law, within the meaning of the constitution of the United States, and which protection has nor is not accorded to this complainant, he has been by said proceedings, and yet is, deprived of the equal protection of the laws.

"All of which illegal and oppressive acts and things are in violation of and in conflict with the constitution of the United States, and ought to be redressed by the judicial powers thereof. Wherefore complainant prays that a writ of injunction may be allowed by your honor to be issued out of this honorable court, under the seal thereof, directed to the respondents and all thereof, that they proceed no further with the charges against this complainant, and that no vote be had by the city council or the said defendants upon the pretended findings of the facts, verdict, or report, and filed September 19, 1887, with the said city clerk, handed in by Councilman Billingsley; and that said defendants, nor any of them, do not declare said office vacant, or in any way or manner proceed further with said char-

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city and county treasurers all moneys coming into his hands as fines, and properly belonging to the city and county. And your petitioners say that after a proper and careful examination of the files and dockets and reports of said A. F. Parsons, police judge, they have ascertained beyond question that said A. F. Parsons, police judge, has appropriated to his own use and benefit large sums of money which is the property of the city of Lincoln, and that he now has, and keeps for his own use, moneys which he has collected as fines from persons brought before him as police judge for violating the city ordinances. And your petitioners say that the said A. F. Parsons, as police judge, collected fines for the violation of the city ordinances in the months of August, September, October, November, and December, 1886, which fines and moneys he has appropriated to his own use, and has utterly failed to keep any record or account of the same, or to account to the city, or turn over to the city treasurer any of the moneys so appropriated, as is required by law. And your petitioners say that in the months of April, May, and June, 1887, the said A. F. Parsons received fines from divers persons, as police judge, which he has appropriated to his own use, and had wholly failed to keep any record of said fines, or to account to the city for the same. And your petitioners say that the said A. F. Parsons, as police judge, collected fines from divers persons in the month of May, 1887, and the months of March and April, 1887, and the month of September, 1886, which fines he has appropriated to his own use and benefit, and has wholly failed to keep any record of the said fines, or to make any report to the city of the same. And your petitioners say that the said A. F. Parsons has been police judge since April, 1886, and that during that time he has collected fines for the violation of statutes of Nebraska to the amount of $329, according to his dockets; and up to the nineteenth day of July, 1887, he had turned in to the county treasurer of Lancaster county but the sum of $15; whereas he had in his possession on the first day of July, 1887, the said sum of $314, which properly belonged to the county. And your petitioners say that on said nineteenth day of July, 1887, the day on which the accountant M. M. White completed the investigation of the said police judge's dockets, said Parsons paid into the county treasury the sum of $195, which leaves due the county the sum of $119, which was in his possession on the nineteenth day of July, 1887. Your petitioners therefore ask that the Honorable Mayor and council may appoint a committee of your honorable body, and that a time and place be mentioned on which to take testimony inquiring into the conduct of A. F. Parsons as police judge, and to investigate the management of his office, and to give the said A. F. Parsons and your petitioners notice of such time and place, and your petitioners will appear with the evidence and testimony proving the facts hereinbefore stated.

A. Saunders.
John Sheedy.
A. J. Hyatt.

ges, nor appoint any person to fill said office; that said defendants may appear and answer this your complainant's bill, but answer under oath being expressly waived; that on the final hearing of this action, said injunction be made perpetual, and that the defendants pay the costs of this action, and that the complainant have such other, further, and different relief as justice may require."

Annexed to the bill was an affidavit of Parsons that he had read it, and knew all the facts therein set forth, and that the same were true.

On reading the bill the circuit judge ordered that the defendants show cause before the circuit court why a preliminary injunction should not issue as prayed for, "and that in the mean time, and until the further order of the court, they be restrained from doing any of the matters sought to be enjoined." In accordance with the prayer of the bill and the order of the judge, an injunction was forthwith issued, and served upon the mayor and councilmen. After this, at a meeting of the city council held for the purpose, the mayor and councilmen proceeded to take up and consider the charges against Parsons, and, after considering the evidence, passed a resolution by which they "find that said Parsons received a number of fines for the violation of the city ordinances, which he failed to turn in to or report to the city treasurer at times required by law, and specified in the charges against said Parsons," and "that his arrangement with the gamblers and prostitutes that, if they would pay a fine monthly, they would not otherwise be molested, was in direct violation of law, and calculated to bring the city government into disgrace;" and "therefore confirm the report of the committee who reported to this counsel on the charges against said Parsons, and declare the office of police judge of the city of Lincoln vacant, and request the mayor to fill the office with some competent person." Thereupon the mayor nominated, and the council on motion confirmed H. J. Whitmore to be police judge to fill the vacancy; and the mayor issued an order to the city marshal, informing him that Whitmore had been duly qualified and given bond and been commissioned as police judge, and directing him to see that he be duly installed in his office. Parsons declining to recognize the action of the city council, or to surrender the office, the city marshal forcibly ejected him, and installed Whitmore.

Upon an affidavit of Parsons, charging the mayor and councilmen with willful and contemptuous violation of the injunction, stating the above facts, and accompanied by a copy of a notice to him from the city clerk setting forth the resolution of the city council, and the nomination and confirmation of Whitmore, as well as by a copy of the mayor's order to the city marshal, the circuit court issued a rule to the mayor and councilmen to show cause why they should not be attached for contempt. Upon their answer to that rule, under oath, producing copies of the ordinances under which they acted, (the material parts of which are set forth in the margin,[1]) admitting and

[1] The original ordinance contained these sections:

"Section 1. Whenever any officer of the city of Lincoln, whose office is elective, shall be guilty of any willful misconduct or malfeasance in office, he may be removed by a vote of two-thirds of all the members elected to the council: provided, that no such officer shall be removed from office unless charges in writing, specifying the misconduct or nature of the malfeasance, signed by the complainant, and giving the name of at least one witness besides the complainant, to support such charges, shall be filed with the city clerk, president of the council, or mayor; which charge and specifications shall be read at a regular meeting of the council, and a copy thereof, certified by said clerk, president of the council, or mayor, accompanied with a notice to show cause at the next regular meeting of said council why he shall not be removed from office, shall be served upon the officer so accused at least five days before the time fixed to show cause.

"Sec. 2. In case the said accused officer shall neglect to appear and file a denial in writing, or render a reason for not doing so, at the first regular meeting of said council after being duly notified, the said charge and specifications shall be taken as true, and the council shall declare the office vacant.

"Sec. 3. In case said officer shall file a denial of said charge and specifications in writing, the council shall adjourn to some day for the trial of said officer; and if, upon the trial of said officer, said council shall be satisfied that he is guilty of any misconduct willfully, or malfeasance in office, they shall cause such finding to be entered upon their minutes, and shall declare said office vacant, and shall proceed at once to fill such vacancy in the manner provided by statute and ordinance.

"Sec. 4. All proceedings and notice in the matter of such charges may be served by the marshal or any policeman, and the return of any such officer shall be sufficient evidence of the service thereof; service and return shall be in the manner provided by law for the service of summonses in justice's courts."

By the ordinance of August 24, 1887, section 3 of the former ordinance was repealed, and the following amendment substituted: "In case said officer shall file a denial of the said charges and specifications in writing, the council, or the committee of the council, to whom said charges shall have been referred, shall appoint some day for the trial of said officer; and if, upon the trial of said officer, said council or said committee shall be satisfied that he is guilty of any misconduct willfully, or malfeasance or misfeasance in office, the council shall cause its findings, or the findings of said committee, to be entered upon the minutes of the council, and the council shall declare the said office vacant, and the said officer removed therefrom. The council shall then forthwith cause the mayor to be notified that the said office is vacant, and that said officer is so removed. When the mayor is so notified, the said office shall be filled by appointment of the mayor by the assent of the council; and such person so appointed shall hold said office until the next general election, and as in such case by statute and ordinance made and provided. If the officer against whom said charges are made shall appear and defend against the same, he shall be held and deemed to have waived all irregularities of proceedings, if any, as do not affect the merits of his defense."

justifying their disregard of the injunction, and suggesting a want of jurisdiction in the circuit court to make the restraining order, the court granted an attachment for their arrest, and, upon a hearing, found them guilty of violating the injunction, and adjudged that six of them pay fines of $600 each, and the others fines of $50 each, beside costs, and in default of payment thereof stand committed to the custody of the marshal until the fines and costs should be paid, or they be otherwise legally discharged. They did not pay the fines or costs, and were therefore taken and held in custody by the marshal.

The petition for a writ of habeas corpus alleged, "that the court had no jurisdiction of said suit commenced by said Albert F. Parsons against your petitioners, and that said restraining order was not a lawful order, and that said judgment of said court that your petitioners were in contempt, and the sentence of said court that your petitioners pay a fine and suffer imprisonment for violating said restraining order, is void, and wholly without the jurisdiction of the circuit court of the United States, and in violation of the constitution of the United States;" and further alleged "as special circumstances, making direct action and intervention of this court necessary and expedient, that it would be useless to apply to the circuit court of the United States for the district of Nebraska for a writ of habeas corpus, because both the circuit and district judges gave it as their opinion in the contempt proceedings that the said restraining order was a lawful order, and within the power of the court to make."

G. M. Lambertson, for petitioners. L. C. Burr, in opposition.

Mr. Justice GRAY, after stating the facts as above, delivered the opinion of the court.

The question presented by this petition of the mayor and councilmen of the city of Lincoln for a writ of habeas corpus is whether it was within the jurisdiction and authority of the circuit court of the United States, sitting as a court of equity, to make the order under which the petitioners are held by the marshal. Under the constitution and laws of the United States, the distinction between common law and equity, as existing in England at the time of the separation of the two countries, has been maintained, although both jurisdictions are vested in the same courts. Fenn v. Holme, 21 How. 481, 484–487; Thompson v. Railroad Co., 6 Wall. 134; Heine v. Levee Com'rs, 19 Wall. 655. The office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of rights of property. It has no jurisdiction over the prosecution, the punishment, or the pardon of crimes or misdemeanors, or over the appointment and removal of public officers. To assume such a jurisdiction, or to sustain a bill in equity to restrain or relieve against proceedings for the punishment of offenses, or for the removal of public officers, is to invade the domain of the courts of common law, or of the executive and administrative department of the government. Any jurisdiction over criminal matters that the English court of chancery ever had became obsolete long ago, except as incidental to its peculiar jurisdiction for the protection of infants, or under its authority to issue writs of habeas corpus for the discharge of persons unlawfully imprisoned. 2 Hale, P. C. 147; Gee v. Pritchard, 2 Swanst. 402, 413; 1 Spence, Eq. Jur. 689, 690; Attorney General v. Insurance Co., 2 Johns. Ch. 371, 378.

From long before the Declaration of Independence, it has been settled in England that a bill to stay criminal proceedings is not within the jurisdiction of the court of chancery, whether those proceedings are by indictment or by summary process. Lord Chief Justice Holt, in declining, upon a motion in the queen's bench for an attachment against an attorney for professional misconduct, to make it a part of the rule to show cause that he should not move for an injunction in chancery in the mean time, said: "Sure, chancery would not grant an injunction in a criminal matter under examination in this court; and, if they did, this court would break it, and protect any that would proceed in contempt of it." Holderstaffe v. Saunders, Holt, 136, 6 Mod. 16. Lord Chancellor Hardwicke, while exercising the power of the court of chancery, incidental to the disposition of a case pending before it, of restraining a plaintiff who had, by his bill, submitted his rights to its determination, from proceeding as to the same matter before another tribunal, either by indictment or by action, asserted in the strongest terms the want of any power or jurisdiction to entertain a bill for an injunction to stay criminal proceedings; saying: "This court has not originally and strictly any restraining power over criminal prosecutions;" and, again: "This court has no jurisdiction to grant an injunction to stay proceedings on a mandamus, nor to an indictment, nor to an information, nor to a writ of prohibition, that I know of." Mayor, etc. v. Pilkington, 2 Atk. 302, 9 Mod. 273; Montague v. Dudman, 2 Ves. Sr. 396, 398. The modern decisions in England, by eminent equity judges, concur in holding that a court of chancery has no power to restrain criminal proceedings, unless they are instituted by a party to a suit already pending before it, and to try the same right that is in issue there. Attorney General v. Cleaver, 18 Ves. 211, 220; Turner v. Turner, 15 Jur. 218; Saull v. Browne, 10 Ch. App. 64; Kerr v. Preston, 6 Ch. Div. 463. Mr. Justice Story, in his Commentaries on Equity Jurisprudence, affirms the same doctrine. 2 Story, Eq. Jur.

§ 893. And in the American courts, so far as we are informed, it has been strictly and uniformly upheld, and has been applied alike whether the prosecutions or arrests sought to be restrained arose under statutes of the state, or under municipal ordinances. West v. Mayor, etc., 10 Paige, 539; Davis v. American Soc., 75 N. Y. 362; Tyler v. Hamersley, 44 Conn. 419, 422; Stuart v. Board Sup'rs, 83 Ill. 341; Devron v. First Municipality, 4 La. Ann. 11; Levy v. Shreveport, 27 La. Ann. 620; Moses v. Mayor, etc., 52 Ala. 198; Gault v. Wallis, 53 Ga. 675; Phillips v. Mayor, etc., 61 Ga. 386; Cohen v. Goldsboro Com'rs, 77 N. C. 2; Oil Co. v. Little Rock, 39 Ark. 412; Spink v. Francis, 19 Fed. 670, and 20 Fed. 567; Suess v. Noble, 31 Fed. 855.

It is equally well settled that a court of equity has no jurisdiction over the appointment and removal of public officers, whether the power of removal is vested, as well as that of appointment, in executive or administrative boards or officers, or is intrusted to a judicial tribunal. The jurisdiction to determine the title to a public office belongs exclusively to the courts of law, and is exercised either by certiorari, error, or appeal, or by mandamus, prohibition, quo warranto, or information in the nature of a writ of quo warranto, according to the circumstances of the case, and the mode of procedure, established by the common law or by statute.

No English case has been found of a bill for an injunction to restrain the appointment or removal of a municipal officer. But an information in the court of chancery for the regulation of Harrow school, within its undoubted jurisdiction over public charities, was dismissed so far as it sought a removal of governors unlawfully elected, Sir William Grant saying: "This court, I apprehend, has no jurisdiction with regard either to the election or the amotion of corporators of any description." Attorney General v. Clarendon, 17 Ves. 491, 498.

In the courts of the several states, the power of a court of equity to restrain by injunction the removal of a municipal officer has been denied in many well-considered cases.

Upon a bill in equity in the court of chancery of the state of New York by a lawfully appointed inspector of flour, charging that he had been ousted of his office by one unlawfully appointed in his stead by the governor, and that the new appointee was insolvent, and praying for an injunction, a receiver, and an account of fees, until the plaintiff's title to the office could be tried at law, Vice-Chancellor McCoun said: "This court may not have jurisdiction to determine that question, so as to render a judgment or a decree of ouster of the office;" but he overruled a demurrer, upon the ground that the bill showed a prima facie title in the plaintiff. Tappen v. Gray, 3 Edw. Ch. 450. On appeal, Chancellor Walworth reversed the decree, "upon the ground that at the time of the filing of this bill the court of chancery had no jurisdiction or power to afford him any relief." 9 Paige, 507, 509, 512. And the chancellor's decree was unanimously affirmed by the court of errors, upon Chief Justice Nelson's statement that he concurred with the chancellor respecting the jurisdiction of courts of equity in cases of this kind. 7 Hill, 259.

The supreme court of Pennsylvania has decided that an injunction cannot be granted to restrain a municipal officer from exercising an office which he has vacated by accepting another office, or from entering upon an office under an appointment by a town council, alleged to be illegal; but that the only remedy in either case is at law by quo warranto. Hagner v. Heyberger, 7 Watts & S. 104; Updegraff v. Crans, 47 Pa. St. 103.

The supreme court of Iowa, in a careful opinion delivered by Judge Dillon, has adjudged that the right to a municipal office cannot be determined in equity upon an original bill for an injunction. Cochran v. McCleary, 22 Iowa, 75.

In Delahanty v. Warner, 75 Ill. 185, it was decided that a court of chancery had no jurisdiction to entertain a bill for an injunction to restrain the mayor and aldermen of a city from unlawfully removing the plaintiff from the office of superintendent of streets, and appointing a successor; but that the remedy was at law by quo warranto or mandamus. In Sheridan v. Colvin, 78 Ill. 237, it was held that a court of chancery had no jurisdiction to restrain by injunction a city council from passing an ordinance unlawfully abolishing the office of commissioner of police; and the court, repeating in great part the opening propositions of Kerr on Injunctions, said: "It is elementary law that the subject-matter of the jurisdiction of a court of chancery is civil property. The court is conversant only with questions of property and the maintenance of civil rights. Injury to property, whether actual or prospective, is the foundation on which the jurisdiction rests. The court has no jurisdiction in matters merely criminal or merely immoral, which do not affect any right to property; nor do matters of a political nature come within the jurisdiction of the court of chancery; nor has the court of chancery jurisdiction to interfere with the duties of any department of government, except under special circumstances, and when necessary for the protection of rights of property." 78 Ill. 247. Upon like grounds it was adjudged in Dickey v. Reed, 78 Ill. 261, that a court of chancery had no power to restrain by injunction a board of commissioners from canvassing the results of an election; and that orders granting such an injunction, and adjudging the commissioners guilty of contempt for disregarding it, were wholly void. And in Harris v. Schryock, 82 Ill. 119, the court, in accordance with its previous decisions, held that the power to hold an election was polit-

ical, and not judicial, and therefore a court of equity had no authority to restrain officers from exercising that power.

Similar decisions have been made, upon full consideration, by the supreme court of Alabama, overruling its own prior decisions to the contrary. Beebe v. Robinson, 52 Ala. 66; Moulton v. Reid, 54 Ala. 320.

The statutes of Nebraska contain special provisions as to the removal of officers of a county or of a city. "All county officers, including justices of the peace, may be charged, tried, and removed from office for official misdemeanors" of certain kinds, by the board of county commissioners, upon the charge of any person. "The proceedings shall be as nearly like those in other actions as the nature of the case admits, excepting where otherwise provided in this chapter." "The complaint shall be by an accuser against the accused, and shall contain the charges with the necessary specifications under them, and be verified by the affidavit of any elector of the state that he believes the charges to be true." No formal answer or replication is required, "but, if there be an answer and reply, the provisions of this [the?] statute relating to pleadings in actions shall apply." "The questions of fact shall be tried as in other actions, and, if the accused is found guilty, judgment shall be entered removing the officer from his office, and declaring the latter vacant, and the clerk shall enter a copy of the judgment in the election book." Comp. St. Neb. c. 18, art. 2, § 7. The nature of this proceeding before county commissioners has been the subject of several decisions by the supreme court of the state. In the earliest one the court declared, "The proceeding is quasi criminal in its nature, and the incumbent undoubtedly may be required to appear without delay, and show cause why he should not be removed. But questions of fact must be tried as in other actions, and are subject to review on error. The right to a trial upon distinct and specific charges is secured to every one thus charged with an offense for which he is liable to be removed from office." "Neither is it sufficient for the board to declare and resolve that the office is vacant. There must be a judgment of ouster against the incumbent." State v. Sheldon, 10 Neb. 452, 456, 6 N. W. 757. The authority conferred upon county commissioners to remove county officers has since been held not to be an exercise of strictly judicial power, within the meaning of that provision of the constitution of Nebraska which requires that "the judicial power of this state shall be vested in a supreme court, district courts," and other courts and magistrates therein enumerated. Const. Neb. art. 6, § 1; State v. Oleson, 15 Neb. 247, 18 N. W. 45. But it has always been considered as so far judicial in its nature that the order of the county commissioners may be reviewed on error in the district court of the county, and ultimately in the supreme court of the state. State v. Sheldon, above cited; Minkler v. State, 14 Neb. 181, 15 N. W. 330; State v. Meeker, 19 Neb. 444, 448, 27 N. W. 427. See, also, Railroad v. Washington Co., 3 Neb. 30, 41; Code Civil Proc. Neb. §§ 580–584, 599; Cr. Code (Ed. 1885) § 572.

This view does not substantially differ from that taken in other states, where similar orders have been reviewed by writ of certiorari, as proceedings of an inferior tribunal or board of officers, not commissioned as judges, yet acting judicially, and not according to the course of the common law. Charles v. Mayor, etc., 27 N. J. Law, 203; People v. Fire Com'rs, 72 N. Y. 445; Donahue v. County of Will, 100 Ill. 94.

In Nebraska, as elsewhere, the validity of the removal of a public officer, and the title of the person removed, or of a new appointee, to the office, may be tried by quo warranto or mandamus. Comp. St. Neb. c. 19, §§ 13, 24; Id. c. 71; Code Civ. Proc. §§ 645, 704; Cases of Sheldon, Oleson, and Meeker, above cited; Queen v. Saddlers' Co., 10 H. L. Cas. 404; Osgood v. Nelson, L. R. 5 H. L. 636.

The provisions of the statutes of Nebraska as to the removal of officers of cities of the first class (of which the city of Lincoln is one) are more general, simply conferring upon the mayor and council "power to pass any and all ordinances not repugnant to the constitution and laws of the state; and such ordinances to alter, modify, or repeal;" and "to provide for removing officers of the city for misconduct;" and to fill any vacancy occurring in the office of police judge or other elective office by appointment by the mayor, with the assent of the council. Comp. St. Neb. c. 13, §§ 11, 15; St. 1887, c. 11, §§ 8, 68, 114.

The original ordinance of the city council of Lincoln, made part of the record, appears to have been framed with the object that the rules established by statute for conducting proceedings for the removal of county officers should be substantially followed in the removal of city officers elected by the people. After ordaining that whenever any such officer "shall be guilty of any willful misconduct or malfeasance in office, he may be removed by a vote of two-thirds of all the members elected to the council," it provides that no such officer shall be removed unless "charges in writing, specifying the misconduct or nature of the malfeasance, signed by the complainant, and giving the name of at least one witness besides the complainant, to support such charges, shall be filed with the city clerk, president of the council, or mayor," and be read at a regular meeting of the council; and a certified copy thereof, with a notice to show cause against the removal, be served upon the officer five days before the next meeting; that if he does not then appear, and file a denial in

writing, "the said charge and specifications shall be taken as true, and the council shall declare the office vacant;" but, if he does, the council shall adjourn to some day for his trial; "and if, upon the trial of said officer, said council shall be satisfied that he is guilty of any misconduct willfully, or malfeasance in office, they shall cause such finding to be entered upon their minutes, and shall declare said office vacant, and shall proceed at once to fill such vacancy in the manner provided by statute and ordinance;" and that all proceedings and notices in the matter of such charges may be served by the city marshal or by a policeman, and the "service and return shall be in the manner provided by law for the service of summonses in justice's courts." The only material change made in that ordinance by the ordinance of August 24th is that the trial of the officer, and the finding of his guilt, may be either by the whole council, or by a "committee of the council to whom such charges shall have been referred." In either case the finding is to be entered upon the minutes of the council, "and the council shall declare the said office vacant and the said officer removed therefrom," and certify the fact to the mayor, whereupon the vacancy shall be filled by appointment by the mayor, with the assent of the council.

The whole object of the bill in equity filed by Parsons, the police judge of the city of Lincoln, against the mayor and councilmen of the city, upon which the circuit court of the United States made the order for the disregard of which they are in custody, is to prevent his removal from the office of police judge. No question of property is suggested in the allegations of matters of fact in the bill, or would be involved in any decree that the court could make thereon. The case stated in the bill is that charges in writing against Parsons for appropriating to his own use moneys of the city were filed, as required by the original ordinance, by Sheedy and Saunders, (Hyatt, not otherwise named in those charges, would seem to have signed them as the additional witness required by that ordinance;) that the charges were referred by the mayor to a committee of three members of the council; that upon notice to the accused, and his appearance before that committee, he objected that the committee had no authority to try the charges, and the committee so reported to the council; that thereupon Sheedy and Saunders procured the passage of the amended ordinance, giving a committee, instead of the whole council, power to try the charges, and report its finding to the council; that after the passage of this ordinance, and against his protest, the committee resumed the trial, and, in order to favor and protect his accusers, and fraudulently to obtain his removal from office, made a report to the city council, falsely stating that they reported all the evidence, and fraudulently suppressing a book which he had offered in evidence, and finding him guilty, and recommending that his office be declared vacant, and be filled by the appointment of some other person; and that the mayor and city council set the matter down for final vote at a future day named, and threatened and declared that they would then, without hearing or reading the evidence taken before the committee, declare the office vacant, and appoint another person to fill it. The bill prays for an injunction to restrain the mayor and councilmen of the city of Lincoln from proceeding any further with the charges against Parsons, or taking any vote on the report of the committee, or declaring the office of police judge vacant, or appointing any person to fill that office.

The matters of law suggested in the bill as grounds for the intervention of the circuit court are that the amended ordinance was an ex post facto law, and that all the proceedings of the city council and its committee, as well as both ordinances, were illegal and void, and in conflict with and violation of those articles of the constitution of the United States which provide that no person shall be deprived of life, liberty, or property without due process of law; that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district where the crime shall have been committed, and to have compulsory process for obtaining witnesses in his favor, and that no state shall pass any ex post facto law, or deprive any person of life, liberty, or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws.

The fifth and sixth amendments to the constitution of the United States, which provide that no person shall be deprived of life, liberty, or property without due process of law, and secure to the accused in criminal prosecutions trial by jury, and compulsory process for obtaining witnesses in his favor, apply to the United States only, and not to laws or proceedings under the authority of a state (Spies v. Illinois, 123 U. S. 131, 8 Sup. Ct. 21;) and that provision of the constitution which prohibits any state to pass ex post facto laws applies only to legislation concerning crimes (Calder v. Bull, 3 Dall. 386). If the ordinances and proceedings of the city council are in the nature of civil, as distinguished from criminal, proceedings, the only possible ground, therefore, for the interposition of the courts of the United States in any form is that Parsons, if removed from the office of police judge, will be deprived by the state of life, liberty, or property without due process of law, in violation of the fourteenth amendment to the constitution, or that the state has denied him the equal protection of the laws, secured by that amendment.

It has been contended by both parties, in argument, that the proceeding of the city council for the removal of Parsons upon the charges filed against him is in the nature of

a criminal proceeding; and that view derives some support from the judgment of the supreme court of Nebraska in State v. Sheldon, 10 Neb. 452, 456, 6 N. W. 757, before cited. But, if the proceeding is of a criminal nature, it is quite clear, for the reasons and upon the authorities set forth in the earlier part of this opinion, that the case stated in the bill is wholly without the jurisdiction of any court of equity. If those proceedings are not to be considered as criminal or quasi criminal, yet if, by reason of their form and object, and of the acts of the legislature and decisions of the courts of Nebraska as to the appellate jurisdiction exercised in such cases by the judicial power of the state, they are to be considered as proceedings in a court of the state, (of which we express no decisive opinion,) the restraining order of the circuit court was void, because in direct contravention of the peremptory enactment of congress that the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except when authorized by a bankrupt act. Act March 2, 1793, c. 22, § 5 (1 Stat. 335;) Diggs v. Wolcott, 4 Cranch, 179; Peck v. Jenness, 7 How. 612, 625; Rev. St. § 720; Watson v. Jones, 13 Wall. 679, 719; Haines v. Carpenter, 91 U. S. 254; Dial v. Reynolds, 96 U. S. 340; Sargent v. Helton, 115 U. S. 348, 6 Sup. Ct. 78. But if those proceedings are to be considered as neither criminal nor judicial, but rather in the nature of an official inquiry by a municipal board intrusted by law with the administration and regulation of the affairs of the city, still, their only object being the removal of a public officer from his office, they are equally beyond the jurisdiction and control of a court of equity. The reasons which preclude a court of equity from interfering with the appointment or removal of public officers of the government from which the court derives its authority apply with increased force when the court is a court of the United States, and the officers in question are officers of a state. If a person claiming to be such an officer is, by the judgment of a court of the state, either in appellate proceedings or upon a mandamus or quo warranto, denied any right secured to him by the constitution of the United States, he can obtain relief by a writ of error from this court. In any aspect of the case, therefore, the circuit court of the United States was without jurisdiction or authority to entertain the bill in equity for an injunction. As this court has often said: "Where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and, whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court; but, if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void." Elliott v. Peirsol, 1 Pet. 328, 340; Wilcox v. Jackson, 13 Pet. 498, 511; Hickey v. Stewart, 3 How. 750, 762; Thompson v. Whitman, 18 Wall. 457, 467.

We do not rest our conclusion in this case, in any degree, upon the ground, suggested in argument, that the bill does not show a matter in controversy of sufficient pecuniary value to support the jurisdiction of the circuit court; because an apparent defect of its jurisdiction in this respect, as in that of citizenship of parties, depending upon an inquiry into facts which might or might not support the jurisdiction, can be availed of only by appeal or writ of error, and does not render its judgment or decree a nullity. Prigg v. Adams, 2 Salk. 674, Carth. 274; Fisher v. Bassett, 9 Leigh, 119, 131–133; Navigation Co. v. Homestead Co., 123 U. S. 552, 8 Sup. Ct. 217. Neither do we say that, in a case belonging to a class or subject which is within the jurisdiction both of courts of equity and of courts of law, a mistake of a court of equity, in deciding that in the particular matter before it there could be no full, adequate, and complete remedy at law, will render its decree absolutely void. But the ground of our conclusion is, that whether the proceedings of the city council of Lincoln for the removal of the police judge, upon charges of misappropriating moneys belonging to the city, are to be regarded as in their nature criminal or civil, judicial or merely administrative, they relate to a subject which the circuit court of the United States, sitting in equity, has no jurisdiction or power over, and can neither try and determine for itself, nor restrain by injunction the tribunals and officers of the state and city from trying and determining. The case cannot be distinguished in principle from that of a judgment of the common bench in England in a criminal prosecution, which was coram non judice; or the case of a sentence passed by the circuit court of the United States upon a charge of an infamous crime, without a presentment or indictment by a grand jury. Case of the Marshalsea, 5 Coke, 68, 76; Ex parte Wilson, 114 U. S. 417, 5 Sup. Ct. 935; Ex parte Bain, 121 U. S. 1, 7 Sup. Ct. 781.

The circuit court being without jurisdiction to entertain the bill in equity for an injunction, all its proceedings in the exercise of the jurisdiction which it assumed are null and void. The restraining order, in the nature of an injunction it had no power to make. The adjudication that the defendants were guilty of a contempt in disregarding that order is equally void, their detention by the marshal under that adjudication is without authority of law, and they are entitled to be discharged. Ex parte Rowland, 104 U. S. 604; Ex parte Fisk, 113 U. S. 713, 5 Sup. Ct. 724; In re Ayers, 123 U. S. 443, 507, 8 Sup. Ct. 164. Writ of habeas corpus to issue.

FIELD, J., (concurring.) I concur in the judgment of this court that the circuit court of the United States had no jurisdiction to interfere with the proceedings of the mayor and common council of Lincoln for the removal of the police judge of that city. The appointment and removal of officers of a municipality of a state are not subjects within the cognizance of the courts of the United States. The proceedings detailed in the record in the present case were of such an irregular and unseemly character, and so well calculated to deprive the officer named of a fair hearing, as to cause strong comment. But, however irregular and violent, the remedy could only be found under the laws of the state and in her tribunals. The police judge did not hold his office under the United States, and in his removal the common council of Lincoln violated no law of the United States. On no subject is the independence of the authorities of the state, and of her municipal bodies, from federal interference in any form, more complete than in the appointment and removal of their officers.

I concur, also, in what is said in the opinion of the court as to the want of jurisdiction of a court of equity over criminal proceedings, but do not perceive its application to the present case. The proceedings before the common council were not criminal in the sense to which the principle applies. That body was not a court of justice, administering criminal law, and it is only to criminal proceedings in such a tribunal that the authorities cited have reference. In many cases, proceedings, criminal in their character, taken by individuals or organized bodies of men, tending, if carried out, to despoil one of his property or other rights, may be enjoined by a court of equity.

WAITE, C. J., (dissenting.) I am not prepared to decide that an officer of a municipal government cannot, under any circumstances, apply to a court of chancery to restrain the municipal authorities from proceeding to remove him from his office without the authority of law. There may be cases, in my opinion, when the tardy remedies of quo warranto, certiorari, and other like writs will be entirely inadequate. I can easily conceive of circumstances under which a removal, even for a short period, would be productive of irremediable mischief. Such cases may rarely occur, and the propriety of such an application may not often be seen; but if one can arise, and if the exercise of the jurisdiction can ever be proper, the proceedings of the court in due course upon a bill filed for such relief will not be void, even though the grounds on which it is asked may be insufficient. If the court can take jurisdiction of such a case under any circumstances, it certainly must be permitted to inquire, when a bill of that character is filed, whether the case is one that entitles the party to the relief he asks, and, if necessary to prevent wrong in the mean time, to issue in its discretion a temporary restraining order for that purpose. Such an order will not be void, even though it may be found on examination to have been improvidently issued. While in force it must be obeyed, and the court will not be without jurisdiction to punish for its contempt. Such, in my opinion, was this case, and I therefore dissent from the judgment which has been ordered.

HARLAN, J., (dissenting.) I concur in the views expressed by the chief justice, and unite with him in dissenting from the opinion and judgment of the court. The proceedings inaugurated by the defendants against Parsons are certainly not of a criminal nature; nor are they embraced by the provision of the statute which declares that "the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." Rev. St. § 720. The act of March 3, 1887, declares that the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, arising under the constitution of the United States. Parsons' suit is confessedly of a civil nature; and it proceeds upon the ground that what the defendants propose to do will violate rights secured to him by the constitution of the United States. It is therefore a suit arising under the constitution of the United States. Whether the circuit court, sitting in equity, could properly grant to the plaintiff the relief asked, is not a question of jurisdiction within the rule that orders, judgments, or decrees are void where the court which passed them was without jurisdiction. It is rather a question as to the exercise of jurisdiction. As this suit is one arising under the constitution of the United States, and is of a civil nature, the inquiry in the mind of the circuit judge, when he read the bill, was whether, according to the principles of equity, a decree could be properly rendered against the defendants? Osborn v. Bank, 9 Wheat. 738, 858. The statute provides that "suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law." But if one of those courts should render a final decree in behalf of the plaintiff, notwithstanding he had a plain, adequate, and complete remedy at law, would the decree be a nullity? Could it be assailed collaterally as void, upon the ground that no case was made justifying relief in equity? When a party has disregarded a preliminary injunction issued by a circuit court of the United States,

has been fined for contempt, and is in custody for failing to pay the fine, must he be discharged upon habeas corpus in every case where it appears, upon the face of the bill, that the plaintiff has a plain, adequate, and complete remedy at law? Those questions, it seems to me, should receive a negative answer. I do not understand the court to decide that the circuit court could not, under any circumstances, or by any mode of proceeding, enforce the rights which the plaintiffs contend are about to be violated by the defendants, but only that the court below, sitting in equity, had no authority to interfere with the proposed action of the defendants. It seems to me that this question would properly arise upon appeal from any final decree rendered in the cause, and is not determinable upon writ of habeas corpus.

## LEWIS v. COCKS.

(23 Wall. 466.)

Supreme Court of the United States. Oct., 1874.

Appeal from circuit court, D. Louisiana.

In 1863 one Anderson brought suit in the provisional court of New Orleans, which was a court established by proclamation of the president during the occupancy of the city by federal troops, against Cocks, who was then out of the state, and his agent, Hyllested. Judgment was rendered for Anderson, and an execution issued, under which the property in controversy in this case was sold to one Izard. After the death of Anderson and the reestablishment of the regular federal courts, Cocks filed a bill in equity against Izard, asking that he be compelled to reconvey the property sold under the execution, on the ground that the judgment of the provisional court was void, and that sufficient service had not been made on Cocks or Hyllested, and that Hyllested was not such an agent that service could be made upon him; and further, that Izard had been guilty of fraud in procuring title to the property, in that he had represented at the execution sale that he was buying for Cocks, and had thereby kept other persons from bidding, and that he now repudiated his fiduciary relation to Cocks. Defendant's answer denied the material allegations of the bill, and alleged that the property had been mortgaged to Lewis, and the title had become vested in the latter by foreclosure. Lewis answered to the same effect, and was made defendant in place of Cocks. The further facts are stated in the opinion of the court.

Mr. P. Phillips, for appellant. Mr. Conway Robinson, contra.

Mr. Justice SWAYNE delivered the opinion of the court.

The question of the validity of the provisional court is not an open one. We have held it valid upon more than one occasion when the question has been before us. The Grapeshot, 9 Wall. 129.

The fraud charged upon Izard is expressly denied by his answer and is not sustained by the evidence. There is a decided preponderance against it. We are unanimous upon the point. It could serve no useful purpose to examine the proofs in detail in order to vindicate our judgment. Nothing further need be said upon the subject.

The remaining part of the case is that which relates to the allegations of the non-service of process.

In considering the bill, we must regard it as being just as it would be if it contained nothing but what relates to this subject. Everything else must be laid out of view. It must be borne in mind that the complainant is not in possession of the property.

If the bill alleged only the nullity of the judgment, under which the premises were sold, by reason of the non-service of the original process in the suit, wherefore the defendant had no day in court, and judgment was rendered against him by default, and upon those grounds had asked a court of equity to pronounce the sale void, and to take the possession of the property from Izard and give it to the complainant, could such a bill be sustained? Such is the case in hand. There is nothing further left of it, and there is nothing else before us. Viewed in this light, it seems to us to be an action of ejectment in the form of a bill in chancery. According to the bill, excluding what relates to the alleged fraud, there is a plain and adequate remedy at law, and the case is one peculiarly of the character where, for that reason, a court of equity will not interpose. This principle in the English equity jurisprudence is as old as the earliest period in its recorded history. Spence, Eq. Jur. 408, note b; Id. 420, note a.

The sixteenth section of the judiciary act of 1789 (1 Stat. 82), enacting "that suits in equity shall not be sustained in either of the courts of the United States in any case where plain, adequate, and complete remedy may be had at law," is merely declaratory and made no change in the pre-existing law.

To bar equitable relief the legal remedy must be equally effectual with the equitable remedy, as to all the rights of the complainant. Where the remedy at law is not "as practical and efficient to the ends of justice and its prompt administration," the aid of equity may be invoked, but if, on the other hand, "it is plain, adequate, and complete" it must be pursued. Boyce v. Grundy, 3 Pet. 215.

In the present case the objection was not made by demurrer, plea, or answer, nor was it suggested by counsel, nevertheless if it clearly exists it is the duty of the court sua sponte to recognize it and give it effect. Hipp v. Babin, 19 How. 278; Baker v. Biddle, Baldw. 416, Fed. Cas. No. 764.

It is the universal practice of courts of equity to dismiss the bill if it be grounded upon a merely legal title. In such case the adverse party has a constitutional right to a trial by jury. Hipp v. Babin, 19 How. 278.

Where the complainant had recovered a judgment at law and execution had issued and been levied upon personal property, and the claimant, under a deed of trust, had replevied the property from the hands of the marshal, and the judgment creditor filed his bill praying that the property might be sold for the satisfaction of his judgment, this court held that there was a plain remedy at law; that the marshal might have sued in trespass, or have applied to the circuit court for an attachment, and that the bill must therefore be dismissed. Knox v. Smith, 4 How. 298.

In the present case the bill seeks to enforce "a merely legal title." An action of ejectment is an adequate remedy.

The questions touching the service of the process can be better tried at law than in equity. If it be desired to have any rulings of the court below brought to this court for review, they can be better presented by bills of exception and a writ of error than by depositions and other testimony and an appeal in equity.

There is another important point, which we have not overlooked. It is whether the judgment of the provisional court can be pronounced a nullity without the legal representative of Anderson, the deceased plaintiff, being before the court as a party. As the first objection is a fatal one we have not considered that question.

Decree reversed, and the case remanded with directions to dismiss the bill.

## DARST v. PHILLIPS.

(41 Ohio St. 514.)

Supreme Court of Ohio. Jan. Term, 1885.

Error to district court, Lucas county.

Bill by Phillips and others against one Darst to enjoin the enforcement of a judgment, and for other relief. Judgment for plaintiffs, and defendant appeals. Affirmed.

C. F. France and E. H. Rhoades, for plaintiff in error. Dodge & Raymond, for defendants in error.

MARTIN, J. Darst took judgment in the common pleas of Williams county against Phillips and others as makers of a promissory note with warrant of attorney attached. There was no service of process or notice. Execution was issued to the sheriff of Lucas county, who levied it on the goods of the judgment defendants. Thereupon they brought the original action in the common pleas of Lucas county, setting out several defenses to the note, one of which was that it had been paid before the judgment was taken, and averring that Darst fraudulently obtained the judgment, and praying for injunction and other relief.

The defendant demurred to the jurisdiction. The district court, on appeal, overruled the demurrer, and granted a perpetual injunction. The object of the present proceeding is to obtain a reversal of this judgment.

In the first place, it is claimed that section 5354 et seq., Rev. St., afforded an adequate remedy at law, and that it was exclusive. By those sections it is provided that a court of common pleas, a district or superior court, may vacate or modify its own judgments after the term, for (amongst other causes) fraud practiced by the successful party in obtaining them, and for taking judgments on warrants of attorney for more than was due when the defendant was not served or notified. The proceeding is required to be by petition brought within a limited time after the rendition of the judgment, and provision is made for an injunction to suspend process on the judgment.

In our opinion, this statutory remedy is merely cumulative. It is not disputed that courts of equity, prior to the statute, had jurisdiction to impeach judgments for fraud, and enjoin proceedings thereon. It is a fundamental principle that when such courts have once been legitimately vested with jurisdiction they retain it, notwithstanding courts of law subsequently acquire jurisdiction by statute or otherwise, unless the legislature abolish or restrict it. 1 Story, Eq. Jur. 64. This principle is distinctly recognized as applicable in respect to the remedies provided by our practice act in Long v. Mulford, 17 Ohio St. 484, where it is held that "what would have been a good cause of action to sustain an original bill is a good cause of action under the Code."

In Coates v. Bank, 23 Ohio St. 415, it is held that the provisions of the statute for the vacation of judgments for fraud do not abridge or qualify the right to maintain an original action impeaching a judgment for fraud. Judge Day, in announcing the opinion, intimates that such an action is maintainable in all cases where an original bill might, before the statute, have been sustained, and states that Long v. Mulford, supra, is regarded as so holding by his brethren. The bench and bar of the state have so understood that case, and, as we think, correctly. We are satisfied with the rule, and consider it definitely settled.

In the case at bar, therefore, the judgment defendant had an election to proceed under the statute to vacate and enjoin, or by original action for injunction.

In the next place, it is objected that the common pleas of Lucas county had no jurisdiction of the action. Under the act for its organization a court of common pleas in this state has general original jurisdiction at law and in equity. An action to enjoin process from a judgment on the ground of fraud is within this jurisdiction, and is within the jurisdiction of the particular court where the fraud is properly laid. Either of several courts, according to special circumstances, may have jurisdiction in a particular case. Darst was duly served with process, and appeared for the purposes of his demurrer. Is the fraud properly laid? The fraud charged was one upon the court as well as upon the judgment defendants. It amounts to this: that the steps evidencing the jurisdiction and cause of action were falsely and fraudulently simulated without the knowledge of the defendants or opportunity for knowledge, and that Darst was at the time subjecting their property to seizure by the sheriff of Lucas county. The vital fact is that there was no cause of action. The payment of the debt revoked the power and left the cognovit without any support, and there was no jurisdiction actually acquired.

This fact courts of equity may for some purposes consider, and is undoubted cause for impeachment and injunction. And we do not forget that a judgment, until reversed, must be deemed valid, because it is the sentence of the law on the record of the facts (3 Bl. Comm. 395), and, therefore, it is immaterial whether the facts be true or false.

The remedy sought in the case at bar operates, in contemplation of law, on the person, and we think it is clearly available to the judgment defendants. Miller v. Longacre, 26 Ohio St. 291, referred to in the briefs, was an action brought in the common pleas of Union county to enjoin the enforcement of an execution issued from a judgment rendered in the common pleas of Marion county. The action was sustained. It appears that the primary action was upon

promissory notes, and there had been a second trial under the statute then in force. Both judgments were given for the plaintiff therein, the first being larger than the second. The execution issued from the first; the creditor claiming, for certain reasons, that it was valid as against some of the defendants. The court held that, as no objection to the jurisdiction was made until after answer, the relief could be granted. In that case the trial court giving the judgments had undoubted jurisdiction, and there was a good cause of action, and no fraud was practiced. The points of the ruling were waiver and the general jurisdiction of the common pleas. The case illustrates the favor with which the general jurisdiction is regarded, even in cases where another common pleas court could more appropriately administer the remedy. It will be observed that the case at bar is distinguishable from one of fraud practiced on the trial; from a case to enjoin a pending action; to impeach a judgment for error; to restrain an execution erroneously issued, as in Miller v. Longacre, supra; and from a variety of other cases supposed to be analogous, and in respect to which many authorities have been cited. And in many cases the nature of the relief required, as also the necessity for new parties, is such that a simple impeachment of the judgment is inadequate, and an original action is indispensable.

Judgment affirmed.

**McGEAN v. METROPOLITAN EL. RY. CO. et al.**

**(30 N. E. 647, 133 N. Y. 9.)**

**Court of Appeals of New York. April 12, 1892.**

Appeal from superior court of New York city, general term.

Action by James H. McGean, as executor and trustee under the will of Delia Powers, against the Metropolitan Elevated Railway Company and the Manhattan Railway Company. From a judgment of the general term of the superior court of New York city awarding damages and an alternative injunction in favor of plaintiff, defendants appeal. Affirmed.

*Brainard Tolles*, for appellants. *Roger Foster & E. J. McGean*, for respondent.

MAYNARD, J. This action was brought July 19, 1889. The judgment appealed from restrains the defendants from maintaining an elevated railway structure on, or in front of, plaintiff's premises, known as "No. 15½ Division Street," in the city of New York. The injunction is not to be operative if the defendants shall, within one month, elect to pay plaintiff the sum of $1,500, as and for the permanent damages to the fee of the premises sustained by him in consequence of the appropriation by the defendants of the use of the street for such a purpose. Upon payment or tender of such sum, the plaintiff is required to execute a conveyance of the property found by the decision to have been taken by the defendants, and, in case of failure to execute such conveyance, it is, in substance, provided that the judgment of injunction shall have no force or effect. Damages to the amount of $500 are also awarded for the injury to the property during the time intervening between June 10, 1887, and March 20, 1890. The rightfulness of this judgment is not questioned except upon a single ground. It was proven by the plaintiff upon the trial, and it has been found by the trial court, that after issue was joined, and on March 20, 1890, the plaintiff conveyed the premises to one Rosenbaum, for the consideration of $8,800. It is, for this reason, contended that plaintiff was not, at the time of the trial, entitled to any preventive relief with respect to these premises, and, in the absence of the right to such relief, that the court could not retain jurisdiction of the action for the purpose of awarding damages for past injuries. It is undoubtedly true that the substantive cause of action in all such cases is the right to a prevention of the continuance of the trespass upon plaintiff's property by the defendants, but, when this right is established, the equitable jurisdiction of the court is complete, and it can award the injured party full compensation for all the damages sustained by the wrongful act sought to be enjoined, subject to the statutory limitations of time. It is equally true that, if there is no such right to a preventive remedy, the matter of damages for past trespasses cannot be the subject of inquiry in a court of equity. Relief must be sought in another forum. In this connection, it is to be observed that the defendants do not claim that the right to this kind of a remedy is extinguished by a transfer during the pendency of the action. Its existence is admitted, but it is asserted that it has been transferred by the plaintiff's own act to his grantee, and that the latter alone can prosecute the action. It would seem that in such a case section 756 of the Code of Civil Procedure would be a sufficient answer to such an objection. That section provides that, in case of a transfer of interest, the action may be continued by the original party, unless the court directs the person to whom the interest is transferred to be substituted in the action or joined with the original party, as the case requires. The action proceeds in the same manner as if the conveyance of the property, which is the subject of the controversy, had not been made, unless the court directs the grantee to be made a party. The question cannot properly be presented for the first time upon the trial of the action, but must be brought to the attention of the court, either by motion or by a supplemental pleading. If the defendant has not had the means of knowing that the plaintiff has parted with his title to the subject matter of the action until the fact is disclosed upon the trial, and he desires to have the new party in interest substituted for or joined with the original plaintiff, he can move to have the trial arrested until the necessary steps can be taken for that purpose, and the trial court can suspend the proceedings if, in the exercise of a sound discretion, it is satisfied that the adoption of such a course is required for the protection of the defendant. It is not seen how, ordinarily, the defendant is prejudiced by a transfer of the plaintiff's interest *pendente lite*, unless there is some question of the solvency of the parties involved. A judgment recovered against the original party would as effectually conclude his assignee after suit brought upon all the issues litigated as if the latter had been substituted in place of his assignor. The statute makes no distinction in this respect between actions at law and in equity, provided the cause of action is assignable. Story, Eq. Pl. § 156. This view does not militate against the rule which authorizes courts of equity, where they have once obtained jurisdiction of a cause, to administer all the relief which the nature of the case and the facts require, and to bring such relief down to the close of the litigation between the parties. The subject of the controversy remains unchanged, which is the unlawful appropriation of certain rights or easements which are appurtenant or incident to the premises designated in the complaint, and, if the decree rendered concludes the owner of the property, whoever he may be, it matters not that the title has shifted during the progress of the action.

But in the present case the plaintiff has not parted with his title to the cause of action, or to the entire property to which it relates. His deed to Rosenbaum contains the following important reservations: "Reserving to the vendor all damages to said property caused or to be caused by the present, past, or future

maintenance and operation of the elevated railway on Division street, as now constructed, and all the fee and easement in Division street, now or heretofore or hereafter occupied and invaded by the said elevated railway structure, when maintained and operated as aforesaid; and the conveyance is made subject to the said reservation to the said party of the first part, his heirs, executors, and administrators." He thus has retained all the title which he ever had to the rights and easements appropriated by the defendants, and to the fee of one-half of the street in width in front of No. 15½ Division street. This street was laid out in 1765, under articles of agreement between Henry Rutgers and James De Lancey, who owned the lands which it traverses, by the terms of which it was mutually covenanted that it should be laid out on the division line between their respective farms, and each grantee to the other a fee interest in that half of the street immediately abutting upon the grantee's property, subject to the right of the public to use the same as a highway; and each conveyed to the other an easement of light, air, and access in the remainder of the street. The decision of this court in Henderson v. Railroad Co., 78 N. Y. 423, thus becomes directly applicable. In that case the plaintiff, when he brought the action, was the owner of some of the abutting lots, and also of the fee of the street, subject to the public easement therein for the purposes of a highway. Before the action was brought the plaintiff had sold some of the lots, and before the last trial of the action had sold and conveyed the remaining lots, reserving, however, the fee of the street and the damages to the adjacent property, both past and prospective; and it was held that his right to the equitable interference of the court for his protection against the encroachments of the defendants was not thereby affected, and the court decreed a perpetual injunction, unless the defendants paid the amount found by the referee to be a fair compensation for the additional burden imposed upon his property. It is true there is not a separate finding in this case, as there was there, as to the value of the fee of the street or its depreciation in consequence of its occupation by the defendants. But it is not seen how the application of the principle is in any wise affected by this omission. It has been found that the existence and use of the defendants' structure, and its threatened continued use, has permanently damaged the fee value of the entire premises to the amount of at least $1,500. There was no request to find, separately, the amount of permanent damage to the fee of the street and to the property conveyed by the plaintiff. They are so connected that a separate finding as to each might be difficult, if not impracticable. As the right to the damages to both pieces of property was still in the plaintiff, such a finding was unnecessary. So long as the ownership of the fee of the street and of the damages to the adjacent property remained in the same person, equity would not permit the defendants to acquire a right to maintain its structure in the street without paying the damages to the adjacent property which the erection and maintenance of such structure have inflicted upon it.

This view is in harmony with the well-settled rules of equitable jurisprudence. No principle has been more frequently asserted, or is so well established, as that, when a court of equity has jurisdiction over a cause for any purpose, it may retain the cause for all purposes, and proceed to a final determination of all the matters at issue. To such an extent has the doctrine been carried that it has been declared that if the controversy contains any equitable feature, or requires any purely equitable relief belonging to the exclusive jurisdiction of equity, or pertaining to the concurrent jurisdiction of equity and law, and a court of equity thus acquires a partial cognizance of the action, it may go on to a complete adjudication, and establish purely legal rights and grant legal remedies, which would otherwise be beyond the scope of its authority. Pom. Eq. Jur. §§ 181, 231, 242. So long as one of the grounds of equitable interference in this class of cases is the avoidance of a multiplicity of suits, this rule must prevail. The plaintiff being entitled to a decree restraining the defendants from the unlawful use of the street in which he still has an interest, it was the duty of the court to award him all the damages sustained in consequence of such unlawful use. As to the permanent damages for the injury to the fee, the defendants are not compelled by this judgment to pay them. They have been ascertained, and payment of them provided for, as a favor to the defendants, and as a condition upon which they may be relieved from the disastrous consequences to their business, which must result from the maintenance of the perpetual injunction, to which, in strict equity, the plaintiff is entitled. The defendants are not harmed, but favored, by such a disposition of the cause. Further litigation is avoided, and a perfect right acquired to maintain in the street, in front of these premises, what has hitherto been an illegal and unauthorized structure. The grantee of the plaintiff has no interest in the subject of this controversy. He has taken his conveyance with a reservation to the plaintiff of the fee of the street and the permanent damages to the adjoining property. Presumably, to the extent of the value of the rights thus reserved, the cost of the property to him has been proportionately diminished. He is estopped by the reservation in his deed, which is to be given the same effect as a direct grant, from asserting any title to any part of this cause of action, or to the rights which the defendants will acquire under the judgment, which puts them in privity of title with the plaintiff. We have not considered, and, in view of the peculiar features of this case, we deem it unnecessary to consider or determine, the abstract question whether the owner of real property, injuriously affected by the maintenance of an unlawful structure in the street upon which his property abuts, can, either before or after suit brought, convey the entire premises, and reserve to himself the

right to maintain an action in equity to restrain the continuance of such structure, or for the recovery of the permanent damages to the property by reason of its maintenance. Such question must be reserved until it arises in concrete form. In the present case the grantor has retained title to a part of the fee of the premises, and unquestionably sufficient to preserve intact the jurisdiction of a court of equity. The judgment must be affirmed, with costs. All concur.

TRIBETTE et al. v. ILLINOIS CENT. R. CO.

(12 South. 32, 70 Miss. 182.)

Supreme Court of Mississippi. Dec. 5, 1892.

Appeal from chancery court, Hinds county; H. C. Conn, Chancellor.

Action by W. H. Tribette and others against the Illinois Central Railroad Company. From an order overruling plaintiffs' motion to dissolve an injunction issued enjoining plaintiffs from prosecuting their different actions, and compelling them to unite their controversies in one suit in equity against defendant, plaintiffs appeal. Reversed.

Calhoun & Green, Williamson & Potter, and Brame & Alexander, for appellants. Mayes & Harris, for appellee.

CAMPBELL, C. J. A number of different owners of property in the town of Terry, destroyed by fire from sparks emitted by an engine of the appellee, severally sued in the circuit court to recover of the appellee damages for the respective losses by said fire, alleged to have resulted from the negligence of the defendant. While these actions were pending, the appellee exhibited its bill against the several plaintiffs, averring that no liability as to it arose by reason of the fire, which arose, not from any negligence or wrong of it or its servants, but from the fault of others, for which it is not responsible; and that the plaintiffs in the different actions are wrongfully seeking to recover damages by their several actions, all of which grew out of the same occurrence, and depend for their solution upon the same questions of fact and of law; wherefore, to avoid multiplicity of suits, and the consequent harassment and vexation, all of the said several plaintiffs are sought to be enjoined from prosecuting their different actions, and to be brought in and have the controversies settled in this one suit in equity. There is no common interest between these different plaintiffs, except in the questions of fact and law involved. The injunction sought was granted, and the defendants served with process, when they appeared and demurred to the bill, and moved to dissolve the injunction on the face of the bill. The case was heard on motion to dissolve the injunction, and it was overruled, and an appeal granted. The question presented is as to the rightfulness of the suit against the defendants, on the sole ground that their several actions at law involve the very same matters of fact and law, without any other community of interest between them. The granting and maintaining the injunction are fully sustained by 1 Pom. Eq. Jur. § 255 et seq., and it is probable that any judge authorized would have granted the injunction upon the text cited. But we affirm, after careful examination and full consideration, that Pomeroy is not sustained in his "conclusions" stated in section 269 of his most valuable treatise, and that the cases he cited do not maintain the proposition that mere community of interest "in the questions of law and fact involved in the general controversy, or in the kind and form of relief demanded and obtained by or against each individual member of the numerous body," is ground for the interposition of chancery to settle in one suit the several controversies. There is no such doctrine in the books, and the zeal of the learned and usually accurate writer mentioned to maintain a theory has betrayed him into error on this subject. It has so blinded him as to cause the confounding of distinct things in his view of the subject, to wit, joinder of parties and avoidance of multiplicity of suits. It has been found that many of the cases he pressed into service to support his assertion are on the subject of joinder where confessedly there could be no doubt that the matter was of equity cognizance. Every case he cited to support his text will be found to be either where each party might have resorted to chancery, or been proceeded against in that forum, or to rest on some recognized ground of equitable interference other than to avoid multiplicity of suits. The cases establish this proposition, viz.: Where each of several may proceed, or be proceeded against, in equity, their joinder as plaintiffs or defendants in one suit is not objectionable. But this is a very different question from that, whether, merely because many actions at law arise out of the same transaction or occurrence, and depend on the same matters of fact and law, all may proceed or be proceeded against jointly in one suit in chancery; and it is believed that it has never been so held, and never will be, in cases like those here involved. Where each of several parties may proceed in equity separately, they are permitted to unite and make common cause against a common adversary, and one may implead in one suit in equity many who are his adversaries in a matter common to all in many cases, but never when the only ground of relief sought is that the adversaries are numerous, and the suits are for that not in itself a matter for equity cognizance. Attention to the distinction mentioned will resolve all difficulties in considering the many cases on this subject. There must be some recognized ground of equitable interference or some community of interest in the subject-matter of the controversy, or common right or title involved, to warrant the joinder of all in one suit; or there must be some common purpose in pursuit of a common adversary, where each may resort to equity, in order to be joined in one suit; and it is not enough that there "is a community of interest merely in the question of law or of fact involved," etc., as stated by Pomeroy in section 268. Although he asserts that this early theory has long been abandoned, he fails utterly to prove it. An examination of the cases he cited under section 256 et seq. will show this to be true. The opinion of the justice (Harlan) in Osborne v. Railroad Co., 43 Fed. Rep. 824, does support the text of Pomeroy, and cites 1

Pom. Eq. Jur. §§ 245, 255, 257 268, 293, and Crews v. Burcham, 1 Black, 352–357 We are content with what has already been said as to the text of Pomeroy, and affirm that not one of his citations sustains his conclusion, and the language of Harlan, J., in the case cited. Nor does Crews v. Burcham sustain the language of Justice Harlan. It belongs to the class of cases where each party might have brought his bill, and all who had a common cause were permitted to make common contest in chancery with their adversaries who were united by a common tie. The decision of the case in which Harlan, J., gave his support to the doctrine of Pomeroy is not complained of, but the opinion is not justified by any case with which we have been made acquainted. The case was one in which each might have brought his separate bill to quiet title, and all concerned were permitted to unite in one bill against their common adversary; and so, it is believed, will be found all the cases on this subject. Certainly, those relied on by Pomeroy are of this character. Those cited in the note to section 269, in which he asserts most broadly the doctrine we combat, are Keese v. City of Denver, 10 Colo. 113, 15 Pac. Rep. 825; Carlton v. Newman, 77 Me. 408, 1 Atl. Rep. 194; De Forest v. Thompson, 40 Fed. Rep. 375; Osborne v. Railroad Co., 43 Fed. Rep. 824; Railroad Co. v. Gibson, 85 Ga. 1, 11 S. E. Rep. 442; Schuyler Fraud Case, 17 N.Y. 592; Sheffield Waterworks Case, L. R. 2 Ch. App. 8; and Case of the Complicated Contract, Black v. Shreeve, 7 N. J. Eq. 440. The case in 43 Fed. Rep. 824, has already been noticed supra. The opinion in the case in 10 Colo., 15 Pac. Rep., quotes the language of Pom. Eq. Jur. § 269, but the case was one where one or more plaintiffs may sue in equity for the benefit of all others similarly situated. Carlton v. Newman, 77 Me. 408, 1 Atl. Rep. 194, affirms the jurisdiction of equity to enjoin the collection of an illegal tax for the purpose of preventing the multiplicity of suits where the entire levy affecting all the taxpayers was illegal. It appears to be exceptional, and to rest on peculiar grounds, not applicable to the case before us. The opinion cites Pom. Eq. Jur. § 269, but seems to rest on the proposition that the whole tax was illegal. The case in 40 Fed. Rep. 375, was that of a plaintiff exhibiting a bill to set aside a sale of land, and vacate deeds made in pursuance of it, against numerous parties, all of whom claimed by separate parcels, but under the proceeding attacked as void. A bill might have been exhibited against each one separately, and it was held to be proper to unite all in one suit. That was clearly right, but Jackson, J., in his opinion, concurred in by Harlan, J., cited Pom. Eq. Jur. §§ 245–269, inclusive, which we have shown to be unsupported by any case of authority. The case in 85 Ga., 11 S. E. Rep., is where a few persons, as representatives of a class consisting of many, exhibited a bill in behalf of all, and lends no countenance to the proposition for which it is cited. The cases in 17 N. Y. 592, L. R. 2 Ch. App. 8, and 7 N. J. Eq. 440, furnish no sort of support to the text of the author, and it is confidently claimed that every case that can be found, if entitled to any consideration, will be seen to be one resting on some other principle than that for which it has been cited in the connection now under review. And while judges have in various instances cited, and sometimes quoted, Pomeroy, in the language above characterized as unsupported, in every instance, we think the case will be found not to call for it, but to be resolvable independently of it upon other grounds of equitable interference; and in our opinion not one of the learned courts which have cited or quoted Pomeroy in the way mentioned would sustain this bill if it was before it for decision. There is danger that by frequent repetitions and piling up assertions, judges citing and quoting text books, and text writers citing the cases thus referring to them, a false doctrine may acquire strength enough to dispute with the true; but we do not believe that any accumulation of dogmatic assertion and citations and quotations can ever establish the proposition that a defendant sued for damages by a dozen different plaintiffs, who have no community of interest or tie or connection between them except that each suffered by the same act, may bring them all before a court of chancery in one suit, and deny them their right to prosecute their actions separately at law as begun by them. It has never been done. There is no precedent for it, and, while this is not conclusive against it, it is significant and suggestive. If it is true, as stated by Pomeroy and some quoting him, that mere community of interest in matters of law and fact makes it admissible to bring all into one suit in chancery in order to avoid multiplicity of suits, all sorts of cases must be subject to the principle; any limitation would be purely arbitrary. It must be of universal application, and strange results might flow from its adoption. The wrecking of a railroad train might give rise to a hundred actions for damages instituted in a dozen different counties, under our law as to venue of suits against railroad companies, in some of which executors or administrators or parents and children might sue for the death of a passenger, and in others claims would be for divers injuries. If Pomeroy's test be maintained, all of these numerous plaintiffs, having a community of interest in the questions of fact and law, claiming because of the same occurrence, depending on the very same evidence, and seeking the same kind of relief, (damages,) could be brought before a chancery court in one suit to avoid multiplicity of suits. But we forbear. Surely the learned author would shrink from the contemplation of such a spectacle; but his doctrine leads to it, and makes it possible. The learned counsel for the appellee here felt the difficulty of the possible result of the doctrine contended for,

and sought to limit its application to controversies about property, excluding those for injuries to be redressed by the estimation of juries; but, as we have said, any such restriction is arbitrary and inadmissible. If preventing multiplicity of suits is such a good thing as to justify bringing into one suit all who are interested in the same questions of law and fact, it is needful that its benefits shall be extended to all cases where it can be applied, and not restricted in its beneficent operations. It should have full sway in all classes of cases. The sole object, we are told, of the doctrine, is to prevent multiplicity of suits by uniting all who have a common interest in the same questions in one suit, and it is quite as important to effect this in one class of cases as another; and, as actions against railroad companies are quite numerous these days, it is of especial concern to prevent multiplicity in this class of cases. Therefore, if the doctrine advanced were sound, it would have to be applied wherever the conditions prescribed existed,—that is, wherever many are interested in the same questions of fact and law. That this is inadmissible must be apparent. The case of Supervisors v. Deyoe, 77 N. Y. 219, contains a good illustration of what we have said. In that case the suit against numerous parties was maintained because it combined elements of jurisdiction in each of the cases of interpleader, bill of peace, and cancellation of written instruments. The recovery of damages for a tort or breach of contract does not pertain to courts of chancery, which decree damages only in a very limited class of cases or under peculiar circumstances or as an incident to some other relief. 1 Pom. Eq. Jur. § 112; 2 Story, Eq. Jur. § 799. Even this learned author, (Pomeroy,) does not say that the existence of numerous suits for damages by a tort or breach of contract, where each case depends on the same questions of fact and law, may be drawn into chancery in one suit, and no case has been found to warrant it. Every case cited by Pomeroy and by the learned and diligent counsel in this case has been examined, and may be disposed of on some other principle acted on by courts of chancery than that contended for, and necessary to sustain the bill in this case. Every case is resolvable on some well-recognized principle of equity procedure, and not one sustains the bill. The cases repudiating the doctrine contended for are numerous. We do not cite them, for it is unnecessary, in view of the fact that not a case has been found in England or America to sustain this bill. No question as to mistake of jurisdiction between courts of law and chancery, within the contemplation of section 147 of our constitution, arises in this case; for if we had only one forum, armed with full power to administer all remedial justice, joinder of all these parties in one action would not be admissible. Bliss, Code Pl. This author says, (section 76:) "Two or more owners of mills propelled by water are interested in preventing an obstruction above that shall interfere with the down flow of the water, and may unite to restrain or abate it as a nuisance; but they cannot hence unite in an action for damages, for, as to the injury suffered, there is no community of interest. There is no more a common interest than though a carrier had at one time carelessly destroyed property belonging to different persons, or the lives of different passengers,"—thus putting the very case we have. The supreme court of California has cited with approval this very section. We thus confront Pomeroy with an equally intelligent author, and a decision by the supreme court of his own state, at war with his views on this subject, if, indeed, it is true that he would uphold this bill, which we do not believe. We have written so much to combat error supported by a distinguished author, and which has had a misleading influence which should be counteracted before further injury results from it, as far as in our power to do it. Reversed, and injunction dissolved.

## WARREN MILLS v. NEW ORLEANS SEED CO.

(4 South. 298, 65 Miss. 391.)

Supreme Court of Mississippi. April 23, 1888.

Appeal from chancery court, Warren county; Warren Cowan, Chancellor.

The appellee, the New Orleans Seed Company, conducts its business in New Orleans. It buys many thousand sacks of cotton-seed; owns many thousands of sacks, which it distributes throughout the country for the purpose of buying and having them filled with cotton-seed, to be shipped to the company in New Orleans. These sacks are plainly marked with its name. The Warren Mills owns a much less number of sacks, which it distributes; and the agents of the Warren Mills use the sacks of the appellee, which are plainly branded with its name, for the purpose of shipping cotton-seed to the Warren Mills; and do this by having a large number of appellee's sacks, together with a few of its own sacks on top and at bottom, to make it appear that all the sacks are its own. Thus the Warren Mills, an opposition company, used sacks owned by the New Orleans Seed Company, against the frequent objections of said seed company. The New Orleans Seed Company filed a bill in the chancery court setting up the above facts, and praying for an injunction against the use of its sacks by the Warren Mills. The Warren Mills demurred to this bill. The demurrer was overruled, and injunction continued, from which the Warren Mills appealed.

Lea & McKee, for appellant. Miller, Smith & Hirsh, for appellee.

ARNOLD, J. The demurrer was properly overruled. The allegations in the bill, of repeated, willful, and continuous wrongs committed and threatened by appellants, warranted the issuance of the injunction. The jurisdiction of equity in such case cannot be doubted. It is said that the prevention of vexatious litigation, and of a multiplicity of suits, constitutes a favorite ground for the exercise of the jurisdiction of equity; and it may be laid down as a general rule that wherever the rights of a party aggrieved cannot be protected or enforced in the ordinary course of proceedings at law, except by numerous and expensive suits, equity may properly interpose, and afford relief by injunction. 1 High, Inj. § 12; 1 Pom. Eq. Jur. § 245. Where trespass to property is a single act, and is temporary in its nature and effects, so that the legal remedy of an action at law for damages is adequate, equity will not interfere; but if the trespass is continuous in its nature, and repeated acts of trespass are done or threatened, although each of such acts, taken by itself, may not be destructive, or inflict irreparable injury, and the legal remedy may therefore be adequate for each single act if it stood alone, the entire wrong may be prevented or stopped by injunction. 1 Pom. Eq. Jur. § 245; 3 Pom. Eq. Jur. § 1357. The separate remedy at law for each of such trespasses would not be adequate to relieve the injured party from the expense, vexation, and oppression of numerous suits against the same wrongdoer in regard to the same subject-matter. The ends of justice require, in such case, that the whole wrong shall be arrested and concluded by a single proceeding. And such relief equity affords, and thereby fulfills its appropriate mission of supplying the deficiencies of legal remedies.

Affirmed and remanded, with leave to appellants to answer within 30 days after the mandate of this court herein is filed in the court below.

REES v. CITY OF WATERTOWN.

(19 Wall. 107.)

Supreme Court of the United States. 1873.

Mr. Justice HUNT delivered the opinion of the court.

This case is free from the objections usually made to a recovery upon municipal bonds. It is beyond doubt that the bonds were issued by the authority of an act of the legislature of the State of Wisconsin, and in the manner prescribed by the statute. It is not denied that the railroad, in aid of the construction of which they were issued, has been built, and was put in operation.

Upon a class of the defences interposed in the answer and in the argument it is not necessary to spend much time. The theories upon which they proceed are vicious. They are based upon the idea that a refusal to pay an honest debt is justifiable because it would distress the debtor to pay it. A voluntary refusal to pay an honest debt is a high offence in a commercial community and is just cause of war between nations. So far as the defence rests upon these principles we find no difficulty in overruling it.

There is, however, a grave question of the power of the court to grant the relief asked for.

We are of the opinion that this court has not the power to direct a tax to be levied for the payment of these judgments. This power to impose burdens and raise money is the highest attribute of sovereignty, and is exercised, first, to raise money for public purposes only; and, second, by the power of legislative authority only. It is a power that has not been extended to the judiciary. Especially is it beyond the power of the Federal judiciary to assume the place of a State in the exercise of this authority at once so delicate and so important. The question is not entirely new in this court.

In the case of *Supervisors* v. *Rogers*,* an order was made by this court appointing the marshal a commissioner, with power to levy a tax upon the taxable property of the county, to pay the principal and interest of certain bonds issued by the county, the payment of which had been refused. That case was like the present, except that it occurred in the State of Iowa, and the proceeding was taken by the express authority of a statute of that State. The court say: "The next question is as to the appointment of the marshal as a commissioner to levy the tax in satisfaction of the judgment. This depends upon a provision of the code of the State of Iowa. This proceeding is found in a chapter regulating proceedings in the writ of mandamus, and the power is given to the court to appoint a person to discharge the duty enjoined by the peremptory writ which the defendant had refused to perform, and for which refusal he was liable to an attachment, and is express and unqualified. The duty of levying the tax upon the taxable property of the county to pay the principal and interest of these bonds was specially enjoined upon the board of supervisors by the act of the legislature that authorized their issue, and the appointment of the marshal as a commissioner in pursuance of the above section is to provide for the performance of this duty where the board has disobeyed or evaded the law of the State and the peremptory mandate of the court."

The State of Wisconsin, of which the city of Watertown is a municipal corporation, has passed no such act. The case of *Supervisors* v. *Rogers* is, therefore, of no authority in the case before us. The appropriate remedy of the plaintiff was and is a writ of mandamus.† This may be repeated as often as the occasion requires. It is a judicial writ, a part of a recognized course of legal proceedings. In the present case it has been thus far unavailing, and the prospect of its future success is, perhaps, not flattering. However this may be, we are aware of no authority in this court to appoint its own officer to execute the duty thus neglected by the city in a case like the present.

In *Welch* v. *St. Genevieve*,* at a Circuit Court for the district of Missouri, a tax was ordered to be levied by the marshal under similar circumstances. We are not able to recognize the authority of the case. No counsel appeared for the city (Mr. Reynolds as *amicus curiæ* only); no authorities are cited which sustain the position taken by the court; the power of the court to make the order is disposed of in a single paragraph, and the execution of the order suspended for three months to give the corporation an opportunity to select officers and itself to levy and collect the tax, with the reservation of a longer suspension if it should appear advisable. The judge, in delivering the opinion of the court, states that the case is without precedent, and cites in support of its decision no other cases than that of *Riggs* v. *Johnson County*,** and *Lansing* v. *Treasurer*.‡ The first case cited does not touch the present point. The question in that case was whether a mandamus having been issued by a United States court in the regular course of proceedings, its operation could be stayed by an injunction from the State court, and it was held that it could not be. It is probable that the case of *Supervisors* v. *Rogers*§ was the one intended to be cited. This case has already been considered.

The case of *Lansing* v. *Treasurer* (also cited), arose within the State of Iowa. It fell within the case of *Supervisors* v. *Rogers*,

*7 Wallace, 175.

†Riggs v. Johnson County, 6 Wallace, 193.

*10 Am. Law Reg. (N. S.) 512, Fed. Cas. No. 17,372.

**6 Wallace, 166.

‡9 Am. Law Reg. (N. S.) 415, Fed. Cas. No. 16,538.

§7 Wallace, 175.

and was rightly decided because authorized by the express statute of the State of Iowa. It offered no precedent for the decision of a case arising in a State where such a statute does not exist.

These are the only authorities upon the power of this court to direct the levy of a tax under the circumstances existing in this case to which our attention has been called.

The plaintiff insists that the court may accomplish the same result under a different name, that it has jurisdiction of the persons and of the property, and may subject the property of the citizens to the payment of the plaintiff's debt without the intervention of State taxing officers, and without regard to tax laws. His theory is that the court should make a decree subjecting the individual property of the citizens of Watertown to the payment of the plaintiff's judgment; direct the marshal to make a list thereof from the assessment rolls or from such other sources of information as he may obtain; report the same to the court, where any objections should be heard; that the amount of the debt should be apportioned upon the several pieces of property owned by individual citizens; that the marshal should be directed to collect such apportioned amount from such persons, or in default thereof to sell the property.

As a part of this theory, the plaintiff argues that the court has authority to direct the amount of the judgment to be wholly made from the property belonging to any inhabitant of the city, leaving the citizens to settle the equities between themselves.

This theory has many difficulties to encounter. In seeking to obtain for the plaintiff his just rights we must be careful not to invade the rights of others. If an inhabitant of the city of Watertown should own a block of buildings of the value of $20,000, upon no principle of law could the whole of the plaintiff's debt be collected from that property. Upon the assumption that individual property is liable for the payment of the corporate debts of the municipality, it is only so liable for its proportionate amount. The inhabitants are not joint and several debtors with the corporation, nor does their property stand in that relation to the corporation or to the creditor. This is not the theory of law, even in regard to taxation. The block of buildings we have supposed is liable to taxation only upon its value in proportion to the value of the entire property, to be ascertained by assessment, and when the proportion is ascertained and paid, it is no longer or further liable. It is discharged. The residue of the tax is to be obtained from other sources. There may be repeated taxes and assessments to make up delinquencies, but the principle and the general rule of law are as we have stated.

In relation to the corporation before us, this objection to the liability of individual property for the payment of a corporate debt is presented in a specific form. It is of a statutory character.

The remedies for the collection of a debt are essential parts of the contract of indebtedness, and those in existence at the time it is incurred must be substantially preserved to the creditor. Thus a statute prohibiting the exercise of its taxing power by the city to raise money for the payment of these bonds would be void.* But it is otherwise of statutes which are in existence at the time the debt is contracted. Of these the creditor must take notice, and if all the remedies are preserved to him which were in existence when his debt was contracted he has no cause of complaint.†

By section nine of the defendant's charter it is enacted as follows: "Nor shall any real or personal property of any inhabitant of said city, or any individual or corporation, be levied upon or sold by virtue of any execution issued to satisfy or collect any debt, obligation, or contract of said city."

If the power of taxation is conceded not to be applicable, and the power of the court is invoked to collect the money as upon an execution to satisfy a contract or obligation of the city, this section is directly applicable and forbids the proceeding. The process or order asked for is in the nature of an execution; the property proposed to be sold is that of an inhabitant of the city; the purpose to which it is to be applied is the satisfaction of a debt of the city. The proposed remedy is in direct violation of a statute in existence when the debt was incurred, and made known to the creditor with the same solemnity as the statute which gave power to contract the debt. All laws in existence when the contract is made are necessarily referred to in it and form a part of the measure of the obligation of the one party, and of the right acquired by the other.‡

But independently of this statute, upon the general principles of law and of equity jurisprudence, we are of opinion that we cannot grant the relief asked for. The plaintiff invokes the aid of the principle that all legal remedies having failed, the court of chancery must give him a remedy; that there is a wrong which cannot be righted elsewhere, and hence the right must be sustained in chancery. The difficulty arises from too broad an application of a general principle. The great advantage possessed by the court of chancery is not so much in its enlarged jurisdiction as in the extent and adaptability of its remedial powers. Generally its jurisdiction is as well defined and limited as is that of a court of law. It cannot exercise jurisdiction when there is an adequate and complete remedy at law. It cannot assume control over that large class of obligations called imperfect obligations, resting upon

*Van Hoffman *v.* City of Quincy, 4 Wallace, 535.
†Cooley, Constitutional Limitations, 285, 287.
‡Cooley, Constitutional Limitations, 285.

conscience and moral duty only, unconnected with legal obligations. Judge Story says,† "There are cases of fraud, of accident, and of trust which neither courts of law nor of equity presume to relieve or to mitigate," of which he cites many instances. Lord Talbot says:‡ "There are cases, indeed, in which a court of equity gives remedy where the law gives none, but where a particular remedy is given by law, and that remedy bounded and circumscribed by particular rules, it would be very improper for this court to take it up where the law leaves it, and extend it further than the law allows."

Generally its jurisdiction depends upon legal obligations, and its decrees can only enforce remedies to the extent and in the mode by law established. With the subjects of fraud, trust, or accident, when properly before it, it can deal more completely than can a court of law. These subjects, however, may arise in courts of law, and there be well disposed of.*

A court of equity cannot, by avowing that there is a right but no remedy known to the law, create a remedy in violation of law, or even without the authority of law. It acts upon established principles not only, but through established channels. Thus, assume that the plaintiff is entitled to the payment of his judgment, and that the defendant neglects its duty in refusing to raise the amount by taxation, it does not follow that this court may order the amount to be made from the private estate of one of its citizens. This summary proceeding would involve a violation of the rights of the latter. He has never been heard in court. He has had no opportunity to establish a defence to the debt itself, or if the judgment is valid, to show that his property is not liable to its payment. It is well settled that legislative exemptions from taxation are valid, that such exemptions may be perpetual in their duration, and that they are in some cases beyond legislative interference. The proceeding supposed would violate that fundamental principle contained in chapter twenty-ninth of Magna Charta, and embodied in the Constitution of the United States, that no man shall be deprived of his property without due process of law—that is, he must be served with notice of the proceeding, and have a day in court to make his defence.**

"Due process of law (it is said) undoubtedly means in the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights "‖ In the New England States it is held that a judgment obtained against a town may be levied upon and made out of the property of any inhabitant of the town. The suit in those States is brought in form against the inhabitants of the town, naming it; the individual inhabitants, it is said, may and do appear and defend the suit, and hence it is held that the individual inhabitants have their day in court, are each bound by the judgment, and that it may be collected from the property of any one of them.* This is local law peculiar to New England. It is not the law of this country generally, or of England.‖ It has never been held to be the law in New York, in New Jersey, in Pennsylvania, nor, as stated by Mr. Cooley, in any of the Western States.¶ So far as it rests upon the rule that these municipalities have no common fund, and that no other mode exists by which demands against them can be enforced, he says that it cannot be considered as applicable to those States where provision is made for compulsory taxation to satisfy judgments against a town or city.§

The general principle of law to which we have adverted is not disturbed by these references. It is applicable to the case before us. Whether, in fact, the individual has a defence to the debt, or by way of exemption, or is without defence, is not important. To assume that he has none, and therefore, that he is entitled to no day in court, is to assume against him the very point he may wish to contest.

Again, in the case of *Emeric* v. *Gilman*, before cited, it is said: "The inhabitants of a county are constantly changing; those who contributed to the debt may be non-residents upon the recovery of the judgment or the levy of the execution. Those who opposed the creation of the liability may be subjected to its payment, while those, by whose fault the burden has been imposed, may be entirely relieved of responsibility. . . . To enforce this right against the inhabitants of a county would lead to such a multiplicity of suits as to render the right valueless." We do not perceive, if the doctrine contended for is correct, why the money might not be entirely made from property owned by the creditor himself, if he should happen to own property within the limits of the corporation, of sufficient value for that purpose.

The difficulty and the embarrassment arising from an apportionment or contribution among those bound to make the payment we do not regard as a serious objection. Contribution and apportionment are recognized heads of equity jurisdiction, and if it be assumed that process could issue directly against the citizens to collect the debt of the city, a court of equity could make the apportionment more conveniently than could a court of law.†

†1 Equity Jurisprudence, § 61.

‡Heard v. Stanford, Cases Tempore Talbot, 174.

*1 Story's Equity Jurisprudence, § 60.

** Westervelt v. Gregg, 12 New York, 209.

‖ Ib.

*See the cases collected in Cooley's Constitutional Limitations, 240-245.

‖ Russell v. Men of Devon, 2 Term R. 667.

¶ See Emeric v. Gilman, 10 California, 408, where all the cases are collected.

§ Cooley's Constitutional Limitations, 246.

† 1 Story's Equity Jurisprudence, § 470 and onwards.

We apprehend, also, that there is some confusion in the plaintiff's proposition, upon which the present jurisdiction is claimed. It is conceded, and the authorities are too abundant to admit a question, that there is no chancery jurisdiction where there is an adequate remedy at law. The writ of mandamus is, no doubt, the regular remedy in a case like the present, and ordinarily it is adequate and its results are satisfactory. The plaintiff alleges, however, in the present case, that he has issued such a writ on three different occasions; that, by means of the aid afforded by the legislature and by the devices and contrivances set forth in the bill, the writs have been fruitless; that, in fact, they afford him no remedy. The remedy is in law and in theory adequate and perfect. The difficulty is in its execution only. The want of a remedy and the inability to obtain the fruits of a remedy are quite distinct, and yet they are confounded in the present proceeding. To illustrate: the writ of *habere facias possessionem* is the established remedy to obtain the fruits of a judgment for the plaintiff in ejectment. It is a full, adequate, and complete remedy. Not many years since there existed in Central New York combinations of settlers and tenants disguised as Indians, and calling themselves such, who resisted the execution of this process in their counties, and so effectually that for some years no landlord could gain possession of his land. There was a perfect remedy at law, but through fraud, violence, or crime its execution was prevented. It will hardly be argued that this state of things gave authority to invoke the extraordinary aid of a court of chancery. The enforcement of the legal remedies was temporarily suspended by means of illegal violence, but the remedies remained as before. It was the case of a miniature revolution. The courts of law lost no power, the court of chancery gained none. The present case stands upon the same principle. The legal remedy is adequate and complete, and time and the law must perfect its execution.

Entertaining the opinion that the plaintiff has been unreasonably obstructed in the pursuit of his legal remedies, we should be quite willing to give him the aid requested if the law permitted it. We cannot, however, find authority for so doing, and we acquiesce in the conclusion of the court below that the bill must be dismissed.

JUDGMENT AFFIRMED.

## STINCHFIELD v. MILLIKEN.

(71 Me. 567.)

Supreme Judicial Court of Maine. December, 1880.

PETERS, J. The following facts are deducible from the evidence in this case: The complainant purchased of the defendants, certain steam-mill machinery, for removal from Hallowell to Danforth, in this State. There was at the time a verbal agreement, that the complainant should build a mill, and put the machinery into it, on a lot of land in Danforth, bought by him of one Russell, who was to deed the lot directly to the defendants. The complainant was also to procure a deed of his home (another) lot to the defendants from the heirs of H. E. Prentiss, who held an absolute title thereof as security for the complainant's indebtedness to them, there being a small balance only unpaid, which the defendants were to pay for him. The defendants were to give an agreement, to convey to the complainant if he paid his indebtedness to them according to the tenor of certain notes to be given.

On June 15, 1875, the complainant gave to the defendants a mortgage on the machinery as personal property to secure the notes hereafter named, in order to protect a lien thereon until the machinery should be put into the mill to be built, and become a part of the real estate. And there was embodied in this mortgage, an agreement of the complainant to build the mill and put the machinery into it. On June 16, 1875, Russell conveyed the mill lot to the defendants. On August 2, 1875, Prentiss conveyed the home lot to them, they paying the balance of the Prentiss claim. On August 4, 1875, the defendants gave a writing to the complainant, agreeing to convey the property to him upon the condition that he would pay to them his notes on one, two, three, and five years, respectively, with interest. The notes were given for the amount payable for the machinery, the sum paid to Prentiss, and for other loans and advances. The complainant went on and erected and completed a mill on the Russell lot, and the steam-mill machinery became a part of it.

The complainant seeks to redeem the property, claiming the transaction to be a mortgage. The defendants contend that the transaction was not a mortgage, that it was a conditional sale.

It was not a legal mortgage: Because the defeasance has no seal. *Warren* v. *Lovis*, 53 Maine, 463. And because the papers were not between the same parties. At law, the conveyance must be made by the mortgager and the defeasance by the mortgagee. *Shaw* v. *Erskine*, 43 Maine, 371.

But the transaction was in equity a mortgage—an equitable mortgage. The criterion is the intention of the parties. In equity, this intention may be ascertained from all pertinent facts either within or without the written parts of the transaction. Where the intention is clear that an absolute conveyance is taken as a security for a debt, it is in equity a mortgage. No matter how much the real transaction may be covered up and disguised. The real intention governs. "If a transaction resolve itself into a security, whatever may be its form, and whatever name the parties may choose to give it, it is in equity a mortgage." *Flagg* v. *Mann*, 2 Sumn. 533, Fed. Cas. No. 4,847.

The existence of a debt is well nigh an infallible evidence of the intention. The intention here is transparent. The defendants have a debt and held the property as a security for its collection. A legal mortgage was avoided; an equitable mortgage was made.

Although different at law, in equity a mortgage is not prevented because the conveyance does not come from the equitable mortgager. It is sufficient that the debtor has an interest in the property conveyed, either legal or equitable. Having such an interest, if he procures a conveyance to one who advances money upon it for him, taking the property as security for the money advanced, he has a right to redeem. The grantee in such case, acquiring the title by his act, holds it as his mortgagee. Jones on Mort. 2d ed. § 331. *Stoddard* v. *Whiting*, 46 N. Y. 627; *Carr* v. *Carr*, 52 N. Y. 251.

It is denied that this court has the power to declare that an absolute deed shall be deemed to be a mortgage, allowing an equitable mortgager the right to redeem. At law, it has no such power. Nor, when the court had a limited jurisdiction in equity, was the doctrine admitted. It was always understood, however, that, in a case like the present, if, instead of a demurrer, an answer was filed admitting the facts alleged, the court had the power to apply the remedy. *Thomaston Bank* v. *Stimpson*, 21 Maine, 195; *Whitney* v. *Bachelder*, 32 Maine, 313; *Howe* v. *Russell*, 36 Maine, 115; *Richardson* v. *Woodbury*, 43 Maine, 206. But since the act of 1874 conferred general chancery powers upon the court, it has full and complete jurisdiction in such cases. *Rowell* v. *Jewett*, 69 Maine, 293–303; Jones, Mort. (2d ed.) § 282.

Courts of equity generally exercise such power. While the grounds upon which the doctrine is admitted vary with different courts, there is a great concurrence of opinion as far as the result is concerned. In our judgment, it is a sound policy as well as principle to declare that, to take an absolute conveyance as a mortgage without any defeasance, is in equity a fraud. Experience shows that endless frauds and oppressions would be perpetrated under such modes, if equity could not grant relief. It is taking an agreement, in one sense, exceeding and differing from the true agreement. Instead of setting it wholly aside, equity is worked out by adapting it to the purpose originally intended. Equity allows reparation to be

made by admitting a verbal defeasance to be proved. The cases which support this view are too numerous to cite. The American cases are collected in Jones, Mort. 2d ed. § 241, *et seq.* See *Campbell* v. *Dearborn*, 109 Mass. 130; and *Hassam* v. *Barrett*, 115 Mass. 256.

The complainant seeks to separate the articles originally mortgaged as personal property, and, being allowed the value of them, redeem the balance of the estate only. That would not be equitable. The personal became a part of the real as originally designed to be. It was affixed and solidly bolted thereto. The mortgage was evidently only to serve a temporary purpose. It was not just to either party that there should be two mortgages instead of one. It is urged that the defendants foreclosed the personal mortgage. It could not be done. The personal mortgage was extinguished when attempted to be done. That was but a ruse to get the possession which the defendants were entitled to. No severance was ever made or attempted to be made.

It is intimated that the mill has burned down, *pendente lite*, under an insurance obtained by the defendants, and a question may arise, before the master, whether the complainant should have a credit of the net proceeds. If the insurance was obtained on the mortgagees' own account only, they should not be allowed. *Cushing* v. *Thompson*, 34 Maine, 496; *Pierce* v. *Faunce*, 53 Maine, 351. The head note in *Larrabee* v. *Lumbert*, 32 Maine, 97, is erroneous in that respect. It was allowed in that case by consent. *Insurance Co.* v. *Woodbury*, 45 Maine, 447.

But where a mortgagee insures the property by the authority of the mortgager, and charges him with the expense, then any insurance recovered should be accounted for. And if a mortgager covenants to insure, and fails to do so, the mortgagee can himself insure at the mortgager's expense.

One of the defendants testifies that "Stinchfield agreed to pay all taxes and insurance." He also says, "We have had the house, stable and mill insured, and have paid the insurance, $108." We think this is evidence of an insurance obtained by the mortgagees at the expense of the mortgager on account of his failure to keep his verbal covenant to insure, and renders it proper that the net proceeds of any insurance obtained should be allowed in the settlement between them.

But this cannot be, if the insurance was collected under a policy in which it is agreed between the insured and insurer that the company in case of loss should be subrogated to the right of the mortgagee. For in such case the insurance is not in fact on the mortgager's account, nor is it such an insurance as could be made available to him. Jones, Mort. (2d ed.) § 420, and cases in note.

The complainant may redeem the whole property upon payment of whatever may be due upon the whole debt. Inasmuch as the complainant sets up a claim exceeding the equitable right, neither party to recover costs up to the entry of this order; and whether future costs shall be recovered by either side, to be reserved for decision when the proceedings are to be finally terminated. Another reason why complainant should not recover costs is, that when his bill was commenced the mortgage debt was not due. The mortgage could not be redeemed until 1880. The bill was commenced long before that time. But as the mortgage is now due, and no point is taken that the proceeding was premature, it will probably be for the interest of all the parties that their matters may be adjusted under this bill. For which purpose a master must be appointed, unless the parties can best determine the accounts between themselves.

*Decree accordingly.*

APPLETON, C. J., WALTON, DANFORTH, VIRGIN, and LIBBEY, JJ., concurred.

AMES v. RICHARDSON.

(13 N. W. Rep. 137, 29 Minn. 330.)

Supreme Court of Minnesota. July 25, 1882.

Plaintiffs brought this action, in the district court for Hennepin county, against the Western Manufacturers' Mutual Insurance Company, to recover the amount due on a policy of insurance for $2,000, issued to one Robert Cochran, on a mill and machinery in this state. The mill was destroyed by fire, and the loss under this policy was adjusted at $1,317.70 on July 19, 1880. On the same day Cochran assigned all his rights under the policy to plaintiffs. Ruth C. Richardson, who had a mortgage upon the mill property, claiming to be entitled to this sum, was substituted as defendant in place of the insurance company.

The action was submitted to the court, *Young*, J., presiding, upon the complaint and answer, the allegations of which were admitted to be true, and the material portions of which are stated in the opinion. The court found for the plaintiffs, and ordered judgment accordingly. Defendant appeals from an order refusing a new trial.

BERRY, J. On December 16, 1879, Cochran, being owner of a piece of land in this state, insured a mill, machinery and fixtures therein against damage by fire, in the Western Manufacturers' Mutual Insurance Company, for $2,000. December 18, 1879, he borrowed of defendant $5,200, for which he gave his promissory note on five years, secured by a mortgage of the land mentioned, which was duly recorded December 22d. By the terms of the mortgage Cochran covenanted with Richardson that at all times during its continuance he would keep the buildings on the premises "unceasingly insured" for at least $5,200, payable in case of loss to Richardson, to the amount then secured by the mortgage. December 28, 1879, Cochran insured the mill, machinery, and fixtures for $1,500 in one company, and for $2,000 in another, and, by indorsement upon each of the two policies issued to him, the loss was made payable to Richardson, as her interest might appear. On July 9, 1880, while the three insurances were in force, the insured property was totally destroyed by fire. Before this Richardson had no knowledge of the first insurance. The loss was adjusted by Cochran and the three insurance companies at $4,298.03, as the true value of the property destroyed. The result was that the losses payable to Richardson were scaled from $3,500 (the face of the last two policies) to $2,442.20, and this sum was paid to her and applied on the note. The loss under the first insurance was scaled and adjusted at $1,317.70, and that sum agreed to be paid Cochran accordingly. This was done July 19, 1880, and on the same day the certificate which had been issued to Cochran by the Western Manufacturers' Mutual Insurance Company, in lieu of a policy, was for a valuable consideration duly assigned to the plaintiffs. They brought this action against the insurance company to recover the amount of the loss as adjusted at $1,317.70. Nothing having been paid upon Richardson's note and mortgage other than the sum of $2,442.20 before mentioned, and the whole debt having been declared due under a provision in the mortgage, there remains due and unpaid thereon something over $3,000. Richardson laying claim to the money ($1,317.70) realized from the first insurance, the company paid it into court, and Richardson was substituted as defendant in the company's place. The question is, who is entitled to this money—plaintiffs or Richardson?

It is well settled that, in the absence of an agreement by a mortgagor to insure for the benefit of his mortgagee, the latter has no right to any advantage whatever from an insurance upon the mortgaged property effected by the former for his own benefit. 1 Jones, Mortg. § 401; *Nichols* v. *Baxter*, 5 R. I. 491; *Plimpton* v. *Ins. Co.*, 43 Vt. 497; May, Ins. §§ 449, 456; *Carter* v. *Rockett, etc., Ins. Co.*, 8 Paige, 437.

It is equally well settled that an agreement by the mortgagor to insure for the benefit of his mortgagee gives the latter an equitable lien upon the proceeds of a policy taken out by the former and embraced in the agreement. And when the agreement is that the mortgagor shall procure insurance upon the mortgaged property, payable in case of loss to the mortgagee, and the mortgagor, or some one for him, procures insurance in the mortgagor's or a third person's name, without making it payable to the mortgagee, though this be done without the mortgagee's knowledge, or without any intent to perform the agreement, equity will treat the insurance as effected under the agreement, (unless this has been fulfilled in some other way,) and will give the mortgagee his equitable lien accordingly. This is upon the principle by which equity treats that as done which ought to have been done. That is to say, inasmuch as the insurance effected ought to have been made payable to the mortgagee, equity will give the mortgagee the same benefit from it as if it had been. In support of these general propositions we refer to *Thomas* v. *Vonkapff*, 6 Gill & J. 372; *Carter* v. *Rockett, etc., Ins. Co.*, and *Nichols* v. *Baxter, supra; Wheeler* v. *Ins. Co.*, 101 U. S. 439; *Cromwell* v. *Brooklyn Fire Ins. Co.*, 44 N. Y. 42; *Miller* v. *Aldrich*, 31 Mich. 408; 1 Story, Eq. Jur. § 64*g*; 2 Am. Lead. Cas. (5th Ed.) 832–4; *In re Sands Ale Brewing Co.*, 3 Biss. 175, Fed. Cas. No. 12,307.

In the cases cited (with the exception of *Nichols* v. *Baxter*) the insurance was effected *after* the agreement to insure. In *Nichols* v. *Baxter* it would seem that the court thought this made no difference, though the opinion alludes (somewhat as a makeweight, as it occurs to us) to the fact, which appeared by inference only, that the insurance in that

case, though effected *before* the agreement to insure, was understood by the parties to be embraced in it. We, however, can see no reason why the same rule should not be applicable to insurance already subsisting when the agreement to insure is made, as to that subsequently obtained, unless this result is affirmatively excluded by the facts of the case. Such subsisting insurance can be made payable to the mortgagee, or assigned to him, so as to satisfy the agreement. Where the agreement is, as in the case at bar, "*to keep*" the premises insured, it is entirely consistent with its letter as well as its spirit to hold that it embraces prior as well as subsequent insurance. And where, as in the present instance, the value of the insured property is such that subsequent insurance, sufficient to satisfy the agreement, cannot be obtained so long as the prior insurance stands, this is an equitable circumstance entitled to great weight upon the question whether the prior insurance ought to be held to be covered by the agreement. This equitable circumstance is much enhanced when the effect of the prior insurance is, as in this case, to scale and reduce the subsequent insurance procured and made payable to the mortgagee under the agreement.

In such a state of facts, to permit the mortgagor to withhold the prior insurance from the mortgagee is to permit him to profit by his own wrong, at the expense of him whom he has wronged, and a violation of one of the first principles of law as well as of equity. The question is not what the mortgagor's *intention* was with reference to the prior insurance, but whether it was equitable that, in carrying out any intention, he should be permitted to withhold the benefits from the mortgagee, especially in view of the maxim that equity regards that as done which ought to have been done. *Cromwell* v. *Brooklyn Fire Ins. Co.*, *Wheeler* v. *Ins. Co.*, *Miller* v. *Aldrich*, and *In re Sands Ale Brewing Co.*, *supra*.

Applying these considerations to this case, we are of opinion that Richardson is clearly entitled to an equitable lien upon the proceeds of the first insurance, to be applied upon her note and mortgage. Cochran ought to have kept his covenant. He could have done this by procuring a third new policy, or by assigning the first insurance, or having it made payable to Richardson. As he did not do the former, he should have done the latter, and therefore Richardson is in equity entitled to stand in the same position as if he had done what he ought to have done.

*Stearns* v. *Quincy Ins. Co.*, 124 Mass. 61, relied upon by the plaintiffs, is not a case presenting the precise question whether an insurance effected before an agreement to insure is to be regarded as embraced in such agreement, so as to give a mortgagee an equitable lien on the proceeds. But the principle there enunciated, and which appears to be supported by other decisions of that state, is that the mortgagee cannot have the lien unless the insurance was obtained by the mortgagor as his agent, or with *intent* to perform an agreement to insure. If this was to be regarded as the correct rule, it would seem to be decisive in the plaintiffs' favor. But it is against the weight and current of authority, and, as it seems to us, inequitable, and therefore we do not follow it.

Another question was discussed upon the argument, viz., whether the covenant to insure ran with the land, so that the record of the mortgage was constructive notice to the plaintiff and to all others of Richardson's (the mortgagee's) equities. We do not deem it at all necessary to consider this question. The mortgagor's assignment of his claim under the certificate after the loss was an assignment of a debt,—a mere chose in action,—which the plaintiffs took subject to all defenses and equities against him. *Archer* v. *Merchants' & M. Ins. Co.*, 43 Mo. 434; *Wilson* v. *Hill*, 3 Met. 66; *Brichta* v. *N. Y. Lafayette Ins. Co.*, 2 Hall, (N. Y.) 372; *Mellen* v. *Hamilton Fire Ins. Co.*, 17 N. Y. 609; *Greene* v. *Warnick*, 64 N. Y. 220; May, Ins. § 386. From all this it follows that, in our opinion, the defendant is entitled to the proceeds of the first insurance paid into the court, instead of the plaintiffs, as found by the court below.

There being no dispute as to the correctness of the findings of fact, the case is remanded, with directions to the district court to render judgment for the defendant accordingly. Though there is no formal reversal of the order denying a new trial, the defendant is entitled to costs, as of course.

**CLEMENTS v. TILLMAN et al.**

**(5 S. E. 194, 79 Ga. 451.)** 11 A.S.R. 441

Supreme Court of Georgia. February 13, 1888.

Error from superior court, Muscogee county; Smith, Judge.

Suit by Hattie E. Tillman and William L. Tillman, plaintiffs and defendants in error, against John W. Clements, defendant and plaintiff in error, for an account and settlement of a legacy due said Hattie E. Tillman under the will of one Jacob A. Clements, John W. Clements being an executor of the same.

The following is the official report:

Hattie E. Tillman, a legatee under the will of Jacob A. Clements, deceased, with her husband and trustee, William L. Tillman, filed their bill for account and settlement against John W. Clements, executor, and Sarah B. Clements, executrix, of said will. The bill contained charges of mismanagement of the estate, violations of the provisions of said bill, and non-payment by the executors of the interest of complainant as legatee. The defendants answered the bill; but as their answers are not material or necessary to an understanding of the errors complained of, they are not set forth. The jury returned the following verdict: "We, the jury, find that Sarah B. Clements has no property or effects of the estate of Jacob A. Clements, deceased, in her hands, as executrix or otherwise. We, the jury, further find that John W. Clements, as executor of the will of Jacob A. Clements, deceased, has now in his hands the sum of eight hundred and ten dollars principal and five hundred dollars interest, belonging to Hattie E. Tillman, as legatee under the will of Jacob A. Clements." Upon this verdict the following decree was rendered by the court: "Whereupon, the premises considered, it is ordered, adjudged, and decreed by the court that the complainant do recover the same sum of eight hundred and ten dollars principal and the further sum of five hundred dollars interest to this date, and the further sum of —— dollars, costs of suit in this behalf laid out and expended, for which said several sums let execution issue, to be levied in the first place of the goods and chattels, lands and tenements, of said Jacob A. Clements, deceased, in the hands of John W. Clements, executor of the will of said Jacob A. Clements, if to be found; and if not to be found, then to be levied of the personal goods and chattels, lands and tenements, of said John W. Clements. It is further ordered and decreed by said court that the said John W. Clements do satisfy and pay the aforesaid amounts, principal, interest, and costs, to the said complainant, on or before the first day of January next; and, in default thereof, that he be held and deemed to be in contempt of the order and decree of this court." Plaintiff in error excepts to the portion of the decree embodied by the last sentence, and says the court erred in rendering a decree to be enforced by attachment for contempt—"First, because the verdict was a money verdict, and the same could only be enforced by execution; second, because the verdict of the jury was a money verdict, and could not be enforced by an attachment for contempt, and could only be enforced by execution; third, because the verdict of the jury was a money verdict, and was a debt, and to enforce the decree by an attachment for contempt would be to imprison the defendant for debt, which is prohibited by the constitution of the state; fourth, because the decree sought and moved for provides both for the enforcement of it by execution, and an attachment for contempt; and the complainant should be required to elect whether she would proceed to enforce it by execution or attachment for contempt if the court determined that it could be enforced by attachment for contempt."

C. J. Thornton, for plaintiff in error. L. F. Garrard, for defendants in error.

KIBBEE, J.[1] Originally, in the absence of statutes providing otherwise, decrees of courts of equity, of whatever kind or nature, operated strictly and exclusively in personam. The only remedy for their enforcement was by what is termed "process of contempt," under which the party failing to obey them was arrested and imprisoned until he yielded obedience, or purged the contempt by showing that disobedience was not wilful, but the result of inability not produced by his own fault or contumacy. The writ of assistance to deliver possession, and even the sequestration to compel the performance of a decree, are comparatively of recent origin. Our statutes expressly provide that "all orders and decrees of the court may be enforced by attachment against the person; decrees for money may be enforced by execution against the property." Code, § 3099. "A decree in favor of any party, for a specific sum of money, or for regular installments of money, shall be enforced by execution against property as at law." Code, § 4215. "Every decree or order of a court of equity may be enforced by attachment against the person for contempt; and if a decree be partly for money and partly for the performance of a duty, the former may be enforced by execution, and the latter by attachment or other process." Code, § 4216. The clear legislative intent is manifest to enlarge and render more efficacious equitable remedies, while preserving the remedies the courts had previously employed in the absence of statutes providing others. Under our statutes, when a party is decreed to perform a duty, or to do any act other than the

[1] Blandford, J., being disqualified, Judge Kibbee, of the Oconee circuit, was designated to preside in his stead.

mere payment of money, which the court has jurisdiction to adjudge he shall do, if he disobeys, the authority of the court is defied; he is guilty of contempt, and the arrest and imprisonment of his person is not imprisonment for debt in any appropriate sense of the term. But if a court of equity should render a simple decree for money on a simple money verdict,—a decree which it may now enforce by the ordinary common-law process against property,—the failure to pay the decree would not be contempt, nor could compulsory process against the person of the party in default be resorted to to enforce payment. In Coughlin v. Ehlert, 39 Mo. 285, the court uses the following language: "We do not mean to say that a party may not be put in contempt for disobeying a decree for the performance of acts which are within his power, and which the court may properly order to be done. If it were shown, for instance, that the party had in his possession a certain specific sum of money or other thing which he refused to deliver up, under the order of the court, for any purpose, it may very well be that his disobedience would be a contempt for which he might lawfully be imprisoned." In Carlton v. Carlton, 44 Ga. 220, Judge McCay, delivering the opinion, says: "We do not intend to say that simply because a debt is adjudged by a decree in chancery, instead of by a judgment at law, it may therefore be enforced by imprisonment. The imprisonment must be clearly for the contempt of the process of the court, and be of one who is able and unwilling to obey the order of the court. * * * It ought never to be resorted to except as a penal process, founded on the unwillingness of the party to obey. The moment it appears that there is inability, it would clearly be the duty of the judge to discharge the party," etc. The court further held that, "ordinarily, it would be improper to include in the order the alternative order for imprisonment on failure, since it is not to be presumed that a contempt will ensue." The constitutional provision, "there shall be no imprisonment for debt," was not intended to interfere with the traditional power of chancery courts to punish for contempt all refusals to obey their lawful decrees and orders. This proposition may be conceded to be sound without affecting the case at bar in any respect. "The power in question was never exercised by chancery courts except in those cases where a trust in the property or fund arose between the parties litigant, or some specific interest in it was claimed, or the chattel had some peculiar value and importance that a recovery of damages at law for its detention or conversion was inadequate. Such interference was in the nature of a bill quia timet, and was asserted only on a proper showing that the fund or property was in danger of loss or destruction." 1 Story, Eq. Jur. §§ 708–710. "No jurisdiction to compel the payment of an ordinary money demand unconnected with such peculiar equities ever existed in chancery courts, nor had they the power to compel such payment by punishing the refusal to pay under the guise of contempt."

In the case at bar the decree was right in awarding an execution against the executor as set forth in said decree, but the facts did not authorize an alternative order imprisoning the defendant on failure to pay. Judgment reversed.

CITY OF ST. LOUIS v. O'NEIL LUMBER CO. et al.

(21 S. W. 484, 114 Mo. 74.)

Supreme Court of Missouri, Division No. 1. Feb. 6, 1893.

Appeal from St. Louis circuit court; Jacob Klein, Judge.

Petition by the city of St. Louis that certain creditors of James McLane, a contractor, be compelled to interplead for the purpose of determining their rights in a fund owing by the city to the contractor. From a judgment of the circuit court giving preference to the O'Neil Lumber Company, James M. Doyle and others appealed. The court of appeals affirmed the judgment, and the case was then certified to the supreme court. Reversed.

J. H. Trembly and Rassieur & Schnurmacher, for respondent.

BRACE, J. This case is certified here from the St. Louis court of appeals, under section 6 of the amendment of the constitution adopted in 1884. The statement of the case, made by Judge Biggs of that court, is as follows:

"On the 17th day of July, 1888, the municipal assembly of the city of St. Louis passed an ordinance authorizing the board of public improvements to contract for certain alterations and repairs at the House of Refuge. Section 2 of the ordinance is as follows: 'The cost of the above work shall be paid by the city of St. Louis, and the sum of forty-five hundred dollars is hereby appropriated out of funds set apart for improvements, alterations, and repairs of the House of Refuge.' The work was let to one James McLane, under three separate contracts. Contract No. 2,071 provided for the erection of two new privy buildings at a cost of twenty-eight hundred dollars. By contract numbered 2,083 McLane agreed to make certain alterations in the basement and in the dormitory of the old building, for the sum of eight hundred and fifty dollars. The third contract, numbered 2,076, provided for furnishing lumber and laying the floor in the shoe shop of the House of Refuge. The foregoing contracts were signed by McLane as principal and the interpleaders Thomas C. Higgins and John M. Sellers as his sureties. Among other things, the contracts provided that 'in case the contractor shall abandon the work * * * the commissioner of public buildings shall have power, under the direction of the board of public improvements, to place such and so many persons as he may deem advisable, by contract or otherwise, to work and complete the work to be done, and to use such materials as he may find on the line of said work, or to procure other materials for the completion of the same, and to charge the expense of said labor and materials to the contractor; that this expense shall be deducted and paid out of such moneys as may then be due, or may at any time thereafter grow due, to him under the contract; and, in case such expense is less than the amount still due under the contract, had it been completed by the contractor, he shall be entitled to receive the difference, and, in case such expense is greater, the party of the first part (which includes the contractor and his sureties) shall pay the amount of such excess.' The contracts also contained the following provision: 'And said party of the first part (which includes the contractor and his sureties) hereby further agrees that he will furnish the said board of public improvements with satisfactory evidence that all persons who have done or furnished materials under this agreement, and are entitled to a lien therefor under any law of the state of Missouri, have been fully paid, are no longer entitled to such lien; and, in case such evidence be not furnished, such amount as the board may consider necessary to meet the lawful claims of the persons aforesaid, provided said persons shall notify said board before the final estimates be returned, shall be retained from the moneys due the said party of the first part under this agreement, until the liabilities aforesaid may be fully discharged.' Under paragraph S of the contract, an estimate of the amount of the work done each month is to be made about the first of each succeeding month, and a valuation according to the current market prices put thereon. From the amount of such estimate, ten per cent. is to be deducted, and the balance certified as due. The obligation of Higgins and Sellers binds them, with McLane, to the city of St. Louis, and for the faithful performance of the foregoing contracts in every particular. The foregoing quotations from the contracts are believed to be sufficient for an understanding of the legal propositions arising upon this record. McLane entered upon the work, and continued it until the 20th day of November, 1888, when he absconded from the state, leaving the work in an unfinished condition. It is conceded that up to the 1st day of November the city had paid to McLane for work done and materials furnished under contract No. 2,071 the sum of one thousand and three dollars and fifty cents. This would leave the sum of one thousand and seven hundred and ninety-six dollars and fifty cents due from the city if the work should be completed. The work under contract No. 2,083 was also left in an unfinished condition. Monthly estimates of the work under this contract had also been made, and up to the 1st day of November McLane had been paid on account thereof six hundred and seven dollars and fifty cents, leaving a balance due from the city, if the work had been completed, of two hundred and forty-two dollars and fifty cents. The work under the third contract had been fully completed and paid for. It was also admitted that, in addition to the amounts earned by McLane under the two contracts between the 1st and 20th of November, the city owed him the sum of thirty-seven dollars for work done at the House of Refuge not embraced in either contract. When McLane abandoned the contracts, the city made an arrangement with Higgins and Sellers to complete the work. No new contract was entered into. The work was to be completed under the old contracts. Higgins and Sellers finished the work to the satisfaction of the city authorities. A few days

after this arrangement with Higgins and Sellers, the O'Neil Lumber Company, one of the interpleaders, filed a suit in equity against McLane and the city, in which it claimed that McLane was indebted to it for lumber furnished on account of said contracts of the value of seven hundred and fifty dollars, and it asked that this amount be charged against the remainder of the money due from the city under the contract. Then followed a like suit by John M. and Edward Doyle, the appellants herein, in which they claimed to have performed work and furnished materials to McLane, under contract No. 2,071, of the value of thirteen hundred and four dollars. They sought to make their claim a charge upon the balance due from the city under said contract No. 2,071. Other mechanics and material men followed with like suits, but, under the view we have taken of the case, it will not be necessary to notice them. When Higgins and Sellers completed the work they claimed that the work done and the materials furnished by them in the completion of contract No. 2,071 actually cost them the sum of one thousand and fifty-nine dollars and eighty-nine cents; that they did work in completing contract No. 2,083 of the value of forty dollars; and that they did extra work under the last-mentioned contract amounting to twenty-nine dollars and fifty cents,—making a total of eleven hundred and twenty-nine dollars and thirty-nine cents. Their contention was, and is now, that, as they had earned this amount in the completion of the work, they were entitled to be first paid out of the balance of the funds due under the McLane contracts, in preference to the O'Neil Lumber Company and Doyle Bros. When the city found itself beset with these conflicting claims, it brought into court the amount due from it under the McLane contracts, to wit, two thousand one hundred and five dollars and fifty cents. The foregoing facts were stated in its petition, and the court was asked to compel the claimants to interplead for the fund, and that they be restrained from the further prosecution of the suits against the city. The necessary orders were made, and thereafter such proceedings were had in the case as to result in a trial between the several interpleaders of their respective claims to priority. The court held that Higgins and Sellers must be paid first. This left a balance of nine hundred and seventy-six dollars and eleven cents, which the court found had been earned by McLane between the 1st and 20th of November. As the O'Neil Lumber Company was the first to institute suit and have the city served with process, the court gave its claim priority over those of the other interpleaders, and ordered it to be paid in full. The suit of the Doyle Bros. being the next in point of time, the remainder of the fund, to wit, the sum of two hundred and twenty-five dollars and sixty cents, was ordered paid to them. From this order of distribution Doyle Bros. have prosecuted their appeal."

The court of appeals affirmed the judgment of the circuit court, (42 Mo. App. 586,) all the judges agreeing that out of the funds to be distributed the amount found to be due Higgins and Sellers must be first paid. But to the conclusion reached by a majority of the court of appeals and the circuit court,—that the remainder should be distributed among the interpleaders according to the priority of their suits,—Judge Thompson dissented, and filed a dissenting opinion, as follows:

"The statute relating to mechanics' liens contains the following section: 'The liens for work and labor done or things furnished, as specified in this article, shall be upon an equal footing, without reference to the date of filing, the account, or lien; and in all cases where a sale shall be ordered, and the property sold, which may be described in any account or lien, the proceeds arising from such sale, when not sufficient to discharge in full all the liens against the same without reference to the date of filing the account or lien, shall be paid pro rata on the respective liens: provided, such account or liens shall have been filed and suit brought as provided by this article.' Rev. St. 1889, § 6727; Rev. St. 1879, § 3193. With this statute in force, the city of St. Louis, in making the contract with McLane, inserted the following provision: 'And said party of the first part (which includes the contractor and his sureties) hereby further agrees that he will furnish the said board of public improvements with satisfactory evidence that all persons who have done work or furnished materials under this agreement, and are entitled to a lien therefor under any law of the state of Missouri, have been fully paid, or no longer entitled to such lien; and, in case such evidence be not furnished, such amount as the board may consider necessary to meet the lawful claims of the persons aforesaid, provided said persons shall notify said board before the final estimates be returned, shall be retained from the moneys due the said party of the first part under this agreement until the liabilities aforesaid may be fully discharged.' With this provision in force, indicating the policy of the state to be that all mechanics and material men entitled to liens shall share ratably, the city sees fit to insert this clause in its contract with the mechanic, indicating a clear purpose on its part to see that the policy of the statute is carried out, and that it will withhold enough of what is due to the principal contractor to pay his subcontractors or material men. It is true that such persons are not, under the law as judicially construed, entitled to a mechanic's lien against any property belonging to the city; but that does not seem to afford a good reason why no effect whatever should be given to this clause of the contract. The city had no right, under the decision of Luthy v. Woods, 6 Mo. App. 67, and St. Louis v. Keane, 27 Mo. App. 642, to hold enough of what was due McLane in the character of trustee for the material men who had furnished to him materials which he used in the work. But events took such a turn that there was not enough for all, and the city, finding itself thus embarrassed, instead of executing the trust itself, brought the fund into a court of equity, and asked that court to administer it; in other words, asked that court to require the contending parties to interplead for it, which was done. It is also

true that the city has not, under the terms of the contract, elected to set this fund apart, and to hold it for any particular beneficiary; but nevertheless I cannot but think that it ought to be distributed, not according to the attachment law, but according to the policy of the mechanics' lien law. This clause of the contract has no doubt existed in the contract forms on which the city lets ont contracts for city buildings from a time when it was supposed that the city buildings were liable to mechanics' liens. Persons supplying materials to city contractors may fairly be presumed to know that such a clause exists in such contracts. They may, therefore, be fairly presumed to give credit to the contractor on the faith of being protected by the city. But this faith is broken, and this just expectation disappointed, when the creditor that makes the first grab at the fund set apart for all gets a preference over the other, albeit in a court called a court of equity.

"The ground on which this result is reached, if I understand the reasoning, is that this fund has never been impressed with the character of a trust, which distinguishes the case from the previous decisions of this court. To my mind, it is a conclusive answer to this to say that the city has done all that it could safely do to impress the fund with the character of a trust fund for the equal benefit of the material men, and has certainly not indicated a contrary purpose by handing it over to a court of equity for distribution. But it is said that the proceedings in equity, which were taken against the city by the material men before the petition of interpleader was filed, were 'equitable garnishments,' and therefore the provision of the attachment law is to be imported into a court of equity, under which, instead of doing equity by making a ratable distribution among the creditors of equal merit, the rule of distribution is to be, first come, first served. It is true that in judicial decisions in this state the proceeding has been denominated an 'equitable garnishment.' But that expression was used for the mere convenience of having a name for an anomalous proceeding. It was not used with reference to the question of priorities, which we are here considering. To my mind, there is no such thing as an 'equitable garnishment' in the sense in which it is here sought to employ the term, any more than there is an equitable indictment, or an equitable bill of attainder. But if we are to disregard the policy of the statute relating to mechanics' liens, and if we are also to disregard the contract between the city and McLane, which shows that both parties had in mind the idea that the material men of McLane should share equally, there is another ground which is inexorably logical as well as undeniably just, on which the same result should be worked out. It is the doctrine of our supreme court in Rieper v. Rieper, 79 Mo. 352,—the same being, so far as I can see, the last controlling decision of that court upon this question,—in which the familiar rule of equity is applied that what are called 'equitable assets' are to be divided pari passu among all creditors before the court. The same doctrine was stated and applied by this court in Heiman v. Fisher, 11 Mo. App. 275, and in St. Louis v. Keane, 27 Mo. App. 646. What, then, are equitable assets? Judge Bakewell, in Heiman v. Fisher, 11 Mo. App. at page 280, says that 'equitable assets are such as can be reached only by the aid of a court of equity, and the established rule is that assets which can only be reached in equity must be distributed pari passu among all creditors.' I take the rule to be that, where assets are of such a character that they are not vendible under an execution at law, and that no lien can be made to attach to them by any proceeding at law, but that they can only be reached and subjected to the demand of a creditor by the aid and the processes of a court of equity, they are for that reason, and that reason alone, equitable assets. Nor does it appear to me to make any difference why, or on what theory of law or of public policy, they are held to be available to the creditor through the aid of processes of equity alone. To bring them within the well-known rule in respect of the distribution of equitable assets, it is enough that they cannot be touched in any way without aid of a court of equity, and that whatever creditor gets satisfaction out of them must submit himself to the principles of a court whose favorite maxim is that equity is equality. But to this view there is opposed the argument that in this state, in the case of what is called a creditors' bill in aid of an execution at law to reach assets which have been concealed or fraudulently conveyed by the debtor, the rule is that the creditor first filing such a bill gets a priority over the others. Such is, no doubt, the rule in this state, though the contrary principle is every day administered in the courts of the United States here in our midst. But the assets thus pursued and made available by the creditor are not equitable assets within the sense of the rule under consideration, for the reason that they are vendible under his execution at law. The creditor can levy upon his debtor's interest in property which the latter has fraudulently conveyed, have it sold at sheriff's sale, become the purchaser, and then bring a suit in equity to clear his title; and I understand that a third person may become the purchaser at sheriff's sale, and have the like remedy in equity. Rights may thus attach to such assets in proceedings at law which in their very nature give a priority,—not merely a priority of lien, but a priority of title. But there is another reason which distinguishes those cases from this. In those cases the moving creditor, even where he does not first sell the debtor's interest under his execution at law, often goes to great labor and expense in uncovering assets of his debtor. It is therefore debatable, to say the least, whether he ought to be required, after fighting the battle, to allow the camp followers who have skulked in the rear to come in and divide with him the fruits of the victory. But no such condition of things exists in respect of the question we are considering. The debtor has made no fraudulent conveyance, has concealed no assets. He has simply run away, leaving visible certain assets in the hands of a custodian, who is

so privileged, under the policy of the law, that that custodian can only be compelled to account for them and to distribute them by a court of equity. Shall the principle which rewards the diligence and courage of the judgment creditor who sues to set aside a fraudulent conveyance be applied so as to give a priority to the creditor seeking satisfaction out of such equitable assets merely because he may happen to file his bill a day before the others? This is not rewarding diligence, courage, labor, and the expenditure of money. It may result merely in rewarding good fortune. The creditor first filing his bill may not even be the most diligent; he may merely be the most fortunate. A day's sickness in the case of his rival creditor, the accident of employing one lawyer instead of another, may, if this is to be the rule, turn the scale, and give him all, while the others standing in equal right get none. I can see no difference in principle between this case and the case of Rieper v. Rieper, 79 Mo. 352, which was, beyond question, correctly decided. In both cases the assets are well known, uncovered, undenied, unconcealed, but capable of being subjected only by proceedings in equity. The moving creditor, who, as in Rieper v. Rieper, seeks to subject the separate estate of a married woman, gets no lien by the mere filing of his bill, and for the naked reason that the assets are equitable assets, and that it is the act of the court, and not the act of the creditor, that creates the lien. The lien is created by the decree, and not by the bringing of the suit. In all such cases the well-known rule of chancery procedure is that all creditors who come in before the final decree of distribution share pari passu.

In this conclusion reached by the learned dissenting judge we concur. We think he might have safely rested it upon the case of Rieper v. Rieper, 79 Mo. 352, and the last ground so forcibly put in his opinion, to which we deem it necessary to add only a word in explanation of our position. While a court of equity, under the admirable doctrine announced in the able opinion of Judge Bliss in Pendleton v. Perkins, 49 Mo. 565, can and will give a remedy to creditors against assets in its custody, or which can be reached only by its strong arm, yet such courts cannot create for their benefit either the process of garnishment on the one hand, or the remedies to be acquired under the mechanic's lien law on the other, and are not constrained to a distribution of those assets to creditors according to the principles that would obtain under the law governing either, but will make such distribution according to right and justice, which in this case would be (after paying Higgins and Sellers the amount found due them for the finishing the work out of the fund) to distribute the remainder among the interpleaders in proportion to the amounts found to be severally due them. That this may be done, the judgment of the St. Louis court of appeals affirming the judgment of the St. Louis circuit court is reversed, and the same remanded to said court of appeals, to be proceeded with accordingly. All concur, except BARCLAY, J., who dissents.

COMSTOCK v. JOHNSON.

(46 N. Y. 615.)

Court of Appeals of New York. 1871.

CHURCH, C. J. The principal question in this case, involving the construction of the grant of water, was correctly decided in the court below. It is well settled in this State that the terms used in this grant are to be taken as a measure of the quantity of water granted, and not a limitation of the use to the particular machinery specified. (*Wakely* v. *Davidson*, 26 N. Y., 387; *Cromwell* v. *Selden*, 3 id., 253.) It was found by the court that, at the time the defendant shut the water off, he asserted that the plaintiff had forfeited his right to the water, and claimed a right to shut it off. In this he was mistaken. In depriving the plaintiff of the use of the water under an assertion of forfeiture, he rendered himself amenable to the process of the court for the protection of the plaintiff's rights. The judgment enjoining the defendants from depriving the plaintiff of the quantity of water to which he was entitled under his deed, cannot be disturbed. The only serious question in the case relates to the use of the buzz saw in front of the mill. The plaintiff did not, by his deed, acquire the title to the land in front of the mill, because the description is limited to the land upon which the mill stands; but he did acquire an easement in such land for the purpose of ingress and egress, and also for the purpose of piling and sawing wood for the use of the mill, as it had been used and enjoyed for forty years. Everything necessary for the full and free enjoyment of the mill passed as an incident, appurtenant to the land conveyed. (2 Kent's Com., 467; *Blaine's Lessee* v. *Chambers*, 1 Serg. & Rawle, 174.) But this would not authorize the plaintiff to erect and use machinery upon this land not necessary to the use of the mill, as it had been used, and would not authorize the use of the buzz saw upon that land. The objection is not that the plaintiff propelled the buzz saw with the water from the dam, as he had the right to use the water for any machinery and in any place which he was entitled to occupy; but he could not occupy the space in front of the mill for that purpose. At the time the water was shut off by the defendants, it was being used only to propel this saw; and it is claimed that the defendants were justified in shutting off the water from that machinery; and for that reason the judgment should be reversed, or, at least, that it should be modified so as to restrain the plaintiff from using his buzz saw on the defendants' premises. As we have seen, the judgment against the defendants is fully warranted by the findings; and the question is, whether any modification should be made against the plaintiff. It is a rule of equity that he who asks equity must do equity. The plaintiff was in fault in using the buzz saw on the defendants' premises. It is said that this was an independent transaction, for which the defendants might have an action; and this was the view of the court below. The rule referred to will be applied when the adverse equity grows out of the very controversy before the court, or of such circumstances as the record shows to be a part of its history, or is so connected with the cause in litigation as to be presented in the pleadings and proofs, with full opportunity afforded to the party thus recriminated to explain or refute the charges. (*Tripp* v. *Cook*, 26 Wend., 143; *McDonald* v. *Neilson*, 2 Cow., 190; *Casler* v. *Shipman*, 35 N. Y., 533.)

All the facts connected with the right of the plaintiff to use the buzz saw were not only spread out upon the record, but were in fact litigated upon the trial, and, as to his strict legal rights, are undisputed; and we cannot say that, but for his use of the saw on the defendants' premises, the water would not have been shut off. Whether this was so or not, the controversy in relation to his right to use the saw was involved in the litigation, and was intimately connected with the wrongful act of the defendants; and, being so, it is proper to apply the equitable rule. It is not indispensable to the application of this rule that the fault of the plaintiff should be of such a character as to authorize an independent action for an injunction against him. The plaintiff, in strictness, was in the wrong in placing his buzz saw in front of the mill. The defendants were in the wrong in shutting off the water, and especially in asserting a forfeiture; and, as both parties are in court to insist upon their strict legal rights, we think substantial justice will be done by modifying the judgment so as to enjoin the plaintiff from using the buzz saw on the land in front of his mill, and, as modified, judgment affirmed, without costs to either party against the other in this court.

All concur.

Judgment accordingly.

## BLEAKLEY'S APPEAL.

(66 Pa. St. 187.)

Supreme Court of Pennsylvania. 1870.

The opinion of the court was delivered, October 27th 1870, by

AGNEW, J. The facts of this case are few. Robert Lamberton was the owner of a judgment for $31,000, entered against Samuel P. Irvin on the 8th day of June, 1865. Irvin had purchased of F. D. Kinnear, Esq., lot No. 449 in Franklin at $2600, of which $820 only remained unpaid, and would fall due on the 6th of August 1865, with a provision for forfeiture of the contract in case of non-payment for thirty days after it fell due. On the 19th of July 1865, Irvin assigned his contract to James Bleakley, binding him to pay the $820 to save the forfeiture, and with the admitted understanding that Irvin should refund the $820 to Bleakley, settle his indebtedness to the bank, of which Bleakley was cashier, and that then Bleakley should reconvey to Irvin's wife. But the assignment was antedated to the 1st of May 1865, thus overreaching Lamberton's judgment. The master finds that this was done to defraud the plaintiff. The finding is ably vindicated in the opinion of Judge Trunkey. The absolute character of the paper, though but a security, the agreement to reconvey to Irvin's wife instead of himself, and the attempt of Bleakley to use the paper to defeat the sheriff's sale of the property by Lamberton on his judgment, evince the true motive for antedating the paper.

Bleakley paid the $820 to Kinnear, and now claims a decree for this sum, before specific performance shall be decreed to Lamberton, who purchased Irvin's title at the sheriff's sale. Kinnear does not resist specific performance, but stands ready to convey to Lamberton, whenever the covinous assignment to Bleakley is put out of his way. It is Bleakley who resists the decree until he is refunded the $820, paid upon the footing of the fraudulent agreement with Irvin, to defeat Lamberton's judgment. Bleakley is made a party to the bill only for the purpose of putting aside the covinous assignment to enable Kinnear to convey to Lamberton. The question then is whether a chancellor would require Lamberton to refund the $820 to Bleakley, as a condition to setting aside the assignment and entitling Lamberton to specific performance of Kinnear.

But clearly Bleakley cannot demand repayment of Lamberton either at law or equity. And first he is not entitled to subrogation to Kinnear's rights. Subrogation is not a matter of contract but of pure equity and benevolence: Kyner *v.* Kyner, 6 Watts 221; Wallace's Appeal, 5 Barr, 103. On what pretence, *in foro conscientiæ*, can a party attempting to carry out a scheme of fraud against another, by a payment, claim compensation of the party he has attempted to defraud? Conscience and benevolence revolt at such an iniquity. Again Bleakley did not recognise Kinnear's title by the payment. He did not profess to bargain for it, and Kinnear did not profess to sell it to him. His act was simply a *payment* and no more, made by him because of Irvin's duty to pay, and accepted by Kinnear because of his right to receive from Irvin. Besides the payment was accepted by Kinnear in ignorance of the attempted fraud. There can be no legal intendment therefore of a bargain on Kinnear's part to vest his right to receive the money in Bleakley. As to Lamberton the payment by Bleakley was not only fraudulent and intended to displace his judgment, but it was also voluntary. It was not paid at Lamberton's request nor for his use and benefit; but on the contrary was intended to defeat his right, as a creditor by overlapping his judgment, by means of the covinous transfer. Bleakley is therefore neither a purchaser, nor a creditor of Lamberton, nor an object of benevolence, but is forced upon the record to compel him to put out of the way the fraudulent barrier to Kinnear's specific performance to Lamberton. He cannot, thus standing before a chancellor, ask him to make repayment to him a condition to a decree to remove the fraudulent obstruction he threw in the way. The payment is one of the very steps he took to consummate the fraud upon Lamberton. If he have a legal right of recovery he must resort to his action at law, and if he can have none, it is a test of his want of equity. And in addition to all this, it is a rule that a chancellor will not assist a party to obtain any benefit arising from a fraud. He must come into a court of equity with clean hands. It would be a singular exercise of equity, which would assist a party, who had paid money to enable him to perpetrate a fraud, to recover his money, just when the chancellor was engaged in thrusting out of the way of his doing equity to the injured party, the very instrument of the fraud. Who does iniquity shall not have equity: Hershey *v.* Weiting, 14 Wright 244–5.

We are therefore of opinion the court committed no error in refusing compensation, and the decree of the court below is confirmed.

ELLISON v. MOFFATT.

(1 Johns. Ch. 46.)

Court of Chancery of New York. 1814.

THE CHANCELLOR. The parties lived in the same county, and, without accounting for the delay, the plaintiff suffered a period of 26 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 overhaul 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.

HORN v. COLE et al.

(51 N. H. 287.)

Supreme Judicial Court of New Hampshire. July Term, 1868.

Mr. Fletcher, for plaintiff. Mr. Ray, for defendants.

PERLEY, C. J. There is no complaint that the rulings and instructions of the court on the trial were erroneous or improper, provided the evidence warranted the jury in returning a verdict for the defendants; and the verdict must stand, if the evidence was competent to prove such representations by the plaintiff as would estop him to set up his title to the goods attached to the property of Charles E. Horn.

The evidence reported in the case was competent to prove that the plaintiff made the representations on the occasion and in the circumstances testified to by Cole; that the plaintiff, though not indebted to Cole, was in debt to others; that Cole, believing the representations to be true, and relying on them as true, caused the goods to be attached as the property of Charles E. Horn; and, also, that the plaintiff made these representations knowing them to be false, with the intention that all persons who were interested in the subject should take them to be true, and act on them as such, and with the intention to mislead and deceive all to whom the representations were communicated, and induce them to act on them as true; that his intention was to deceive his own creditors, and prevent them from taking the goods as his for the debts which he owed to them. These facts must be taken to have been established by the verdict.

But, as there was no evidence that the plaintiff knew Cole had any demand against Charles E. Horn, we cannot infer that the plaintiff had Cole in his mind as an individual whom he meant to deceive by his false representations, or that he had an intent to prevent Cole from taking the goods for a debt which he owed to Cole, as he owed no such debt; and, on the evidence reported, the jury were not at liberty to find that the plaintiff had Cole in his mind as an individual whom he meant to deceive and defraud by inducing him to take the goods for his demand against Charles E. Horn. This raises the point, which the counsel for the plaintiff takes, whether, to estop a party from showing that his representations were false, it is necessary that the false representations should have been intended to deceive and defraud the individual party who trusted to them and acted on them, provided there was a general intention to deceive and defraud all persons who were interested in the subject-matter of the false representations.

The ground on which a party is precluded from proving that his representations on which another has acted were false is, that to permit it would be contrary to equity and good conscience. This has been sometimes called an "equitable estoppel," because the jurisdiction of enforcing this equity belonged originally and peculiarly to courts of equity, and does not appear to have been familiarly exercised at law until within a comparatively recent date; and, so far as relates to suits at law affecting the title to land, I understand that in England and in some of the United States the jurisdiction is still confined to courts of equity. Storrs v. Barker, 6 Johns. Ch. 166, 168; Evans v. Bicknell, 6 Ves. 174, 178; Pickard v. Sears, 6 Adol. & E. 469. The doctrine, however, is a very old head of equity, and is recognized and applied in a great number of the early cases. Dyer v. Dyer, 2 Ch. Cas. 108; Teasdale v. Teasdale, 13 Vin. Abr. 539; Hobbs v. Norton, 1 Vern. 136; Gale v. Lindo, Id. 475; Hunsden v. Cheyney, 2 Vern. 150; Lamlee v. Hanman, Id. 499; Raw v. Pote, Id. 239; Blanchet v. Foster, 2 Ves. Sr. 264; East India Co. v. Vincent, 2 Atk. 83; Stiles v. Cowper, 3 Atk. 693; Webber v. Farmer, 13 Vin. Abr. 525; 2 Brown, Parl. Cas. 88; 2 Eq. Cas. Abr. 481; Neville v. Wilkinson, 1 Brown, Ch. 543; Storrs v. Barker, 6 Johns. Ch. 166; Strong v. Ellsworth, 26 Vt. 366.

Many of these cases related to underhand agreements in fraud of marriage settlements; but the principle is of general application. 1 Fonbl. Eq. 267, note x. Relief was given according to the circumstances of the case, —sometimes by enjoining suits at law, in which the legal title was set up, and sometimes by decreeing conveyances and the cancelling of deeds and other instruments; but in all these cases relief was given in equity contrary to the strict legal rights of the defendants.

Thus, in the case of an equitable estoppel, a party is not allowed to assert his strict legal right because, in the circumstances of the individual case, it would be contrary to equity and good conscience. Take the present case for an illustration. In trover, following the legal definition of the action, if the plaintiff proves property in himself and a conversion by the defendant, he has maintained his action, and is entitled to a verdict and judgment. It is conceded that the plaintiff owned the goods, and that the defendants converted them. The defense here set up appeals from the strict rule at law to the equitable doctrine that a party shall not be allowed to exercise his legal right of proving the facts, if, on account of his previous declarations or conduct, it would be contrary to equity and good conscience. So in a writ of entry; by the technical rules at law, if the demandant proves seisin in himself and a disseisin by the tenant within the time of limitation, he is entitled to judgment; but if the demandant, having a dormant title to the land demanded, concealed his title, and encouraged the tenant to purchase from another, he is not allowed, in our

practice, to set up his legal title, because it would be contrary to equity and good conscience.

It thus appears that what has been called an "equitable estoppel," and sometimes, with less propriety, an "estoppel in pais," is properly and peculiarly a doctrine of equity, originally introduced there to prevent a party from taking a dishonest and unconscientious advantage of his strict legal rights,—though now with us, like many other doctrines of equity, habitually administered at law. But formerly the practice was different, and suits at law, the courts being incapable of giving effect to this equity, were often enjoined where the party insisted on his rights at law contrary to the equitable doctrine, as in Raw v. Pote, Stiles v. Cowper, and Webber v. Farmer, qua supra.

It would have a tendency to mislead us in the present inquiry, as there is reason to suspect that it has sometimes misled others, if we should confound this doctrine of equity with the legal estoppel by matter in pais. The equitable estoppel and legal estoppel agree indeed in this, that they both preclude from showing the truth in the individual case. The grounds, however, on which they do it are not only different, but directly opposite. The legal estoppel shuts out the truth, and also the equity and justice of the individual case on account of the supposed paramount importance of rigorously enforcing a certain and unvarying maxim of the law. For reasons of general policy, a record is held to import incontrovertible verity, and for the same reason a party is not permitted to contradict his solemn admission by deed. And the same is equally true of legal estoppels by matter in pais. Certain acts done out of court and without deed were, by a technical and unyielding rule of law, upheld on like grounds of public policy, and followed always by certain legal consequences. The legal effect of such acts was not permitted to be controverted by proof.

Thus, if one accepts a lease and enters under it, he is estopped to claim any other estate in the land during the term; he cannot show that he owned the land when the lease was made. Estoppels by matter in pais were few in number, and all of this general and well defined character; and they all enforced some technical rule of the law against the truth, and also against the justice and equity of the individual case. Coke, in his examination of the different kinds of estoppel by matter in pais, enumerates the following: "By livery, by entry, by acceptance of rent, by partition, and by acceptance of an estate." Co. Litt. 352a. In Lyon v. Reed, 13 Mees. & W. 309, Parke, B., speaking of legal estoppels by matter in pais, says: "They are but few, and are pointed out by Lord Coke, Co. Litt. 352a. They are all cases which anciently really were, and in contemplation of law have always continued to be, acts of notoriety no less solemn than the execution of a deed, such as livery, acceptance of an estate, and the like. Whether a party had or had not concurred in an act of this sort was deemed a matter which there could be no difficulty in ascertaining, and then the legal consequences follow."

In the authorities which contain the most complete enumeration of the different kinds of legal estoppels and the fullest discussion of the law on the subject, I find no allusion to the equitable estoppel which we are now considering. All legal estoppels, whether by record, by deed, or by matter in pais, depended on strict legal rules, and shut out proof of the truth and justice of the individual case. Viner, Abr., "Estoppel," passim; Lyon v. Reed, 13 Mees. & W. 309; Freeman v. Cooke, 2 Exch. 658.

For this reason, because legal estoppels, whether by record, deed, or matter in pais, shut out proof of the truth and justice of individual cases, they have been called odious, and have been construed with much strictness against parties that set them up. They were formerly required, like other defences regarded as inequitable, to be pleaded with certainty to a certain intent in every particular. If they were relied on by way of averment, and tried by the jury, the jury might find, and according to some authorities were bound by their oath veritatem dicere to find, according to the truth of the case, regardless of the estoppel. Trials Per Pais, 284; Co. Litt. 227a; Com. Dig. "Estoppel," E, 10. The practice is now different, and legal estoppels may be relied on, when given in evidence, without being specially pleaded. Legal estoppels exclude evidence of the truth and the equity of the particular case to support a strict rule of law, on grounds of public policy.

Equitable estoppels are admitted on the exactly opposite ground of promoting the equity and justice of the individual case by preventing a party from asserting his rights under a general technical rule of law, when he has so conducted himself that it would be contrary to equity and good conscience for him to allege and prove the truth. The facts upon which equitable estoppels depend are usually proved by oral evidence; and the evidence should doubtless be carefully scrutinized, and be full and satisfactory, before it should be admitted to estop the party from showing the truth, especially in cases affecting the title to land. But where the facts are clearly proved, the maxim that estoppels are odious—which was used in reference to legal estoppels, because they shut out the truth and justice of the case—ought not to be applied to these equitable estoppels, as it has sometimes been, inadvertently, as I think, from a supposed analogy with the legal estoppel by matter in pais, to which they have, in this respect, no resemblance whatever. Lord Campbell, in Howard v. Hudson, 2 El. & Bl. 10; Andrews v. Lyons, 11 Allen, 349, 351. In other cases, where

more attention has been paid to the real nature of this equitable doctrine, it has been held that such estoppels are not odious, and to be construed strictly, but are entitled to a fair and liberal application, like other equitable doctrines which are admitted to suppress fraud and promote honesty and fair dealing. Mellor and Compton, JJ., in Ashpitel v. Bryan, 3 Best & S. 474; Cowen, J., in Dezell v. Odell, 3 Hill, 220; Com. v. Moltz, 10 Pa. St. 530, 531; Buckingham v. Hanna, 2 Ohio St. 557; Van-Rensselaer v. Kearney, 11 How. 326; Preston v. Mann, 25 Conn. 118, 128.

In this equitable estoppel, the party is forbidden to set up his legal title because he has so conducted himself that to do it would be contrary to equity and good conscience. As in other cases of fraud and dishonesty, the circumstances out of which the question may arise are of infinite variety; and, unless courts at law are willing to abdicate the duty of administering the equitable doctrine effectually in suppression of fraud and dishonesty, the application of it cannot be confined within the limit of any narrow technical definition, such as will relieve courts from looking, as in other cases depending on fraud and dishonesty, to the circumstances of each individual case. Certain general rules will doubtless apply, as in other cases where relief is sought on such grounds. But I find myself unable to agree with the authorities where the old maxim that legal estoppels are odious has been applied to this equitable estoppel, and where attempts have been made to lay down strict definitions, such as would defeat the remedy in a large proportion of the cases that fall within the principle on which the doctrine is founded.

The doctrine having been borrowed from equity, courts at law that have adopted it should obviously look to the practice in equity for their guide in the application of it; and in equity, the doctrine has been liberally applied to suppress fraud and enforce honesty and fair dealing, without any attempt to confine the doctrine within the limits of a strict definition. For instance, the doctrine has not in equity been limited to cases where there was an actual intention to deceive. The cases are numerous where the party who was estopped by his declarations or his conduct to set up his legal title, was ignorant of it at the time, and of course could have had no actual intention to deceive by concealing his title. Yet, if the circumstances were such that he ought to have informed himself, it has been held to be contrary to equity and good conscience to set up his title, though he was in fact ignorant of it when he made the representations. Hobbs v. Norton, Hunsden v. Cheyney, Teasdale v. Teasdale, qua supra; and Burrowes v. Lock, 10 Ves. 470. So, if the party knew the facts, but mistook the law. Storrs v. Barker, 6 Johns. Ch. 166. Nor is it necessary in equity that the intention should be to deceive any particular individual or individuals. If the representations are such, and made in such circumstances, that all persons interested in the subject have the right to rely on them as true, their truth cannot be denied by the party that has made them against any one who has trusted to them and acted on them. Gale v. Lindo, Webber v. Farmer, qua supra.

In the much and well considered case of Preston v. Mann, 25 Conn. 118, 128, Storrs, J., delivering the opinion of the court, says: "The doctrine of estoppel in pais, notwithstanding the great number of cases which have turned upon it and are reported in the books, cannot be said even yet to rest upon any determinate legal test which will reconcile the decisions, or will embrace all transactions to which the general principles of equitable necessity wherein it originated demand that it should be applied. In fact, it is because it is so peculiarly a doctrine of practical equity, that its technical application is so difficult, and its reduction to the form of abstract formulas is still unaccomplished." This was said in 1856, and little has since been done towards extricating the doctrine from the confusion and conflict of authority with which it was then embarrassed. This, as I think, has been caused by the fact that courts have continued to exercise their ingenuity in the vain attempt to compress a broad doctrine of equity within the narrow limits of a technical definition.

The case of Pickard v. Sears, 6 Adol. & E. 469, decided as late as 1837, appears to have been regarded, both in England and in this country, as the leading case at law on this subject. It was trover by the mortgagee of personal goods against the defendants, who were purchasers at a sheriff's sale on execution against the mortgagor. The facts set up in defence were, that the plaintiff was present at the sale, did not disclose his title as mortgagee, and encouraged the defendants to purchase. The question on trial was as to the property of the plaintiff in the goods, and Lord Denman directed a verdict for the plaintiff. A rule to show cause why the verdict should not be set aside was made absolute.

In delivering the judgment of the court, Lord Denman said: "His [the plaintiff's] title having been established, the property could only be devested by gift or sale, of which no specific act was even surmised. But the rule of law is clear that where one, by his words or conduct, willfully causes another to believe the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring a different state of things as existing at the same time; and the plaintiff might have parted with his interest in the property by a verbal gift or sale, without any other formalities that threw technical difficulties in the way of legal evidence. And we think his conduct in standing by and giving a kind of sanction to the proceedings under the execution was a fact of such a nature that the opinion of the jury ought to have been taken whether he had not, in point of fact, ceased to be the owner."

It is worthy of note that in this suit at law

the court, so late as 1837, after stating the general equitable doctrine, did not venture to put the defence directly on the ground that the plaintiff was estopped by his conduct to prove the truth of the case, but allowed the facts to go to the jury as evidence that the plaintiff, in some undefined and mysterious way, had parted with his property in the goods. So late and so reluctant were the courts to admit in suits at law this defence, which depended on fraud and dishonesty, and which belonged, originally and appropriately, to the jurisdiction in equity.

It can hardly be supposed that Lord Denman, in the statement which he made of this equitable doctrine in reference to the facts of that case, understood that he was laying down a technical definition fixing the limits of the doctrine, and excluding all cases that did not come clearly within the terms which he used on that occasion. Nevertheless, the remarks of Lord Denman have often been treated as a sort of authoritative text covering the whole ground, which it was the business of courts in later cases to expound and explain. And it is curious to observe what different and contradictory interpretations have been put on his statement of the equitable doctrine. It has been cited in Massachusetts as authority for decisions in which it has been held that the representations, to estop the party from showing they were not true, must have been made with the intent to deceive, and the intent to deceive the party who sets up the defence. Plumer v. Lord, 9 Allen, 455; Andrews v. Lyons, 11 Allen, 349. And in California the same case has been relied on for the rule that where a representation comes in any way to the ears of a party, who acts on it, the party making the representation is estopped to deny its truth, unless it had the character of a confidential communication. Mitchell v. Reed, 9 Cal. 204. In England it has been treated as a statement of the equitable doctrine made in reference to the circumstances of that case, and not intended as a formal and complete definition. Freeman v. Cooke, 2 Exch. 654; Gregg v. Wells, 10 Adol. & E. 90; Jorden v. Money, 5 H. L. Cas. 212.

It would be a laborious and not a profitable task to attempt an analysis of all the recent decisions on this subject. I will briefly advert to some of those which appear to be the most important.

In Plumer v. Lord, 9 Allen, 455, it was held that to create an estoppel in pais, the declarations or acts must have been accompanied with a design to mislead; and Langdon v. Doud, 10 Allen, 433, is to the same point. In Andrews v. Lyons, 11 Allen, 349, the court went one step further, and decided that the declarations or acts must have been accompanied with a design to deceive the party who sets up the estoppel, and induce him to act on them; and in this last case it is said that such an estoppel shuts out the truth, and is odious, and must be strictly proved. In Hawes v. Marchant, 1 Curt. 144, Fed. Cas. No. 6,240, the rule is laid down that to be estopped the party must have designedly made admissions inconsistent with the defense or claim which he proposes to set up, and another, with his knowledge and consent, so acted on this admission, that he will be injured by allowing the admission to be disputed; and this rule is cited and apparently approved in Audenried v. Betteley, 5 Allen, 382.

In these cases, it is to be observed, the court have not been content with saying, in reference to the facts before them, that, if certain things concurred in the case, it would fall within the equitable doctrine, and the party would be estopped, but they have undertaken to lay down a strict legal definition of general application, excluding from the operation of the doctrine all cases that do not fall within the terms of the definition. Applying the rule as laid down in Hawes v. Marchant to the present case, if Horn had known that Cole had a demand against Charles E. Horn, had falsely represented to Cole that the goods belonged to Charles, with the design to deceive him and induce him to attach the goods as the property of Charles, and Cole, relying on the representation, had taken the goods as the property of Charles, and as Horn intended, yet if, after he had made the false representation, he did not know that the goods were taken as the property of Charles, and assent that they should be so taken, he would not be estopped to set up his own title in the goods. The statement that another party must have acted on the false statement with his knowledge and assent must mean this, or it can mean nothing; for he could not know that he had acted on it at all until the act was done and accomplished.

The remark of Lord Campbell in Howard v. Hudson, qua supra, though not called for by the case, is to the effect that the representation must have been intended to deceive.

These authorities would seem to sustain the plaintiff's counsel fully in his position that the false representation must not only be intended to deceive but also to deceive the identical party that acted on them.

There are, however, authorities of equal respectability, and in greater numbers, which maintain a different doctrine.

In England, the case of Pickard v. Sears does not appear to have been understood as intended to lay down a complete definition of the equitable doctrine excluding all cases that could not be brought within the terms of the remarks made by Lord Denman. In Freeman v. Cooke, 2 Exch. 654, it was held that the term "willfully," used in Pickard v. Sears, was not to be understood in the sense of "maliciously"; and that, whatever a man's real meaning may be, if he so conducts himself that a reasonable man would take the representation to be true, and believe it was meant he should act on it, and

he did act on it as true, the party making the representation would be equally precluded from contesting its truth. This is wholly inconsistent with the notion that an intention to deceive is an essential ingredient of the representation, which precludes the party making it from showing that it was false. So in Jorden v. Money, 5 H. L. Cas. 212, it was held not to be necessary that the party making the representations should know that they were false; that no fraud need have been intended at the time; but, if the party unwittingly misled another, you must add that he has misled him under such circumstances that he had reasonable ground for supposing that the person whom he was misleading would act upon what he was saying.

In Gregg v. Wells, 10 Adol. & E. 90, Lord Denman says: "Pickard v. Sears was in my mind at the time of the trial, and the principle of that case may be stated even more broadly than it is there laid down. A party who negligently or culpably stands by and allows another to contract on the faith and understanding of a fact which he can contradict, cannot afterwards dispute that fact in the action against the person whom he has himself assisted in deceiving." This shows that Lord Denman did not himself understand that his remarks in Pickard v. Sears were to be taken as a definition and limitation of the equitable doctrine, for he says the principle of the case might be stated more broadly than it is laid down there, and may include the case of a culpable negligence. So Hobbs v. Norton, 1 Vern. 136; Hunsden v. Cheyney, 2 Vern. 150; Teasdale v. Teasdale, 13 Vin. Abr. 539; Burrowes v. Lock, 10 Ves. 475,—before cited, show that the practice in equity does not require that there should in all cases be an intention to deceive, or even a knowledge that the representation was false.

We come now to the decisions in this country, which give a broader application to this doctrine than those before cited.

In Dezell v. Odell, 3 Hill, 221, the general doctrine is said to be that when a party, either by his declarations or his conduct, has influenced a third person to act in a particular manner, he will not be afterwards permitted to deny the truth of the admission if the consequence would be to work an injury to such third person, and that in such case it must appear—First, that he made an admission which is clearly inconsistent with the evidence he proposes to give, or the claim which he proposes to set up; second, that the party has acted on the admission; third, that he will be injured by allowing the truth of the admission to be disputed. According to this interpretation of the equitable doctrine, it would seem not to be necessary that the representation should be intended to deceive, or that the party making it should know it to be false, or that it should be intended the party should act on it, who does so in fact, and is deceived by it. The rule of this case has been adopted and followed in Newman v. Hook, 37 Mo. 207; Carpenter v. Stillwell, 12 Barb. 135; and Eldred v. Hazlett, 33 Pa. St. 316.

In Roe v. Jerome, 18 Conn. 138, the general doctrine is stated to be that where one person, by his words or conduct causes another to believe in a certain state of things, and thus induces him to act on that belief, so as injuriously to affect his previous position, he is concluded from averring a different state of things as existing at the time; and this rule was followed in the later cases of Cowles v. Bacon, 21 Conn. 451, and Dyer v. Cady, 20 Conn. 563; and in Preston v. Mann, 25 Conn. 118, before cited, it is said that the doctrine did not then rest on any determinate, legal test which will embrace all transactions to which the general principles of equity, in which it originated, demand that it should be applied.

Buchanan v. Moore, 13 Serg. & R. 304, 306, is to the point that, though the party believed his representation to be true, and made it under a mistake, he is estopped to show that he made the representation innocently believing it to be true, provided the other party acted on it, and had reason to act on it, as true. So in Strong v. Ellsworth, 26 Vt. 366, it is said by Redfield, C. J., that he who by his words or actions, or his silence even, intentionally or carelessly induces another to do an act which he would not otherwise have done, and which will prove injurious to him if he is not allowed to insist on the fulfillment, may insist on such fulfillment; and that the doctrine of equitable estoppels lies at the foundation of morals. In Mitchell v. Reed, 9 Cal. 204, it was held that where a statement made to a third person is not confidential, but general, and is acted on by others, the party making the declaration is estopped to deny its truth; that the intention with which the declaration is made is not material, except, perhaps, where it is confidential. This case and Quirk v. Thomas, 6 Mich. 76, are authorities that to work the estoppel it is not necessary the declaration should be made to the party who acts on it, nor in his presence, nor that the declaration should be intended to come to the knowledge of any particular person.

In a suit at law to recover damages for a false affirmation that the signer of a note was of age, it was decided, in Lobdell v. Baker, 1 Metc. (Mass.) 193, that it was not necessary to allege or prove that the defendant knew the signer was an infant. Wilde, J., in delivering the opinion of the court, said: "A party may render himself liable in an action for damages to a party prejudiced by a false affirmation, though not made with any fraudulent intention." This, it may be said, is not directly in point, but the only difference is in the form of the remedy. The principle involved is the same, whether the

question is raised in a suit to recover damages for the false representation, or redress is sought by estopping the party to prove the falsehood of the representation. Both cases go on the same general ground that the party is responsible for the consequences of his false representation.

There are numerous authorities that it is not necessary to the estoppel that the declarations or conduct should be intended to deceive any particular person or persons; that, if they were intended to deceive generally, or were of such a character, and made in such circumstances, that it must have been understood they were likely to deceive, and any person using due diligence was in fact deceived by them, it is enough. Gregg v. Wells, 10 Adol. & E. 90; Wendell v. Van Rensselaer, 1 Johns. Ch. 353; Adams v. Brown, 16 Ohio St. 78; Dezell v. Odell, 3 Hill, 221; Quirk v. Thomas, 6 Mich. 76; Mitchell v. Reed, 9 Cal. 204.

It has been declared in many cases that this equitable estoppel involves a question of legal ethics, and applies wherever a party has made a representation, by words or conduct, which he cannot in equity and good conscience prove to be false; and that this kind of estoppel, being a broad doctrine of equity, cannot be limited in application by the terms of any narrow legal definition. In Canal Co. v. Hathaway, 8 Wend. 483, it is said by Sutherland, J., that the party is estopped when in good conscience and equity he ought not to be permitted to gainsay his admission; and in the same case, by Nelson, J.: "From the means in which the party must avail himself of these estoppels, it is obvious there can be no fixed and settled rules of universal application." And in Dezell v. Odell, 3 Hill, 225, Bronson, J., adopting the language of Nelson, J., in Canal Co. v. Hathaway, adds, "It is a question of ethics." In Strong v. Ellsworth, 26 Vt. 366, Redfield, J., says the doctrine lies at the foundation of morals. In Lucas v. Hart, 5 Iowa, 415, the court holds that: "In these estoppels there can be no fixed and settled rules of universal application to regulate them as in technical legal estoppels; that in many, and probably in most, instances, whether the act or admission shall operate as an estoppel or not must depend on the circumstances of the case, though there are some general rules which may materially assist in the examination of such cases." In the application of these general rules to that case the court decided that the acts and admissions of the respondent estopped him from asserting his title to the property in question; that to permit him to do it would be "unconscionable, and contrary to that fairness and honest dealing which courts of equity seek ever to promote and encourage."

In Frost v. Saratoga Ins. Co., 5 Denio, 154, it is said by Beardsley, C. J., that such an estoppel is a question of ethics, and is allowed to prevent fraud and injustice, and exists wherever a party cannot in good conscience gainsay his own acts or assertions.

The case of Preston v. Mann, 25 Conn. 118, is strong to the point that this estoppel, depending on a broad doctrine of equity, cannot be governed in application by narrow and strict rules of construction, such as have prevailed in legal estoppels.

In some, if not in most, of the cases, in which it is said that if a party makes representations intending to deceive the party that acts on them, the equitable estoppel applies, it was not intended, as I think, to lay down a rule excluding all cases that did not fall within the statement made in reference to the facts of the case then under consideration; that what is said is not to be taken as a rule to limit and define the doctrine and exclude all other cases. They say, if such and such things concur, "this case will fall within the doctrine"; but they do not intend to say no other cases are within it. For example, in Kinney v. Farnsworth, 17 Conn. 361, Storrs, J., says that "admissions which have been the means, designedly, of leading others to a particular course of conduct, cannot afterwards be conscientiously retracted by one who has made them." He could not have intended to lay down the rule that one would in no case be estopped by a representation not designed to deceive, because the same judge, in Preston v. Mann, says: "The doctrine is not reduced to the limits of any formula," and, "whatever the motive may be, if one so acts or speaks that the natural consequence of his words or conduct will be to influence another to change his condition, he is legally charged with the intent to induce the other to believe and to act on that belief, if such proves to be the result." So Lord Denman, speaking, in Gregg v. Wells, 10 Adol. & E. 90, of his judgment in Pickard v. Sears, says: "The principle of that case may be stated even more broadly than it is there laid down."

In this state we have several cases where the general question has been more or less considered. In Wells v. Pierce, 27 N. H. 503, the doctrine of equitable estoppel was traced to its origin in equity, and it was held that if the owner actively encourages the purchase of his property from another, he will be precluded from claiming it, though he was not aware of his interest at the time; which is clearly in conflict with the notion that the representation must be accompanied with an intention to deceive. In Davis v. Handy, 37 N. H. 65, the doctrine of Wells v. Pierce was approved and applied. In the recent case of Drew v. Kimball, 43 N. H. 285, one point directly involved was whether it was necessary that the party to be estopped should intend to deceive and defraud the individual to whom the representation was made, and who set up the defence; and it was held that it was not necessary. Indeed it seems to me that it would be trifling with a doctrine depending on equity and good con-

science to hold otherwise. So, if a representation was intended to deceive one man, and it in fact deceived and defrauded another. Then, again, if the representation were intended to have one operation, and, as it turned out, deceived and defrauded by another method not contemplated by the party at the time, but still the natural consequence of the representation, it would be quibbling with a doctrine depending for its application on the morality of the act to hold that the party would not be answerable for the consequences of his false and fraudulent representation as much as if it had taken effect on the party and in the manner intended. In a case depending on a question of "legal ethics," it would bring down the morality of the law to a very low standard to hold that a party was not liable for the wrong caused by his fraud to one man, because the fraud was contrived against another man.

In Drew v. Kimball the case did not raise the precise point taken in this case. But, on a full discussion of the general doctrine, and a review of the authorities, the court, adopting the hypothetical case put by Parke, B., in Freeman v. Cooke, say: "If, whatever a man's intentions may be, he so conducts himself that a reasonable man would take the representation to be true, and believe it was meant he should act upon it, and he did act upon it, as true, the party making the representation would be equally precluded from contesting its truth. In short, the representations are to be regarded as willful when the person making them means them to be acted on, or if, without regard to intention, he so conducts himself that a reasonable man would take the representation to be true, and believe it was meant he should act on it."

There have been several other cases in this state where this equitable doctrine has been considered and applied. Thompson v. Sanborn, 11 N. H. 201; Simons v. Steele, 36 N. H. 73; McMahon v. Portsmouth Mut. Fire Ins. Co., 22 N. H. 15; Odlin v. Gove, 41 N. H. 473; Corbett v. Norcross, 35 N. H. 99, 115; Richardson v. Chickering, 41 N. H. 380, 385. Though I do not find that the precise point taken here for the plaintiff has been directly decided in any of our cases, yet the general current of our decisions on the subject tends to a liberal application of the doctrine for the suppression of fraud and dishonesty, and the promotion of justice and fair dealing. No disposition has been shown in the courts of this state to treat this equitable estoppel as odious, and embarrass its application by attempts to confine it within the limits of a narrow technical definition. We are content to follow where the spirit and general tone of these decisions lead; and they lead plainly to the conclusion that, where a man makes a statement disclaiming his title to property, in a manner and under circumstances such as he must understand those who heard the statement would believe to be true, and, if they had an interest in the subject, would act on as true, and one, using his own means of knowledge with due diligence, acts on the statement as true, the party who makes the statement cannot show that his representation was false, to the injury of the party who believed it to be true, and acted on it as such; that he will be liable for the natural consequences of his representation, and cannot be heard to say that the party actually injured was not the one he meant to deceive, or that his fraud did not take effect in the manner he intended.

Our conclusion is that, on the facts which the verdict has established, the plaintiff was estopped to show his representation that the goods belonged to Charles E. Horn to be false, though he did not know that the defendant Cole had any demand against Charles E. Horn, and though he had not Cole in his mind as the party whom he meant to deceive.

Judgment on the verdict.

**PENN et al. v. GUGGENHEIMER et al.**

(76 Va. 839.)

Supreme Court of Appeals of Virginia. Oct. 16, 1882.

Appeal from circuit court, Botetourt county.

Bill by Max Guggenheimer and others against William J. Penn, as administrator of Stuart B. Penn and in his own right, Ann S. Penn, and others, to ascertain the interest of William J. Penn in the estate of S. B. Penn, deceased, and to subject the same to judgments of plaintiff against said William J. Penn. Under the will of Charles B. Penn certain lands were given to his children. He owned a third interest in certain land on James river, known as the "Home Place," the other two-thirds of which belonged to his wife by descent from her father. Under said will he expressed a wish that his wife should retain the "home place," and at her death it should be the property of her son Stuart B. Penn. The widow, in 1850, received the personal estate given to her under the will of her husband, and gave a receipt reciting that she received it "agreeably to the provisions of his said last will and testament." At the same time the "home place" was put on the land book of the county and assessed for taxes in her name as tenant for life and devisee of her husband. She never renounced the will, nor had dower assigned, but she filed an answer in 1867 to the plaintiff's bill, in which answer she denied that she had done anything to divest herself of her two-thirds in the "home place." The circuit court entered a decree that the widow had elected to accept the provision in the will of her husband, and that the remainder of the "home place" passed on the death of the said Stuart B. Penn, childless, among others, to the said William J. Penn, who was entitled to an interest of one-fourth, subject to his mother's life estate, which interest was liable to be subjected by his creditors to the satisfaction of their judgment liens. From this judgment Ann S. Penn appealed, and, pending the appeal, died. Affirmed.

Edmund Pendleton, for Mrs. Ann S. Penn. J. H. H. Figgatt and John J. Allen, for Max Guggenheimer. G. W. & L. C. Hansbrough, for George Skillen Penn and Mrs. Frances L. Mayo.

STAPLES, J. The main question in this case turns upon the construction to be given to the will of Charles B. Penn which was admitted to probate at the September term of the county court of Botetourt, in the year 1849. The testator, at the time of his death, was possessed of a valuable real and personal estate, which he devised and bequeathed to his wife, Mrs. Ann Penn, and to his four children. To his two sons George S. Penn and William Penn he gave severally a tract of land. To Mrs. Mayo, his married daughter, he gave certain real estate and a sum of $10,000 in bank stock. To his wife he bequeathed all his slaves, with the full confidence that she would make such disposition of them among his children as should be just and equitable, after retaining such of them as she might desire for her own use during her lifetime. His other personal estate he directed to be sold, and the balance remaining, after the payment of his debts, together with the proceeds of any real estate not specifically devised, he bequeathed to his wife, with the full confidence that she would divide it among his children as she might deem just and proper.

The third clause of the will, which gives rise to this controversy, is as follows:

"It is my will and desire that my wife shall retain the home place, and at her death it shall be the property of my son Stuart B. Penn, which I hereby give to him, his heirs, and assigns forever."

The home place, thus mentioned by the testator, is a tract of about 820 acres, one-half of which, known as the "lower half," was the property of Mrs. Penn, devised to her by her father. She was also the owner of one-third of the upper half of the tract, derived by descent from her sisters.

The testator was entitled to two undivided thirds acquired by purchase in the upper half of the tract. So that his interest at the time of his death did not exceed one-third of the entire tract.

The first question arising under the clause already quoted is whether the testator intended to dispose of the entire tract, or whether the will is to be construed as disposing merely of his undivided third.

If the former interpretation be the true one, it is conceded that it was incumbent upon Mrs. Penn, the widow, to make her election, and that she cannot claim both her own estate and the provision made for her by the will.

Before entering into a discussion of that question it will be proper briefly to advert to some of the principles of law governing in such cases.

The doctrine of election is said to rest upon the equitable ground that no man can be permitted to claim inconsistent rights with regard to the same subject, and that any one who asserts an interest under an instrument is bound to give full effect, as far as he can, to that instrument. Or, as it is sometimes expressed, he who accepts a benefit under a deed or will must adopt the contents of the whole instrument, conforming to all its provisions, and relinquishing every right inconsistent with it.

In the terse language of Lord Rosslyn in Wilson v. Lord Townsend, 2 Ves. Jr. 697: "You cannot act. You cannot come forth to a court of justice claiming in repugnant rights. When you claim under a deed, you must claim under the whole deed together. You cannot take one clause, and advise the court to shut their eyes against the rest.

Suppose, in a will, a legacy is given to you by one clause; by another, an estate of which you are in the possession is given to another. While you hold that, you shall not claim the legacy." 1 Pom. Eq. Jur. §§ 465, 466; 1 White & T. Lead. Cas. Eq. pt. 1, pp. 541, 547, 548; Kinnaird v. Williams, 8 Leigh, 400; Craig v. Walthall, 14 Grat. 518; Dixon v. McCue, Id. 540. In order, however, to raise a case of election, it is well settled the intention on the part of the testator to give that which is not his own must be clear and unmistakable. It must appear from language which is unequivocal, which leaves no room for doubt as to the testator's design. The necessity for an election can never arise from an uncertain or dubious interpretation of the clause of donation. 1 Pom. Eq. Jur. § 472; 2 Story, Eq. Jur. § 10.

It is not necessary, however, that this intention should be expressly declared. The dispositions of the instrument, fairly and reasonably interpreted, may of themselves show a clear design on the part of the testator to bestow upon the devisee property which in fact belongs to another.

As in other cases, the intention may be gathered from the whole and every part of the instrument. The difficulty of ascertaining the testator's intent, it is said, is always much greater where he has a partial interest in the estate devised than where he undertakes to dispose of an estate in which he has no interest.

In the former case, the presumption is that he intended to dispose of that which he might properly dispose of, and nothing more; and this presumption will always prevail, unless the intention is clearly manifested by demonstration plain, or necessary implication on the part of the testator to dispose of the whole estate, including the interest of third parties. Generally, when the testator has an undivided interest in certain property, and he employs general words in disposing of it, as "all my lands," or "all my estate," no case of election arises from it; for it does not plainly appear that he meant to dispose of anything but what was strictly his own. 2 Story, Eq. Jur. § 1087; 1 Pom. Eq. Jur. § 489.

A case of election does arise, however, when the testator, having an undivided or partial interest in an estate, devises it specifically, thus indicating a purpose to bestow it as an entirety. This rule on this subject is thus laid down in 1 Pom. Eq. Jur. § 489. Where the testator proposes to give the whole thing itself, using language which, by reasonable intention, must necessarily describe and define the whole corpus of the thing in which his particular interest exists as a distinct and identified piece of property, then an intention to bestow the whole, and not merely the testator's individual share, must be inferred, and a case for an election arises. This rule is mentioned and commented on by Judge Christian in delivering the opinion of this court in Gregory v. Gates, 30 Grat. 83, to which I refer as authority for other views here announced.

Now, let us apply these principles to the case in hand. In the first place, there can be no doubt that the tract of land or estate in question was universally known and described as the "Home Place." It is so spoken of by all the witnesses, by the parties, and it was so denominated in all the pleadings. Mrs. Penn, in her answer, describes it as the "Home Place." She speaks of the "upper half of the home place" and the "lower half of the home place." It is scarcely to be supposed that the testator would term it differently from every other person; that he referred only to his partial interest of one-third when by universal consent, usage, and habit, the entire tract was known and recognized as the home place. His language is: "That my wife shall retain the home place, and at her death it [the home place] shall be the property of my son Stuart B. Penn, which I hereby give him, his heirs and assigns, forever." What gives some significance, at least, to this language is that the mansion house, occupied by the testator and his family for many years, was located, not upon the half in which the testator had an interest of two-thirds, but upon that portion exclusively owned by Mrs. Penn. It was this portion upon which the family resided that might with some propriety be termed the "Home Place," and not the two undivided thirds of one-half, constituting merely a part of the tract.

It was said in the argument before this court that the language of the clause now under consideration is different from the other clauses of the will. For example, that the testator, when disposing of his own property, invariably uses the words, "I give and bequeath," whereas in the present instance he merely expresses the wish that his wife shall retain the home place. This difference of phraseology grows out of the fact that the testator was carefully defining and limiting an estate to be enjoyed by his wife during her life, and the language used by him was such as he supposed would accomplish the object. He then proceeds to say that it is his will and desire at her death it (the home place) "shall be the property of my son Stuart B. Penn, which I hereby give him, his heirs and assigns, forever." It is impossible by argument or illustration to add to the force and perspicuity of this language. Nothing can be plainer, more direct and comprehensive. The cases of Padbury v. Clark, 2 Macn. & G. 298; Howells v. Jenkins, 2 Johns. & H. 706; Grosvenor v. Durston, 25 Beav. 97; Grissell v. Swinhoe, L. R. 7 Eq. 291, 295,—in which it was held that the devisee was bound to elect,—are directly in point and conclusive of the question.

The other dispositions made by the testator confirm thoroughly this view of his intention. He gave to his son George S. Penn an estate worth about $11,000, to his son William Penn an estate of the value of $14,000, and to Mrs. Mayo property worth $12,000 or $15,000.

The provision made for his wife was more

than sufficient for her support and maintenance during her life in the most comfortable and abundant manner. If, however, he designed that his son Stuart B. Penn should take the one-third of the home place, subject to the incumbrance of the life estate, the provision for him was wholly inadequate, and disproportionate to the benefits conferred upon his other children. On the other hand, if the testator intended that the entire home place should be the property of his son Stuart B. Penn, the period of his enjoyment would be postponed until the death of Mrs. Penn, and the value of the devise would be about equal to the provision for the other children.

I am therefore of opinion that by the plain terms of the will Mrs. Penn was put to her election, and that she could not and cannot choose both her own estate and the bequests made in her favor.

The next inquiry is, whether Mrs. Penn did, in fact, elect to claim under the will.

An election may be implied as well as expressed. Whether there has been an election must be determined upon the circumstances of each particular case, rather than upon any general principles. 1 White & T. Lead. Cas. Eq. 539, 571, 572. It may be inferred from the conduct of the party, his acts, his omissions, and his mode of dealing with the property. Unequivocal acts of ownership, with knowledge of the right to elect, and not through a mistake with respect to the condition and value of the estate, will generally be deemed an election to take under the will. 1 Pom. Eq. Jur. §§ 514, 515. Lapse of time, although not of itself conclusive, yet, when connected with circumstances of enjoyment, may be decisive upon the question of election.

In Adsit v. Adsit, 2 Johns. Ch. 448, 451, Chancellor Kent said: "Taking possession of property under a will or other instrument, and exercising unequivocal acts of ownership over it for a long period of time, will amount to a binding election."

"Positive acts of acceptance or renunciation," says Mr. Justice Story, "may arise from long acquiescence, or from other circumstances of a stringent nature, and are not indispensable."

"Again," he says, "it may be necessary to consider whether he [the devisee] can restore other persons affected by his claim to the same situation as if the acts had not been performed, or the acquiescence had not existed, and whether there has been such a lapse of time as ought to preclude the court from entering upon such inquiries upon its general doctrine of not entertaining suits upon stale demands or after long delays." 2 Story, Eq. Jur. §§ 1097–1098.

Where the election is once made by the party bound to elect, either expressly or impliedly, and with full knowledge of all the facts, it binds not only himself, but also all those parties who claim under him, his representatives and heirs. 1 Pom. Eq. Jur. § 516.

Let us apply these principles to the case before us. Upon the death of the testator, in the year 1849, Mrs. Penn continued in the possession of the home place until the present time, a period of 30 years. It does not appear that she ever expressed any dissatisfaction with the provisions of the will till the filing of her answer in the cause in the year 1867. In the year 1850 the entire tract was entered upon the commissioner's books of the county and assessed with taxes in her name, as tenant for life. Whether this was done by her direction or not, it does not appear. It can scarcely be supposed she was ignorant of a fact disclosed on every tax ticket paid by her.

It has been already stated that by the will testator's slaves were given to Mrs. Penn, in full confidence that she would make such disposition of them among his children as would be just and equitable, after retaining such proportion of them as she might desire for her own use during her life.

The residue of the real and personal estate was also given to her in trust for the benefit of the children. In the year 1850,—not long after the testator's death,—the executors turned over to her the entire personal estate, including slaves, and took her receipt, stating that this was done in conformity with the provisions of the will. The executors must therefore have understood that Mrs. Penn had accepted the provision made for her benefit. Upon no other ground would they have been warranted in thus dealing with the assets. The terms of the receipt given by her show that she was perfectly apprised of the contents of the will, that she knew the condition and value of the property, and that she had united with the executors in fulfilling the intentions and wishes of the testator. Had Mrs. Penn renounced the will, as she was bound to do, in order to claim her own estate, she would have been entitled only to one-third of the slaves for life, and one-third of the personal property absolutely. As it was, she received from the executors under the will 49 slaves, of the value of $18,370, and other property, worth between $5,000 and $6,000. The testimony shows that Mrs. Penn never made any formal division of the property; that she, however, distributed among her children about 12 of the slaves, retaining the residue in her own possession, for her own use and benefit, until their emancipation in 1865. It is of no sort of consequence that during his lifetime Stuart B. Penn resided at the home place, and managed and controlled all the operations of the estate. This was, of course, done by the authority of Mrs. Penn, and doubtless for the reason that it was more agreeable to her that one of her sons should relieve her of the trouble and responsibility, to which, amid the infirmities of declining years, she was unequal. She certainly exercised a dominion and ownership of the property, to which she was en-

titled only under her husband's will, and which she could never have assumed unless she intended to conform to its provisions.

After this long lapse of time, after this long-continued enjoyment and possession of the estate, and unequivocal recognition of the provisions of the will by receiving the property from the executors, it is too late for Mrs. Penn, at this day, to disclaim the testator's bounty, and assert title to her own estate.

The slaves have long since been emancipated, the personal property exhausted, and it is now impossible to place the children in the condition they would have occupied had Mrs. Penn in the outset declared her intention to hold her own property.

So far from it, it is very clear that she made her election to claim under the will, and that she did so with a deliberate and intelligent choice, and with a full knowledge of all the circumstances, and of her own rights. No possible injury can accrue to any one from the conclusion thus reached, for Mrs. Penn lived and died in the enjoyment of the estate. She never attempted any other disposition of it.

Stuart B. Penn, the devisee, is dead, without children, and the estate has passed in due course of law to Mrs. Penn's children. A contrary decision can result only in disturbing a condition of things settled and acquiesced in for many years by all parties. I think, therefore, there is no error upon this branch of the case in the decision of the circuit court.

The learned counsel for the appellant, in his petition for an appeal, and in his argument before this court, has taken the ground that the parties bringing this suit are neither heirs nor purchasers nor beneficiaries under the will of Charles Penn, but judgment creditors of William J. Penn, and, as such, intruders and volunteers, seeking to set aside a family settlement, and to vest in William J. Penn an interest which he himself does not claim, and to which he never asserted any title. It will not be denied that complainants, by virtue of their judgments, have a lien upon all the real estate of their debtor, and that under our statute they may enforce that lien in a court of equity.

This right of the complainants, and, indeed, of all judgment creditors, cannot be affected by any omission of disclaimer on the part of the debtor. According to repeated decisions of this court, when the freehold has once vested, the owner cannot divest himself of the title by any mere parol disclaimer; but he can only do so by deed or some other act sufficient to pass an estate. Even had William J. Penn executed such deed, voluntarily relinquishing his title, his creditors would not be bound by it. When the court has once settled that Stuart B. Penn is entitled to the home place under the will of his father, William J. Penn, as one of his heirs, has an absolute title to his just share or proportion of that estate, and his creditors may not only subject it to satisfaction of their debts, but they may resort to a court of equity for the purpose of ascertaining that interest, and of removing every obstacle in the way of the just enforcement of their liens. William J. Penn can no more defeat the claims of his creditors by a disclaimer of title than he could do so by a voluntary deed, or gift or assignment.

In Dold v. Geiger's Adm'r, 2 Grat. 98, it was held that choses in action, to which the wife becomes entitled during coverture, are liable to the claims of the husband's creditors, and a voluntary relinquishment of the same by the husband, and a settlement upon the wife, before being reduced into possession, will not protect such choses in action from such creditors' claims.

Judge Stanard, in answer to an objection similar to the one made here, said: "I think it may safely be laid down as a just deduction from the elementary principles of our law that the general rule is that the rights of property of a debtor, whether in possession or in action, present or reversionary, in law or in equity, and of value adequate to pay his debts, and without which he is insolvent, and the payment of his debts must be frustrated, cannot by the mere volition of the debtor, in the form of assignment, surrender, or other modes of arrest, pass to volunteers without valuable consideration, and be thereby placed in the hands of such volunteers, beyond the reach and secure from the claims of such creditors." This opinion of Judge Stanard, and, indeed, the decision itself, constitutes a complete answer to the points made by counsel, and render unnecessary any further discussion of the subject.

The next question is whether the circuit court erred in disallowing the account of William J. Penn against the estate of Stuart B. Penn, for money alleged to have been paid by the former as administrator of Stuart B. Penn. The latter died in the year 1857, considerably indebted. William B. Penn qualified as his administrator, and removed to the home place, thereafter residing with his mother, the life tenant. There is no doubt that the net income derived from the estate was appropriated by him to the payment of his brother's debts. The only question is whether this income was sufficient for that purpose, or whether any part of the indebtedness was discharged by William J. Penn out of his private means. William J. Penn, in one of his depositions, states that from 1857 to 1860 he realized from the home place an income of $6,196.15, all of which, by the direction of his mother, was applied to the payment of his brother's debts. He further states that Stuart B. Penn had a note in bank of $4,600, for which the witness, at the request of his mother, substituted his own note. The larger por-

tion of this latter note was paid off by him in February, 1864, and the balance in 1865, in Confederate money. This, reduced to its actual value in sound money, amounts to a very insignificant sum.

In the concluding part of William J. Penn's deposition he expresses the opinion that he has been fully reimbursed for all moneys expended by him in the payment of his brother's debts. Unfortunately for the parties setting up this claim, William J. Penn is their witness, and their only witness. They cannot ask the court to discard their own testimony, and enter a decree in their favor upon a case unsupported by proof. I have no doubt, however, that William J. Penn has given an accurate and truthful account of his transactions and dealings with the estate.

The home place was regarded as one of the most valuable estates on James river, yielding a large income annually to its owners. A very small portion of its profits was required for the support of Mrs. Penn; the balance passed into the hands of William J. Penn, and I am satisfied that he was fully reimbursed for every dollar appropriated by him for the payment of his brother's debts.

The complainants, after the fullest opportunity, have been unable to adduce any testimony to the contrary. They are clearly not entitled to a reversal of the decree in the present state of the case, and it is most apparent that nothing is to be gained by further inquiry.

Upon the whole, I think the decree of the circuit court should be affirmed.

Decree affirmed.

DEICHMAN v. ARNDT.

(22 Atl. 799, 49 N. J. Eq. 106.)

Court of Chancery of New Jersey. Oct. 26, 1891.

Action by Deichman against Arndt for the construction of a will.

*Charles A. Fitch*, for complainant. *Wm. M. Davis*, for defendant

BIRD, V. C. By the bill in this case the complainant asks the aid of the court in determining the true construction of the last will of Ann Arndt, deceased, and consequently the rights of the legatees and devisees under said will. At the time of her death and of the making of her will she was the owner of a lot of land with a dwelling thereon, in which she resided. Before the making of her will she gave a bond to William M. Davis, the guardian of Harry King Arndt, one of her infant children, conditioned for the payment of $500, with interest. To secure this bond she gave a mortgage upon said house and lot. By her will she devises this house and lot to her son Harry in the following language: "I give to my son Harry King Arndt, absolutely, to be held in trust, however, by my executor hereinafter named, the dwelling-house and lot wherein I now reside, situate on Main street, in Phillipsburg, N. J., until he arrives at the age of twenty-one (21) years; my executor to rent the same, collect the rent, pay all taxes, insurance, services, and repairs, and the balance remaining to be used for the support and maintenance of my son Harry King Arndt, hereinbefore named." Two questions are presented in the bill for consideration, viz.: Is the devise to be regarded as a payment and discharge of the bond, and is the gift to Harry an absolute fee? In this case the testatrix in clear language directs that all of her debts be paid as soon as conveniently can be after her decease. She makes disposition of her personal estate, including bank-stock, giving a portion thereof to her daughter, a portion to another son, and a portion to the said Harry. The division of this personal property is not equal, but the extent of inequality is not made apparent. She first gives to her daughter certain household furniture; and, in the second place, to her son Frank certain household furniture; and, in the third place, makes the devise of the house and lot to Harry. She then provides for the protection of her cemetery lot, and gives the three children all of her silver-ware. Immediately after this she directs her executor to sell "the balance of my household effects," and to divide the proceeds thereof between her three children, directing him, however, to hold the share of Harry until he arrives at the age of 21 years. Then she directs her executors to collect the dividends of her 19 shares of bank-stock, and to pay the same towards the support and maintenance of Harry until he arrives at the age of 21 years, at which last-mentioned date he is authorized to sell the said stock and divide the proceeds between her three children. Notwithstanding this last provision, she authorizes her executor to sell all the said shares of bank-stock at such time or times as he shall think fit, and to invest the proceeds, and pay the interest thereof for the support and maintenance of her son Harry until he arrives at the age of 21 years. She then directs that the residue of her estate, "consisting principally of bonds and mortgages and notes, money and stock, should be divided equally between my three children, share and share alike, my executor, however, retaining that portion falling to my son Harry King Arndt until he arrives at the age of twenty-one years." From this it appears that the testatrix was indebted to the guardian of her son in the sum of $500: that she made her said son both devisee and legatee, imposing a condition upon the devise that the executor should receive the rents and profits until the son arrives at the age of 21 years, for his support and maintenance, and a like condition upon the gift of the legacy; and that, as the matter stands, both the devise and the legacy are of uncertain value. Where there is nothing to show a contrary intention upon the part of the testator, and he directs the payment of his debts, the gift of a legacy is never presumed to have been given for the purpose of discharging a debt due from the testator to the legatee. Van Riper v. Van Riper, 2 N. J. Eq. 1, Heisler v. Sharp, 44 N. J. Eq. 167, 14 Atl. Rep. 624; Rusling v. Rusling, 42 N. J. Eq. 594, 8 Atl. Rep. 534; Chancey's Case, 1 P. Wms. 408, 410, 2 White & T. Lead. Cas. 752, notes, 820; Reynolds v. Robinson, 82 N. Y. 103; Boughton v. Flint, 74 N. Y. 477; In re Huish, 43 Ch. Div. 260. The courts so little favor the discharge of debts by legacies that they have uniformly laid hold of slight circumstances to overcome the presumption that payment was intended independently of the direction to pay debts. Hence, when the gift has been of land or of goods and chattels, or upon conditions unfavorable to the donee when compared with the present discharge of the debt, the payment of both has been required. 2 White & T. Lead. Cas. 821. "Money and land being things of a different kind, the one, though of greater value, shall never be taken in satisfaction of the other, unless so expressed." "Whatever is given by will is *prima facie* to be intended a benevolence." Eastwood v. Vinke, 2 P. Wms. 613, 616. In this case the court remarked: "But, though the court has gone so far, it never yet construed a devise of land to be a satisfaction for a debt of money." In Bryant v. Hunter, 3 Wash. C. C. 48, Fed. Cas. No. 2,068, WASHINGTON, J., says: "The general rule is that a devise of land is not a satisfaction or part performance of an agreement to pay money." See, also, Eaton v. Benton, 2 Hill, 576, 580. The bond in this case being for the payment of money, and the gift being land, the construction must necessarily be controlled by the cases cited. It can make no difference that the payment of the bond was secured by mortgage on the land devised. It cannot be doubted but that the gifts of goods and chattels and proceeds of bank-stock and residue by the testatrix to her son Harry are alike subject to the same conditions that govern with

respect to the devise of land. According to all of the cases there is no similitude whatever between those gifts and the obligation which the testatrix had directed her executor to pay.

I have not thought it necessary to put any stress upon the fact that both the bond and the mortgage were given to the guardian of the devisee and legatee. It has been suggested that if this bond be paid to the guardian of Harry, Harry's proportion of the estate of the testatrix will be much larger than the portion received by his brother and sister. This would be an important consideration if it were the duty of courts to construe wills so as to make an equal disposition of the estate disposed of thereby among legatees and devisees, irrespective of the directions of the will. There is nothing in this will to give any certain assurance to the court that the testatrix intended to make an equal disposition of her estate among her children. If there be any inequality in the value of the gifts, the testatrix may have had very good reason therefor; but, whether she had or not, she had a lawful right to make any distinction she chose. This bond must be first paid out of the personal estate, as other debts, before the payment of any of the legacies.

The next question presented for consideration is whether or not the interest devised to Harry be less than the fee-simple absolute. When the sentence making the devise to Harry is read, if there be any doubt as to the extent of the interest devised, such doubt will be dissipated upon careful reflection. The testatrix first declares that she gives him the premises absolutely, but afterwards gives such directions as at first view would seem to have been intended as a qualification to the extent of limiting his interest to the rents and profits until he arrives at the age of 21 years. But when this sentence and this apparent qualification are read in connection with the succeeding clauses in the will, by which gifts are made to Harry, the doubt is removed. She ordered the silver to be divided between her three children; but Harry's interest in other personal property and in the bank-stock and in the residue of the personal property is to be retained by the executor, and the interest and dividends paid to Harry, until he arrives at the age of 21 years, when he is entitled to the possession of the principal. From the control given to the executor over the interest of Harry until he arrive at the age of 21 years the testatrix in all probability intended to provide against the necessity of appointing a guardian for him. In my judgment the fee-simple absolute vested in Harry.

## RICHARDS v. HUMPHREYS.

(15 Pick. 133.)

Supreme Judicial Court of Massachusetts. Oct. Term, 1833.

By an agreed statement of facts it appeared that John Hawes, the defendant's testator, on October 23, 1813, made his last will, by which he bequeathed to the plaintiff, who was his sister, the sum of $500, she being then the wife of Jeremiah Richards; that the plaintiff, having been informed of this legacy by the testator, applied to him to advance her money, in order to enable her to make a purchase of some land; that, in consequence of her application, the testator, on December 7, 1826, advanced the sum of $466, and she gave a receipt therefor, which stated that the money was received of the testator "in part of her right of dower in his last will and testament"; that this payment took place without the interference or participation of the plaintiff's husband; and that the testator stated to the plaintiff that he was desirous of paying off, in his lifetime, this legacy, and several others, given by him to his brothers and sisters and their children, and offered to pay her the residue of the legacy given to her, but that she declined receiving it on that occasion.

It further appeared that the plaintiff's husband died on February 4, 1828; that the testator died on January 22, 1829; that the will was duly proved and allowed on June 14, 1830; that on March 2, 1832, the plaintiff demanded of the defendant the payment of the legacy, and that the defendant offered to pay the residue of the legacy after the sum of $466 should be deducted, and, upon the entry of this action in the court of common pleas, brought into court the sum of $35.87.

If the court should be of opinion that the plaintiff was entitled to recover the whole of the legacy, then the defendant was to be defaulted, and judgment to be rendered against the estate of the testator for such sum as the court should determine to be proper; otherwise the plaintiff was to become nonsuit.

Metcalf & Lovering, for plaintiff. Mr. Aylwin, for defendant.

SHAW, C. J., drew up the opinion of the court. The only quesiton left for the decision of the court in the present case is whether the payment made by John Hawes, the testator, in his life, to his sister, Mrs. Richards, the present plaintiff, under the circumstances in proof, amounted to an ademption, pro tanto, of the legacy now sued for.

The ademption of a specific and of a general legacy depends upon very different principles. A specific legacy of a chattel, or a particular debt, or parcel of stock, is held to be adeemed when the testator has collected the debt, or disposed of the chattel or stock, in his lifetime, whatever may have been the intent or motive of the testator in so doing. But when a general legacy is given, of a sum of money, out of the testator's general assets, without regard to any particular fund, intention is of the very essence of ademption. The testator, during his life, has the absolute power of disposition or revocation. If he pay a legacy in express terms during his lifetime, although the term "payment," "satisfaction," "release," or "discharge" be used, it is manifest that it will operate by way of ademption, and can operate in no other way, inasmuch as a legacy, during the life of the testator, creates no obligation on the testator or interest in the legatee, which can be the subject of payment, release, or satisfaction. If, therefore, a testator, after having made his will, containing a general bequest to a child or stranger, makes an advance, or does other acts, which can be shown by express proof or reasonable presumption to have been intended by the testator as a satisfaction, discharge, or substitute for the legacy given, it shall be deemed in law to be an ademption of the legacy. Hence it is that when a father has given a child a legacy as a portion or provision for such child, and afterwards, upon the event of the marriage or other similar occasion, makes an advance to such child as for a portion or provision, though to a smaller amount than the legacy, it shall be deemed a substitute for the provision contemplated by the will, and thence as an ademption of the whole legacy. This is founded on the consideration that the duty of the father to make a provision for his child is one of imperfect obligation, and voluntary; that his power of disposing is entire and uncontrolled; that he is the best and the sole judge of his ability in this respect, and of the amount which it is proper for him to appropriate to any one child as such provision. The law presumes, in the absence of other proof, that it was the intention of the father by the legacy to make such provision; that it was not his intention to make a double provision; that when, after the will is executed, another provision is made for the same child, the original intent of making such provision by will is accomplished and completed; that the purpose of giving the legacy is satisfied, and, of course, concludes; that the legacy itself is adeemed. And if the subsequent portion or provision made in the lifetime of the testator is less than the lagacy, still it operates as an ademption of the whole legacy, not because a smaller sum can be a payment of a larger, but because it manifests the will and intent of the testator, who is the sole disposer of his own bounty, to reduce the amount of the provision originally contemplated when he made his will. Hartop v. Whitmore, 1 P. Wms. 681; Clarke v. Burgoine, 1 Dickens, 353. From this view of the subject of the ademption of general legacies, it seems manifest that the ademption takes effect, not from the act of the legatee in releasing or receiving satisfacti n

of the legacy, but solely from the will and act of the testator in making such payment or satisfaction, or substituting a different act of bounty, which is shown by competent proof to be intended as such payment, satisfaction, or substitute.

The question, therefore, is whether, from the facts shown in the present case, it sufficiently appears that the advance of money made by the testator in his lifetime to his sister was intended as a part payment and satisfaction of the legacy given to her by his will. If it was so intended, the law deems it an ademption pro tanto.

Most of the cases cited on the part of the plaintiff to show what the law does and what it does not regard as an ademption are cases where the testator, in making an advance during his lifetime, does not express the object or purpose of such advance, and its intended effect upon the legacy given, and are designed to show from what combinations of facts and circumstances the law will or will not raise a presumption that it was the intention of the testator that the advance should or should not operate, in whole or in part, as a satisfaction or substitute for the legacy. But they all proceed upon the assumption that, where such intention is proved, either by legal or competent proof or by legal presumption, the consequence of ademption will follow. Such were the cases of Ex parte Dubost, 18 Ves. 140, and Powel v. Cleaver, 2 Brown, Ch. 499, —the former, that of an illegitimate child, described as the daughter of another person; and the latter, of a niece. There was nothing in either case satisfactorily to show that the testator intended to place himself in loco parentis, and therefore nothing, according to the somewhat artificial reasoning before stated, to raise the presumption that he intended the legacy as a provision for a child. The ground, therefore, was taken away upon which the law would conclude that the advance on marriage was intended as a provision; and therefore, there being neither evidence nor presumption that the advance was a substitute for the legacy, it could not operate as an ademption.

In the present case we are of opinion that, conforming strictly to the rules of law in regard to the admissibility of evidence, it is quite apparent from the facts proved that the payment was intended by the testator as an advance on account of this legacy, and an ademption pro tanto.

If it stood upon the receipt alone, we are strongly inclined to the opinion that by a necessary construction it must apply to this legacy. It acknowledges the receipt of the money of Hawes in part of the plaintiff's right of dower under his last will, he being her brother. Had the words "of dower" been omitted, the receipt would have been sufficiently clear, to wit, her right under his last will and testament. When the words come to be applied to the subject-matter, it is apparent that they are perfectly senseless. If, by retaining these qualifying words, the clause could be made to apply to any other right or subject-matter, or if the effect of them in their actual application would be such that they could not apply to and describe this legacy, the court would certainly not be warranted in rejecting them. It is a general rule, in the construction of written instruments, that where words are used by way of description of persons or things, and the words apply in all material particulars to one subject, and there is no other to which they can apply, they shall be considered as applying to that which they do describe sufficiently to indicate its identity, although they fail in some particular. Such misdescription is regarded as a latent ambiguity, which arises when the words come to be applied to the subject-matter, and therefore may be corrected by showing aliunde that there is no such subject to which they can be applied, but that there is another which the words do sufficiently describe to show that it was the subject intended. So where a legacy describes one species of stock, but it appears that when the testator made his will he had not that particular species of stock, but another so like it that it could leave no doubt it was the one intended, this latter shall pass by the legacy. Selwood v. Mildmay, 3 Ves. 310. Here, considering the receipt as a receipt of money in part of a right of dower under his will, it is wholly senseless, and describes nothing, because, on reference to the will, no such right appears, and no commutation or satisfaction of any right of dower is shown to which it can apply. But there is another interest, which, being a testamentary gift to a woman, might by an ignorant female be miscalled a right of dower; but, what is more material, if the receipt does not apply to this legacy, it would be wholly without application. It is upon these grounds that we are strongly inclined to the opinion that, if it stood upon the construction of the receipt alone, taken in connection with the will, it must be considered a payment on account of this legacy, without reference to the declarations of the testator. But the ground upon which the court decide the cause is this: Whatever may be the difficulties in applying the rule which prohibits the admission of parol evidence to alter or control a written instrument, there is one modification, which will sanction its admission in the present case. Whenever an act is done, the declarations of the party doing it, made at the time, are received to show the character of the act, and the purpose and design with which it it done. It is readily conceded that it would not be competent to give in evidence the declarations of the testator, showing that he intended by any clause in his will something different from the dispositions expressed, or to limit or control the legal inferences and presumptions arising from those expressions. Nor would

it be admissible to show such declarations alone to prove a direct intent of the testator to revoke or adeem a legacy. It would be, in either case, to make or revoke a will by parol, which is alike contrary to the general rule of law and to the statute of frauds. But when an act is done, which, if done with one intent, will operate as an ademption, and, if with a different intent, otherwise, under the rule already stated, evidence of the declarations of the intent may be given to qualify the act, and the act operates by way of ademption. Here the declarations made at the time of the advance and payment of the money, not being contradictory to the receipt, but in conformity with it, prove conclusively that they were made in part satisfaction of this legacy. Besides, if it were necessary to resort to that principle, it is a well-established exception to the general rule excluding parol evidence to explain and control a written instrument that a receipt for money may be so explained and controlled.

But there is another fact stated in the case which it seems competent to show by parol evidence, and which leads to the same conclusion. It is stated that the testator expressed his desire to the plaintiff at the same time to pay off the legacies to his brothers and sisters in his lifetime, and that he offered to pay her the balance of her legacy, which she declined receiving What is the inference from an offer to pay the balance, except that part was already paid? On the whole, we are satisfied that the evidence, to the extent of showing the intent and purpose of the payment, was admissible; and, being admitted, it proves conclusively that it was a payment on account of this legacy.

As to the objection that at the time of the payment the plaintiff was a feme covert, we are of opinion that it does not vary the result. It is very clear that the plaintiff's husband, having died before the testator, had no interest in this legacy. The only ground, therefore, is that the plaintiff was at the time of the payment under the disability of coverture. But we have seen that ademption depends solely on the will of the testator, and not at all upon the ability of the party receiving to give a valid discharge. Had the money been paid to trustees or others for her benefit, without any act or consent of hers, if given expressly in lieu or in satisfaction of such legacy to her, it would have operated as an ademption. Had he purchased a house or other property in her name and for her benefit, with the like intent and purpose expressed, it would have had the same effect. The circumstance of her disability, therefore, at the time of the payment, is not inconsistent with the testator's intent, in making it, to advance and satisfy the legacy to her; nor does it affect the efficacy of such payment as an ademption. The balance of the legacy having been paid into court, nothing now remains due.

Plaintiff nonsuit.

WHELESS v. WHELESS et al.

(21 S. W. 595, 92 Tenn. 293.)

Supreme Court of Tennessee. March 2, 1893.

Appeal from chancery court, Davidson county; J. A. Cartwright, Special Chancellor.

Bill for partition by Joseph Wheless and others against H. H. Wheless. Judgment for complainants. Defendant appeals. Affirmed.

Dickenson & Frazer, Stokes & Stokes, and Frizzell & Zarecor, for appellant. Joseph Wheless, Jr., and N. D. Malone, for respondent G. A. Tillman, guardian ad litem. J. S. Pilcher, for widow of J. F. Wheless. J. W. Byrnes, for petitioner McCrosky.

CALDWELL, J. Gen. John F. Wheless died intestate and without issue, leaving a widow, and numerous collateral kindred. The bill in this cause was filed for a partition of his lands, where that could be done, and for sale and division of proceeds, where partition in kind might not be practicable. The widow, in her answer, claimed that the undivided interest of her husband in what is known as the "Baxter Smith Tract" was not realty, but personal property, under the doctrine of equitable conversion, and that it therefore belonged to her, as distributee, and not to the heirs. The chancellor decided this question against her, and she appealed.

No doctrine is more firmly fixed in English and American jurisprudence than that of equitable conversion, by which, under certain circumstances, real estate is treated, in equity, as personal property, and personal estate as real property. Through this doctrine, courts of equity treat as land money directed to be employed in the purchase of land, and, as money, land directed to be sold and converted into money; and the direction upon which the conversion arises may be made by will, or by deed, settlement, or other contract inter vivos. Adams, Eq. *135, 136; 1 Pom. Eq. Jur. § 371; 2 Story, Eq. Jur. § 790; 4 Amer. & Eng. Enc. Law, 127; 6 Amer. & Eng. Enc. Law, 664, 665. It was early recognized in this state, (Stephenson v. Yandle, 3 Hayw. [Tenn.] 109,) and has since been applied in several cases upon the construction of wills. McCormick v Cantrell, 7 Yerg. 615; Williams v. Bradley, 7 Heisk. 58; Green v. Davidson, 4 Baxt. 448. The difficulty which sometimes arises in the application of the principle to a particular instrument lies, not in the subtlety of the principle itself, but rather in ascertaining the intention of the maker from the words employed. To operate as a conversion, the direction that the form of the property be changed must be imperative, in the sense of being positive and unmistakable. If the intention, as gathered from the whole instrument, be left in doubt, or the direction allows the trustee to sell or not, as he deems best, the courts are not at liberty to say that a conversion has taken place, but must deal with the property according to its actual form and character. 2 Story, Eq. Jur. § 1214. Mr. Pomeroy says: "No express declaration in the instrument is needed that land shall be treated as money, although not sold, or that money shall be deemed land, although not actually laid out in the purchase of land. The only essential requisite is an absolute expression of an intention that the land shall be sold, and turned into money, or that the money shall be expended in the purchase of land. * * * The true test, in all such cases, is a simple one: Has the will or deed creating the trust absolutely directed, or has the contract stipulated, that the real estate be turned into personal, or the personal estate be turned into real?" 3 Pom. Eq. Jur. § 1159. Again: "The whole scope and meaning of the fundamental principle underlying the doctrine are involved in the existence of a duty resting upon the trustees or other parties to do the specified act: for, unless the equitable right exists, there is no room for the operation of the maxim, 'Equity regards that as done which ought to be done.' The rule is therefore firmly settled that, in order to work a conversion while the property is yet actually unchanged in form, there must be a clear and imperative direction in the will, deed, or settlement, or a clear, imperative agreement in the contract, to convert the property; that is, to sell the land for money, or to lay out the money in the purchase of land. If the act of converting—that is, the act, itself, of selling the land, or of laying out the money in land—is left to the option, discretion, or choice of the trustees, or other parties, then no equitable conversion will take place, because no duty to make the change rests upon them. It is not essential, however, that the direction should be express, in order to be imperative. It may be necessarily implied. * * * If by express language, or by a reasonable construction of all its terms, the instrument shows an intention that the original form of the property shall be changed, then a conversion necessarily takes place." Id. § 1160. To the same effect are Wurt's Exr's v. Page, 19 N. J. Eq. 375; Ford v. Ford, 70 Wis. 19, 33 N. W. Rep. 188; Hobson v. Hale, 95 N. Y. 588. Numerous other authorities, textbooks, and judicial decisions are at hand; but they are, in the main, so harmonious, and so entirely in accord with the full quotations just made from Mr Pomeroy, that we forbear to make further citations with respect to the character of direction necessary to work the notional change, and call the doctrine of equitable conversion into play. As a matter of some moment on the question of construction, it is well to observe that unless the sale or purchase contemplated is expressly directed to be made at a specified time in the future, or upon the happening of some particular event, which may or may not happen, the conversion takes place, in wills, as from the death of the testator; and in deeds, and other instruments inter vivos, as from the date of their execution. 3 Pom. Eq. Jur. § 1162.

The instrument upon which the controversy arises in this cause is a deed, in the following language: "We, Baxter Smith and wife, Bettie G. Smith, * * * in consideration of the sum of $34,395.60, paid

and secured to be paid as hereinafter mentioned, have bargained and sold, and do hereby transfer and convey, unto James H. Yarbrough, in trust, as hereinafter mentioned, the following tract of land * * * to have and to hold, for himself and other beneficiaries hereinafter named, in trust for the following uses and purposes: That is to say, said tract of land has been jointly purchased by James C. Warner, Percy Warner, John P. White, John F. Wheless, B. F. Wilson, W. M. Grantland, Charles L. Ridley, Baxter Smith, and J. H. Yarbrough, L. H. Davis, and G. A. Maddux,—the last three purchasing as a firm, under the firm name and style of Yarbrough, Maddux and Davis,—each paying and to pay one tenth of the purchase money for said land, as hereafter set out, except John P. White, who pays two tenths. * * * Said tract of land is conveyed to said J. H. Yarbrough, as trustee for said named purchasers, with power and authority to hold, possess, and manage the same in their interest and behalf, and to sell and convey the same, by deed in fee simple, upon the written direction of a majority in value of the adult beneficial owners then living, upon such terms and conditions as they may direct, and to collect and divide the proceeds of sale among said beneficiaries, their heirs, administrators, executors, and assigns, as their several interests may appear. * * The aforesaid sum of $34,395.60 has been paid, and secured to be paid, as follows: * * To secure the payment of the promissory notes herein described, a lien is expressly retained upon the share or interest of the maker alone, and not against the tract as a whole. In case any of the beneficiaries herein named, in order to preserve his or their own title, should have to pay and discharge for another any accruing taxes or other incumbrance or lien upon the whole property, then, in that event, he or they shall have a lien upon the share or interest of the person who has failed to make such payment. Should said J. H. Yarbrough desire to resign the trust herein given him, he may do so, by and with the consent and approval, in writing, of a majority in value of the adult beneficiaries, owners, named above, and appoint in his room and stead a new trustee, and clothe him with like power and duties as those now conferred on him, by a suitable deed of conveyance in writing, to be recorded in the register's office of Davidson county, Tennessee."

Such are the material portions of the instrument the court is called upon to construe in this case; and the inquiry is whether the land conveyed thereby is to be treated, in equity, as realty, or as personalty. If as realty, the share of Gen. Wheless passed to his heirs, under the statute of descent; if as personalty, it went to his widow, as sole distributee, subject in either case, of course, to his debts.

A general view of the deed readily discloses a proposed speculation, entered into by several persons jointly,—a syndicate buying land to sell again. In furtherance of the scheme a trustee was appointed, and the land conveyed to him for the benefit of all the purchasers,—for each of them according to his interest. The idea of a resale, as the ultimate object of the enterprise, runs through the whole instrument. It appears, from the nature of the transaction; from the words conferring upon the trustee power and authority "to sell, * * * and collect and divide the proceeds;" and from the provision for appointment of a successor in case the trustee should resign. That a partition in kind should ever occur, or that the trust should cease before a sale of the land and division of its proceeds were fully accomplished, was never contemplated. The land was bought to sell again, and a trustee was appointed as a part of the plan. All this is clear; but it is entirely consistent with the proposition that the trust was created merely as a cheaper and more convenient method of preserving and conveying the land. More is required to make a case of equitable conversion. The fact of a contemplated resale is present in every purchase of land upon speculation; and land purchased with such view is not converted into personalty by the mere appointment of a trustee to receive the title, and as the agency through which the resale is to be accomplished for the owners. It is manifest that the paramount object of the enterprise was a resale of the land through the trustee, as representative of the beneficial owners, yet the deed does not contain any imperative direction that he shall sell; no absolute, unconditional duty to sell is placed upon him. "The equitable 'ought'" is not to be found in the deed, either as a matter expressed or to be necessarily implied. Not only does it contain no positive direction that he shall sell, but it, in reality, does not even permit him to sell, upon his own motion. His only power of sale is made to depend, expressly, upon the direction of others. He has no independent authority in that respect. The words of the deed on this point are: "With power and authority to hold, possess, and manage the same in their interest and behalf, and to sell and convey the same, by deed in fee simple, upon the written direction of a majority in value of the adult beneficial owners then living, upon such terms and conditions as they may direct." This language imposes upon the trustee no positive, unqualified obligation to sell the land at all events. At most, it but gives him authority to sell at such time, and upon such terms and conditions, as others may direct. In effect, it but makes him the instrumentality through which a majority of the beneficial owners living at any given time may make a sale. He has no right to sell without their written direction, and no authority to demand or require such direction at one time or another. It cannot be that a conversion was wrought by the creation of a trust so passive as this one is.

To meet the fact that the trustee has no power to sell unless directed by a majority of the adult beneficiaries to do so, it is suggested that the beneficiaries themselves are clothed with a trust, to the extent of being empowered to direct when and how the sale shall be made, and that they are bound to give such direction. There can be no doubt that it was contemplated that the beneficiaries should at some time give the trustee the required direction to

sell the land, and that a duty was, to that extent, indirectly devolved upon them; but that can hardly be said to have made trustees of them, or to have magnified the limited power of the real trustee into an imperative obligation to convert the land into money. The purchasers, though intending an ultimate sale, clearly had no thought that the terms of the deed changed the character of the property, and converted the real estate into personalty. That they intended the land to be held as realty until actually sold and turned into money is manifest from the general frame and terms of the deed, and especially from those parts of it retaining separate liens in favor of the grantor, and providing for a special lien in favor of such beneficiaries as might be compelled to pay taxes or discharge liens for others. In the portion of the deed last referred to, the interest of each of the several beneficiaries is referred to as an interest in land, as such, and provisions are made with reference thereto which would be inappropriate as applied to personalty. We are of opinion that the deed shows upon its face when considered as a whole, that the land was conveyed to a trustee merely for convenience, and to save expense and trouble in the ultimate sale and conveyance, and that no conversion took place.

Our attention has been called to the very instructive and soundly reasoned case of Crane v. Bolles, (N. J. Ch.) 24 Atl. Rep. 237, in which a conversion of land into money was held to have occurred under direction contained in a will. There are several points of similarity between that case and this one, and perhaps as many important differences. The principles of law laid down in that case are the same recognized and applied by us in this one, the difference in result reached being due to difference in purport of instruments construed. Without stating the aspects in which the two instruments agree, or those in which they differ, we are content with simply saying that the court in that case said that the direction for sale was "imperative," and did not depend on the "request or consent" of the testator's children, while in this case there is no imperative direction to sell, and the power to sell does depend on the direction of the beneficiaries. Affirm the decree.

## WILDER v. RANNEY.

(95 N. Y. 7.)

Court of Appeals of New York. 1884.

Appeal from a judgment of the general term, where the judgment of the trial court at a special term was affirmed.

This was an action for specific performance of a covenant in a lease to sell and convey the leased premises. The facts are stated in the opinion of the court.

William W. Badger, for appellant. E. Countryman, for respondent.

EARL, J. In January, 1879, Henry D. Ranney died in the city of New York, leaving a last will and testament, in which he appointed Lafayette Ranney and Thomas Russell executors, who were also to act as trustees in the execution of the provisions of the will. He gave and devised to his executors, for the uses and purposes mentioned in his will, all his residuary estate, and directed them to consolidate it into a safe and permanent fund, which would yield a regular interest or income; gave them power to sell and convey real estate, loan and invest money as the best interests of his estate might demand, and directed that the entire interest or income thus derived, after paying taxes, repairs to houses, and all necessary expenses and disbursements connected with his real estate, should be paid over to his wife for her support through life; and after the decease of his wife, he directed the estate to be distributed as mentioned in the will. After his decease the will was admitted to probate, and letters testamentary were issued to both of the executors, and they qualified and entered upon the discharge of their duties under the will. Among the lots of land left by the testator as a part of his residuary estate, was a lot in the city of New York, with a house thereon, and on the 10th day of April the executor Ranney entered into a agreement in writing with the plaintiff for leasing the house and lot to him for a term of three years from the first day of May, 1879, at an annual rental of $1,200, the agreement purporting to be between the two executors as parties of the first part, and the plaintiff as party of the second part; and it contained a stipulation that upon payment by the party of the second part of all claims under the lease, and the further payment of the sum of $12,000, the parties of the first part would terminate the lease, and convey the property by deed to the party of the second part; provided, however, that such purchase should be perfected within two years from the date of the agreement. The agreement was signed by Ranney alone as executor, and by the plaintiff. The other executor, Russell, refused to execute it, objecting to the clause giving to the plaintiff the option to purchase within two years. The plaintiff was at the time informed by Ranney of this objection and refusal on the part of his co-executor, but he was told by Ranney that one executor was as good as two. At the end of the two years the plaintiff claimed to have exercised his option to purchase, and offered to perform on his part, but the defendant Russell refused to execute any deed, and perform the agreement, upon the ground that he was not bound thereby. Then this action was commenced to compel the specific performance of the agreement; and the court at trial term dismissed the complaint on the ground that the contract was not binding upon both executors, and that both could not be compelled to join in the conveyance.

By the terms of the will the title to the real estate left by the testator was vested in the two executors, and it is settled beyond any controversy that in such a case it can be conveyed only by a deed executed by both. Under this will the executors had a discretion to exercise as to the time when, and the terms upon which, the real estate should be sold, and the parties interested as beneficiaries in the estate had the right to the exercise of the discretion by both executors. One could not convey without the other, or enter into any agreement to convey which would be binding upon the other. Brennan v. Willson, 71 N. Y. 502; Berger v. Duff, 4 Johns. Ch. 368. Here it is proved by uncontradicted evidence, and found by the trial court, that Russell did not assent to the clause in the agreement giving the plaintiff the option to purchase, and the plaintiff was informed of that fact, and Russell never thereafter ratified the agreement, but uniformly objected to that clause whenever it was called to his attention. If the property agreed to be sold had been strictly personal, the rule would be otherwise, because one executor, or one trustee, may dispose of personal property to a bona fide purchaser without the consent of the other. This lot was not, for the purpose now in hand, personal estate, within the principles laid down in Bogert v. Hertell, 4 Hill, 492, and other cases. There may have been a conversion of this real estate into personalty for many purposes, but not for all purposes. It physically remained real estate, taxable as such, controllable as such, and it could only be conveyed as such. And the rules of law generally applicable to real estate remained applicable to this.

No case was made upon the proofs for damages against Ranney for a failure to convey in pursuance of the agreement executed by him; and it does not appear that any claim upon the trial was made that relief should be awarded to the plaintiff by way of damages.

On the whole, therefore, we are of the opinion that this case was properly disposed of, and the judgment should be affirmed. All concur.

Judgment affirmed.

MAYOR, ETC., OF CITY OF BALTIMORE et al. v. WHITTINGTON.

(27 Atl. 984.)

Court of Appeals of Maryland. Nov. 16, 1893.

Appeal from circuit court of Baltimore city.

Suit by Jacob Craft Whittington against the mayor and city council of Baltimore and Clarence M. Ellinger for injunction. From a decree for complainant, defendants appeal. Affirmed.

Argued before ROBINSON, C. J., and BRISCOE, BRYAN, FOWLER, and McSHERRY, JJ.

Thos. G. Hayes, Jas. P. Gorter, Wm. S. Bryan, Jr., and F. W. Story, for appellants. F. C. Slingluff and T. Wallis Blakiston, for appellee.

McSHERRY, J. By section 47, art. 49, of the Municipal Code of Baltimore City, it is enacted, in substance, that when any lots of ground are chargeable with the payment of taxes, and are subject to ground rents or leases for terms of years, renewable forever, the collector shall, in the sale of such lots for nonpayment of taxes, first sell only the leasehold interest, if it should sell for an amount sufficient to pay the taxes, but, if it should not, then that he shall sell the whole fee-simple estate, provided these provisions "shall not apply to cases where the books of the city do not disclose the fact that the lot or lots are on lease as aforesaid, or unless the collector shall have actual notice of such lease prior to the sale thereof." The city tax collector of Baltimore sold in March, 1891, for the nonpayment of state and city taxes, the fee-simple estate in a lot of ground on Druid Hill avenue, and the mayor and city council became the purchaser. The sale was reported to the circuit court of Baltimore city, and was ratified in May, 1892. In October following, the city, through and by its comptroller, sold the lot to Clarence M. Ellinger, to whom it was thereafter conveyed. When the sale was made by the collector, the lot was subject to a lease for 99 years, renewable forever, which was owned by J. Henry Weber, and the reversion or fee was owned by the appellee, Whittington. The unpaid taxes were due by the owner of the leasehold estate, but the collector sold the whole fee, without having first offered, or having attempted to sell, the leasehold, as required by the section of the City Code to which reference has been made. There was no entry on the books of the collector showing that the lot was subject to a lease, and the single question involved in the case is whether, when the collector made the sale, he had "actual notice" of the existence of the lease. If he had, the sale was irregular. If it was irregular, the decree of the circuit court of Baltimore city, restraining by injunction the mayor and city council, and its grantee, Ellinger, from disturbing the possession of the owner of the reversion, must be affirmed.

It appears by the record that in 1883 proceedings were instituted in the circuit court of Baltimore city by Rebecca and Mary McKeen against J. Henry Weber for a sale of this same leasehold estate under a mortgage thereon executed by Weber in 1881. Mr. T. Wallis Blackiston was appointed trustee to make the sale. He took possession of the property, and collected the rents and profits, but, owing to a depreciation in its value, made no sale of it. In the mean time the ground rent was regularly paid to the appellee, up to July, 1892, but the state and city taxes for the eight years beginning with 1882 remained unpaid. On the 1st day of December, 1890, Lewis N. Hopkins, city collector, filed a petition in the foreclosure proceedings representing that taxes for the years just mentioned were in arrear upon the property "decreed to be sold." The petition further stated that the collector was unable to enforce the collection of those taxes by reason of the pendency of the foreclosure proceedings, and it prayed that the trustee might be required to pay the taxes out of the rents theretofore collected from the property, or that the collector might "be allowed to proceed to collect said taxes by sale of the property in the ordinary way." This petition was signed by the late Mr. W. A. Hammond, "city solicitor, attorney for petitioner," and was sworn to by the deputy city collector. Subsequently, an order was passed, requiring the trustee to pay the taxes within five days out of the funds previously collected by him "as rents from the property decreed to be sold," and directing, upon his failure to do so, that the property be sold in the ordinary way by the collector. The trustee did fail to pay the taxes, and the collector made, under authority of this order, the sale of March, 1891, already mentioned. It is upon these facts that the appellee relies to show that the collector had "actual notice" of the existence of the leasehold estate.

Notice is of two kinds,—actual and constructive. Actual notice may be either express or implied. If the one, it is established by direct evidence; if the other, by the proof of circumstances from which it is inferable as a fact. Constructive notice is, on the other hand, always a presumption of law. Express notice embraces, not only knowledge, but also that which is communicated by direct information, either written or oral, from those who are cognizant of the fact communicated. Wade, Notice, § 6. Implied notice, which is equally actual notice, arises where the party to be charged is shown to have had knowledge of such facts and circumstances as would lead him, by the exercise of due diligence, to a knowledge of the principal fact. 16 Amer. & Eng. Enc. Law, 790. Or, as defined by the supreme court of Missouri in Rhodes v. Outcalt, 48

Mo. 370, "a notice is regarded in law as actual when the party sought to be affected by it knows of the particular fact, or is conscious of having the means of knowing it, although he may not employ the means in his possession for the purpose of gaining further information." It is simply circumstantial evidence from which notice may be inferred. It differs from constructive notice, with which it is frequently confounded, and which it greatly resembles, in respect to the character of the inference upon which it rests; constructive notice being the creature of positive law, resting upon strictly legal presumptions, which are not allowed to be controverted, (1 Story, Eq. Jur. § 399; Townsend v. Little, 109 U. S. 504, 3 Sup. Ct. 357,) while implied notice arises from inference of fact, (Williamson v. Brown, 15 N. Y. 354; Wade, Notice, § 3.) With constructive notice we are not now concerned, and it is not pretended that the city collector had express notice, or knowledge personally, of the existence of the leasehold estate. But he became a party to the equity proceeding, wherein a decree had been passed directing a sale of the leasehold interest. He did more. He asked, notwithstanding the decree had been long before signed and enrolled, that he be permitted to sell for the nonpayment of taxes, under the summary process of distraint, the identical property previously decreed to be sold, and no other or different interest; and the property which had been thus previously decreed to be sold was not the fee simple, but only the leasehold interest in the lot in question. He obviously knew there was a proceeding pending in the circuit court of Baltimore city, having for its object the sale of some interest in the property. He knew, further, the equity proceeding interfered with the execution of his distraints, and he applied to the court for leave to proceed, in spite of the decree, to sell the same property which had been decreed to be sold. We say he knew these things, and we say so, not because the record shows that he was personally aware of them, as matters of actual knowledge, but because the deputy city collector and the collector's attorney, both of whom were his agents in this transaction, did have such knowledge; the one having sworn to the facts stated in the petition, and the other having signed the petition itself. So both the attorney and the deputy collector knew, or at least were in possession of facts which would necessarily lead, upon the exercise of the slightest diligence, to a knowledge or notice, of the existence of the lease. They must therefore be regarded as knowing that which, with ordinary diligence, they might have known, or that which they were conscious of having the means of knowing. This result is not a legal presumption, but an inference of fact, and it seems to us an irresistible inference. It would be idle to say that the collector was ignorant of facts relating to the title to property which he was about to sell for the nonpayment of taxes, when his deputy, acting for him and in his name, was in full possession of them, or that he did not know the things which his attorney was aware of in that particular proceeding respecting the state of the title; and it would be equally idle to say that the deputy, when he swore to the petition, and the attorney, when he signed it, filed it, and procured a court's order upon it, were not apprised of the character of the estate previously decreed to be sold, or were not in a position where they were conscious of having the means of knowing precisely what property the decree affected. At all events, the exercise of ordinary diligence would most assuredly have informed both of these agents of the collector of every fact which the records in the equity case disclosed, and among those facts was the material and important one that the lot was subject to a lease for 99 years, renewable forever. It is consequently a legitimate inference of fact that both of these representatives of the collector knew what the record in the foreclosure case disclosed as to there being a leasehold estate in Weber, and not a fee, and this was implied actual notice. Notice to the attorney, as well as notice to the deputy, was notice to the collector, and was actual, and not merely constructive, notice to him, for the principal is bound by and affected with notice to his agent, and he is equally bound by notice received by his attorney in the same transaction. Astor v. Wells, 4 Wheat. 466; Reed's Appeal, 34 Pa. St. 209; Houseman v. Association, 81 Pa. St. 256; Smith v. Ayer, 101 U. S. 320. If this were not so, then, in every case where notice is necessary, it might be avoided by simply employing an agent. We are, for the reasons we have given, of opinion that the collector had, through the means we have indicated, such actual notice of the existence of the lease as to bring him within the proviso quoted from the City Code, and that he was therefore not authorized to sell the fee-simple estate until he had first offered the leasehold for sale. It results, then, that the sale made by him was irregular, and the decree granting the injunction applied for by the appellee must be affirmed. Decree affirmed, with costs in this court and in the court below.

## BROWN v. VOLKENING.

(64 N. Y. 76.)

Court of Appeals of New York. 1876.

Appeal from common pleas of New York city and county, general term.

This was an action to foreclose a mortgage given to the plaintiff by one Decker. Defendant's answer alleged that before the execution of the mortgage Decker had conveyed to him the premises in question in consideration of certain mantels, mirrors, etc., which were furnished by defendant for nineteen houses which Decker was building; and that defendant had taken possession prior to the execution of the mortgage, and that plaintiff had notice of his rights. There was a finding of the court upon the facts, which follows:

"That prior to the execution of the mortgage in said complaint mentioned, and on or about the 15th day of June, 1872, said Decker had surrendered the keys of the house to said Volkening, and said Volkening had entered into and had the actual and exclusive possession of the premises in said mortgage mentioned and described as purchaser thereof, under and in pursuance of an agreement made and entered into by and between him and said Peter P. Decker, in January, 1872, for the sale and conveyance thereof by said Decker to him, and has made various alterations and improvements in the dwelling-house thereon exceeding $2,000 in value, and had, prior to July, 1872, so far performed said agreement on his part and paid the full consideration in said agreement mentioned, that he had become entitled to a specific performance thereof by said Peter P. Decker, and to a conveyance to him by said Decker and wife, free from any such incumbrances thereon as that subsequently attempted to be created by the said mortgage to the plaintiff.

"That such possession of said Volkening so continued, and at the time of the execution of said mortgage was actual and exclusive and could have been easily ascertained by the plaintiff by inquiry on said premises."

And as a matter of law:

"That such possession of said premises by said Volkening, as such equitable owner, was notice to the plaintiff of his rights; that the plaintiff was not a purchaser or incumbrancer of the said premises in good faith, and that the mortgage was not a valid lien, as against Volkening, and thereupon directed a dismissal of the complaint as to him." Judgment accordingly. Further facts in the opinion.

Amasa J. Parker, for appellant. Samuel Hand, for respondent.

ALLEN, J. The findings of facts by the learned judge by whom the action was tried are equivocal. Read as a whole, they only imply of necessity a constructive possession of the premises, a mere power over them by the respondent. They come far short of showing an actual use and occupation by him. The delivery of the possession to him by Decker was symbolical, by a surrender of the keys of the house, and the actual and exclusive possession, and the expenditure of moneys in making alterations and improvements in the house as stated in the findings, must be regarded in the connection in which the statements are found, as but the continuance of that constructive possession commenced and evidenced by the delivery of the keys. The cautious finding or treatment of the judge that such possession, so continued, could have been easily ascertained by the appellant by inquiry on said premises, without indicating that there was an actual occupant of whom such inquiry could have been made, tends strongly to show that the learned judge used the word "possession," as distinct from that of actual occupation, and in its strictly technical sense. Possession means simply the owning or having a thing in one's own power; it may be actual, or it may be constructive. Actual possession exists where the thing is in the immediate occupancy of the party; constructive is that which exists in contemplation of law, without actual personal occupation.

Had the judge intended to find an actual visible occupation of the premises by the respondent, he would, with his usual accuracy, have so found in terms and not by argument found a possession merely, which from the circumstances stated as establishing such possession show a constructive possession, as that term is understood in the law. If the evidence is referred to to give effect to the findings and judgment, it entirely fails to establish any thing more than the merest constructive possession in the respondent, and that of a very doubtful character. So that while in cases where the findings of fact are doubtful and may be insufficient unexplained to sustain the judgment, the evidence may be resorted to in aid of the interpretation and in support of the judgment; a reference to the testimony in this case shows that a finding of actual and visible occupation, such an occupation as is required (as well in law as in equity) to break in upon the registry laws, would have been without evidence and erroneous.

The testimony viewed in its most favorable light for the respondent shows that he did not at any time accept the house from Decker, his grantor, as finished and completed until long after the mortgage to the plaintiff; that until late in the fall he was urging Decker to complete the house as he had agreed, and complaining that it was not done, and did not accept the deed thereof until November. The work which he did upon the house after the delivery of the keys in June was performed by mechanics and laborers, and substantially in the execution of his agreement with Decker, for work upon the nineteen houses which Decker was

building, including the one upon the mortgaged premises. The fact that the work put upon the house in question by the respondent was of a better character and more expensive than was put upon the other houses, or that he was bound to put upon this, did not vary the character of the act, or give any particular significance to it as affecting the plaintiff, or third persons. Whether Decker had or had not men at work upon the house during the same time may be doubtful upon the evidence, and the fact is not found. The only possession of the respondent was by having laborers and mechanics at work upon an unfinished house, one of a block of nineteen houses, the record title of which was in Decker, and to which the respondent had no paper title, with nothing to indicate any difference in the proprietorship or the direction of the work between this house and any of the other eighteen houses. There was no one remaining or staying permanently in the house until long after the giving of the mortgage to the plaintiff. It was an unfinished and unoccupied house.

In view of the undisputed evidence and of the peculiar language of the findings of fact, we are constrained to hold that an actual, visible occupation of the premises by the respondent was neither proved or found, and had the fact been so found by the judge it would have been error for which the judgment would have been reversed. The protection which the Registry Law gives to those taking titles or security upon land upon the faith of the records should not be destroyed or lost, except upon clear evidence showing a want of good faith in the party claiming their protection, and a clear equity in him who seeks to establish a right in hostility to him. Slight circumstances or mere conjecture should not suffice to overthrow the title of one whose deed is first on record. The statute makes void a conveyance not recorded only as against a subsequent purchaser in good faith and for a valuable consideration. 1 Rev. St. p. 756, § 1. Actual notice of a prior unrecorded conveyance, or of any title, legal or equitable, to the premises, or knowledge and notice of any facts which should put a prudent man upon inquiry, impeaches the good faith of the subsequent purchaser.

There should be proof of actual notice of prior title, or prior equities, or circumstances tending to prove such prior rights, which affect the conscience of the subsequent purchaser. Actual notice of itself impeaches the subsequent conveyance. Proof of circumstances short of actual notice which should put a prudent man upon inquiry, authorizes the court or jury to infer and find actual notice. The character of the possession which is sufficient to put a person upon inquiry, and which will be equivalent to actual notice of rights or equities in persons other than those who have a title upon record, is very well established by an unbroken current of authority. The possession and occupation must be actual, open and visible; it must not be equivocal, occasional or for a special or temporary purpose; neither must it be consistent with the title of the apparent owner by the record.

In Moyer v. Hinman, 13 N. Y. 180, the plaintiff was in actual possession of farming lands, under a contract of purchase, and that circumstance was held notice to all persons who had subsequently become interested in the premises, of all the plaintiff's rights under his contract. De Ruyter v. St. Peter's Church, 2 Barb. Ch. 555, was a case of actual possession and use of the premises, and such possession was held constructive notice of the rights of the occupant. Gouverneur v. Lynch, 2 Paige, 300, was like Moyer v. Hinman, supra. Chief Justice Parsons, in Norcross v. Widgery, 2 Mass. 508, says: "This notice may be express, or it may be implied from the first purchaser being in the open and exclusive possession of the estate under his deed." The same doctrine is held in Colby v. Kenniston, 4 N. H. 262, and both cases are cited with approval by the chancellor in Tuttle v. Jackson, 6 Wend. 213. In Bank v. Flagg, 3 Barb. Ch. 316, it was held that the actual possession of the premises by the tenant of a purchaser was constructive notice to subsequent mortgagees of the equitable rights of such purchaser. I have met with no case in which any thing short of actual, visible, and as is said in some cases, notorious possession of premises, has been held constructive notice of title in a claimant. See Chesterman v. Gardner, 5 Johns. Ch. 29; Grimstone v. Carter, 3 Paige, 421; Cook v. Travis, 20 N. Y. 400; Webster v. Van Steenbergh, 46 Barb. 212. All the cases agree that notice will not be imputed to a purchaser except where it is a reasonable and just inference from the visible facts. Neither will the principles of constructive notice apply to unimproved lands, nor to cases where the possession is ambiguous or liable to be misunderstood. Patten v. Moore, 32 N. H. 382. It should not apply within the same principle to an uninhabited and unfinished dwelling-house; there must be a possession actual and distinct, and manifested by such acts of ownership as would naturally be observed and known by others.

The using of lands for pasturage or for cutting of timber is not such an occupancy as will charge a purchaser or incumbrancer with notice. Coleman v. Barklew, 27 N. J. Law, 357; McMechan v. Griffing, 3 Pick. 149; Holmes v. Stout, 10 N. J. Eq. 419. See also Fassett v. Smith, 23 N. Y. 252.

It cannot be said, either upon the cautious findings of the learned judge or upon the evidence, that the respondent was the open, actual occupant of the houses, either by himself or by tenants, or that there were any open, visible acts of ownership, by the re-

spondent, of the mortgaged premises, which the public or third persons would be likely to notice, or which would suggest an inquiry into his claim, or which would evince bad faith or gross neglect should a party dealing in respect to the premises neglect to make inquiry.

The judgment should be reversed and a new trial granted.

To obviate an objection suggested by the learned counsel for the appellant, and which may be made upon a second trial, although not made before, it is proper to state that Volkening was a proper party defendant, and his rights can properly be determined in this action. Whether his equities are prior and superior to the rights of the plaintiff under his mortgage, or junior and subordinate thereto, must necessarily be determined in the judgment for a foreclosure of the plaintiff's mortgage. Bank v. Flagg, supra. Volkening is not contesting the title of the mortgagor, but simply asserts a right under him prior in point of time to the mortgage. The question of priority between the two is necessarily involved in the action, and proper to be determined in it.

CHURCH, C. J., and RAPALLO and MILLER, JJ., concur. ANDREWS and EARL, JJ., concur in result, on the ground that the evidence does not warrant a finding of actual and exclusive occupation by Volkening prior to or at the time plaintiff's mortgage was executed. FOLGER, J., dissents.

Judgment reversed.

DEASON et al. v. TAYLOR.

(53 Miss. 697.)

Supreme Court of Mississippi. Oct., 1876.

Appeal from chancery court, Lincoln county; Thomas Y. Berry, Chancellor.

Bill in equity by Bentonville Taylor against J. B. Deason, M. W. Hoskins, and G. W. Hoskins, her husband, Ellen McClendon and A. D. McClendon, her husband, to recover the balance of the purchase money of certain land, and to subject land to the payment of the same.

The bill showed that on February 16, 1872, the complainant sold and conveyed the land in question to J. B. Deason; the deed, which was duly recorded on February 19, 1872, reciting a consideration of "the sum of $700, to be paid to the party of the first part on or before the first day of July, 1872, by the party of the second part." For the purchase money Deason gave his note, of even date with the deed, as follows: "On or before the first day of July next, I promise to pay Bentonville Taylor, or bearer, the sum of $700, for town lots conveyed by him to me this day. This sum is to be paid in Mississippi state certificates of indebtedness at par." After maturity of the note, Deason sold and conveyed the lots to the defendant M. W. Hoskins, and the latter and her husband sold and conveyed the same to the defendant Ellen McClendon. When Deason sold and conveyed the lots to the defendant Hoskins, he informed her agent that he had paid Taylor all the purchase money.

The defendants demurred to the bill, on the ground that the complainant had no vendor's lien, it appearing on the face of the bill that the consideration for the sale of the lands was not money or United States currency; and because the recital in the deed was not notice to the defendants Hoskins and McClendon of the complainant's equity.

The demurrer was overruled, and an answer filed, and upon final hearing a decree was rendered for the complainant for the balance of the purchase money due him, and foreclosing his vendor's lien on the land. The defendants appeal.

Sessions & Cassedy, for appellants. Chrisman & Thompson, for appellee. Bentonville Taylor, pro se.

CHALMERS, J. We are content with the finding of the chancellor on the facts. If any injustice was done in fixing the amount due, it was to the appellee, and not to the appellants. The fact that the note was dischargeable in Mississippi certificates of indebtedness (known as Alcorn money) did not deprive it of the protection of the vendor's equitable lien. Harvey v. Kelly, 41 Miss. 490.

In the face of the deed which Taylor executed to Deason was this recital: "The party of the first part (the vendor), for and in consideration of the sum of $700, to be paid on or before the first day of July, 1872, by the party of the second part" (the vendee), &c. For this sum of $700, Deason, the vendee, executed his note to Taylor, due 1st of July, 1872. The deed was recorded at once, and Deason took possession of the premises. Without having completed payment in full of the note, Deason sold the premises in 1874 to Hoskins, who subsequently sold to Mrs. McClendon. Both Hoskins and Mrs. McClendon deny actual knowledge, at and before their purchases, that any thing remained due to Taylor.

Did the law give them constructive notice of Taylor's rights? Nothing is better settled than that the purchaser of real estate is bound to take notice of all recitals in the chain of title through which his own title is derived. Not only is he bound by everything stated in the several conveyances constituting that chain, but he is bound fully to investigate and explore everything to which his attention is thereby directed. Where, therefore, he is informed by any of the preceding conveyances, upon which his own deed rests, that the land has been sold on a credit, he is bound to inform himself as to whether the purchase money has been paid since the execution of the deed. Wiseman v. Hutchinson, 20 Ind. 40; Croskey v. Chapman, 26 Ind. 333; Johnston v. Gwathmey, 4 Litt. (Ky.) 317.

It is argued, however, that this principle only applies before the maturity of the notes, as shown by the recitals of the deed, and that it will not apply where, as in the case at bar, subsequent purchasers have bought after the notes were past due. It is said that, in such case, the subsequent purchasers may rely upon a presumption that the original debt has been paid. We know of no principle which would justify a reliance upon such a presumption, and it is expressly negatived by the cases of Honore v. Bakewell, 6 B. Mon. 67, and Thornton v. Knox, Id. 74. They may rely upon such presumption after sufficient time has elapsed to bar the notes, although, in fact, they may have been renewed. Avent v. McCorkle, 45 Miss. 221.

It appears in the case at bar that the subsequent purchasers knew that Deason had bought the realty on a credit, because they asked him at the time of their purchase if he had paid all the money due Taylor. It was their own folly if they relied upon his assurances, instead of applying for information to Taylor, who lived in an adjoining county, and is shown by the bill to be a practising lawyer, well known in Brookhaven, where the lots were situated and all the defendants resided.

Decree affirmed.

IRVINE et al. v. GRADY.

(19 S. W. 1028, 85 Tex. 120.)

Supreme Court of Texas. June 3, 1892.

Appeal from district court, Taylor county; T. H. CONNER, Judge.

Action by P. H. Grady against Sam B. Irvine and W. E. Rayner for the amount of a promissory note, and to foreclose a mortgage on cattle. Judgment for plaintiff, and defendants appeal. Reversed.

*Sayles & Sayles*, *M. A. Spoonts*, and *K. K. Leggett*, for appellants. *John Bowyer*, for appellee.

GAINES, J. This is an appeal from a judgment rendered in favor of P. H. Grady against Sam B. Irvine and W. E. Rayner in a suit by the former to recover of the latter the amount of a promissory note made by Irvine as principal, and Rayner as surety, and to foreclose a mortgage upon cattle executed by Irvine to secure its payment. The note was given for a part of the purchase money of a half interest in a stock of cattle sold by Grady to Irvine. The defense was that the note was procured by fraud, in this: That at and before the time of the sale of the cattle Grady represented to Irvine that there were 3,000 head of cattle in the stock, which were running at large upon the range; that Irvine was ignorant of the number, and relied upon the representation of Grady, and was induced thereby to make the purchase; and that, in point of fact, there were less than 2,000 head of cattle in the stock sold. Upon the trial one Moore testified that, a short time before the sale, Irvine agreed to give him $100 to make the trade with Grady; that he saw Grady, who stated his price, but also stated that he did not know how many cattle there were, and would not "guaranty" that there were 3,000, and that he (witness) therefore abandoned the negotiation, but told Irvine what Grady had said. Irvine testified that before he made the purchase Moore came to him, and told him he thought he could make the trade for him; that he told him he would give him $50 to do so; but that he heard nothing more about the matter from Moore, and supposed that he had dropped the attempt to buy. He expressly denied in his testimony that Moore told him that Grady said that he did not know the number of cattle, and that he would not "guaranty" any number. Grady also testified that he made the statement to Moore. The testimony of these witnesses as to what Grady said to Moore was objected to by defendants, upon the ground that the knowledge of Moore could not be imputed to Irvine under the peculiar circumstances of the case. The bill of exceptions does not show that at the time the testimony was admitted the plaintiff offered to prove that the statement of Grady to Moore was communicated by the latter to Irvine. But, since it appears from the statement of facts that Moore subsequently testified that he told Irvine what Grady had said to him, it follows that, if there was error in the court's ruling, it was cured by the subsequent connecting testimony. There being evidence tending to show that Grady's remarks were communicated to Moore, they were properly admitted, although Irvine denied in his testimony that such communication had been made. Therefore the question whether, under the peculiar facts of the case, the knowledge of Moore ought to be imputed to Irvine, is not raised by the assignment of error, upon the admission of the testimony. It is, however, presented by an assignment of error upon the charge of the court. The instruction complained of is as follows: "The material issue in this case being whether or not the appellant Irvine had actual knowledge that Grady did not claim to know the number of cattle there were in the stock at or before the time the sale was made, and that his representation as to numbers was a mere matter of opinion, with no superior means of information, the court erred in its general charge in imputing to Irvine information acquired by his agent in another transaction, which was never completed, or any benefit therefrom ever acquired, by Irvine, and which knowledge or information so acquired by said agent was never communicated to Irvine." Whether the legal proposition involved in this charge be correct or not is a question we have found it difficult to determine. As a general rule, it is universally recognized that notice to the agent is notice to the principal. Upon the proposition that knowledge which comes to an agent during the course of his employment, while effecting or assisting in the consummation of a transaction for his principal, is imputed to his principal in any suit in which that transaction may be involved, there is no conflict of authority. But whether the principal will be affected with notice of a fact which has come to the knowledge of his agent in the course of some other business, previous to his employment by his principal, is a question upon which the authorities are not agreed. That question, however, does not concern us here. The peculiarity of the present case is that, while Moore acquired his knowledge during the course of his employment as Irvine's agent, his agency was concluded before the negotiation was undertaken which resulted in the sale of the cattle. After his agency was abandoned and his connection with the business had ceased, the negotiation was resumed through another channel, and conducted to a consummation without any assistance or participation whatever on his part. A difficulty we have encountered in the attempt to determine whether the rule of imputed knowledge should apply in such a case grows out of the fact that the authorities are not in accord as to the principle upon which the doctrine rests. By some it is held that the rule rests upon the principle of the legal identity of the principal and agent. Boursot v. Savage, L. R. 2 Eq. 134. By others it is placed upon the ground that, when a principal has consummated a transaction in whole or in part through an agent, it is contrary to equity and good conscience that he should be permitted to avail himself of the benefits of his agent's participation without becoming responsible as well for his agent's knowledge as for his agent's acts.

Le Neve v. Le Neve, 2 White & T. Lead. Cas. Eq. (4th Amer. Ed.) 109, and note, 179.

The doctrine of the identity of the principal and agent, as applied to the mere question of imputed notice, seems technical and arbitrary, and, if broadly applied, would extend the rule so as to embrace cases in which its operation would be manifestly unjust. The latter, in our opinion, is the more reasonable and equitable foundation of the rule, and gives it a more salutary operation. Such being, in our opinion, the proper ground upon which the rule should be placed, we think the knowledge of Moore should not be imputed to Irvine. Moore did not consummate the transaction as finally concluded, nor, in effecting it, did Irvine in any manner avail himself of Moore's assistance, or receive the benefit of any act done by him.

Another reason that is sometimes given for the doctrine that notice to the agent is notice to the principal is that it is the duty of the agent to communicate his knowledge to the principal, and he is therefore "irresistibly presumed" to have so communicated it. Boursot v. Savage, supra. This would seem rather a deduction from the doctrine that it is inequitable for the principal to avail himself of the agent's acts without being held to know what the agent knows, rather than an independent foundation for the rule of constructive notice. But, however that may be, our ruling upon the question before us should be the same. If Moore had agreed upon a sale with Grady, then he should have communicated to Irvine what Grady told him before the agreement was carried into effect. But when he saw that he could not succeed in what he had undertaken to accomplish, and that nothing was to come of his effort, the contract between him and Irvine ceased. The transaction remained as if nothing had been done, and he was not bound to communicate to Irvine what had occurred between him and Grady. We conclude, therefore, the court erred in giving the instruction under consideration. The sale from Grady to Irvine took place in December, 1886; and the price for Grady's half interest, including, also, an interest in some horses and other property used in connection with the ranch, and worth about $500, was $11,000. The plaintiff offered to prove by one Lynn that in March or April, 1886, he (witness) bought a half interest in the stock upon a credit for the sum of $11,500. The testimony was objected to by defendants, but was admitted by the court. We think the court erred in its ruling. The testimony was irrelevant, and was calculated to mislead the jury, to the prejudice of appellants. The issues were: (1) Did the plaintiff represent that there were 3,000 head of cattle in the stock, and, if so, was that representation false; and (2) was Irvine induced to buy by that representation, and did he rely upon it when he concluded the transaction? Testimony as to what some third person agreed to pay for a half interest in the cattle, some three months after Irvine bought, was not relevant to either of these issues. The value of the cattle at the time of the sale may be a circumstance tending to throw light upon the transaction, but the testimony under consideration was not competent to prove that value.

The court did not err in giving the special charge complained of in appellants' first and second assignments of error. Neither was there error in giving the paragraph in the general charge which is complained of in the eleventh assignment.

We are also of the opinion that the court did not err in refusing to give charge No. 1, asked by appellants. The propositions of law involved in the charge are correct, but the same instructions were substantially given in the general charge. In the general charge, however, the jury were told that if, at the time of the consummation of the sale, Irvine was informed that Grady did not know the number of cattle, and would not warrant any number, and that Irvine completed the trade with a knowledge of that fact, they should find for plaintiff. We think this was correct. If such express statement was made to him by Grady at the time the sale was concluded, we do not see how he was misled. There was testimony to show that such a statement was made by Grady when the bill of sale was executed, while there was testimony to show the contrary. In view of another trial, however, we will say that, if the jury should find that Grady told Moore he did not know the number of the cattle, and would not warrant any number, and that Moore communicated this fact to Irvine, this should not necessarily preclude Irvine's defense; and they still might find for defendants, provided they should believe that, in the subsequent negotiations, Grady did not represent that there were 3,000 head of cattle, and did fraudulently induce Irvine to believe that he knew that there were in fact that number. For the errors pointed out the judgment is reversed, and the cause remanded.

## PRINGLE v. DUNN et al.

(37 Wis. 449.)

Supreme Court of Wisconsin. Jan. Term, 1875.

Appeal from circuit court, Milwaukee county.

Action by one Pringle against Andrew Dunn and wife and others to foreclose a mortgage given to the La Crosse & Milwaukee Railroad Company to secure a bond of said company for $5,000, payable January 1, 1864, said mortgage bearing date April 11, 1854, and alleged to have been recorded on such date, and afterwards assigned to plaintiff, as a bona fide purchaser for value. There was no record of the assignment. The court found that the witnesses to the mortgage did not subscribe it at the time of its execution, but after it had been recorded; that, after such subscription, it was not again recorded; that the plaintiff was the bona fide holder of the bond and mortgage; that the defendants other than Andrew Dunn and wife had no actual knowledge of the mortgage, and the recording of the mortgage before it was subscribed was not constructive notice; and dismissed the complaint. Plaintiff appeals. Modified.

Mariner, Smith & Ordway, for appellant. Guy C. Prentiss, J. P. C. Cottrill, and John W. Cary, for respondents.

COLE, J. Before approaching the legal questions involved in this case, it is necessary to determine a question of fact; and that is, does the evidence show that the mortgage sought to be foreclosed was properly attested when first left at the office of the register, so as to entitle it to record? There is considerable testimony in the case which tends strongly to prove that the mortgage had no witnesses when it was recorded. And the court found as a fact that the mortgage was not subscribed by the witnesses Baker and McFarlane at the time of its execution, and before it was transcribed upon the records and entered in the general index, but was subscribed by these witnesses after it was recorded, and that it was not again recorded. This finding affirms one important fact, which is much contested by the defendants, which is the genuineness of the signature of the witness A. J. McFarlane to the instrument. An attempt is made to prove, and it is argued that the evidence shows, that McFarlane never signed the mortgage as a witness, and that his signature thereto is a forgery. On this point we will only make the remark that we are satisfied from the evidence, and especially by an inspection of the writings themselves, of the authenticity of the signature. Whether the mortgage was subscribed by the witnesses at the time of its execution and before it was left at the office for registry is a question of more doubt upon the evidence. The testimony is quite strong and positive that the mortgage had no subscribing witnesses when it was recorded. But this testimony is contradicted; and, considering the circumstances attending the execution and delivery of the mortgage, we think the probabilities favor the inference that the instrument was witnessed when it was left for record. According to this view, there was a mistake in transcribing the mortgage upon the record by omitting the names of the witnesses. The weight of the evidence, to our minds, supports this inference or conclusion. It is to be observed that the mortgage is perfect and fair on its face, showing two witnesses. A strong presumption fairly arises from the instrument itself that it was witnessed at the time of its execution. This presumption is not overcome nor repelled by the testimony offered to show that it was not witnessed at that time. In respect to the degree or quantity of evidence necessary to justify a finding that the subscribing witnesses signed the instrument after it was executed and recorded, the case would seem to come within the rule laid down in Kercheval v. Doty, 31 Wis. 478, where it is said: "The proposition being to set aside or invalidate a written contract by evidence of a far less certain and reliable character than the writing itself, the greatest clearness and certainty of proof should be required. It is like the cases where the object is to correct or reform a deed or other instrument on the ground of mistake, or to set aside or rescind it on the same ground; where the rule is that the fact must be established by clear and satisfactory evidence." The testimony offered to show that the mortgage was not witnessed when executed and before it was recorded falls short of this rule. The fact is not established by clear and conclusive proof that it was not witnessed when executed. It would serve no useful purpose to go into a detailed discussion of the evidence upon this point, and we shall not do so. It is sufficient to say that, giving to the testimony offered to show that the mortgage was not witnessed before it was received for record all the weight to which it is entitled, it fails to establish that fact in a clear, satisfactory manner.

Assuming, then, that the mortgage was witnessed when it was left at the office of the register to be recorded, the further important inquiry arises as to what effect must be given to the record as constructive notice to subsequent bona fide purchasers for value. This record was in this state. The entry of the mortgage was made in the general index book, but the full record of the instrument had no subscribing witnesses; and therefore the question is, would such a record operate as constructive notice to subsequent purchasers for value, independent of any actual notice? It is claimed by the counsel for the plaintiff that the record does and should so operate, notwithstanding the

mistake in the registration or recording of the instrument in extenso. This presents a question of no little difficulty, which must be solved by the application of general principles of law to the provisions of our statute.

It is a familiar rule that an instrument must be properly executed and acknowledged so as to entitle it to record, in order to make the registry thereof operate as constructive notice to a subsequent purchaser. Says Mr. Justice Story: "The doctrine as to the registration of deeds being constructive notice to all subsequent purchasers is not to be understood of all deeds and conveyances which may be de facto registered, but of such only as are authorized or required by law to be registered, and are duly registered in compliance with law. If they are not authorized or required to be registered, or the registry itself is not in compliance with the law, the act of registration is treated as a mere nullity; and then the subsequent purchaser is affected only by such actual notice as would amount to a fraud." 1 Eq. Jur. § 404. See, also Ely v. Wilcox, 20 Wis. 528; Fallass v. Pierce, 30 Wis. 444; Lessee of Heister v. Fortner, 2 Bin. 40; Shove v. Larsen, 22 Wis. 142. and cases cited on page 146. Under our statute, among other requisites, two witnesses are essential to a conveyance, to entitle it to record. The statute requires every register to keep a general index, each page of which shall be divided into eight columns, with heads to the respective columns as prescribed; and the duty is imposed upon the register to make correct entries in said index of every instrument received by him for record, under the respective and appropriate heads, and immediately to enter in the appropriate column, and in the order of time in which it was received, the day and hour of reception; and it is declared that the instrument "shall be considered as recorded at the time so noted." Rev. St. 1858, c. 13, §§ 142, 143. In Shove v. Larsen, supra, the effect of this index containing correct entries of matters required to be made therein was considered, and it was held that by force of the statute it operated as constructive notice to a subsequent purchaser. In that case the index contained an accurate description of the land mortgaged, but in transcribing the mortgage at large upon the records a mistake was made in the description; and it was claimed in behalf of the subsequent purchaser that it was the registration of the instrument at large which alone amounted to constructive notice. But this construction of the statute was not adopted, the court holding that a subsequent purchaser was bound to take notice of the entries in the index, which the law required the register to make. This result seemed to follow necessarily from the language of the statute, which declared that the instrument should be considered as recorded at the time noted. Time might elapse before the instrument was transcribed at large on the record, or it might be lost, and not transcribed at all, leaving the index the only record of its contents. And the manifest intention of the statute seemed to be to make the index notice of all proper entries from its date, and also of the instrument itself until it was registered in full. The further consequence would seem necessarily to result from this view of the statute that the registration of the conveyance in extenso relates back to the registration in the index, and from thence there is constructive notice of the contents of the instrument. The doctrine of Shove v. Larsen was approved in Hay v. Hill, 24 Wis. 235, but the court refused to make the entry in the index in that case operate as constructive notice, because upon its very face it bore conclusive evidence that it was not made at its date; in other words, the rectitude and integrity of the index were successfully impeached by the index itself. See, also, Insurance Co. v. Scales, 27 Wis. 640. Where there is nothing upon the face of the index to impeach or throw suspicion upon its accuracy, there it would affect a subsequent purchaser with notice of those facts which the law required to appear therein. Doubtless, a still further consequence follows from this construction of the statute, namely, that where, by some mistake, there is a discrepancy between the proper index entries and the instrument as registered, there each supplies the defects of the other in the constructive notice thereby given; that is, it appears to be the intention of the statute to charge the subsequent purchaser constructively with such knowledge as the proper index entries afford, as well as with notice of those facts derived from the registration itself. He is presumed to have examined the whole record, and is affected with notice of what it contains. But when the instrument, as registered in full, appears defective in some material and essential parts, which are not supplied by the index entries, what effect, then, must be given the record as constructive notice? This is really the difficult question in this case. From the entries in the index it would not appear whether the mortgage was witnessed or not. The presumption from the mere entries themselves would be that it was witnessed and acknowledged, so as to entitle it to record; but when the mortgage, as registered in full, was examined, it would be found that it had no witnesses, and had no business on the records. As the record itself is only constructive notice of its contents, it is difficult to perceive how it can go beyond the facts appearing upon it, and charge a purchaser constructively with knowledge of a fact not in the record.

One of the counsel for the defendants states the argument on this point as follows: He

insists and claims that the entries in the index books, so far as they indicated that the mortgage had been filed for record, indicated also that the mortgage was so executed as to entitle these entries of it to be made; but that, when the full record was looked at for all the particulars of the mortgage, and perhaps for the express purpose of verifying the entries in the index, it is found that the apparent assertion by the index entries that the mortgage was properly executed was wholly untrue, and that the mortgage in fact was no incumbrance. The fact, as truly shown to exist by the full record, overcomes and destroys the false assertion as to the fact in the index. And, it appearing by the instrument registered that it was not entitled to record, both the registration and index itself cease to affect the purchaser with constructive notice.

It is not readily perceived wherein this argument as to the effect of our various provisions upon the subject of registration is unsound. The question mainly depends upon the construction of our own statutes. So far as we are aware, this is the first time the point has been presented in this court for adjudication. We have derived but little aid from the decisions in other states, for the reason that few of them have similar statutory provisions. We have been referred by the counsel for the plaintiff to two cases in Michigan,—Brown v. McCormick, 28 Mich. 215, and Starkweather v. Martin, Id. 472. In Brown v. McCormick the effect of the registry, as notice to subsequent purchasers, was made to turn upon the curative act of 1861, mentioned in the opinion. In Starkweather v. Martin the question was, how far the absence, on the registry of a deed, of any mark or device indicating a seal, or of any statement of the register that the original was sealed, affected the validity of the record entry as evidence of title. The record entry of the deed was made more than forty years before the cause was decided, by the proper officer, and in the appropriate place for the registry of deeds, under the law permitting the registry of only sealed instruments; and the instrument was in the form of a warranty deed, purporting to be acknowledged and dated at a time when it was the common and lawful course to seal conveyances, and contrary to official duty to take the acknowledgment unless the conveyance was sealed, and where the conclusion, attestation clause, and certificate of acknowledgment of the instrument all spoke of it as under seal. The court said that these facts and incidents, taken together, afforded a very strong presumption that the original was sealed.

The doctrine of this case does not seem to have a very strong bearing upon the question under consideration. It may be said that it was contrary to the duty of the register to record the mortgage unless it was properly acknowledged and witnessed, and that a presumption arises that he would not have done so. But in answer to this it may also be said that the law made it the duty of the register to record the mortgage unless it was properly acknowledged and witnessed, and that a presumption arises that he would not have done so. But in answer to this it may also be said that the law made it the duty of the register to record, or cause to be recorded correctly, all instruments authorized by law to be recorded. Section 140, c. 13, Rev. St. 1858. And the presumption that he performed his duty in recording the mortgage correctly is as strong as the presumption that he would not have recorded it unless it was entitled to registry.

In Shove v. Larsen, a number of cases are referred to which hold that a mistake in recording a deed, or recording it out of its order, renders the registration ineffectual as notice to subsequent incumbrancers and purchasers. The doctrine of those cases would seem to be applicable to the case before us. The registration and index entries being incomplete, because showing that the mortgage had no subscribing witnesses, constructive notice could not be presumed of such a record; for the principle "that the registry is notice of the tenor and effect of the instrument recorded only as it appears upon that record" fully applies. Shepherd v. Burkhalter, 13 Ga. 443. See, in addition to the cases cited in Shove v. Larsen, Brown v. Kirkman, 1 Ohio St. 116; Stevens v. Hampton, 46 Mo. 404; Bishop v. Schneider, Id. 472; Terrell v. Andrew Co., 44 Mo. 309; Frost v. Beekman, 1 Johns. Ch. 288.

The question, then, arises whether the evidence shows that any of the defendants were affected with actual notice of the mortgage. This question, we think, must be answered in the affirmative, so far as the defendants Thomas Maloy and Stanislaus Bartosz are concerned.

In the deposition taken on his own behalf, but read as a part of the plaintiff's case, Thomas Maloy distinctly admits that he had heard, when he purchased his lots, that there was a defective railroad mortgage upon them, but that he did not look for it, because his abstract did not show it. It is claimed by one of the counsel for the defendants that this related to the Aiken mortgage, and not to the one upon which this action is brought It seems to us, however, that this is a totally inadmissible construction of the testimony. He most certainly refers to the mortgage in suit. And what he had heard about there being a defective railroad mortgage upon the property was sufficient to put him upon inquiry. Parker v. Kane, 4 Wis. 1. "What is sufficient to put a purchaser upon an inquiry is good notice; that is, where a man has sufficient information to lead him to a fact, he shall be deemed conusant of it."

Sugd. Vend. (9th London Ed.) p. 335. "In regard to the inquiry required of a party, it should be such as a prudent and careful man would exercise in his own business of equal importance. Accordingly, where the mortgagee is informed that there are charges affecting the estate, and is cognizant of two only, he cannot claim to be a purchaser without notice of other charges, because he believes that the two, which satisfy the word "charges," are all the charges upon it. He is bound to inquire whether there are any others. The rule with respect to the consequences of a purchaser abstaining from making inquiries does not depend exclusively upon a fraudulent motive. A man may abstain from mere heedlessness or stupidity, and be none the less responsible for the consequences; but, if he make reasonable inquiry, and is deterred by a false answer, he is excusable, if it be of a character to delude a prudent man." 1 Story, Eq. Jur. § 400b; Jackson v. Van Valkenburgh, 8 Cow. 260. Independently of the record, Maloy had notice of the existence of the mortgage, or had a knowledge of such facts as to call for further inquiry. He cannot, therefore, be protected as an innocent purchaser for value.

The defendant Bartosz must be charged with notice of the mortgage by the recitals in the deed from Tenney and wife to his immediate grantor. He was present when that deed was executed and delivered to his uncle. He testifies that he did not know whether anything was said about the railroad mortgage at that time or not; that he did not understand English very well. The purchase was really made by his uncle for him. And, whether he fully understood the conversation at the time about incumbrances, he must be chargeable with notice of what appears in his chain of title. This clause was in the deed to his uncle; "Said premises are free and clear from all incumbrances except a mortgage to the La Crosse Railroad Co., which I am to save said Bartosz harmless from." The general rule upon this subject is "that, where a purchaser cannot make out a title but by a deed which leads him to another fact, he will be presumed to have knowledge of that fact." The following authorities are very clear and decisive upon that point: Fitzhugh v. Barnard, 12 Mich. 105; Case v. Erwin, 18 Mich. 434; Baker v. Mather, 25 Mich. 51; Insurance Co. v. Halsey, 8 N. Y. 271; Frost v. Beekman, 1 Johns. Ch. 298; Gibert v. Peteler, 38 N. Y. 165; Acer v. Westcott, 46 N. Y. 384; Coles v. Sims, 5 De Gex, M. & G. 1. The clause in the deed referred to the mortgage as an existing incumbrance, and he cannot now, in good faith, claim that it is not a lien upon his property.

The counsel for the plaintiff claims that the defendant McLindon had actual knowledge of the existence of the mortgage. It is true, he testified that when he purchased he knew by report that there was a railroad mortgage upon the property, but he says that the report stated that the mortgage was void. Were he not protected by another principal, he could not certainly be regarded as a bona fide purchaser. But he purchased from S. S. Johnson, or claims through Johnson, in whom the title stood free from any taint. For the rule is well settled that a purchaser affected with notice may protect himself by purchasing of another who is a bona fide purchaser for a valuable consideration. For a similar reason, if a person who has notice sells to another who has no notice, and is a bona fide purchaser for a valuable consideration, the latter may protect his title, although it was affected with the equity arising from notice in the hands of the person from whom he derived it. Mr. Justice Story says this doctrine, in both of its branches, has been settled for nearly a century and a half in England. 1 Eq. Jur. § 410. He states an exception to the rule, which was recognized and enforced in Ely v. Wilcox, 26 Wis. 91, where the estate became revested in the original fraudulent grantee, when the original equity was held to reattach to it. There is no pretense that McLindon comes within the exception; and, as a bona fide purchase of an estate for a valuable consideration purges away the equity from the estate in the hands of all persons who derive title under it, he is protected. It is said that it does not appear that Johnson's title was derived from the common source. As we understand the bill of exceptions, an abstract was offered in evidence to show title from Bunn, by various intermediate conveyances, to the defendant, which was ruled out on the plaintiff's objection. But perhaps it is a better answer to the objection to say that the plaintiff has made the defendants parties under the general allegation that they claim some interest in or title to the mortgaged premises, which was subject to the mortgage. This allegation implies that this interest was not adverse, but was derived from Dunn, though subsequent in date, and inferior in right, to the plaintiff's mortgage.

It was further insisted that the evidence showed that the defendant Mary Maloy had actual notice of the mortgage. We do not think this position is sustained by the testimony. It is attempted to charge her with the same actual knowledge her husband had, because he aided her when she made her purchase of Martin Maloy. It does not appear that anything was said at this time about the railroad mortgage, or that she ever had any notice of it. It does not appear, even, that he was acting as her agent in any legal sense; and, besides, if he were, his knowledge, acquired at another time, when not engaged in her business, ought not to be imputed to her. Notice, to bind the principal, should be brought home to the agent while engaged in the business or negotiation of the principal, and when it would be a breach of trust in the former not to communicate the knowledge to the latter. 1 Story, Eq. Jur. § 408.

and cases cited in note 1. The evidence fails to bring her within that rule.

A number of other questions were discussed upon the argument; but we believe these observations dispose of all the more important ones.

The judgment of the circuit court as to the defendants Thomas Maloy and Stanislaus Bartosz must be reversed, and the cause remanded for further proceedings in accordance with this decision.

It is so ordered.

HOUSTON v. TIMMERMAN.

(21 Pac. 1037, 17 Or. 499.)

Supreme Court of Oregon. May 3, 1889.

Appeal from circuit court, Linn county.

*Hewitt & Bryant* and *Tilman Ford*, for appellant. *J. K. Weatherford* and *D. R. N. Blackburn*, for respondent.

LORD, J. This was a suit to partition certain lands described herein. The defendant denied that the respondent had any interest in said lands, and alleged that she was the owner in fee-simple, and entitled to the possession of the whole of said premises. The plaintiff, in reply, denied this, and alleged affirmatively that some time in July, 1884, she commenced a suit against A. J. Houston for a divorce and alimony, and for an equal undivided one-third of the real property then owned by said Houston, and that he was the owner in fee of said real property, which was duly described therein. That the summons in said divorce suit was served on ———, 1884, and that prior to that time and prior to the 26th day of September, 1884, the defendant Timmerman had notice that the complaint for divorce and one-third of said real property had been filed by the plaintiff against her husband. That on the 5th day of February, 1886, a decree was entered, granting a divorce in favor of the plaintiff, and adjudging her to be the owner of the undivided one-third of said real property, etc. The court below, after a trial of said cause, rendered a decree therein, granting the prayer of plaintiff for partition, except as to the 160 acres of land mentioned therein, and partition was ordered and made on June 26, 1888, and confirmed by the court. The defendant Timmerman derived her title to the premises in dispute in this wise: On the 15th day of March, 1880, the plaintiff's husband, A. J. Houston, for value, made and delivered his promissory note to the defendant Timmerman for the sum of $3,400, with interest at the rate of 10 per cent. per annum from date; that, the said A. J. Houston failing to pay said note, the defendant Timmerman commenced suit on the 26th day of September, 1884, and caused service of summons to be made upon him on that day, and that on October 27, 1884, the defendant Timmerman recovered judgment against the said A. J. Houston for the sum of $5,463.87, which, on the same day, was duly docketed in the judgment lien docket, and thereupon became a lien upon all the real property mentioned in the complaint in this suit. It further appears that on March 19, 1883, said A. J. Houston made and delivered his promissory note to J. T. Williams for $1,000, with interest from date at the rate of 10 per cent. per annum, payable six months after date, and to secure the payment of the same executed a mortgage, which was duly recorded, upon the 160 acres of land set out in the complaint. The said Houston failing to pay said note, the mortgage was foreclosed against the said Houston and the plaintiff herein. The defendant Timmerman, however, answered, setting up her judgment, and asked, if the property be sold to foreclose said mortgage, that the overplus, if any, should be applied in payment of her judgment, and a decree was accordingly so entered, etc.; that execution was issued upon said decree, and said 160 acres was sold to the defendant Timmerman for $2,500; that thereafter, on May 13, 1885, execution was issued upon said judgment, and the remainder of the premises described herein was sold to the defendant Timmerman, and said sale confirmed, and deeds were duly executed by the sheriff to said defendant.

It will be noticed that the suit of the defendant Timmerman to recover the amount due on the note against A. J. Houston, who was then the husband of the plaintiff herein, was commenced after the suit of the plaintiff for divorce against her husband, and that a judgment was recovered and docketed before a decree in the divorce suit was rendered, and in which one-third of the real estate then owned by the husband was decreed the plaintiff. It is true, there was no direct proof of the date of the service of the summons in the divorce suit; but, as this will not affect the result reached, it is immaterial. The contention is that the defendant Timmerman was a purchaser *pendente lite*. There is, however, a preliminary question to be first disposed of, namely, that the appeal was not taken within six months as allowed by law. The answer to this is that the objection relates to the interlocutory or first decree, and not to the final decree, and that, as our own Code does not authorize an appeal from interlocutory judgments or decrees, but only from such as are final, and, the appeal from the final decree being within six months, there was a right of appeal, and the objection, therefore, is unavailing.

An examination of the statutes of the two states from which the authorities were read, to the effect that an appeal might be taken before a final judgment or decree was entered shows that appeals in those states may be taken from interlocutory judgments or decrees, which, not being the case under our Code, they fail on application. See Freem. Co-tenancy, §§ 519, 527. But to return. Among the ordinances or rules adopted by Lord Chancellor BACON "for the better and more regular administration of justice" was one which provided that, where a person "comes in *pendente lite*, and while the suit is in full prosecution, and without any color of allowance, or privity of the court there regularly, the decree bindeth." Chancellor KENT said that a "*lis pendens* duly prosecuted and not conclusive is notice to a purchaser so as to affect and bind his interest by the decree." Strictly speaking, however, the doctrine of *lis pendens* is not founded upon notice, but upon reasons of public policy, founded upon necessity. "It affects him," said Lord Chancellor CRANWORTH, "not be-

cause it amounts to notice, but because the law does not allow litigant parties to give to others, pending the litigation, rights to the property in dispute, so as to prejudice the opposite party. * * * The necessities of mankind require that the decision of the court shall be binding, not only on the litigant parties, but also on those who derive title under them by alienation made pending the suit, whether such alienees had or had not notice pending proceedings. If this were not so, there could be no certainty that litigation would ever come to an end." Bellamy v. Sabine, 1 De Gex & J. 566. The main purpose of the rule is to keep the subject-matter of the litigation within the power of the court until the judgment or decree shall be entered; otherwise, by successive alienations, its judgment or decree could be rendered abortive, and thus make it impossible for the court to execute its judgments or decree. Hence the general proposition that one who purchases of either party to the suit the subject-matter of the litigation, after the court has acquired jurisdiction, is bound by the judgment or decree, whether he purchased for a valuable consideration or not, and without any express or implied notice in point of fact, is sustained by many authorities, and disputed by none. Eyster v. Gaff, 91 U. S. 521; Grant v. Bennett, 96 Ill. 513; Randall v. Lower, 98 Ind. 261; Daniels v. Henderson, 49 Cal. 242; Blanchard v. Ware, 43 Iowa, 530; Carr v. Lewis, 15 Mo. App. 551; Currie v. Fowler, 5 J. J. Marsh. 145; Hiern v. Mill, 13 Ves. 120; 1 Story, Eq. Jur. § 405. The doctrine of *lis pendens* was introduced in analogy to the rule at common law in a real action "where if the defendant aliens after pendency of the writ, the judgment in the action will overreach such alienation." Sorrell v. Carpenter, 2 P. Wms. 482. And this may account for the leaning in some of the courts to restrict the application of the rule of *lis pendens* to actions or suits affecting title to real property. McLaurine v. Monroe, 30 Mo. 469; Winston v. Westfeldt, 22 Ala. 760; Baldwin v. Love, 2 J. J. Marsh. 489; Murray v. Lylburn, 2 Johns. Ch. 441. But it is hardly considered well settled that it may not with equal propriety be applied to the sales of chattels. Two things, however, seem indispensable to give it effect: (1) That the litigation must be about some specific thing, which must necessarily be affected by the termination of the suit; and (2) that the particular property involved in the suit "must be so pointed out by the proceeding as to warn the whole world that they intermeddle at their peril." Freem. Judgm. §§ 196, 197. Now, the divorce suit of the plaintiff was not brought specifically to recover the one-third of the real estate of her husband, as was decreed in the divorce proceeding. The land was not the subject-matter of the litigation, and the subject of the suit was not to recover title that belonged to the plaintiff. It was incidental and collateral to the divorce proceeding. The court has no jurisdiction to affect the title of the husband to his lands, or decree that one-third of them shall be set apart for her in her own right and title, independent of a decree for divorce. Nor has the plaintiff any title on which to base a suit to recover any portion of the same, except as it comes by force of the statute upon a decree for divorce. A proceeding in divorce is partly *in personam* and partly *in rem*, and, in so far as it is to affect the marriage *status*, it is to change a thing independent of the parties, and is a proceeding not against the parties *in personam*, but against their *status in rem*. 5 Amer. & Eng. Cyclop. Law, "Divorce," 751. The matter upon which the jurisdiction acts is the *status*. The marriage is the thing which the suit is brought to dissolve. It is the subject of the litigation; but, as incidental to it, the court may grant temporary alimony *pendente lite*, or permanent alimony, when a decree for divorce is rendered. And the general rule is that bills for alimony do not bind the property of the defendant with *lis pendens*. 1 Story, Eq. Jur. § 196; Brightman v. Brightman, 1 R. I. 112; Isler v. Brown, 66 N. C. 556; Almond v. Almond, 4 Rand. (Va.) 662. But the court cannot affect the title of the real property of the defendant in a divorce proceeding until the point is reached that a decree of divorce is to be rendered. Temporary alimony may be granted *pendente lite*, but the title of the real estate of the defendant remains intact, and cannot be affected during the pendency of the proceeding, but only when the proceeding for a divorce has terminated, and a decree rendered that the marriage is dissolved, and then only by force of the statute.

Our statute provides: "Whenever a marriage shall be declared void or dissolved the party at whose prayer such decree shall be made shall in all cases be entitled to the undivided one-third part in his or her undivided right in fee of the whole of the real estate owned by the other at the time of such decree; and it * * * shall be the duty of the court to enter a decree in accordance with this provision." Code Or. § 499. It is "whenever a marriage shall be declared dissolved" that the statute operates, not before, or *pendente lite;* and the court then becomes authorized, and it is its "duty," "to enter a decree" for the undivided one-third part in fee of the whole of the real estate "owned by the defendant at the time of such decree" for a divorce. It must be manifest, then, that the primary object of the suit is to affect the marriage relation,—its *status;* that it is the specific matter in controversy to be affected; and that it is only when the *status* is changed by a decree of divorce that the statute operates to divest title "owned" by the defendants, and that it then becomes the duty of the court to enter a decree in accordance with its provisions. Nor do the cases cited by counsel sustain his contention. In Tolerton v. Williard, 30 Ohio St. 586, the suit was of "double aspect," as said

by the court, and was brought to protect her equitable right in property which was the subject of dispute. This property was bought with the wife's money, and she sought a restoration of her rights. The court says: "It is evident that the court in coming to its conclusion did take these equities into consideration, so that the decree may fairly be considered an equitable one in her favor." And again: "In a proceeding like the one under consideration where the wife claims rights in her husband's property other than those arising from the marital relation, and insists upon them in connection with her claim for alimony, the court is fully authorized to pass upon them." In Daniel v. Hodges, 87 N. C. 97, the proceeding was for alimony, and the only property which the husband owned was a lot that the wife sought to have subjected to her claim, and was in actual possession of it by order of the court when her husband, pending the litigation, conveyed it to another, and the court held, under the exceptional circumstances of the case, that the doctrine of *lis pendens* applied. There the proceeding was to subject the specific thing to her claim, which the husband attempted to defeat by conveying away the property, and the court, while admitting the general doctrine that a *lis pendens* was not applicable in such cases, said: "We are of the opinion the petition for alimony under the particular circumstances of the case constituted such a *lis pendens* as affected the purchaser with notice, independent of the actual notice had, and rendered the deeds void." But this has no relevancy to the case at bar. There she sought to subject the property to her claim for alimony, and the suit was directed specifically against it, and she was put in actual possession by order of the court, and then it was only "under the peculiar circumstances of the case" that the court thought the purchaser from the husband pending the litigation was affected with the rule of *lis pendens*. Here there was no alienation of the property, which was only incidentally involved, or any charge of any act on the part of the defendant Houston to defeat any right whatever which might accrue to the plaintiff, if the marriage should be dissolved. If the defendant Houston had conveyed away the property to another with the object of defeating her right, upon a decree for divorce, to any interest in his lands, such purchaser may be affected with the rule of *lis pendens* in such case; but that is not the question here, and which it will be time enough to decide when properly presented for our consideration. The debt which the defendant Houston owed the defendant Timmerman was contracted long before the suit for divorce was commenced, or the cause or ground of the divorce existed, and doubtless the credit was given on the faith of the property, a part of which included the property in dispute, then owned by Houston. There is no pretense of any fraud or collusion, or that the debt is not an honest obligation which Houston ought to have paid long before the divorce proceeding was instituted. Although the commencement of the divorce suit might result in a decree which would affect the property of the defendant, the property was not the subject specifically of the litigation, and by reason thereof was not withdrawn from such burdens as might be legally imposed upon it for just claims upon judgments recovered and docketed against its owner, prior to divesting him of his title by force of the statute under the decree. The defendant Timmerman had the legal right to commence her action to recover the money due on the note of Houston, and the fact that the wife of Houston had instituted proceedings for a divorce did not affect that right, but when judgment was recovered thereon, and docketed, by force of law, the lands then owned by him in that county, including the land in dispute, became subject to the lien of such judgment; and, as the facts show that this was before any decree was rendered in the divorce whereby title to such lands could be divested, it follows that whoever took title from him subsequently, either by contract or by operation of law, took said title *cum onere*, or subject to the lien of such judgment. It results, as a purchaser of said lands at an execution sale upon such judgment, the defendant Timmerman was not affected by or subject to the rule of *lis pendens*, and her deed thereby rendered invalid. It is true, in the divorce suit the property was described in the complaint and decree, which, since the decision in Bamford v. Bamford, 4 Or. 30, has been deemed essential to reach the property of the guilty party, but it is apprehended that neither allegation or proof concerning the lands is necessary, but that it is enough and a sufficient compliance with the latter clause of section 499, Code Or., to say in effect that the party obtaining the divorce is hereby entitled to one-third of the real property owned by the other, whatever it may be. In this view, if any question arises as to what property was so owned by him, it can be determined by appropriate proceedings for that purpose between the parties interested, much better than in a divorce suit, in which it is neither proper nor convenient that third parties, in order to protect their rights, should be compelled to intervene and become parties to a controversy between husband and wife in a divorce proceeding. Barrett v. Failing, 6 Sawy. 475, 3 Fed. Rep. 471. So that, however we look at the facts of this record, our conclusion is that the decree of the lower court must be reversed, and it is so ordered.

ROSEMAN et al. v. MILLER.

(84 Ill. 397.)

Supreme Court of Illinois. Sept. Term, 1876.

Appeal from circuit court, Grundy county; Josiah McRoberts, Judge.

Mr. Charles W. Needham, for appellants. Mr. S. W. Harris, for appellee.

SCHOLFIELD, J. The present appeal is prosecuted to reverse a decree of the court below allowing the complainant to redeem from a sheriff's sale, and setting aside certain deeds, and enjoining the prosecution of a suit in ejectment.

The only question made is whether the evidence in the record is sufficient to sustain the decree.

At the June term, 1869, of the superior court of Chicago, one Lake obtained a judgment against the complainant for $1,735.45, and costs of suit. Execution was thereupon issued to the sheriff of Grundy county, and by him levied upon the E. ½ of the S. E. ¼, and the E. ½ of the S. W. ¼, of section 16, township 33, range 7, in that county. On the 19th day of February, 1870, the lands were struck off and sold by the sheriff, en masse, to the defendant Roseman, for $10, and, there being no redemption from the sale, the sheriff executed and delivered to him a deed therefor on the 24th day of May, 1871. On the 26th day of October, 1871, Roseman conveyed, by quitclaim deed, an equal undivided half of the land to the defendant Beach.

The two tracts of land, as is apparent by reference to the description, do not adjoin each other, there being another 80-acre tract between them. The evidence shows that there is a house, barn, orchard, etc., on each tract, and they constitute two wholly separate and independent farms. They were worth, in the aggregate, at the time of the sale, a sum varying, in the opinions of different witnesses, from $6,000 to something over $8,000; but they were incumbered by a mortgage, the balance on which was $1,889.86.

The policy of selling en masse, as was here done, separate and wholly independent tracts of land, neither of which has any apparent tendency to augment the value of the other, when taken together, is liable to produce great injustice; and, notwithstanding they may have been previously offered separately without obtaining bidders, where the amount bid for them en masse is merely nominal, the officer should ordinarily postpone the sale, and readvertise. Ten dollars, when compared with the value of the property to be sold, even after making due allowance for the depreciation in value in consequence of the mortgage lien, was purely a nominal bid, and no one making it could reasonably anticipate that he was, therefore, to become the owner of the property. In cases of such gross inadequacy between the value of the property and the amount bid, as was observed in Hamilton v. Quimby, 46 Ill. 96, the court will seize upon any circumstances of unfairness towards the debtor to afford him relief.

The defendant Beach, in our opinion, has shown no equity in his favor which places his title upon a better footing than that of the defendant Roseman. Although he may have been a purchaser without notice, yet, if he took the deed as a volunteer, or has not paid the purchase money, he is not an innocent purchaser for value, and cannot be protected. It was incumbent on him to prove that he was a purchaser for value, and had paid the purchase money, and this, too, independently of the recitals in the deed; and, not having done so, there is no presumption to aid him. Brown v. Welch, 18 Ill. 343; Hamilton v. Quimby, supra.

The case made by the evidence for the complainant is that he was induced to believe, and did believe, that the sale to Roseman was not consummated, and would be canceled on his paying the amount due on the judgment. This is, in substance, the evidence of his father, who was acting as his agent in the matter. Subsequent to the sale, this witness says he paid the sheriff on the judgment $444, and in conversation with the sheriff he was informed that Roseman had paid nothing on his purchase; that the sale amounted to nothing, and that he would cancel it upon full payment of the execution. He is contradicted, in some respects, by the evidence of the sheriff, but we think he is borne out by other circumstances. If he had not supposed the sale informal, and of no validity, why not, out of the $444, appropriate enough to redeem from it? This would have been most natural. The judgment was bearing but 6 per cent. interest, but, if there was a sale, the amount of the bid was bearing 10 per cent. Nothing could be gained by leaving this amount to stand, and appropriating all the payments on the balance of the judgment. He says he had paid the sheriff his costs accrued prior to the sale, and the sheriff also received $14 out of this payment of $444, on account of his costs. The sheriff, neither in this nor in subsequent accounting on the receipt of money on the judgment, before the execution of the deed to Roseman, took any account of the bid of Roseman; and although he gave Roseman a certificate of purchase, it does not appear that any return of the sale was indorsed on the execution or venditioni exponas; for this witness swears that he had the clerk of the court whence they were issued to examine, and he reported no return could be found. Although complainant has fully paid the amount of the judgment on which the sale was made, he has never received any credit on account of Roseman's purchase. The witness is positive that he paid the sheriff, in all, $49, for costs, which the sheriff assured him covered the costs of advertising, sale of property, and return of execution. If the sale was bona fide, and the money paid at the time, it was the duty of the sheriff to have rendered an account of

it. His return should have shown the fact, and that no return is introduced to support him we regard as greatly weakening his evidence.

Roseman was a constable, and, prior to the sale, had acted as bailiff to the court, and in one instance as deputy sheriff, and shortly subsequent to the sale he was regularly appointed as the deputy of the sheriff. His association with the sheriff was such as to tend very strongly to show that, if he did not actually occupy, at the time of the sale, a position which, under the law, rendered him ineligible to purchase at all, he must have known of the conduct of the sheriff in this matter, and, knowing, he is affected by it.

When Roseman bid, we cannot regard, from the mere nominal amount of his bid, that he was in good faith expecting and intending to become the purchaser of the land. Before he took a deed, he was requested to call at complainant's office, at a subsequent day, for his money. He did not then notify the complainant that he claimed the property, but by his silence gave him to believe that he would accept the money. There is, moreover, some evidence tending to show that his motives were rather to avail of an unconscionable advantage to extort money than to insist upon a bona fide legal right in obtaining the deed.

In what we have said we have followed the view supported by the evidence of the complainant, because, after mature consideration of all the evidence, we are unable to say the court below erred in accepting that view; and we have not deemed it advisable to lengthen our opinion by quoting the evidence in full.

Our conclusion is, the decree below works no injustice. It gives to Roseman all to which he is, in good conscience, entitled; and it does not appear that Beach has been deprived thereby of money he has paid in good faith.

The copy of the execution in the record is without a seal. On this ground alone the sale might have been declared a nullity, and no redemption been necessary. But we have chosen to place our affirmance upon other grounds, thinking the omission of the seal may have been through carelessness of the copying clerk, and not because there was none in fact. The decree is affirmed.

Decree affirmed.

PEEK v. PEEK. (No. 12,315.)

(19 Pac. 227, 77 Cal. 106.)

Supreme Court of California. Sept. 22, 1888.

Commissioners' decision. In bank. Appeal from superior court, San Bernardino county; Henry M. Willis, Judge.

Ejectment by Lee Peek, a minor, by Jerry McNew, his guardian, against Nettie A. Peek, for land in San Bernardino county. Defendant filed a cross-complaint, asking a conveyance of the legal title to the land. Judgment for plaintiff, and defendant appealed.

Rowell & Rowell, Harris & Allen, and Wells, Van Dyke & Lee, for appellant. H. C. Rolfe, for respondent.

HAYNE, C. Ejectment, with a cross-complaint by defendant praying for a conveyance of the legal title. The facts are as follows: One L. R. Peek orally promised the defendant that if she would marry him, he would, on or before the marriage, convey to her the property in controversy. She relied upon this promise, and married him "for no other reason or consideration." The conveyance was not made. He put it off by excuses and protestations, and on the morning of the marriage, without the knowledge of defendant, conveyed the property to his son by a former marriage, who was then a boy about 10 years old. The marriage with defendant did not prove a happy one, and after a year's residence upon the property Peek deserted the defendant, and the son, Lee Peek, brought the present action to recover possession of the property. The court below gave judgment for the plaintiff, and the defendant appeals.

The foundation of the defendant's claim being the promise of L. R. Peek, the first question to be considered is whether such promise was of any validity. It is clear that it was within the statute of frauds. But it is contended that there was such part performance and fraud as would induce a court of equity to give relief, notwithstanding the statute. We think that if the actual fraud of L. R. Peek be left out of view, there was no such part performance as would take the case out of the statute. There may undoubtedly be cases of a part performance of oral antenuptial agreements sufficient to warrant their enforcement in equity. See Neale v. Neale, 9 Wall. 1. But it seems to be generally agreed that the marriage alone does not amount to such part performance. See Ath. Mar. Sett. 90; Browne, St. Frauds (4th Ed.) § 459; Henry v. Henry, 27 Ohio St. 121. With reference to this subject, Story says: "The subsequent marriage is not deemed a part performance, taking the case out of the statute, contrary to the rule which prevails in other cases of contract. In this respect it is always treated as a peculiar case, standing on its own grounds." 2 Eq. Jur. § 768. Nor does the fact that the defendant resided with her husband upon the property make any difference. The reason assigned for holding possession to be part performance is that, unless validity be given to the agreement, the vendee would be a trespasser. But it is manifest that this reason would not apply where the vendor was the husband and the vendee the wife, living with him upon the property. The possession which is referred to by the cases which hold it to be sufficient part performance is a possession exclusive of the vendor. Browne, St. Frauds (4th Ed.) § 474. But the fact that the marriage was brought about by the actual fraud of L. R. Peek seems to us to make a difference. There can be little doubt upon the record that there was actual fraud on his part. He denies that he made any promise to convey the property in controversy. But the court finds that he did make it, and, taking this to be the fact, we think that the defendant's account as to the time of the promise, and of the reason she married him without the conveyance, must be accepted as the true one. According to her testimony, the promise was repeated up to the time of the marriage, and she was induced to have the ceremony performed before the conveyance was executed by means of excuses and protestations, which must have been made for the purpose of deceiving her. On the day before the marriage, he pretended that he was going to have the deed executed at once. He said to the defendant: "The officers are in town that are required to draw up the papers. Come to-night, and I will have the place deeded to you, and the $15,000 put in your name. He left me in the hotel, and in a few minutes he came and told me that Mr. Frank McKenny was out of town, and it could not be attended to that evening." The next day "he said he would have the deeds drawn, and he went up and said that they were all busy at the court-house, and he couldn't have it done at that time; and he called on me again with the same story, that the gentlemen at the court-house were busy, and that he could not have the deeds fixed, and that I could rest contented." He, however, succeeded in inducing the defendant to marry him that evening by protesting that the papers should be executed as soon as practicable. After the marriage he kept up for a short time the pretense that he was going to fulfill his promise, but never did so. It seems clear that he never intended to have the deed executed. The story that he could not have it done because the officers at the court-house were busy is ridiculous. On the very day that he was making this excuse he got a deed executed conveying the property to his son. And the fact that he induced the defendant to marry him by promising to convey the property to her, when at that very time he was conveying it to somebody else, seems conclusive as to his fraudulent intent. We think, therefore, that the conclusion of the court below, that the deed was not made "with any

fraudulent intent whatever," is not sustained by the facts. This fraud on the part of L. R. Peek, by which he induced the defendant to irretrievably change her condition, seems to us to be ground for relief in equity. It has been laid down that if the agreement was intended to be reduced to writing, but was prevented from being so by the fraudulent contrivance of the party to be bound by it, equity will compel its specific performance. 2 Story, Eq. Jur. § 768; Ath. Mar. Sett. 85. And the recent case of Green v. Green, 34 Kan. 740, 10 Pac. 156, is exactly in point. In that case a widow, owning 160 acres of land, orally promised a man that if he would marry her, she would devote the proceeds of the land to their joint support. Relying upon this promise, he married her, but subsequently ascertained that on the eve of the marriage she had conveyed the property to her children by former marriage, "in consideration of love and affection." The court held that he could maintain an action to have the deed set aside on the ground of fraud. Compare, also, Petty v. Petty, 4 B. Mon. 215.

We do not say that the mere fraudulent omission to have an agreement reduced to writing would of itself be ground for specifically enforcing the agreement. But where the fraudulent contrivance induces an irretrievable change of position, equity will enforce the agreement; and the marriage brought about by the fraudulent contrivance is a change of position, within the meaning of the rule. In Glass v. Hulbert, 102 Mass. 24, in reasoning, upon somewhat different facts, to the conclusion that, in order to be ground for the enforcement of the oral contract, the fraudulent contrivance must have induced some irretrievable change of position, the court said: "The cases most frequently referred to are those arising out of agreements for marriage settlements. In such cases, the marriage, although not regarded as a part performance of the agreement for a marriage settlement, is such an irretrievable change of situation that, if procured by artifice, upon the faith that the settlement had been made, or the assurance that it would be executed, the other party is held to make good the agreement, and not permitted to defeat it by pleading the statute." This, we think, is a correct statement of the law.

It is argued, however, that the plaintiff knew nothing of the fraud, and therefore is not affected by it. But it is very clear that a mere volunteer, however innocent, cannot retain the fruits of the fraud, and we think that with reference to at least a portion of the property the plaintiff was a mere volunteer. There are two grounds upon which it is urged that he was a purchaser for valuable consideration. In the first place, it is said that his father was his guardian, and as such owed the plaintiff a balance of $148, and that this sum was part of the consideration of the deed. But there was no consent of the ward to such an application of the sum due him. His testimony is as follows: "I never paid my papa any money for the deed that he showed me. I do not know anything about how much money was mentioned in the deed as being the consideration for it. I never knew anything about that. Nothing of that kind passed between us. No property or money or anything. I did not have any property at that time to give him. If I had any, I didn't know it." So that, even if the ward could have consented to such an appropriation of his funds without the sanction of the probate court, there was no such consent. Nor was there any sanction of the probate court. It may be that upon a proper settlement of the guardian's accounts a much larger sum will be found to be due from him. He cannot get rid of liability to his ward in that way. In the next place, it is said that L. R. Peek promised his first wife upon her deathbed that the son should have the property. But it is clear that such promise was a mere moral, and not a valuable, consideration. It did not prevent the plaintiff from being a volunteer. See, generally, Lloyd v. Fulton, 91 U. S. 484, 485. Finally, it is argued that the first wife furnished half of the money with which the property was purchased, and that a trust resulted to her in consequence. This was the view taken by the trial court. But, conceding that a trust did result, it did not affect the whole property, but at most only a portion corresponding to the proportion of the price which she furnished; and the portion which it did affect was in no sense a consideration for the deed which is involved here. Upon the theory that a trust resulted to the first wife, the plaintiff must claim as her successor in interest. It does not appear that she left a valid will in his favor, and if not he could succeed to a portion only of her interest. Furthermore, it might possibly become a question as to whether the defendant took with notice of the son's equitable interest, and as to how she would be affected thereby. These latter questions have not been argued, and we think they should be left open upon the retrial. It is deserving of serious consideration whether L. R. Peek, who was a party to the contract which the defendant relies upon, should not have been joined as a party to the cross-suit. But the objection as to his nonjoinder as a defendant to the cross-complaint was not taken by demurrer, and is not argued in the respondent's brief, and for these reasons we express no opinion concerning it. We therefore advise that the judgment and order denying a new trial be reversed, and the cause remanded for a new trial.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and the cause remanded for a new trial.

MUIR v. SCHENCK.

(3 Hill, 228.)

Supreme Court of New York. July, 1842.

A bond and mortgage were given by defendant to the plaintiff in the sum of $1,500, to be paid in five installments. When three installments had been paid to the plaintiff, he assigned the bond to D. as collateral security. Afterwards the plaintiff assigned the mortgage and the bond to A., who gave notice to defendant of the assignment, and defendant promised to pay him the money thereon, and did pay him the fourth installment, at one time, and later he paid the balance. After the payment of the fourth installment, and before the payment of the balance, D. gave defendant notice of the assignment of the bond to him, and he himself claimed the balance. The lower court held that the last payment to A. was good, notwithstanding D.'s notice.

*By the Court*, COWEN, J. The question is, whether the defendants were right in preferring Austin, and making the last payment to him instead of Doty. Doty had the first assignment from the obligee, and, as between him and Austin, was entitled to the money. In a conflict of equitable claims, the rule is the same at law as in equity, *qui prior est tempore, potior est jure*. There was no need of notice to Austin for the purpose of securing the preference as against him; and Austin might have been compelled at the election of Doty to pay over to him the last installment received from the defendants. But before that installment was paid, he chose to fix the defendants by giving notice of his right to them, and forbidding the payment of any more to Austin. The payments were correctly made to the latter, till notice. The payment afterwards, was in the defendants' own wrong. The notice, when it came, afforded them a complete protection, and had the farther effect to render what was before an inchoate right in Doty, perfect from the beginning. As Austin had never any right to receive, the defendants had now no right to pay. No one would doubt that the first assignment divested the right of the obligee, though the legal interest remained in him. Could he transfer to Austin a greater right than his own? His legal interest was not assignable; and he had parted with all his equitable right. Does it not follow that nothing remained for Austin?

The decision at the circuit, I admit, derives some degree of countenance from the remarks made by Chancellor Kent in *Murray* v. *Lylburn*, (2 *John. Ch. Rep.* 441, 443.) I allude to the view there taken of *Redfearn* v. *Ferrier*, (1 *Dow's Parl. Cas.* 50,) which the learned Chancellor supposed should perhaps be received as a qualification of the rule laid down by Lord Thurlow, in *Davies* v. *Austen*, (1 *Ves. Jun.* 249,) who said: "A purchaser of a chose in action must *always* abide by the case of a person from whom he buys; *that* I take to be an *universal* rule." True, his lordship was speaking of the case of the assignor, as it stood between him and the debtor; yet the same rule has been often applied to a case as between him and one of his previous assignees. Nothing is better settled, for instance, than that the previous assignment of a chose in action will prevent its passing to assignees by a general assignment under the bankrupt or insolvent acts; an assignment carrying even the legal right, and this too, without notice either to the debtor or the subsequent assignees. Ordinarily, any notice to subsequent conventional assignees must be out of the question; for the first assignee cannot know who they will be. Notice to the debtor might, I admit, afford them a better chance; for then there would be one of whom they might enquire, and of whom they naturally would enquire. This might prevent fraud; and, to require it, would therefore perhaps be very proper. It is required by the law of Scotland, as appears by *Redfearn* v. *Ferrier*, which was decided upon the Scotch law. By that law there must be what is called an *intimation* to the debtor, before the assignment is perfect and secures a complete preference even as against a subsequent assignee. In suggesting, however, that such is perhaps the law of England or of this state, Chancellor Kent admitted that he was doing what was not necessary to the decision of the case under his consideration, which turned on a point entirely different, viz. a *lis pendens* operating as constructive notice. In *Livingston* v. *Dean*, (2 *John. Ch. Rep.* 479,) there was actual notice. But neither *Redfearn* v. *Ferrier*, nor the two cases decided by Chancellor Kent, related to a previous express assignment. There was scarcely the semblance of such an assignment, but only a trust to be inferred by the court of chancery from circumstances—a sort of implied trust—a creature peculiar to that court. The prior right claimed, was spoken of as a latent equity. As between express assignments, I take the law to be correctly laid down by Parker, C. J. in *Wood* v. *Partridge*, (11 *Mass. Rep.* 488, 491, 2.) He said: "Between assignor and assignee the contract is complete without any notice to the debtor;" and he considered the notice as intended to protect the debtor alone. Story, J. in his learned work on the *Conflict of Laws*, (*p.* 328 *to* 330,) mentions the difference between the Scotch law and our own, admitting the necessity of *intimation* in the former. He says, that according to our law, an assignment operates, *per se*, as an equitable transfer of the debt, and he concedes that notice is necessary to protect the debtor; adding: "But an arrest or attachment of the debt in his hands by any creditor of the assignor, will not entitle such creditor to a priority of right, if the debtor receive notice of the assignment *pendente lite*, and in time to avail himself of it in discharge of the suit against him." That has been held in several cases. (*Bholen* v. *Cleveland*, 5 *Mason*, 174, 176, *Fed. Cas. No.* 1,381; *Fos-*

*ter* v. *Sinkler*, 4 *Mass. Rep.* 450; *Dix* v. *Cobb*, *id.* 508.) In *Wood* v. *Partridge*, this question between a previous assignee and a subsequent attaching creditor, was considered the same in principle as that between conflicting assignees. It is undoubtedly so. The principle has been declared by other cases. (*White's heirs* v. *Prentiss' heirs*, 3 *Monroe*, 510; *Madeira* v. *Catlett*, 7 *id.* 477.) In *Jordan* v. *Black*, (2 *Murph.* 30,) the claim of the assignee presented a very strong equity. Hall, J. said, in substance that, "upon an examination of the authorities it would be found that the ground taken by the assignee of being a *bona fide* purchaser, is tenable by those persons only who have the *legal title* in them, and plead that they are purchasers for a valuable consideration without notice. By this plea they show that they have as much equity on their side as their opponents; and that being the case, a court of equity will not interfere and divest them of their *legal title*. All that the assignee shows is, that she purchased the assignor's right to a chose in action. She has no *legal*, but only an *equitable* title."

No fraud upon Austin's rights is imputable to Doty. He entertained a confidence that the assignor would pay his claim, and that he should therefore not find it necessary to take measures for collecting the bond. He gave notice to the defendants as soon as he found himself disappointed.

Nor is it any answer to Doty's claim, that the defendants promised to pay Austin. It is said truly, that this, in an ordinary case, would have entitled him to an action in his own name. *Prima facie* it brought him within the rule, that an assignee of a chose in action may sue in his own name, on an express promise by the debtor to pay him.(*a*) This arises from *consideration* and privity; but in the case at bar, the assignment to Austin having failed of effect by reason of the prior assignment to Doty, there was no consideration for the promise. The case is the same as if Austin had held no assignment even in form. The last payment by the defendants was, therefore, made in their own wrong; and there must be a new trial, the costs to abide the event.

New trial granted.

(*a*) See *Jessel* v. *The Williamsburgh Ins. Co.*, (3 Hill, *p.* 88, 9,) and the cases there cited.

## WALLIS v. SMITH.

(21 Ch. Div. 243.)[1]

Court of Appeal. March 28, 1882.

On the 30th of August, 1879, an agreement of that date was made between the plaintiff, William Peter Vosper Wallis, and the defendant, Joseph Melland Smith. By this agreement the plaintiff contracted to sell to the defendant an estate comprising about 95 acres on the south side of Beulah Hill, Norwood, for the price of £70,000; and the defendant was to provide the necessary capital, not exceeding £70,000, for the purpose of laying out and making the necessary roads and drains for the said estate, to manufacture bricks, tiles, and terra-cotta out of the clay on the said estate, not only for the houses to be erected on the estate, but for sale, and was to erect houses therein subject to the terms and conditions thereinafter set forth.

The material clauses in the agreement were as follows:

(1) That the memorandum of agreement should form the basis of two contracts to be prepared between the parties, if found necessary,—one for the sale of the land by the plaintiff, and the other for the construction for the works by the defendant.

(5) A deposit of £5,000 was to be paid by the defendant as follows: £500 on the execution of the contract, and £4,500 on or before the 31st of March, 1880; such sums to be paid to a deposit account with the London & County Bank, in the joint names of the plaintiff and defendant; such amount being a deposit on £70,000, the purchase money of the estate.

(6) On the execution of this contract, and upon payment of the said sum of £500, part of the said deposit of £5,000, the plaintiff should give the defendant possession of such portions of the estate as might be necessary for carrying out the contract, and the defendant should proceed to obtain plans and commence the works, which were to be completed within 10 years. In the event of such works not being completed within 10 years, and the plaintiff and defendant not agreeing to an extension of the time, then such portions of the estate as might be unsold should be sold by public auction; and the proceeds, after paying such moneys as might be due to the defendant in respect of moneys expended in respect of the said works, should be applied in paying the balance of the said purchase money of £70,000, and the remainder should be divided equally between the plaintiff and defendant.

(7) So soon as the defendant should have spent a sum equal to £5,000 on the works, the defendant should be entitled to receive back the deposit lodged by him with the bank. The £70,000 was to be expended by the defendant in carrying on the works till the whole should be completed.

(8) After the deposit of £500 had been paid, the title of the plaintiff should be investigated; and if he should be unable to make a good title the defendant should be entitled to receive back his deposit of £500, and in addition the plaintiff should pay the defendant £5,000 as liquidated damages.

(9) The defendant to be entitled in the accounts to 7 per cent. on his disbursements, as an equivalent to his personal attention.

(10) The proceeds of the sale of the bricks and of the houses and land, and rents and fines on leases, were to be expended, in the first place, in repaying the capital expended by the defendant in excess of £5,000, it being the intention of the parties that £5,000 expended on the estate should be in lieu of and substitution for the £5,000 deposit, and the balance to be applied in payment of the said purchase money of £70,000 until fully paid; and after the repayment of the capital brought in by the defendant, and the payment of the £70,000 for the land, the proceeds were to be equally divided between the parties from time to time.

(13) There was to be no personal liability on the defendant for payment of the £70,000, nor on the plaintiff for repayment to the defendant of any advances for the works; but each party was to look only to the proceeds for payment.

(25) If the defendant should commit a substantial breach of the contract, either in not proceeding with due diligence to carry out and complete the works, or in failing to perform any of the provisions therein contained, then and in either of the said events the deposit money of £5,000, whether expended upon the estate or not, was to be forfeited, and, if the balance of such deposit had not then been paid, then the defendant should forfeit and pay a sum of money equal to such balance; the intention being that, if default was made by the defendant as aforesaid, he should forfeit and pay to the plaintiff, by way of liquidated damages, the sum of £5,000, and the agreement to be void and of no effect; but, in estimating such £5,000, credit was to be given for all moneys expended by the defendant upon the works other than the plant, and the plaintiff should not be called upon to pay or give any compensation or satisfaction for any moneys expended by the defendant on the said estate in pursuance of the contract; the object and intention being that the plaintiff, upon such events happening, should have, and if necessary retake, possession of the estate, with all buildings and works erected thereon, discharged from this contract, without any interference on the part of the defendant, his heirs, executors, administrators, or assigns; but such breach was not to be the consequence of a misconstruction of the language or meaning of any of the provisions of the contract.

(26) If the plaintiff should fail to fulfill any of the conditions or stipulations of this contract, or should hinder the defendant in the performance of the stipulations of this contract, or do any act prejudicial to the carry-

[1] Irrelevant parts omitted.

ing out of the contract, the defendant should be entitled to take possession of the whole of the estate without any further payment of purchase money.

No part of the deposit or sum of £5,000 was ever paid by the defendant, and the defendant expended nothing on the estate, and performed none of the acts stipulated for in the agreement.

The plaintiff accordingly brought the present action, claiming £5,000 as liquidated damages, or, in the event of the court deciding that the sum named was a penalty, claiming such damages as he might be found entitled to.

The defendant, in his defence, alleged that he had been induced to enter into the agreement by the misrepresentations of the plaintiff as to the price which he had himself given for the land, and put in a counterclaim asking that the agreement might be set aside and canceled.

The action came on for hearing on the 3d of January, 1882.

Cookson, Q. C., and C. Lyttleton Chubb, for plaintiff. Glasse, Q. C., and Mr. Terrell, for defendant.

* * * * * * * * * * * * * *

JESSEL, M. R. This appeal raises a question of very considerable difficulty and one as to which it is not impossible that learned judges may in future differ as judges have differed in times past. The case was opened, if I may say so, with the greatest fairness. The appellant's counsel, Mr. Macnaghten, said that if there were no authorities to be cited the meaning of the agreement is plain, and I agree with him. The only question we have to decide is whether the authorities compel us to construe this document in an extraordinary or nonnatural sense, contrary to the plain meaning of the words. Of course, if cases have laid down a rule that in certain events words are to have a particular meaning, and that has become a settled rule, it may be assumed that persons, in framing their agreements, have had regard to settled law, and may have purposely used words which, though on the face of them they may have a different meaning, they know, by reason of the decided cases, must bear a particular or special meaning; and therefore we must consider whether there are cases which lay down any such rule making a settled law, in the sense of being binding on this court.

The agreement in question is an agreement of a peculiar kind. It is a sort of partnership between the plaintiff, Mr. Wallis, and the defendant, Mr. Smith. It is dated in August, 1879, and after some very special provisions, which I need not read, come three important clauses, namely, the fifth, sixth, and twenty-fifth clauses. [His lordship read the clauses.]

The twenty-fifth clause is that on which the question turns, and the first question of construction is whether the clause does or does not apply to the nonpayment of the first deposit of £500. It appears to me that it does not. I never give a very confident opinion on questions of construction of ambiguous instruments, but I think the fair meaning of the clause is this: that the deposit of £500 is contemplated to be paid on the execution of the contract, and the idea did not seem to occur to the parties that it would not be paid. It was not in fact paid. Therefore, we find that what is to be forfeited is the deposit money; that is what it means; and, if the balance of the deposit has not been paid, that means the balance after providing the £500, then a sum equal to that balance. It contemplates its being paid in any event. Therefore, it appears to me the parties did not contemplate the nonpayment of the £500.

There is another observation to be made about the £500; assuming that construction not to be right. It has been observed that the nonpayment of the £500 prevents the sixth clause coming into operation, so that Smith cannot take possession and proceed with the works. How then can you ascertain the damage? It is not merely the nonpayment of the £500 on the deposit account; it prevents the works being proceeded with. It does not appear to me to be very easy to ascertain the damages.

In the next place, is this a proper deposit? That, again, is a question which has arisen in many of the cases. It appears to me it is. It is a deposit in part payment of the nominal purchase money. It is a deposit in joint names; therefore, no doubt, in one sense, it is not putting it out of the power of Smith; but, in another sense, it is. The moment you put it in joint names, it is out of his power, though the other party cannot deal with it without his consent. It is a security for the performance of the agreement.

Then, again, is it true that the twenty-fifth clause lasts for 10 years, so as to forfeit the deposit? It appears to me it does not. The balance of the deposit was contemplated to be paid on the 31st of March then next, the agreement being in August, and it is then to be laid out on the works. It is clear there is no forfeiture after that, because, in estimating the £5,000, credit is to be given for all moneys expended. The moment you have expended that £5,000, there is no deposit to forfeit. It is quite true, the agreement has been put an end to, and that that destroys the right of Smith to get back his money, but it is no longer a forfeiture, in any other sense of the word.

Then, again, there is this to be said: The nonpayment of the £500 prevents the performance of the agreement. If the £500 is included in the proviso for forfeiture, that is not a single event, of the nonpayment of

money, but it is a double event, of the non payment of the money and the avoidance of the agreement.

It appears to me, therefore, that we have in this case two elements: The one is that there is no single event as to which the damages can be certainly ascertained; the other is that the agreement has no relation to a real payment, within the terms of the various authorities.

Now, I have to consider (and, I am afraid, at some length) what the decisions are. I think they may be classed in this way: There is a series of decisions, beginning—I do not say actually beginning, but beginning for this purpose—with Astley v. Weldon, 2 Bos. & P. 346, which purports to be founded on older authority, and ending with the case in the appeal court of In re Newman, 4 Ch. Div. 724, in which this has been determined: that where a sum of money is stated to be payable either by way of liquidated damages, or by way of penalty for breach of stipulations, all or some of which are, or one of which is, for the payment of a sum of money of less amount, that is really as penalty, and you can only recover the actual damage, and the court will not sever the stipulations. If any one of the stipulations is for the payment of the sum of money of less amount, then the proviso is bad. The ground of that doctrine I do not know. The ground stated by the judges in two or three of the cases is this: they say it was an extension to the common law of the well-known doctrine of equity. I do know a little of equity, but I am sorry to say I cannot assent to the accuracy of the statement that it is an extension to the common law of the well-known doctrine. However, that is the ground put by the judges.

Another ground may be put. I do not find it put anywhere, but it may be put,—and there are some expressions which, though I do not say they amount to what I am about to say, tend that way; and that is the well-known doctrine that, in the construction of written instruments, you may depart from the literal meaning of the words, if reading the words literally leads to an absurdity. Now, it may well be that the courts thought that it was absurd to make a man pay a larger sum by reason of the nonpayment of a smaller. It has always appeared to me that the doctrine of the English law as to nonpayment of money—the general rule being that you cannot recover damages because it is not paid by a certain day—is not quite consistent with reason. A man may be utterly ruined by the nonpayment of a sum of money on a given day, the damages may be enormous, and the other party may be wealthy. However, that is our law. If, however, it were not our law, the absurdity would be apparent. I see no reason, apart from our law, why a man may not stipulate, "You shall pay me £500 on a given day." It may be of almost vital importance to him. He may have to deposit it as security for the granting of concessions of enormous value, and the other party may know it. He may have to make a payment on a stamp for a most valuable patent, and the other party may know that he relies upon it. It is not unreasonable, as it appears to me, in those cases, to say, "If you do not pay the £500," or it may be £50, "on that date, you shall pay £5,000 for the damage I shall sustain." There may be such cases, and many more cases besides those I have given as illustrations. However, the decisions do go to that length. Many of them are old decisions, and one of them, at least, is the decision of the court of appeal; I think we are bound by them, and to that extent, therefore, they govern any case of the same kind.

The next class of cases is this. It is a class of cases in which the amount of damages is not ascertainable per se, but in which the amount of damages for a breach of one or more of the stipulations either must be small, or will in all human probability be small,—that is, where it is not absolutely necessary that they should be small; but it is so near to a necessity, having regard to the probabilities of the case, that the court will presume it to be so.

Then the question is whether in that class of cases, the same rule applies? Now, upon this there is no decision. There are a great many dicta upon the question, and a great many dicta on each side. I do not think it is necessary to express a final opinion in this case, but I do say this: that the court is not bound by the dicta on either side, and the case is open to discussion. It is within the principle, if principle it be, of a larger sum before a penalty for nonpayment of a smaller sum; but, at the same time, it is also within another class of cases to which I am now going to call attention.

The class of cases to which I refer is that in which the damages for the breach of each stipulation are unascertainable, or not readily ascertainable, but the stipulations may be of greater or less importance, or they may be of equal importance. There are dicta there which seem to say that if they vary much in importance the principle of which I have been speaking applies, but there is no decision. On the contrary, all the reported cases are decisions the other way; although the stipulations have varied in importance, the sum has always been treated as liquidated damages.

I now come to the last class of cases. There is a class of cases relating to deposits. Where a deposit is to be forfeited for the breach of a number of stipulations, some of which may be for the payment of money on a given day, in all those cases the judges have held that this rule does not apply, and that the bargain of the parties is to be carried out. I think that exhausts the substance of the cases.

If, therefore, we apply these rules to the present case, the result will be this: that according to my construction of the contract there is no ascertainable, definite sum of a less amount than the sum named payable within it, as a single condition, and consequently the decisions on that point do not apply; nor is it (because the words are "substantial breach") a case in which one or more of the stipulations can be treated as trifling, or of trifling importance; therefore, those dicta to which I have referred do not apply. It is a case in which the stipulations vary in importance, but as the breach must be substantial, and as the amount of damages would therefore be substantial, also, I think that the decisions apply which say that in those cases the sum stipulated is liquidated damages. Lastly, as I said before, those rules do not apply to deposits. I will now go very shortly through the cases to show that they do really amount to what I say. The first case is Astley v. Weldon, 2 Bos. & P. 346, 350. I need not state the facts of the case. In that case a larger sum was mentioned as penalty or damages for the nonpayment of the smaller, one of the sums being a payment of £1. 11s. 6d. a week, and the sum for damages £200. The decision was that the sum could not be treated as liquidated damages, but as penalty. The ground of the decision is put by Lord Eldon, who was then lord chief justice of the common pleas, in these words: "What was urged in the course of the argument has ever appeared to me to be the clearest principle, viz. that where a doubt is stated whether the sum inserted be intended as a penalty or not, if a certain damage less than that sum is made payable upon the face of the same instrument in case the act intended to be prohibited be done, that sum shall be construed to be a penalty." Now "certain damage" is used there by Lord Eldon, having regard to English law, that by English law the nonpayment of the sum at a given day as a general rule was merely the amount to be paid. There were certain cases under commercial law where it also included interest, but that was all. Therefore it is certain damage, because that is the English law, and the principle is that if a certain damage occurs that sum is made payable on the face of it. That he states to be the principle. It is a very limited principle. Then he goes on to another doctrine, which, as he was familiar with equity law, he does not state as equity. He says (2 Bos. & P. 353): "A principle has been said to have been stated in several cases, the adoption of which one cannot but lament, namely, that if the sum would be very enormous and excessive, considered as liquidated damages, it shall be taken to be a penalty, though agreed to be paid in the form of contract." Then he goes on to say: "With respect to the case of Hardy v. Martin, 1 Brown, ch. 419, note, I do not understand why one brandy merchant, who purchases the lease and good will of a shop from another, may not make it a matter of agreement that if the vendor trade in brandy within a certain distance he shall pay £600; and why the party violating such agreement should not be bound to pay the sum agreed for, though, if such agreement be entered into in the form of a bond with a penalty, it may perhaps make a difference." He does not forget the statute of William III. Then he goes into the case itself, and shows that the breach might be £1. 11s. 6d. a week, but of course would make the defendant liable for £200. That is the whole substance of the judgment of Lord Eldon. He perfectly well knew that whatever had been the doctrine of equity at one time, it was not then the doctrine of equity to give relief on the ground that agreements were oppressive where the parties were of full age, and at arm's length. It is very likely, and I believe it is true historically, that the doctrine of equity did arise from a general notion that these acts were oppressive. At all events, long before his time it had been well settled in equity that equity did relieve from forfeiture for nonpayment of money, and I think I may say, in modern times, from nothing else. There were old cases extending to relief from all sorts of things. The nonpayment of money might be the nonpayment of £1 on a given day, as relief against a penalty, or it might be a forfeiture for a condition broken in the case of a mortgage, or it might be the nonpayment of money in the case of purchase, or it might be the nonpayment of money in the case of rent with a proviso for re-entry.

Now we come to the next judgment in the same case, which is the first instance of a dictum of a different character. Mr. Justice Heath says this: "It is very difficult to lay down any general principle in cases of this kind, but I think there is one which may be safely stated. Where articles contain covenants for the performance of several things, and then one large sum is stated at the end to be paid upon breach of performance, that must be considered as a penalty." That cannot be right, because it would include covenants for the performance of several things of equal value. I am not at all certain that Mr. Justice Heath intended to lay down any such general proposition. Then he goes to the rule: "It is a well-known rule in equity that if a mortgage covenant be to pay £5 per cent., and if the interest be paid on certain days, then to be reduced to £4 per cent. the court of chancery will not relieve if the early day be suffered to pass without payment; but if the covenant be to pay £4 per cent., and if the party do not pay at a certain time, it shall be raised to £5 per cent., then the court of chancery will relieve." It was settled so early as that; I am sorry it was so settled, because anything more irrational than the doctrine I think can hardly be stated. It entirely depended on form, and not on substance. Then Mr. Justice Rooke says: "The determination of the court in construing

this instrument must be guided by the intention of the parties. Now, it appears very clearly, from the stipulation that small sums of money should be paid in certain cases, that the parties considered the larger sum as a penalty." He confines his judgment therefore, to the same point as Lord Eldon, and so does Mr. Justice Chambre, the remaining judge. "There is one case in which the sum agreed for must always be considered as a penalty; and that is where the payment of a smaller sum is secured by a larger." Then he goes on to say you cannot sever the covenants, and so forth.

I have gone into that case rather minutely because it is, I may say, the foundation of the subsequent cases on the subject. The next case, which is one of the greatest importance, is the case of Kemble v. Farren, 6 Bing. 141, which has always been treated as a leading authority on the subject. I will not give a very positive opinion as to what the whole of that judgment means. I say so because very eminent judges have taken very different views of the judgment, and therefore I suppose it is more ambiguous than it appears to me to be. But one thing is clear,—that Chief Justice Tindal, in giving the opinion of the full court, put an end, if I may say so, to any such doctrine as was shadowed forth by Mr. Justice Heath in the case I have just cited. He says (6 Bing. 148) this: "And, if the clause had been limited to breaches which were of an uncertain nature and amount, we should have thought it would have had the effect of ascertaining the damages upon any such breach at £1,000. For we see nothing illegal or unreasonable in the parties, by their mutual agreement, settling the amount of damages, uncertain in their nature, at any sum upon which they may agree. In many cases such an agreement fixes that which is almost impossible to be accurately ascertained; and in all cases it saves the expense and difficulty of bringing witnesses to that point." Now, that is conclusive on the general doctrine; that is, it was the opinion of the full court of common pleas that, if the claims were limited to breaches of uncertain nature and amount, the sum mentioned would not be treated as a penalty. Then he goes on to say: "If, therefore, on the one hand, the plaintiff had neglected to make a single payment of £3. 6s. 8d. a day, or, on the other hand, the defendant had refused to conform to any usual regulation of the theater, however minute or unimportant, it must have been contended that the clause in question in either case would have given the stipulated damages of £1,000. But that a very large sum should become immediately payable in consequence of the nonpayment of a very small sum, and that the former should not be considered as a penalty, appears to be a contradiction in terms, the case being precisely that in which courts of equity have always relieved, and against which courts of law have, in modern times, endeavoured to relieve, by directing juries to assess the real damages sustained by the breach of the agreement."

Now, those latter words only apply to the case mentioned of a smaller sum not being paid, and an agreement to pay a larger on the nonpayment; they do not apply to the question of minute breaches of regulations; and then there are some words which I need not read. It appears to me to bring the case, simply as regards the judgment, to the same result entirely as in the previous case, and no more. He says, "Here" (that is, in Astley v. Weldon, 2 Bos. & P. 346), "there was a distinct agreement that the sum stipulated should be liquidated and ascertained damages. There were clauses in the agreement, some sounding in uncertain damages, others relating to certain pecuniary payments. The action was brought for the breach of a clause of an uncertain nature; and yet it was held by the court that for this very reason it would be absurd for the court to construe the sum inserted in the agreement as liquidated damages, and it was held to be a penal sum only. As this case appears to us to be decided on a clear and intelligible principle, and to apply to that under consideration, we think it right to adhere to it, and this makes it unnecessary to consider the subsequent cases, which do not in any way break in upon it."

It appears to me that, rightly read, Kemble v. Farren, 6 Bing. 141, does not go beyond Astley v. Weldon, 2 Bos. & P. 346. I say so with some hesitation, because I know there has been a difference between eminent judges as to whether or not the sentence I read about the breach of minute regulations was not intended to apply to the whole of the judgment, and to say this: that, where it is manifest that the damages must be minute, the same consideration applies as when the damages are ascertained at a certain sum.

The authorities are so numerous that I am afraid to go through them at any length, but I must call attention to two cases which are rather important. In the first place, there is Reynolds v. Bridge, 6 El. & Bl. 528, where Lord Chief Justice Coleridge says (El. & Bl. 540): "In Astley v. Weldon, Lord Eldon distinctly laid down that the mere magnitude of the sum named could not prevent it from being liquidated damages. Another rule has been suggested: that, where the sum is to be paid for the breach of an agreement comprehending more than one stipulation, it shall not be taken for liquidated damages. That is certainly found in some cases; but it cannot be said to be law now." That is very emphatic, and is entirely contrary to Mr. Justice Heath's dictum, if he intended it to be read as it stands. Then he refers to the case of Atkyns v. Kinnier, 4 Exch. 776, which is an important case, in which Lord Wensleydale commented on

Kemble v. Farren, 6 Bing. 141, and then he goes on to say: "The principle seems to be that if you find a covenant, the breach of which will occasion a damage, not uncertain, but such as is capable of being ascertained, as where there is a particular sum to be paid, which is much less than the sum named as payable upon the breach, there it is held that the last-named sum is specified by way of penalty, because a court of equity would limit the amount to be actually paid. Then comes the case where there are several provisions, the breach of some of which will produce an ascertainable damage, but the breach of others an uncertain damage. In that case (though we do not require to determine it now), inasmuch as there is one provision in respect of which the sum named cannot be taken as liquidated damages, it cannot be so taken for any provision, for, if it could, the contract would mean liquidated damages in one case, and not in another. If you look in the judgment of Chief Justice Tindal and Mr. Baron Parke, they seem rather to contemplate the case where all the provisions are of one kind. Mr. Baron Parke says: 'If there be a contract consisting of one or more stipulations, the breach of which' (meaning, I think, of each of which) 'cannot be measured; then the parties must be taken to have meant that the sum agreed on was to be liquidated damages, not a penalty. On this principle, if there were no more in the covenant than what I have read, this would be clearly a case of liquidated damages.'"

There is a dictum of Lord Chief Justice Coleridge in Magee v. Lavell, L. R. 9 C. P. 107, 111. He says: "The general principle of law appears to me to be where a contract contains a variety of stipulations of different degrees of importance, and one large sum is stated at the end to be paid on breach of performance of any of them, that must be considered as a penalty." That is a dictum which is not supported by any decision, and it appears to me to be quite irreconcilable with principle. It is exactly opposed to what Lord Chief Justice Tindal says in Kemble v. Farren, 6 Bing. 141. The mere fact of the stipulations varying in importance cannot show that the parties did not fix a sum, where the damage is not ascertainable, but I am bound to say that though that is my opinion, and that I should have thought it was quite clear, I find that in the case of In re Newman, 4 Ch. Div. 724, 731,—a decision of the court of appeal,—that dictum is approved of. In the first place, Lord Justice James says: "The authority of Kemble v. Farren cannot be considered as having been in any degree nibbled away by those cases before Lord Wensleydale which have been referred to, and which, it is said, show that the principle of Kemble v. Farren is to be confined to a case in which, amongst other stipulations, there was one stipulation for the payment of a sum of money. That was not the ratio decidendi of Kemble v. Farren, in which it was laid down in broad terms that, wherever there is a sum mentioned at the end of a contract as damages for the nonperformance of any of a great number of stipulations, there it must be treated as a penalty." With the greatest respect to Lord Justice James, it appears to me that the very contrary was laid down in express terms. There is some mistake about it; that is all I can say. Then he refers to the decision of Mr. Justice Heath in Astley v. Weldon, 2 Bos. & P. 346, which was overruled, and which was obviously, in my opinion, wrong. As regards Magee v. Lovell, L. R. 9 C. P. 107, I have this observation to make: It was only a dictum during the argument by Lord Chief Justice Coleridge. I distrust dicta in all cases, and especially dicta during argument. I must say, however, that in Re Newman, 4 Ch. Div. 724, Lord Justice Bramwell intimated his agreement with it, although, as I have already said, there is not only no decision to be found laying down such a doctrine, but it is really opposed to several judgments, including the two I have cited. Lord Justice Bramwell himself refers to two cases (Galsworthy v. Strutt, 1 Exch. 659, and Atkyns v. Kinnier, 4 Exch. 776) which are decisions in favor of liquidated damages where there was more than one stipulation, so that we have not only dicta opposed to dicta, but we have decisions opposed to decisions. As I said before, although I wish to leave the question open where there are several stipulations, and one or more is or are of such a character that the damages must be small, I do not wish for a moment to abstain from stating my opinion that there is no such doctrine where there are several stipulations, though they may not be of equal importance, or where there are several stipulations irrespective of importance, which is the doctrine laid down by Mr. Justice Heath, and apparently approved of by Lord Justice James. There is neither authority nor principle for any such doctrine, and I cannot see that it is established by any case which is binding on this court. I am not one of those who think that a long course of judicial decision can be set aside by any other court. As regards the doctrine of Astley v. Weldon, I think it is technically binding. There is not only the decision of the court of appeal, but there is also the decision of the court of exchequer. But, independently of that, if I find a long course of decisions by inferior courts, acquiesced in, which have become part of the settled law, I do not think it is the province of the appeal court, after a long course of time, to interfere, because most contracts have been regulated by those decisions; but, where that is not the case, where the dicta are as they are in this case, not only contradictory, but those dicta which are in favor of the appellant are modern, as compared with the older dicta, then I think it is

not right to say that the law is settled by the superior courts. There is another consideration which always has weight with me: When the law is settled, it gets into the text-books, which are a very considerable guidance to practitioners.

In the last edition of Mr. Mayne's valuable book on Damages (3d Ed. p. 128), he cites the dicta of Mr. Justice Heath, and he says, "This, however, must be limited to cases where it is apparent that the parties could not have intended the entire sum to be the ascertained damages of any breach." So that he treats the law as settled just the other way. I do not cite that as an authority, I only cite it to show that the law is not treated in the text-books as being settled, notwithstanding the dicta either of Mr. Justice Heath or of Mr. Justice Chambre, as approved by Lord Justice James.

I think it necessary to say so much because I have always thought, and still think, that it is of the utmost importance, as regards contracts between adults—persons not under disability, and at arm's length, that the courts of law should maintain the performance of the contracts according to the intention of the parties; that they should not overrule any clearly expressed intention on the ground that judges know the business of the people better than the people know it themselves. I am perfectly well aware that there are exceptions, but they are exceptions of a legislative character.

One notable exception in old times was the usury law, now repealed, to prevent people bargaining as to the rate of interest they would pay for the loan of money. There have been many other laws in modern times, such as the factory acts and the mines regulation acts, and so on, but they are all statutes. Judges have no right to say that people shall not perform their contracts which they have entered into deliberately, and put a different meaning on the contracts from that which the parties intend. In this case we have a very striking illustration. The contract in question was most carefully prepared. The plaintiff is or was a solicitor; the defendant had the assistance of a solicitor, and, I am told, also of counsel, but whether counsel presided at the final framing of the document, I am by no means certain, there being contradictory statements on that point. But it was a most deliberate and carefully-drawn instrument, and one which I think ought to be construed according to the plain meaning of the words. I am glad to find that I do not feel myself compelled to decide contrary to what is the plain meaning of the terms by any of the decisions.

In my opinion, the decision of Mr. Justice Fry is right, and ought to be affirmed.

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**PATTON et al. v. CAMPBELL.**

(70 Ill. 72.)

Supreme Court of Illinois. Sept. Term, 1873.

Bentley, Swett & Quigg, for appellants. Waite & Clarke, for appellee.

CRAIG, J. This was a bill in chancery, filed in the superior court of Cook county, by George W. Campbell, as assignee in bankruptcy of the late firm of Durham & Wood, against William Patton and others, to recover the value of certain goods which had been replevied by Patton & Co. from Durham & Wood.

It appears from the record that on or about the 20th of October, 1870, Patton & Co., of New York, sold Durham & Wood, of Chicago, a bill of goods, amounting to $1,600, on a credit of four months. About the first of November, after the sale, Durham & Wood failed, and Patton & Co. commenced an action of replevin to recover the goods they had sold. A replevin bond in the penal sum of $1,000, in the usual form, was filed with the papers in the action, and $800 or $900 worth of the goods were replevied.

In the fire of October 8th and 9th, 1871, the papers in the case, including the bond, were destroyed. Subsequently the action was dismissed.

The defendants answered the bill, to which replication was filed, the cause was heard on the proofs taken, and decree rendered in favor of complainants for $850.

The defendants bring the cause to this court, and seek to reverse the decree on two grounds:

First. For the reason a court of chancery has no jurisdiction, the remedy of complainants being complete at law.

Second. The purchase of goods from Patton & Co., by Durham & Wood, was fraudulent, and Patton & Co., upon discovery of the fraud, had the right to rescind the sale and replevy the property.

The questions will be considered in the order in which they are raised.

The bill in this case is filed to recover upon an instrument under seal, which had been destroyed.

The jurisdiction of a court of equity arising from accident is a very old head, in equity, and probably coeval with its existence. But it is not every case of accident which will justify the interposition of a court of equity. The jurisdiction will be maintained only when a court of law can not grant suitable relief; and where the party has a conscientious title to relief. 1 Story, Eq. Jur., § 79.

In case, however, of lost instruments under seal, equity takes jurisdiction, on the ground that, until a recent period, it was the settled doctrine that there was no remedy on a lost bond in a court of common law, because there could be no profert of the instrument, without which the declaration would be defective. The jurisdiction having been assumed and exercised on this ground, it is still retained and upheld. 1 Story, Eq. Jur., § 81; Walmsley v. Child, 1 Vesey, Sen., 341; Fisher v. Sievres, 65 Ill. 99.

Under the allegations in the bill in this cause, we think it is well settled that a court of equity had jurisdiction.

The remaining question in the case is, were the goods purchased under such circumstances as gave the appellants the right of rescission on the ground of fraud, or was there such a fraud practised that the title to the property did not pass to Durham & Wood?

The evidence shows that Hart, who was a traveling agent for appellants, called on Durham & Wood, in Chicago, to sell them goods. They examined his samples and told him they wanted to make a large order, and wanted to buy on four months' time. Hart told them, Patton & Co. hardly ever vary from three months' time. Durham remarked, he had bought and could buy of A. T. Stewart & Co., of New York, on four months' time. On this statement, Hart sold the goods on four months' time.

It turned out, on investigation, that Durham & Wood had only bought two bills of goods of Stewart & Co., and they were sold on thirty days' credit.

While it is true the statement made by Durham, that he had bought and could buy goods of Stewart & Co. on four months' time, was false, yet, it does not appear that this statement induced Hart to sell the goods; it only had the effect to cause him to give one month longer credit on the goods than he otherwise would, which did not, in this case, in anywise affect the rights of appellants, for the reason that the failure occurred and the goods were replevied within less than two months after the sale.

It appears, from the evidence, that Hart made no objection to sell the goods on three months' time; he neither asked nor required any representations from Durham, as to the standing or responsibility of the firm, to induce him to sell the goods on a credit of three months. At the time the goods were purchased, it does not appear that Durham & Wood were in failing circumstances, insolvent, or in any manner pressed by their creditors; for aught that appears they were at that time solvent, and responsible for all their contracts.

Neither does it appear that they made any false representations in regard to what they were worth, what property they owned, or the amount of debts they had contracted.

It is not shown that the goods were bought with the intent not to pay for them, or with a view to make an assignment.

We understand the rule to be, that if a party, knowing himself to be insolvent, or in failing circumstances, by means of fraudulent pretenses or representations, purchases goods with the intention not to pay for them,

but with the design to cheat the vendor out of his goods, such facts would warrant the vendor in rescinding the contract for fraud, and would justify him in recovering possession of the property by replevin, where the goods had not in good faith passed into the hands of third parties. Henshaw v. Bryant, 4 Scam. 97.

But the case under consideration does not come within this rule.

There is no evidence in this record to show that the goods were bought with any impure or wrong motives.

It is true that, some two months after the purchase of the goods, the parties went into bankruptcy, but this was involuntary, and does not, of itself, show the condition of the firm at the time the goods were bought.

Upon a careful examination of the whole record, we are satisfied the decree of the court below was correct, and it will be affirmed.

### JACOBS v. MORANGE.

(47 N. Y. 57.)

Court of Appeals of New York. Dec., 1871.

Appeal from judgment of the New York common pleas, affirming judgment for plaintiff.

Samuel Hand, for appellant. M. A. Kurshedt, for respondent.

PECKHAM, J. The defendant in this suit is a lawyer. The plaintiff some years since brought an action against the defendant in the marine court, in the city of New York. The defendant recovered a verdict in that suit, of $86 against the plaintiff. Without taking the case to the general term of that court, the plaintiff carried it for review to the court of common pleas of that city, and after argument there that court reversed the judgment, with costs. The defendant paid these costs voluntarily without the entry of any judgment. Within a year thereafter the court of appeals decided that the court of common pleas had no jurisdiction of a case from the marine court, until it had been first heard and decided by the general term of that court. The common pleas had previously held the other way, viz., that it had jurisdiction in such case. Some nine years after this reversal in the common pleas the defendant issued an execution in the marine court, and then the plaintiff instituted this suit in equity to stay his proceedings, and a judgment is obtained for a perpetual stay on the ground that the judgment in the marine court was erroneous, and that both parties in the review in the common pleas had acted under a mutual mistake of law.

This presents the question, can a court of equity grant relief in a case of this character upon the sole ground of a mistake of law? There is no circumstance of any description that adds anything to this ground of relief. Ignorantia legis neminem excusat and kindred maxims are old in the law. If they are true, this judgment is erroneous.

In early times the jurisdiction of the court of chancery in the hands of chancellors unskilled in the law was almost without limit; but for very many years that court has been guided by rules and precedents, by the science of the law as much as courts of common law. Their jurisdiction and modes of relief are well settled. The statutes and laws of the land are as much the law there as in any other court. 1 Story Eq., § 19; Id., §§ 17, 18.

The whole basis for this relief is founded upon the fact that an inferior court made an erroneous decision upon a question of law; that the plaintiff was misled thereby and suffered this loss. This is the best position the plaintiff can take. This must be the "surprise" sometimes spoken of in the books. Jeremy Eq. Jur. 366.

What a flood of litigation would such a rule open? If this can be regarded as the "surprise" that requires or justifies equitable relief, how broad is the principle, how extensive its ramifications? Almost every case reversed by this court would form a basis for such "surprise," especially where courts of last resort reverse or modify their own decisions. How many cases are lost at the trial or upon review by the ignorance of counsel in failing to perceive the point, or in failing to present it properly for review. How easy to get up cases, in the ordinary affairs of life, of a misunderstanding of the law. Thus the same principle would extend to courts of equity for errors committed or assumed to be committed there. Under such a system of jurisprudence it would be difficult to reach the end of a lawsuit.

In this case the statute of this state provided a mode of review of judgments rendered in the marine court. The time and the manner were prescribed. This statute was well known to these parties, or should have been but for their negligence. Yet the plaintiff, with the statute before him, passed for the sole purpose of enabling the party aggrieved to review a judgment in the marine court, comes to a court of equity for relief against his ignorance of the manner of obtaining such review.

We are referred to no principle or authority to sustain such an action, and I think none can be found.

On this point Chancellor Kent observed: "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 when 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." Lyon v. Richmond, 2 Johns. Ch. 51, 60.

Though the decree in that case was reversed by the court of errors (14 Johns. 501), it was entirely upon other grounds.

In Storrs v. Barker, 6 Johns. Ch. 166; 10 Am. Dec. 316, where ignorance of the law was set up as a ground of defense, the court affirmed the rule that ignorance of the law with a knowledge of the facts was no ground of defense. See 1 Story Eq., § 120, to the same effect.

Suppose the plaintiff had misunderstood the statute as to the time of appeal, could a court of equity extend the time prescribed by the statute? Many such cases have occurred from a misapprehension of the law as to when a judgment is perfected. Courts of law could grant no relief, and I am not aware that any lawyer has supposed that a court of equity had any more power to extend the statute.

In Champlin v. Laytin, 18 Wend. 407; 31 Am. Dec. 382, in the court of errors on appeal from chancery, Bronson, J., reviewed the authorities in a sound opinion, showing as he claimed that there was really no

authority against the rule that ignorance of the law simply was no ground for relief.

The opinion of Paige, Senator, the other way, does not seem to me to be well grounded. He was of opinion that the judgment in that case could be affirmed upon other grounds. But the principle laid down by him denies relief to the plaintiff in this case. He recognized a difference between ignorance of the law and a mistake of the law. Adopting the language of Johnson, J., in Lawrence v. Beaubien, 2 Bailey, 623; 23 Am. Dec. 155, who says: "The former is passive, and does not presume the reason. The latter presumes to know when it does not, and supplies palpable evidence of its existence." He would grant relief in the former not in the latter.

The difficulty of proving the one or the other seems to constitute all the difference in the cases.

Without any special review of authorities on this question which we have particularly examined, it is enough to say that it is conceded that no case has been found warranting the interference of a court of equity upon facts like these, and no sound principle will authorize it.

The decree must be reversed, without costs. All concur.

RIEGEL v. AMERICAN LIFE INS. CO.

(25 Atl. 1070, 153 Pa. St. 134.)

Supreme Court of Pennsylvania. Feb. 13, 1893.

Appeal from court of common pleas, Philadelphia county; THAYER, Judge.

Bill by E. Theresa Riegel, administratrix of Jacob Riegel, deceased, against the American Life Insurance Company, asking the reinstatement of a surrendered policy. Decree sustaining a demurrer to the bill, and dismissing it, from which plaintiff appeals. Reversed.

William W. Porter and Frederick J. Geiger, for appellant. H. Hazelhurst, for appellee.

STERRETT, J. When this cause was here two years ago, on appeal from decree sustaining the general demurrer, and dismissing the bill, an amendment, for the purpose of clearly expressing what at most was only implied, was moved, and allowed at bar, by adding to the fifth paragraph of the bill these words: "Both of the parties acting in respect to the transaction on the basis that the said Leisenring was then alive." That defect in the bill, however, did not appear to be the ground on which the demurrer was sustained in the court below. The plaintiff's equity, grounded on averments of fact contained in the bill, and admitted by the pleading, was then fully considered, and emphatically sustained, in a clear and convincing opinion by our Brother WILLIAMS, reported in 140 Pa. St. 201, and 21 Atl. Rep. 392. The decree was accordingly reversed, and record remitted, with direction that the defendant plead or answer, etc. After full consideration of the facts and circumstances, the opinion referred to concluded thus: "Upon these facts, if the attention of the learned judge had not been diverted from them, we feel sure he would have reached the same conclusion that we have reached,—that it would be grossly inequitable to hold the plaintiff to a bargain made under the influence of a mistake of fact like that before us. This mistake the demurrer admits. If there had been any circumstance which the defendant could have set up to show that a correction of this mistake at this time would be inequitable, it should have been shown to the court by answer. If such circumstances do exist, they may yet be presented, as the case goes back to enable the defendant to take defense upon the merits." The defendant company, having been declared insolvent, was duly dissolved, on application of the attorney general, more than a year before the answer was filed by Mr. Ritchie, the then president of the Real-Estate Title Insurance Company, which, in the interim, appears to have been appointed receiver of the defunct company. No plea or answer was ever filed by any officer of said company, nor by any one, on its behalf, who had any knowledge, otherwise than by information obtained from others, of the facts averred in the bill. Mr. Ritchie and his company were entire strangers to the transaction, and neither of them appears to have had any knowledge of the facts upon which plaintiff's equity is grounded; and of course it was impossible for him, as president of the receiver company, to answer otherwise than upon information and belief. In the jurat to his answer he swears the allegations thereof are true "so far as they are therein stated as of his own knowledge," etc.; but the answer contains not a single allegation that purports to be "as of his own knowledge."

The special evidential efficacy of a responsive answer in equity is due to the fact that the plaintiff, by calling on the defendant to answer the allegations of the bill, appeals to his conscience, accredits him, and *pro hac* makes him his own witness. The plaintiff in this case never called upon Mr. Ritchie, or any other stranger to the transactions alleged in the bill, to make answer thereto. The officers of the insurance company, who were cognizant of those transactions, were the proper persons to deny, if they could of their own knowledge, the averments of the bill, and thus make the answer responsive. The answer of Mr. Ritchie in this case is in no sense a responsive answer. It is merely pleading; and, as such, put in issue the facts in dispute, without more. Eaton's Appeal, 66 Pa. St. 490; Burke's Appeal, 99 Pa. St. 361; Socher's Appeal, 104 Pa. St. 609; Coleman v. Ross, 46 Pa. St. 185; Story, Eq. Jur. §§ 1528, 1529; 3 Greenl. Ev. §§ 287–289; Daniell, Ch. Pr. 846. In note to the latter it is said that an answer which alleges as facts what the defendant could not personally know, though responsive to the bill, simply puts plaintiff upon proof of his own allegations. So, too, in 3 Greenl. Ev. § 287, it is said that, if the fact asserted by the defendant is such that it is not and cannot be within his own knowledge, but is in truth only an expression of his strong conviction of its existence, or is what he deems an infallible deduction from facts which were known to him, his answer is not responsive, in the sense of being evidence in his own favor. The nature of his testimony cannot be changed by the positiveness of his assertion. The answer of an infant by his guardian *ad litem*, though it be responsive to the bill, and sworn to by the guardian, is not evidence in his favor.

But whether the answer be regarded as responsive or not, the proofs were quite sufficient to warrant the learned master in finding, as he did, the truth of every material averment in the bill. His findings of fact are in strict accord wth the uncontradicted testimony, and his conclusions of law are so manifestly correct that his report should have been unhesitatingly approved, and decree made in accordance therewith. No testimony, either written or oral, was introduced by or on behalf of the defendant. All the material facts on which plaintiff's equity is grounded were as clearly and conclusively established as if they had been admitted by answer, or by demurrer to the bill; so that practically we have now before us substantially the same questions that were fully considered and determined when the case was here before. In that appeal the fourth and fifth specifications

of errors are quotations from the opinion of the learned president of the court below dismissing the bill, wherein, speaking of the new contract, he says: "(4) It was not a contract induced by a mistake about facts, but a contract made in view of doubtful facts, and because of the doubtful facts. (5) It was in the nature of a compromise, founded upon the doubts which existed, not upon any mistake of the facts." In this appeal the third specification, quoted from the opinion of same learned judge, again dismissing the bill, is that "the new contract was not a contract induced by mutual mistake about the facts, but a contract made in view of doubtful facts, and because of the doubtful facts." The second specification in this is in effect the same as the fifth in the former appeal. These propositions go to the very heart of the plaintiff's case. They substantially involve the only cardinal questions that are or ever have been in it, and about which there is the slightest room for doubt. They are the very questions that were considered and decided by this court when the case was here before. That clearly appears in the opinion, wherein, after reciting the facts averred in the bill, it is said: "The case presented on these facts was that of a contract entered into under the influence of a mutual mistake, and a claim for relief from such contract. The mistake was in relation to the fact of Leisenring's death. Both parties evidently supposed and acted on the supposition that he was alive, and that the annual premiums upon his life, which had become burdensome to Mrs. Riegel, must be continued indefinitely until his death should take place. As it had become difficult for her to pay these premiums, the only way in which she could be relieved from them was to surrender her policy, and accept a paid-up policy for such smaller sum as the premiums already paid would purchase. Rather than take the risk of losing the entire amount of the policy, by her inability to keep up the annual payments, she surrendered her policy for $6,000, and accepted in lieu of it a paid-up policy for $2,500. This was the contract she made while in ignorance of Leisenring's death. At the time she made it she was already relieved from the burdensome premiums, and the entire amount of the policy was honestly due her from the company. What was the effect of the mistake upon her? Simply to take from her the difference between the two policies, and give her absolutely nothing for it. She surrendered a policy for $6,000, on which the liability of the company was already fixed, and received one for $2,500, to secure relief from a burden already removed. The company parted with nothing. She secured nothing. The whole transaction was a mistake, and, if the decree of the court stands, the result will be to take $3,500 from Mrs. Riegel and give it to the insurance company. These facts seem to us to present a clear and a strong case for equitable relief, so strong, indeed, that a mere statement of them is the only argument necessary for its support. The duty of a chancellor to relieve in cases of mutual mistake is so well settled that no citation of authorities can be needed. * * * The learned judge who heard this case in the court below, and who is thoroughly familiar with the principle to which we have referred, seems to have been misled in regard to the facts set up in the bill. He treats the arrangement made between Mrs. Riegel and the company on the 20th of March as a compromise of a claim against the company for the alleged death of Leisenring, which Mrs. Riegel was unable to establish, because unable to show the death. As the fact of the death, and the consequent liability of the company on the policy, were uncertain, it was a case for the application of the doctrine that the adjustment of a doubtful claim constituted a valid consideration for the surrender of the policy and the acceptance of the new one, and upon this theory the decree was entered. But it nowhere appears that Mrs. Riegel made any claim on the company, or supposed that she had any. She was asking relief from future payments of premiums on a policy on which she supposed future payments would have to be made, and, to get this relief, she was willing to sacrifice more than one half of the sum insured. The company was willing, in consideration of the large reduction of its liability, to give her a policy for what her payments would purchase, and relieve her in future. This is an exchange often made, and adjusted by well-settled rules. It was a compromise of nothing. We do not doubt the correctness of the rule applied by the learned judge in cases to which it is fairly applicable, but this is not one of them. The plaintiff distinctly avers that she did not know of the death of Leisenring until some 10 days after the exchange of policies was effected, and that 'both parties to the transaction were acting, in respect thereto, on the basis that Leisenring was alive.' She distinctly avers that the object of the arrangement was to secure relief for herself from the indefinite payment of premiums that had become burdensome to her; that the new policy was accepted for that reason, and the old one surrendered, at a time when, had she known the fact, she was entitled to demand the entire sum upon which she had so long and so steadily paid the burdensome premiums."

Little, if anything, can be profitably added to what is so clearly and forcibly said in the foregoing quotations in support of our former decree. The error into which the learned judge of the common pleas appears to have unintentionally fallen in the outset, and to which he seems to cling so pertinaciously, is not so much in regard to the well-settled principles of equity, upon which relief is granted in cases of mutual ignorance or mistake of material facts, as in the construction which he put upon the undisputed acts and declarations of the parties to this contention, and the circumstances connected therewith. Sufficient reference to those principles is made in our former opinion, but it may not be amiss to revert to some of them. The general rule is that an act done or a contract made under a mistake of a material fact is voidable and relievable in equity. The fact must of course be

material to the act or contract; for, though there may be an accidental mistake or ignorance of the fact, yet, if the act or contract is not materially affected by it, relief will not be granted. Thus, A. buys from B. an estate to which the latter is supposed to have an unquestionable title. It turns out, upon due investigation of the facts unknown at the time to both parties, that B. has no title; as, if there be a nearer heir than B., who was supposed to be dead, but is in fact living. In such a case equity would relieve the purchaser and rescind the contract. But suppose A. buys from B. an estate the location of which was well known to each of them, and they mutually believed it contained 20 acres, when in fact it contained only 19¾ acres, and the difference would not have varied the purchase in the view of either party; in such a case the mistake would not be ground for rescission of the contract. 1 Story, Eq. Jur. §§ 140, 141. It makes no difference in application of the principle that the subject-matter of the contract be known to both parties to be liable to a contingency which may destroy it immediately; for, if the contingency has, unknown to the parties, already happened, the contract will be avoided, as founded on a mutual mistake of a matter constituting the basis of the contract. 1 Story, Eq. Jur. §§ 143*a*, 143*b*. The principle is illustrated by familiar examples, employed by text writers, thus: A. agrees to buy a certain horse from B. It turns out that the horse is dead at the time of the bargain, though neither party was then aware of the fact. The agreement is void. A. agrees to buy a house belonging to B. The house was previously destroyed by fire, but the parties dealt in ignorance of that fact. The contract, not being for sale of the land on which the house stood, was not enforceable. So, too, A., being entitled to an estate for the life of B., agreed to sell it to C. B. was dead, but both parties were ignorant of the fact. The agreement was avoided. For similar reasons, a life insurance cannot be revived by payment of a premium within the time allowed for that purpose by the original contract, but after the life had dropped, unknown to both insurer and assured, although it was in existence when the premium became due, and although the insurer has waived proof of the party's health, which, by the terms of the renewal, it might have required. The waiver applies to the proof of health, not to the fact of his being alive. Pritchard v. Society, 3 C. B. (N. S.) 622. Mr. Pollock, in his excellent treatise on the Principles of Contract, (page *441,) states the general principle thus: "An agreement is void if it relates to a subject-matter (whether a material subject of ownership, or a particular title or right) contemplated by the parties as existing, but which in fact did not exist." This is followed by an interesting discussion of the subject, with numerous illustrations of the principles involved. See Cochrane v. Willis, 1 Ch. App. 58; Allen v. Hammond, 11 Pet. 71; Hitchcock v. Giddings, 4 Price, 135; Hore v. Becher, 12 Sim. 465; Couturier v. Hastie, 5 H. L. Cas. 673. In many of the cases prominence is given to failure of consideration, resulting from mutual mistake or ignorance of material facts, but entire failure of consideration is not an essential ingredient in any case.

It cannot be doubted that in exchanging the old for the new policy both parties acted on the basis that Leisenring was then alive. Their every act in the transaction was predicated of that as an assumed fact. The new policy, like the old one, was a risk on a life assumed to be then in being. The difference between them was that the one carried with it an obligation on the part of the holder to pay annual premiums during the life of Leisenring; the other exempted her from that obligation. She purchased that exemption by surrendering seven twelfths of the original insurance, or $3,500. If the exchange was not made on the assumption by both parties that Leisenring was then alive, the company stultified itself by issuing a paid-up policy on the life of one who was then in his grave; and the plaintiff was guilty of the supreme folly of paying $3,500 for exemption from a liability which, by the previous death of Leisenring, had *ipso facto* ceased. In other words, at the time the exchange of policies was made, the plaintiff had a perfectly valid claim upon the defendant for the full amount of the insurance, $6,000, and surrendered $3,500 of that to secure exemption from a liability that had ceased to exist; but she and the company were both at that time ignorant of the fact that the life on which the original risk was taken had previously dropped. The supposed element of doubt as to whether Leisenring was then dead or not never entered into the contemplation of either party; nor did it form any part of the consideration for exchange of policies. The positive and uncontradicted proof by the actuary of the company was that the amount of the paid-up policy was ascertained and fixed, according to the established rules of the company, at the very sum that would have been required if Leisenring had been personally present in the office when the terms of exchange were settled. The central fact underlying the transaction, and to which every circumstance connected therewith clearly points, was the assumption by both parties that Leisenring was then in full life. When last theretofore heard from he was alive, and the presumption was that he continued to live. In the absence of any knowledge to the contrary, it was quite natural and reasonable that the parties, in making the exchange, should act upon that presumption, and assume, as they evidently did, that he was still alive. Of course they could not know positively that he was then alive, any more than any one can certainly know that a friend from whom he is far separated by distance is now living. In view of the undisputed facts as to the acts of both parties, and everything connected with the transaction, it would be wholly unreasonable and unwarranted to hold that the parties treated upon the basis that the fact which was the subject of their agreement was doubtful, or that the contract was made "in view of doubtful facts, and because of the doubtful facts." In the light of the proofs upon

which the findings of the master are based, and of all the circumstances, the acts of the parties are not susceptible of any such construction as has been put upon them by the learned judge of the common pleas. In short, the facts established by the uncontradicted proofs, and found by the master, are essentially the same as those admitted by the demurrer, and upon which our former decree was based. Certainly they are not less favorable to the plaintiff now than then. It therefore appears to us that a proper consideration of the orderly administration of justice should have resulted in a decree in accordance with the views expressed in our former opinion.

This proceeding is not grounded upon a previous rescission of the agreement under which the exchange of policies was made, but is for the purpose of enforcing a rescission by decree of this court, etc. It is therefore adjudged that the decree of the court of common pleas be reversed and set aside, and exceptions to master's report dismissed; and it is now adjudged and decreed that the contract under which said exchange of insurance policies was made be rescinded; that the paid-up policy for $2,500 be surrendered and canceled; and that the original policy of insurance be reinstated, as of date of its surrender; and it is further adjudged and decreed that the defendant company pay to the plaintiff the sum of $6,000, with interest from October 4, 1889, and also all the costs of this proceeding.

PAXSON, C. J. I dissent, and would affirm the decree, upon the clear and able opinion of the learned judge below.

MITCHELL, J. I concur with the chief justice in his dissent.

## GRYMES v. SANDERS et al.

(93 U. S. 55.)

Supreme Court of the United States. Oct. Term, 1876.

Appeal from the circuit court of the United States for the eastern district of Virginia.

Conway Robinson and Mr. Leigh Robinson, for appellant. Edwin L. Stanton and George M. Dallas, for appellees.

Mr. Justice SWAYNE. The appellant was the defendant in the court below. The record discloses no ground for any imputation against him. It was not claimed in the discussion at the bar, nor is it insisted in the printed arguments submitted by the counsel for the appellees, that there was on his part any misrepresentation, intentional or otherwise, or any indirection whatsoever. Nor has it been alleged that there was any intentional misrepresentation or purpose to deceive on the part of others.

The case rests entirely upon the ground of mistake. The question presented for our determination is whether that mistake was of such a character, and attended with such circumstances, as entitle the appellees to the relief sought by their bill and decreed to them by the court below.

Peyton Grymes, the appellant, owned two tracts of land in Orange county, Va., lying about twenty-five miles from Orange court-house. The larger tract was regarded as valuable, on account of the gold supposed to be upon it. The two tracts were separated by intervening gold-bearing lands, which the appellant had sold to others. Catlett applied to him for authority to sell the two tracts, which the appellant still owned. It was given by parol; and the appellant agreed to give, as Catlett's compensation, all he could get for the property above $20,000. Catlett offered to sell to Lanagan. Lanagan was unable to spare the time to visit the property, but proposed to send Howel Fisher to examine it. This was assented to; and Catlett thereupon wrote to Peyton Grymes, Jr., the son of the appellant, to have a conveyance ready for Fisher and himself at the court-house upon their arrival. The conveyance was provided accordingly, and Peyton Grymes, Jr., drove them to the lands. They arrived after dark, and stayed all night at a house on the gold-bearing tract. Fisher insisted that he must be back at the court-house in time to take a designated train east the ensuing day. This involved the necessity of an early start the next morning. It was arranged that Peyton Grymes, Jr., should have Peyton Hume, who lived near at hand, meet Fisher on the premises in the morning and show them to him, while Grymes got his team ready for their return to the court-house. Hume met Fisher accordingly, and showed him a place where there had been washing for surface-gold, and then took him to an abandoned shaft, which he supposed was on the premises. There Fisher examined the quartz and other debris lying about. But a very few minutes had elapsed when Grymes announced that his team was ready. The party immediately started back to the court-house. Arriving too late for the train, they drove to the house of the appellant: and Fisher remained there until one o'clock that night. While Fisher was there, considerable conversation occurred between him and the appellant in relation to the property; but it does not appear that any thing was said material to either party in this controversy. Fisher proceeded to Philadelphia, and reported favorably to Lanagan, and subsequently, at his request, to Repplier, who became a party to the negotiation. He represented to both of them that the abandoned shaft was upon the premises. Catlett went to Philadelphia, and there he sold the property to the appellees for $25,000. Fisher was sent to the court-house to investigate the title. He employed Mr. Williams, a legal gentleman living there, to assist him. A deed was prepared by Mr. Williams, and executed by the appellant on the 21st of March, 1866. On the 7th of April ensuing, the appellees paid over $12,500 of the purchase-money, and gave their bond to the appellant for the same amount, payable six months from date, with interest. The deed was placed in the hands of a depositary, to be held as an escrow until the bond should be paid. Catlett, under a power of attorney, received the first installment, paid over to the appellant $10,000, and retained the residue on account of the compensation to which he was entitled under the contract between them. The vendees requested Hume to hold possession of the property for them until they should make some other arrangement. He occupied the premises until the following July, when, with their consent, he transferred the possession to Gordon. In that month, Lanagan and Repplier came to see the property. Hume was there washing for gold. He began to do so with the permission of the appellant before the sale, and had continued the work without intermission. The appellees desired to be shown the boundary-lines. Hume said he did not know where they were, and referred them to Johnson. Johnson came. The appellees desired to be taken to the shaft which had been shown to Fisher. Johnson said it was not on the premises. Hume thought it was. Johnson was positive; and he was right. The appellees seemed surprised, but said little on the subject. They proceeded to examine the premises within the lines, and, before taking their departure, employed Gordon to explore the property for gold. Subsequently this arrangement was abandoned, and they paid him for the time and money he had expended in getting ready for the work. In September, they sent Bowman as their agent to make the exploration. On his way, he stopped at the court-house, and told the appel-

lant that the shaft shown to Fisher as on the land was not on it. The appellant replied instantly, "that there was no shaft on the land he had sold to Repplier and Lanagan, and that he had never represented to any one that there was a shaft on the land, and that he had never authorized any one to make such a representation, nor did he know or have reason to believe that any such representation had, in fact, been made by any one." It does not appear that his attention had before been called to the subject, or that he was before advised that any mistake as to the shaft had occurred. Bowman spent some days upon the land, and made a number of cuts, all of which were shallow. The deepest was only fifteen feet in depth. It was made under the direction of Embry and Johnson, two experienced miners living in the neighborhood. It reached a vein of quartz, but penetrated only a little way into it. They thought the prospect very encouraging, and urged that the cut should be made deeper.

Bowman declined to do anything more, and left the premises. No further exploration was ever made. Johnson says, "I know the land well, and know there has been gold found upon it, and a great deal of gold, too,—that is to say, surface-gold,—but it has never been worked for vein-gold. The gold that I refer to was found by the defendant, Grymes, and those that worked under him." He considered Bowman's examination "imperfect and insufficient." He had had "twenty-three years' experience in mining for gold."

Embry's testimony is to the same effect, both as to the surface-gold and the character of the examination made by Bowman. The premises lie between the Melville and the Greenwood Mines. Before the war, a bucket of ore, of from three to four gallons, taken from the latter mine, yielded $2,400 of gold. This, however, was exceptional. In the spring of 1869 a vein was struck, from forty to fifty feet below the surface, yielding $500 to the ton. Work was stopped by the influx of water. It was to be resumed as soon as an engine, which was ordered, should arrive. Ore at that depth, yielding from eight to ten dollars a ton, will pay a profit. Embry says he is well acquainted with the courses of the veins in the Melville and the Greenwood Mines, and that "the Greenwood veins do pass through the land in controversy, and some of the Melville veins do also." Speaking of Bowman and his last cut, he says:—

"At the place I showed him where to cut he struck a vein, but just cut into the top of it; he did not go down through it, or across it. From the appearance of the vein, I was very certain that he would find gold ore, if he would cut across it and go deep into it, and I told him so at the time; but he said that they had sent for him to return home, and he couldn't stay longer to make the examination, and went off, leaving the cut as it was; and the exploration to this day has never been renewed. I am still satisfied, that, whenever a proper examination is made, gold, and a great deal of it, will be found in that vein; for it is the same vein which passes through the Greenwood Mine, which was struck last spring, and yielded $500 to the ton. His examination in other respects, as well as this, was imperfect and insufficient. I don't think he did any thing like making a proper exploration for gold. I don't think he had more than three or four hands, and they were not engaged more than eight or ten days at the utmost."

In September, 1866, Repplier instructed Catlett to advise the appellant, that, by reason of the mistake as to the shaft, the appellees demanded the return of the purchase-money which had been paid. In the spring of 1867, Lanagan, upon the same ground, made the same demand in person. The appellant replied, that he had parted with the money. He promised to reflect on the subject, and address Lanagan by letter. He did write accordingly, but the appellees have not produced the letter. This bill was filed on the 21st of March, 1868.

A mistake as to a matter of fact, to warrant relief in equity, must be material, and the fact must be such that it animated and controlled the conduct of the party. It must go to the essence of the object in view, and not be merely incidental. The court must be satisfied, that but for the mistake the complainant would not have assumed the obligation from which he seeks to be relieved. Kerr on Mistake and Fraud, 408; Trigg v. Read, 5 Humph. 529; Jennings v. Broughton, 17 Beav. 241; Thompson v. Jackson, 3 Rand. 507; Harrod's Heirs v. Cowan. Hardin, 553; Hill v. Bush, 19 Barb. (Ark.) 522; Juzan v. Toulmin, 9 Ala. 662.

Does the case in hand come within this category?

When Fisher made his examination at the shaft, it had been abandoned. This was prima facie proof that it was of no account. It does not appear that he thought of having an analysis made of any of the debris about it, nor that the debris indicated in any wise the presence of gold. He requested Hume to send him specimens from the shafts on the contiguous tracts, and it was done. No such request was made touching the shaft in question, and none were sent. It is neither alleged nor proved that there was a purpose at any time, on the part of the appellees, to work the shaft. The quartz found was certainly not more encouraging than that taken from the last cut made by Bowman under the advice of Embry and Johnson. This cut he refused to deepen, and abandoned. When Lanagan and Repplier were told by Johnson that the shaft was not on the premises, they said nothing about abandoning the contract, and nothing which

manifested that they attached any particular consequence to the matter, and certainly nothing which indicated that they regarded the shaft as vital to the value of the property. They proceeded with their examination of the premises as if the discovery had not been made. On his way to Philadelphia, after this visit, Lanagan saw and talked several times with Williams, who had prepared the deed. Williams says, "I cannot recollect all that was said in those conversations, but I do know that nothing was said about the shaft, and that he said nothing to produce the impression that he was dissatisfied or disappointed in any respect with the property after the examination that he had made of it." Lanagan's conversation with Houseworth was to the same effect.

The subsequent conduct of the appellees shows that the mistake had no effect upon their minds for a considerable period after its discovery, and then it seems to have been rather a pretext than a cause.

Mistake, to be available in equity, must not have arisen from negligence, where the means of knowledge were easily accessible. The party complaining must have exercised at least the degree of diligence "which may be fairly expected from a reasonable person." Kerr on Fraud and Mistake, 407.

Fisher, the agent of the appellees, who had the deed prepared, was within a few hours' travel of the land when the deed was executed. He knew the grantor had sold contiguous lands upon which veins of gold had been found, and that the course and direction of those veins were important to the premises in question. He could easily have taken measures to see and verify the boundary-lines on the ground. He did nothing of the kind. The appellees paid their money without even inquiring of any one professing to know where the lines were. The courses and distances specified in the deed show that a surveyor had been employed. Why was he not called upon? The appellants sat quietly in the dark, until the mistake was developed by the light of subsequent events. Full knowledge was within their reach all the time, from the beginning of the negotiation until the transaction was closed. It was their own fault that they did not avail themselves of it. In Shirley v. Davis, 6 Ves. 678, the complainant, being desirous to become a freeholder in Essex, bought a house which he supposed to be in that county. It proved to be in Kent. He was compelled in equity to complete the purchase. The mistake there, as here, was the result of the want of proper diligence. See also Seton v. Slade, 7 Ves. 269; 2 Kent's Com. 485; 1 Story's Eq., sects. 146, 147; Attwood v. Small, 6 Cl. & Fin. 338; Jennings v. Broughton, 17 Beav. 234; Campbell v. Ingilby, 1 De G. & J. 405; Garrett v. Burleson, 25 Tex. 44; Warner v. Daniels et al., 1 Woodb. & M. 91; Ferson v. Sanger, id. 139; Lamb v. Harris, 8 Ga. 546; Trigg v. Read, 5 Humph. 529; Haywood v. Cope, 25 Beav. 143.

Where a party desires to rescind upon the ground of mistake or fraud, he must, upon the discovery of the facts, at once announce his purpose, and adhere to it. If he be silent, and continue to treat the property as his own, he will be held to have waived the objection, and will be conclusively bound by the contract, as if the mistake or fraud had not occurred. He is not permitted to play fast and loose. Delay and vacillation are fatal to the right which had before subsisted. These remarks are peculiarly applicable to speculative property like that here in question, which is liable to large and constant fluctuations in value. Thomas v. Bartow, 48 N. Y. 200; Flint v. Woodin, 9 Hare, 622; Jennings v. Broughton, 5 De G., M. & G. 139; Lloyd v. Brewster, 4 Paige, 537; Saratoga & S. R. R. Co. v. Row, 24 Wend. 74; Minturn v. Main, 3 Seld. 220; 7 Rob. Prac., c. 25, sect. 2, p. 432; Campbell v. Fleming, 1 Ad. & El. 41; Sugd. Vend. (14th ed.) 335; Diman v. Providence, W. & B. R. R. Co., 5 R. I. 130.

A court of equity is always reluctant to rescind, unless the parties can be put back in statu quo. If this cannot be done, it will give such relief only where the clearest and strongest equity imperatively demands it. Here the appellant received the money paid on the contract in entire good faith. He parted with it before he was aware of the claim of the appellees, and cannot conveniently restore it. The imperfect and abortive exploration made by Bowman has injured the credit of the property. Times have since changed. There is less demand for such property, and it has fallen largely in market value. Under the circumstances, the loss ought not to be borne by the appellant. Hunt v. Silk, 5 East, 452; Minturn v. Main, 3 Seld. 227; Okill v. Whittaker, 2 Phill. 340; Brisbane v. Dacres, 5 Taunt. 144; Andrew v. Hancock, 1 Brod. & B. 37; Skyring v. Greenwood, 4 Barn. & C. 289; Jennings v. Broughton, 5 De G., M. & G. 139.

The parties, in dealing with the property in question, stood upon a footing of equality. They judged and acted respectively for themselves. The contract was deliberately entered into on both sides. The appellant guaranteed the title, and nothing more. The appellees assumed the payment of the purchase-money. They assumed no other liability. There was neither obligation nor liability on either side, beyond what was expressly stipulated. If the property had proved unexpectedly to be of inestimable value, the appellant could have no further or other claim. If entirely worthless, the appellees assumed the risk, and must take the consequences. Segur v. Tingley, 11 Conn. 142; Haywood v. Cope, 25 Beav. 140; Jennings v. Broughton, 17 id. 234; Attwood v. Small, 6 Cl. & Fin. 497; Marvin v. Bennett, 8 Paige, 321; Thom-

as v. Bartow, 48 N. Y. 198; Hunter v. Goudy, 1 Ham. 451; Hall v. Thompson, 1 Sm. & M. 481.

The bill, we have shown, cannot be maintained.

In our examination of the case, we have assumed that those who are alleged to have spoken to the agent of the appellees upon the subject of the shaft, before the sale, had the requisite authority from the appellant.

Considering this to be as claimed by the appellees, our views are as we have expressed them. We have not, therefore, found it necessary to consider the question of such authority; and hence have said nothing upon that subject, and nothing as to the aspect the case would present if that question were resolved in the negative.

Decree reversed, and case remanded with directions to dismiss the bill.

**PARK BROS. & CO., Limited, v. BLODGETT & CLAPP CO.**

(29 Atl. 133, 64 Conn. 28.)

Supreme Court of Errors of Connecticut. Feb. 8, 1894.

Appeal from court of common pleas, Hartford county; Taintor, Judge.

Action by Park Bros. & Co., Limited, against the Blodgett & Clapp Company for damages for breach of contract. Judgment for defendant. Plaintiff appeals. Affirmed.

Albert H. Walker, for appellant. Edward S. White, for appellee.

TORRANCE, J. This is an action brought to recover damages for the breach of a written contract, dated December 14, 1888. The contract is set out in full in the amended complaint. It is in the form of a written proposal, addressed by the plaintiff to the defendant, and is accepted by the defendant in writing upon the face of the contract. Such parts of the contract as appear to be material are here given: "We propose to supply you with fifteen net tons of tool steel, of good and suitable quality, to be furnished prior to January 1, 1890, at" prices set forth in the contract for the qualities of steel named therein. "Deliveries to be made f. o. b. Pittsburgh, and New York freight allowed to Hartford. To be specified for as your wants may require." The contract was made at Hartford, by the plaintiff through its agent A. H. Church, and by the defendant through its agent J. B. Clapp. After filing a demurrer and an answer, which may now be laid out of the case, the defendant filed an "answer, with demand for reformation of contract," in the first paragraph of which it admitted the execution of said written contract. The second, third, and fourth paragraphs of the answer are as follows: "The defendant avers that on or about December ——, 1888, it was agreed by and between the plaintiff and defendant, the plaintiff acting by its said agent, A. H. Church, that the plaintiff should supply the defendant prior to January 1, 1890, with such an amount of tool steel, not exceeding fifteen tons, as the defendant's wants during that time might require, and of the kinds and upon the terms stated in said contract, and that the defendant would purchase the same of the plaintiff on said terms. (3) That by the mistake of the plaintiff and defendant, or the fraud of the plaintiff, said written contract did not embody the actual agreement made as aforesaid by the parties. (4) That the defendant accepted the proposal made to it by the plaintiff, and contained in said written contract, relying upon the representations of the plaintiff's said agent, then made to it, that by accepting the same the defendant would only be bound for the purchase of such an amount of tool steel of the kinds named therein as its wants prior to January 1, 1890, might require, and the defendant then believed that such proposal embodied the terms of the actual agreement made as aforesaid by and between the plaintiff and defendant." The fifth and last paragraph of the answer is not now material. The answer claimed, by way of equitable relief, a reformation of the written contract. In reply the plaintiff denied the three paragraphs above quoted; denied specifically that the written contract did not embody the actual agreement made by the parties; and denied the existence of any joint mistake or fraud. Thereupon the court below, sitting as a court of equity, heard the parties upon the issues thus formed, found them in favor of the defendant, and adjudged that the written contract be reformed to correspond with the contract as set out in paragraph 2 of the answer. At a subsequent term of the court, final judgment in the suit was rendered in favor of the defendant. The present appeal is based upon what occurred during the trial with reference to the reformation of the contract. Upon that hearing the agent of the defendant was a witness, on behalf of the defendant, and was asked to state "what conversation occurred between him and A. H. Church in making the contract of December 14, 1888, at and before the execution thereof, and relevant thereto." The plaintiff "objected to the reception of any parol testimony, on the ground that the same was inadmissible to vary or contradict the terms of a written instrument, or to show any other or different contract than that specified in the instrument, or to show anything relevant to the defendant's prayer for its reformation." The court overruled the objection, and admitted the testimony, and upon such testimony found and adjudged as hereinbefore stated.

The case thus presents a single question, whether the evidence objected to was admissible under the circumstances; and this depends upon the further question, which will be first considered, whether the mistake was one which, under the circumstances disclosed by the record, a court of equity will correct. The finding of the court below is as follows: "The actual agreement between the defendant and the plaintiff was that the plaintiff should supply the defendant, prior to January 1, 1890, with such an amount of tool steel, not exceeding fifteen tons, as the defendant's wants during that time might require, and of the kinds and upon the terms stated in said contract, and that the defendant would purchase the same of the plaintiff on said terms. But by the mutual mistake of said Church and said Clapp, acting for the plaintiff and defendant respectively, concerning the legal construction of the written contract of December 14, 1888, that contract failed to express the actual agreement of the parties; and that said Church and said Clapp both intended to

have the said written contract express the actual agreement made by them, and at the time of its execution believed that it did." No fraud is properly charged, and certainly none is found, and whatever claim to relief the defendant may have must rest wholly on the ground of mistake. The plaintiff claims that the mistake in question is one of law, and is of such a nature that it cannot be corrected in a court of equity. That a court of equity, under certain circumstances, may reform a written instrument founded on a mistake of fact is not disputed; but the plaintiff strenuously insists that it cannot, or will not, reform an instrument founded upon a mistake like the one here in question, which is alleged to be a mistake of law. The distinction between mistakes of law and mistakes of fact is certainly recognized in the text-books and decisions, and to a certain extent is a valid distinction; but it is not practically so important as it is often represented to be. Upon this point Mr. Markby, in his "Elements of Law" (sections 268 and 269), well says: "There is also a peculiar class of cases in which courts of equity have endeavored to undo what has been done under the influence of error and to restore parties to their former position. The courts deal with such cases in a very free manner, and I doubt whether it is possible to bring their action under any fixed rules. But here again, as far as I can judge by what I find in the text-books and in the cases referred to, the distinction between errors of law and errors of fact, though very emphatically announced, has had very little practical effect upon the decisions of the courts. The distinction is not ignored, and it may have had some influence, but it is always mixed up with other considerations, which not unfrequently outweigh it. The distinction between errors of law and errors of fact is therefore probably of much less importance than is commonly supposed. There is some satisfaction in this, because the grounds upon which the distinction is made have never been clearly stated." The distinction in question can therefore afford little or no aid in determining the question under consideration. Under certain circumstances a court of equity will, and under others it will not, reform a writing founded on a mistake of fact; under certain circumstances it will, and under others it will not, reform an instrument founded upon a mistake of law. It is no longer true, if it ever was, that a mistake of law is no ground for relief in any case, as will be seen by the cases hereinafter cited. Whether, then, the mistake now in question be regarded as one of law or one of fact is not of much consequence; the more important question is whether it is such a mistake as a court of equity will correct; and this perhaps can only, or at least can best, be determined by seeing whether it falls within any of the well-recognized classes of cases in which such relief is furnished. At the same time the fundamental equitable principle which was specially applied in the case of Northrop v. Graves, 19 Conn. 548, may also, perhaps, afford some aid in coming to a right conclusion. Stated briefly and generally, and without any attempt at strict accuracy, that principle is that in legal transactions no one shall be allowed to enrich himself unjustly at the expense of another through or by reason of an innocent mistake of law or fact, entertained without negligence by the loser, or by both. If we apply this principle to the present case, we may see that, by means of a mutual mistake in reducing the oral agreement to writing, the plaintiff, without either party intending it, gained a decided advantage over the defendant, to which it is in no way justly entitled, or at least ought not to be entitled, in a court of equity.

The written agreement certainly fails to express the real agreement of the parties in a material point; it fails to do so by reason of a mutual mistake, made, as we must assume, innocently, and without any such negligence on the part of the defendant as would debar him from the aid of a court of equity. The rights of no third parties have intervened. The instrument, if corrected, will place both parties just where they intended to place themselves in their relations to each other; and, if not corrected, it gives the plaintiff an inequitable advantage over the defendant. It is said that if, by mistake, words are inserted in a written contract which the parties did not intend to insert, or omitted which they did not intend to omit, this is a mistake of fact which a court of equity will correct in a proper case. Sibert v. McAvoy, 15 Ill. 106. If, then, the oral agreement in the case at bar had been for the sale and purchase of 5 tons of steel, and, in reducing the contract to writing, the parties had, by an unnoticed mistake, inserted "15 tons" instead of "5 tons," this would have been a mistake of fact entitling the defendant to the aid of a court of equity. In the case at bar the parties actually agreed upon what may, for brevity, be called a conditional purchase and sale, and upon that only. In reducing the contract to writing, they, by an innocent mistake, omitted words which would have expressed the true agreement, and used words which express an agreement differing materially from the only one they made. There is perhaps a distinction between the supposed case and the actual case, but it is quite shadowy. They differ not at all in their unjust consequences. In both, by an innocent mistake mutually entertained, the vendor obtains an unconscionable advantage over the vendee, a result which was not intended by either. There exists no good, substantial reason, as it seems to us, why relief should be given in the one case and refused in the other, other things being equal. It is hardly necessary to say that, in cases like the one at bar, courts of equity ought to move with

great caution. Before an instrument is reformed, under such circumstances, the proof of the mistake, and that it really gives an unjust advantage to one party over the other, ought to be of the most convincing character. "Of course the presumption in favor of the written over the spoken agreement is almost resistless; and the court has wearied itself in declaring that such prayers (for relief of this kind) must be supported by overwhelming evidence, or be denied." Palmer v. Insurance Co., 54 Conn. 501, 9 Atl. 248. We are not concerned here, however, with the amount or sufficiency of the proofs upon which the court below acted, nor with the sufficiency of the pleadings; we must, upon this record, assume that the pleadings are sufficient, and that the proofs came fully up to the highest standard requirements in such cases. Upon principle, then, we think a court of equity may correct a mistake of law in a case like the one at bar, and we also think the very great weight of modern authority is in favor of that conclusion. The case clearly falls within that class of cases where there is an antecedent agreement, and, in reducing it to writing, the instrument executed, by reason of the common mistake of the parties as to the legal effect of the words used, fails, as to one or more material points, to express their actual agreement. It is perhaps not essential in all cases that there should be an antecedent agreement, as appears to be held in Benson v. Markoe, 37 Minn. 30, 33 N. W. 38; but we have no occasion to consider that question in the case at bar. The authorities in favor of the conclusion that a court of equity in such cases will correct a mistake, even if it be one of law, are very numerous, and the citation of a few of the more important must suffice.

In Hunt v. Rousmanier's Adm'rs, 1 Pet. 1, decided in 1828, it is said: "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 fulfill, 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." It was said in the argument before us that this was a mere obiter dictum, but that is hardly correct. It is true the case was held not to fall within the principle, but the principle was said to be "incontrovertible" (page 13), and was applied to the extent at least of determining that the case then before the court did not come within it. In Snell v. Insurance Co., 98 U. S. 85, the court applied the principle so clearly stated in the case last cited, and reformed a policy of insurance, though the mistake was clearly one as to the legal effect of the language of the policy. In numerous other decisions of that court the same principle has been cautiously but repeatedly applied, but it is not necessary to cite them. On the general question, whether a court of equity will relieve against a mistake as to the legal effect of the language of a writing, the case of Griswold v. Hazard, 141 U. S. 260, 11 Sup. Ct. 972, 999, is a strong case, though perhaps hardly an authority upon the precise question in this case. Canedy v. Marcy, 13 Gray, 373, was a case where the oral contract was for the sale of two-thirds of certain premises, but the deed, by mistake of the scrivener, conveyed the entire premises. The words used were ones intended to be used in one sense, the error being that all concerned supposed those words would carry out the oral agreement. This was clearly a mistake "concerning the legal construction of the written contract," but the court, by Chief Justice Shaw, said: "We are of the opinion that courts of equity in such cases are not limited to affording relief only in cases 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." In Goode v. Riley, 153 Mass. 585, 28 N. E. 228, decided in 1891, the court says: "The only question argued is raised by the defendant's exception to the refusal of a ruling that, if both parties intended that the description should be written as it was written, the plaintiff was not entitled to a reformation. It would be a sufficient answer that the contrary is settled in this commonwealth,"—citing a number of cases. In Kennard v. George, 44 N. H. 440, the parties, by mistake as to its legal effect, supposed a mortgage deed to be valid when it was not. The court relieved against the mistake, and said: "It seems to us to be a clear case of mutual mistake, where the instrument given and received was not in fact what all the parties to it supposed it was and intended it should be; and in such a case equity will interfere and reform the deed, and make it what the parties at the time of its execution intended to make it; and in this respect it makes no difference whether the defect in the instrument be in a statutory or common-law requisite, or whether the parties failed to make the instrument in the form they intended, or misapprehended its legal effect." In Eastman v. Association, 65 N. H. 176, 18 Atl. 745, decided in 1889, the mistake was as to the legal effect of an insurance certificate, but the court granted relief by way of reformation. The court says: "Both parties intended to make the benefit payable to Gigar's administrator. That it was not made payable to him was due to their mutual misapprehension of the legal effect of the language used in the certificate. * * * Equity requires an amendment of the writing that will make the contract what the parties supposed it was, and intended it should be, although their mistake is one of law, and not of fact." In Trusdell v. Lehman, 47 N. J. Eq. 218, 20 Atl. 391, the marginal note is as follows: "Where it clearly appears that a deed drawn professedly to carry out the

agreement of the parties, previously entered into, is executed under the misapprehension that it really embodies the agreement, whereas, by mistake of the draughtsman either as to fact or law, it fails to fulfill that purpose, equity will correct the mistake by reforming the instrument in accordance with the contract." In a general way, the same rule is recognized and applied with more or less strictness in the following cases: Clayton v. Freet, 10 Ohio St. 544; Bush v. Hicks, 60 N. Y. 298; Andrews v. Andrews, 81 Me. 337, 17 Atl. 166; May v. Adams, 58 Vt. 74, 3 Atl. 187; Griffith v. Townley, 69 Mo. 13; Benson v. Markoe, 37 Minn. 30, 33 N. W. 38; Gump's Appeal, 65 Pa. St. 476; Cooper v. Phibbs, L. R. 2 H. L. 170. See, also, 2 Pom. Eq. Jur. § 845, and Bisp. Eq. §§ 184–191. And, whatever the law may be elsewhere, this is certainly the law of our own state. Chamberlain v. Thompson, 10 Conn. 243; Stedwell v. Anderson, 21 Conn. 144; Woodbury Savings Bank v. Charter Oak Ins. Co., 31 Conn. 518; Palmer v. Insurance Co., 54 Conn. 488, 9 Atl. 248; and Haussman v. Burnham, 59 Conn. 117, 22 Atl. 1065. Indeed, since the time of Northrop v. Graves, supra, it is difficult to see how our law could have been otherwise. We conclude then that by our own law, and by the decided weight of authority elsewhere, the defendant was entitled to the relief sought. If this is so, then clearly he was entitled to the parol evidence which the plaintiff objected to; for in no other way, ordinarily, can the mistake be shown. "In such cases parol evidence is admissible to show that the party is entitled to the relief sought." Wheaton v. Wheaton, 9 Conn. 96. "It is settled, at least in equity, that this particular kind of evidence, that is to say, of mutual mistake as to the meaning of words used, is admissible for the negative purpose we have mentioned. And this principle is entirely consistent with the rule that you cannot set up prior or contemporaneous oral dealings to modify or override what you knew was the effect of your writing." Goode v. Riley, 153 Mass. 585, 28 Atl. 228; Reyn. Theory Ev. § 69; 1 Greenl. Ev. (15th Ed.) § 269a; Steph. Dig. Ev. § 90.

The view we have taken of this case renders it unnecessary to notice at any length the cases cited by counsel for the plaintiff in his able argument before us. Upon his brief, he cites five from Illinois, two from Indiana, and one from Arkansas. After an examination of them, we can only say that most of them seem to support the claims of the plaintiff. If so, we think they are opposed to the very decided weight of authority, and do not state the law as it is held in this state.

Before closing, however, we ought to notice the case of Wheaton v. Wheaton, supra, upon which the plaintiff's counsel seems to place great reliance. The case is a somewhat peculiar one. Even in that case, however, the court seems to recognize the principle governing the class of cases within which we decide the case at bar falls, for it says: "It is not alleged that the writings were not so drawn as to effectuate the intention of the parties, through the mistake of the scrivener. On the contrary it is alleged that the scrivener was not even informed what the agreement between the parties was." From the statement of the case in the record and in the opinion, it clearly appears that the mistake was not mutual; indeed, it does not even appear that at the time when the note was executed the other party even knew that there was any mistake at all on the part of anybody. Upon the facts stated, the plaintiff in this case did not bring it within the class of cases we have been considering. The case was correctly decided, not on the ground that the mistake was one of law, but on the ground that the mistake of law was one which, under the circumstances alleged, a court of equity would not correct. The court, however, in the opinion, seems to base its decision upon the distinction between mistakes of law and mistakes of fact; holding in general and unqualified terms, as was once quite customary, that the latter could be corrected and the former could not. The court probably did not mean to lay the law down in this broad and unqualified way; but if it did, it is sufficient to say that it is not a correct statement of our law, at least since the decision of Northrop v. Graves, supra. On the whole, this case of Wheaton v. Wheaton can hardly be regarded as supporting the plaintiff's contention. There is no error apparent upon the record. In this opinion the other judges concurred.

PERKINS v. PARTRIDGE et al.

(30 N. J. Eq. 82.)

Court of Chancery of New Jersey. Oct. Term, 1878.

Bill for relief. On final hearing, on pleadings and proofs.

B. A. Vail, for complainant. S. M. Dickinson, for defendants.

THE CHANCELLOR. The complainant seeks to set aside a conveyance made by him to Charles F. Partridge, on the 1st of August, 1875, whereby he conveyed in fee to the latter his house and lot in Woodbridge township, in the county of Middlesex, for the consideration (including the price of certain household furniture sold with the property) of $10,000, subject, however, to a mortgage of $3,000 thereon. For the balance, $7,000, of the purchase-money, after deducting the amount of the mortgage, he agreed to receive, and did receive accordingly, a mortgage of that amount then held by the defendant, Charles Partridge, father of the grantee, on nineteen hundred and twenty acres of wild land in Brown's tract, in Herkimer county, New York. The ground of the complainant's complaint is that he was induced to accept the last-mentioned mortgage through false and fraudulent representations in reference thereto made by the defendants. These representations, according to the bill, were, that the property was a good and safe security for the money the payment of which the mortgage purported to secure; and that the mortgaged land was sold by Charles Partridge to the mortgagor at the rate of $25 an acre. The bill alleges that, in fact, the mortgagor (who was also the obligor in the bond therein mentioned, and the payment of which it was made to secure) was a man of no pecuniary responsibility; and that the mortgaged premises were not sold by Charles Partridge for any such sum of money as the defendants represented, and were worth only about $2,000.

That the complainant was defrauded by the representations of the defendants, is clear from the evidence. His property was brought to the notice of Charles F. Partridge by Frederick Reed, a real estate agent, to whom Partridge had applied with a view to obtaining an exchange of some Brooklyn property of his for country property. Reed had the complainant's property also in hand to find a purchaser for it. He mentioned to each of the parties the property of the other, with a view to exchange. The complainant was not satisfied to exchange at the price at which the Brooklyn property was held. This was communicated by the agent to Partridge, who then said he had made up his mind to retain his Brooklyn property and get a country place in some other way. He then said that "his father (the defendant, Charles Partridge,) had a mortgage of $7,000 on land in Herkimer county which was good, which he would put in in exchange; that his father would let him have it to use, but not for a cent less than the face of it; and that he would have to pay his father for it." After the contract was signed, and on the day when the deed was delivered and before the papers were exchanged, the complainant and Charles F. Partridge and his father being then at the lawyer's office to exchange the papers, Reed, who was there also, sought and obtained a private interview with Charles Partridge, the father (who seems to have interested himself in getting the contract drawn and signed), and then said to him that the complainant, as he, Reed, had learned, knew nothing about the $7,000 mortgage, had had no time to search the title or investigate the matter at all, and would have to rely entirely on what he, Partridge, said about it. Partridge then said that it was a perfectly good, first-class mortgage; that the parties were good, and that the interest had always been paid promptly; and that he had sold the land for $25 an acre, and would not sell any more of the tract for less than $30 an acre. Reed thereupon informed the complainant of the purport of the conversation, and the deed was then delivered and the mortgage accepted. The complainant testifies that Charles Partridge came to see his property before the contract was entered into, and then mentioned the mortgage to him, saying that it was a good mortgage, and that he had sold the land on which it was for $25 an acre. The complainant testifies that Charles F. Partridge told him, both before and after the conveyance had been made, that he would have to pay his father $7,000 for the mortgage; that $6,999 would not buy it. The complainant's wife corroborates him in this statement as to one occasion, she having been present when Charles F. Partridge said substantially the same thing to him. The fact appears to be that Charles Partridge not only did not sell the mortgaged premises for $25 an acre, but did not sell them at all. He swears, indeed, that he sold them to the mortgagor, Thomas H. Phillips, and the deed to the latter probably (it has not been laid before me) expresses a consideration in accordance with the representations, but it is evident that there was no bona fide sale at all. Charles Partridge, indeed, swears that Phillips paid something, besides giving the mortgage, as consideration, but admits that it was only from $10 to $25, and though he further says that Phillips agreed to pay $15 or $20 an acre, Phillips swears that he gave no consideration except the mortgage. It seems extremely probable that the conveyance to Phillips was made merely in order to obtain a mortgage from an apparent purchaser. Charles Partridge testifies that he made an exchange of the property with certain persons whom he designates as Charles F. Bouton and De

Witt H. Phillips (though the conveyance to Thomas H. Phillips had then been made), and that he gave Thomas H. Phillips a consideration for conveying directly to them. It appears that he gave him about $50 for his trouble in the matter. Thomas H. Phillips says that he thinks the conveyance to Bouton and Phillips was made on the same day on which the property was conveyed to him. The deed to Bouton and Phillips has never been put on record, and neither of the defendants can give any trustworthy account of either of those persons.

The statement made by the defendants, of the manner in which the son accounted to the father for the value of the mortgage, is unsatisfactory.

Again, there is evidence of fraudulent design in the endorsements of interest made by Charles Partridge on the bond. Six months' interest is endorsed thereon as having been received in September (the word, however, is written over the word "March"), 1874, from Thomas H. Phillips, and the same amount from him on the 7th of April, 1875, while the evidence is that Thomas H. Phillips conveyed away the property on the same day on which it was conveyed to him, March 6, 1874, and he swears that he never paid Charles Partridge, or any one else, any interest on the mortgage. It is worthy of remark, in this connection, that Charles Partridge says, in his testimony, that he received this interest of Bouton and Phillips, and that the Phillips of that firm was not Thomas H. Phillips. No interest has been paid on the mortgage since it was assigned to the complainant.

The mortgaged premises appear to have been valued, in 1866, at $2 an acre, and their value consisted, principally, in the bark of the hemlock trees growing on them. The right to this bark was reserved by the grantors, in the deed to Partridge, and the bark has since been taken away by them. The land, therefore, appears to be of little, if any, value. Nor are the representations which were made by the defendants to induce the complainant to accept the mortgage, to be regarded as mere "dealing talk" —simplex commendatio. They were substantial, important representations as to existing facts, materially affecting the character and value of the mortgage. That the mortgaged premises had been sold, by the mortgagee, to the mortgagor for about $50,000; that the property was first-rate property; that the land was good and the timber valuable; that the land would be more valuable after it was cleared; that the mortgage was a good mortgage—all these are false allegations as to the existence of material facts.

By means of these false and fraudulent representations, made, it is evident, for the purpose of inducing the complainant to accept the mortgage as $7,000 of the purchase-money of his property, the defendants were enabled to obtain the conveyance of that property. The complainant made no investigation as to the character of the mortgage, or the value of the mortgaged premises, because of his confidence in those representations, and it appears that the defendants were anxious and in haste to close up the transaction and obtain a deed for his property. The complainant has been guilty of no laches to debar him from relief. It appears, from the testimony, that, by the agreement, Charles F. Partridge was to have the interest which would become due on the mortgage on the 6th of September, 1875. The principal of the mortgage was not due until March 6, 1877. The bill was filed on the 16th of December, 1875. The complainant, before filing the bill, and after he found that he could collect no interest on the mortgage, requested Charles F. Partridge to reconvey the Woodbridge property to him, offering to reassign to him the mortgage, but Partridge refused. The complainant is entitled to relief. The deed should be set aside and a reconveyance to the complainant ordered on the complainant's re-assigning the bond and mortgage to the defendant, Charles F. Partridge. He, according to the testimony of his father, purchased it of him, and has paid him therefor in full. Charles F. Partridge must account, also, for the use and occupation of the house and lot conveyed to him by the complainant, and for the value of the household furniture. The defendants will be decreed to pay costs.

STIMSON v. HELPS et al.

(10 Pac. Rep. 290, 9 Colo. 33.)

Supreme Court of Colorado. Feb. 26, 1886.

Appeal from county court, Boulder county.

The complaint sets out that on the sixth day of October, 1881, William Stimson leased to the defendants in error the S. W. ¼ of section 21, in township 1, range 70 west, in said county, for the period of four years and six months, for the purpose of mining for coal, under the conditions of said lease; that they had no knowledge of the location of the boundary lines of said tract at the time of the leasing, and that they so informed Stimson, the defendant in the case; that they requested Stimson to go with them and show them the boundary lines; that the defendant, pretending to know the lines bounding said land, and their exact locality, went then and there with plaintiffs, and showed and pointed out to them what he said was the leased land, and the boundary lines thereof, especially the north and south lines thereof; that plaintiffs not then knowing the lines bounding said land, nor the exact location thereof, and relying upon what the defendant then and there pointed out to them as the leased land, and the lines thereof, then and there proceeded to work on the land pointed out, and sank shafts for mining coal thereon, and made sundry improvements thereon,—made buildings, laid tracks, etc.; that all the said work was done and labor performed and improvements made on the land pointed out by defendant to plaintiffs as the leased land, and that plaintiffs, relying upon the statements of defendant as aforesaid, and not knowing otherwise, believed they were performing the work, and making all the improvements on the land they had so leased, which they did by direction of the defendant; that while they were working on the said land Stimson was frequently present, and told the plaintiffs they were on his land, and received royalty from ore taken therefrom; that about April 10, 1882, they were notified to quit mining on said ground by the Marshall Coal Mining Company; that the land belonged to said company; that none of the said improvements were put on said leased land; and that they were compelled to quit work and mining thereon; that the improvements made by them were worth $2,000; that Stimson falsely represented to them other and different lines than the true boundaries of said premises, and showed and pointed out to them other and different lands than the lands leased them, and thereby deceived them, and damaged them, in the sum of $2,000. Issue joined, and trial to the court. Motion by defendant's counsel for judgment on the pleadings, and evidence overruled. Judgment for the plaintiffs in the sum of $2,000, and costs.

Wright & Griffin, for appellant. G. Berkley, for appellees.

ELBERT, J. The law holds a contracting party liable as for fraud on his express representations concerning facts material to the treaty, the truth of which he assumes to know, and the truth of which is not known to the other contracting party, where the representations were false, and the other party, relying upon them, has been misled to his injury. Upon such representations so made the contracting party to whom they are made has a right to rely, nor is there any duty of investigation cast upon him. In such a case the law holds a party bound to know the truth of his representations. Bigelow, Fraud, 57, 60, 63, 67, 68, 87; Kerr, Fraud & M. 54 et seq.; 3 Wait, Act. & Def. 436. This is the law of this case, and, on the evidence, warranted the judgment of the court below.

The objection was made below, and is renewed here, that the complaint does not state sufficient facts to constitute a cause of action. Two points are made: (1) That the complaint does not allege that the defendant knew the representations to be false; (2) that it does not allege intent to defraud.

It is not necessary, in order to constitute a fraud, that the party who makes a false representation should know it to be false. He who makes a representation as of his own knowledge, not knowing whether it be true or false, and it is in fact untrue, is guilty of fraud as much as if he knew it to be untrue. In such a case he acts to his own knowledge falsely, and the law imputes a fraudulent intent. Kerr, Fraud & M. 54 et seq., and cases cited; Bigelow, Fraud, 63, 84, 453; 3 Wait, Act. & Def. 438 et seq.; 2 Estee, Pr. 394 et seq. "Fraud" is a term which the law applies to certain facts, and where, upon the facts, the law adjudges fraud, it is not essential that the complaint should, in terms, allege it. It is sufficient if the facts stated amount to a case of fraud. Kerr, Fraud & M. 366 et seq., and cases cited; 2 Estee, Pl. 423. The complaint in this case states a substantial cause of action, and is fully supported by the evidence.

The action of the county court in refusing to allow the appellant to appeal to the district court after he had given notice of an appeal to this court, and time had been given in which to perfect it, cannot be assigned as error on this record. If it was an error, it was error not before, but after, the final judgment from which this appeal is taken.

The judgment of the court below is affirmed.

[Note from 10 Pac. Rep. 292.]

A contract secured by false and fraudulent representations cannot be enforced. Mills v. Collins, 67 Iowa, 164, 25 N. W. Rep. 109.

A court of equity will decree a rescission of a contract obtained by the fraudulent representations or conduct of one of the parties thereto, on the complaint of the other, when it satisfactorily appears that the party seeking the rescission has been misled in regard to a ma-

terial matter by such representation or conduct, to his injury or prejudice. But when the facts are known to both parties, and each acts on his own judgment, the court will not rescind the contract because it may or does turn out that they, or either of them, were mistaken as to the legal effect of the facts, or the rights or obligations of the parties thereunder, and particularly when such mistake can in no way injuriously affect the right of the party complaining under the contract, or prevent him from obtaining and receiving all the benefit contemplated by it, and to which he is entitled under it. Seeley v. Reed, 25 Fed. Rep. 361.

When, by false representations or misrepresentations, a fraud has been committed, and by it the complainant has been injured, the general principles of equity jurisprudence afford a remedy. Singer Manuf'g Co. v. Yarger, 12 Fed. Rep. 487. See Chandler v. Childs, 42 Mich. 128, 3 N. W. Rep. 297; Cavender v. Roberson, 33 Kan. 626, 7 Pac. Rep. 152.

When no damage, present or prospective, can result from a fraud practiced, or false representations or misrepresentation made, a court of equity will not entertain a petition for relief. Dunn v. Remington, 9 Neb. 82, 2 N. W. Rep. 230.

A person is not at liberty to make positive assertions about facts material to a transaction unless he knows them to be true; and if a statement so made is in fact false, the assertor cannot relieve himself from the imputation of fraud by pleading ignorance, but must respond in damages to any one who has sustained loss by acting in reasonable reliance upon such assertion. Lynch v. Mercantile Trust Co., 18 Fed. Rep. 486.

Equity will not relieve against a misrepresentation, unless it be of some material matter constituting some motive to the contract, something in regard to which reliance is placed by one party on the other, and by which he was actually misled, and not merely a matter of opinion, open to the inquiry and examination of both parties. Buckner v. Street, 15 Fed. Rep. 365.

False representations may be a ground for relief, though the person making them believes them true, if the person to whom they were made relied upon them, and was induced thereby to enter into the contract. Seeberger v. Hobert, 55 Iowa, 756, 8 N. W. Rep. 482.

Fraudulent representations or misrepresentations are not ground for relief, where they are immaterial, even though they be relied upon. Hall v. Johnson, 41 Mich. 286, 2 N. W. Rep. 55. See, to same effect, Lynch v. Mercantile Trust Co., 18 Fed. Rep. 486; Seeberger v. Hobert, 55 Iowa, 756, 8 N. W. Rep. 482.

In fraudulent representation or misrepresentation the injured parties may obtain relief, even though they did not suppose every statement made to them literally true. Heineman v. Steiger, 54 Mich. 232, 19 N. W. Rep. 965.

Where the vendor honestly expresses an incorrect opinion as to the amount, quality, and value of the goods he disposes of in a sale of his business and good-will thereof, and the purchaser sees or knows the property, or has an opportunity to know it, no action for false representations will lie. Collins v. Jackson, 54 Mich. 186, 19 N. W. Rep. 947.

Mere "dealing talk" in the sale of goods, unless accompanied by some artifice to deceive the purchaser or throw him off his guard, or some concealment of intrinsic defects not easily detected by ordinary care and diligence, does not amount to misrepresentation. Reynolds v. Palmer, 21 Fed. Rep. 433.

False statements made at the time of the sale by the vendor of chattels, with the fraudulent intent to induce the purchaser to accept an inferior article as a superior one, or to give an exorbitant and unjust price therefor, will render such purchase voidable; but such false statement must be of some matter affecting the character, quantity, quality, value, or title of such chattel. Bank v. Yocum, 11 Neb. 328, 9 N. W. Rep. 84.

A statement recklessly made, without knowledge of its truth, is a false statement knowingly made, within the settled rule. Cooper v. Schlesinger, 111 U. S. 148, 4 Sup. Ct. Rep. 360.

Whether or not omission to communicate known facts will amount to fraudulent representation depends upon the circumstances of the particular case, and the relations of the parties. Britton v. Brewster, 2 Fed. Rep. 160.

Where a vendor conceals a material fact, which is substantially the consideration of the contract, and which is peculiarly within his knowledge, it is fraudulent misrepresentation. Dowling v. Lawrence, 58 Wis. 282, 16 N. W. Rep. 552.

Evidence of fraudulent representations must be clear and convincing. Wickham v. Morehouse, 16 Fed. Rep. 324.

Where a man sells a business, and the contract of sale contained a clause including all right to business done by certain agents, evidence that the seller was willing to engage in the same business with such agents is not proof of fraud in making the contract. Taylor v. Saurman, 110 Pa. St. 3, 1 Atl. Rep. 40.

It was recently held by the supreme court of Indiana, in the case of Cook v. Churchman, 104 Ind. 141, 3 N. E. Rep. 759, that where money is obtained under a contract, any fraudulent representations employed by a party thereto as a means of inducing the loan to be made, if otherwise proper, are not to be excluded because of the statute of frauds; also that where parol representations are made regarding the credit and ability of a third person, with the intent that such third person shall obtain money or credit thereon, the statute of fraud applies, and no action thereon can be maintained, although the party making the representations may have entered into a conspiracy with such person with the expectation of obtaining some incidental benefit for himself.

## HARRIS v. TYSON.
(24 Pa. St. 347.)[1]

Supreme Court of Pennsylvania. May 21, 1855.

Error to court of common pleas, Chester county.

Mr. Bell, for plaintiff in error. Hickman & Lewis, for defendant in error.

BLACK, J. This action depends on the defendant's right to dig and take away chrome from the land of the plaintiff. The defendant claims that right under the plaintiff's deed, giving and granting it in due form. But the plaintiff asserts that the deed is fraudulent and void, because (1) the defendant suppressed the truth; (2) he suggested a falsehood; (3) he paid a totally inadequate consideration; and (4) he got the deed by means of threats, which amounted to duress.

1. A person who knows that there is a mine on the land of another may nevertheless buy it. The ignorance of the vendor is not of itself fraud on the part of the purchaser. A purchaser is not bound by our laws to make the man he buys from as wise as himself. The mere fact, therefore, that Tyson knew there was sand chrome on Harris' land, and that Harris himself was ignorant of it, even if that were exclusively established, would not be ground for impugning the validity of the deed. But it is not by any means clear that one party had much advantage over the other in this respect. They both knew very well that chrome could be got there, which one wanted and the other had no use for. But the whole extent of it in quantity was probably not known to either of them for some time after the deed. When it was discovered that sand chrome was as valuable as the same mineral found in the rock, and that large quantities of the former could be got in certain parts of the fast land as well as by the streams, it was natural enough that the plaintiff should repent, and the defendant rejoice, over the contract; but this did not touch its validity. Every man must bear the loss of a bad bargain legally and honestly made. If not, he could not enjoy in safety the fruits of a good one. Besides, we do not feel sure that the contract has made the plaintiff any poorer, for it is not improbable that he would never have discovered the value of the mineral deposit on his land if he had not granted to the defendant the privilege of digging.

2. If the defendant, during the negotiation for the purchase, willfully made any misstatement concerning a material fact, and then misled the plaintiff, and induced him to sell it at a lower price than he otherwise would, then the contract was a cheat, and the deed is void utterly. But, in all cases where the evidence brings the parties face to face, the language and conduct of the defendant seem to have been unexceptionable. An offer was made and rejected to prove that Tyson had made certain statements in the neighborhood which were calculated to produce the impression that all the chrome in that region was not very valuable. It was even proposed to be shown that he had spoken in depreciating terms of sand chrome on a tract adjoining Harris'. It would at least have been useless, and it might have had a pernicious influence on the minds of the jury, to have admitted such evidence. To invalidate a solemn deed by showing that misrepresentations were used to obtain it, there must be very clear proof that the falsehood was told directly or indirectly to the grantor. It was not to be supposed that he was influenced by a statement neither made to himself nor communicated to him. If the vendee's conduct in all his transactions with the vendor was honest and fair, he is not answerable in this action for what he may not have said elsewhere to other persons.

3. 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.

4. The allegation of duress is founded on these facts: Before the date of the deed now in question, Harris made a written contract with Tyson to sell him his land out and out; but he refused to make the conveyance, and Tyson declared that he would bring an action on the covenant. The difficulty was then settled by the cancellation of the agreement, and the execution of the deed granting the mineral right. The court received this evidence, and most properly instructed the jury that duress to invalidate the deed must be of the person. For the plaintiff it was insisted that the deed might be avoided merely by proving a threat to sue the grantor for a good cause of action. There is not only no judicial decision in favor of this opinion, but I think it is new, even as an argument at the bar. This is the whole body of the case. There is nothing else of leading importance in it. Yet the judgment is brought here on no less than thirty-nine exceptions.

* * * * * * * * *

Judgment affirmed.

[1] Irrelevant parts of opinion omitted.

MATTHEWS v. CROCKETT'S ADM'R et al. (82 Va. 394.)

Supreme Court of Appeals of Virginia. Sept. 16, 1886.

Appeal from circuit court, Wythe county, in the cause of J. Stuart Crockett, as administrator c. t. a. of Elizabeth E. Crockett, deceased, and as committee of Henry E. Crockett, a lunatic, etc., as plaintiff, against C. E. Mayer and Maria B., his wife, William Gibboney, Alex. F. Matthews, and others, defendants.

The case, so far as it is necessary to be stated in order to a correct understanding of the matter in controversy, is this: The said Elizabeth E. Crockett, under the terms of the will of her father, the late Henry Erskene, was entitled for her life to the interest on a certain coupon mortgage bond of the White Sulphur Springs Company. This bond is described in the record as "Bond No. 2," and was for the sum of $21,848.66. In 1869, being indebted to one William Gibboney, of Wythe county, in the sum of $2,210.92, she delivered to the latter two coupons cut from the said bond, each being for the sum of $1,310.92, and due October 15, 1861, and October 15, 1862, respectively, to be by him collected, and the proceeds, as far as necessary, to be applied to the payment of his debt, and the balance, if any, to be paid over to her. This arrangement was evidenced by a written contract, dated June 28, 1869, and designated in the record as "the Gibboney Contract."

In January, 1877, Elizabeth E. Crockett departed this life, leaving three children surviving her, who, under the will of Henry Erskene, thereupon became entitled to the said bond. These children were the appellees, J. Stuart Crockett, Henry E. Crockett, and Maria B., the wife of C. E. Mayer. The first, J. Stuart Crockett, qualified as the administrator with the will annexed of his mother, and afterwards as committee of his brother, Henry E. Crockett, who had become non compos mentis.

On the 13th of January, 1880, the said J. Stuart Crockett, as administrator and committee as aforesaid, assigned to the appellant, Alex. F. Matthews, of Lewisburg, W. Va., the coupons above mentioned, subject to the rights of Gibboney, and so much of the interest of Henry E. Crockett as had not been previously assigned in the bond aforesaid. The consideration for this assignment was the sum of $3,500 in cash.

In the progress of the cause in the lower court, Matthews, as a defendant, filed an answer asserting a claim to the bond and coupons by virtue of the assignment, and praying that his answer be treated, if necessary, as a cross bill, which was ordered accordingly.

To this cross bill J. Stuart Crockett, in his own right and as administrator and committee as aforesaid, filed an answer, which he prayed to be also treated as a cross bill, charging that at the time of the assignment, the defendant, Matthews, was counsel to collect the claims thereby assigned; that he took advantage of his position as counsel to defraud the complainant; that he withheld from him material information as to the value of the securities, and by concealment and misrepresentations obtained the assignment for a grossly inadequate consideration. And the prayer of the cross bill was that the assignment be canceled.

Matthews answered, denying that he was the complainant's counsel, as charged in the cross bill. He averred that the complainant proposed to him to buy the securities, and that he bought the same for a fair consideration. He denied the charges of fraud, concealment, and misrepresentation, and he denied generally the allegations of the cross bill.

Testimony was taken, and, the cause coming on to be heard, a decree was rendered declaring the assignment, so far as the coupons were concerned, to be null and void; and thereupon Matthews appealed.

J. W. Caldwell, for appellant. J. A. Walker and D. S. Pierce, for appellees.

LEWIS, P. (after stating the facts as above) delivered the opinion of the court. We are of opinion that the decree is erroneous. A careful examination of the record leaves no room for doubt that the evidence, so far from overcoming, sustains the answer of the appellant in every essential particular. It is unnecessary, therefore, to decide whether an attorney may lawfully purchase from his client, pendente lite, the subject-matter of his employment (as to which, see Rogers v. Marshall, 3 McCrary, 76, 13 Fed. 59; 2 White & T. Lead. Cas. Eq. pt. 2, p. 1216 et seq.); for no such question properly arises in the present case.

The appellee Crockett claims that he employed the appellant as his counsel to collect the bond and coupons in question in the suit of Gay, etc., v. White Sulphur Springs Co., etc., pending in the district court of the United States for the district of West Virginia, and that he so employed him in the fall of 1877. But this is not only denied by the appellant in his answer and in his deposition, but is disproved by the letters of the appellee himself, many of which are filed with the record. Thus, in a letter written from Wytheville, dated January 16, 1878, after referring to certain other matters, he inquires of the appellant, whether he would "like to purchase a balance on three of the White Sulphur coupons (1861, '62, and '63)," and says, "They are held here by Mr. Gibboney and Robert Crockett in payment of some debts due by my mother's estate," and then he proceeds to give other information respecting them, which would have been wholly unnecessary if the appellant had been previously employed as counsel to collect

them. And in a letter to the appellant, dated the 24th of the same month, he says, "I will arrange with Mr. Gibboney to get you to collect the bonds," meaning the coupons. It also appears that in April, 1878, in response to a letter of the appellee, the appellant wrote, expressing his willingness to act as counsel in several matters for the former, including the collection of the Gibboney coupons. At the same time he drew up a written agreement, stipulating for the measure of compensation for his services, which he transmitted to the appellee to be executed. But the latter, instead of executing and returning the agreement, copied it, taking care, however, to omit so much as related to the coupons; and this modified paper, with his signature attached, he inclosed to the appellant. Yet he files with his deposition, as evidence in the cause, the original draft of the agreement, signed by himself,—when, it does not appear,—but which never became a perfect instrument.

It also appears that he at one time deposited with the appellant "the Gibboney contract" as collateral security; that is, he pledged as collateral the interest of the estate of his testatrix in the coupons in question after satisfying the Gibboney debt. Subsequently, their affairs, in respect to which the collateral was pledged, having been satisfactorily arranged, he wrote the appellant, saying, "I am now entitled to the Gibboney contract given you as collateral;" thus showing that the appellant held the contract, not as counsel, for the collection of the coupons mentioned therein, but as collateral. This letter was dated December 18, 1879, less than one month prior to the assignment in question, and it is not pretended that the appellant was employed to collect the coupons after the date of that letter.

Moreover, the answer avers that prior to and until the assignment of the claims in question they "were represented as attorney and counsel solely and exclusively by the late Hon. Samuel Price," a distinguished member of the West Virginia bar; and the evidence tends to show, if it does not conclusively show, that such was the fact.

In addition to these facts, there are other circumstances disclosed by the record tending to the same conclusion, namely, that the appellant was not at any time the counsel of the appellee in relation to the subject-matter of the assignment in question.

The appellee, however, contends that no matter whether the relation of counsel and client existed between the parties or not, the assignment is void, because obtained by fraud. But here again the charge is not sustained by the proofs.

As to the price for which the sale was made, it is sufficient to say that an executed contract will not be set aside for mere inadequacy of consideration. It is only in those cases where the inadequacy of price is so gross as to lead to the irresistible inference of fraud that a sale made without imposition, between parties standing on equal ground, will be rescinded by a court of equity. "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." Chancellor Kent in Osgood v. Franklin, 2 Johns. Ch. 1, 23.

"Where a legal capacity is shown to exist, that the party had sufficient understanding to clearly comprehend the nature of the business, that he consented freely to the special matter about which he was engaged, and no fraud or undue influence is shown to have been used to bring about the result, the validity of the disposition cannot be impeached, however unreasonable or imprudent or unaccountable it may seem to others. It is not the propriety or impropriety of the disposition, but the capacity to make it, and the fact that it was freely made with the full assent of the grantor, that must control the judgment of the court." Greer v. Greers, 9 Grat. 330. See, also, Eyre v. Potter, 15 How. 42; Dunn v. Chambers, 4 Barb. 376; Crebs v. Jones, 79 Va. 381.

In the light of these principles and the evidence in the case, the question as to alleged inadequacy of consideration may be laid out of view. Nor can the decree be sustained on the ground of actual fraud. In Atlantic Delaine Co. v. James, 94 U. S. 207, the court say: "Canceling an executed contract is an exertion of the most extraordinary power of a court of equity. The power ought not to be exercised except in a clear case, and never for an alleged fraud, unless the fraud be made clearly to appear."

So, in Hord v. Colbert, 28 Grat. 49, it is said that "the party alleging fraud must clearly and distinctly prove it. If the fraud is not strictly and clearly proved as it is alleged, although the party against whom relief is sought may not have been perfectly clear in his dealings, no relief can be had." See, also, Gregory v. Peoples, 80 Va. 355.

These principles are now so firmly established in our jurisprudence as that they may be said to be axiomatic; and they are decisive of the present case. No question as to a devastavit and a fraudulent participation therein is made in the pleadings or otherwise; and not only does the evidence fail to establish the fraud alleged, but it does not warrant even a suspicion against the good faith and integrity of the appellant in the whole course of his dealing in relation to the matters in controversy. Nothing was concealed or misrepresented; all was fair and open. The record shows that the appellee had the means of knowing, and probably did know, as much in relation to the value of the securities in question as the appellant did; and it shows, moreover, that the sale was deliberately made, without any undue influence being used by the appel-

lant or by any other person. The order of the federal court capitalizing the interest on the coupons, to which reference is made in the cross bill, was not entered until long after the assignment to the appellant, and there is nothing to show that such an order had been asked for, or even contemplated, before the assignment was made.

In short, the evidence disproves the charge of fraud, and the circuit court, instead of canceling, ought to have upheld the assignment, and decreed accordingly.

The decree will therefore be reversed, and a decree entered here in conformity with this opinion.

Decree reversed.

YAUGER v. SKINNER et al.

(14 N. J. Eq. 389.)

Chancery Court of New Jersey. May Term, 1862.

Mr. Vanatta, for plaintiff. Mr. Chandler, for defendant.

GREEN, Ch. The bill charges that, on the eighteenth of February, 1859, the complainant entered into a written agreement with Abraham Skinner, one of the defendants, by which Skinner covenanted to convey to the complainant a farm of one hundred and thirty-five acres, in the county of Morris, for the consideration of six thousand seven hundred and fifty dollars, the title deed and possession of the premises to be delivered, and the consideration to be paid or secured on the first of April then next. On the fourth of April, in pursuance of the contract, the deed and possession of the premises was delivered to the complainant, who thereupon paid to the grantor one thousand dollars in cash and notes, and gave his bond for five thousand seven hundred and fifty dollars (the balance of the consideration), secured by mortgage upon the said premises. Subsequent to the agreement the complainant sold the farm upon which he then resided, and moved upon the farm purchased of Skinner, and has since made valuable permanent improvements thereon.

On the seventh of April, 1860, a petition was filed in this court by Henry K. Skinner, a son of the grantor, praying that a commission of lunacy issue, in which petition, verified by the oath of the petitioner, it is alleged that the said Abraham Skinner then was, and for two years past and upwards had been, so far deprived of his reason and understanding that he was rendered altogether unfit and unable to govern and care for himself or to manage his affairs. A commission of lunacy thereupon issued, by virtue of which an inquisition was taken, on the eighteenth of April, 1860, whereby it was found that the said Abraham Skinner was at the time of taking the said inquisition a lunatic and of unsound mind, and did not enjoy lucid intervals, so that he was not capable of the government of himself or of his estate or property, and that he had been in the same state of lunacy for the space of one year then last past and upwards. The inquisition did not find whether the said Abraham Skinner had alienated any lands or tenements after he became lunatic nor expressly whether he was or was not of unsound mind when he so conveyed to the complainant. The inquisition was subsequently confirmed, and Henry K. Skinner appointed the guardian of the lunatic whose lunacy still continues.

The bill charges that the contract for the purchase of the said farm was made by the complainant in good faith, without any knowledge or suspicion of insanity in the grantor; that after the execution of the contract, and after the complainant had sold the farm where he previously resided, and had taken possession of the farm purchased of Skinner, but before the delivery of the deed, he heard reports questioning his capacity to make a deed, but was induced, as well by the advice of others as by the opinion of the son and agent of Skinner, to complete the contract and take the title; and that at the time of the execution of the papers the said Abraham Skinner appeared to be, and in the opinion of the complainant was, of sound mind, and in every respect competent to transact business.

The bond and mortgage given by the complainant for the farm having become due, the complainant has been called upon for payment, which he is ready and willing to make, provided his title is good, and the premises assured to him in pursuance of the terms and effect of his deed; but he insists that he ought not to be required to pay the purchase money if the deed is voidable by reason of the grantor being of unsound mind at the time of making the same. He further alleges that he is now able, if the validity of the deed were judicially called in question, to prove that the purchase was made upon his part in perfect good faith, and for a full and fair price, and that the grantor had sufficient capacity at the time of making the contract and the deed to make the same; or if he was not, that the complainant was entirely ignorant of his incapacity. But as the validity of the title may be hereafter called in question when the witnesses are dead, or the facts lost from memory, the complainant is advised that he cannot safely pay the purchase money for the said farm until it be judicially ascertained and determined that the purchase was made by the complainant in good faith for a fair price, and without knowing that the grantor was a lunatic, and that the complainant's deed should be confirmed and declared valid against the grantor and his heirs. The bill prays either that it may be declared and decreed that the deed was made for a full and fair consideration, and in good faith on the part of the complainant, and that the said deed is valid and binding upon the grantor and his heirs forever, the complainant thereupon proffering himself ready to pay the balance of the purchase money; or if the court should be of opinion that for any cause the deed is not valid, and ought not to be confirmed, that it may now be avoided, the bond and mortgage of the complainant given for the consideration money directed to be cancelled, the money advanced on the purchase to be repaid with interest, and the complainant paid the value of the permanent improvements made upon the farm since the purchase, and that in the meantime the defendants may be restrained

from prosecuting at law or in equity for the recovery of the amount due upon the said bond and mortgage.

The answer of Henry K. Skinner, the guardian of the lunatic, admits all the material charges and allegations of the bill touching the sale and conveyance of the said farm and the payment and security of the consideration. It does not deny the capacity of the grantor, but on the contrary, insists that at the time of the conveyance there was no reason to question the sanity or capacity of the grantor; that his insanity was not developed until the autumn of 1859, some months after the execution of the deed. It denies that the complainant had any just ground for fear or apprehension touching the validity of his title, or that, upon the statements contained in the bill, there was any sufficient reason for the institution of this suit.

Evidence has been taken, and the cause is brought on for final hearing upon the pleadings and proofs.

The complainant's bill of complaint is in the nature of a bill quia timet, filed by the purchaser against the vendor of real estate for the better protection of his title. The contract for the purchase was made on the eighteenth of February, 1859. The conveyance was made on the fourth of April following. A commission of lunacy was afterwards issued out of this court, and by an inquisition, taken on the eighteenth of April, 1860, the vendor was found to be a lunatic, and to have been in the same state of lunacy for the space of one year then last past and upwards.

At the time of the conveyance, the complainant gave a mortgage upon the premises for five thousand seven hundred and fifty dollars of the purchase money. The mortgage debt is now past due, and payment has been demanded. The complainant proffers himself ready to pay the purchase money, but alleges that his title is imperilled by the inquisition and decree of this court, and asks either that his title shall be declared valid, or that it shall be set aside, the bond and mortgage of the complainant given for the purchase money ordered to be given up to be cancelled, and the parties restored to the condition in which they were before the purchase.

That the complainant's title is clouded, and its security imperilled, by the proceedings and decree of this court, cannot be questioned. The date of the conveyance is overreached by the inquisition of lunacy. If it be said that the terms of the inquisition, "a year and upwards," do not necessarily cover the date of the conveyance, which was a year and fourteen days prior to the date of the inquisition, still the language is broad enough for that purpose, and may operate as prejudicially to the complainant's rights as though the inquisition in unequivocal terms overreached the date of the conveyance. Taken in connection with the proceedings in the cause, with the facts stated in the petition, and with the omission of the usual clause of the inquisition, that the lunatic had or had not aliened any of his lands during his lunacy, the inquisition must prejudice the security of the complainant's title, to what extent it is not material to decide. Upon a bill filed on behalf of his heirs to avoid the title on the ground of lunacy an issue would be awarded. Upon that issue the inquisition is competent evidence. It would throw the burthen of proof upon the purchaser. No statute of limitations runs against the lunatic. A bill to set aside the title on the ground of the lunacy of the vendor may be filed ten, twenty, or even thirty years after the date of the conveyance, when the witnesses may be dead or the recollection of facts have partially or totally perished. In the recent case of Price v. Berrington the conveyance was made in 1809. A commission of lunacy issued against the vendor in 1837, and he was found by the inquisition to have been a lunatic without a lucid interval from the year 1796. In 1836, a bill was filed in the court of chancery to set aside the conveyance. In 1840, an issue was directed to try the lunacy. In 1848, the issue was tried, and lunacy found by the jury, and in 1849 the deed of 1809 was declared void as against the grantor and his representatives. And although this decree was subsequently reversed upon appeal, the case affords a striking illustration of the extent to which questions touching the lunacy of a grantor may cloud and imperil a title. 7 Hare, 394, 3 Macn. & G. 486.

It was objected, upon the argument, that the inquisition was not competent evidence against third persons. But the rule is well settled, both at law and in equity, that an inquisition of lunacy, though not conclusive, is competent evidence in proof of the lunacy against persons claiming title under the alleged lunatic. Sergeson v. Sealey, 2 Atk. 412; Frank v. Mainwaring, 2 Beav. 115; Hall v. Warren, 9 Ves. 609; Phil. & Amos. Ev. 545; Covenhoven's Case, 1 N. J. Eq. 27; Whitenack v. Stryker, 2 N. J. Eq. 28; Den v. Clark, 10 N. J. Law, 217; Hart v. Deamer, 6 Wend. 497.

It is upon this ground that a court of equity will in its discretion permit a purchaser, whose conveyance is overreached by the inquisition, to traverse the finding of the jury upon his agreeing to be bound by the final decision upon the traverse. Buller's N. P. 216; In re Christie, 5 Paige, 242; Covenhoven's Case, 1 N. J. Eq. 27.

The frame of this bill is unusual, and so far as I am aware without a precedent. This fact alone constitutes no objection to the relief sought, if it can be supported upon principle.

If a bill were filed by or on behalf of the lunatic, to avoid the conveyance on the ground of lunacy, and the lunacy were es-

tablished, the court, on setting aside the conveyance, would release the purchaser from the payment of the purchase money.

On the other hand, where a vendor is found a lunatic from a date subsequent to the time of the contract to purchase, but prior to the execution of the conveyance, the purchaser may enforce the completion of the contract by a bill for specific performance. Owen v. Davies, 1 Ves. Sr. 82; Hall v. Warren, 9 Ves. 605; Pegge v. Skynner, 1 Cox, Ch. 23.

And where the vendor is by an inquisition found lunatic from a date prior to the contract of purchase, the other party may file a bill for specific performance, and obtain an issue to inquire whether the defendant was a lunatic, or whether the contract was executed during a lucid interval; and if the issue be found in his favor, he may have a decree for specific performance. So he may ask in the alternative to have the contract either performed or discharged. Frost v. Beavan, 17 Jur. 369, 19 Eng. Law & Eq. 25; Fry, Spec. Perf. 73.

Nor will a court of equity, on the application of the lunatic, or those claiming under him, set aside a contract overreached by an inquisition of lunacy, if the purchase be fair, for a full consideration, and without notice of the lunacy to the purchaser, especially where the parties cannot be fully reinstated in the condition in which they were prior to the purchase. Sergeson v. Sealey, 2 Atk. 412; Niell v. Morley, 9 Ves. 478; Price v. Berrington, 3 Macn. & G. 486.

These cases show the ground upon which courts of equity proceed in dealing with contracts overreached by inquisitions of lunacy, and sustain the principles of the present bill. The complainant is entitled, if he have acted in good faith, either to have the contract confirmed, and his title declared valid, or to have it declared null and void, and to be released from the obligation of his contract. He ought not to be compelled to fulfil the contract on his part while his title is clouded and its validity imperilled by the proceedings of this court.

The evidence fully sustains the allegations of the complainant's bill, that at the date of the conveyance, on the fourth of April, 1859, the defendant was not lunatic, but was of sound mind, and fully capable of the government of himself and of the management of his affairs and business. There is, indeed, no conflict in the evidence upon this point aside from the inquisition itself and the affidavit of the petitioner, upon which the inquisition was issued. The testimony of the family of the lunatic, of his physicians, and of his neighbors and acquaintances, clearly proves that at the date of the conveyance, and for some time thereafter, during a period clearly overreached by the inquisition of lunacy, the defendant was fully capable of transacting business. This fact is fully corroborated by the answer, and by the testimony of the son of the defendant, upon whose testimony the inquisition issued, and who is now the guardian of the lunatic. He asserts that the averment in the petition, that the lunacy of his father commenced two years prior to that date, was unintentionally and erroneously made, and that in point of fact his lunacy was not clearly developed nor his incapacity for business manifested until the autumn succeeding the date of the commission. Under these circumstances, an issue to inquire as to the lunacy is unnecessary.

Nor do I deem the existence of the lunacy at the date of the conveyance, on the fourth of April, a controlling circumstance in the cause. The proof is clear that the executory contract to purchase, made on the nineteenth of February, 1859, was made by the complainant in good faith, and for a full and fair price, when the lunacy of the defendant was neither known nor suspected; that the contract was executed on the fourth of April, in like good faith on the part of the complainant, without the knowledge or belief of the existence of incapacity on the part of the defendant. Under these circumstances, upon the strength of the authorities already cited and the clear dictates of justice, the contract would be upheld and enforced, even though the incapacity of the grantor at the date of the conveyance should be established.

The decree will be made without the allowance of costs to either party as against the other.

## TATE v. WILLIAMSON.

(2 Ch. App. 55.)

Court of Appeals in Chancery. Dec. 17, 1866.

This was an appeal by the defendant, Robert Williamson, from a decree of Vice Chancellor Wood, setting aside a sale, on the ground that the purchaser stood in a fiduciary relation to the vendor, and did not make a full disclosure to him of all material facts within his knowledge relating to the value of the property. The facts of the case fully appear in the report of the case before the vice chancellor (L. R. 1 Eq. 528) and the judgment of the lord chancellor.

Mr. W. M. James, Q. C., and Mr. Little, in support of the decree. Attorney General (Sir J. Rolt), and Mr. Bristowe, for the appellant.

Solicitors for the plaintiff: Messrs. N. C. & C. Milne.

Solicitors for the appellant: Messrs. Clowes & Hickley.

LORD CHELMSFORD, L. C. In this case the vice chancellor has made a decree that an agreement for the sale by the intestate, William Clowes Tate, to the defendant, Robert Williamson, of the undivided moiety of an estate called the "Whitfield Estate," in the county of Stafford, consisting of messuages, lands, and coal mines, ought to be set aside, upon the ground of the defendant not having communicated to the intestate all the information which he had acquired with reference to the value of the property, and, in particular, of his not having communicated an estimate of the value of the mines which was obtained by the defendant pending the agreement.

The question raised by the appeal is whether any such relation existed between the defendant and the intestate as to render it the duty of the defendant to make the communication.

The jurisdiction exercised by courts of equity over the dealings of persons standing in certain fiduciary relations has always been regarded as one of a most salutary description. The principles applicable to the more familiar relations of this character have been long settled by many well-known decisions, but the courts have always been careful not to fetter this useful jurisdiction by defining the exact limits of its exercise. Wherever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed.

Did, then, the defendant, R. Williamson, when he put himself in communication with the intestate, clothe himself with a character which brought him within the range of the principle?

In considering this question, it will be necessary to bear in mind the situation of both the parties at the time when the agreement for the sale of the property was entered into.

The intestate, when he was quite an infant, had become possessed of the property in question independently of his father. He contracted habits of extravagance at the university, and in consequence of some displeasure which he had occasioned to his father on the subject of his debts, the father's doors were closed against him. He was thus thrown upon the world at an early age without any one to control him, and with scarcely a friend to counsel him, and towards the close of his life he became addicted to drinking and died prematurely at the age of twenty-four. The defendant is the nephew of Mr. Hugh Henshaw Williamson, the great uncle by marriage of the intestate, who had been the trustee and manager of the property, and the receiver of the rents, which latter duty the defendant had for some short time been deputed to perform for him. It does not appear that the defendant by his employment acquired any particular information respecting the property, but as he states in his answer that he had "previously" (to his first interview with the intestate) "some idea of endeavoring to be the purchaser of the estate, in case the same should come into the market," it is reasonable to suppose that he was not altogether ignorant of its character, and must have formed some idea of its value.

I think no stress can be laid upon the circumstance of Mr. H. H. Williamson having been the trustee of the property. The trusteeship, as to the intestate's moiety, had come to an end upon his attaining his majority, in July, 1857. The accounts had been settled, and Mr. Williamson, in surrendering his trust, had behaved generously to the intestate. Though he continued after this period to receive the rents and manage the property, yet there appears to have been nothing in the office which he undertook after his trusteeship expired which would have prevented his dealing with the intestate upon the same terms as a mere stranger. Much less could the mere receipt of the rents for his uncle have placed Robert Williamson in a different position from that of any ordinary purchaser. But a new and peculiar relation arose out of the circumstances which afterwards occurred. In the year 1859 the debts which the intestate owed at the university were causing him considerable embarrassment. He had been pressed by Mr. Holloway, acting for his Oxford creditors, for payment of an amount of £1,000. He was unable, in consequence of the unfor-

tunate quarrel with his father, to apply to him for advice, and, having before experienced the kindness of Mr. H. H. Williamson, he turned to him again in his difficulties. The letter by which the intestate made his situation known to Mr. Williamson is not forthcoming. The defendant, in his answer, says that he was informed by Mr. H. H. Williamson that it stated he was again involved, and either asked for assistance, or for advice as to the mode of procuring assistance. I should have been glad if we could have seen the terms of this letter, as it might have explained the exact nature of the office which Mr. Williamson was asked to undertake. In the answer to this letter, dated the 30th of July, 1859, which is set out in the bill, in paragraph 52, Mr. Williamson invited the intestate to his house, and desired him to bring with him "a correct account of his debts, omitting nothing, and he would see what could be done." The intestate did not accept the invitation, and nothing more was heard of the matter until about the 26th of August following, when Mr. H. H. Williamson received a list of the intestate's debts due to Oxford creditors, amounting, as already mentioned, to £1,000. The defendant, in his answer, says "that the list was given to him by Mr. H. H. Williamson, and that he, after perusing the same, remarked that the charges were excessive, and that the bills might probably be settled for half the amount; that Mr. H. H. Williamson thereupon requested him to see the intestate, and ascertain upon what terms he could be relieved from his debts, and, if this could be done for £500 or a little more, he authorized the defendant to advance the intestate that amount on further security of the property." The defendant accordingly wrote to the intestate on the 26th of August, 1859, the letter, which is set out in paragraph 58 of the bill, in which he states that his uncle is not sufficiently well to attend to business; that the list of debts owing forms a very heavy amount, which Mr. Holloway expects to have paid immediately; and adds, "I will meet you in the course of a few days in London, upon having a couple of days' notice, and, after hearing your views on the subject, will talk over the matter, and see in what way it can be arranged." The counsel for the defendant say that his office was merely to see whether a compromise of the debts could be effected, and that, at the time of the purchase, his mission was at an end. One can hardly believe that his advice and assistance could have been understood to be of this limited character. He knew that Mr. Holloway was pressing for immediate payment to the Oxford creditors, and that if he refused to reduce the amount the whole must be paid. It does not appear that, if Mr. Holloway had insisted on a payment in full, Mr. H. H. Williamson would not have been disposed to advance a larger sum than that which he had mentioned, as the property would have been an ample security for any amount required to cover the whole of the debts. And the defendant must have been perfectly aware that the intestate's property in Staffordshire was the only fund out of which the debts could be discharged.

The account of the defendant's interview with the intestate we have from the answer alone. He states that he offered to negotiate with the intestate's creditors for an abatement of their claims, telling him "that he was authorized by his uncle to advance £500 or more if required" (I suppose he must have added "upon the security of the property"), "but that the intestate positively refused to allow him to ask for any deduction from his debts, saying that any such application would injure his character." The answer then proceeds: "But he at the same time stated that he was desirous to sell his share of the Whitfield estate." Mr. Bristowe, for the defendant, said the instant the intestate refused to allow any attempt to compromise his debts, the defendant's office of adviser came to an end, and from that moment the parties, to use the familiar expression, were dealing "at arms' length." I cannot accept this view of the defendant's position. I think that his visit to London was not solely for the compromise, but generally for the arrangement of the intestate's debts; that he came with authority which involved a dealing with the property of the intestate, as he was to advance his uncle's money on the security of this property. And it may be observed that he had his attention particularly directed to the mode of satisfying the debts by a mortgage. He knew, too, that if the payment of the debts in full was insisted upon, and his uncle refused to advance a larger sum than "£500 or a little more," a sufficient amount to discharge all the debts could easily be raised upon the security of the property, which was subject only to a mortgage for £1,000. It seems to me that the defendant had placed himself in a position which rendered it incumbent upon him to give the best advice to the intestate how to relieve himself from his debts, and no one can doubt that if his judgment had been unbiased that he would have recommended a mortgage, and not a sale. But it appears, from the defendant's own statement, that he had a reason for not giving his advice. As already stated, he had previously thought of purchasing the estate in case it should come into the market for sale, "an event," he says, "he thought was not unlikely to happen." I asked the defendant's counsel what he understood by these words, and was answered that the defendant's expectation was founded upon the inconvenient nature of property consisting of an undivided moiety. This may have first led the defendant to expect that he might have an opportunity of purchasing the property at no distant period, but his belief in the probability of a sale must have been considerably strengthened at the time of his interview with

the intestate, from the knowledge he had of his embarrassments. Whether the conversation between the defendant and the intestate turned so abruptly from the intestate's refusal to compromise his debts, to the expression of his desire to sell his share of the Whitfield estate, as represented by the defendant or not, it is quite clear to my mind that the confidential relation between the parties had not terminated when the negotiation for the purchase of the property by the defendant commenced, and that he did not then, or at any time afterwards, stand in the situation of an ordinary purchaser.

This being so, the defendant, pending the agreement, was bound to communicate all the information he acquired which it was material for the intestate to know in order to enable him to judge of the value of his property. It was admitted that the valuation of Mr. Cope was in the hands of the defendant at the time he wrote his letter of the 10th September, 1859. The defendant is charged with making untrue representations in that letter. If he had done so, it would of course strengthen the case against him, but I find nothing in the letter which amounts to a misrepresentation, nor anything more than a disparagement of the property, not uncommon with a purchaser when he desires to stimulate the owner of the property to close with his offer.

Having stated my opinion with regard to the duty cast upon the defendant to communicate Cope's valuation to the intestate, it seems unnecessary to pursue the case further. The fair dealing, in other respects, of the defendant during the negotiation, and before the agreement was signed, becomes almost irrelevant. The refusal of the solicitors to proceed with the agreement unless the young man had some legal assistance, the recommendation of the defendant that the intestate should apply to his father for advice, the opportunity afforded him pending the negotiation of consulting any friends who were capable of advising him, the reference to Mr. Payne whether merely for the purpose of completing the agreement, or to afford the intestate an opportunity of obtaining his opinion as to the value, all these considerations are of no consequence, when once it is established that there was a concealment of a material fact, which the defendant was bound to disclose.

Nor, after this, is it of any importance to ascertain the real value of the property.

Even if the defendant could have shewn that the price which he gave was a fair one, this would not alter the case against him. The plaintiff, who seeks to set aside the sale, would have a right to say, "You had the means of forming a judgment of the value of the property in your possession, you were bound, by your duty to the person with whom you were dealing, to afford him the same opportunity which you had obtained of determining the sufficiency of the price which you offered; you have failed in that duty, and the sale cannot stand." But, in truth, there are strong grounds for thinking that the price agreed to be paid by the defendant is quite inadequate to the value of the property. There is no occasion to weigh the opposite opinion of the engineers and surveyors, and to form a conclusion from them. It is sufficient to take the valuation of the mines by Cope, amounting to £20,000, and the valuation of the surface by the defendant's own witnesses, ranging from £10,000 to £11,290, and making every allowance for a reduction of the value of the intestate's share, in consequence of its being an undivided moiety, it will appear that the value, by the defendant's own shewing, must have been at the least £14,000. For this property the defendant agreed to pay £7,000 apparently about half the value, and that not at once, but £1,500 was to be advanced to the intestate, which was to bear interest till the day for the completion of the purchase, which advance must have been intended to enable the intestate to pay off his debts immediately; £2,000 was to be paid on the 25th March, 1860, and the residue by yearly instalments in the four following years.

It appears to me, upon a careful review of the whole case, that it would be contrary to the principles upon which equity proceeds, in judging of the dealings of persons in a fiduciary relation, to allow the purchase by the defendant, Robert Williamson, to stand.

I am satisfied that the defendant had placed himself in such a relation of confidence, by his undertaking the office of arranging the intestate's debts by means of a mortgage of his property, as prevented him from becoming a purchaser of that property without the fullest communication of all material information which he had obtained as to its value; that this openness and fair dealing were the more necessary when he was negotiating with an extravagant and necessitous young man, deprived at the time of all other advice, eager to raise money, and apparently careless in what manner it was obtained; and the defendant having, by concealment of a valuation which he had privately obtained, procured a considerable advantage in the price which the seller was induced to take, and which even the defendant's witnesses prove to be grossly inadequate, he cannot be permitted so to turn the confidence reposed in him to his own profit, and the sale ought to be set aside. Decree affirmed. Petition of appeal dismissed, with costs.

ROSS v. CONWAY et al. (No. 13,341.)

(28 Pac. 785, 92 Cal. 632.)

Supreme Court of California. Jan. 6, 1892.

Department 2. Appeal from superior court, Sonoma county; S. K. DOUGHERTY, Judge.

Suit by James E. Ross against John M. Conway et al. to annul, on the ground of undue influence, a trust-deed made by his mother, Elizabeth G. Ross, for the benefit of defendants. Plaintiff had judgment, and defendants appeal. Affirmed.

*George D. Collins* and *George A. Johnson*, (*D. M. Delmas*, of counsel,) for appellants. *John A. Wright*, for respondent.

HARRISON, J. The plaintiff, as the sole heir of his mother, Elizabeth G. Ross, brought this action to cancel and annul two certain deeds of trust conveying certain real estate in Santa Rosa, executed by his mother, August 11, 1888, and August 18, 1888, respectively, alleging that at the time of their execution his mother was weak in body, and that her mind was impaired, and that the defendant Conway, who was the pastor of the Roman Catholic church of Santa Rosa, of which she had been for many years a member, and who was also her spiritual adviser, had thereby acquired great influence over her, and, taking advantage of such influence and of her mental weakness, had caused her to execute the said deeds of trust for the benefit of himself and of the church of which he was the pastor. The defendants denied these allegations, and the cause was tried by the court, a jury having been called in as advisory to the court upon certain issues. The verdict of the jury and the findings of the court were in support of the allegations of the complaint, and judgment was rendered in favor of the plaintiff. A motion for a new trial having been made and denied, an appeal has been taken from both the judgment and the order denying a new trial.

The two deeds of trust are substantially the same, the last one having been executed merely for the purpose of correcting an erroneous description in the first. Under the trust created by the deeds the trustees are directed to sell one of the parcels of land "as soon as practicable," and out of the proceeds thereof apply $8,000 in the improvement of the other parcel, and pay the remainder of the proceeds to the defendant Conway. Out of the income to be derived from the parcel to be improved, $75 per month was to be paid to the plaintiff, and the remainder monthly "to the pastor of the Roman Catholic church in Santa Rosa, to be disbursed by him in such manner as he may deem charitable." Other provisions contingent upon the death or change in circumstances of the plaintiff are unnecessary to be repeated here. The issues before the court were, in substance, whether Mrs. Ross was, at the respective dates on which the deeds of trust were executed, of weak mind, or able to comprehend the provisions of the instruments; and whether the defendant Conway used the influence which he had acquired over her, by virtue of being her spiritual adviser, for the purpose of procuring her to make such disposition of her property. Upon these issues there was much conflicting evidence before the court, both in the testimony of the witnesses who were examined, as well as in the circumstances under which the instruments were executed, and the purposes held by Mrs. Ross with reference to her son and to the church. Upon the evidence before it the court found in favor of the plaintiff. This finding was in accordance with the verdict of the jury, and upon a motion for a new trial, in which the evidence was again brought before the court for consideration, it adhered to its former conclusion. Under these circumstances we cannot disregard its finding. Inasmuch, however, as counsel have elaborately argued the facts, we have examined the record, and are of the opinion that the evidence fully justifies the findings of the court.

The court finds that at the dates of the execution of the deeds of trust Mrs. Ross was of weak mind, and in a dying condition, and that she died on the 20th of August; that the defendant Conway was, and had for a long time previously been, the pastor of the Roman Catholic church at Santa Rosa, and the spiritual adviser of Mrs. Ross; that a confidence was reposed in him by her, and that there existed on his part an influence and apparent authority over her arising out of his relation to her as her spiritual adviser, and that he took an unfair advantage of this influence, and used this confidence and authority for the purpose of procuring her to execute the two deeds of trust. The court also finds that Mrs. Ross had in December, 1887, executed a will of all her estate, with the exception of some minor legacies, in favor of the plaintiff herein, and that the provision in the deeds of trust for the defendants, other than the defendant Conway, were without any consideration from them, but were made solely through the influence of Conway.

The rule is inflexible that no one who holds a confidential relation towards another shall take advantage of that relation in favor of himself, or deal with the other upon terms of his own making; that in every such transaction between persons standing in that relation the law will presume that he who held an influence over the other exercised it unduly to his own advantage; or, in the words of Lord LANGDALE in Casborne v. Barsham, 2 Beav. 78, the inequality between the transacting parties is so great "that, without proof of the exercise of power beyond that which may be inferred from the nature of the transaction itself, this court will impute an exercise of undue influence;" that the transaction will not be upheld unless it shall be shown that such other had independent advice, and that his act was not only the result of his own volition, but that he both understood the act he was doing and comprehended its result and effect. This rule finds its application with peculiar force in a case where the effect of the transaction is to divert an estate from those who, by the ties of nature, would be its natural recipients, to the person through whose influ-

ence the diversion is made, whether such diversion be for his own personal advantage, or for the advantage of some interest of which he is the representative. It has been more frequently applied to transactions between attorney and client or guardian and ward than to any other relation between the parties, but the rule itself has its source in principles which underlie and govern all confidential relations, and is to be applied to all transactions arising out of any relation in which the principle is applicable. It is termed by Lord ELDON "that great rule of the court that he who bargains in any matter of advantage with a person placing confidence in him is bound to show that a reasonable use has been made of that confidence." Gibson v. Jeyes, 6 Ves. 278. It was said by Sir SAMUEL ROMILLY in his argument in Huguenin v. Baseley, 14 Ves. 300, that "the relief stands upon a general principle applying to all the variety of relations in which dominion may be exercised by one person over another,"—a principle which was afterwards affirmed by Lord COTTENHAM in Dent v. Bennett, 4 Mylne & C. 277, saying that he had received so much pleasure from hearing it uttered in that argument that the recollection of it had not been diminished by the lapse of more than 30 years.

That the influence which the spiritual adviser of one who is about to die has over such person is one of the most powerful that can be exercised upon the human mind, especially if such mind is impaired by physical weakness, is so consonant with human experience as to need no more than its statement; and in any transaction between them, wherein the adviser receives any advantage, a court of equity will not enter into an investigation of the extent to which such influence has been exercised. Any dealing between them, under such circumstances, will be set aside as contrary to all principles of equity, whether the benefit accrue to the adviser, or to some other recipient who, through such influence, may have been made the beneficiary of the transaction. These principles have been so invariably announced whenever the question has arisen that a mere reference to the authorities will suffice. Norton v. Relly, 2 Eden, 286; Huguenin v. Baseley, 14 Ves. 273; Thompson v. Heffernan, 4 Dru. & War. 291; Dent v. Bennett, 4 Mylne & C. 269; In re Welsh, 1 Redf. Sur. 246; Richmond's Appeal, 59 Conn. 226, 22 Atl. Rep. 82; Ford v. Hennessy, 70 Mo. 580; Pironi v. Corrigan, 47 N. J. Eq. 135, 20 Atl. Rep. 218; Connor v. Stanley, 72 Cal. 556, 14 Pac. Rep. 306; 1 Bigelow, Fraud, 352; Story, Eq. Jur. § 311.

The finding of the court that Mrs. Ross did not have any independent advice upon the subject of making the deeds of trust is fully sustained by the evidence. It appears from the record that the attorney who prepared the instruments was introduced to her by Conway, and that the only persons with whom she had any interview, or from whom she could receive any advice respecting the same, were this attorney and the defendant Conway. On the 9th of August she had expressed to Conway a desire to make a testamentary disposition of her property, and, upon his suggestion that Mr. Collins was a suitable person, she requested that he would send him to her at the hospital where she was lying. He thereupon sought Collins, and, telling him the wish of Mrs. Ross, accompanied him to the hospital. On their way he told Collins of the mode in which she proposed to dispose of her property, and, after their arrival, remained in the room with them while she was giving directions about the will, going out, however, occasionally, for short intervals to visit other people in the hospital, and leaving the building before the will was formally executed. Two days later he visited Collins at his office, and, after hearing the will read, he made to Collins a suggestion of some changes, and whether a deed of trust would not be preferable to a will. An appointment was then made between him and Collins to meet that afternoon in the room of Mrs. Ross at the hospital. After their arrival at the hospital, Conway made a suggestion to her that she execute a deed of trust instead of a will, and also other suggestions in reference to her disposition of the property. Only himself and Collins were in the room during this consultation, he, however, leaving it temporarily a few times during the period over which the interview extended, but remaining until Collins had received all the directions that she gave. Assuming that, by virtue of his relation to her, he had acquired an influence over her, it must be held that in the transaction under investigation there was an undue exercise of such influence; that by not insisting that she should have independent advice, and by continuing to remain in her presence during the interview with the only other person whom he permitted to see her, he exercised an influence over her actions which, though unseen and inaudible, was none the less effective in its results. "The question is," said Lord ELDON in Huguenin v. Baseley, 14 Ves. 300, "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 providence was placed round her, as against those who advised her, which from their situation and relation with respect to her they were bound to exert on her behalf." While the contract of purchase made between the defendant Conway and the trustees under the instruments sought to be annulled was irrelevant to any material issue before the court, and would have been properly excluded from evidence, we are unable to see that its admission could in any way have been prejudicial to the rights of the appellants. The judgment and order denying a new trial are affirmed.

We concur: DE HAVEN, J.; McFARLAND, J.

Hearing in bank denied.

## HOYT v. GODFREY.

(88 N. Y. 669.)

Court of Appeals of New York. April 11, 1882.

Appeal from an order of the general term affirming an order of the special term, where a motion to vacate an order of arrest was denied.

In this case a fraudulent disposition by defendant of his property, for the purpose of defrauding his creditors, was alleged by the complainant. The further facts are stated in the opinion of the court.

Samuel C. Mount, for appellant. William B. Tullis, for respondent.

TRACY, J. The next and most serious ground relied upon is that the defendant, in contemplation of his assignment, canceled an indebtedness of $5,806.60 due from his brother Henry. That this cancellation was made is not denied, and the question here is whether it was so made without consideration and with fraudulent intent. The indebtedness had existed since the defendant purchased Henry's interest in the business, during which time the brother had been in the defendant's employ at a salary of $3,000 per year as traveling salesman. Nothing had been paid on this indebtedness, and the brother was insolvent. The cancellation was made by a single entry made in the books to the credit of the brother. When questioned about it in the proceedings supplementary to execution, it is said in the moving papers that the only explanation the defendant gave of it was that Henry was poor and had six children. Assuming that the defendant intended to cancel this indebtedness for the reason claimed by the plaintiff, does it follow that such act amounts to a disposition of his property with intent to defraud his creditors? To constitute such a disposition of property three things must concur; first, the thing disposed of must be of value, out of which the creditor could have realized all or a portion of his claim; second, it must be transferred, or disposed of by the debtor; and third, this must be done with intent to defraud. Does a debt, payment of no part of which can be enforced by reason of the insolvency of the debtor, constitute property within the purview of this statute? We doubt it. Shultz v. Hoagland, 85 N. Y. 464. Does such an entry in the books of account amount to a transfer or disposition of the debt? We think not. If made without consideration it does not amount to a satisfaction of the debt. The assignee could sue and recover judgment for it as if such entry had not been made. But however this may be, if the debtor believed the debt to be worthless, it could hardly be said that he canceled it with intent to defraud his creditors. That the debt was in fact of no value, and that the defendant so regarded it is apparent from the evidence in the case. He canceled it on the eve of making a general assignment for the benefit of his creditors, when he must have known that the books would pass into the hands of the assignee and be open to the inspection of his creditors when its fraudulent character, if it was in fact fraudulent, would be discovered. No false or fictitious entries were made to account for or explain the entry in question. If the defendant believed that this account was of value, and his intent was to cheat and defraud his creditors of the amount due him from his brother Henry, it is difficult to understand why he should not have attempted to allay suspicion and prevent investigation by making false entries of credits which would appear, on their face at least, to be honest and fair. The absence of such entries, together with the acknowledged worthlessness of the debt, and the relationship existing between the debtor and creditor, we think sufficiently explain this entry; at least, standing alone, it is not sufficient to sustain the charge that the defendant disposed of his property with intent to defraud his creditors. It would at most amount to but constructive guilt, but the constructive guilt of a debtor who is innocent in fact is not sufficient ground of imprisonment. Actual intent to defraud should be clearly established. Spies v. Joel, 1 Duer, 669; Caldwell's Case, 13 Abb. Pr. 415; Birchell v. Strause, 28 Barb. 296; Krauth v. Vial, 10 Abb. Pr. 139; Pacific Mut. Ins. Co. v. Machado, 16 Abb. Pr. 454.

Orders of general and special terms reversed and motion to vacate order of arrest granted.

CHANDLER et al. v. HOLLINGSWORTH et al.

(3 Del. Ch. 99.)

Court of Chancery of Delaware. Sept. Term, 1867.

E. G. Bradford and Mr. Higgins, for complainants. Mr. McCaulley, for defendants.

BATES, Ch. The case presented for relief is this: William Chandler, three days before his marriage with the complainant Elizabeth Chandler, while under an engagement of marriage with her, made a voluntary conveyance of all his estate, real and personal, thereby, if it be allowed to operate, defeating the right of dower which otherwise would have accrued from the marriage, and also withdrawing from his own control the means he then had, whereby provision mght be made for his intended wife and the issue of the marriage, either through a will or by law in case of his dying intestate. This conveyance was made without notice to her, and, as we must take it, without her knowledge derived in any way whatever before the marriage. Yet no misrepresentation as to his means appears; nor any positive deception as to what was done beyond simple nondisclosure. Nor are we to consider it as an element in the case that Mrs. Chandler, before the engagement, knew that Chandler had held this property or that she had formed any expectations with regard to it.

We may now take the legal question presented by such a case. Will a court of equity relieve against a voluntary conveyance by the husband of all his estate, made pending an engagement; or, as the English cases term it, pending a treaty of marriage made without any disclosure to the intended wife or knowledge on her part, though without any express misrepresentation or deception practiced by the husband? This is the general question; but it is to be considered in two forms:

(1) Will equity relieve, at least so far as to save to the wife her dower in the real estate, even though the conveyance must stand as it affects the personal estate and also the real estate, except as this may be subject to dower?

(2) Will equity go further, and set aside the deed wholly, thereby admitting to take effect the same consequences which would have followed if no such deed had been executed, so that, as Chandler in fact died intestate, the whole property shall descend or be distributed as in ordinary cases of intestacy?

Either form of relief will give Mrs. Chandler her dower. On the latter depends her claim to a share of the personal estate, and the claim on behalf of the infant complainant as heir at law and distributee.

1. Let us consider the first question. The English court of chancery has from the earliest times protected the marital rights of the husband against a fraudulent settlement by the wife pending a treaty of marriage. It is considered that he becomes a purchaser of the wife's property, in consideration of the charge he assumes of her maintenance and the payment of her debts; that this is a right upon which fraud may be committed, and which ought to be protected. Lord Thurlow, in Countess of Strathmore v. Bowes, 1 Ves. Jr. 27. This view has commanded universal consent from the beginning. But until a recent date the doubt has been as to what circumstances should be held to render the settlement fraudulent,—whether there must have been some misrepresentation or deception practiced upon the husband, such as amounts to actual fraud, or whether mere nondisclosure was sufficient as a fraud in law to invalidate the settlement; especially, whether mere nondisclosure should be fatal where the husband was at the time of the marriage ignorant as well of his wife's having held the property as of its having been disposed of away from him.

The first full examination of this subject was in Countess of Strathmore v. Bowes (decided in 1789) supra. That was a bill filed by Bowes, the husband, to set aside a settlement made before marriage by his wife, the Countess of Strathmore. There was also a cross bill filed by the wife to set aside a deed revoking the settlement, on the ground of duress by the husband in obtaining it from her. First, upon an issue directed to inquire whether the deed of revocation was obtained by the duress, and, a verdict so finding, that deed was set aside. 2 Brown. Ch. 345. Then the cause came to be heard upon the bill to set aside the settlement, before Justice Buller, sitting for the lord chancellor. He decreed in favor of Lady Strathmore. Upon a rehearing before Lord Chancellor Thurlow, the decree was affirmed; and, finally, it was affirmed again on appeal to the house of lords. The argument before Justice Buller and his opinion are reported in 2 Cox, Ch. 28. The rehearing before the lord chancellor, with his opinion, are reported both in Cox, Ch. and in 1 Ves. Jr. 22. Upon the rehearing the arguments are best reported in Ves. Jr., but the opinion of Lord Thurlow, in Cox, Ch. As a decision the case is of no importance upon the question before us, since the settlement made by Lady Strathmore was not a fraud upon the marital rights of her husband under any—the most liberal—construction of fraud. It was made before she knew Bowes, her future husband, even pending a treaty of marriage with another man, and with his consent; and her marriage to Bowes was itself obtained by a gross fraud on his part. But the case is valuable as containing a full review of all the prior decisions. Justice Buller considered that the decisions had gone only so far as to relieve the husband in cases of some actual fraud practiced upon him, and he so lays down the rule. The result, he says, is "that, if the wife is guilty of any fraud, and holds out to the husband that

there is nothing to interfere with his rights, then any deed executed by her in prejudice of such representation shall be void." Bare concealment he held not to be sufficient. 2 Cox, Ch. 30. Lord Thurlow, though it did not affect the result of that case, seems to have held to the more liberal construction of frauds, which includes concealment as well as positive misrepresentation. In his opinion (1 Ves. Jr. 28) he says: "If a woman, during the course of a treaty of marriage with her, makes, without notice to the intended husband, a conveyance of any part of her property, I should set it aside, though good prima facie, because affected with that fraud." It is true, according to Justice Buller's view, that the early decisions were upon cases of actual misrepresentation or deception, but it is also true that the distinct question whether bare concealment was itself fraud had never before been raised; and therefore the cases prior to that of Strathmore v. Bowes are to be considered rather as presenting examples of fraud as they occurred in fact, than as deciding in what fraud on marital rights must consist so as to limit the construction of it. Lord Thurlow must so have regarded them in laying down his view of fraud in terms more comprehensive than Justice Buller had done, embracing in his definition mere concealment, which Justice Buller had expressly excluded. The later decisions in England and America have sanctioned the view of Lord Thurlow.

The first of these is Goddard v. Snow, 1 Russ. 485, decided by Lord Gifford, master of the rolls, in 1826. In that case, the wife, ten months before her marriage, settled to her separate use for her life, and subject to her appointment after her death, two sums of money, £900 in all, being not the whole of her estate. Her intended husband was ignorant both of her possession of the funds and of the settlement made of them, and so continued until after her death, when he filed his bill to set aside the settlement as one made in fraud of his marital rights. No actual misrepresentation was alleged, nor deception other than was implied in the concealment. Here the precise question was presented whether bare concealment was in itself a fraud. In the argument and decision of this case, Countess of Strathmore v. Bowes was fully reviewed, and the opinions of Justice Buller and Lord Thurlow considered. Concealment alone was held to be a fraud, and the settlement was set aside.

Next is a case in which the subject is considered by Lord Brougham, though the decision went upon other grounds. St. George v. Wake, 1 Mylne & K. 610. Lord Brougham raises the question, and upon a review of the cases says that in none, except Goddard v. Snow, had there been a positive decision avoiding a settlement by the wife on the mere ground of want of knowledge by the husband. "Yet," he proceeds to say, "it is certain that all the cases in which the subject is approached treat the principle as one of undoubted acceptance in this court; and it must be held to be the rule of the court, to be gathered from a uniform current of dicta, though resting upon a very slender foundation of actual decision touching the simple point." This was in 1833.

In England v. Downs (1840) 2 Beav. 522, in which the question concerned the validity of a settlement made by a widow upon children of a former marriage before a second marriage, the master of the rolls, Lord Langdale, considered it not sufficiently proved that the settlement was made pending a treaty of marriage; or, if so, that it was concealed up to the time of the marriage; and on these grounds he sustained the settlement. But he states the law quite fully on the point before us, and clearly in accordance with Goddard v. Snow, that mere concealment is sufficient to avoid an antenuptial settlement by the wife. He adds a qualification, not necessary to be here considered, viz. that the concealment is evidence of fraud, rather than fraud per se, and therefore is open to explanation; so that cases may occur in which noncommunication would not be held fraudulent.

Next is Taylor v. Pugh (1842) 1 Hare, 608. In this case, a settlement made before marriage, to the exclusion of the husband, was sustained on the special ground that the husband had previously seduced the woman, thus putting her in a situation in which she must submit to a marriage without being able to stipulate for a settlement out of her own property. In his opinion, the vice chancellor, Sir James Wigram, notices, with strong disapproval, the argument, that to avoid such an antenuptial settlement by a wife, without the intended husband's knowledge, actual fraud or deception must be proved; and he cites as the true rule a statement from 2 Ropers, Husb. & Wife, 162, that "deception will be inferred if, after the commencement of the treaty for marriage, the wife should attempt to make any disposition of her property without her intended husband's knowledge or concurrence."

It is true that the cases cited subsequent to that of Goddard v. Snow give only the dicta of judges in support of the rule of that case; but they show at least a concurrent judicial opinion, from that case down, in favor of the rule which holds mere concealment to be at least evidence of fraud. The real doubt has been whether the concealment should, in all cases, per se avoid the settlement, or whether a settlement not disclosed to the husband might, nevertheless, be sustained upon such equitable considerations as the meritorious character of the objects provided for, such as children of a former marriage (Hunt v. Matthews, 1 Vern. 408; King v. Cotton, 2 P. Wms. 675); so the poverty of the husband and his inability to make any settlement upon his wife (King v. Cotton, supra; St. George v. Wake, 1 Mylne & K. 610); so the fact that

the settlement is of part only of the wife's property, which was the ground in De Manneville v. Crompton, 1 Veas. & B. 354.

The only equitable consideration relied upon in the pending case was that Mrs. Chandler, as we must assume, had no knowledge that William Chandler had held the property in controversy; and hence the expectation of it could not have been an inducement to the marriage. But this circumstance is certainly immaterial. The true ground of relief is not the disappointment of an expectation, but fraud upon a legal right; that is, the right to a marriage without any secret alteration of the circumstances of the parties as they stood at the time of the engagement. The husband's ignorance of the property settled, though urged in Goddard v. Snow and Taylor v. Pugh as a ground for sustaining the settlement, was expressly overruled and was disapproved in England v. Downs. In the latter case Lord Langdale says: "If both the property and the mode of its conveyance pending the marriage treaty were concealed from the intended husband, as was the case in Goddard v. Snow, there is still a fraud practiced on the husband. The nonacquisition of property of which he had no notice is no disappointment; but still his legal right to property actually existing is defeated, and the vesting and continuance of a separate power in his wife over property which ought to have been his, and which is, without his consent, made independent of his control, is a surprise upon him, and might, if previously known, have induced him to abstain from the marriage." In Taylor v. Pugh the same consideration was rejected by the vice chancellor; and he reasoned with great force that no equitable considerations arising out of the circumstances of the particular case, such as those before referred to, shall excuse a concealment from the husband, or sustain a settlement made without his knowledge.

In this country the ignorance of the husband of a settlement by the wife pending a treaty of marriage has of itself been uniformly held fatal to the settlement, though no actual misrepresentation or deceit might appear. The cases are collected in 1 White & T. Lead. Cas. Eq. 317. See, especially, Linker v. Smith, 4 Wash. C. C. 224, Fed. Cas. No. 8,373; Tucker v. Andrews, 13 Me. 124; Logan v. Simmons, 3 Ired. Eq. 487; Spencer v. Spencer, 3 Jones, Eq. 404, 409; Poston v. Gillespie, 5 Jones, Eq. 258; Ramsay v. Joyce, 1 McMul. Eq. 236 (in which latter case an issue was directed to the single question whether the husband had knowledge of the settlement); and Manes v. Durant, 2 Rich. Eq. 404. In North and South Carolina the whole subject of fraud on marital rights has been examined in a series of cases contemporaneous with the later English decisions, and without reference to them, but reaching the same conclusion, viz. that no antenuptial settlement by the wife can be valid if made without the husband's knowledge; it matters not how meritorious may be the objects provided for by the wife, or what may be the circumstances of the husband. He is considered as having rights springing out of the treaty of marriage, not to be controlled by any equitable considerations between the wife and third person. And in North Carolina the result reached by frequent investigations of the subject has been to establish a rule requiring, in order to sustain a settlement by the wife, not only that the husband have general knowledge of her intention to make one, or that she has done so, but requiring his consent to the very act or instrument by which the settlement is made. Spencer v. Spencer, 3 Jones, Eq. 409; Poston v. Gillespie, 5 Jones, Eq. 262.

We see, then, both in England and in this country, since the decision of Countess of Strathmore v. Bowes, and the cases prior to it, the course of judicial opinion has tended more and more to strengthen the protection of marital rights against settlements made to their prejudice (1) by enlarging the ground of invalidity. This originally was only actual fraud, evidenced by positive misrepresentation or deceit, but now it includes also constructive fraud, such as arises from mere nondisclosure; and (2) by excluding all the exceptions founded on equitable considerations in the particular case, which were originally allowed to support such settlement; thus making in all cases the husband's knowledge, at least, and in some courts his positive assent, essential to the validity of a conveyance or settlement made after an engagement to marry.

Now, wishing to lay down a rule only for the case presented, it is enough to say that this court will protect a husband against a voluntary conveyance or settlement by the wife of all her estate, to the exclusion of her husband, made pending an engagement of marriage, without his knowledge, prior to the marriage, even in the absence of express misrepresentation or deceit, and whether the husband knew of the existence of the property or not. The concealment of what it is the right of the husband to know, and what it is the duty of the wife to disclose, is itself fraud in law. It is a doctrine of equity, not so fully developed at the date of Strathmore v. Bowes as now, that the concealment, to the prejudice of another party with whom one is dealing, of facts which, if known to him, might affect his decision, and which there is an obligation arising out of the transaction to disclose, is a fraud. It is so treated in equity without respect to the motive of the party in the concealment, being what is termed a "constructive fraud." But whether a conveyance or settlement made under the circumstances I have stated is always void, or whether it may be sustained upon such equitable considerations as were admitted in the

earlier English cases, and in St. George v. Wade, 1 Myine & K. 610, such as the reasonableness of its provisions as being made for children of a former marriage, or its embracing only a part of the wife's estate, or such as the husband's inability to make a settlement upon the wife, I leave as questions open in this state until they arise judicially.

We now reach a question which was discussed with much earnestness and ability on both sides: Will equity extend to the wife the like protection against an antenuptial conveyance by her husband which we have seen it affords to the husband against her?

After a patient examination of the argument and authorities, I find no just ground of discrimination against the wife. First, dower is a right of property, and, as such, a proper subject of protection; indeed, a right above all other rights of property favored. Again, dower is a marital right, as well as is the husband's interest in the wife's property. Protection, maintenance, and dower are the rights inuring to her from the marriage; and, though her dower is inchoate only until the husband's death, it is none the less, in his lifetime, a legal right, vested and indefeasible, except by her own act. This is so far recognized that a release of it by the wife is held a sufficient consideration to support a postnuptial settlement upon her, and to make it available, if bona fide, against the husband's creditors. Ath. Mar. Sett. (27 Law Lib.) 162; Bullard v. Briggs, 7 Pick. 533. Again, the wife is a purchaser of her marital rights, as much so as is the husband. She takes them for a consideration, rendered by her in the marriage,—a consideration not, indeed, the same in kind as that rendered by the husband for his marital rights, but, considering all the consequences involved in marriage, what the wife surrenders is in value or measure more, certainly not less, than what she receives. She surrenders her person, her services, her self-control, her means of self-support; and, as to property, far more than the interest she acquires. However, it should be said that whether the wife's dower, as well as the husband's interest in her estate, is to be protected against fraud, depends not at all upon such considerations as the comparative value of the consideration rendered by each, or the value of their respective rights, but solely upon the fact that there exists a marital right, which, in common with all legal rights, is a proper subject of legal protection, whether it be itself of more or less value, or whether it spring from a larger or less consideration rendered. If there could be any ground, in addition to the mere existence of a right defrauded, to evoke a swifter interposition for one sex rather than the other, it would be the consideration that the wife, being of the weaker sex, the more needs legal protection.

It was argued by the defendant's counsel that in England dower is not protected as a marital right against a conveyance by the husband before the marriage, even though made on the eve of marriage and expressly to exclude the wife, that under the English decisions, the husband and wife, in this respect, stand on a different footing. There is no decision upon the precise question, but the weight of opinion is in favor of the position taken. Prior to the statute of uses, estates were largely held in trust; and it was, from the beginning, considered that dower did not attach to a use, even when it was one reserved to the husband under a conveyance made by himself. Whether a conveyance with a use reserved to himself by the husband, made on the eve of marriage, and with the express purpose of barring dower, was, at that period, held to be effectual, does not appear by any decided case. The case Ex parte Bell, 1 Glyn & J. 282, cited in 1 Roper, Husb. & Wife (32 Law Lib.) 354n, that a voluntary settlement made by the husband, though set aside as fraudulent against creditors, prevents his wife's right of dower, cannot be taken as a decision upon the question, since it does not appear whether the settlement was made pending a marriage treaty. The dicta on this point are conflicting. Lord Chief Baron Gilbert is reported to have said that such a conveyance would be fraudulent as to the wife. 4 Cruise, Dig. 416; 1 Roper, Husb. & Wife (32 Law Lib.) 354n. In 1 Crusie, 411, and in 4 Cruise, 416, it is laid down that a secret conveyance by the husband, in trust before marriage, to defeat dower, is void; and the whole doctrine as to antenuptial settlements by the wife is expressly applied to conveyances by the husband made under like circumstances. On the other hand, Lord Hardwicke, in Swannock v. Lyford, Co. Litt. 208a, note 1, also reported fully in Park, Dower, 382, treats it as admitted "that if a man, before marriage, conveys his estate privately, without the knowledge of his wife, to trustees in trust for himself and his heirs in fee, that will prevent dower." Upon this authority, Park, Dower, 236, so lays down the rule. So, also, does 1 Washb. Real Prop. 161. After the statute of uses, which converted all uses into legal estates, and so admitted dower to attach to them, another mode of avoiding the inconveniences of dower was resorted to by the practice of settling jointures in lieu of dower. By a statute of Henry VIII., which was passed to remedy the inconvenient effect of the statute of uses as to dower, the husband was authorized to settle upon his intended wife, before the marriage, a jointure, which, if reasonable, was held effectual as an equivalent for dower, and barred it, even though made without the wife's privity, the courts of equity reserving the power to relieve the wife against a jointure unfair or merely illusory. Such, after much controversy was the construction finally given to this statute in Earl of Buckingham v. Drury, 3 Brown, Parl. Cas. 492, cited in 1 Roper, Husb. & Wife, 477. The effect was that dower, under the English system, became a

precarious, and, in the case of large estates, an infrequent mode of provision for the wife; and hence its value as a marital right, and the importance of protecting it, was the less appreciated. Marriage was not presumed to have been contracted in expectation of it, unless upon representations to the wife that she would become entitled to it. This may account for what otherwise must appear as an unjust discrimination made by the English courts of equity in withholding from the wife such protection as is given to the husband against secret antenuptial settlements. Such a reason is suggested in the note to 1 Roper, Husb. & Wife, 354. But in this country, clearly the same reasons do not apply. Her dower is the only provision made by law for the wife out of the husband's real estate. Practically it is a most important resource, and the only form of provision out of real estate enjoyed by her, except under wills. It does, in fact, to a large extent, enter into the wife's expectations in contracting marriage, and properly so. It, therefore, ought to receive all the protection accorded to any marital right. To refuse it would, in this country, where jointures are unknown, render the right of dower precarious, if not wholly illusory.

In none of the American cases has this subject been thoroughly examined; but so far as they have gone they treat the wife's marital rights and their claim to protection as being on the same footing with those of the husband. In Swaine v. Perine, 5 Johns. Ch. 482, a conveyance was made by a husband before marriage, with a view to defeat the wife's dower. The deed was to his daughter, was kept concealed for many years, and possession did not go with it. After the husband's death the widow filed her bill for dower, and it was decreed to her; the deed being adjudged fraudulent as against her. It is true, that in a previous suit, the deed had been held void as against a mortgagee claiming under a mortgage subsequent in date to the deed; but the widow was admitted to her dower not at all in consequence of the decree previously made, that the deed was void as against the mortgagee. It was expressly declared to be fraudulent as against her also; and she would have been relieved quite as certainly, had there been no previous controversy between the husband's representatives and another party touching the deed. It is also true that this was treated by the chancellor as a case of fraud in fact. It is, then, an authority for the relief of the wife against an antenuptial conveyance by the husband, fraudulent in fact; but whether she should be relieved against a conveyance on the ground of mere nondisclosure is a question not decided in Swaine v. Perine.

To the same extent precisely is the ruling of Petty v. Petty, 4 B. Mon. 215. In that case a settlement by the husband, on the eve of marriage, of all his property, upon his children by a former marriage, was declared void so far as it affected the wife's dower in the real estate. It was a case of fraud in fact, very gross in its circumstances, being in violation of express representations made to the wife before marriage, in order to induce her consent. This case, like Swaine v. Perine, decides nothing as to the effect of mere concealment. It is, however, in one of its features, a valuable recognition of the meritorious character of dower as a marital right, and of its claim to legal protection; for the wife was relieved upon a bill filed in her husband's lifetime, while her dower was inchoate only, the deed being adjudged void, lest it should, through delay, become an impediment to her right of dower in the event of her surviving the husband.

Now, although, in Swaine v. Perine and Petty v. Petty, relief was given against fraud in fact, yet in weighing the effect of these decisions upon the case before us this is to be considered. They recognize the wife's dower to be a marital right, and as such a proper subject of protection in equity against a fraudulent antenuptial conveyance, placing it upon an equal footing in this respect with the husband's marital rights. Then, with respect to the sort of fraud against which she should be relieved; whether it must be only what is termed fraud "in fact," or whether she should be protected against "constructive fraud," such as bare concealment, the same rule must apply in her favor which we have already seen has become settled for the husband's protection, viz. that constructive, as well as actual, fraud will invalidate an antenuptial conveyance.

Two cases, at least, have carried the protection of the wife thus far. One is Cransom v. Cransom, 4 Mich. 230. A husband, two weeks before his marriage, made a voluntary conveyance of his lands to his sons, with the design to exclude his intended wife. There was no misrepresentation to the wife; no positive deception. It was a case of mere concealment. The deed was held void on two distinct grounds, viz. the absence of a sufficient delivery, and also that, "being executed secretly, for the purpose of cutting off the wife's dower, it was a fraud in law upon her rights accrued directly from the marriage." The other case of this class is Smith v. Smith, 6 N. J. Eq. 515. A husband, on the day of the marriage, but before it, without the wife's knowledge, settled property upon himself and a daughter by a former marriage, with intent to defeat dower. Actual misrepresentation was alleged by the bill, but denied by the answer. No proof to that effect appears, and the decision does not rest upon any such feature; but the chancellor assumes the broad ground that "a voluntary conveyance by a man on the eve of marriage, unknown to the intended wife, and made for the purpose of defeating the in-

terest which she would acquire by the marriage in his estate, is fraudulent as against her. I see no sound distinction," he adds, "between this case and the like conveyance by a woman under the like circumstances."

In 1 Scrib. Dower, 561, there are cited, to the same point, Littleton v. Littleton, 1 Dev. & B. 327, and Rowland v. Rowland, 2 Sneed, 543; but these cases I have not seen. Scribner refers to the American decisions as "not being entirely uniform"; and in 1 Washb. Real Prop. 175, it is said that "the cases are singularly conflicting." On examination of the cases, I find no conflict whatever as to the power of a court of equity to relieve the wife. It is only in courts of law, where a legal seisin is essential to dower, that the claim to it against the husband's conveyance prior to marriage has been denied; as in Baker v. Chase, 6 Hill, 482. The other case cited in Washburn as against the doctrine of Swaine v. Perine is Jenny v. Jenny, 24 Vt. 324. I have examined this case, and think it not relevant to the question, though, not having it by me, I cannot state its circumstances. The rule to be derived from the equity decisions is that the wife's dower will be protected against a voluntary conveyance of the husband, made pending a marriage engagement, under precisely the same circumstances in which the husband is relieved against an antenuptial settlement by the wife.

I am therefore of opinion that Mrs. Chandler is entitled to dower out of the real estate described in the deed of trust, notwithstanding the execution of the deed before her marriage, together with one-third of the rents and profits accrued since her husband's death. It appears from the answer that part of the real estate—a lot in Wilmington—has been sold by the trustees for $400, its value. Assuming, as it is proper to do, that the purchaser was a bona fide purchaser, without notice, the court will not follow this lot into his hands; but the widow is nevertheless entitled, as against the defendants, to an assignment of such a share of the remaining real estate as she would have taken if the lot had remained in their hands; and therefore, in assigning the dower, although it will be assigned only out of the remaining real estate, yet in estimating her share of that, the whole real estate, including the lot sold, will be considered.

2. It now remains to consider briefly the claim of the complainants to relief beyond the allowance of dower to the widow. The prayer is that the trust deed be declared wholly void, so that the real estate may descend under the intestate law, and the personal estate be distributed precisely as if no deed had been executed. This relief the court cannot decree.

A court of equity will not interfere to set aside a voluntary conveyance, because the conveyance disappoints hopes or expectations, however just and reasonable; not even because it violates obligations, if they are only natural or moral ones. Courts of equity, as well as of law, protect only legal rights, and enforce legal obligations; legal, I mean, as distinguished from such as are merely natural or moral. For example, a promise, however solemnly made and binding in morals, if without a consideration, is not enforced in equity any more than at law; nor is the obligation of a parent to provide for children after his death. So a conveyance will be set aside on the ground of fraud only when it is in fraud of some legal right, and one existing at the time it is made. Now, in this case, we may waive the fact that, as to the infant complainant, he was not in esse at the execution of the trust deed. It is a consideration decisive of the whole of this branch of the case that, even had William Chandler not conveyed his estate, his marriage would have vested no rights in it, nor have restricted his absolute control of it beyond the wife's dower in the real estate. He could, after marriage, have effectually disposed of his whole personal estate and of the inheritance of his real estate by just such a trust deed as this. It follows that his control of the property could not be less absolute before the marriage than after it; for, otherwise, an engagement to marry would be of more force than marriage itself. Besides, as any disposal of property before marriage, which he could as freely have made after marriage, defeated no right, but removed only a bare chance that the complainants might succeed to it if Chandler should continue to hold it and die intestate, the loss of such a chance cannot be treated as the disappointment of a just and reasonable expectation in marriage, nor as so altering the circumstances of the husband as to have influenced the decision of the intended wife. Again, it is clear that this deed would have stood against any attempt by Chandler to dispose of the personal estate and the inheritance of the real estate by another deed or by will. That he made no such attempt, but died intestate, so that, as it happened, these complainants would have succeeded to the whole property but for this deed, cannot affect the deed. A conveyance can be set aside only for causes affecting it when it is made, as for fraud then committed, or for the protection of rights then existing. Its validity cannot be held in suspense, to be determined by future contingencies. This would subject titles to a distressing uncertainty.

But it was argued for the complainants that the deed, being fraudulent in respect to dower, is, therefore, wholly void, passing no title whatever; so that the heir at law may succeed to the real estate, and the distributees to the personal estate, as a consequence of the fraud on the right of dower, though they themselves might have no equi-

ty to set the deed aside. Such would be the effect if the deed were illegal; as where it violates the provisions of a statute which avoids the deed itself. It is then a nullity, and stands in the way of no claim which otherwise would be valid. And so, where a conveyance is tainted with fraud in fact, in which the parties claiming under it are implicated, such a conveyance is wholly void; for no effect whatever can be given to an instrument actually fraudulent; and therefore it is that, although a conveyance which is merely voluntary, and not fraudulent in fact, is invalid only against existing creditors, and not against subsequent creditors. Yet, if the conveyance is tainted with actual fraud, it is void altogether, and subsequent creditors are let in. But such is not the effect of constructive fraud. The object of the doctrine of constructive fraud is to protect some right or interest which, in equity, ought to be preserved, against the effect of a conveyance which is in other respects valid; and therefore equity does not avoid the deed altogether, but saves against it the rights or interests which are to be protected. A deed containing some provisions or having some operation forbidden by statute or public policy, or contrary, as in this case, to some equity, is held invalid only so far as the statute or policy or equity requires, upon the principle "ut res magis valeat quam pereat." Bredon's Case, 1 Coke, 76; Shep. Touch. 68; Doe v. Pitcher, 6 Taunt. 359; Darling v. Rogers, 22 Wend. 483. Thus a voluntary conveyance, if not fraudulent in fact, passes the title to the grantor, but subject to the rights of existing creditors, which are preserved by raising an implied trust in the grantor. See 1 Story, Eq. Jur. § 371. So in this case the trust deed is effectual between the parties, but equity preserves the right of dower against the real estate in the hands of the grantees. Precisely as at law, dower follows real estate conveyed by the husband after the marriage, though the conveyance is otherwise good. It does not seem accurate to say that a deed is void for constructive fraud. The deed is valid; title under it passes, but subject in equity to those rights which are affected by the fraud.

Decree for complainant, Mrs. Chandler, in accordance with the foregoing opinion.

STILL et ux. v. RUBY et al.

(35 Pa. St. 373.)

Supreme Court of Pennsylvania. Jan. Term, 1860.

Error to district court, Philadelphia county.

Scire facias by Mary Ruby, John Ruckstool, and Eliza A. Ruckstool against Charles Still and Sarah K., his wife, on a mortgage given by the defendants to the female plaintiffs of the Heart & Hand Female Beneficial Society of Philadelphia.

The following affidavit of defence was filed by one of the defendants: "Charles Still, one of the above-named defendants, and on behalf of his codefendant, being duly sworn, &c., saith: That they have a just and legal defence to the whole of plaintiffs' claim in the above case, the nature and character of which is as follows: That the said Eliza A. Ruckstool, one of the above-named plaintiffs, before and at the time of the commencement of this suit, and at the time of the execution of the mortgage on which said suit is brought, was and still is married to one John Ruckstool, then and yet her husband, who is still living, to wit, at Philadelphia aforesaid, in the county aforesaid; and this deponent for himself and his codefendant further says, that they have not, nor has either of them, any knowledge of John Ruckstool joined as a party plaintiff in this suit, except as the reputed husband of the said Eliza A. Ruckstool; his name does not appear in the mortgage on which this suit is brought. Nor have this deponent and his codefendant, or has either of them, at any time, had any transactions of business or otherwise with him. All of which the deponent expects to be able to prove on the trial of the case."

Judgment was rendered for want of a sufficient affidavit of defence.

J. M. Arundel, for plaintiff in error. Mr. Brinkle and B. A. Mitchell, for defendant in error.

WOODWARD, J. The affidavit disclosed no defence whatever. Mrs. Ruckstool, as appeared on the face of the mortgage, was only trustee for the Heart & Hand Female Beneficial Society, in whom the beneficial interest of the mortgage was vested. Femes covert, like infants, lunatics, and others non sui juris, may be trustees, subject, of course, to their legal incapacity to deal with the estate vested in them: Hill, Trustees, 49. The incapacity of Mrs. Ruckstool to sue in her own name was obviated by her husband joining with her. The mortgagors must pay the money as they agreed to do.

The judgment is affirmed.

## DANSER v. WARWICK.

(33 N. J. Eq. 133.)

Court of Chancery of New Jersey. Oct. Term, 1880.

George C. Beekman, for complainant. Joel Parker, for defendant.

VAN FLEET, V. C. The complainant is the widow of David C. Danser. She seeks to have a parol trust established and enforced against the defendant. She alleges that her husband, some months before his death, assigned the bond and mortgage in controversy to the defendant, upon a parol trust or understanding that he would forthwith, or by a short day, transfer them to her. The transfer to the defendant was intended to be merely a step in vesting her with title. The assignment to the defendant bears date February 1, 1875, and Danser died on the 13th day of the following September. The bond and mortgage were in Danser's possession at the time of his death, and have since then been constantly in the possession of the complainant. The defendant has never asked for them, nor attempted to get possession of them. A month or six weeks prior to Danser's death, the defendant directed an assignment to be drawn to the complainant, stating to the person to whom he gave the direction that he must draw it for Danser, who would pay him. He, at the same time, said it was right that the old lady—referring to the complainant—should have the bond and mortgage. Danser, at this time, was prostrated by the disease which shortly afterwards caused his death. The defendant did not remain to execute the assignment, but said he would return soon and do so. He did not return that day. He was subsequently informed, on two or three different occasions, while Danser was living, that the assignment had been drawn and was ready for execution. On each occasion he said he had forgotten or neglected to execute it, but would call soon and do so. He never fulfilled his promise. Two or three weeks after Danser's death, he called for the assignment Danser had made to him, and which he had left when he gave direction for the draft of the one to the complainant, and stated that he meant to do what was right about the matter, but he would not execute the assignment to the complainant until things were fixed up; Danser owed him. He took both papers, and has never executed the assignment to the complainant.

This narrative comprises only those facts which are not disputed by either party.

The defendant denies that the mortgage was transferred to him subject to a trust, but says, on the contrary, that the assignment was made to satisfy a promissory note he held against Danser, upon which there was due $2,000 of principal and a year and six or seven months' interest. His explanation of the preparation, by his direction, of an assignment to the complainant, is this: He says, some time after the execution of the assignment to him, he ascertained that the person who made the mortgage had no title on record for the mortgaged premises; that he went at once to Danser, and told him he had swindled him, and that if he did not take the mortgage back he would make him. He says that Danser replied that the mortgagor's title was all right, but if he was dissatisfied he would pay him his debt, or give him another security, and he could then reassign the mortgage. He further says that it was ultimately arranged that Danser should have two mortgages, which were then liens on his lands, canceled, and execute a mortgage thereon to him, and he was then to assign the mortgage in controversy to the complainant. He says it was after this scheme had been agreed upon that he ordered the assignment to the complainant to be drawn.

These statements present the question of fact to be decided. The counsel of the defendant, however, insists that, as a matter of law, the bill in this case must be dismissed, regardless of what the evidence demonstrates the truth to be in respect to the trust alleged, his contention being that the trust set up by the complainant is one which cannot be established except by written evidence. The trust, it will be observed, affects personal property, and not lands. The subject of it is a debt. That part of the statute of frauds which enacts that all declarations and creations of trust shall be manifested by writing, and signed by the party creating the same, or else shall be void and of no effect, applies only to trusts of lands, and has no application to trusts of personal property. A valid trust of personalty may be created verbally, and proved by parol evidence. A trust of personal property, almost precisely like the one under consideration, and which had been created by mere spoken words, and was supported by only parol evidence, was upheld by Chancellor Williamson in Hooper v. Holmes, 11 N. J. Eq. 122; also Kimball v. Morton, 5 N. J. Eq. 26; Sayre v. Fredericks, 16 N. J. Eq. 205; Eaton v. Cook, 25 N. J. Eq. 55; 2 Story, Eq. Jur. § 972; 1 Perry, Trusts, § 86. A valid trust of a mortgage debt may be created by parol; for, though a trust thus created cannot embrace the land held in pledge, yet it is good as to the debt, and will entitle the cestui que trust to sufficient of the proceeds of sale, when the land is converted into money, to pay the debt. Sayre v. Fredericks, supra; Benbow v. Townsend, 1 Mylne & K. 506; Childs v. Jordan, 106 Mass. 321.

It must be held, then, that the trust alleged in this case is valid, and if it has been sufficiently proved, the complainant is entitled to have it established and enforced. The question then is, has it been proved? A high degree of evidence should be required.

Before the court ingrafts a trust upon a written instrument, absolute on its face, it should require the most cogent proof. Such proof, I think, has been furnished in this case. The undisputed facts make a strong case against the defendant. He attempts to explain and moderate the force of the one having the greatest weight. I refer, of course, to the fact that he had an assignment drawn to the complainant, and that when he gave the order he said it was right that she should have the bond and mortgage. His attempted explanation has, however, resulted in a series of contradictions which utterly destroy his testimony.

By his answer, which is under oath, he says that after he sent his assignment to Ocean county for record, he was informed that the mortgagor had no title on record for the mortgaged premises, and that he went at once to see Danser, and that an arrangement was then made by which Danser was either to pay his debt or substitute another security, and he was then to reassign the mortgage. His assignment was not lodged for record until October 23, 1875. Danser had then been dead more than a month, so that the arrangement, at the time stated, was unquestionably a fabrication. When the defendant came to testify, he swore that, before he lodged his assignment for record, he had heard, from one George P. Conover, that the mortgagor had no title, and he went at once to see Danser. But it is perfectly clear, from the evidence, that Conover could not have given this information until long after Danser's death; for he did not have it himself. Conover obtained his information from the mortgages, and the mortgagor swears that he first obtained it from a search made in December, 1876. The defendant was subsequently recalled and re-examined, against the complainant's objection, and without an order for that purpose, and then swore that one Edward P. Jacobus first informed him that the mortgagor had no title, and that this information was given to him very soon after the assignment was made to him. But, upon the examination of Jacobus, it was shown that the search from which he obtained his information was not made until after Danser had been dead more than a month. So it is perfectly clear that the information which the defendant says led to his interview with Danser did not come to him until after Danser was dead, and the conclusion is therefore unavoidable that no such interview as he describes took place. The tergiversation of the defendant upon this point renders his testimony unworthy of credit. I find it impossible to believe him.

It must also be remarked that the defendant's conduct in relation to the custody of the bond and mortgage, as portrayed by himself, shows very clearly that he did not believe they were his property. He says the bond and mortgage were delivered to him, with the assignment, on the day of the date of the assignment, and that he took them to a hotel, in which he and Danser were jointly interested, and which was under the management of Danser, and threw them in a desk in the bar-room. He retained the assignment. He gave them no further care or attention, but carried the assignment to his house, and placed it in his safe. He does not know when or how Danser got possession of the bond and mortgage. So far as appears, he has never tried to find out. Danser did not live in the hotel, but occupied a dwelling in the village where the hotel was located. The defendant says, that while Danser was sick, on the occasion of his last visit to him, Danser told the complainant to get the bond and mortgage and give them to him, but that she refused to do so, and, to repeat his own words, "she was just as cross to me as she could be." He did not ask Danser why he had taken them from the desk, nor did he insist upon their being at once surrendered. He never asked for them after Danser's death, nor did he make any attempt to obtain possession of them. Every phase of his conduct evinces a consciousness that he had no right to them, and that any attempt to take them from the possession of the complainant would be met by a resistance which he knew was grounded in right and truth. The evidence, in my opinion, fully establishes the trust alleged.

The defendant also insists that the trust upon which the complainant's action is founded should not be enforced, because it was concocted to cheat and defraud Danser's creditors. It is enough to say of this contention that no such defence is presented by the answer, and that the complainant's right to a decree cannot be defeated by a defence she has had no opportunity to meet and disprove.

There must be a decree establishing the trust, and requiring the defendant to execute it. The defendant must pay costs.

## LAMBE v. EAMES.

(6 Ch. App. 597.)[1]

Court of Appeal in Chancery. March 10, 1871.

John Lambe, by his will, gave his freehold house in Cockspur street, and all his estate, to his widow, "to be at her disposal in any way she might think best for the benefit of herself and family." The testator died in 1851, leaving the widow and children. One of his sons had an illegitimate son, Henry Lambe, born in the lifetime of the testator, but after the date of his will.

The widow died in 1865, having by her will devised the freehold house in Cockspur street to trustees, upon trust for one of her daughters, Elizabeth Eames, but charged with an annuity for Henry Lambe.

Henry Lambe filed the bill in this suit to obtain payment of the annuity, which was disputed by Elizabeth Eames, on the ground that the widow had only a power of disposition amongst the family, and that Henry Lambe, being illegitimate, could not take under that power.

The vice-chancellor, Malins, decided that the devise to the widow was absolute, and that she had therefore power to devise to the plaintiff as reported. L. R. 10 Eq. 267.

The defendant Elizabeth Eames appealed.

Mr. Bristowe, Q. C., and Mr. W. Barber, for appellant. Mr. Heath, for defendant. Mr. Cotton, Q. C., and Mr. Warner, for plaintiff.

JAMES, L. J. In this case my opinion is that the decision of the vice-chancellor is perfectly right. If this will had to be construed irrespective of any authority, the construction would, in my opinion, not be open to any reasonable doubt.

It is the will of a man who was in business as a shopkeeper, and was when he made his will in the prime of life, with a wife and young children, and it is to this effect: [His lordship then read the will.] Now the question is whether those words create any trust affecting the property; and in hearing case after case cited, I could not help feeling that the officious kindness of the court of chancery in interposing trusts where in many cases the father of the family never meant to create trusts, must have been a very cruel kindness indeed. I am satisfied that the testator in this case would have been shocked to think that any person calling himself a next friend could file a bill in this court, and, under pretence of benefiting the children, have taken the administration of the estate from the wife. I am satisfied that no such trust was intended, and that it would be a violation of the clearest and plainest wishes of the testator if we decided otherwise.

The testator intended his wife to remain head of the family, and to do what was best for the family. If he had said, "I give the residue of my property to my three sons, each to take his share, to be at his disposition as he should think best, for the benefit of him and his family," in such a case it would be clear that the testator did not mean to tie the property up, but to give a share to each son, believing that he would do the best for his family.

But it is said that we are bound by authority. The cases cited may, however, be distinguished. In this will there is, in the first place, an absolute gift, and we have to be satisfied that this gift is afterwards cut down. It was also argued that in some cases, as in Crockett v. Crockett, 2 Phil. Ch. 553, the court has decided there was some interest in the children, but did not declare what it was, leaving the matter to be dealt with after the death of the tenant for life.

It is possible that in this case there may be some obligation on the widow to do something for the benefit of the children; but assuming that there is such an obligation, it cannot be extended to mean a trust for the widow for her life, and after her death for the children in such shares as she may think fit to direct. That would be to enlarge the will in a way for which there is no foundation; but unless the will has that meaning, what trust is there? I cannot agree that she is to take what she likes, and that what she has not spent is to go at her death for the benefit of her children. In Crockett v. Crockett, 2 Phil. Ch. 553, it was only decided that the children had some interest; and if the widow fairly satisfied that obligation, and gave them some interest, nothing more could be required.

Then this case was said to be like Godfrey v. Godfrey, 2 N. R. 16, 11 Wkly. R. 554. But there the vice-chancellor decided that there was an interest, though he did not define what that interest was. [His lordship then read and commented on the judgment in Godfrey v. Godfrey, and said that the ratio decidendi in that case was that there was a trust.] But it is impossible in this case to say that there was a trust. The testator clearly intended her to deal with the property as she pleased, and contemplated that she might risk it in his trade.

The other cases cited are merely illustrations of the same kind, and do not enable the court to escape from the difficulty of having to decide upon the meaning of the word "family." It seems to me impossible to put any restriction upon the meaning of that word, or to exclude any person who, in ordinary parlance, would be considered within the meaning. The word might include sons-in-law, or daughters-in-law, and many others. It is equally uncertain what the property is, because, if she could spend any part for her own private purposes, then there might be nothing left for the trust.

It is impossible to execute such a trust in this court, and if the case stood alone, I should say that no sufficient trust was declared by

[1] Irrelevant parts omitted.

the will. But if there be any such obligation, I think it has been fairly discharged by the way in which she has made her will; giving part for the benefit of one member of the family, and part to a natural son, whom she might reasonably think it her duty to benefit.

It appears to me, that the decision of the vice-chancellor is right, and that the appeal must be dismissed.

* * * * * * * *

## RICHARDS v. DELBRIDGE.

(L. R. 18 Eq. 11.)

Chancery Division. April 16, 1874.

Demurrer. The bill filed by Edward Bennetto Richards, an infant, by his next friend, stated: That John Delbridge, deceased, was possessed of a mill, with the plant, machinery, and stock-in-trade thereto belonging, in which he carried on the business of a bone manure merchant, and which was held under a lease dated the 24th of June, 1863. That on the 7th of March, 1873, John Delbridge indorsed upon the lease and signed the following memorandum: "7th March, 1873. This deed and all thereto belonging I give to Edward Bennetto Richards from this time forth with all the stock-in-trade. John Delbridge." That the plaintiff was the person named in the memorandum, and the grandson of John Delbridge, and had then for some time assisted him in the business. That John Delbridge, shortly after signing the memorandum, delivered the lease on his behalf to Elizabeth Ann Richards, the plaintiff's mother, who was still in possession thereof. That John Delbridge died in April, 1873, having executed several testamentary instruments which did not refer specifically to the said mill and premises, but he gave his furniture and effects, after his wife's death, to be divided among his family. That the testator's widow, Elizabeth Richards, took out administration to his estate, with the testamentary papers annexed. The bill, which was filed against the defendants Elizabeth Delbridge, Elizabeth Ann Richards, and the testator's two sons, who claimed under the said testamentary instruments, prayed a declaration that the indorsement upon the lease by John Delbridge and the delivery of the lease to Elizabeth Ann Richards created a valid trust in favor of the plaintiff of the lease and of the estate and interest of John Delbridge in the property therein comprised, and in the good will of the business carried on there, and in the implements and stock-in-trade belonging to the business. The defendants demurred to the bill for want of equity.

Fry, Q. C., and Mr. Phear, in support of the demurrer. W. R. Fisher (Mr. Southgate, Q. C., with him), and T. D. Bolton, for plaintiff. Gregory, Rowcliffes & Rawle, for defendants.

JESSEL, M. R. This bill is warranted by the decisions in Richardson v. Richardson, L. R. 3 Eq. 686, and Morgan v. Malleson, L. R. 10 Eq. 475, but, on the other hand, we have the case of Milroy v. Lord, 4 De Gex, F. & J. 264, before the court of appeals, and the more recent case of Warriner v. Rogers, L. R. 16 Eq. 340, 348, in which Vice Chancellor Bacon said: "The rule of law upon this subject I take to be very clear, and, with the exception of two cases which have been referred to (Richardson v. Richardson and Morgan v. Malleson), the decisions are all perfectly consistent with that rule. The one thing necessary to give validity to a declaration of trust—the indispensable thing—I take to be, that the donor, or grantor, or whatever he may be called, should have absolutely parted with that interest which had been his up to the time of the declaration, should have effectually changed his right in that respect, and put the property out of his power, at least in the way of interest."

The two first mentioned cases are wholly opposed to the two last. That being so, I am not at liberty to decide the case otherwise than in accordance with the decision of the court of appeal. It is true the judges appear to have taken different views of the construction of certain expressions, but I am not bound by another judge's view of the construction of particular words; and there is no case in which a different principle is stated from that laid down by the court of appeal. Moreover, if it were my duty to decide the matter for the first time, I should lay down the law in the same way.

The principle is a very simple one. A man may transfer his property, without valuable consideration, in one of two ways: he may either do such acts as amount in law to a conveyance or assignment of the property, and thus completely divest himself of the legal ownership, in which case the person who by those acts acquires the property takes it beneficially, or on trust, as the case may be; or the legal owner of the property may, by one or other of the modes recognized as amounting to a valid declaration of trust, constitute himself a trustee, and, without an actual transfer of the legal title, may so deal with the property as to deprive himself of its beneficial ownership, and declare that he will hold it from that time forward on trust for the other person. It is true he need not use the words, "I declare myself a trustee," but he must do something which is equivalent to it, and use expressions which have that meaning; for, however anxious the court may be to carry out a man's intention, it is not at liberty to construe words otherwise than according to their proper meaning.

The cases in which the question has arisen are nearly all cases in which a man, by documents insufficient to pass a legal interest, has said: "I give or grant certain property to A. B." Thus, in Morgan v. Malleson, L. R. 10 Eq. 475, the words were: "I hereby give and make over to Dr. Morris an India bond"; and in Richardson v. Richardson, L. R. 3 Eq. 686, the words were, "grant convey, and assign." In both cases the judges held that the words were effectual

declarations of trust. In the former case, Lord Romilly considered that the words were the same as these: "I undertake to hold the bond for you," which would undoubtedly have amounted to a declaration of trust.

The true distinction appears to me to be plain, and beyond dispute; for man to make himself a trustee there must be an expression of intention to become a trustee, whereas words of present gift shew an intention to give over property to another, and not retain it in the donor's own hands for any purpose, fiduciary or otherwise.

In Milroy v. Lord, 4 De Gex, F. & J. 264, 274, Lord Justice Turner, after referring to the two modes of making a voluntary settlement valid and effectual, adds these words: "The cases, I think, go further, to this extent: That if the settlement is intended to be effectuated by one of the modes to which I have referred, the court will not give effect to it by applying another of those modes. If it is intended to take effect by transfer, the court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust."

It appears to me that that sentence contains the whole law on the subject. If the decisions of Lord Romilly and of Vice-Chancellor Wood were right, there never could be a case where an expression of a present gift would not amount to an effectual declaration of trust, which would be carrying the doctrine on that subject too far. It appears to me that these cases of voluntary gifts should not be confounded with another class of cases in which words of present transfer for valuable consideration are held to be evidence of a contract which the court will enforce. Applying that reasoning to cases of this kind, you only make the imperfect instrument evidence of a contract of a voluntary nature which this court will not enforce; so that, following out the principle even of those cases, you come to the same conclusion.

I must, therefore, allow the demurrer; and, though I feel some hesitation, owing to the conflict of the authorities, I think the costs must follow the result.

## NORTON v. RAY.

(29 N. E. 662, 139 Mass. 230.)

Supreme Judicial Court of Massachusetts. Bristol. May 8, 1885.

Report from superior court; Knowlton, Judge.

Action by William T. Norton against Ann S. Ray, as executrix of Isaiah C. Ray, for money had and received. Isaiah C. Ray had during his life-time purchased a piece of property with plaintiff's money and for his benefit, but took the deed in his own name. Isaiah C. Ray then gave plaintiff a written declaration of trust, by which he agreed to hold the property for plaintiff's benefit, but instead of doing this he deeded the property to plaintiff's wife without plaintiff's knowledge. This action was brought to recover the value of the property from Ray's estate. On this state of facts, Knowlton, J., in the superior court, found for defendant, and reported the case to the supreme court. Judgment for defendant.

H. M. Knowlton, for plaintiff. F. A. Milliken, for defendant.

W. ALLEN, J. The plaintiff's only remedy is in equity. The case discloses a trust, and cannot be brought within the decisions in which it has been held that an action for money had and received will lie against a trustee by a cestui que trust to recover a liquidated sum due to him under the trust. Johnson v. Johnson, 120 Mass. 465, and cases cited; Davis v. Coburn, 128 Mass. 377. Judgment for the defendant.

## OULD v. WASHINGTON HOSPITAL FOR FOUNDLINGS.

(95 U. S. 303.)

Supreme Court of United States. 1877.

Error to supreme court, District of Columbia.

In this case the plaintiff in error brought an action of ejectment against defendant, who held the land under a charitable trust created by a testator, whose heirs at law the plaintiffs were. The case was tried upon an agreed statement of facts, which sufficiently appear in the opinion of the court.

Benjamin F. Butler and O. D. Barrett, for plaintiffs in error. Walter S. Cox and James M. Johnston, for defendant in error.

Mr. Justice SWAYNE delivered the opinion of the court.

This case was submitted to the court below, upon an agreed statement of facts.

The court found for the defendant, and gave judgment accordingly. The plaintiffs thereupon sued out this writ of error. The questions presented for our consideration are questions of law arising upon the will of Joshua Pierce, deceased. The will declares: "I give, devise, and bequeath all those fourteen certain lots" (describing fully the premises in controversy) "to my friends, William M. Shuster and William H. Clagett, of the said city of Washington, and the survivor of them, and the heirs, executors, administrators, and assigns of such survivor, in trust, nevertheless, and to and for and upon the uses, intents, and purposes following, that is to say: In trust to hold the said fourteen lots of ground, with the appurtenances, as and for a site for the erection of a hospital for foundlings, to be built and erected by any association, society, or institution that may hereafter be incorporated by an act of congress as and for such hospital, and upon such incorporation, upon further trust to grant and convey the said lots of ground and trust-estate to the corporation or institution so incorporated for said purpose of the erection of a hospital, which conveyance shall be absolute and in fee: provided, nevertheless, that such corporation shall be approved by my said trustees, or the survivor of them, or their successors in the trust; and, if not so approved, then upon further trust to hold the said lots and trust estate for the same purpose, until a corporation shall be so created by act of congress which shall meet the approval of the said trustees or the survivor or successors of them, to whom full discretion is given in this behalf; and, upon such approval, in trust to convey as aforesaid; and I recommend to my said trustees to select an institution which shall not be under the control of any one religious sect or persuasion; and, until such conveyance, I direct the taxes, charges, and assessments, and all necessary expenses of, for, and upon said lots, and every one of them, to be paid by my executors, as they shall from time to time accrue and become due and payable, out of the residue of my estate."

The will was duly proved and admitted to probate in the proper court in the District of Columbia on the 22d of June, 1864. On the 22d of April, 1870, congress passed "An act for incorporating a hospital for foundlings in the city of Washington." 16 Stat. 92. On the 4th of April, 1872, Shuster and Clagett, the trustees, conveyed the property to the defendant in error, the Washington Hospital for Foundlings, so incorporated, pursuant to the directions of the will.

The statute of wills of Maryland of 1798, which is still in force in the District of Columbia, provides that "no will, testament, or codicil shall be effectual to create any interest or perpetuity, or make any limitation or appoint to any uses not now permitted by the constitution or laws of the state." 2 Kilty's Laws Md. c. 101.

Our attention has been called in this connection to nothing in the constitution, and to nothing else in the laws of the state, as requiring consideration. No statute of mortmain or statute like that of 9 Geo. II. c. 36, is an element in the case.

The statute of 43 Eliz. c. 4, was never in force in Maryland. Dashiell v. Attorney General, 5 Har. & J. 392. It is not, therefore, operative in the District of Columbia.

The opinion prevailed extensively in this country for a considerable period that the validity of charitable endowments and the jurisdiction of courts of equity in such cases depended upon that statute. These views were assailed with very great learning and ability in 1833 by Mr. Justice Baldwin, in Magill v. Brown, Brightly, N. P. 346. An eminent counsel of New York was the pioneer of the bar in 1835 in a like attack. His argument in Burr v. Smith, 7 Vt. 241, was elaborate and brilliant, and, as the authorities then were, exhaustive. He was followed in support of the same view, in 1844, by another counsel no less eminent, in Vidal v. Mayor, etc., 2 How. 128. The publication, then recent, of the Reports of the British Records Commission, enabled the latter gentleman to throw much additional and valuable light into the discussion. The argument was conclusive.

In delivering the opinion of the court, Mr. Justice Story, referring to the doctrine thus combated, said, "Whatever doubts might, therefore, properly be entertained upon the subject when the Case of the Trustees of the Philadelphia Baptist Association was before the court (1819), those doubts are entirely removed by the later and more satisfactory sources of information to which we have alluded."

The former idea was exploded, and has since nearly disappeared from the jurisprudence of the country.

Upon reading the statute carefully, one cannot but feel surprised that the doubts thus indicated ever existed. The statute is

purely remedial and ancillary. It provided for a commission to examine into the abuses of charities already existing, and to correct such abuses. An appeal lay to the lord chancellor. The statute was silent as to the creation or inhibition of any new charity, and it neither increased nor diminished the pre-existing jurisdiction in equity touching the subject. The object of the statute was to create a cheaper and a speedier remedy for existing abuses. The Morpeth Corporation, Duke, Char. Uses, 242. In the course of time, the new remedy fell into entire disuse, and the control of the chancellor became again practically sole and exclusive. The power of the king, as parens patriae, acting through the chancellor, and the powers of the latter independently of the king, are subjects that need not here be considered. Fontain v. Ravenel, 17 How. 379; 2 Story, Eq. Jur. § 1190.

The learning developed in the three cases mentioned shows clearly that the law as to such uses, and the jurisdiction of the chancellor, and the extent to which it was exercised, before and after the enactment of the statute, were just the same.

It is, therefore, quite immaterial in the present case whether the statute was or was not a part of the law of Maryland. The controversy must be determined upon the general principles of jurisprudence, and the presence or absence of the statute cannot affect the result.

Two objections were urged upon our attention in the argument at bar:

(1) That there is no specification of the foundlings to be provided for, and that therefore the devise is void for uncertainty.

In this connection, it was suggested by one of the learned counsel for the plaintiffs in error that a hospital for foundlings tends to evil, and ought not to be supported.

(2) That the devise is void because it creates a perpetuity.

The statute of Elizabeth, before referred to, names 21 distinct charities. They are: (1) For relief of aged, impotent, and poor people. (2) For maintenance of sick and maimed soldiers. (3) Schools of learning. (4) Free schools. (5) Scholars in universities. (6) Houses of correction. (7) For repair of bridges; (8) of ports and havens; (9) of causeways; (10) of churches; (11) of sea banks; (12) of highways. (13) For education and preferment of orphans. (14) For marriage of poor maids. (15) For support and help of young tradesmen; (16) of handicraftsmen; (17) of persons decayed. (18) For redemption or relief of prisoners or captives. (19) For ease and aid of poor inhabitants concerning payment of fifteens. (20) Setting out of soldiers; (21) and other taxes.

Upon examining the early English statutes and the early decisions of the courts of law and equity, Mr. Justice Baldwin found 46 specifications of pious and charitable uses recognized as within the protection of the law, in which were embraced all that were enumerated in the statute of Elizabeth. Magill v. Brown, supra. It is deemed unnecessary to extend the enumeration beyond those already named.

A charitable use, where neither law nor public policy forbids, may be applied to almost any thing that tends to promote the well-doing and well-being of social man. Perry, Trusts, § 687.

In the Girard Will Case, the leading counsel for the will thus defined charity: "Whatever is given for the love of God, or the love of your neighbor, in the catholic and universal sense,—given from these motives and to these ends, free from the stain or taint of every consideration that is personal, private, or selfish." Mr. Binney's Argument (page 41).

The objection of uncertainty in this case as to the particular foundlings to be received is without force. The endowment of hospitals for the afflicted and destitute of particular classes, or without any specification of class, is one of the commonest forms of such uses. The hospital being incorporated, nothing beyond its designation as the donee is necessary. Who shall be received, with all other details of management, may well be committed to those to whom its administration is intrusted. This point is so clear, that discussion or the citation of authorities is unnecessary. Cases illustrating the subject in this view are largely referred to in Perry, Trusts, § 699, and in the note to section 1164, Story, Eq. Jur. See, also, Id. §§ 1164, 1190, and notes.

Hospitals for foundlings existed in the Roman empire. They increased when Christianity triumphed. They exist in all countries of Europe, and they exist in this country. There are no beneficiaries more needing protection, care, and kindness, none more blameless, and there are none who have stronger claims than these waifs, helpless and abandoned upon the sea of life.

A perpetuity is a limitation of property which renders it inalienable beyond the period allowed by law. That period is a life or lives in being, and 21 years more, with a fraction of a year added for the term of gestation, in cases of posthumous birth.

In this case the devise was in fee to two trustees, and to the survivor of them. They were directed to convey the premises to an eleemosynary corporation for foundlings, whenever congress should create one which the trustees approved. If the will had been so drawn as itself to work the devolution of the title upon the happening of the event named, the clause would have been an executory devise. If the same thing had been provided for in a deed inter vivos, a springing use would have been involved; and such use would have been executed by the transfer of the legal title, whenever that occurred. The testator chose to reach the end in view by the intervention of trustees, and directing them to convey at the proper time. This provision in the will was, therefore, a conditional

limitation of the estate vested in the trustees, and nothing more. Their conveyance was made necessary to pass the title. The duty with which they were charged was an executory trust. Amb. 552. The same rules generally apply to legal and to equitable estates. They are alike descendible, devisable, and alienable. Croxall v. Shererd, 5 Wall. 268. When such uses are consummated, and no longer in fieri, the law of perpetuity has no application. Franklin v. Armfield, 2 Sneed, 305; Dartmouth College v. Woodward, 4 Wheat. 518; Perrin v. Carey, 24 How. 465. It is intended that what is given shall be perpetually devoted to the purpose of the giver.

In the case last named, the will expressly forbade for ever the sale of any part of the devised property. This court held the inhibition valid. Of course, the legislature, or a court of equity, under proper circumstances, could authorize or require a sale to be made. Stanley v. Colt, 5 Wall. 119.

There may be such an interval of time possible between the gift and the consummation of the use as will be fatal to the former. The rule of perpetuity applies as well to trust as to legal estates. The objection is as effectual in one case as in the other. If the fatal period may elapse before what is to be done can be done, the consequence is the same as if such must inevitably be the result. Possibility and certainty have the same effect. Such is the law upon the subject.

A devise to a corporation to be created by the legislature is good as an executory devise. A distinction is taken between a devise in praesenti to one incapable, and a devise in futuro to an artificial being, to be created and enabled to take. Ang. & A. Corp. § 184; Porter's Case, 1 Coke, 24; Attorney General v. Bowyer, 3 Ves. 714; Inglis v. Trustees of Sailors' Snug Harbor, 3 Pet. 99; Sanderson v. White, 18 Pick. 328.

At common law, lands may be granted to pious uses before there is a grantee competent to take. In the meantime the fee will lie in abeyance. It will vest when the grantee exists. Town of Pawlet v. Clark, 9 Cranch, 292. See, also, Beatty v. Kurtz, 2 Pet. 566, and Vincennes University v. Indiana, 14 How. 268.

Charitable uses are favorites with courts of equity. The construction of all instruments where they are concerned is liberal in their behalf. Mills v. Farmer, 19 Ves. 487; Magill v. Brown, supra; Perry, Trusts, § 709. Even the stern rule against perpetuities is relaxed for their benefit.

"But a gift may be made to a charity not in esse at the time,—to come into existence at some uncertain time in the future,—provided there is no gift of the property in the first instance, or perpetuity in a prior taker." Perry, Trusts, § 736.

Archbishop Secker, by his will, gave £1,000 to trustees for the purpose of establishing a bishop in the British possessions in America. Mansfield, of counsel, insisted that "there being no bishop in America, or the least likelihood of there ever being one," the legacy was void, and must fall into the residue. Lord Chancellor Thurlow said, "The money must remain in court till it shall be seen whether any such appointment shall take place." Attorney General v. Bishop of Chester, 1 Brown, Ch. 444.

A testator devised his real estate to trustees, in trust, with the rents and profits to purchase ground in Cambridge, proper for a college, and to build all such structures as should be necessary for that purpose (the college to be called "Downing College"), and to obtain a royal charter for founding such college and incorporating it by that name, in the University of Cambridge. The trustees were to hold the premises devised to them "in trust for the said collegiate body and their successors for ever." The devise was held to be valid. Attorney General v. Lady Downing, 2 Amb. 550.

A sum of money was bequeathed to erect a blue-coat school and establish a blind asylum, with direction that land should not be purchased, and the expression of an expectation that lands would be given for the charities. In answer to the suggestion at the bar that the application of the fund might be indefinitely postponed, it was said, on the other side, that the court would fix a time within which the gift must take effect; and 2 Ves. 547, and 3 Atk. 806, were cited in support of the proposition.

The vice chancellor said the cases of Downing College and the Attorney-General v. Bishop of Chester seemed to be authorities against the objection, but that the point did not arise in the case before him. It was obviated by a codicil to the will, which appears to have been overlooked by the counsel on both sides. Henshaw v. Atkinson, 3 Madd. 307. See, also, Philpott v. St. George's Hospital, 6 H. L. Cas. 359. In this case, as in the one we are considering, the trustee was required to approve the designated charity before paying over the money.

A testator left a sum of money to build and endow a future church. The question was raised, but not decided, whether the court would hold the fund for an indefinite time. The lord chancellor said: "A gift to a charitable purpose, if lawful, is good, although no object may be in existence at the time. This was expressly decided in Attorney General v. Bishop of Chester, where the gift was for establishing a bishop in his majesty's dominions in America," etc. Sinnett v. Herbert, 7 Ch. App. 237.

A testatrix, by her will, directed, among other things, that when and as soon as land should be given for the purpose, as thereinafter mentioned, almshouses should be built in three specified places. She further directed that the surplus remaining after building the almshouses should be appropriated for making allowances to the inmates. It was held that the fund was well given, or

that the gift to charity was not conditional and contingent, but that there was an absolute immediate gift to charity, the mode of execution only being made dependent on future events. Chamberlayne v. Brockett, 1872, 1873, 8 Ch. App. p. 206. The bearing of this authority upon the case in hand needs no remark. See, also, McIntire Poor School v. Zanesville Canal & Manuf'g Co., 9 Ohio, 203, and Miller v. Chittenden, 2 Iowa, 315, 4 Iowa, 252. These were controversies relating to real estate. The same point as here was involved. Both gifts were sustained. The judgments are learned and able.

The last of this series of cases to which we shall refer is an adjudication by this court. The testator gave the residue of his estate, embracing a large amount of real property, to the chancellor of the state of New York, the mayor and recorder of the city of New York, and others, designating them only by their official titles, and to their respective successors in office for ever, in trust to establish and maintain an asylum for aged, decrepit, and worn-out sailors, the asylum to be called "The Sailors' Snug Harbor." If the trustees so designated could not execute the will, they were to procure from the legislature an act of incorporation, giving them the requisite authority. Such an act was passed, and the institution was established. The heir at law sued for the property. This court held that the official designations were descriptio personarum, and that the trustees took personally. See Bac. Abr. "Grant," C; Owen v. Bean, Duke, Char. Uses, 486; Wellbeloved v. Jones, 1 Sim. & S. 40. Nothing was said as to the capacity of the successors to take. A special act of incorporation was deemed necessary. There being no particular estate to support the final disposition, the latter was held to be an executory devise. This court decided that the gift was valid. That upon the creation of the corporation the title to the property became vested in it, or that the naked legal title was held by the heir at law in trust for the corporation.

The points of analogy between that case and this are obvious. There, as here, a future corporation was necessary to give the devise effect. There, as here, there was a possibility that such a corporation might never be created. In both cases the corporation was created, and the intention of the testator was carried into full effect. It is a cardinal rule in the law of wills that courts shall do this whenever it can be done. Here we find no impediment in the way. The gift was immediate and absolute, and it is clear beyond doubt that the testator meant that no part of the property so given should ever go to his heirs at law, or be applied to any other object than that to which he had devoted it by the devise here in question.

There are numerous other authorities to the same effect with those last cited. The latter are abundantly sufficient to dispose of this case. It is therefore unnecessary to extend this opinion by pursuing the subject further.

Judgment affirmed.

HOLLAND et al. v. ALCOCK et al.

(16 N. E. 305, 108 N. Y. 312.)

Court of Appeals of New York. February 7, 1888.

Appeal from general term, supreme court, Second department.

Action by Mary Holland, Ellen Bagley, Catherine Alcock, Ann Bagley, Thomas Bagley, and Mary Hanley, heirs at law and next of kin of Thomas Gunning, deceased, against Henry Alcock, impleaded with Frederick Smyth, as executors and trustees under the will of Thomas Gunning, to declare void the residuary clause in such will because of the indefinite designation of the beneficiaries therein. Judgment at special term for plaintiffs, and at general term for defendants. Plaintiffs appeal.

E. H. Benn, for appellants. I. Newton Williams and David McClure, for respondents.

RAPALLO, J. The third clause of the testator's will is in the following words: "All the rest, residue, and remainder of my estate I give and bequeath to my said executors, to be applied by them for the purpose of having prayers offered in a Roman Catholic Church, to be by them selected, for the repose of my soul, and the souls of my family, and also the souls of all others who may be in purgatory." The validity of this clause is the question now presented for adjudication. The action is brought by five nieces and a nephew of the testator, who claim to be his next of kin and heirs at law, and, as such, entitled to his residuary estate in case the disposition thereof attempted to be made by the third clause of the will is adjudged to be invalid. The estate consists wholly of personal property, and amounted at the time of the testator's death, in 1882, to about the sum of $28,000. By the second clause of his will the testator devised and bequeathed all his estate, real and personal, to his executors, in trust for the uses and purposes set forth in the will, which were to pay certain legacies, amounting in the aggregate to about $16,500, and to apply the residue as directed in the third clause, before recited. That clause must therefore be regarded as creating, or attempting to create, a trust of personal property for the purpose specified. The plaintiffs claim that the trust thus attempted to be created is void; that as to the residuary estate the testator died intestate; and that distribution thereof should be made among the next of kin, etc. The defendant Alcock, one of the executors, demurred to the complaint. At special term the demurrer was overruled, and the plaintiffs had judgment. On appeal to the general term the judgment was reversed, and judgment was rendered in favor of the defendant Alcock, thus affirming the validity of the third clause of the will. The plaintiffs now appeal.

Some of the points involved in the case now before us were passed upon in the late case of Gilman v. McArdle, 99 N. Y. 451, 2 N. E. 464. In that case the deceased had in her life-time placed in the hands of the defendant a sum of money, on his promise to apply it to certain purposes during the life-time of the deceased and of her husband, and after the death of both of them to pay their funeral expenses, etc., and to expend what should remain in procuring Roman Catholic masses to be said for the repose of their souls. This court declined to decide whether a valid trust had been created in respect to the surplus, there being no ascertained or ascertainable beneficiary who could enforce it; and the majority of the court expressly reserved its opinion upon that question, disposing of the case upon the ground that a valid contract inter vivos, to be performed after the death of the promisee, had been established, that there was nothing illegal in the purpose for which the expenditure was contracted to be made, and that there was no want of definiteness in the duty assumed by the promisor; and we held that as there had been no breach of the contract, but the promisor was ready and willing to perform, he was entitled, as against the legal representatives of the promisee, to retain the consideration. The point upon which the majority of the court in the case last cited reserved its decision is now again presented. There is no contract inter vivos, but the will expressly bequeaths the fund in question to the executors, in trust for the purposes therein specified; one of which is to apply the residuary estate to the purpose of having prayers offered in a Roman Catholic Church for the repose of the souls of the testator, of his family, and of all others who may be in purgatory. It is claimed that this disposition contains all the elements of a valid trust of personal property, that there are definite and competent trustees, that the purpose of the trust is lawful, and that it is sufficiently definite to be capable of being enforced by a court of equity, as the court could decree the payment of the fund to a Roman Catholic Church or Churches for the purpose directed by the will. But, if all this should be conceded, there is still one important element lacking. There is no beneficiary in existence, or to come into existence, who is interested in, or can demand the execution of, the trust. No defined or ascertainable living person has, or ever can have, any temporal interest in its performance; nor is any incorporate church designated so as to entitle it to claim any portion of the fund. The absence of a defined beneficiary is, as a general rule, a fatal objection to any attempt to create a valid trust. It is said by Wright, J., in Levy v. Levy, 33

N. Y. 107, that, "if there is a single postulate of the common law established by an unbroken line of decision, it is that a trust without a certain beneficiary, who can claim its enforcement, is void, whether good or bad, wise or unwise." It is only in regard to the class of trusts known as "charitable" that a different rule has ever prevailed in equity in England, and still prevails in some of our sister states. Whether the English doctrine of charitable uses and trusts prevails in this state will be considered hereafter. In all other cases the rule as stated by Judge Wright is universally recognized, both in law and in equity.

It is claimed that the trust now under review is not void according to the general rules of law for want of a defined beneficiary, because the trust is for the purpose of having prayers offered in a Roman Catholic Church to be selected by the executors. It is contended that this is in effect a gift to such Roman Catholic Church as the executors shall select, inasmuch as the money to be expended for the masses would, according to the usage, be payable to the church or churches where they were to be solemnized, and therefore, as soon as the selection is made, the designated church or churches will be the beneficiary or beneficiaries, and entitled to the payment; that the trust is therefore, in substance, to pay the fund to such Roman Catholic Church or Churches as the executors may select; and that a duly-incorporated church, capable of receiving the bequest, must be deemed to have been intended. Passing the criticisms to which the assumptions contained in this proposition are subject, and considering the trust as if it had been in form to pay over the fund to such Roman Catholic Church as the executors might select, to defray the expense of offering prayers for the dead, the objection of indefiniteness in the beneficiary would not be removed. The case of Power v. Cassidy, 79 N. Y. 602, is relied upon by the respondents as supporting their claim. In that case the bequest was of a fund to the executors in trust, to be divided by them among such Roman Catholic charities, institutions, schools, or charities in the city of New York as a majority of the executors should decide, and in such proportions as they might think proper. The opinion of the court by Miller, J., holds that giving full force and effect to the rule that the object of the trust must be certain and well defined; that the beneficiaries must be either named, or capable of being ascertained, within the rules of law applicable to such cases; and that the trusts must be of such a nature that a court of equity can direct their execution, and making no exception in favor of charitable uses,—the bequest should be upheld, as coming within the general rule; that the clause designates a certain class of objects of the testator's bounty, to which he might have made a valid direct bequest, and that by conferring power upon his executors to designate the organizations which should be entitled to participate, and the proportion which each should take, he did not impair the legality of the provision, so long as the organizations referred to had an existence recognized by law, and were capable of taking and could be ascertained; that the evidence showed that at the time of the execution of the will, and of the testator's death, there were in the city of New York incorporated institutions of the class referred to in the will, and that a portion of these had been designated by a majority of the executors; that none but incorporated institutions could lawfully have been selected, and that, even if the executors had failed to make a selection or apportionment, the court would have had power to decree the execution or the trust, there being no difficulty in determining what institutions came within the class described by the testator. It must be observed that in the case cited the beneficiaries were confined to Roman Catholic institutions of a certain class in the city of New York. These were necessarily limited in number. By 1 Rev. St. p. 734, § 97, it is provided that a trust power does not cease to be imperative when the grantee has the right to select any, and exclude others, of the persons designated as the objects of the trust; by section 99, that, when the terms of the power import that the estate or fund is to be distributed between the persons designated in such manner or proportions as the trustee of the power may think proper, the trustee may allot the whole to any one or more of such persons, in exclusion of the others; by section 100, that if the trustee of a power, with the right of selection, shall die leaving the power unexecuted, its execution shall be decreed in equity for the benefit equally of all the persons designated as objects of the trust; and by section 101, that where a power in trust is created by will, and the testator has omitted to designate by whom the power is to be exercised, its execution shall devolve on the court of chancery. Regarding these provisions as declarations of general rules applicable to all trust powers, and governing trusts of personal as well as real property, the decision in Power v. Cassidy in no manner infringes upon the rule that the designation of a beneficiary, entitled to enforce its execution, is essential to the validity of a trust; and the only point as to which the correctness of that decision is open to any doubt is whether, in fact, the beneficiaries in that case were sufficiently defined and capable of ascertainment to enable a court of equity to enforce the trust in their behalf. The view taken in respect to that point was certainly very liberal; but the court has in subsequent cases repeatedly announced that the decision was not to be extended, and it is evident that, without a material extension, it cannot be made to cover the present case. Here, if the church or

churches from among which the selection is to be made are to be regarded as the beneficiaries, they are not limited, as in Power v. Cassidy, to a Roman Catholic Church or Churches in the city of New York, but include all the Roman Catholic Churches in the world. No one church, or the churches of any particular locality, can claim the benefit of the bequest. In this respect the case at bar is analogous to that of Prichard v. Thompson, 95 N. Y. 76, where the bequest was of a sum of money to the executors, to be distributed by them "among such incorporated societies organized under the laws of the state of New York or the state of Maryland, having lawful authority to receive and hold funds upon permanent trusts for charitable or educational uses," as the executors, or the survivors of them, might select, and in such sums as they might determine. This bequest was held void because of the indefiniteness of the designation of the beneficiaries. The opinion was written by the same learned judge who delivered the opinion in Power v. Cassidy, and by him distinguished from that case on the ground that in Power v. Cassidy the class of beneficiaries was specially designated and confined to the limits of a single city, and to a single religious denomination, so that each one could readily be ascertained, and each had an inherent right to apply to the court to sustain and enforce the trust; while in the case at bar every charitable and educational institution within two states was included. This case (Prichard v. Thompson) also establishes that the power to the executors to select the beneficiary or beneficiaries does not obviate the objection of the omission of the testator to designate them in the will, unless the persons or corporations from among whom the selection is to be made are so defined and limited that a court of equity would have power to enforce the execution of the trust, or, in default of a selection by the trustee, to decree an equal distribution among all the beneficiaries. This discussion has proceeded in answer to the claim that the church or churches where the masses were to be solemnized were the intended objects of the testator's bounty, and the beneficiaries of the trust; but the correctness of that position is by no means conceded. It is, however, not necessary to discuss it. If the bequest had been of a sum of money to an incorporated Roman Catholic Church or Churches, duly designated by the testator, and authorized by law to receive such bequests, for the purpose of the solemnization of masses, a different question would arise. But such is not this case. The bequest is to the executors in trust, to be by them applied for the purpose of having prayers offered in any Roman Catholic Church they may select.

It has been argued that the absence of a beneficiary entitled to enforce the trust is not fatal to its existence where the trustee is competent and willing to execute it, and the purpose is lawful and definite; that it is only where the trustee resists the enforcement of the trust that the question of the existence of a beneficiary entitled to enforce it arises. I have not found any case in which this question has been adjudicated, or the point has been made, and it does not seem to be presented on this appeal. The case now before us arises on a demurrer by the defendant Alcock, one of the executors, to the complaint, on the ground that it shows no right in the plaintiffs. The complaint alleges that the defendant Alcock, together with Frederick Smyth, were named as executors in the will; that the defendant Alcock did not qualify, and has never acted, as executor or as trustee of the alleged trust sought to be created by the third clause, nor participated in any form in carrying out the same; but that his co-executor, Frederick Smyth, has taken possession of the whole estate, as such executor and trustee. Smyth is not a party to this appeal. It comes up on the demurrer of Alcock alone, and there is nothing in the complaint to show that he is willing to execute the trust; but, on the contrary, it shows that he has in no manner acted, or qualified himself to act, therein. But, aside from these considerations, I do not think that the validity or invalidity of the trust can depend upon the will of the trustee. If the trust is valid, he can be compelled to execute it; if invalid, he stands, as to personal property undisposed of by the will, as trustee for the next of kin, and the equitable interest is vested in them immediately on the death of the testator, subject only to the payment of his debts and the expenses of administration. When a trust is attempted to be created without any beneficiary entitled to demand its enforcement, the trustee would, if the trust property were in his possession, have the power to hold it to his own use without accountability to any one, and contrary to the intention of the donor, but for the principle that in such a case a resulting trust attaches in favor of whoever would, but for the alleged trust, be equitably entitled to the property. This equitable title cannot on any sound principle be made to depend upon the exercise by the trustee of an election whether he will or will not execute the alleged trust. In such a case there is no trust, in the sense in which the term is used in jurisprudence. There is simply an honorary and imperfect obligation to carry out the wishes of the donor, which the alleged trustee cannot be compelled to perform, and which he has no right to perform contrary to the wishes of those legally or equitably entitled to the property, or who have succeeded to the title of the original donor. The existence of a valid trust capable of enforcement is consequently essential to enable one claiming to hold as trustee to withhold the property from the legal representatives of the alleged donor. A merely nominal trust, in the performance of which no ascertainable person has any interest, and which

is to be performed or not as the person to whom the money is given thinks fit, has never been held to be sufficient for that purpose.

It is contended, however, that charitable uses and trusts are not subject to the general rules of law upon this subject, and that the bequest now under consideration is of that class. The distinguishing features of this class of trusts, as administered in England from an early period, were that they might be established through trustees, who might consist either of individuals or a corporation; and, in the case of individual trustees, they might hold in indefinite succession, and be self-perpetuating, and the funds might be devoted in perpetuity to the charitable purposes indicated by the donor; while private trusts were not permitted to continue longer than a life or lives in being and 21 years and a fraction afterwards. The persons to be benefited might consist of a class, though the individual members of the class might be uncertain. The scheme of the charity might be wanting in sufficient definiteness or details to admit of its practical administration, and, in such cases, a court of equity would order a reference to a master in chancery to devise a scheme for its administration, which should as nearly as possible conform to the intentions of the founder of the charity; and thus was called into operation what was known as the "cy-près doctrine." These charitable trusts were regarded as matters of public concern, and were enforceable by the attorney general, although, in many cases, the court would compel their performance without his intervention, at the instance of a town or parish, or of its inhabitants, or of an individual of the class intended to be benefited, such as one of the poor or maimed, etc. In a comparatively recent case argued in this court, many instances of ancient charities were cited which had been enforced by the court of chancery in England, such as Cooke's Charity, decided A. D. 1552, whereby the testator ordered the purchase of lands, and the erection of a free grammar school; Bond's Charity, decided A. D. 1553, in which the testator's will, dated in 1506, directed that there should be established a Bede house at Bablock, and there should be built a chapel, and therein one mass to be said on Sunday, and therein to be ten poor men, and a woman to dress their meat and drink,—the priest to be a brother of Trinity guild and Corpus Christi guild, etc.; Howell's Charity, decided in 1557, whereby the testator directed his executors to provide a rent of 400 ducats yearly forever, to be appropriated each year to promote the marriage of four orphan maidens, honest, and of good fame. This trust appears to have been enforced in chancery upon a bill filed by certain orphan maidens in behalf of themselves and others. We were also referred to numerous other charities for the support of the poor, for erection of almshouses, hospitals, maintaining school-masters, keeping churches in repair, and other similar purposes. In the case of Bond's Charity, cited above, a license was granted by King Henry VII., in 1508, to the testator's son and others to grant lands to support a priest to sing mass, and twelve poor men and one woman to say prayers and obsequies for the king, the brothers and sisters of the guild, and for their souls, and especially for the soul of the testator, Thomas Bond, in the then newly-erected chapel at Bablock. It appears that religious or pious uses were, when the Roman Catholic religion prevailed in England, recognized as charities. In 1434, Henry Barton devised to the rector of St. Mary's, and the church-wardens, and their successors, certain lands, at a perpetual rent, payable to the guild of Corpus Christi, etc., so that said rector of St. Mary's and his successors, or their parish priests, when they should say prayers in the pulpit of the church, should pray for the souls of Richard Barton, the testator's father, of Dionesia, his mother, and for the souls of their children, and all the faithful deceased, and, in case they should neglect to do so for two days after the proper time, that the master and wardens of said guilds, etc., should levy a distress upon said lands for 12 pence by way of penalty, and retain such distress until such prayers should be said. This property appears to have been afterwards seized by the crown, under the statutes of chauntries (1 Edw. VI.), and granted by Edward VI. to one Stapleton; but the rector, etc., of St. Mary's having re-entered, it was made to appear in a litigation between them and the successors in interest of Stapleton that no prayer for souls had been made, nor had the rents of the premises been devoted to any manner of superstitious use within the space of six years and more next before the first year of the reign of King Edward VI., since which time the rents and profits had been employed by the parson and church-wardens of the parish in good uses and purposes. The case was tried in the 22d and 23d Eliz., and the parish was allowed to retain the land for general charitable purposes.

The purposes for which charities were established in England were so numerous and varied, and the learning contained in the books on that subject is so vast, that it would be futile to attempt to go into it in detail, or to do more than briefly refer to their history, so far as is necessary to determine whether the English doctrine of charitable uses and trusts, as distinguished from private trusts governed by the general rules of law, still has any place in the jurisprudence of this state. The statute of 1 Edw. VI., A. D. 1547, known as the "Statute of Chauntries," recited that a great part of superstition and errors in Christian religion had been brought into the minds of men by reason of their ignorance of their true and perfect salvation through the death

of Jesus Christ, and by devising vain opinions of purgatory, and masses to be done for those who are departed, which doctrine is maintained by nothing more than by the abuse of trentalles, chauntries, and other provisions for the continuance of such blindness and ignorance; that the amendment of the same, and converting them to good and godly uses, such as the erection of grammar schools, the education of youth, and better provision for the poor, cannot in the present parliament conveniently be done, nor be committed to any person than to the king, who by the advice of his most prudent council can and will most wisely alter and dispose of the same. It then recites the act of 37 Hen. VIII. for the dissolution of colleges, chauntries, etc., and enacts that all colleges, free chapels, and chauntries not in the actual possession of the late or present king, (with certain specified exceptions,) and all their lands and revenues, are declared to be in the actual seizure and possession of the present king, without office found; and that all sums of money, etc., which by any conveyance, will, devise, etc., have been given or appointed in perpetuity towards the maintenance of priests, anniversaries, or obits, be vested in the king. Certain colleges, free chapels, and chauntries, such as those within the universities of Oxford and Cambridge, and others specified in the statute, were exempted from its provisions; but the king was empowered to alter the chauntries in the universities. In this manner property which had been devoted by the donor to uses which had come to be regarded as superstitions were, through the king, put to charitable uses which were deemed lawful; and this policy was carried out by many decrees of the court of chancery. The statute of 39 Eliz., A. D. 1597, authorized persons owning estates in fee-simple during 20 years next ensuing the passage of the act, by deed enrolled in the high court of chancery, to found hospitals, houses of correction, almshouses, etc., to have continuance for ever, and place therein a head and members, and such number of poor as they pleased; and such institutions were declared to be corporations, with perpetual succession. It will be observed that this was but a temporary act, which gave power only for 20 years next ensuing its passage, to found the chauntries mentioned. This statute also contained a provision entitled "An act to reform deceits and breaches of trust touching lands given to charitable uses," which recited that divers institutions had been founded, some by the queen and her progenitors, and some by other godly and well-disposed people, for the charitable relief of poor, aged, and impotent people, maimed soldiers, schools of learning, orphans, and for other good, charitable, and lawful purposes and intents, and that lands and goods given for such purposes had been unlawfully converted to the lucre and gain of some few greedy and covetous persons; and then proceeds to provide for the issue of commissions out of chancery to inquire into those wrongs, and decree the observance of the trusts according to the intent of the founders thereof. This statute was followed by that of 43 Eliz. c. 4, "To redress the misemployment of lands, goods, and stocks of money heretofore given to charitable uses." This act is known as the "Statute of Charitable Uses," and was at one time, together with that of 39 Eliz., regarded as the foundation of the law of charitable uses, and of the jurisdiction of chancery in cases of charities. But the reports of the record commission established in 1819 have disclosed that the jurisdiction had been exercised, and charity laws administered, by the courts of chancery from a much earlier period. The act, however, throws light upon what were at the time considered and recognized as charitable uses, for they are enumerated in the preamble as follows, viz.: The relief of the poor, the maintenance of the sick and maimed soldiers and mariners, schools of learning, free schools, and schools in universities; the repair of bridges, ports, havens, causeways, churches, sea-banks, and highways; the education and preferment of orphans; the maintenance of houses of correction; the marriage of poor maidens; the aid of young tradesmen, handicraftsmen, and persons decayed; the relief or redemption of prisoners or captives; the aid of poor persons in the payment of taxes. The act then provides for the issuing of commissions by the lord chancellor of England or the chancellor of the duchy of Lancaster, and the redress of breaches of trust, as in the statute 39 Eliz. In this enumeration of charitable uses there is none which would cover the present case; and indeed, under the statute of chauntries and other statutes prohibiting superstitious uses, it would not have been recognized in England as valid as a charity or otherwise. But assuming, as perhaps we ought to assume, that before gifts for the support of priests, chauntries, etc., came to be regarded as superstitious uses, they were within the principles of charity, and that they became illegal only by virtue of the statutes against superstitious uses; in this state, where all religious beliefs, doctrines, and forms of worship are free, so long as the public peace is not disturbed, the trust in question cannot be impeached on the ground that the use to which the fund was attempted to be devoted was a superstitious use. The efficacy of prayers for the dead is one of the doctrines of the Roman Catholic Church, of which the testator was a member; and those professing that belief are entitled in law to the same respect and protection in their religious observances thereof as those of any other denomination. These observances cannot be condemned by any court, as matter of law, as superstitious, and the English statutes against superstitious uses can have no effect here. Amend. Const. U. S. art. 1; Const. N. Y. art. 1, § 3. If, in other respects, the bequest was by the law of England valid as a "charitable" use, and the English doctrine of

charitable uses prevails in this state, the objections to its validity on the ground of indefiniteness of the trust, perpetuity, and the absence of an ascertainable beneficiary can be overcome; otherwise, they must prevail, at least so far as relates to the absence of a beneficiary, which is sufficient to dispose of the case without reference to the other points. We will therefore treat the bequest as a charitable use.

The principal cases in this state in which the doctrine of charitable uses has been discussed are Williams v. Williams, 8 N. Y. 527; Owens v. Missionary Soc., 14 N. Y. 380; Beekman v. Bonsor, 23 N. Y. 298; Downing v. Marshall, Id. 366; Levy v. Levy, 33 N. Y. 97; Rose v. Rose (1863) 4 Abb. Dec. 108; Bascom v. Albertson, 34 N. Y. 584; Burrill v. Boardman, 43 N. Y. 254. These cases were argued by counsel of eminent ability, and in the arguments and opinions display a depth of learning and thoroughness of research which render it useless to attempt a discussion of the question here as an original question, or to do more than summarize the main points upon which the arguments turned, and ascertain how the case stands upon those authorities. So lately as the case of Burrill v. Boardman, 43 N. Y. 254, the question was argued as still an open one; and that case was decided on the ground that the trust was valid without resorting to the doctrine of charitable uses. Comstock, J., in a note to the eleventh edition of Kent's Commentaries (volume 4, p. 305, note 2), states that the essential requisites of a valid trust are (1) a sufficient expression of an intention to create a trust; (2) a beneficiary who is ascertained, or capable of being ascertained; that the appointment or non-appointment of a trustee of the legal estate is not material; that if the trust or beneficial purpose be well declared, and if the beneficiary is a definite person or corporation capable of taking, the law itself will fasten the trust upon him who has the legal estate, whether the grantor, testator, heir, or next of kin, as the case may be; and that, outside of the domain of charitable uses, no definiteness of purpose will sustain a trust if there be no ascertained beneficiary who has a right to enforce it. And in delivering the opinion of this court in Beekman v. Bonsor, 23 N. Y. 310, the same learned judge says that the joint authority of the cases of Williams v. Williams, 8 N. Y. 527, and Owens v. Missionary Soc., 14 N. Y. 398, establishes the propositions (1) that a gift to charity is maintainable in this state if made to a competent trustee, and if so defined that it can be executed, as made by the donor, by a judicial decree, although it may be void, according to general rules of law, for want of an ascertained beneficiary; (2) that in other respects the rules of law applicable to charitable uses are within those which appertain to trusts in general; (3) that the cy-près power which constitutes the peculiar feature of the English system, and is exercised in determining gifts to charity where the donor has failed to define them, and in framing schemes of approximation near to or from the donor's true design, is unsuited to our institutions, and has no existence in the jurisprudence of this state on this subject. But he declined to re-examine these cases, as he concludes that the law of charities could not be invoked in the case then under consideration. The same learned judge, however, in the subsequent case of Bascom v. Albertson, 34 N. Y. 584, in which he acted as counsel, reviewed at length the question whether the English law of charitable uses prevailed to any extent whatever in this state. His argument was preserved in print, and was used in Burrill v. Boardman, 43 N. Y. 254, and in that argument, referring to what he had said in his opinion in Beekman v. Bonsor as to the proposition that a gift to charities, if well defined, and made to a competent trustee, was maintainable in this state, although it might be void, according to general rules of law, for want of an ascertained beneficiary, and to the similar remark in his opinion in Downing v. Marshall, 23 N. Y. 382, characterizes his own remarks in those two cases as a most inconsiderate repetition, as a dictum, of a proposition laid down by another judge; calling attention to the fact that the repetition was a mere dictum, because in the two cases in which it was made the trusts were held void.

The case of Williams v. Williams, 8 N. Y. 524, is the leading case in the court of last resort of this state in support of the doctrine that the English law of charitable uses is in force in this state, and it fully supports the proposition that it is. In that case the testator after making a bequest to an incorporated church, bequeathed the sum of $6,000 to Zophar B. Oakley and other individual trustees, with power to perpetuate their successors, as a perpetual fund for the education of the children of the poor who should be educated in the academy of the village of Huntington, with directions to accumulate the fund up to a certain point, and apply the income in perpetuity to the education of the children whose parents' names were not upon the tax-lists. The opinion was delivered by Denio, J., and concurred in by four of the other judges, three judges dissenting. The opinion held that this bequest, by the general rules of law, would be defective and void, as a conveyance in trust for the want of a cestui que trust in whom the equitable title could vest, and could be sustained only by force of that peculiar system of law known in England under the name of the "Law of Charitable Uses;" that the objection that the bequest assumed to create a perpetuity would also be fatal if the Revised Statutes applied to gifts for charitable purposes. But the learned

judge held that according to the laws of England as understood at the time of the American Revolution, and as it still existed, devises and bequests for the support of charity or religion, though defective for want of such a grantee or donee as the rules of law required in other cases, would, when not within the purview of the mortmain act, be supported in the court of chancery; that the law of charitable uses did not originate in, and was not created by, the statute 43 Eliz. c. 4, but had been known and recognized and enforced before that statute, and was ingrafted upon the common law, and consequently was not abrogated by the repeal in this state of the statute 43 Eliz. in 1788 (Laws 1788, c. 46, § 37); that the provisions of the Revised Statutes did not affect property given in perpetuity for religious or charitable purposes; and that consequently the bequest to Zophar B. Oakley and others, in trust for the children of the poor, was valid.

In Owens v. Missionary Soc., 14 N. Y. 380, the testator bequeathed the residue of his estate to the "Methodist General Missionary Society," an unincorporated association existing when the will was made, and when it took effect, in 1834, but which, subsequent to the testator's death, became incorporated. In a suit between the incorporated society and the next of kin of the testator, the bequest was held void, and that the next of kin were entitled to the residue. Opinions were delivered by Selden, J., and Denio, J. Judges A. S. Johnson, T. A. Johnson, Hubbard, and Wright concurred in the opinion of Selden, J., which held that the bequest was not valid as one made to the association for its own benefit, because of its incapacity to take; nor could it be sustained as a charitable or religious use, as it was not accompanied by any trust as to the application of the fund. Also that, where there was no trustee competent to take, our court of chancery had no jurisdiction to uphold a trust for a charitable or religious purpose; and it distinguished the case from Williams v. Williams on the ground that there the bequest was to trustees competent to take. Although the tenor of the opinion is against following the example of the English chancellors in applying a peculiar and partial system of rules to the support of charitable gifts, Judge Selden disavows the intention of denying the power of courts of equity in this state to enforce the execution of trusts created for public and charitable purposes in cases where the fund is given to a trustee competent to take, and where the charitable use is so far defined as to be capable of being specifically executed by the authority of the court, even although no certain beneficiary other than the public at large may be designated. Denio, J., while reaffirming the decision in Williams v. Williams, placed his vote upon the ground that the trust was not one which could be executed by the court as a charitable use, the purposes of the society being "to diffuse more generally the blessings of education, civilization, and Christianity throughout the United States and elsewhere;" that although trusts in favor of education and religion had always been considered charitable uses, and were recognized as such in the statute of Elizabeth, the advancement of civilization generally was not classed among charities, and the whole fund might be disposed of for purposes promotive of universal civilization, which still would not be charitable objects in the understanding of the law. Six of the judges were of opinion that the charity was not sufficiently defined by the terms of the will, and that the judgment in favor of the next of kin should be affirmed on that ground.

The next case in order is Beekman v. Bonsor, 23 N. Y. 298. In that case the amount to be given to the charitable purpose, as well as the manner in which the fund was to be applied, was left to the discretion of the executors. They renounced, and it was held that the trust was incapable of execution, that the cy-près power, as exercised in England in cases of charity, had no existence in this state, and that the next of kin were entitled to the fund. Numerous points were discussed in the opinion, which was by Comstock, J., and he there made the dictum, which he afterwards recalled, that a gift of charity which would be void, by the general rules of law, for the want of an ascertained beneficiary, will be upheld by the courts of this state if the thing given was certain, if there was a competent trustee to administer the fund as directed, and if the charity itself was precise and definite.

Downing v. Marshall, 23 N. Y. 366, held that a devise and bequest to an unincorporated missionary society was void, on the same grounds as in the case of Owens v. Missionary Soc., supra.

Up to this time the doctrine of the case of Williams v. Williams as to the validity of trusts for charities, even in the absence of a definite beneficiary, had been acquiesced in. But in Levy v. Levy, 33 N. Y. 97, it was vigorously assailed by Wright, J., who discussed the question anew whether the English doctrines of trust for charitable uses were law in this state. That learned judge expressed a decided opinion that they were not (page 105 et seq.); that that peculiar system of jurisprudence proceeded in disregard of rules deemed elementary and fundamental in other limitations of property, in upholding indefinite charitable gifts, by the exercise of chancery powers and the royal prerogative; that it was not the exercise of the ordinary jurisdiction of chancery over trusts, but a jurisdiction extended and strengthened by the prerogative of the crown and the statute of 43 Eliz. over public and indefinite uses defined in that statute as "charities;" that even in England it had

been deemed necessary to restrain and regulate by act of parliament the creation of these indefinite charitable trusts, by the statutes of mortmain and other restrictions, and it cannot be supposed that the system was deliberately retained in this state freed from all legislative restriction. He calls attention to the fact that in 1788 the legislature of this state repealed the statute of 43 Eliz., the statute against superstitious uses, and the mortmain acts. That at that time it was supposed that the law for the enforcement of charitable trusts had its origin only in the statute of Elizabeth; and argues that the legislature of 1788, in thus sweeping away all the great and distinctive landmarks of the English system, must have intended that the effect of the repeal should be to abrogate the entire system of indefinite trusts, which were understood to be supported by that statute alone; and that the whole course of legislation in this state indicates a policy not to introduce any system of public charities except through the medium of corporate bodies. That in 1784 the general law for the incorporation of religious societies had been enacted, and that before, and contemporaneously with, the repeal of the statute of Elizabeth and the statutes of mortmain, special acts incorporating such societies were passed, and other acts have been passed creating or authorizing corporations for various religious and charitable purposes, in all of which are to be found limitations upon the amount of property to be held by such societies; thus indicating a policy to confine within certain limits the accumulation of property perpetually appropriated, even to charitable and religious objects. That the absolute repeal of the statute of Elizabeth and of the mortmain acts was wholly inconsistent with the policy thus indicated, unless it was intended to abrogate the whole law of charitable uses as understood and enforced in England. The opinion then refers to the course of legislation in this state following the repeal of the English statutes authorizing corporations for charitable, religious, literary, scientific, and benevolent purposes, and in all cases limiting the amount of property to be enjoyed by them. This legislation is claimed to disclose a policy differing from the British system, and absolutely inconsistent with the supposition that uses for public or indefinite objects, and of unlimited duration, can be created and sustained without legislative sanction. Since the case of Williams v. Williams, decided 35 years ago, there has been no adjudged case in this court which supports a charitable gift on the principles enunciated by Judge Denio in pronouncing that decision. Of course, this observation applies only to the indefinite charity which the case included, and not to the gift in favor of a religious corporation.

After the decision of that case the struggle in this court for the overthrow of charitable uses began in the case of Owens v. Missionary Soc., 14 N. Y. 380. The opponents of such trusts had for their justification the repeal in 1788 in this state of all the British statutes which upheld such trusts in England, and the substitution of a charity system maintained by our statute laws in the form of corporate charters containing, by legislative enactment, power to receive, hold, and administer charitable gifts of every variety known in the practice of civilized communities and our statute of uses and trusts, defining the trusts which may lawfully be created. This statute has been held binding on the courts, although, of course, it ceases to operate when the legislature charters a corporation for a charitable purpose, with power to take and hold property in perpetuity for such purpose. From the case of Owens v. Missionary Soc., 14 N. Y. 380, through the cases of Downing v. Marshall, 23 N. Y. 366; Levy v. Levy, 33 N. Y. 97; Bascom v. Albertson, 34 N. Y. 584; Burrill v. Boardman, 43 N. Y. 254; and Holmes v. Mead, 52 N. Y. 332 (decided in 1873),—the struggle was continued, and the announcement definitely made, in the latest of those cases, that the controversy was closed by the adoption of the principles enunciated in the said last-mentioned case. In Williams v. Williams, Judge Denio, whose great learning and ability are universally acknowledged, maintained, as the basis of his conclusion in favor of charitable trusts as the law of this state, that they came to us by inheritance from our British ancestors, and as part of our common law. That particular postulate being finally overthrown, and the British statutes having been repealed at the very origin of our state government, we should be a civilized state without provision for charity if we had not enacted other laws for ourselves. But charity, as a great interest of civilization and Christianity, has suffered no loss or diminution in the change which has been made. The law has been simplified, and that is all. Instead of the huge and complex system of England, for many generations the fruitful source of litigation, we have substituted a policy which offers the widest field for enlightened benevolence. The proof of this is in the great number of charitable institutions scattered throughout the state. It is not certain that any political state or society in the world offers a better system of law for the encouragement of property limitations in favor of religion and learning, for the relief of the poor, the care of the insane, of the sick and the maimed, and the relief of the destitute, than our system of creating organized bodies by the legislative power, and endowing them with the legal capacity to hold property which a private person or a private corporation has to receive and hold transfers of property. Under this system, many doubtful and obscure questions disappear, and give place to the more simple inquiry wheth-

er the grantor or devisor of a fund designed for charity is competent to give; and whether the organized body is endowed by law with capacity to receive, and to hold and administer, the gift. In Williams v. Williams, supra, in maintaining a gift for pious uses to an incorporated religious society, Judge Denio assigned the reasons which have been universally approved since that time; and they are summed up by saying that charitable limitations of property in favor of corporations competent, by statute law, to hold them, are valid or invalid on the same grounds as other limitations of property between natural persons, and are referable to the general system of law which governs in the ordinary transactions of mankind. From his reasoning in the other branch of the case before him, it appears that he had not reached the conclusion established in the later cases, namely, that with us charity is found in our corporation laws, general and special, which have been extended so as to embrace the purposes heretofore known and recognized as charitable, and which are continually extending and improving, so as to meet the new wants which society in its progress may develop.

As the result of the foregoing views, the judgment of the supreme court at general term should be reversed, and that of the special term affirmed.

All concur, except EARL, J., not voting.

Judgment accordingly.

## EASTERBROOKS et al. v. TILLINGHAST.

(5 Gray 17.)

Supreme Judicial Court of Massachusetts. Oct. Term, 1855.

Bill by Anne Easterbrooks and others, heirs at law of Elery Wood, against Thomas Tillinghast, to obtain a release of a homestead held by the said Wood upon the following trusts: "That said trustee and trustees shall use and improve the same, or lease the same from time to time to good and trusty tenants, in such manner as will best secure the income and profits thereof; and that said trustee and trustees shall not sell my farm, but out of the income thereof shall keep the walls and buildings in good repair, and after deducting the expenses and a reasonable compensation for their services, shall annually, or oftener if necessary, appropriate and apply all the income and profits of said estate to the support of the gospel, and the maintenance and support of a pastor or elder in the Six-Principle Baptist Church in said Swanzey, which was under the pastoral care of Elder Philip Slade, late of said Swanzey, at the time of his decease, and which shall continue in the faith and practice of the six principles of the doctrine of Christ, as recorded in the sixth chapter of Hebrews, first and second verses, and their successors in said church, as long as they or their successors shall maintain the visibility of a church in said faith and order, and uniting in fellowship and communion with those who hold and practice said principles, and no others. And I hereby direct that said income and profits of said estate shall be applied by said trustee and trustees as aforesaid to the maintenance and support of such pastor or elder as shall from time to time be appointed by a majority of said church, and shall be approved of by said trustee and trustees; and in case of any disagreement between said church and trustees in relation to the appointment and approval of a pastor, a pastor shall be approved of by the Rhode Island and Massachusetts General Conference of the old Six-Principle Baptist denomination; and whenever said trustee or his successor shall die or depart from said faith and practice, another trustee or trustees shall be appointed by said general conference, and said trustee or trustees so appointed shall have the same power and trust over said estate as said Thomas Tillinghast; and on the death or departure from said faith and practice of such trustee, other trustee or trustees shall from time to time be appointed by said general conference, with same power and trusts over said estate; and, in case of the failure of such appointment, my will is that a suitable trustee shall be appointed by the supreme judicial court of the commonwealth of Massachusetts, or any other court in said commonwealth, having at the time jurisdiction over trustees and property holden in trust, so that said trust shall continue forever. And I do hereby empower said trustees to do all acts, and legally to make and execute all instruments and contracts, in writing and otherwise, which shall be necessary for full and perfect execution of said trusts. And I hereby give, bequeath and devise to said church, and to their successors in said church, forever, the right and privilege to hold their meetings and communions in my dwelling-house as heretofore, with use of my chairs in said house, or so long as said house will accommodate said church."

It was alleged that in March, 1853, there were but two members of the Six-Principle Baptist Church in Swanzey; that they met with defendant trustee, and voted to call a meeting of the church, and that on the day of such meeting, although notice was given thereof, but two persons were present, when they voted, as the number of members were so small, to dissolve, which vote was duly entered on the records of the church; that defendant fraudulently induced two women, neither of whom had attended any meetings of the church for over 20 years, and did not attend the meeting called at the time of the dissolution, to meet, when the formality of admitting another member was gone through with; and that defendant, though duly informed of the proceedings by which the church had been dissolved, refused to release the homestead farm to plaintiffs, according to the prayer of the bill. The defendant demurred to the bill. Demurrer overruled.

T. D. Eliot (E. Ames with him), for plaintiffs. C. B. Farnsworth, for defendant.

METCALF, J. The devise of Elery Wood to the defendant was in special trust that he and his successors in the trust should appropriate and apply the income and profits of the devised property to the support of the gospel, and the maintenance of a pastor or elder in a church in Swanzey, of a certain faith and practice, as long as they (the members of said church), or their successors, should maintain the visibility of a church in such faith and order. And the plaintiffs have alleged in their bill that the visibility of said church has not been maintained; that, therefore, the devised property cannot be rightfully held any longer by the defendant; but that it has, by the statutes of the commonwealth, descended to them as the heirs at law of the devisor; and they pray, among other things, that the defendant may be decreed to release the property to them. The facts on which the plaintiffs rely in support of their allegation that the visibility of said church has not been maintained are set forth in the bill, and they are admitted by the defendant, for present purposes and effects, by his demurrer to the bill.

The first question in the case is whether the Six-Principle Baptist Church in Swan-

zey, for whose benefit Wood's devise was made, has ceased to maintain its visibility, or, in language more commonly used, ceased to be a visible church. If it has, then the second question is, whether the plaintiffs, as Wood's heirs at law, are now entitled to the devised property, which is still in the defendant's possession.

1. The bill avers that on the 31st day of March, 1853, there were only two members of said church; that they, on that day, at a meeting called by public notice, voted and resolved that they would not any longer endeavor to maintain the appearance of a visible church; that they declared the same dissolved and extinct; and that the said vote and resolve were entered on the records of said church. This seems to the court to have been a dissolution of the church, so that it thenceforth ceased to be a visible church in any sense, legal or ecclesiastical. Of course, the attempt afterwards made to admit members was futile.

If any of these alleged facts could have been safely denied or successfully admitted and avoided, the defendant should have filed an answer to the bill, and not have demurred to it.

2. The devise to the defendant of the property in question was doubtless a devise in fee (Cleveland v. Hallett, 6 Cush. 407); and having been made to him as trustee, and for a specific purpose only, he holds the property, since the failure of the trust by the extinction of the cestui que trust, not for his own benefit, but for the devisor's heirs at law, as a resulting trust, and is answerable to them for it (Hill, Trustees [2d Am. Ed.] 157, 184, 185). The precise mode of relief to which the law entitles the heirs may be a subject for consideration hereafter.

Demurrer overruled.

## DYER v. DYER.

2 Cox, Ch. 92.

Court of Chancery. Nov. 27, 1788.

In 1737 certain copyhold premises holden of the manor of Heytesbury, in the county of Wilts, were granted by the lord, according to the custom of that manor, to Simon Dyer (the plaintiff's father), and Mary, his wife, and the defendant William (his other son), to take in succession for their lives, and to the longest liver of them. The purchase money was paid by Simon Dyer, the father. He survived his wife, and lived until 1785, and then died, having made his will, and thereby devised all his interest in these copyhold premises (amongst others) to the plaintiff, his younger son. The present bill stated these circumstances, and insisted that the whole purchase money being paid by the father, although, by the form of the grant, the wife and the defendant had the legal interest in the premises for their lives in succession, yet in a court of equity they were but trustees for the father, and the bill therefore prayed that the plaintiff, as devisee of the father, might be quieted in the possession of the premises during the life of the defendant.

The defendant insisted that the insertion of his name in the grant operated as an advancement to him from his father to the extent of the legal interest thereby given to him. And this was the whole question in the cause. This case was very fully argued by Mr. Solicitor General and Ainge for plaintiff, and by Burton & Morris, for defendant. The following cases were cited, and very particularly commented on: Smith v. Baker, 1 Atk. 385; Taylor v. Taylor, Id. 386; Mumma v. Mumma, 2 Vern. 19; Howe v. Howe, 1 Vern. 415; Anon., 1 Freem. Ch. 123; Benger v. Drew, 1 P. Wms. 781; Dickinson v. Shaw, before the lords commissioners in 1770; Bedwell v. Froome, before Sir T. Sewell, on the 10th May, 1778; Row v. Bowden before Sir L. Kenyon, siting for the lord chancellor; Crisp v. Pratt, Cro. Car. 549; Scroope v. Scroope, 1 Ch. Cas. 27; Elliot v. Elliot, 2 Ch. Cas. 231; Ebrand v. Dancer, Id. 26; Kingdon v. Bridges, 2 Vern. 67; Back v. Andrew, Id. 120; Rundle v. Rundle, Id. 264; Lamplugh v. Lamplugh, 1 P. Wms. 111; Stileman v. Ashdown, 2 Atk. 480; Pole v. Pole, 1 Ves. Sr. 76.

LORD CHIEF BARON, after directing the cause to stand over for a few days, delivered the judgment of the court.

The question between the parties in this cause is whether the defendant is to be considered as a trustee for his father in respect of his succession to the legal interest of the copyhold premises in question, and whether the plaintiff, as representative of the father, is now entitled to the benefit of that trust. I intimated my opinion of the question on the hearing of the cause, and I then indeed entertained very little doubt upon the rule of a court of equity, as applied to this subject; but as so many cases have been cited, some of which are not in print, we thought it convenient to take an opportunity of looking more fully into them, in order that the ground of our decision may be put in as clear a light as possible, especially in a case in which so great a difference of opinion seems to have prevailed at the bar. And I have met with a case in addition to those cited, which is that of Rumboll v. Rumboll, 2 Eden, 15, on the 20th April, 1761. The clear result of all the cases, without a single exception, is that the trust of a legal estate, whether freehold, copyhold, or leasehold; whether taken in the names of the purchasers and others jointly, or in the name of others without that of the purchaser; whether in one name or several; whether jointly or successive,—results to the man who advances the purchase money. This is a general proposition, supported by all the cases, and there is nothing to contradict it; and it goes on a strict analogy to the rule of the common law that, where a feoffment is made without consideration, the use results to the feoffer. It is the established doctrine of a court of equity that this resulting trust may be rebutted by circumstances in evidence. The cases go one step further, and prove the circumstance of one or more of the nominees, being a child or children of the purchaser, is to operate by rebutting the resulting trust; and it has been determined in so many cases that the nominee, being a child, shall have such operation as a circumstance of evidence, that we should be disturbing landmarks if we suffered either of these propositions to be called in question, namely, that such circumstance shall rebut the resulting trust, and that it shall do so as a circumstance of evidence. I think it would have been a more simple doctrine if the children had been considered as purchasers for a valuable consideration. Natural love and affection raised a use at common law. Surely, then, it will rebut a trust resulting to the father. This way of considering it would have shut out all the circumstances of evidence which have found their way into many of the cases, and would have prevented some very nice distinctions, and not very easy to be understood. Considering it as a circumstance of evidence, there must be, of course, evidence admitted on the other side. Thus it was resolved into a question of intent, which was getting into a very wide sea, without very certain guides. In the most simple case of all, which is that of a father purchasing in the name of his son, it is said that this shews the father intended an advancement, and therefore the resulting trust is rebutted; but then a circumstance is added to this, namely, that the son happened to be provided for. Then the question is, did the father intend to advance a son already provided for? Lord Not-

tingham could not get over this, and he ruled that in such a case the resulting trust was not rebutted; and in Pole v. Pole, 1 Ves. Sr. 76, Lord Hardwicke thought so too; and yet the rule in a court of equity as recognized in other cases is that the father is the only judge as to the question of a son's provision. That distinction, therefore, of the son being provided for or not, is not very solidly taken or uniformly adhered to. It is then said that a purchase in the name of a son is a prima facie advancement, and, indeed, it seems difficult to put it in any way. In some of the cases some circumstances have appeared which go pretty much against that presumption, as where the father has entered and kept possession, and taken the rents; or where he has surrendered or devised the estate; or where the son has given receipts in the name of the father. The answer given is that the father took the rents as guardian of his son. Now, would the court sustain a bill by the son against the father for these rents? I should think it pretty difficult to succeed in such a bill. As to the surrender and devise, it is answered that these are subsequent acts; whereas the intention of the father in taking the purchase in the son's name must be proved by concomitant acts; yet these are pretty strong acts of ownership, and assert the right, and coincide with the possession and enjoyment. As to the son's giving receipts in the name of the father, it is said that, the son being under age, he could not give receipts in any other manner; but I own this reasoning does not satisfy me. In the more complicated cases, where the life of the son is one of the lives to take in succession, other distinctions are taken. If the custom of the manor be that the first taker might surrender the whole lease, that shall make the other lessees trustees for him; but this custom operates on the legal estate, not on the equitable interest; and therefore this is not a very solid argument. When the lessees are to take successive, it is said that, as the father cannot take the whole in his own name, but must insert other names in the lease, then the children shall be trustees for the father; and to be sure, if the circumstance of a child being the nominee is not decisive the other way, there is a great deal of weight in this observation. There may be many prudential reasons for putting in the life of a child in preference to that of any other person; and if in that case it is to be collected from circumstances whether an advancement was meant, it will be difficult to find such as will support that idea. To be sure, taking the estate in the name of the child, which the father might have taken in his own, affords a strong argument of such an intent; but where the estate must necessarily be taken to him in succession, the inference is very different. These are the difficulties which occur from considering the purchase in the son's name as a circumstance of evidence only. Now, if it were once laid down that the son was to be taken as a purchaser for a valuable consideration, all these matter of presumption would be avoided.

It must be admitted that the case of Dickinson v. Shaw is a case very strong to support the present plaintiff's claim. That came on in chancery, on 22d May, 1770. "A copyhold was granted to three lives to take in succession, the father, son, and daughter. The father paid the fine. There was no custom stated. The question was whether the daughter and her husband were trustees during the life of the son, who survived the father. At the time of the purchase the son was nine and the daughter seven years old. It appeared that the father had leased the premises from three years to three years to the extent of nine years. On this case Lords Commissioners Smythe and Aston were of opinion that, as the father had paid the purchase money, the children were trustees for him." To the note I have of this case it is added that this determination was contrary to the general opinion of the bar, and also to a case of Taylor v. Alston, in this court. In Dickinson v. Shaw there was some little evidence to assist the idea of its being a trust, namely, that of the leases made by the father. If that made an ingredient in the determination, then that case is not quite in point to the present; but I rather think that the meaning of the court was that the burthen of proof laid on the child; and that the cases which went the other way were only those in which the estate was entirely purchased in the name of the children. If so, they certainly were not quite correct in that idea, for there had been cases in which the estates had been taken in the names of the father and son. I have been favoured with a note of Rumboll v. Rumboll, before Lord Keeper Henley on the 20th April, 1761, where a copyhold was taken for three lives in succession, the father and two sons. The father paid the fine, and the custom was that the first taker might dispose of the whole estate (and his lordship then stated that case fully). Now, this case does not amount to more than an opinion of Lord Keeper Henley, but he agreed with me in considering a child as a purchaser for good consideration of an estate bought by the father in his name, though a trust would result as against a stranger. It has been supposed that the case of Taylor v. Alston in this court denied the authority of Dickinson v. Shaw. That cause was heard before Lord Chief Baron Smythe, myself, and Mr. Baron Burland, and was the case of an uncle purchasing in the names of himself and a nephew and niece. It was decided in favour of the nephew and niece, not on any general idea of their taking as relations, but on the result of much parol evidence, which was admitted on both sides, and the equity on the

side of the nominees was thought to preponderate. Lord Kenyon was in that cause, and his argument went solely on the weight of the parol evidence. Indeed, as far as the circumstance of the custom of the first taker's right to surrender, it was a strong case in favour of a trust. However, the court determined the other way on the parol evidence. That case, therefore, is not material. Another case has been mentioned, which is not in print, and which was thought to be materially applicable to this (Bedwell v. Froome, before Sir T. Sewell); but that was materially distinguishable from the present. As far as the general doctrine went, it went against the opinion of the lords commissioners. His honour there held that the copyholds were part of the testator's personal estate, for that was not a purchase in the name of the daughter. She was not to have the legal estate. It was only a contract to add the daughter's life in a new lease to be granted to the father himself. There could be no question about her being a trustee, for it was as a freehold in him for his daughter's life. But in the course of the argument his honour stated the common principles as applied to the present case, and ended by saying that, as between father and child, the natural presumption was that a provision was meant. The anonymous case in 1 Freem. Ch. 123, corresponds very much with the doctrine laid down by Sir T. Sewell, and it observes that an advancement to a child is considered as done for valuable consideration, not only against the father, but against creditors. Kingdon v. Bridges, 2 Vern. 67, is a strong case to this point,—that is, the valuable nature of the consideration arising on a provision made for a wife or for a child; for there the question arose as against creditors.

I do not find that there are in print more than three cases which respect copyholds where the grant is to take successive,—Rundle v. Rundle, 2 Vern. 264, which was a case perfectly clear; Benger v. Drew, 1 P. Wms. 781, where the purchase was made partly with the wife's money; and Smith v. Baker, 1 Atk. 385, where the general doctrine as applied to strangers was recognized; but the case turned on the question whether the interest was well devised. Therefore, as far as respects this particular case, Dickinson v. Shaw is the only case quite in point; and then the question is whether that case is to be abided by. With great reverence to the memory of those two judges who decided it, we think that case cannot be followed; that it has not stood the test of time, or the opinion of learned men; and Lord Kenyon has certainly intimated his opinion against it. On examination of its principles, they seem to rest on too narrow a foundation, namely, that the inference of a provision being intended did not arise, because the purchase could not have been taken wholly in the name of the purchaser. This, we think, is not sufficient to turn the presumption against the child. If it is meant to be a trust, the purchaser must shew that intention by a declaration of trust; and we do not think it right to doubt whether an estate in succession is to be considered as an advancement, when a moiety of an estate in possession certainly would be so. If we were to enter into all the reasons that might possibly influence the mind of the purchaser, many might perhaps occur in every case upon which it might be argued that an advancement was not intended. And I own it is not a very prudent conduct of a man just married to tie up his property for one child, and preclude himself from providing for the rest of his family. But this applies equally in case of a purchase in the name of the child only, yet that case is admitted to be an advancement; indeed, if anything, the latter case is rather the strongest, for there it must be confided to one child only. We think, therefore, that these reasons partake of too great a degree of refinement, and should not prevail against a rule of property which is so well established as to become a landmark, and which, whether right or wrong, should be carried throughout.

This bill must therefore be dismissed; but, after stating that the only case in point on the subject is against our present opinion, it certainly will be proper to dismiss it without costs.

### In re O'HARA.

(95 N. Y. 403.)

Court of Appeals of New York. 1884.

Appeal from surrogate court, Kings county.

The facts of the case are stated in the opinion of the court.

Geo. H. Starr and Samuel D. Morris, for appellants. William N. Dykman, for respondents.

FINCH, J. The testatrix gave to three persons, who were her lawyer, her doctor and her priest, absolutely, but as joint tenants, the bulk of her estate. Practically she disinherited her relatives in favor of strangers, who had no claim upon her bounty, except such as originated in their professional characters, and the confidence and friendship thus engendered. For this reason probate of the will was resisted. While the testatrix was shown to have been superstitious, whimsical, blindly devoted to her church and its ecclesiastics, habitually under the influence of stimulants, and seriously dependent upon the advice of those who became her residuary legatees, it is yet certain that there was no want of testamentary capacity. But although the attack failed upon that ground, the charge of undue influence was somewhat supported by the evidence relating to her character and surroundings, which made possible and tended to render probable the existence of an outside power capable of moulding her wishes to its own. The exigency demanded of the proponents some adequate and reasonable explanation of a diversion of the estate to strangers holding the power and influence derived from confidential relations, consistent with the free action and untrammeled exercise of the testamentary intention. The explanation came. A letter of instruction, addressed to the residuary legatees, contemporaneous with the will, and dictating the purpose as well as explaining the reason of the absolute legacy, was produced upon the hearing. These written instructions demonstrated that the residuary clause was not intended by the testatrix to pass to the legatees any beneficial interest. The absolute devise, on its face difficult of explanation except upon a theory of undue influence, thereby lost its suspicious character and put the legatees in more of a disinterested attitude. It appeared that the testatrix did not at all desire or intend to bestow her estate upon those to whom she gave it; that her real intention was to devote it to certain charitable purposes; that these, she was advised, could not effectively be accomplished by her will, except through an absolute devise to individuals, in whose honorable action she could confide; and, therefore, and for that reason, and to effect that ulterior purpose, she gave her estate in form to the professional friends, not meaning any beneficial legacy to them or for their use. With this development of the defense the attack took on a new phase. The heirs at law and next of kin began an action in equity to set aside and annul the residuary devise and bequest, or to establish a trust, which, failing as to the intended beneficiaries, should result to those who would otherwise have taken by descent or distribution. Both cases are now before us, and it is convenient to consider them together, since our conclusion in one may tend seriously to affect the result in the other.

The proof is uncontradicted that the testatrix made the residuary devise and bequest in its absolute and unconditional form in reliance upon a promise of the legatees to apply the fund faithfully and honorably to the charitable uses dictated in the letter of instructions. It does not disprove this statement to assert that no express promise to that effect was made, or that it was the pledge of Judge McCue alone. One of the legatees, Father McGuire, is dead, and the title is in the two survivors, and it is with them only that we need to deal. The trial judge did, indeed, find as a fact that Dr. Dudley did not know until after testatrix's death that the unattested letter of instructions existed, but he certainly did know before the will was made the character of the intended disposition; that he was selected as one of the executors; that the relatives by blood were to take but a trifle, and that the bulk of the estate was to be applied to charitable purposes by the executors; and with this knowledge he accepted the proposed trust. The trial judge further finds that Judge McCue "made no promise to obtain the bequest or devise and practiced no fraud." This finding is assailed, but unsuccessfully so far as it frees the legatees from a charge of actual fraud. In that respect we agree that there was no evil or selfish intention on their part. But the finding that Judge McCue "made no promise to obtain the bequest or devise" cannot be sustained. If anything is rendered certain by the evidence it is that the testatrix made the absolute devise and bequest upon the suggestion of a necessity therefor by Judge McCue, and upon the understanding that he and his associates would faithfully and honorably carry out her expressed intentions. If we say that McCue made no such promise, that he came under no such honorable obligation, then we must say that the testatrix was misled into a false belief, upon which, as true, she unmistakably acted. For it is not possible to doubt that if the legatees had said—we will not promise; we will do as we please; we will not be even honorably bound not to

take this money for ourselves—the absolute bequest would never have been made. It matters little that McCue did not make in words a formal and express promise. Everything that he said and everything that he did was full of that interpretation. When the testatrix was told that the legal effect of the will was such that the legatees could divert the fund to their own use, which was a statement of their power, she was told also that she would only have their honor and conscience on which to rely, and answered that she could trust them; which was an assertion of their duty. Where in such case the legatee, even by silent acquiescence, encourages the testatrix to make a bequest to him to be by him applied for the benefit of others, it has all the force and effect of an express promise. Wallgrave v. Tebbs, 2 Kay & J. 321; Schultz's Appeal, 80 Pa. St. 405. If he does not mean to act in accord with the declared expectation which underlies and induces the devise, he is bound to say so, for his silent acquiescence is otherwise a fraud. Russell v. Jackson, 10 Hare, 204.

So far then as McCue is concerned he stands in the attitude of having procured and induced the testatrix to make a devise or bequest to himself and his associates, by asserting its necessity and promising faithfully to carry out the charitable purposes for which it was made, and whether his associates knew or promised, or did not, makes no difference where the devise is to them as joint tenants, and all must get their rights through the result accomplished by one. Rowbotham v. Dunnett, 8 Ch. Div. 430; Hooker v. Oxford, 33 Mich. 453; Russell v. Jackson, 10 Hare, 206. If, therefore, in her letter of instructions, the testatrix had named some certain and definite beneficiary, capable of taking the provision intended, the law would fasten upon the legatee a trust for such beneficiary and enforce it, if needed, on the ground of fraud. Equity acts in such case not because of a trust declared by the testator, but because of the fraud of the legatee. For him not to carry out the promise by which alone he procured the devise and bequest, is to perpetrate a fraud upon the devisor which equity will not endure. The authorities on this point are numerous. Thynn v. Thynn, 1 Vern. 296; Oldham v. Litchford, 2 Freem. 284; Reech v. Kennegal, 1 Ves. Sr. 124; Podmore v. Gunning, 5 Sim. 485; Muckleston v. Brown, 6 Ves. 52; Hoge v. Hoge, 1 Watts, 163; McKee v. Jones, 6 Pa. St. 425; Dowd v. Tucker, 41 Conn. 197; Hooker v. Oxford, 33 Mich. 454; Williams v. Vreeland, 32 N. J. Eq. 135. The circumstances in these cases were varied and sometimes peculiar, but all of them either recognize or enforce the general doctrine. It has been twice applied in our own state. Brown v. Lynch, 1 Paige, 147; Williams v. Fitch, 18 N. Y. 546. In the last of these cases the making of a bequest to the plaintiff was prevented by an agreement of the father, who was next of kin, to hold in trust for the plaintiff; and the English cases were cited with approval and the trust enforced. All along the line of discussion it was steadily claimed that a plain and unambiguous devise in a will could not be modified or cut down by extrinsic matter lying in parol, or unattested papers, and that the statute of frauds and that of wills excluded the evidence; and all along the line it was steadily answered that the devise was untouched, that it was not at all modified, that the property passed under it, but the law dealt with the holder for his fraud, and out of the facts raised a trust, ex maleficio, instead of resting upon one as created by the testator. The character of the fraud which justifies the equitable interference is well described in Glass v. Hulbert, 102 Mass. 40. It was said to consist "in the attempt to take advantage of that which has been done in performance or upon the faith of the agreement while repudiating its obligation under cover of the statute."

Yet that is not the position of the defendants here. By their answer they deny any promise, whatever, made by them; any trust accompanying the request; any agreement to hold for the benefit of others; and insist that the property is theirs "for their own use and disposal."

Yet this is evidently intended merely as an assertion of what they insist is their legal position, and is not meant as a repudiation of their promise or its honorable obligation, and no beneficiary claiming any such violation of duty, or even as threatened or intended, is before us.

But it may happen, as it does happen here, that all of the charitable uses enjoined are for the benefit of those incapable of taking, or of a character in direct violation of the law of the state. What then becomes the duty of a court of equity? A fraud remains, except that it takes on graver proportions, and becomes more certain and inevitable. The agreement which induced the absolute device, and the fraud of a beneficial holding secured by a contrary promise, still confront us. And what is worse, it does not need that the absolute legatees repudiate their promise, for if ever so honorably willing to perform it, they cannot do so without setting at defiance and secretly evading the law and general policy of the state. The alternative is plain, and offers no chance of escape. If the legatees repudiate their obligations, that is a fraud upon the dead woman, who acted upon the faith of their promise. If they are willing to perform they cannot perform, except by a fraud upon the law to which they and the testatrix are equally parties.

In such a case the fraud remains and ex-

ists, identical in its character as to the testatrix, but an injury to the heir at law and next of kin instead of an identified and capable beneficiary. And it becomes not only a fraud against them, but a fraud upon the law, since it is a declared and admitted effort to accomplish by a secret trust what could not on the face of the will be done at all. If, on the ground of fraud, equity, as it has often done, and will always do, fastens a trust ex maleficio upon the fraudulent legatee or devisee for the protection of a named and definite beneficiary, no reason can be given why it should not do the same thing when the fraud attempted assumes a more serious character, because aimed at an evasion of the law, and seeking the shelter of unauthorized purposes. In such event, if equity withholds its power, one of two things is accomplished; either the legatee holds the estate beneficially, which is a fraud upon the testatrix and the intended objects of her bounty, or the fund is devoted to unauthorized purposes, in fraud of the law, and of the heirs and next of kin. If a trust ex maleficio may be fastened upon the property in the hands of the fraudulent legatee in the one case, why not also in the other? If in the one the fraud grows out of a refusal to perform, which would be the voluntary act of the legatee repudiating his promise, and so an actual fraud; in the other it grows out of the impossibility of performance, except in defiance of the public law, which is legally a fraud. In neither event can the legatee honestly hold. In both, either fraud triumphs, or equity defeats it through the operation of a trust, and protects those justly entitled. And so are the cases. In Jones v. Badley, L. R. 3 Eq. Cas. 635, the suit was by the co-heiresses and next of kin to make the defendants trustees for them, on the ground that a devise made to them of a residue absolute on its face was, in fact, for charitable purposes in violation of the mortmain act, and made on the faith of an agreement by the legatees that they would make such application. One of them was the confidential medical adviser of the testatrix; the devise to the two was in joint tenancy; no purposed or intentional dishonesty was charged against them; instead of wholly repudiating their duty, they alleged in their answer a design to carry out the charitable purposes; and yet the court did not hesitate on the ground of fraud to fasten a trust upon the property in their hands for the benefit of the heir and next of kin. Wallgrave v. Tebbs, 2 Kay & J. 313, 321, and Russell v. Jackson, 10 Hare, 207, were cited with approval. The latter case was a bill filed by the next of kin, alleging that the absolute devise of a residue was upon a secret trust either for charitable or illegal purposes. The court so held as to the proceeds of the freehold and leasehold estates, and because the dispositions "could not by law take effect," declared the devisees trustees for the heir and next of kin. In Muckleston v. Brown, 6 Ves. 63, 65, Lord Eldon intimated that where the devisees took under an agreement to hold upon such trusts as the testator should declare, but he omitted to declare any, there would be a trust to the heir which equity would decree; and added, as to a case of evasion of the statute, the pointed inquiry: "Is the court to feel for individuals, and not to feel for the whole of its own system, and compel a discovery of frauds that go to the root of its whole system?" In Schultz's Appeal, 80 Pa. St. 405, the plaintiff failed solely for want of proof of an agreement by the legatee inducing the devise; and the same difficulty existed in Rowbotham v. Dunnett, 8 Ch. Div. 430; and as to three of the four tenants in common in Tee v. Ferris, 2 Kay & J. 367; but all confirm the general doctrine asserted.

It is needed now that we consider the character of the charitable uses upon which these legatees agreed to hold the residuary estate. The testatrix began her letter of instructions by saying: "I am desirous of accomplishing certain purposes, some of which at least cannot be legally carried out by express provisions of my will; and, therefore, in order more certainly to effect my purposes I have constituted you such residuary devisees and legatees." The first purpose indicated is to "set apart" the income of $20,000 to the ecclesiastical education of poor young men for the Roman Catholic priesthood. She directed that this provision be made "a permanent one" and that the legatees make such arrangements that after their death the income should continue so to be appropriated. This purpose contemplated and required that the principal of the fund should be held inalienable and without an absolute power of disposition during the three lives of the legatees and for an indefinite period beyond. During this period the legal title to both the real and personal property would remain in the trustees and they pay over the income, and after the death of two the survivor was directed in some undefined manner to provide for the continuance of such income in the future. The plan violated the statute against perpetuities both as to real and personal estate, and the active trust was unlimited in its duration. Schettler v. Smith, 41 N. Y. 334; Adams v. Perry, 43 N. Y. 497; Garvey v. McDevitt, 72 N. Y. 561. What the respondent replies is that "the legatees may hand over the designated sum to an incorporated college" engaged in educating that class of young men. But the testatrix neither authorized nor contemplated any such thing. She chose her trustees for three lives, and no other was to be substituted till the death of the third, and then there might be another will, with an absolute bequest of the $20,000 to three other trustees, all honorable men, acting under a

letter of instructions, and so the process go on in evasion and defiance of the law. If, indeed, the testatrix intended a gift to a college corporation, that could have been done by her will. She could have made the devise or bequest without the risk of depending on some one's honor that the fund would not be diverted to private use, so that, in so far as this devise or bequest was represented to require an absolute devise or bequest to individuals, she was either misled or deceived, or else did not intend a gift to a college corporation. The legatees, therefore, cannot perform their promise as they made it and as the testatrix understood it without violating the law of the state against perpetuities.

The letter of instruction then proceeds: "I desire $3,000 set apart, the income whereof shall be applied to the purchase of shoes for poor children attending the parochial schools of St. Paul's R. C. Church, Brooklyn." This provision offends in the same way with the first as to the duration of the trust with also the difficulty that the beneficiaries are indeterminate. Levy v. Levy, 33 N. Y. 99. Again the respondent answers, both as to this clause and the one following which requires "$3,000 set apart for the St. Vincent de Paul Society connected with St. Paul's Church," that the church is incorporated, "and will receive $6,000 with a request from the residuary legatees to use one-half the income to purchase shoes for poor children attending the parochial school." The request would bind nobody. What the testatrix directed was not a gift to the church, but an application by her own chosen trustees of income to the two specified purposes. And if she intended the disposition now suggested, once more it is true that she could have given $6,000 to the church corporation with a request as to the supply of shoes quite as well as her legatees can do it, and there was no need of the absolute devise and bequest represented to exist.

Then follow these provisions, viz.: "The sum of $3,000 for the benefit of the Home of the Good Shepherd, and the sum of $5,000 for the Little Sisters of the Poor, both in Brooklyn." It is said that these two societies are incorporated, but they may not be entitled to the principal, if the trustees refuse it, for the latter are authorized to "limit the use of said bequests to the income thereof." And again the observation recurs that a bequest to these corporations could easily have been made in the will if that had been understood to be the real intention.

Finally the letter prescribes that any residue of the fund remaining should be applied "in aid" of the charities and purposes named in the will or in the letter, "or in any other charity which you or a majority of you may prefer." The respondent says that just such a provision as this in the body of a will has been upheld. Power v. Cassidy, 79 N. Y. 602. That is not true. On the contrary this court has very recently declined to carry the doctrine of that case beyond its own essential limits, and is not likely to agree that a devise may become the mere equivalent of a general power of attorney. Prichard v. Thompson, 95 N. Y. 76.

All through this letter the duty of the legatees is denominated a "trust," the gifts provided are sometimes called "bequests," and at its close, after charging the legatees to impose upon her beneficiaries "as far as you can" the "obligation" of "'the offering of the holy sacrifice of the mass" in her own behalf and that of certain named relatives, she expresses her own sense of the force and character of her letter in the concluding sentence, "I desire to give to these instructions all the force and solemnity of a last will and testament."

This letter of instructions clearly and unmistakably shows the real nature of the transaction. The writer leaves almost nothing to the discretion of the trustees. She selects out her own objects of charity in the main, describes them in detail, fixes the amounts to be given and impresses upon her directions the "solemnity of a last will and testament." It is not at all the case of a devise to one absolutely to be expended at his discretion, but a definite and distinct trust having in view specific purposes and contemplating their precise performance.

If we construed this document to mean such dispositions as are now asserted, we should be driven to the inevitable inference that every one of them could have been easily, and safely, and perfectly made in the will itself, and that when told to the contrary by Judge McCue the testatrix was told what was utterly untrue, and what a jury might easily believe was known to be untrue, and so that the testatrix was led, by deception and fraud, to incur the danger and peril of an absolute devise and bequest—a conclusion which would destroy the will as the product of fraud. We do not believe that. Justice to two honorable men, of character and standing, forbids any such theory. Nothing about the case calls upon us for a conclusion so harsh and needless. On the contrary, we think Judge McCue told the truth to the testatrix, and that truth was that she could not tie up her estate in the hands of individuals perpetually, they distributing only the income, without violating the law of the state, and that she must either give up the purpose or depend for its accomplishment upon an absolute devise accompanied by a secret trust.

We have thus an important question squarely presented. If equity will not touch this devise by putting a trust for the heirs at law and next of kin upon the fund in the hands of these legatees, the road to an evasion of our statutes, and to the temptations of necessity or greed, will be left wide

open. While in such cases it has been well said that the court should act with caution and only upon the clearest proof of the fraud (Collins v. Hope, 20 Ohio, 501), yet when, as here, the facts are proved beyond reasonable question, we ought not to hesitate. The testatrix did intend an absolute devise to these legatees on the face of the will; but she did not intend that they should have the resultant beneficial interest, and relied upon their promise to carry its fruits elsewhere. They do not refuse to perform. Although they deny the promise, it is quite possible that they mean to keep it. We are not authorized to say or suspect that they will not, but if they do, they must inevitably carry out a planned and purposed evasion of our statutes against perpetuities.

It is said, however, and that brings us to the decisive point in the case; that the English authorities turned upon the fact that because of the statutes of mortmain the lands devised upon an honorable promise by the absolute devisee to dispense them in charity, could not by any process or in any mode be carried to that destination without violating the law, while in this case the charity is not prohibited, but only certain modes of its operation. Let us test this suggestion.

The statutes of mortmain were numerous, and followed each other in a succession as rapid as the devices and evasions of the ecclesiastics which they were framed to overthrow, until by the Act 9 Geo. II. c. 36, it was ordained that no lands or tenements, or money to be laid out thereon, should be given for or charged with any charitable uses whatsoever, unless by deed intended, executed in the presence of two witnesses and made at least one year before the death of the party and registered in a prescribed manner. While under this statute a devise of land was forbidden to charitable uses, it could be so devoted by a deed inter vivos, and in each of the cases we have cited, the absolute devisee, acting as owner, could by indenture have transferred to charity the land he had taken as devisee. But that did not serve to ward off a trust ex maleficio in any single instance. The result was plainly apparent that the property of the testator, by the artifice of an absolute devise coupled with a secret agreement, had been carried to a charity in defiance of the public law and in fraud of the mortmain acts. These acts did not, therefore, absolutely and totally forbid gifts of land to charitable uses. They put their prohibition not on the gift, but on the manner of it. They forbade it by will or devise. It is a similar prohibition upon the manner of gifts or transfers which our law imposes. While it is true, as was said at special term in the very able opinion contained in the record, that our statute does not forbid charitable devises and bequests, it does forbid expressly and imperatively a certain manner of making them. Gifts or transfers made in that manner are prohibited and made void. The principal legatee in this case knew it, and it was distinctly planned between him and the testatrix that her understood and declared purpose, which could not be lawfully carried out by a devise on the face of the will, should be effected by an absolute devise coupled with his honorable obligation to hold and appropriate the property to forbidden uses. An evasion of the law was the very occasion and object of the absolute devise. Without that it could not have been suggested without a fraud upon the testatrix, for if there was no need of it, if no statute was to be avoided or flanked, the very suggestion of an absolute devise was fraudulent.

The question here is the character of the legatees' agreement and precisely that and nothing else must serve as a test. They agreed for three lives, under the pretense of ownership, to dole out the income of this fund to indeterminate persons of their selection; at the end of three lives in some manner to continue that process, making it permanent; and to dispense a possible surplus to any charities they might choose. That precise agreement, the one which they made, on the faith of which the testatrix acted, they must honorably and explicitly carry out or else they have defrauded her; and if they do carry it out as they agreed and as she understood it, they tie the property up for three lives and an uncertain period beyond, and so violate and defy the law.

We are not ready to concede that our statute against perpetuities is any the less sacred than the English acts of mortmain, or may be evaded with impunity. It may possibly be that the evils of such evasion are greater in the one case than in the other, but that will not justify us in shutting our eyes to the process, or holding that equity stands helpless in presence of the fraud. The learned presiding judge at the general term, while affirming this judgment formally that it might more swiftly come to our bar, sent with it a very wise and prudent caution. He said: "It seems clear to us that the law ought not to encourage arrangements for the disposition of property by testators, such as this case discloses." In Wallgrave v. Tebbs, supra, the vice-chancellor said that "the duty of a devisee under the circumstances stated was to throw up the property." Any devise or bequest of this character is dangerous and indefensible. It exposes testators to the suggestion of unnecessary difficulties as inducements to the artifice of an absolute devise concealing an illegal trust. It exposes the devisee to temptation and even when he acts honestly, to severe and unrelenting criticism. It subserves no good or useful purpose. If we sustain it we admit that any statute may be thus evaded, and that equity cannot redress the wrong.

We are not satisfied that the will was made through undue influence and therefore affirm the judgment of the general term which affirmed the decree of the surrogate, with costs.

But in the equity action we reverse the judgment of the general term and of the special term, with costs of both parties on the appeal to this court, payable out of the fund, and order a new trial.

All concur as to the first appeal. All concur as to the second, except RAPALLO, J., not voting.

Judgments accordingly.

## KING v. TALBOT.

(40 N. Y. 76.) [1]

Court of Appeals of New York. 1869.

This was an action for an accounting against the defendants, as the surviving executors of the will of the father of the plaintiffs. By the will the executors were directed to invest $15,000 for each of the plaintiffs, and the executors made these investments in certain railroad bonds and stock, and in some bank stock. The value of these securities having depreciated, the investment was repudiated by the plaintiffs, and this action brought. The further facts appear in the opinion of the court.

Stephen P. Nash, for appellants. George M. Titus, for respondents.

WOODRUFF, J. It is conceded that in England the rule is, and has long been settled, that a trustee, holding funds to invest for the benefit of his cestui que trust, is bound to make such investment in the public debt, for the safety whereof the faith of their government is pledged; or in loans, for which real estate is pledged as security. And that although the terms of the trust commit the investment, in general terms, to the discretion of the trustee, that discretion is controlled by the above rule, and is to be exercised within the very narrow limits, which it prescribes.

As a purely arbitrary rule, resting upon any special policy of that country, or on any peculiarity in its condition, it has no application to this country. It is not of the common law. It had no applicability to the condition of this country, while a colony of Great Britain, and cannot be said to have been incorporated in our law.

So far, and so far only, as it can be said to rest upon fundamental principles of equity, commending themselves to the conscience, and suited to the condition of our affairs, so far it is true, that it has appropriate application and force, as a guide to the administration of a trust here, as well as in England.

I do not therefore deem it material to inquire through the multitude of English cases, and the abundant texts of the law-writers, into the origin of the rule in England, or the date of its early promulgation. Nor in this particular case do I deem it necessary to determine whether it should, by precise analogy, be deemed to prohibit here investments in any other public debt than that of the state of New York.

Neither, in my judgment, are we at liberty, in the decision of this case, to propound any new rule of conduct, by which to judge of the liability of trustees, now subjected to examination. Under trusts heretofore created, the managers thereof performed their duty with the aid of rules for the exercise of their discretion, which were the utterance of equity and good conscience, intelligible to their understanding, and available for their information; otherwise, trusts heretofore existing have been traps and pitfalls to catch the faithful, prudent and diligent trustee, without the power to avoid them.

But it is not true that there is no underlying principle or rule of conduct in the administration of a trust, which calls for obedience. Whether it has been declared by the courts or not, whether it has been enacted in statutes or not, whether it is in familiar recognition in the affairs of life, there appertains to the relation of trustee and cestui que trust, a duty to be faithful, to be diligent, to be prudent in an administration intrusted to the former, in confidence in his fidelity, diligence and prudence.

To this general statement of the duty of trustees, there is no want of promulgation or sanction, nor want of sources of information for their guidance. In the whole history of trusts, in decisions of courts for a century in England, in all the utterances of the courts of this and the other states of this country, and not less in the conscious good sense of all intelligent minds, its recognition is uniform.

The real inquiry therefore is, in my judgment, in the case before us, and in all like cases: Has the administration of the trust, created by the will of Charles W. King, for the benefit of the plaintiff, been governed by fidelity, diligence and prudence? If it has, the defendants are not liable for losses which nevertheless have happened.

This however aids but little in the examination of the defendants' conduct, unless the terms of definition are made more precise. What are fidelity, diligence and discretion? and what is the measure thereof, which trustees are bound to possess and exercise?

It is hardly necessary to say that fidelity imports sincere and single intention to administer the trust for the best interest of the parties beneficially interested, and according to the duty which the trust imposes. And this is but a paraphrase of "good faith."

The meaning and measure of the required prudence and diligence has been repeatedly discussed, and with a difference of opinion. In extreme rigor, it has sometimes been said that they must be such and as great as that possessed and exercised by the court of chancery itself. And again, it has been said that they are to be such as the trustee exercises in the conduct of his own affairs, of like nature, and between these is the declaration that they are to be the highest prudence and vigilance, or they will not exonerate.

My own judgment, after an examination of the subject, and bearing in mind the nature of the office, its importance and the

[1] Irrelevant parts omitted.

considerations which alone induce men of suitable experience, capacity and responsibility to accept its usually thankless burden, is that the just and true rule is that the trustee is bound to employ such diligence and such prudence in the care and management as in general prudent men of discretion and intelligence in such matters employ in their own like affairs.

This necessarily excludes all speculation, all investments for an uncertain and doubtful rise in the market, and of course every thing that does not take into view the nature and object of the trust, and the consequences of a mistake in the selection of the investment to be made.

It therefore does not follow that because prudent men may, and often do, conduct their own affairs with the hope of growing rich, and therein take the hazard of adventures which they deem hopeful, trustees may do the same; the preservation of the fund and the procurement of a just income therefrom are primary objects of the creation of the trust itself, and are to be primarily regarded.

If it be said that trustees are selected by the testator or donor of the trust, from his own knowledge of their capacity, and without any expectation that they will do more than, in good faith, exercise the discretion and judgment they possess, the answer is: First, the rule properly assumes the capacity of trustees to exercise the prudence and diligence of prudent men in general; and second, it imposes the duty to observe and know or learn what such prudence dictates in the matter in hand.

And once more the terms of the trust, and its particular object and purpose, are in no case to be lost sight of in its administration.

Lewin, in his treatise on the law of Trusts, etc., (page 332), states, as the result of the several cases, and as the true rule, that "a trustee is bound to exert precisely the same care and solicitude in behalf of his cestui que trust as he would do for himself; but greater measure than this a court of equity will not exact." In general this is true; but if it imports that if he do what men of ordinary prudence would not do, in their own affairs, of a like nature, he will be excused, on showing that he dealt with his own property with like want of discretion, it cannot be sustained as a safe or just rule toward cestuis que trust; nor is it required by reasonable indulgence to the trustee; it would be laying the duty to be prudent out of view entirely, and I cannot think the writer intended it should be so understood.

The Massachusetts cases (Harvard College v. Amory, 9 Pick. 446; Lovell v. Minot, 20 Pick. 116) cited by the counsel for the defendants, are in better conformity with the rule as I have stated it.

To apply these general views to the case before us, and with the deductions which necessarily flow from their recognition: The testator gave to each of his children $15,000, the interest on the same, so far as required, to be applied to their maintenance and education, and the principal, with any accumulations thereon, to be paid to them severally on their majority; appointed the defendant, Talbot, and his partner, Mr. Olyphant, executors, "intrusting to their discretion the settlement of my affairs and the investment of my estate for the benefit of my heirs."

If I am correct in my views of the duty of trustees, this last clause neither added to, nor in any wise affected the duty or responsibility of these executors; without it they were clothed with discretion; with it their discretion was to be exercised with all the care and prudence belonging to their trust relation to the beneficiaries. Such is the distinct doctrine of the cases very largely cited by the counsel for the parties, and is, I think, the necessary conclusion from the just rule of duty I have stated.

What then was the office of the trustees, as indicated by the terms and nature of the trust? If its literal reading be followed, it directed that "$15,000" in money be placed at "interest." The nature of the trust, according to the manifest intent of the testator, required that in order to the maintenance and support of infant children, whose need, in that regard, would be constant and unremitting, that interest should flow in with regularity and without exposure to the uncertainties or fluctuations of adventures of any kind. And then the fund should continue, with any excess of such interest accumulated for their benefit, so as to be delivered at the expiration of their minority.

Palpably then the first and obvious duty was to place that $15,000 in a state of security; second, to see to it that it was productive of interest; and third, so to keep the fund that it should always be subject to future recall for the benefit of the cestui que trust.

I do not attach controlling importance to the word "interest" used by the testator, but I do regard it as some guide to the trustees, as an expression of the testator, that he did not contemplate any adventure with the fund, with a view to profits as such.

But apart from the inference from the use of that word, I think it should be said, that whenever money is held upon a trust of this description, it is not according to its nature, nor within any just idea of prudence to place the principal of the fund in a condition in which it is necessarily exposed to the hazard of loss or gain, according to the success or failure of the enterprise in which it is embarked, and in which by the very terms of the investment, the principal is not to be returned at all.

It is not denied that the employment of the fund, as capital in trade, would be a clear departure from the duty of trustees. If it cannot be so employed under the management of a copartnership, I see no reason

for saying that the incorporation of the partners tends, in any degree, to justify it.

The moment the fund is invested in bank, or insurance, or railroad stock, it has left the control of the trustees; its safety and the hazard, or risk of loss, is no longer dependent upon their skill, care or discretion in its custody or management, and the terms of the investment do not contemplate that it ever will be returned to the trustees.

If it be said that at any time the trustees may sell the stock (which is but another name for their interest in the property and business of the corporation), and so re-possess themselves of the original capital, I reply that is necessarily contingent and uncertain; and so the fund has been voluntarily placed in a condition of uncertainty, dependent upon two contingencies: First, the practicability of making the business profitable; and, second, the judgment, skill and fidelity of those who have the management of it for that purpose.

If it be said that men of the highest prudence do in fact invest their funds in such stocks, becoming subscribers and contributors thereto in the very formation thereof, and before the business is developed, and in the exercise of their judgment on the probability of its safety and productiveness, the answer is, so do just such men, looking to the hope of profitable returns, invest money in trade and adventures of various kinds. In their private affairs they do, and they lawfully may put their principal funds at hazard; in the affairs of a trust they may not. The very nature of their relation to it forbids it.

If it be said that this reasoning assumes that it is certainly practicable so to keep the fund that it shall be productive, and yet safe against any contingency of loss; whereas in fact if loaned upon bond and mortgage, or upon securities of any description, losses from insolvency and depreciation may and often do happen, nothwithstanding due and proper care and caution is observed in their selection. Not at all. It assumes and insists that the trustees shall not place the fund where its safety and due return to their hands will depend upon the success of the business in which it is adventured, or the skill and honesty of other parties intrusted with its conduct; and it is in the selection of the securities for its safety and actual return that there is scope for discretion and prudence, which if exercised in good faith, constitute due performance of the duty of the trustees.

My conclusion is therefore that the defendants were not at liberty to invest the fund bequeathed to the plaintiff in stock of the Delaware and Hudson Canal Company; of the New York and Harlem Railroad Company; of the New York and New Haven Railroad Company; of the Bank of Commerce; or of the Saratoga and Washington Railroad Company; and that the plaintiff was not bound to accept these stocks as and for his legacy, or the investment thereof.

In regard to the bonds of the Hudson River Railroad Company and of the Delaware and Hudson Canal Company, it appears by schedule B, given in evidence, that the former were mortgage bonds; but what was the extent or sufficiency of the security afforded by such mortgage, or what property was embraced in it does not appear, nor does it appear whether there was any security whatever for the payment of the canal company's bond.

It is not necessary for the decision of this case; and I am not prepared to say that an investment in the bonds of a railroad or other corporation, the payment whereof is secured by a mortgage upon real estate, is not suitable and proper under any circumstances.

If the real estate is ample to insure the payment of the bonds, I do not at present perceive that it is necessarily to be regarded as inferior to the bond of an individual secured by mortgage; it would of course be open to all the inquiries which prudence would suggest if the bond and mortgage were that of an individual. The nature, the location and the sufficiency of the security and the terms of the mortgage, and its availability for the protection and ultimate realization of the fund, must of course enter into the consideration.

But it is not necessary to pursue that subject. The plaintiff in his complaint rejects the entire investment. The court below held that it was equitable that the plaintiff should be held to receive the whole or none of the stocks and bonds, and to that ruling neither the plaintiff nor the defendant have excepted; and therefore the question whether the judgment below was correct in that respect is not before us.

It is proper however to say that I do not clearly apprehend the propriety of that ruling, unless it be on the ground that the plaintiff in his complaint did so elect.

The rule is perfectly well settled that a cestui que trust is at liberty to elect to approve an unauthorized investment and enjoy its profits, or to reject it at his option; and I perceive no reason for saying that where the trustee has divided the fund into parts and made separate investments, the cestui que trust is not at liberty, on equitable as well as legal grounds, to approve and adopt such as he thinks it for his interest to approve. The money invested is his money; and in respect to each and every dollar, it seems to me he has an unqualified right to follow it, and claim the fruits of its investment, and that the trustee cannot deny it. The fact that the trustee has made other investments of other parts of the fund, which the cestui que trust is not bound to approve, and disaffirms, cannot, I think, affect the power. For example, suppose in the present case the cestui que trust, on de-

livery to him of all the securities and bonds in which his legacy had appeared invested, had declared: Although these investments are improperly made, not in accordance with the intent of the testator, nor in the due performance of your duty, I waive all objection on that account, except as to the stock of the Saratoga and Washington Railroad Company. That I reject and return to you. Is it doubtful that his position must be sustained?

The result is, that the main features of the judgment herein must be affirmed.

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## In re BARKER'S TRUSTS.

(1 Ch. Div. 43.)

Chancery Division. Nov. 6, 1875.

This was a petition under the trustee act, 1850, and the bankruptcy act, 1869, asking for the removal of the sole trustee of a will (who had also a beneficial interest under it), on the ground that he had been adjudicated bankrupt, and for the appointment of a new trustee in his place, and for a vesting order.

Part of the property subject to the trusts of the will consisted of bonds transferable by delivery with coupons. The trusts were to receive the income, and pay it to one of the petitioners during life.

Mr. Chitty, Q. C., and Mr. Bush, in support of petition. Chapman Barber, for trustee. Solicitors: Tatham, Procter & Co.; Walter, Moojen & Co. Mr. Chester, for other parties.

JESSEL, M. R. In my view, it is the duty of the court to remove a bankrupt trustee who has trust money to receive or deal with, so that he can misappropriate it. There may, be exceptions, under special circumstances, to that general rule; and it may also be that, where a trustee has no money to receive, he ought not to be removed merely because he has become bankrupt; but I consider the general rule to be as I have stated. The reason is obvious. A necessitous man is more likely to be tempted to misappropriate trust funds than one who is wealthy; and besides, a man who has not shewn prudence in managing his own affairs is not likely to be successful in managing those of other people.

However, if special circumstances are required for the removal of a bankrupt trustee, I should in the present case find them in the nature of the trust property. Part of the property consists of bonds with coupons, which could very easily be made away with. The trustee must be removed, and I make an order accordingly.

CHICK et al. v. WILLETTS.

(2 Kan. 384.)

Supreme Court of Kansas. Jan. Term, 1864.

Error from district court, Shawnee county.

Nathan P. Case, for plaintiffs in error. J. & D. Brockway, for defendant in error.

CROZIER, C. J. Two questions are presented by the record: First, which law, the twentieth section of the Code, or the second section of the "amendatory act," prescribes the limitation; and, second, when an action upon a promissory note, secured by a mortgage on real estate, is barred by the statute of limitations, has the mortgagee any remedy upon the mortgage? These are the facts: On the sixth day of April, 1858, at Kansas City, in the state of Missouri, the defendant executed to the plaintiffs his promissory note, payable one day after date. Afterwards, and on the 12th day of August of that year, the defendant, to secure the payment of the note, executed, in this state, a mortgage upon some lots in Topeka, which mortgage contained a stipulation that if default was made in the payment of the note for two years from the date of the mortgage, that instrument might be foreclosed, etc. On August 13, 1863, a suit was instituted upon the note and mortgage, and the facts, as above stated, being admitted, judgment was rendered for the defendant. To reverse that judgment this proceeding is instituted.

The note having been made in Missouri, would, under the act of February 10, 1859, have been barred in two years from the passage of that act, if there were nothing else to be considered. By a stipulation in the mortgage, the time of payment was deferred two years from August 12, 1858.

The mortgage having been made in this state, was the arrangement, with reference to our statute of limitations, a Kansas or Missouri contract? Although no change was made upon the face of the note, yet the clause of the mortgage referred to was effective to change its terms as if written across its face. The time of its payment, with reference to the land, was extended two years. Its payment, as against the land, could not be enforced before that time; nor would the limitation laws begin to run against it until the expiration of that time. These changes in the original contract were effected by the paper which was executed in this state. The contract evidenced by the mortgage is essentially different from that set out in the note, and must control it. Therefore, the contract, as it stood, after the making of the mortgage, was a Kansas contract, and would not be barred in two years.

The statutes of limitation of this state are wholly unlike the English statute, and differ materially from the limitation laws of those states which have adhered to the common law forms of action and modes of procedure. Those statutes apply, in terms, to the forms of the action at law and contain no provisions concerning an equitable proceeding. If a party had concurrent remedies, one at law, the other in equity, courts of equity applied the limitation prescribed for the action at law. But in all other cases they were said to act merely in analogy to the statutes, and not in obedience to them.

In this state, the case is entirely different. The distinction between actions at law and suits in equity is abolished; and the statutes of limitation apply equally to both classes of cases. They were made to apply to the subject matter, and not to the form of the action. In England and the states referred to, a limitation different from that prescribed for simple contracts in writing, was prescribed for specialties. Here, "an action upon a specialty, or any agreement, contract or promise in writing," must be brought within three years; and it matters not what the relief demanded may be, whether such as could formerly be obtained only in a court of law, or such as might have been afforded by a court of equity exclusively.

Mortgages here differ essentially from mortgages at common law, and in the states referred to. At common law, a mortgage was a conveyance with a defeasance, and gave the mortgagee a present right of possession. Upon it, even before the conditions were broken, he might enter peaceably or bring ejectment. If the condition was broken, the conveyance became absolute. If the money was paid when due, the estate reverted to the mortgagor; if not so paid, the estate was gone from him forever. After a time, the law of mortgage was so modified that the legal title was not considered as having passed until the condition was broken. At a later day, another still more important innovation was made. While it was considered that, upon the condition broken, the mortgagee became invested with the legal title, and was entitled to possession, yet, in that condition of things, his title was subject to a defeasance. The rents and profits operated as cancellation, pro tanto, of his conveyance; and when they reached a sum sufficient to reimburse his original investment, with such use as the law allowed, the legal title reverted to the mortgagor, and he would be entitled to the possession; and he had a right to facilitate this operation by payment of the money, and upon application to a court of equity, his title would be disencumbered of the cloud the mortgage cast upon it. This right of the mortgagor was called "the equity of redemption," and, considering the then prevalent theory of mortgages, the phrase was peculiarly appropriate and expressive. The title had passed, but he had a right to redeem; and it is among the highest glories of equitable jurisprudence, that at so early a day the means of enforcing this right were supplied. Some

of the states still adhere to the common law view, more or less modified by the real nature of the transaction; but in most of them, practically, all that remains of the old theory is their nomenclature. In this state, a clean sweep has been made by statute. The common law attributes of mortgages have been wholly set aside; the ancient theories have been demolished; and if we could consign to oblivion the terms and phrases—without meaning except in reference to those theories—with which our reflections are still embarrassed, the legal profession on the bench and at the bar would more readily understand and fully realize the new condition of things. The statute gives the mortgagor the right to the possession, even after the money is due, and confines the remedy of the mortgagee to an ordinary action and sale of the mortgaged premises; thus negativing any idea of title in the mortgagee. It is a mere security, although in the form of a conditional conveyance; creating a lien upon the property, but vesting no estate whatever, either before or after condition broken. It gives no right of possession, and does not limit the mortgagor's right to control it—except that the security shall not be impaired. He may sell it, and the title would pass by his conveyance—subject, of course, to the lien of the mortgagee.

If we are right in these views as to our statute of limitations, and the operation of a mortgage under our law, the English cases and cases in New York and Ohio, cited by counsel for plaintiffs, have no application to the case at bar. The statutes of limitation under which they were made, make distinctions between notes and mortgages which do not exist here; and the operations of notes and mortgages there and here are totally different. The decisions are not authorities in this case, for the reason that they are not applicable, and cannot be made so. If our limitation law omitted mortgages, and our law of conveyances gave the right of possession to the mortgagee, some of them would be in point; but as neither of these conditions exist here, they throw no light upon the questions under consideration in the case at bar.

Our conclusions are, that the twentieth section of the Code prescribes the limitation to an action on the note or mortgage, and as the three years expired on the 12th day of August, 1863, a suit commenced on the 13th was too late. Judgment affirmed.

All the justices concurring.

BARRETT et al. v. HINCKLEY.

(14 N. E. 863, 124 Ill. 32.)

Supreme Court of Illinois. Jan. 19, 1888.

Appeal from superior court, Cook county; J. E. Gary, Judge.

Watson S. Hinckley, plaintiff, sued George D. Barrett, Adalina S. Barrett, and William H. Whitehead, impleaded with others, defendants, in ejectment. Judgment for plaintiff, and the above-mentioned defendants appealed.

Whitehead & Packard, for appellants. Wilson & Moore, for appellee.

MULKEY, J. Watson S. Hinckley, claiming to be the owner in fee of the land in controversy, on the twenty-sixth day of February, 1885, brought an action of ejectment in the superior court of Cook county against the appellants, George D. Barrett, Adalina S. Barrett, William H. Whitehead, and others, to recover the possession thereof. There was a trial of the cause before the court without a jury, resulting in a finding and judgment for the plaintiff, and the defendants appealed. The evidence tends to show the following state of facts: In 1870, Thomas Kearns was in possession of the land, claiming to own it in fee-simple. On August 3d of that year he sold and conveyed it to William H. W. Cushman for the sum of $80,000. Cushman gave his four notes to Kearns for the balance of the purchase money,—one for $12,500, maturing in 30 days; three for $16,875 each, maturing, respectively, in two, three, and four years after date,—and all secured by a mortgage on the premises. The notes seem to have all been paid but the last one. In 1878, Kearns died, and his widow, Alice Kearns, administered on his estate. Previous to his death, however, he had hypothecated the mortgage and last note to secure a loan from Greenebaum. Subsequently, and before the commencement of the present suit, Greenebaum, in his own right, and Mrs. Kearns, as administratrix of her husband, for value, sold and assigned by a separate instrument in writing the mortgage and note to the appellee, Watson S. Hinckley. This is in substance the case made by plaintiff. The defendants showed no title in themselves or any one else. The conclusion to be reached, therefore, depends upon whether the case made by the plaintiff warranted the court below in rendering the judgment it did.

It is claimed by appellants, in the first place, that much of the evidence relied on by appellee to sustain the judgment below was improperly admitted by the court, and various errors have been assigned upon the record questioning the correctness of the rulings of the court in this respect. They, however, go further, and insist that, even conceding the facts to be as claimed by appellee himself, they are not sufficient in law to sustain the action. As the judgment below will have to be reversed on the ground last suggested, it will not be necessary to consider the other errors assigned. We propose to state as briefly as may be some of the reasons which have led us to the conclusion reached. In doing so, it is perhaps proper to call attention at the outset to some considerations that should be steadily kept in mind as we proceed, and to which we attach not a little importance.

It is first to be specially noted that this is a suit at law, as contradistinguished from a suit in equity. It is brought to enforce a naked legal right, as distinguished from an equitable right. The plaintiff seeks to recover certain lands, the title whereof he claims in fee-simple. To do this he is bound to show in himself a fee-simple title at law, as contradistinguished from an equitable fee. Fischer v. Eslaman, 68 Ill. 78; Wales v. Bogue, 31 Ill. 464; Fleming v. Carter, 70 Ill. 286; Dawson v. Hayden, 67 Ill. 52. Has he done this? He attempts to derive title remotely through the mortgage from Cushman to Kearns, but upon what legal theory is not very readily perceived. His immediate source of title, however, seems to be Mrs. Kearns, as administratrix of her husband, and Greenebaum, as pledgee of the note and mortgage. The instrument through which he claims is lost or destroyed, and all we know concerning its character is what the plaintiff himself says about it. As to its contents, he does not pretend to state a single sentence or word in it, but characterizes it as an assignment, and gives the conclusions which he draws from it in general terms only. After stating his purchase of the note and mortgage in January, 1880, he says: "The assignment was from Mrs. Kearns, the administratrix of Thomas Kearns' estate, and Elias Greenebaum, the banker. At the time of the purchase, a separate writing was given to me,—a full assignment. * * * It was a very explicit assignment, or full assignment, of the note and mortgage, and the land, the property, and all the right and title to the land." It will be observed, the instrument is throughout characterized as an assignment only, which does not, like the term "deed" or specialty, signify an instrument under seal. A mere written assignment, founded upon a valuable consideration, is just as available for the purpose of passing to the assignee the equitable title to land as an instrument under seal. Such being the case, we would clearly not be warranted in inferring that the assignment was under seal, from the simple fact that the witness gives it as his opinion that the instrument was "a full assignment" of the land, which is nothing more than the witness' opinion upon a question of law. There not being sufficient evidence in the record to show that the assignment was under seal, it follows that, even conceding the legal title to the property to have been in Mrs. Kearns and Greenebaum,

or either of them, it could not have passed to the appellee by that instrument, and, if not by it, not at all, because that is the only muniment of title relied on for that purpose. This conclusion is of course based upon the fundamental principle that an instrument inter partes, in order to pass the legal title to real property, must be under seal. But this is not all. Even conceding the sufficiency of the assignment to pass the legal title, the record, in our opinion, fails to show that the assignors, or either of them, had such title; hence there was nothing for the assignment to operate upon, so far as the legal estate in the land is concerned. Having no such title, they could not convey it. "Nemo plus juris ad alienum transferre potest, quam ipse habet." That the legal estate in this property was not either in Greenebaum or Mrs. Kearns at the time of the assignment to plaintiff is demonstrable by the plainest principle of law. Let us see. Thomas Kearns was the owner of this property in fee. He conveyed it in fee to Cushman. The latter, as a part of the same transaction, reconveyed it by way of mortgage to Kearns. By reason of this last conveyance, Kearns became mortgagee of the property, and Cushman mortgagor. According to the English doctrine, and that of some of the states of the Union, including our own, Kearns, at least as between the parties, took the legal estate, and Cushman the equitable. According to other authorities, Kearns, by virtue of Cushman's mortgage to him, took merely a lien upon the property to secure the mortgage indebtedness, and the legal title remained in Cushman. For the purposes of the present inquiry, it is not important to consider just now, if at all, which is the better or true theory. It is manifest, and must be conceded, that the legal estate in the land, after the execution of the mortgage, was either in the mortgagee or mortgagor, or in both combined. Such being the case, it is equally clear appellee, to succeed, must have deduced title through one or both of these parties. This could only have been done by showing that the legal title had, by means of some of the legally recognized modes of conveying real property, passed from one or both of them to himself. This he did not do, or attempt to do; indeed, he does not claim through them, nor either of them. Not only so; neither Mrs. Kearns nor Greenebaum, through whom appellee does claim, derives title through any deed or conveyance executed by either the mortgagor or mortgagee; nor does either of them claim as heir or devisee of the mortgagor or mortgagee.

As the assignment of the note and mortgage to appellee did not, as we hold, transfer or otherwise affect the legal title to the land, it may be asked, what effect, then, did it have? This question, like most others pertaining to the law of mortgages, admits of two answers, depending upon whether the rules and principles which prevail in courts of equity or of law are to be applied. If the latter, we would say none; because, as to the note, that could not be assigned by a separate instrument, as was done in this case, so as to pass the legal title. Ryan v. May, 14 Ill. 49; Fortier v. Darst, 31 Ill. 213; Chickering v. Raymond, 15 Ill. 362. As to the mortgage, it is well settled that could not be assigned like negotiable paper, so as to pass the legal title in the instrument, or clothe the assignee with the immunity of an innocent holder, except under certain circumstances which do not apply here. Railway Co. v. Loewenthal, 93 Ill. 433; Hamilton v. Lubukee, 51 Ill. 415; Olds v. Cummings, 31 Ill. 188; McIntire v. Yates, 104 Ill. 491; Fortier v. Darst, 31 Ill. 212. But that the mortgagee, or any one succeeding to his title, might, by deed in the form of an assignment, pass to the assignee the legal as well as the equitable interest of the mortgagee, we have no doubt, though there is some conflict on this subject. 2 Washb. Real Prop. 115, and authorities there cited. Yet the assignors, in the case in hand, not having the legal title, as we have just seen, could not, by any form of instrument, transmit it to another. If, however, the rules and principles which obtain in courts of equity are to be applied, we would say that, by virtue of the assignment, the appellee became the equitable owner of the note and mortgage, and that it gave him such an interest or equity respecting the land as entitled him to have it sold in satisfaction of the debt.

There is perhaps no species of ownership known to the law which is more complex, or which has given rise to more diversity of opinion, and even conflict in decisions, than that which has sprung from the mortgage of real property. By the common law, if the mortgagor paid the money at the time specified in the mortgage, the estate of the mortgagee, by reason of the performance of the condition therein, at once determined, and was forever gone, and the mortgagor, by mere operation of law, was remitted to his former estate. On the other hand, if the mortgagor failed to pay on the day named, the title of the mortgagee became absolute, and the mortgagor ceased to have any interest whatever in the mortgaged premises. By the execution of the mortgage, the entire legal estate passed to the mortgagee, and, unless it was expressly provided that the mortgagor should retain possession till default in payment, the mortgagee might maintain ejectment as well before as after default. This is the view taken by the common-law courts of England, and which has obtained, with certain limitations, in most of the states of the Union, including our own, in which the common-law system prevails. In Carroll v. Ballance, 26 Ill. 9, which was ejectment by the mortgagee against the assignee of the mortgagor, to recover the mortgaged premises, this court thus states the English rule on the

subject: "In England, and in many of the American states, it is understood that the ordinary mortgage deed conveys the fee in the land to the mortgagee, and under it he may oust the mortgagor immediately on the execution and delivery of the mortgage, without waiting for the period fixed for the performance of the condition, [citing Coote Mortg. 339; Blaney v. Bearce, 2 Greenl. 132; Brown v. Cram, 1 N. H. 169; Hobart v. Sanborn, 13 N. H. 226; Paper-Mills v. Ames, 8 Metc. (Mass.) 1]. And this right is fully recognized by courts of equity, although liable to be defeated at any moment in those courts by the payment of the debt." Again, in Nelson v. Pinegar, 30 Ill. 481, which was a bill by mortgagee to restrain waste, it is said: "The complainant, as mortgagee of the land, was the owner in fee, as against the mortgagor and all claiming under him. He had the jus in re, as well as ad rem, and being so is entitled to all the rights and remedies which the law gives to such an owner." So, in Oldham v. Pflegar, 84 Ill. 102, which was ejectment by the heirs of the mortgagor against the grantee of the mortgagor, this court, in holding the action could not be maintained, said: "Under the rulings of this court, the mortgagee is held, as in England, in law the owner of the fee, having the jus in re, as well as the jus ad rem." In Finlon v. Clark, 118 Ill. 32, 7 N. E. 475, the same doctrine is announced, and the cases above cited are referred to with approval. Taylor v. Adams, 115 Ill. 570, 4 N. E. 837. Courts of equity, however, from a very early period, took a widely different view of the matter. They looked upon the forfeiture of the estate at law, because of non-payment on the very day fixed by the mortgage, as in the nature of a penalty, and, as in other cases of penalties, gave relief accordingly. This was done by allowing the mortgagor to redeem the land on equitable terms at any time before the right to do so was barred by foreclosure. The right to thus redeem after the estate had become absolute at law in the mortgagee was called the "equity of redemption," and has continued to be so called to the present time. These courts, looking at the substance of the transaction, rather than its form, and with a view of giving effect to the real intentions of the parties, held that the mortgage was a mere security for the payment of the debt; that the mortgagor was the real beneficial owner of the land, subject to the incumbrance of the mortgage; that the interest of the mortgagee was simply a lien and incumbrance upon the land, rather than an estate in it. In short, the positions of mortgagor and mortgagee were substantially reversed in the view taken by courts of equity.

These two systems grew up side by side, and were maintained for centuries without conflict or even friction between the law and equity tribunals by which they were respectively administered. The equity courts did not attempt to control the law courts, or even question the legal doctrines which they announced. On the contrary, their force and validity were often recognized in the relief granted. Thus, equity courts, in allowing a redemption after a forfeiture of the legal estate, uniformly required the mortgagee to reconvey to the mortgagor, which was of course necessary to make his title available in a court of law. In maintaining these two systems and theories in England, there was none of that confusion and conflict which we encounter in the decisions of the courts of this country; resulting, chiefly, from a failure to keep in mind the distinction between courts of law and of equity, and the rules and principles applicable to them respectively. The courts there, by observing these things, kept the two systems intact, and in this condition they were transplanted to this country, and became a part of our own system of law. But other causes have contributed to destroy that certainty and uniformity which formerly prevailed with us. Chiefly among these causes may be mentioned the statutory changes in the law in many of the states, and the failure of the courts and authors to note those changes in their expositions of the law of such states. Perhaps another fruitful source of confusion on this subject is the fact that in many of the states the common-law forms of action have been abolished by statute, and instead of them a single statutory form of action has been adopted, in which legal and equitable rights are administered at the same time, and by the same tribunal. Yet the distinction between legal and equitable rights is still preserved, so that, although the action in theory is one at law, it is nevertheless subject to be defeated by a purely equitable defense. Under the influence of these statutory enactments and radical changes in legal procedure, by which legal and equitable rights are given effect and enforced in the same suit, the equitable theory of a mortgage has in many of these states entirely superseded the legal one. Thus, in New York it is said, in the case of Trustees, etc., v. Wheeler, 61 N. Y. 88, "that a mortgage is a mere chose in action. It gives no legal estate in the land, but is simply a lien thereon; the mortgagor remaining both the legal and equitable owner of the fee." Following this doctrine to its logical results, it is held by the courts of that state that ejectment under the Code will not lie at the suit of the mortgagee against the owner of the equity of redemption. Murray v. Walker, 31 N. Y. 399. In strict conformity with the theory that the mortgagee has no estate in the land, but a mere lien as security for his debt, the courts of New York, and others taking the same view, hold that a conveyance by the mortgagee before foreclosure, without an assignment of the debt, is in law a nullity. Jackson v. Curtis, 19 Johns. 325; Wilson v. Troup, 2 Cow. 231; Jackson v. Willard, 4 Johns. 41. And this court seems to have recognized the same rule as obtaining in this state, in Delano v. Bennett, 90 Ill. 533.

The New York cases just cited, and all others taking the same view, are clearly inconsistent with the whole current of our decisions on the subject, as is abundantly shown by the authorities already cited. The doctrine would seem to be fundamental that if one sui juris, having the legal title to land, intentionally delivers to another a deed therefor, containing apt words of conveyance, the title at law, at least, will pass to the grantee; but for what purposes or uses the grantee will hold it, or to what extent he will be able to enforce it, will depend upon circumstances. If the mortgagee conveys the land without assigning the debt to the grantee, the latter would hold the legal title as trustee for the holder of the mortgage debt. Sanger v. Bancroft, 12 Gray, 367; Barnard v. Eaton, 2 Cush. 304; Jackson v. Willard, 4 Johns. 40. It is true, the interest which passes is of no appreciable value to the grantee. Thus, in the case last cited, Chancellor Kent, in speaking of it, says: "The mortgage interest, as distinct from the debt, is not a fit subject of assignment. It has no determinate value. If it should be assigned, the assignee must hold the interest at the will and disposal of the creditor who holds the bond." In Wait's Actions and Defenses (volume 4, p. 565) the rule is thus stated: "By the common law, a mortgagee in fee of land is considered as absolutely entitled to the estate, which he may devise or transmit by descent to his heirs." In conformity with this view, Pomeroy, in his work on Equity Jurisprudence, (volume 3, p. 150,) in treating of this subject, says: "In law, the mortgagee may convey the land itself by deed, or devise it by will, and on his death intestate it will descend to his heirs. In equity, his interest is a mere thing in action, assignable as such, and a deed by him would operate merely as an assignment of the mortgage; and in administering the estate of a deceased mortgagee a court of equity treats the mortgage as personal assets, to be dealt with by the executor or administrator." We have already seen that under the decisions of this court, and by the general current of authority, a mortgage is not assignable at law by mere indorsement, as in the case of commercial paper. But, on the other hand, the estate and interest of the mortgagee may be conveyed to the holder of the indebtedness, or even of a third party, by deed with apt words of conveyance; and the fact that it is in form an assignment will make no difference. 2 Washb. Real Prop. 115, 116. Such an assignee, if owner of the mortgage indebtedness, might, no doubt,, maintain ejectment in his own name for his own use. Or the action might be brought in his name for the use of a third party owning the indebtedness. Kilgour v. Gockley, 83 Ill. 109. So, in this case, if the action had been brought in the name of Kearns' heirs for the use of Hinckley, no reason is perceived why the action might not be maintained.

It must not be concluded, from what we have said, that the dual system respecting mortgages, as above explained, exists in this state precisely as it did in England prior to its adoption in this country, for such is not the case. It is a conceded fact that the equitable theory of a mortgage has, in process of time, made in this state, as in others, material encroachments upon the legal theory which is now fully recognized in courts of law. Thus, it is now the settled law that the mortgagor or his assignee is the legal owner of the mortgaged estate, as against all persons except the mortgagee or his assigns. Hall v. Lance, 25 Ill. 250, 277; Emory v. Keighan, 88 Ill. 482. As a result of this doctrine, it follows that, in ejectment by the mortgagor against a third party, the defendant cannot defeat the action by showing an outstanding title in the mortgagee. Hall v. Lance, supra. So, too, courts of law now regard the title of a mortgagee in fee in the nature of a base or determinable fee. The term of its existence is measured by that of the mortgage debt. When the latter is paid off, or becomes barred by the statute of limitations, the mortgagee's title is extinguished by operation of law. Pollock v. Maison, 41 Ill. 516; Harris v. Mills, 28 Ill. 44; Gibson v. Rees, 50 Ill. 383. Hence the rule is as well established at law, as it is in equity, that the debt is the principal thing, and the mortgage an incident. So, also, while it is indispensable in all cases to a recovery in ejectment that the plaintiff show in himself the legal title to the property as set forth in the declaration, except where the defendant is estopped from denying it, yet it does not follow that because one has such title he may under all circumstances maintain the action; and this is particularly so in respect to a mortgage title. Such title exists for the benefit of the holder of the mortgage indebtedness, and it can only be enforced by an action in furtherance of his interests; that is, as a means of coercing payment. If the mortgagee, therefore, should, for a valuable consideration, assign the mortgage indebtedness to a third party, and the latter, after default in payment, should take possession of the mortgaged premises, ejectment would not lie against him at the suit of the mortgagee, although the legal title would be in the latter, for the reason it would not be in the interest of the owner of the indebtedness. In short, it is a well-settled principle that one having a mere naked legal title to land in which he has no beneficial interest, and in respect to which he has no duty to perform, cannot maintain ejectment against the equitable owner, or any one having an equitable interest therein, with a present right of possession. This case, with a slight change of the circumstances, would afford an excellent illustration of the principle. Suppose the present plaintiff had obtained possession under his equitable title to the note and mortgage, and the heirs of Kearns, who hold the legal title, had brought ejectment against him, the action clearly could not have

been maintained, for the reasons we have just stated. But it does not follow, because such an action would not lie against him, that he could, upon a mere equitable title, maintain the action against others. Cottrell v. Adams, 2 Biss. 351–353, Fed. Cas. No. 3,272; 9 Myers, Fed. Dec. 240. The question in that case was almost identical with the question in this, and the court reached the same conclusion we have. See, also, Speer v. Hadduck, 31 Ill. 439.

For the reasons stated, the judgment of the court below is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Judgment reversed.

## MARVIN v. BROOKS et al.

(94 N. Y. 71.)

Court of Appeals of New York. 1883.

Appeal from the general term in the First judicial department.

This was an action for an accounting, in which the complaint alleged an agreement for a joint purchase by plaintiff and defendants Brooks and Mifflin, from one Potter, of certain securities held by the latter as executor for one Ward. There was a finding of fact by a referee, the substance of which and the further facts of the case are stated in the opinion.

Albert Stickney, for appellant. George H. Adams, for respondent.

FINCH, J. There has been no accounting in this case such as a court of equity awards when it determines that such relief is proper. The finding of the referee that Brooks had fully accounted for the stock and bonds and the purchase price of the same, must be understood in connection with the theory of the report that Brooks was to purchase the whole of the stock and bonds, and then one-half of each was to be delivered to and "become the property of" the plaintiff, "on his paying therefor one-half of the purchase money." That view of the transaction makes it an ordinary contract of purchase and sale, having in it no element of agency with trust and confidence reposed, and leaves the plaintiff to his legal remedy and with no right to an accounting in equity. Such an accounting, when decreed between parties standing in a confidential relation, and followed by proof of money or property intrusted to the agent, throws upon the latter the burden of rendering an account and an explanation, and requires him to show that his trust duties have been performed and the manner of their performance. Such a decree proceeds upon the ground that the defendant stands in the attitude of an agent dealing to some extent with the money or property of the other party; intrusted in a confidential relation with an interest which makes him a quasi trustee, and by reason of that relation knowing what the other party cannot know, and bound to reveal to him the entire truth. The equitable jurisdiction has always rested largely upon such relation of confidence, involving the need of discovery and the duty of explanation, and hence the burden of such explanation and the proof of its truth fell, in such cases, upon the defendant whose conduct was questioned, whenever an accounting was decreed, and required of him the extreme of good faith. 3 Greenl. Ev. § 253; 1 Story, Eq. Jur. §§ 315, 316.

No such result occurred in this case. No interlocutory decree for an accounting was made, and no accounting with the burden of explanation resting on the defendant was had. As to the two material facts of which in the complaint the plaintiff averred his ignorance, whether the property delivered was the whole of the property bought, and whether the purchase-price represented was the actual purchase-price paid; questions which on an accounting in equity Brooks would have been required affirmatively to answer; as to these the trial left the original doubt undispelled. The findings of the referee therefore evidently mean that the plaintiff was not entitled to an accounting, and that so far as the complaint alleged an agreement of purchase at an understood price, that contract was fully performed, and Brooks had accounted for the property bought.

If, upon the facts, the referee's view of the nature of the transaction was a correct one, his conclusion and that of the general term were right; but if the dealing between the parties was something different from that, and of such a character as to entitle the plaintiff to a decree for an accounting, then the dismissal of the complaint was wrong. We are thus conducted to an inquiry into the nature of the transaction.

If at first it is possible to say that before Brooks went to Detroit there was merely an agreement of purchase and sale, and a relation of debtor and creditor; that Brooks was to buy for himself, and then as owner sell one-half to Marvin, upon the contingency of an original price less than $50,000, though that theory is shaken and qualified by the understanding of a joint interest, by the assurance that Marvin was to be in "on the hard pan," and by the offer to participate equally in the enterprise; if at first the true nature of the agreement was doubtful and debatable, it ceased to be so when Brooks reached Detroit, and a new series of events occurred, throwing light upon the understanding. Brooks conducted his negotiations for the purchase through Darling & Co., who dealt with Potter, the executor having control of the Ward interest. Nothing indicates that Darling & Co. were anything else than the agents or brokers of Brooks. Besides the stock and bonds, a stock-note of $28,000 of the old Silver Islet Mining Company, and three hundred and sixty-four shares of the stock of the Ontario Mineral Lands Company were supposed, both by Brooks and Marvin, to belong to and form a part of the Ward interest, intended to be purchased. On the 26th of September Brooks telegraphed that a contract of purchase had been made with Potter at the price of $45,000; that fifteen per cent. was to be paid down that day, and that the balance would be subject to draft with the securities attached. But the dispatch did not stop here, as it would have done if Marvin had no interest except to buy of Brooks when the latter had become owner. He adds a request that Marvin would deposit his share of the down payment in the American Exchange Bank, and have it telegraphed to the

Second National Bank of Detroit, and explains that he, Brooks, will deposit "for Boston account here;" that is, will provide on the spot his half of the down payment. Not getting an immediate answer, Brooks on the same day telegraphs again: "Answer something. Will take one-fifth of your half if desired." These dispatches put Marvin in the position of a joint purchaser. If he was to buy of Brooks, after the latter had become owner, he could see and know what securities Brooks in fact had to sell, and judge or ascertain, before parting with his money, whether they constituted the whole of the Ward interest, and whether the price demanded was the true half of that paid. But now he is called on to buy of Potter one-half of the Ward interest at one-half of $45,000, asserted to be the price demanded, and to part with his money before he knows what that interest is, and in sole reliance upon the good faith of Brooks as to price. The latter becomes Marvin's agent for the purchase of one-half of the property, and asks to be intrusted with Marvin's money to be employed in carrying out the purpose of the agency. Marvin observes the peculiarity of the situation, and asks two questions, made necessary by the demand upon him. He inquires if the Ward interest includes "explicitly" the stock-note, and the three hundred and sixty-four shares. He is answered that every interest is included. He inquires when the balance is to be paid, and is told, in five days. Thereupon he remits to Brooks, as requested, on the same 26th day of September, the sum of $3,375, being the one-half of the required down payment. Stopping here, we cannot fail to see that new elements mark the character of the transaction. Through Brooks, acting as his agent, and in reliance upon Brooks, both as to what is bought, and what is to be paid, Marvin has become the purchaser of one-half of the Ward interest from Potter, and parted with his money to the agent, to be by him applied upon that purchase. The case becomes more than a mere agency. It becomes one in which the agent is intrusted with the principal's money, to be expended for a specific purpose. The agent takes the fund in trust, to appropriate it to the directed purchase. Whether he did so actually appropriate it, Marvin does not know from any proof, evidence or voucher. Brooks has said so in his unsworn account rendered, and that is all. Marvin has been forced to stand in the litigation with the burden on himself of showing a misappropriation by Brooks. He has never been allowed the right of requiring Brooks to prove how, and in what manner, he performed the trust duty assumed. Had he a right to demand that remedy, and by an accounting shift so much of the burden of proof to the agent, and require him to show, by competent evidence, what became of the money confided to his care? It is best, perhaps, before answering this question, to follow the transaction to its close, and understand it in all its scope. There was some difficulty in making up the balance of the purchase-money to meet the expected draft. Mifflin, who was to furnish $15,000 upon the Brooks half, was slow, and Marvin deposited $38,500 to meet the expected draft, having been requested by Brooks to see that the funds were supplied. Before the draft arrived the $15,000 was deposited, and replaced so much of the sum provided. The draft came. It was drawn by Brooks upon the Exchange Bank, and payable to the order of Darling & Co. But the latter were not the vendors. The answer alleges that they were, but every telegram and letter of Brooks asserts the contrary; his statement of account shows Darling & Co. furnishing part of the down payment, to be paid to Potter on the Brooks and Marvin purchase; and the referee correctly finds that Brooks bought of Potter "through Darling & Co." It is quite probable that the vendor, when trusting this firm with possession of the securities, held them responsible for the purchase-money, but when they received it on the draft they took it, not as the vendors, but for and in behalf of Brooks, and by his direction, and for the purpose to which Brooks was bound to apply it. So that the transaction was in legal effect again that Brooks was intrusted with Marvin's money, to be by him "through Darling & Co." appropriated to the payment of the vendor.

But attached to the draft were the securities. The stock-note and Ontario shares were not among them; and it is said Marvin paid his money for precisely what was delivered, and knew exactly what he was getting for his payment. But that is not true, for two reasons. The draft was dated October 4, and paid the next day. Four days earlier Brooks had written "I will collect the $28,000 note," and under date of October 2, Brooks had added to the order which he sent Marvin for the latter's share of stock and bonds, the statement "Potter is to furnish note and Ontario stock." Marvin had a right, therefore, to assume that he was paying his money for something more bought than was delivered, and directing the bank to pay, expressly reserved his right as against other parties to demand the balance of his purchase. It seems to us, therefore, beyond reasonable question that Brooks was the agent of Marvin to purchase for him of Potter the one-half of the Ward interest, whatever that in fact might prove to be beyond what was certainly known; that the agent was to pay for such half precisely what he himself paid for the remaining half but not to exceed $25,000; that the agent was intrusted with the money of the principal to be used in effecting such purchase; and that whether he so applied the whole of it, and what the securities bought really were, the agent accurately knew and could readily ex-

plain, while the principal could not know, except as the result of investigation and inquiry. We think such a case justifies a resort to equity and a decree for an accounting.

The basis and extent of the equitable jurisdiction over matters of account appears to have been seldom considered in our courts, but often discussed in the English authorities. We have been referred to many of these, but they seem to us not harmonious, and occasionally difficult to reconcile. Phillips v. Phillips, 9 Hare, 471; Dinwiddie v. Bailey, 6 Ves. 139; Mackenzie v. Johnston, 4 Madd. 374; King v. Rossett, 2 Younge & J. 33; Massey v. Banner, 4 Madd. 416; Padwick v. Hurst, 18 Beav. 575; Navulshaw v. Brownrigg, 2 De Gex, M. & G. 441; Makepiece v. Rogers, 11 Jur. (N. S.) 314; Barry v. Stevens, 31 Beav. 258; Foley v. Hill, 2 H. L. Cas. 28; Moxon v. Bright, 4 Ch. App. 292. The best considered review of the authorities puts the equitable jurisdiction upon three grounds, viz.: The complicated character of the accounts; the need of a discovery, and the existence of a fiduciary or trust relation. 1 Story, Eq. Jur. § 459, and note 5. The necessity for a resort to equity for the first two reasons is now very slight, if it can be said to exist at all, since a court of law can send to a referee a long account, too complicated for the handling of a jury, and furnishes by an examination of the adverse party before trial, and the production and deposit of books and papers, almost as complete a means of discovery as could be furnished by a court of equity. But the jurisdiction of the latter court over trusts and those fiduciary relations which partake of that character remains, and in such cases the right to an accounting seems well established. But the existence of a bare agency is not sufficient. If it was, it would draw into equity every case of bailment in which an account existed. In Moxon v. Bright, supra, it was said that there are "numerous cases showing that where the relation of principal and agent had imposed a trust upon the agent, the court would entertain a bill for an accounting, and the only difficulty was in determining what constituted this species of trust." In Foley v. Hill, supra, the question arose over that sort of relation which exists as between a banker and his depositor, and it was held to be merely that of debtor and creditor. The court added, however, that as between principal and factor the equitable jurisdiction attached, because the latter partook of the character of a trustee, and that "so it is with regard to an agent dealing with any property * * * and though he is not a trustee according to the strict technical meaning of the word, he is quasi a trustee for that particular transaction," and, therefore, equity has jurisdiction. Something to the same general purport was said in this court. Marston v. Gould, 69 N. Y. 225. An accounting is always proper in cases of partnership, yet where the parties were not partners, but the relation existing was that of a quasi partnership, and the position of the party sued involved "the same trust, duties and obligations," the right to an accounting was declared. To the same effect are other authorities. 1 Story, Eq. Jur. § 463; Shepard v. Brown, 4 Giffard, 208; Hemings v. Pugh, Id. 456. In this case Brooks stood relatively to Marvin as his agent to purchase for him one-half of the Ward interest, and when intrusted with Marvin's money to be so applied, at a price to be by him determined, and to cover the whole of an unknown interest, he stood in a fiduciary relation, and became a quasi trustee of the money in his hands and of the property purchased, and Marvin has the right to call him to account in equity. The court therefore erred in dismissing the complaint, and in refusing to make the findings which would have shown the agency and that no accounting had been had.

The judgment should be reversed, the reference discharged and a new trial granted, with costs to abide the event.

All concur.

Judgment reversed.

## NORTON et al. v. COONS.

(6 N. Y. 33.) [1]

Court of Appeals of New York. 1851.

This action was brought by R. & A. Norton against Joseph H. Coons to compel contribution from him as co-surety upon the following note:

"$1,000. One year after date we jointly and severally promise to pay to the order of Olive Eldridge $1,000, for value received. Troy, March 31, 1841, with interest. Schryver & Aikin. R. & A. Norton. Joseph H. Coons."

Schryver & Aikin were the principal debtors and the parties to this action were sureties. The plaintiffs had been compelled by suit to pay the amount of the note, with costs.

N. Hill, Jr., for appellant. G. Stow, for respondents.

GRAY, J. It is not denied that, as between principal and surety, when the character in which they are obligated does not appear on the face of the instrument, parol evidence is admissible to show which is principal and which surety. Nor is it denied that one who is about to become a surety upon a note already executed by the principal and other sureties may regulate the terms of his suretyship to suit himself. He may contract to be co-surety with others who have executed the instrument, or to be, as between him and them, surety alone, not co-surety with them, and thus exempt himself from liability to contribute. Harris v. Warner, 13 Wend. 400. The defendant assumes that the proof offered by him and rejected, would establish an agreement between him and one of the principals, by which he was not to be co surety with the plaintiffs, but surety for them, and, therefore, not liable in this action to reimburse to the plaintiffs any portion of the amount paid by them. The note itself affords no evidence of this agreement. The question, therefore, is whether it is competent to establish it by parol. The doctrine of contribution was first established and enforced in equity. It rested upon and resulted from the maxim, that "equality is equity." This principle has been so long established that persons becoming bound as sureties for a principal debtor are regarded as acting under a contract implied from the settled rules which regulate their liability to each other. Craythorne v. Swinburne, 14 Ves. 169. As between the makers of the note and the payee, their rights and liabilities are regulated by the terms of the contract as expressed; as between the sureties the contract is implied from their signatures to the note, so that the whole contract as expressed and implied is, in short, an agreement by the several obligors to pay the note at maturity, and if, upon default of its being paid, either of the sureties pay it, the others shall contribute, each his equal proportion of the amount paid, less the share of the one who has paid the whole. In the one case the parties have defined their liabilities in express terms; in the other the law has defined them, and in terms equally express, and thus settled as between the sureties the legal effect of subscribing their names to the note. They are each chargeable with knowledge of the legal liability incurred as between themselves by the execution of the note, and should, therefore, be regarded as standing in the same relation to each other, and bound by the same rules they would be if the legal effect of their contract had been fully written above their signatures.

We are referred to the case of Craythorne v. Swinburne, 14 Ves. 169, as authority for receiving parol evidence of the terms upon which the defendant signed the note. That was a case in which the instrument then under consideration very clearly regulated the terms of the suretyship, but parol evidence was offered and received. It was, however, evidence of extrinsic facts, and was, as remarked by Lord Eldon in that case, in support and not in contradiction of the written instrument. No doubt is entertained that parol evidence of collateral facts is admissible to rebut the presumption arising from the face of the instrument, that all are principals and equally bound to contribute. Harris v. Brooks, 21 Pick. 195. The defendant's proposition goes further. After proving for whose benefit the note was made and who received the funds, and thus establishing the relation of principal and surety, he proposes to show that he was not co-surety, not by extrinsic facts, but by a parol agreement varying the operation of his contract as defined by law and subscribed to by him, and thus, in effect, made his written agreement. Within my means of research, I have not been able to find a case going that length, and I apprehend none exists. The law in this case having defined the rights and obligations of the sureties as between themselves, their signatures establish their assent to it, and the contract is thus made as clear and certain as if the whole had been written. It is the highest and best evidence of their agreement, and the reason of the rule that excludes parol evidence from being received to vary the operation of a contract, wholly written by the parties, applies with all its force to this case.

The mischiefs and frauds to be guarded against in the one case are as great as those in the other. Although the facts in this case are not analogous to those in the case of Thompson v. Ketcham, 8 Johns. 189, yet the principle which should govern this is stated there by Kent, C. J., as a principle

[1] Irrelevant parts omitted.

of general application, and that is, where the operation of a contract is clearly settled by a general principle of law, it is to be taken to be the true sense of the contracting parties, and it is against the general rule to vary the operation of a writing by parol. See Hall v. Newcomb, 7 Hill, 416.

It will not be denied that the operation of the contract in this case was clearly settled by a principle of law. The defendant, by subscribing his assent to it, has so far made it his written contract as to be prohibited from overthrowing it by a parol agreement made at the same time. The judgment of the supreme court should be affirmed.

* * * * * * * * * * * * * *

RUGGLES, C. J., and JEWETT and McCOUN, JJ., concurred, as did GARDINER, J., in a separate opinion. FOOT, J., dissented. PAIGE, J., gave no opinion, and MULLETT, J., was not present at the argument.

Judgment affirmed.

## WHITE v. MILLER.

(47 Ind. 385.)

(Supreme Court of Indiana. Nov. Term, 1874.

Appeal from court of common pleas, Decatur county.

F. Gavin and F. D. Miller, for appellant. B. W. Wilson and F. L. Bracken, for appellee.

DOWNEY, J. The complaint in this action, which was by the appellee against the appellant, alleges that the plaintiff and the defendant executed a note on the 14th day of January, 1869, to one Goff, for the sum of eight hundred dollars, payable in one year after date, with eight per cent. interest, the appellee executing the note as the surety of the appellant; that afterward, on the 14th day of January, 1870, the appellee paid off and satisfied the note.

A copy of the note is filed with and made part of the complaint.

The appellant answered in several paragraphs. The first paragraph was a general denial. The second alleged that the plaintiff, on the 15th day of December, 1869, before the maturity of the note, without the knowledge or consent of the defendant, and against his known desire, paid off and discharged the said note, the defendant being then and there solvent, and abundantly able to pay the note. The third states that he admits the making of the note, and that the plaintiff was his surety, and alleges that it was given for money loaned to the defendant; that shortly after the execution of the same, it was transferred to one Jones; that Jones had the money to loan for a number of years thereafter, and that the defendant had (for a valuable consideration) made arrangements with Jones to become the borrower of said money for a second year, and had his promise to loan the same to the defendant at said rate of interest as long as he wanted to borrow of him; that afterwards, on the 18th day of October, 1869, the defendant loaned the plaintiff the sum of one thousand three hundred dollars until the first day of January, 1870; that afterward, on the 15th day of December, 1869, the plaintiff, without right and against the known desire of the defendant, with a full knowledge of all said facts, and with the intent to cheat and defraud the defendant out of his right and privilege of becoming the borrower of said sum of eight hundred dollars for said second year, and of his prospect of having the use of said money for a number of years thereafter, and to procure an offset to the defendant's claim against him for thirteen hundred dollars, due on the 1st day of January, 1870, and to make himself the creditor of the defendant, did, on said 15th day of December, 1869, and before the maturity of said note, and while the defendant was abundantly able either to pay or secure said note, all of which was well known to the said plaintiff at the time, falsely and fraudulently represent to said Jones, the holder of the note, that the defendant did not any longer wish to borrow said money, having obtained from other sources all he needed, and that it was the defendant's wish that the said plaintiff should become the favored borrower of said sum; that thereupon the holder of the note, being ignorant of the said facts, and relying upon such false and fraudulent statements of the plaintiff, did on said day deliver over to said plaintiff the note mentioned in the complaint, and receive from him the plaintiff's note with surety; and thereupon said plaintiff did, by the use of said fraudulent device and practice, become the borrower of said money and the holder of the note mentioned in the complaint; that the current rate of interest at said time and place, and ever since, has been ten per cent. per annum, and that the defendant was by said means compelled to and did borrow, after great trouble and difficulty, a sum of money in lieu thereof, for which he was compelled to pay, and now is paying, interest at the rate of ten per cent. per annum; that the payment by the plaintiff as aforesaid of said note was not necessary for his (plaintiff's) safety; wherefore the defendant says that the said payment was the voluntary payment of the plaintiff, and without any compulsion or obligation on his part, etc.

The fourth paragraph alleges, that on the 1st day of April, 1870, after the payment of said note, the defendant obtained judgment in the Marion common pleas, against the plaintiff, for the sum of one thousand and forty-seven dollars and twelve and one-half cents, in which action the defendant was personally served with process, and appeared to the action, a transcript of which is filed herewith, and made a part of the paragraph; that the claim of the plaintiff had at said time fully matured, and was a legitimate subject of counterclaim in said action; all of which was known at the time to the plaintiff. This paragraph is pleaded in bar of costs only.

The fifth paragraph was an answer of payment. There was no sixth.

The seventh paragraph assumes the form of a cross complaint, sets up the same facts contained in the third paragraph, and claims damages in the sum of fifty dollars for expense and trouble in prosecuting suits against the plaintiff for said sum of thirteen hundred dollars, for loss of ten days' time in finding money to replace said sum of eight hundred dollars, and for two per cent. interest above said rate, at which he was borrowing of said Jones, for two years, which amount he alleges is due and unpaid, and for which he demands judgment.

The plaintiff demurred to each paragraph

of the answer, for the reason that neither stated facts sufficient to constitute a defence to the complaint, nor to entitle the defendant to other relief claimed.

This demurrer was sustained to the second, third, fourth and seventh paragraphs of the answer, and overruled as to the others. The defendant excepted.

The issues were closed by a reply in denial of the paragraphs of the answer which were held to be good.

The cause was then tried by the court, without the intervention of a jury, and there was a finding for the plaintiff, a motion made by the defendant for a new trial overruled, and judgment rendered on the finding.

The first, second, third and fourth assignments of error allege, that the court improperly sustained the demurrer to the second, third, fourth and seventh paragraphs of the answer.

The fifth is, that the court erred in overruling the motion for a new trial.

We will refer to these alleged errors in their order.

The second paragraph of the answer alleges, that the plaintiff "paid off and discharged the note," which had been executed to Goff on the 15th day of December, 1869, before it was due. We think we must hold that this allegation shows a payment and satisfaction of the note at that date, whatever may be the conclusion as to the law which may follow. When the surety pays the debt of his principal after its maturity, whether a suit has been commenced for its collection or not, he may unquestionably have his action to recover the amount which he has so paid from his principal. Mr. Burge, in his work on Suretyship (page 359), says: "As soon as the principal has made default in the fulfillment of the obligation, for the fulfillment of which the surety undertook, the latter may discharge the obligation, and relieve himself of his liability. If the obligation for which the surety engaged was the payment by the principal of a sum of money, and the money is due to the creditor under the obligation or contract, the surety may pay the creditor the money due to him, even though he did not pay the debt by the desire of the creditor, the authority or consent of the principal to the payment is proved by the joint obligation of himself and surety to the creditor. The surety is permitted to recover, by an action of assumpsit against the principal, the money so paid by him, upon the ground that as there is no express stipulation between the parties there is a promise implied by law on the part of the principal to reimburse him the money so paid by him for the principal; but, if the surety take from his principal any security upon which he may proceed for the recovery of the money paid by him, he must resort to the remedy adapted to the security which he has taken, and cannot maintain an action of assumpsit," etc. Burge, Sur. 360.

The material question here is, can the surety voluntarily, and without the request of his principal, pay off and discharge the debt of his principal, before it has matured, and, after the lapse of the time which the obligation had to run, sue the principal for the money thus paid? The case of Jackson v. Adamson, 7 Blackf. 597, justifies an affirmative answer to this question. This is elsewhere decided to be the law. Armstrong v. Gilchrist, 2 Johns. Cas. 424, and Craig v. Craig, 5 Rawle, 91. But clearly the principal cannot be made to pay the debt until it has matured.

The third paragraph of the answer stands on different ground. The payment of the note by the surety before its maturity is not shown. It is simply alleged in that paragraph, that Jones "did deliver over to the plaintiff the note mentioned in the complaint, and receive from him the plaintiff's note, with security." This does not show such a payment or satisfaction of the note as would enable the surety to sue for money paid. Pitzer v. Harmon, 8 Blackf. 112; Stevens v. Anderson, 30 Ind. 391. The giving of security for the payment of the substituted note does not change the rule. Bennett v. Buchanan, 3 Ind. 47.

If we are right in this view, then the note of White, the principal, was not paid before its maturity; and, conceding the position of the appellant to be legally correct, this paragraph of the answer was properly held bad.

The fourth paragraph of the answer does not show that the claim now sued upon could have been used as a counter-claim in the action by the defendant against the plaintiff, referred to in the paragraph. It is not shown that it arose out of or was connected with the cause of action in that case. Section 60 of the Code, with reference to costs in such cases, is not applicable.

The seventh paragraph is defective, we think, for the reason mentioned in passing upon the third paragraph. It is doubtful, also, whether either this or the third paragraph sufficiently shows that the defendant had any valid arrangement with Jones for a further loan of the money mentioned in the note held by Jones.

The remaining questions grow out of the overruling of the motion for a new trial. It was urged in the motion that the finding of the court was contrary to law, was not supported by the evidence, and was excessive in amount.

The note to Goff, on which Miller was surety for White, was put in evidence, the suretyship was proved, and it was proved that Miller had paid the note, by first giving his own note, and afterward paying that note off. These were the essential facts of the plaintiff's case. As to the amount of

the judgment, it is claimed that it is too large by about twenty dollars. This excess is found by computing interest at six per cent. on the amount paid by the plaintiff. We think, however, that, as there was no actual payment of the note so as to authorize the plaintiff to sue until he discharged the note which he gave to Goff in lieu of the note of White and himself, he could recover the rate of interest mentioned in the original note, until the debt was actually discharged. It does not appear from the evidence that Goff agreed to receive the note of Miller in payment and discharge of the original note.

The judgment is affirmed, with costs.

## AETNA LIFE INS. CO. OF HARTFORD v. TOWN OF MIDDLEPORT. SAME v. TOWN OF BELMONT. SAME v. TOWN OF MILFORD.

(8 Sup. Ct. 625, 124 U. S. 534.)

Supreme Court of the United States. Feb. 6, 1888.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

This was an appeal from a decree of the circuit court of the United States for the Northern district of Illinois, dismissing on demurrer the bill of the Aetna Life Insurance Company, the present appellant. The substance of the bill is that the complainant is the owner of 15 bonds, of $1,000 each, issued by the township of Middleport, in the state of Illinois, dated February 20, 1871, and delivered to the Chicago, Danville & Vincennes Railroad Company. These bonds were payable to bearer, and were bought of the railroad company by the complainant, who paid value for them. The bill recited that this railroad company was incorporated in 1865 under the laws of the state of Illinois, with power to construct a railroad from a point in Lawrence county, by way of Danville, to the city of Chicago; that an act of the legislature of that state, passed March 7, 1867, authorized cities, towns, or townships, lying within certain limits, to appropriate moneys and levy a tax to aid the construction of said road; and "that said act authorized all incorporated towns and cities, and towns acting under township organization, lying wholly or in part within 20 miles of the east line of the state of Illinois, and also between the city of Chicago and the southern boundary of Lawrence county, in said state, to appropriate such sums of money as they should deem proper to the said Chicago, Danville & Vincennes Railroad Company, to aid it in the construction of its road, to be paid as soon as the track of said road should be laid and constructed through such cities, towns, or townships: provided, however, that a proposition to make such appropriation should first be submitted to a vote of the legal voters of such cities, towns, or townships at a regular, annual, or special meeting, of which at least ten days' previous notice should be given; and also provided that a vote should be taken on such proposition, by ballot, at the usual place of election, and that a majority of the votes cast should be in favor of the proposition. And your orator further avers that said act authorized and required the authorities of such cities, towns, and townships to levy and collect such taxes, and to make such other provisions as might be necessary and proper for the prompt payment of such appropriations so made." It is then alleged that on the eighth day of June, 1867, after due publication of notice according to law, a meeting of the legal voters of said town of Middleport was held, at which they cast their votes by ballot upon the proposition to levy and collect a tax of $15,000 upon the taxable property of the inhabitants of the town to aid in the construction of said railroad, provided Watseka, a city in the county of Iroquois, situated in or near the south line of said town, should be made a point in said road; that it appeared, on counting the votes, that 323 were in favor of and 68 were against such tax, and that thereupon the proposition was duly declared carried, the proceedings relating to the meeting and vote duly attested by the town clerk and the moderator of the meeting, and by said clerk duly recorded in the town records. The bill further averred that the railroad company accepted this vote and appropriation of the township, and, relying upon such vote and the good faith of said town, accepted the condition of the appropriation, and constructed and completed its track through said town; that on the tenth day of February, 1871, the board of town auditors adopted a resolution of which the following is a copy: "Whereas the township of Middleport did, on the eighth day of June, 1867, vote aid to the Chicago, Danville & Vincennes Railroad Company to the amount of fifteen thousand dollars, and it appearing that said township is unable to pay such amount in money, therefore resolved by the board of auditors of said township that bonds issue to said Chicago, Danville & Vincennes Railroad Company to the amount of fifteen thousand dollars, together with a sufficient amount to cover the discount necessary on said bonds in negotiating the same, to-wit, one thousand five hundred dollars; said bonds to be dated February 20, A. D. 1871, and to bear interest at the rate of ten per cent. from date per annum." In pursuance of this resolution, it was alleged that on the twenty-fourth day of March, 1871, the supervisor and town clerk of Middleport executed the 15 bonds which are the subject of this suit; that "the said bonds were numbered one to fifteen, inclusive, and were delivered to the said railroad company, upon the fulfillment of the conditions of said vote, in payment of ninety cents on the dollar of the appropriation made to said company by said vote; both parties believing that said bonds were fully authorized by law, and were legal, valid, and binding on said town, and also believing them to be legal evidences of the debt in favor of said company incurred by said town in voting said appropriation." It was then alleged that on or about the twenty-sixth day of June, 1876, the town of Middleport, which up to that time had paid the interest upon the bonds, filed a bill in equity in the circuit court for the county of Iroquois against the complainant corporation as the holder of said bonds, and certain other persons, "alleging, in substance, the making and issuing of said bonds, as herein stated, that the same were delivered to your orator, and that your orator was the holder thereof, and that the same were made and issued without authority of law, and were invalid, and praying the court so to decree, and to enjoin

your orator from collecting the same, and for other relief, as by the record in the cause, upon reference thereto, will fully appear." It was averred that the circuit court dismissed the bill, but that upon appeal to the supreme court of Illinois the decree dismissing it was reversed,—that court holding that these bonds were void, as issued without authority of law; and the case was remanded to said circuit court for further proceedings, whereupon it passed a decree, in conformity with the opinion of said supreme court, adjudging the bonds void, and enjoined their collection. The bill then charged that said supreme court, while holding the bonds to be void, did not deny, but impliedly admitted, the validity of the appropriation by the town, and insisted that by the issue and delivery of said bonds to the railroad company, and their sale by that company to the present complainant, it was thereby subrogated to the rights of action which that company would have on the contract evidenced by the vote of the town, and the acceptance and fulfillment of the contract by the railroad company. It was also alleged that no part of the principal sum named in the bonds, or any part of said appropriation, had ever been paid, but that, on the contrary, the town of Middleport denied all liability therefor; that ever since the purchase of said bonds the complainant had continued to hold, and then held, the same, and had been and then was the holder of all rights which the railroad company or its assigns had against said town by reason of the premises. A decree was then prayed for that the town of Middleport should pay to complainant the amount found due, and should without delay levy and collect all taxes necessary for such payment; also, that the court would enforce the rights of complainant by writs of mandamus, and such other and further orders and decrees according to the course of equity as should be necessary and proper; and also prayed that W. H. Leyford, in whose hands as receiver the Chicago, Danville & Vincennes Railroad Company had been placed by the court, it being insolvent, might be made a party defendant thereto. To this bill the defendant demurred, and assigned the following as causes for demurrer:

First. That said bill does not contain any matter of equity whereon this court can ground any decree or give complainant any relief as against this respondent.

Second. Bill shows it is exhibited against respondent and the Chicago, Danville & Vincennes Railroad Company and William Leyford, its receiver, as respondents thereto, and the facts set forth therein show the same relief cannot be granted against all of said respondents, and fails to state facts showing respondents jointly liable, but stated facts which show this respondent, if liable at all, is not jointly liable or in any manner connected with the others, and the bill is multifarious.

Third. Fails to show any written agreement on which suit is brought that would bind respondent, and fails to state facts showing a cause of action exists against respondent that arose within five years last past before bringing suit.

Fourth. Fails to show any written agreement on which suit is brought binding on respondent on which has arisen a cause of action within the last ten years prior to bringing this suit.

Fifth. Fails to set forth facts showing an excuse for the great delay in bringing suit which is shown on face of bill, and equity will not relieve against laches.

Sixth. Bill contains many blanks of dates and names and nothing on face of bill from which facts can be obtained to fill same.

The court below sustained the demurrer, and dismissed the bill, from which judgment complainant appealed.

O. J. Bailey, Jas. H. Sedgwick, and Francis Fellowes, for appellant. Robert Doyle, for appellee.

Mr. Justice MILLER, after stating the case as above, delivered the opinion of the court.

In the argument of the demurrer before the circuit court, several objections to the bill were taken. The defendant in error, however, relies here upon three principal grounds of defense: First, it denies the right of subrogation, upon which rests the whole case of the complainant; second, it relies upon the statute of limitations of five years; and, third, it asserts that the former decree in the state court is a bar to the action here. The circuit court held that the statute of limitations was a bar to the present suit, and dismissed the bill on that ground.

But we regard the primary question, whether the complainant is entitled to be substituted to the rights of the railroad company after buying the bonds of the township, a much more important question, and are unanimously of opinion that the transaction does not authorize such subrogation. The bonds in question in this suit were delivered by the agents of the town of Middleport to the railroad company, and by that company sold in open market as negotiable instruments to the complainant in this action. There was no indorsement, nor is there any allegation in the bill that there was any express agreement that the sale of these bonds carried with them any obligation which the company might have had to enforce the appropriation voted by the town. Notwithstanding the averment in the bill that the intent of complainant in purchasing said bonds, and paying its money therefor, was to acquire such rights of subrogation, it cannot be received as any sufficient allegation that there was a valid contract to that effect. On the contrary, the bill fairly presents the idea that by reason of the facts of the sale the complainant was in equity subrogated to said rights, and entitled to enforce the same against the town of Middle-

port. The argument of the learned counsel in the case is based entirely upon the right of the complainant to be subrogated to the rights of the railroad company by virtue of the principles of equity and justice. He does not set up any claim of an express contract for such subrogation. He says: "The equity alleged in the plaintiff's bill is, as I have said, the equity of subrogation. Before proceeding to call the attention of the court to the facts from which this equity arises, it may be useful to advert to the instances in which the right of subrogation exists, and to the principles on which it rests." He founds his argument entirely upon the proposition that when the complainant purchased these bonds he thereby paid the debt of the town of Middleport to the railroad company, as voted by it, and that, because it paid this money to that company on bonds which are void, it should be subrogated to the right of the company against the town. The authorities on which he relies are all cases in which the party subrogated has actually paid a debt of one party due to another, and claims the right to any security which the payee in that transaction had against the original debtor. But there is no payment in the case before us of any debt of the town. The purpose of the purchase as well as the sale of these bonds, and what the parties supposed they had effected by it, was not the payment of that debt, but the sale and transfer of a debt of the town from one party to another, which debt was evidenced by the bonds that were thus transferred. Neither party had any idea of extinguishing by this transaction the debt of the town. It was very clear that it was a debt yet to be paid, and the discount and interest on the bonds was the consideration which induced the complainant to buy them.

The language of this court in Otis v. Cullum, 92 U. S. 447, is very apt, and expresses precisely what was done in this case. In that case Otis & Co. were the purchasers of bonds of the city of Topeka from the First National Bank of that place. These bonds were afterwards held by this court to be void for want of authority, just as in the case before us. A suit was brought against the bank, which had failed and was in the hands of a receiver, to recover back the money paid to it for the bonds. After referring to the decision of Lambert v. Heath, 15 Mees. & W. 486, this court said: "Here, also, the plaintiffs in error got exactly what they intended to buy, and did buy. They took no guaranty. They are seeking to recover, as it were, upon one, while none exists. They are not clothed with the rights which such a stipulation would have given them. Not having taken it, they cannot have the benefit of it. The bank cannot be charged with a liability which it did not assume. Such securities throng the channels of commerce, which they are made to seek, and where they find their market. They pass from hand to hand like bank-notes. The seller is liable ex delicto for bad faith; and ex contractu there is an implied warranty on his part that they belong to him, and that they are not forgeries. While there is no express stipulation, there is no liability beyond this. If the buyer desires special protection, he must take a guaranty. He can dictate its terms, and refuse to buy unless it be given. If not taken, he cannot occupy the vantage ground upon which it would have placed him." Page 449.

Nor can this case be sustained upon the principle laid down in this court in Louisiana v. Wood, 102 U. S. 294. That was a case in which the city of Louisiana, having a right by its charter to borrow money, had issued bonds and placed them on the market for that purpose. These bonds were negotiated by the agents of the city, and the money received for their sale went directly into its treasury. It was afterwards held that they were invalid for want of being registered. Afterwards the parties who had bought these bonds brought suit against the city for the sum they had paid, on the ground that the city had received their money without any consideration, and was bound ex aequo et bono to pay it back. The court said: "The only contract actually entered into is the one the law implies from what was done, to wit, that the city would, on demand, return the money paid to it by mistake, and, as the money was got under a form of obligation which was apparently good, that interest should be paid at the legal rate from the time the obligation was denied."

In the present case there was no borrowing of money. There was nothing which pretended to take that form. No money of the complainants ever went into the treasury of the town of Middleport; that municipality never received any money in that transaction. It did not sell the bonds, either to complainant or anybody else. It simply delivered bonds, which it had no authority to issue, to the railroad company, and that corporation accepted them in satisfaction of the donation by way of taxation which had been voted in aid of the construction of its road. The whole transaction of the execution and delivery of these bonds was utterly void, because there was no authority in the town to borrow money or to execute bonds for the payment of the sum voted to the railroad company. They conferred no right upon anybody, and of course the transaction by which they were passed by that company to complainant could create no obligation, legal or implied, on the part of the town to pay that sum to any holder of these bonds.

City of Litchfield v. Ballou, 114 U. S. 190, 5 Sup. Ct. 820, sustains this view of the subject. That town had issued bonds for the purpose of aiding in the construction of a system of water-works. In that case, as in Louisiana v. Wood, the bonds were so far

in excess of the authority of the town to create a debt that they were held by this court to be void, in the case of Buchanan v. Litchfield, 102 U. S. 278. After this decision, Ballou, another holder of the bonds, brought a suit in equity upon the ground that, though the bonds were void, the town was liable to him for the money which he had paid in their purchase. This court held that there was no equity in the bill, on the ground that, if the plaintiff had any right of action against the city for money had and received, it was an action at law, and equity had no jurisdiction. It was also attempted, in that case, to establish the proposition that, the money of the plaintiffs having been used in the construction of the water-works, there was an equitable lien in favor of the plaintiffs on those works for the sum advanced. This was also denied by the court.

One of the principles lying at the foundation of subrogation in equity, in addition to the one already stated, that the person seeking this subrogation must have paid the debt, is that he must have done this under some necessity, to save himself from loss which might arise or accrue to him by the enforcement of the debt in the hands of the original creditor; that, being forced under such circumstances to pay off the debt of a creditor who had some superior lien or right to his own, he could, for that reason, be subrogated to such rights as the creditor, whose debt he had paid, had against the original debtor. As we have already said, the plaintiff in this case paid no debt. It bought certain bonds of the railroad company at such discount as was agreed upon between the parties, and took them for the money agreed to be paid therefor. But, even if the case here could be supposed to come within the rule which requires the payment of a debt in order that a party may be subrogated to the rights of a person to whom the debt was paid, the payment in this case was a voluntary interference of the Aetna Company in the transaction. It had no claim against the town of Middleport. It had no interest at hazard which required it to pay this debt. If it had stood off, and let the railroad company and the town work out their own relations to each other, it could have suffered no harm and no loss. There was no obligation on account of which, or reason why, the complainant should have connected itself in any way with this transaction, or have paid this money, except the ordinary desire to make a profit in the purchase of bonds. The fact that the bonds were void, whatever right it may have given against the railroad company, gave it no right to proceed upon another contract and another obligation of the town to the railroad company. These propositions are very clearly stated in a useful monograph on the Law of Subrogation, by Henry N. Sheldon, and are well established by the authorities which he cites. The doctrine of subrogation is derived from the civil law, and "it is said to be a legal fiction, by force of which an obligation extinguished by a payment made by a third person is treated as still subsisting for the benefit of this third person, so that by means of it one creditor is substituted to the rights, remedies, and securities of another. * * * It takes place for the benefit of a person who, being himself a creditor, pays another creditor whose debt is preferred to his by reason of privileges or mortgages, being obliged to make the payment, either as standing in the situation of a surety, or that he may remove a prior incumbrance from the property on which he relies to secure his payment. Subrogation, as a matter of right, independently of agreement, takes place only for the benefit of insurers; or of one who, being himself a creditor, has satisfied the lien of a prior creditor; or for the benefit of a purchaser who has extinguished an incumbrance upon the estate which he has purchased; or of a co-obligor or surety who has paid the debt which ought, in whole or in part, to have been met by another." Sheld. Subr. §§ 2, 3. In section 240 it is said: "The doctrine of subrogation is not applied for the mere stranger or volunteer who has paid the debt of another without any assignment or agreement for subrogation, without being under any legal obligation to make the payment, and without being compelled to do so for the preservation of any rights or property of his own." This is sustained by a reference to the cases of Shinn v. Budd, 14 N. J. Eq. 234; Sandford v. McLean, 3 Paige, 117; Hoover v. Epler, 52 Pa. St. 522.

In Gadsden v. Brown, Speer, Eq. 37, 41, Chancellor Johnson says: "The doctrine of subrogation is a pure, unmixed equity, having its foundation in the principles of natural justice, and from its very nature never could have been intended for the relief of those who were in any condition in which they were at liberty to elect whether they would or would not be bound; and, so far as I have been able to learn its history, it has never been so applied. If one with a perfect knowledge of the facts will part with his money, or bind himself by his contract in a sufficient consideration, any rule of law which would restore him his money or absolve him from his contract would subvert the rules of social order. It has been directed in its application exclusively to the relief of those that were already bound, who could not but choose to abide the penalty." This is perhaps as clear a statement of the doctrine on this subject as is to be found anywhere.

Chancellor Walworth, in the case of Sandford v. McLean, 3 Paige, 122, said: "It is only in cases where the person advancing money to pay the debt of a third party stands in the situation of a surety, or is compelled to pay it to protect his own rights, that a court of equity substitutes him in the place of the creditor, as a matter of

course, without any agreement to that effect. In other cases the demand of a creditor, which is paid with the money of a third person, and without any agreement that the security shall be assigned or kept on foot for the benefit of such third person, is absolutely extinguished."

In Railroad Co. v. Dow, 120 U. S. 287, 7 Sup. Ct. 482, this court said: "The right of subrogation is not founded on contract. It is a creation of equity; is enforced solely for the purpose of accomplishing the ends of substantial justice, and is independent of any contractual relations between the parties."

In the case of Shinn v. Budd, 14 N. J. Eq. 234, the New Jersey chancellor said (pages 236, 237): "Subrogation as a matter of right, as it exists in the civil law, from which the term has been borrowed and adopted in our own, is never applied in aid of a mere volunteer. Legal substitution into the rights of a creditor, for the benefit of a third person, takes place only for his benefit who, being himself a creditor, satisfies the lien of a prior creditor, or for the benefit of a purchaser who extinguishes the incumbrances upon his estate, or of a co-obligor or surety who discharges the debt, or of an heir who pays the debts of the succession. Code Nap. bk. 3, tit. 3, art. 1251; Civil Code La. art. 2157; 1 Poth. Obl. pt. 3, c. 1, art. 6, § 2. 'We are ignorant,' say the supreme court of Louisiana, 'of any law which gives to the party who furnishes money for the payment of a debt the rights of the creditor who is thus paid. The legal claim alone belongs, not to all who pay a debt, but only to him who, being bound for it, discharges it.' Nolte & Co. v. Their Creditors, 9 Mart. (La.) 602; Curtis v. Kitchen, 8 Mart. (La.) 706; Cox v. Baldwin, 1 Miller, (La.) 147. The principle of legal substitution, as adopted and applied in our system of equity, has, it is believed, been rigidly restrained within these limits." The cases here referred to as having been decided in the supreme court of Louisiana are especially applicable, as the Code of that state is in the main founded on the civil law from which this right of subrogation has been adopted by the chancery courts of this country. The latest case upon this subject is one from the appellate court of the state of Illinois,—Suppiger v. Garrels, 20 Bradw. 625,—the substance of which is thus stated in the syllabus: "Subrogation in equity is confined to the relation of principal and surety and guarantors; to cases where a person, to protect his own junior lien, is compelled to remove one which is superior; and to cases of insurance. * * * Any one who is under no legal obligation or liability to pay the debt is a stranger, and, if he pays the debt, a mere volunteer." No case to the contrary has been shown by the researches of plaintiff in error, nor have we been able to find anything contravening these principles in our own investigation of the subject. They are conclusive against the claim of the complainant here, who in this instance is a mere volunteer, who paid nobody's debt, who bought negotiable bonds in open market without anybody's indorsement, and as a matter of business. The complainant company has therefore no right to the subrogation which it sets up in the present action.

Without considering the other questions, which is unnecessary, the decree of the circuit court is affirmed.

These principles require, also, the affirmance of the decrees in the cases of the same appellant against the town of Belmont, (No. 1,135,) and the town of Milford, (No. 1,136;) and so it is ordered.

GUSDORF et al. v. IKELHEIMER et al.

(75 Ala. 148.)

Supreme Court of Alabama. Dec. Term, 1883.

Appeal from city court, Selma county; John Haralson, Judge.

Wm. C. Ward, for appellants. White & White, contra.

BRICKELL, C. J. The appellants, Gusdorf & Co., were judgment creditors of Solomon Lehman, and caused an execution issuing upon their judgment to be levied upon personal property of value sufficient to satisfy it. At the time of the judgment and levy, they had also choses in action transferred to them by the judgment debtor, as collateral security for their debt. The appellees were general creditors of Lehman, and, on the day succeeding the levy of the execution, they caused an attachment to issue, which was levied upon the same personal property on which the execution was levied. The attachment suit was duly and successfully prosecuted to judgment in favor of the appellees. The personal property was, or the proceeds of sales were, more than sufficient to satisfy the execution of Gusdorf & Co., and were by the sheriff applied to its satisfaction. Before this application of the proceeds of sales was made, Gusdorf & Co. had made collection of the collaterals to the amount, as alleged in the original bill, of seven hundred and forty-three $^{41}/_{100}$ dollars, which yet remains in their hands; and the purpose of the original bill is to compel them to apply that sum in satisfaction of their execution, exonerating the proceeds of the sales of the property, to that extent, from liability to the execution, for the benefit of the appellees, and the satisfaction of their junior lien. This, of course, involves a decree compelling them to pay that sum to the appellees. The equities of the appellees and of Gusdorf & Co., upon this state of facts, we first propose to consider.

The general principle, upon which the equity of the bill is founded, is that if one creditor has a lien upon, or interest in, or the security of two funds for a debt, and another creditor of the same debtor has a lien upon, or interest in, or the security of one only of the funds for another debt, the latter has the right, in equity and good conscience, to compel the former first to resort for satisfaction to the fund on which he alone has the lien, interest, or security, if that course is necessary for the satisfaction of both debts, whenever it will not trench upon his rights, or operate to his prejudice. 1 Story, Eq. Jur. § 633; Nelson v. Dunn, 15 Ala. 501; Chapman v. Hamilton, 19 Ala. 121. "The nature of the property which constitutes the double fund does not affect the operation of the principle; and it applies whenever a paramount creditor holds collateral security, or can resort collaterally to the real or personal property for the satisfaction of the debt." 2 White & T. Lead. Cas. Eq. pt. 1, p. 262. In De Peyster v. Hildreth, 2 Barb. Ch. 109, a creditor had a judgment which was a lien upon real estate, and upon which execution had issued, and was levied upon personal property sufficient for the payment of the judgment; and it was held he was bound to exhaust the levy, in exoneration of the real estate for the relief of mortgagees taking a mortgage subsequently to the judgment. And in Ingalls v. Morgan, 10 N. Y. 178, a judgment creditor having a lien on real estate which was sold by the debtor, and notes for the purchase-money taken and transferred to the creditor, it was held he was bound to collect and apply the notes in satisfaction of the judgment. Without losing all recourse upon the lands in the hands of a subsequent purchaser, he could not surrender the notes to the debtor from whom he received them. The court said: "The facts present a case where the creditor has a lien upon two funds for the security of his debt, and another party has an interest in one only of these funds, without any right to resort to the other. In such a case, equity will compel the creditor to take his satisfaction out of the fund upon which he alone has an interest, so that both parties may, if possible, escape without injury. There are numerous cases to be found in the books in which a court of equity has intervened and applied this doctrine, without inquiry or distinction whether the property constituting the two funds or securities was of the same nature; whether the one was real, and the other personal; or, if both were personal, whether the one was visible, tangible, capable of actual possession, and the other a chose resting in action. The distinction can only be made, when a necessity for it may be shown to exist, to prevent the operation of the principle from working to the prejudice of the paramount creditor. Goss v. Lester, 1 Wis. 51. The whole foundation of the principle, it is said, is the natural equity and benevolence which requires every one to exercise his rights, so far as he can without inconvenience to himself, in a way that will avoid causing loss to others. 1 Story, Eq. Jur. § 633.

An attachment is a statutory process; and its purpose is that the jurisdiction of the court in the ulterior proceedings may be the more effectual, and that security for the judgment obtained may be afforded to the plaintiff. From the day it is made, the levy creates a lien, taking precedence of all subsequent alienations, or of subsequent incumbrances, made or created by the debtor, and of subsequent liens acquired by other creditors by the operation of law, or of legal process. The lien, it is true, is, primarily, incipient, inchoate, and conditional, operating only on the particular property which is the subject of the levy, and will be defeated if judgment is not obtained, upon

which process can issue for the subjection of the property to sale. And it is, of consequence, as is insisted by counsel, less stringent, frailer, and more uncertain than the lien of an execution. Phillips v. Ash, 63 Ala. 414. But that the lien is of statutory derivation, and the mode of its enforcement is prescribed by statute, is not of itself an objection to compelling a creditor having prior liens so to use them, that the attaching creditor, after he has obtained judgment, shall not be defeated. Real estate is by statute subjected to the satisfaction of legal process, and liens of judgments or executions operating upon it are derived wholly from statutes declaring them. A court of equity, in this country, does not more often exercise its jurisdiction to marshal assets, and in the exercise of the jurisdiction compelling creditors or others to exhaust funds or securities to which they alone can resort, than in the exoneration of lands for the benefit of creditors having liens upon them by judgment, or by execution derived from statute. The existence of the jurisdiction, and the propriety of its exercise, have not been questioned. A mechanic's lien is the creature of statute, and yet, in the application of this doctrine, it has been regarded as standing upon equal ground with a mortgage, affecting to the same extent legal and equitable rights. Hamilton v. Schwehr, 34 Md. 108; Kenny v. Gage, 33 Vt. 302. Whether the court would intervene to marshal assets, and to apply this doctrine, at the instance of an attaching creditor, before he had by judgment perfected the lien of the attachment; or whether, in such case, intervention would not be limited to a preservation of things and of the rights of the parties in statu quo, if it could be done without injustice to the prior creditor, is not a question now arising. The appellees had perfected their lien by judgment before exhibiting the bill. The prior creditors had notice of the levy of the attachment, and, so far as they could without inconvenience to themselves, or without trenching upon the rights of others, were bound in good conscience so to employ their prior lien upon the property levied upon, and the collaterals they had received as security for their debt, as not to disappoint and defeat the levy in the event it was perfected by judgment.

The collaterals, the choses in action transferred to Gusdorf & Co., were intended by the debtor, and were by them received, as a source or fund from which the debt reduced to judgment should be paid. It is true that, by taking the collaterals, the right to proceed by execution on the judgment was not intended to be delayed or postponed, and the creditor had the right to retain the collaterals, while pursuing legal remedies upon the judgment, and, if necessary to his full security and satisfaction, would not have been interfered with, or compelled to resort to the one in preference to the other. But having realized, by collection from the collaterals, the sum now in controversy, before satisfaction was obtained through the medium of the execution, that sum was by operation of law immediately applied to the satisfaction of his debt, extinguishing it pro tanto. A payment to him by the debtor of a like sum, at that instant of time, would not have been for that purpose more effectual. The source or fund from which moneys are derived often directs and controls their appropriation. And when a creditor receives moneys, derived from sources or funds which have been devoted to particular purposes, he is without right to appropriate them to other uses. Field v. Holland, 1 Am. Lead. Cas. 341; Schiffer v. Feagin, 51 Ala. 335; Webster v. Singley, 53 Ala. 208.

But it is said that after the levy of the execution and the transfer of the collaterals there was an agreement between the debtor and the creditor that there should be no appropriation of the moneys derived from the collaterals, until it was ascertained that the proceeds of the sale of the property levied on by execution were not sufficient to pay the debt. If any such agreement was made, it was subsequent to the levy of the attachment at the suit of the appellees, and after debtor and creditor had notice or knowledge of it. The levy created a lien, which could not be impaired by the subsequent acts or agreements of the debtor; and the creditor, having notice of it, was disabled from entering into any agreement by which the equitable obligation to exhaust the moneys arising from the collaterals, before resorting to the proceeds of the sales of the property levied upon and sold under execution, would be relieved for the benefit of the debtor, and by which he could regain the collaterals, or acquire the moneys realized from them, discharged from both debts.

All that it is needful to say now in reference to the subsequent garnishments at the suit of Hellman & Herman and Kiefer & Brothers is that there was not a debt owing from Gusdorf & Co., the garnishees, to Lehman, the debtor in attachment. A garnishment is a species of attachment, and like it is strictly a statutory remedy. It lies only for the subjection of debts or demands upon which the defendant in attachment can in his own name and right recover at law in an action of debt, or of indebitatus assumpsit. There was no debt due or owing by Gusdorf & Co. to Lehman, when the garnishment was served, nor could a debt arise from the transaction and relations existing between them, unless the money realized from the collaterals had exceeded the debt to the security of which they were appropriated. The money it is intended by the garnishments to reach is not due or owing to Lehman; it forms a payment; it is not a debt; it is an extinguishment pro tanto of the debt due to Gusdorf & Co. Of the char-

acter of payment it was not deprived because Gusdorf & Co. did not make an application of it, retaining it in their hands, separate from the moneys received from the sheriff. The law, in view of the source from which it was derived, applied it in payment of the debt the collaterals from which it was realized were intended to secure. This application, without infringing upon the equities of the appellees, of which they had notice, Gusdorf & Co. could not avoid or refuse, converting themselves into debtors of Lehman.

In addition, the rights and equities of the junior attaching creditors were subordinate to the rights and equities the appellees, as prior attaching creditors, had acquired by their superior diligence. In courts of equity, as in courts of law, after-acquired rights by the employment of legal remedies yield precedence to clear rights acquired through like remedies. Herbert v. Mechanics' Building & Loan Ass'n, 17 N. J. Eq. 497. Upon the whole case, it seems clear that Gusdorf & Co. had double security for the payment of their judgment, while the appellees had a claim upon but one species of the property, constituting their security. From the fund upon which the appellees had no claim or lien, Gusdorf & Co. had in their possession a sum of money which it was their duty to apply in satisfaction of their judgment. If the application had been made, as it could have been without injury or inconvenience, a corresponding sum the appellees would have realized from the sales of the property upon which they had a lien, junior to that of Gusdorf & Co. Upon plain principles of equity and justice, they should be compelled to yield up the money derived from the collection of the collaterals, that it may be applied to the satisfaction of the judgment of the appellees. Otherwise, through mere wantonness or caprice, or from mere indifference or favoritism, they would be permitted to work injury to another, of whose rights they had notice, and to whom they at least owed good faith.

When a sheriff, having collected money under legal process, is in doubt as to its proper appropriation, he may give notice to all parties in interest, make a statement of the facts, and apply to the court from which the process issued, and to which it is returnable, for its advice and direction. Henderson v. Richardson, 5 Ala. 349. The parties interested in the distribution of the money, or either of them, may also apply to the court for its direction to the sheriff, and for the determination of their respective rights. Turner v. Lawrence, 11 Ala. 427. In either case, the application is summary, addressed to the inherent power of the court to control its own process, preventing its misuse or abuse, and protecting its officers against the conflicting claims of suitors. The power has therefore been exercised only when it was necessary to determine between rival claimants the priorities of legal liens, derived from legal process. In its exercise the court has not assumed jurisdiction of matters of purely equitable cognizance, nor has it undertaken to marshal assets, adjusting the equitable rights of rival claimants. Williams v. Rogers, 5 Johns. 163; Bruton v. Cannon, Harp. (S. C.) 389. The power the court exercises is of the same nature and character with that which is exercised in setting aside, upon motion, sales of land made under its process. It is not inconsistent with, nor in deprivation of, the jurisdiction of a court of equity to interfere and grant fuller and more complete relief than can be obtained in a court of law. Ray v. Womble, 56 Ala. 32; Lockett v. Hurt, 57 Ala. 198. The marshaling of assets is peculiarly of equitable cognizance, and it is in the exercise of this jurisdiction the court applies its own doctrine, that a creditor having the security of two funds shall not so exercise his rights as to disappoint another creditor, who has the security of only one of them,—a doctrine it often enforces through subrogation, which it alone can decree. In the present case, the jurisdiction of the court is undoubted. We find no error in the record, and the decree of the city court must be affirmed.

LABADIE et al. v. HEWITT.

(85 Ill. 341.)

Supreme Court of Illinois, June Term, 1877.

Appeal from circuit court, St. Clair county, William H. Snyder, Judge.

Bill by William C. Hewitt against James F. Labadie and others for partition. The defendants demur. Decree for complainant, and defendants appeal. Affirmed.

Mr. T. J. Richardson, for the appellants. Mr. John B. Bowman and Mr. R. A. Halbert, for the appellee.

WALKER, J. It has been repeatedly held that when the general assembly gives a new remedy, by petition, under the statute, it in no wise affects the jurisdiction of the court of chancery; that the new remedy is cumulative; that the court of chancery may proceed under its original jurisdiction as though the cumulative remedy had not been given, unless limited or restricted by statute. The court of chancery has entertained and exercised jurisdiction in cases of partition from quite an ancient period. Courts of law were also invested with jurisdiction to adjudge and make partition, even before it became a source of equitable relief. After chancery assumed jurisdiction, the courts of law continued to make partition, without any change in their mode of procedure. But the practice in the British courts of law was inconvenient and cumbersome, and our general assembly, to remedy the evil, gave a petition in lieu of the old writ of partition, and prescribed the practice thereunder. But it has never been supposed that in doing so they designed to take away the jurisdiction from the courts of chancery, or intended thereby in any degree to alter or amend the practice in that court. Hence bills have, since the partition act, been filed in chancery whenever the facts of the case have required such proceedings, and in doing so we are aware of no practice that requires the proceeding to conform to the practice of the partition act; in fact, the decisions of this court recognize the chancery practice as governing such proceedings. Chickering v. Failes, 29 Ill. 304; Kester v. Stark, 19 Ill. 328; Gregory v. Gover, Id. 608; Walker v. Laflin, 26 Ill. 472. The act of 1861 (Sess. Laws, p. 181), fully recognizes chancery proceedings as not being governed by the partition act, but being unable to avail of its provisions.

An examination of the bill in this case clearly shows that it was intended as a bill in chancery for partition. Its frame clearly shows that to have been the primary object, and it must be considered as governed by chancery practice. That practice, in our courts, has never required such bills to be verified by oath; hence this objection was not well taken. Had the proceeding been under the statute, it would have been different, as the statute requires the oath. In other respects, the bill seems to be good in substance.

There is no force in the objection that the bill was multifarious. We fail to see in what it can be claimed to be so; but, even if it was, that objection could only be raised by demurrer, specifying it as a ground of objection. If not so raised, the objection is considered as waived; and it cannot be raised on trial or after decree rendered, though, if raised by answer, the court may or not, as it chooses, on the hearing, allow the objection. 1 Daniel, Ch. Prac. (1st Lond. Ed.) p. 451. Hence, even if the bill was multifarious, the objection comes too late.

It is next urged that the court erred by allowing Monchevant to pay for necessary repairs, to prevent waste and loss to the tenants in common. It is urged that he should have set up his claim by cross bill, or at least by answer praying relief, which would be treated as a cross bill. It is not denied that when such repairs to an estate owned in common are necessary and properly made, they become a charge against the other tenants in common; and when one of them files a bill for partition, and in it admits the charge as correct and equitable, and asks that it may be satisfied out of the proceeds of the sale before partition is made of the money, and the other defendants demur, and thus admit the justice of the claim, no reason is perceived why the court, in adjusting the equities of the parties, should not decree its payment. Had the other defendants objected to its allowance, then he might have been required to file a cross bill. But that is by no means certain in this proceeding, as, when the court acquires jurisdiction to make partition, it will do complete justice amongst all the parties in interest. Henrichsen v. Hodgen, 67 Ill. 179.

There was no objection that the bill did not pray the appointment of commissioners, as they were duly appointed, and examined the premises, and reported that they could not be divided without manifest injury to the parties in interest; and the act of 1861 authorized the court to sell the premises, and divide the money among the tenants in common.

It is urged with much apparent earnestness that it was error to decree of the proceeds of the sale the payment of a sufficient sum to the administrator of the deceased, from whom the lands descended, to pay the debts allowed against him, which were proved up and allowed against the estate. The tenants in common held these lands charged with the debts of the estate, and when the property could not be partitioned, and the estate had to be sold for the purpose, no objection is perceived to making such an order. It would not be just to the purchaser to have the money paid to the heirs, and leave the premises liable to be again sold to pay the debts. It works no injury to the heirs, and deprives

them of no right, and the premises will, no doubt, bring more to them than if they were sold subject to the debts against the estate. This is not a sale for the payment of such debts, but it is a sale that partition may be made in money, as it could not be done in land; and it is only equitable to deduct a sufficient sum from the proceeds of the sale to free it from the lien of the debts.

Had the land been susceptible of division, then the object of the bill would have been accomplished, and it would have been beyond the power of the court to have ordered the sale for the payment of the debts, but leaving the administrator to proceed to obtain an order from the county court for a sale.

The entire record considered, we fail to perceive any error for which the decree should be reversed, and it is affirmed.

Decree affirmed.

## PAGE v. MARTIN.

(20 Atl. 46, 46 N. J. Eq. 585.)

Court of Errors and Appeals of New Jersey. June 21, 1890.

Appeal from court of chancery; BIRD, Vice-Chancellor.

The following is the agreement referred to in the opinion.

"Stanley, N. J., July 30, '84.

"In consideration of his keeping the line fence dividing my land from that of the property now occupied by S. R. Bissell, also exclusive right of way over a strip of land, adjoining said Bissell's line fence, one hundred feet wide, from the river to said woodland, for the term of five years from August 1, 1884, with the privilege of five years' additional on the same terms. It is further agreed that the said Page shall have the option to purchase the desired tract and the right of way strip, at any time during the continuance of this lease, for the sum of one hundred and fifty (150) dollars per acre, or any portion of the tract in the same ratio of value, say one-half the tract for one-half the sum stated.

"In case of the sale or mortgage of the farm by me, this tract is to be excepted. The said Page is permitted to erect a boat-house, and make such other improvements as he may deem advisable.

"He is also permitted to inclose it by a wire barb or other suitable fence to be kept in repair at his sole expense.

"[Signed] EZRA G. TOLMAN.

"Witness: GEO. SHEPARD PAGE.

"JAMES MCGUINE."

*Thos. N. McCarter*, for appellant. *Theodore Runyon*, for respondent.

GARRISON, J., (after stating the facts as above.) This bill was for the specific performance of an agreement to convey lands. The attitude of courts of equity upon applications of this character may be summarized in two propositions: *First*, that the relief invoked is not a matter *ex debito justitiæ*, but rests in the sound discretion of the court; and, *second*, that where a contract is certain in all its parts, and for a fair consideration, and where the party seeking its enforcement is not himself in default, it is as much a matter of course for courts of equity to decree the performance of the contract as it is for courts of law to give damages for the breach of it. That relief rests, not upon what the court must do, but rather upon what, in view of all the circumstances, it ought to do, is a distinction which is of little or no practical moment. In every case of this character the court is chiefly concerned with the equities of the parties before it. In the present case the party seeking the enforcement of specific performance grounds his right upon a written contract made with the owner of the lands, under the supposed protection of which he entered into possession of the premises, and laid out a large sum of money in their permanent improvement. Resistance comes, not from the owner, but from one who, with full notice of the above facts, purchased the lands, and is based solely upon the alleged incapacity of the owner to make a valid contract. The dismissal of the complainant's bill, under these circumstances, does not inure to the benefit of him whose incapacity furnished the sole ground for the action of the court. In the absence of fraud, its effect is simply to transfer the improvements from him who innocently made them to a speculative volunteer. The defense, being a purely legal one, must be clearly made out by him who sets it up. The decree in the court of chancery dismissed the bill, with the results above indicated. This appeal questions whether such a disposition of the case does complete justice between the parties. The facts necessary to an understanding of the original transaction are briefly these: One Ezra Tolman, who was the owner of two acres of rough land adjoining his other property, entered into a written agreement in respect to said lands with Page, a neighboring proprietor. After the delivery of this writing, Page inclosed the tract with wire fencing, and, with the approval of the owner, expended nearly $700 in the construction of a boat-house, and in otherwise fitting the premises for a pleasure park and picnic ground. This was in the spring of 1884. In December of the year following, Tolman was, upon an inquisition of lunacy, determined to be of unsound mind; and in 1887 his guardian obtained an order for the sale of his lands, and, among them, the lands in the possession of Page under the said agreement were offered for sale. Previous to the sale of these lands, Page notified the guardian that, in the exercise of the option contained in his agreement with Tolman, he desired to take title to the said lands, and tendered himself ready to make payment therefor according to the terms agreed upon. At the sale, Martin, who is the sole defendant in this suit, became the purchaser at precisely the same price which Page had agreed to give. Before the bidding began, Martin was notified by Page of his said agreement, and of the other facts above stated. A deed for the lands was delivered by the guardian to Martin, but without general covenants of title. Page then tendered to Martin the full sum which Page was to pay, and which Martin had paid, and upon his refusal to convey filed his bill in the court of chancery.

The evidence as to Tolman's general incapacity to transact business in 1884 was so slight that we must assume what indeed was evident from the conclusions of the vice-chancellor, who heard the case, that the main ground for declaring void his contract with Page is its supposed inadequacy of consideration. The inadequacy which thus becomes the controlling feature of the case, will upon examination be found to attach solely to the leasehold interest and easements which Page was to enjoy prior to the exercise by him of his option to purchase; and even upon these points all inadequacy vanishes in view of the large sum of money immediately expended by the lessee upon the lands of his lessor. Where a tenant, with power to purchase, expends in one year, on the permanent improvement of the land, double its entire purchase price, it is a refinement

of technicality to say that all of his rights shall be lost because he was not, by the terms of his lease, compelled to make these improvements. The jurisdiction now exercised concerns itself solely with that which conduces to justice. Moreover, the terms of the lease are before us only as evidence of mental incapacity on the one hand, or of *mala fides* on the other. For all other purposes, that portion of the contract is excluded and passed. The insistment is not that the agreement was unfair or disadvantageous as understood and performed between the parties to it, but that it is evidence of inability to contract, because advantage might have been taken of some of its provisions by a person less scrupulous than the complainant. The agreement in question actually resulted in changing a piece of land, valueless to its owner, into improved property, so that in any event the owner became assured of receiving the full value of his land; for, if the purchase fell through, he still had the land permanently improved beyond even the purchase price. So that, if we are to judge of Tolman's business capacity by the only transaction fully before us, it indicates at least average shrewdness and foresight. As to *mala fides* on the part of Page, the contract is singularly at variance to such a notion. It being admitted that he was not compelled to put the improvements upon the land, the fact that he did so is the strongest possible proof of good faith upon his part. If we look to the part of the agreement which concerns the purchase of the land by Page, it bears the same evidence of entire fairness. The price agreed upon was $150 an acre, which, according to the testimony, was all that it was worth. Moreover, with what force can this price for the bare soil be criticized by one who himself gave precisely the same price for the same land after $700 had been expended in its improvement? It will not, I think, be contended that a decree which cedes these improvements without consideration to a mere volunteer with notice is compelled by the equities of the case, or that it does complete justice to the parties to this dispute. I cannot avoid the impression that the agreement has been viewed too rigidly as a lease, and too little as a contract of sale, in which latter aspect we are now solely concerned with it. The criticism of the court below, and much of the argument of counsel, cease to be significant when the contract is regarded in this latter light. Thus viewed, it is a contract of sale, plain and fair in all its parts, whereby the owner agrees to sell for a full price land valueless, or even an expense, to him, and by which the vendee is given a period of option, during which time he is to save the owner harmless, and bear himself all of the expense of care and improvement. If there is anything harsh or suspicious in such a transaction, I utterly fail to perceive it. If Page's object had been to acquire the land for an inadequate price,—and, unless this was a possible result of his contract, the case against him falls to the ground,—he must have known that to a man of Tolman's habits a cash sum much smaller than the purchase price, to say nothing of the improvements, would have been the surest means of accomplishing his object.

The result reached in this court is that Page had a contract fair in all its parts; that Tolman's incapacity to make such a contract is not shown; that Page, in *bona fide* reliance upon this contract, improved the property, and was entitled to a deed upon tender of the purchase money; that Martin purchased with notice of the facts out of which complainant's rights grew; and that complete justice will be done to the parties to this suit by a decree that Martin deed the property to Page upon payment of the price paid by him for said lands, without interest.

Upon the argument, it was insisted that the contract set out in the bill could not be enforced because it lacked mutuality of obligation. In so far as this contention rests in matter of law, the proposition is that a contract to convey, which at its inception contemplated an option in the vendee, cannot be enforced by him after an affirmative exercise of the option, because, prior to its exercise, he was under no obligation to purchase. In support of this contention the case of Hawralty v. Warren, 18 N. J. Eq. 124, is cited. That case was, it is true, almost identical with the one now before us; but, so far from supporting the proposition for which it is cited, it is diametrically opposed to such an insistment. The language of Chancellor ZABRISKIE in that case is as follows: "It is now well settled that an optional agreement to convey without any covenant or obligation to convey, 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." This case was afterwards cited by Chancellor RUNYON in Scott v. Shiner, 27 N. J. Eq. 187, as an authority for the doctrine that a stipulation that a party shall have an option of purchase is equivalent to a conditional agreement to convey.

The complainant's case must be deemed to be before us for consideration upon its merits.

Let the record be remitted in order that a decree may be entered in accordance with the views herein expressed.

Reversed unanimously.

JONES v. NEWHALL.

(115 Mass. 244.)

Supreme Judicial Court of Massachusetts. Suffolk. June 20, 1874.

Bill by Leonard S. Jones against Benjamin B. Newhall to enforce specific performance of a contract for the purchase of all the interest of complainant in the Worthington Land Associates, and all the right and interest of Jones in any property belonging to the Dorchester Land Association, the share of said Jones consisting of 14 shares of stock of said land association, together with two certain mortgages. Decree for plaintiff. Case reported to the full court. Bill dismissed.

R. D. Smith & A. E. Jones, for plaintiff. A. C. Clark, for defendant.

WELLS, J. Jurisdiction in equity is conferred upon this court by Gen. St. 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 the 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 Metc. (Mass.) 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. 121.

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 Corp., 4 Pick. 507, 511; Adderley v. Dixon, 1 Sim. & S. 607; Harnett v. Yielding, 2 Schoales & L. 549, 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 nonfulfillment of a contract for the sale or purchase of land as 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 fulfillment of the contract, and payment of the full amount of the price agreed on. Old Colony Railroad v. Evans, 6 Gray, 25.

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 the 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 to personal estate. Adderley v. Dixon, 1 Sim. & S. 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 of 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 installment 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 install-

ment 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 & S. R. Co., 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 installment 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 installments; 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. § 64i; Snell, Eq. 335; Slim v. Croucher, 1 De Gex, 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 Gex & 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 the court of law. Hall v. Warren, 9 Ves. 605; Walker v. Eastern Counties Ry. Co., 6 Hare, 594; Kenney v. Wexham, 6 Madd. 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 Ry. Co. 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 the court of common law, whose jurisdiction and modes of remedy as a court of law had already become extended much beyond those of 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 the 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, Fed. Cas. No. 764.

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. Oelricks v. Spain, 15 Wall. 211, 228; Grand Chute v. Winegar, Id. 373; Phoenix Mut. Life Ins. Co. v. Bailey, 13 Wall. 616; Parker v. Winnipiseogee Lake Cotton & Woollen Co., 2 Black, 545; Baker v. Biddle, Baldw. 394, Fed. Cas. No. 764. See, also, Woodman v. Freeman, 25 Me. 531; Piscataquis F. & M. Ins. Co. v. Hill, 60 Me. 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, Fraud & M. 45; Bisp. Eq. § 200; also, Id. § 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, 8 Ch. App. 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 defense 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. & H. 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 Metc. (Mass.) 525, 529; Woodman v. Saltonstall, 7 Cush. 181; Pratt v. Pond, 5 Allen, 59; Clark v. Jones, Id. 379; Metcalf v. Cady, 8 Allen, 587; Mill River Loan Fund Ass'n v. Claflin, 9 Allen, 101; Com. v. Smith, 10 Allen, 448; Bassett v. Brown, 100 Mass. 355, 105 Mass. 551, 560. The demurrer, therefore, must be sustained, and the bill dismissed.

## LINDSAY v. GLASS.

(21 N. E. 897, 119 Ind. 301.)

Supreme Court of Indiana. June 6, 1889.

Appeal from circuit court, Bartholomew county; NELSON R. KEYES, Judge.

Action by Eliza Glass against James Keyes, to recover certain sums of money. Judgment for plaintiff, and defendant appeals.

G. W. Cooper and C. B. Cooper, for appellant. F. T. Hord, M. D. Emig, and R. W. Harrison, for appellee.

MITCHELL, J. Eliza Glass brought this action against James Lindsay, to recover certain sums of money derived from her deceased husband's estate, which she charges that the defendant received and appropriated to his own use. There is no controversy but that the defendant received $2,060 of the plaintiff's money from various sources, but he denies her right to recover, because he says that in the month of November, 1884, the plaintiff being very old, feeble, and totally blind, and without a home, agreed with the defendant, who is her brother, to give him all her property in consideration of his agreement to furnish her a good home, and support and take care of her during the remainder of her natural life. He asserts that, in compliance with his agreement, he kept the plaintiff from the date above mentioned until in the month of February, 1887, at which time she left his house, and has not since returned, although he has been all the time and still is ready and willing to perform his part of the contract. There was a verdict and judgment for the plaintiff below for $1,502.12, and the sole question here relates to the propriety of the ruling of the court in overruling the defendant's motion for a new trial.

It is well to observe that contracts made by persons in the helplessness of misfortune and distress, or under the infirmity and decrepitude of old age, through which a claim is asserted to their property in consideration of an unexecuted promise of support and maintenance, are peculiar in their character and incidents. One who is aged and infirm, without a home, and in a state of dependence upon another, to whom property is conveyed or transferred in consideration of an agreement for support, is scarcely in a situation to exercise the care for his own interest and protection that usually characterizes the conduct of persons in making ordinary contracts. Such contracts, involving continuing care and personal service, and requiring for their proper execution that the parties concerned should occupy towards each other relations of confidence and esteem, cannot be specifically enforced while they remain executory. Ikerd v. Beavers, 106 Ind. 483, 7 N. E. Rep. 326. To compel one to accept the alternative of receiving support under an improvident contract or to become a subject of charity might often result in great oppression. Such contracts belong to a class, the specific enforcement of which courts of chancery do not undertake. Parties who enter into such agreements must rely upon a continuance of the confidence and esteem which induced the arrangement in the beginning, or take their chances to recover damages if the contract is repudiated. For the protection of persons who thus dispose of their property, courts are inclined to treat the transfer or conveyance, so long as the contract for support remains executory, as having been made upon the condition subsequent that the promise to furnish care and maintenance shall be fully and fairly performed. Richter v. Richter, 111 Ind. 456, 12 N. E. Rep. 698; Bogie v. Bogie, 41 Wis. 209; Rowell v. Jewett, 69 Me. 293; Eastman v. Batchelder, 36 N. H. 141; Bethlehem v. Annis, 40 N. H. 34; Wilder v. Whittemore, 15 Mass. 262; Thayer v. Richards, 19 Pick. 398. Until the contract is fully performed on both sides, it is liable to be rescinded, and the property reclaimed, leaving the parties to their remedies, respectively, for what may have been furnished under the contract. In the present case the plaintiff persistently denied that she ever made any contract with the appellant by which he became entitled to her property in consideration of a promise to support her. Besides, if there was a contract such as the appellant claims, there was evidence which tended to show that he was not fairly carrying it out, and that the plaintiff was left in the family of a stranger, where she was receiving care at the defendant's expense, until her sisters took her in charge. The finding of the jury was therefore fully justified upon either hypothesis. A transfer of property in consideration of an agreement to furnish the grantor a home, with care and support, imposes a personal obligation upon the grantee or transferee which he cannot evade without the consent of the other party concerned. One who accepts the property of a sister or parent, and agrees in consideration thereof to furnish a home, with suitable maintenance and support, does not perform his contract fairly, and according to its spirit, by simply furnishing shelter and subsistence. A home is something in addition to a roof over one's head, with food and drink supplied by strangers.

The appellant complains because certain letters received by him, requesting that he come and assist the plaintiff in settling some business transactions, were excluded from the jury. The letters were irrelevant to any matter in issue. So, also, were certain questions relating to the treatment received by the plaintiff from her sisters before she came to live with the appellant. There was no error in permitting the plaintiff to prove that the appellant said he wanted to sell her land because he needed the money.

We find no instructions in the record. Hence there is no question before us as to the proper rate of interest to be charged in such a case. We must presume that the

court instructed the jury properly upon the subject of interest. Upon the view of the case most favorable to the appellant, he was entitled to nothing more than to be reimbursed for the actual value of the support and maintenance furnished, and for expenses incurred in and about the plaintiff's business. So far as we can discover, this was the rule applied. The judgment is affirmed, with costs.

## MADDISON v. ALDERSON.

(L. R. 8 App. Cas. 467.)[1]

House of Lords. June 4, 1883.

Rigby, Q. C., and W. D. Rawlins, for appellant. Davey, Q. C., and Gainsford Bruce, for respondent.

SELBORNE, L. C. 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 of 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; and she, by her statement of defence and counter-claim, insisted that she was entitled to the same benefit which she would have taken under the will, if duly executed, by virtue of a parol agreement alleged to have been made with her by her master for sufficient consideration, and to have been on her part performed. I do not think it necessary to read the averments contained in the 3rd, 4th and 5th paragraphs of her pleading, because, so far as the facts are concerned, they must now be taken from the verdict of the jury, together with the judge's notes of the evidence at the trial, if (as seems to have been assumed in both the courts below) that evidence, as well as the verdict, may be regarded. Whether that assumption was correct or not is in my view immaterial, because in either view my own conclusion would be the same.

The question which (at the instance of the appellant's counsel, and without objection from the respondent) was left by 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 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 service 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.

It was admitted in the argument at the bar, that the appellant had endeavored to bring her case within the supposed authority of Loffus v. Maw, 3 Giff. 592, decided by Vice Chancellor Stuart (under circumstances not dissimilar) on the doctrine of representation, for which purpose the vice chancellor relied upon some expressions used by Lord Cottenham in Hammersley v. De Biel, 12 Clark & F. 45, at page 62, note, and considered himself at liberty to disregard the reasons assigned by Lord Cranworth and

[1] Irrelevant parts omitted.

Lord Brougham for the later decision of this house in Jorden v. Money, 5 H. L. Cas. 185. Mr. Justice Stephen and the court of appeal (rightly, in my opinion) took a different view. I have always understood it to have been decided in Jorden v. Money, 5 H. L. Cas. 185, that the doctrine of estoppel by representation is applicable only to representations as to some state of facts alleged to be at the time actually in existence, and not to promises de futuro, which, if binding at all, must be binding as contracts, —a distinction which is illustrated by such cases as Prole v. Soady, 2 Giff. 1, and Piggott v. Stratton, 1 De Gex., F. & J. 33. Hammersley v. De Biel, 12 Clark & F. 45, was a case of contract for valuable consideration, duly signed, so as to fulfill the requirements of the statute of frauds, in the view both of Lords Langdale and Cottenham in chancery, and of Lord Campbell in the house of lords. 12 Clark & F. 63, 64, note, and 87; 3 Beav. 474–476. Those decisions are consistent with each other. Hammersley v. De Biel, 12 Clark & F. 45, does not justify, and Jorden v. Money, 5 H. L. Cas. 185, is irreconcilable with, the reasons stated by the vice chancellor for his judgment in Loffus v. Maw, 3 Giff. 592.

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. Div. 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 Clark & F. 64, note, and Lassence v. Tierney, 1 Macn. & 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 Cotton in Britain v. Rossiter, 11 Q. B. Div. 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. Div. 123. Crosby v. Wadsworth, 6 East, 602, 611, was an action of trespass brought by the purchaser against the vendor of a growing crop. The contract was by parol, and it was held to be concerning an interest in land, within the 4th section of the statute. "But," said Lord Ellenborough, "the statute does not expressly and immediately vacate such contracts, if made by parol; it only precludes the bringing of actions to enforce them by charging the contracting party, or his representatives, on the ground of such contract, and of some supposed breach thereof, which description of action does not properly apply to the one now brought, viz. a mere general action of trespass, complaining of an injury to the possession of the plaintiff, however acquired, by contract or otherwise. But although the contract for this interest in or concerning land may not be in itself wholly void under the statute, merely on account of its being by parol (so that, if the same had been executed, the parties could have treated it as a nullity), yet, being executory, and as for the nonperformance of it no action could have been, by the provisions of the 4th section, maintained, we think it might be discharged before anything was done under it which could amount to a part execution of it."

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 build-

ings) 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 towards 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 gestae subsequent to and arising out of the contract. So long as the connection of those res gestae with the alleged contract does not depend upon mere parol testimony, but is reasonably to be inferred from the res gestae themselves, justice seems to require some such limitation of the scope of the statute, which might otherwise interpose an obstacle even to the rectification of material errors, however clearly proved, in an executed conveyance founded upon an unsigned agreement.

It is not in England only that such a doctrine prevails; a similar (perhaps even a larger) equity is also recognized in other countries, whose eqitable jurisprudence is derived from the same original sources as our own. By the law of Scotland, "written contracts, in strict technical language, are those of which authentic written evidence is required, not merely in proof, but in solemnity; as obligations relative to land; or obligations agreed to be reduced to writing; or those required by statute to be in writing." To constitute any such contract, there must be a "final engagement"; and as a corollary to that rule a "locus penitentiae" is given; i. e. "a power of resiling from an incomplete engagement, from an unaccepted offer, from a mutual contract to which all have not assented, from an obligation to which writing is requisite, and has not yet been adhibited in an authentic shape." But to this, "rei interventus raises a personal exception, which excludes the plea of locus penitentiae. It is inferred from any proceedings, not unimportant, on the part of the obligee, known to and permitted by the obligor to take place on the faith of the contract, as if it were perfect; provided they are unequivocally referable to the contract, and productive of alteration of circumstances, loss, or inconvenience, though not irretrievable." Bell, Princ. §§ 18, 25, 26.

This must, I think, have been the principle on which the house of lords proceeded in 1701, when it reversed the decree of Lord Somers in Lester v. Foxcroft, Colles, Parl. Cas. 108. Lord Redesdale, in Clinan v. Cooke, 1 Schoales & L. 22, and Bond v. Hopkins, Id. 433, referred to that case as if it had been the earliest decision on the subject. But there were, in fact, two prior cases before Lord Guilford,—Hollis v. Edwards, 1 Vern. 159, and Butcher v. Stapely, Id. 363,—decided in 1683 and 1685, within the first ten years after the enactment of the statute of frauds, in the earlier of which the lord keeper had refused, and in the latter had granted, relief. Butcher v. Stapely, 1 Vern. 363, was a strong case upon its circumstances; for the relief was there granted to a purchaser in possession of land under an unsigned agreement, against a subsequent purchaser (with notice) of the same land from the vendor, the defendant having paid his purchase-money under a signed agreement, and having obtained a conveyance of the legal estate. Lord Guilford "declared that, inasmuch as possession was delivered according to the agreement, he took the bargain to be executed."

Among later cases I may refer to Pengall v. Ross, 2 Eq. Cas. Abr. 46, decided by Lord Cowper in 1709; Lockey v. Lockey, Finch, Prec. 519, by Lord Macclesfield, in 1719; and Potter v. Potter, 1 Ves. Sr. 441, by Strange, master of the rolls, in 1750. "There must be something," said Lord Cowper (2 Eq. Cas. Abr. 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 (Finch Prec. 519) that an unwritten agreement, "if executed on one part, had been always 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, 1 Ves. Sr. 441, said: "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, 2 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. Mertins, 3 Atk. 1; Owen v. Davies (1747) 1 Ves. Sr. 83. This Lord Cowper, in Pengall v. Ross, 2 Eq. Cas. Abr. 46, and Lord Macclesfield in Seagood v. Meale (A. D. 1721) Finch, Prec. 561, 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 Schoales & L. 40; Hughes v. Morris, 2 De Gex, M. & G. 356; Britain v. Rossiter, 11 Q. B. Div. 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 unequivocally, 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 Swanst. 181. "The acknowledged possession," said Sir T. Plumer in Morphett v. Jones, 1 Swanst. 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. Div., at page 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 (1) Clerk v. Wright, 1 Atk. 13, and Whaley v. Bagnel, 1 Brown, Parl. Cas. 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. Bayly, 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. Ch. 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. Bayly, 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, Ch. 27) 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 favourable to their argument: Walker v. Walker, 2 Atk. 98, and Parker v. Smith, 1 Colly. 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 favour 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 Colly. 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 Colly. 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.

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## HENDRICKSON v. HINCKLEY.

(17 How. 443.)

Supreme Court of the United States. Dec. Term, 1854.

The facts are stated in the opinion of the court.

Mr. Hart, for appellant. Mr. Mills, contra.

CURTIS, J., delivered the opinion of the court.

The complainant filed his bill in the circuit court of the United States for the district of Ohio, and, that court having ordered the bill to be dismissed, on a demurrer, for want of equity, the complainant appealed.

The object of the bill is to obtain relief against a judgment at law, founded on three promissory notes, signed by the complainant, and one Campbell, since deceased.

A court of equity does not interfere with judgments at law, unless the complainant has an equitable defence, of which he could not avail himself at law, because it did not amount to a legal defence, or had a good defence at law, which he was prevented from availing himself of by fraud or accident, unmixed with negligence of himself or his agents. Marine Ins. Co. v. Hodgson, 7 Cranch, 333; Creath v. Sims, 5 How. 192; Walker v. Robbins, 14 How. 584.

The application of this rule to the case stated in the bill leaves the complainant no equity whatever.

The contract under which these notes were taken was made in December, 1841. One of the notes is dated in December, 1841, and the others in January, 1842. In April, 1848, suit was brought on the notes. In October, 1850, the trial was had and judgment recovered. The reasons alleged by the bill for enjoining the judgment are:

1. That the consideration of the notes was the sale of certain property, and the complainant and Campbell were defrauded in that sale. But this alleged fraud was pleaded, in the action at law, as a defence to the notes, and the jury found against the defendants. Moreover, upwards of six years elapsed after the sale, and before the suit was brought; and the vendees, who do not pretend to have been ignorant of the alleged fraud during any considerable part of that period of time, did not offer to rescind the contract, nor did they, at any time, either return or offer to return the property sold.

2. The bill alleges certain promises to have been made by an agent of the defendant, concerning the time and mode of payment of the notes when they were given. These promises could not be availed of in any court, as a defence to the notes; for, to allow them such effect, would be to alter written contracts by parol evidence, which cannot be done in equity any more that at law, in the absence of fraud or mistake. Sprigg v. Bank of Mount Pleasant, 14 Pet. 201.

But whatever substance there was in this defence, it was set up, at law, and upon this also, the verdict was against the defendants; and the same is true of the alleged partial failure of consideration.

3. The next ground is, that on the trial at law, letters from the joint defendant, Campbell, containing admissions adverse to the defence, were read in evidence to the jury; and the bill avers that Campbell was not truly informed concerning the subjects on which he wrote, and that, until the letters were produced at the trial, the complainant was not aware of their existence, and so was surprised.

To this there are two answers, either of which is sufficient. The first is that the complainant and Campbell, being jointly interested in the purchase and ownership of the property for which these notes were given, and the joint defendants in the action at law, and there being no allegation of any collusion between Campbell and the plaintiff in that action, the complainant cannot be allowed to allege this surprise. If he did not know what admissions Campbell had made, he might, and with the use of due diligence, would have known them; and he must be treated, in equity as well as at law, as if he had himself made the admissions.

Another answer is, that if there was surprise at the trial, a motion for delay, as is practiced in some circuits, or a motion for a new trial, according to the practice in others, afforded a complete remedy at law.

4. The complainant asserts that he has claims against the defendant, and he prays that, inasmuch as the defendant resides out of the jurisdiction of the court, these claims may be set off against the judgment recovered at law by the decree of the court upon this bill. But upon this subject the bill states, speaking of the action at law: "Your orator frequently conferred with L. D. Campbell, one of his attorneys, in reference to the said cause, and frequently spoke to him of the claims which your orator and said Andrew Campbell had against the said Hinckley, as hereinafter specifically set forth; but the said Campbell, attorney, regarded the defence pleaded as so amply sufficient as that neither he nor your orator ever thought it necessary to exhibit said demands against said Hinckley as matter of defence, could it even have been done consistently with the defence made as aforesaid."

He purposely omitted to set off these alleged claims in the action at law, and now asks a court of equity to try these unliquidated claims and ascertain their amount, and enable him to have the same advantage which he has once waived, when it was directly presented to him in the regular course of legal proceedings. Courts of equity do not assist those whose condition is attributable only to want of due diligence, nor lend their aid to parties, who, having had a plain, adequate, and complete remedy at law, have purposely omitted to avail themselves of it.

It is suggested that courts of equity have

an original jurisdiction in cases of set-off, and that this jurisdiction is not taken away by the statutes of set-off, which have given the right at law. This may be admitted, though it has been found exceedingly difficult to determine what was the original jurisdiction in equity over this subject. 2 Story, Eq. 656, 664. But whatever may have been its exact limits, there can be no doubt that a party sued at law has his election to set off his claim, or resort to his separate action. And if he deliberately elects the last, he cannot come into a court of equity and ask to be allowed to make a different determination, and to be restored to the right which he has once voluntarily waived. Barker v. Elkins, 1 Johns. Ch. 465; Greene v. Darling, 5 Mason, 201, Fed. Cas. No. 5,765.

Similar considerations are fatal to the plaintiff's claim for relief, on the ground that the defendant resides out of the state, and that therefore he should have the aid of a court of equity, to subject the judgment at law to the payment of the complainant's claim. When the complainant elected not to file these claims in set-off in the action at law, he knew that defendant, who was the plaintiff in that action, resided out of the state. If that fact was deemed by the complainant insufficient to induce him to avail himself of his complete legal remedy, it can hardly be supposed that it can induce a court of equity to interpose to create one for him. The question is not merely whether he now has a legal remedy, but whether he has had one and waived it. And as this clearly appears, equity will not interfere.

The decree of the court below is affirmed.

## WM. ROGERS MANUF'G CO. v. ROGERS.

(20 Atl. 467, 58 Conn. 356.)

Supreme Court of Errors of Connecticut. Feb. 17, 1890.

Appeal from superior court, Hartford county; FENN, Judge.

This was a suit to enjoin the violation of a contract between Frank W. Rogers and the Wm. Rogers Manufacturing Company and the Rogers Cutlery Company as follows: "(1) That said companies will employ said Rogers in the business to be done by said companies, according to the stipulations of said agreement, for the period of twenty-five years therein named, if said Rogers shall so long live and discharge the duties devolved upon him by said Watrous as general agent and manager of the business to be done in common by said companies, under the directions and to the satisfaction of said general agent and manager; it being understood that such duties may include traveling for said companies, whenever, in the judgment of said general agent, the interest of the business will be thereby promoted. (2) The said companies agree to pay said Rogers for such services so to be rendered, at the rate of $1,000 per year for the first five years of such services, and thereafter the same or such larger salary as may be agreed upon by said Rogers and the directors of said companies, said salary to be in full during said term of all services to be rendered by said Rogers, whether as an employe or an officer of said companies, unless otherwise agreed. (3) The said Rogers, in consideration of the foregoing, agrees that he will remain with and serve said companies under the direction of said Watrous, as general agent and manager, including such duties as traveling for said companies, as said general agent may devolve upon him, including also any duties as secretary or other officer of either or both of said companies, as said companies may desire to have him perform at the salary hereinbefore named for the first five years and at such other or further or different compensation thereafter during the remainder of the twenty-five years as he, the said Rogers, and the said companies may agree upon. (4) The said Rogers during said term stipulates and agrees that he will not be engaged or allow his name to be employed in any manner in any other hardware, cutlery, flatware, or hollow-ware business either as manufacturer or seller, but will give, while he shall be so employed by said companies, his entire time and services to the interests of said common business, diminished only by sickness, and such reasonable absence for vacations or otherwise as may be agreed upon between him and said general agent." The complaint was held insufficient, and the plaintiffs appealed.

*F. Chamberlin* and *E. S. White*, for appellants. *C. R. Ingersoll* and *F. L. Hungerford*, for appellee.

ANDREWS, C. J. Contracts for personal service are matters for courts of law, and equity will not undertake a specific performance. 2 Kent, Comm. 258, note b; Hamblin v. Dinneford, 2 Edw. Ch. 529; Sanquirico v. Benedetti, 1 Barb. 315; Haight v. Badgeley, 15 Barb. 499; De Rivafinoli v. Corsetti, 4 Paige, 264. A specific performance in such cases is said to be impossible because obedience to the decree cannot be compelled by the ordinary processes of the court. Contracts for personal acts have been regarded as the most familiar illustrations of this doctrine, since the court cannot in any direct manner compel the party to render the service. The courts in this country and in England formerly held that they could not negatively enforce the specific performance of such contracts by means of an injunction restraining their violation. 3 Wait, Act. & Def. 754; Marble Co. v. Ripley, 10 Wall. 340; Burton v. Marshall, 4 Gill, 487; De Pol v. Sohlke, 7 Rob. (N. Y.) 280; Kemble v. Kean, 6 Sim. 333; Baldwin v. Society, 9 Sim. 393; Fothergill v. Rowland, L. R. 17 Eq. 132. The courts in both countries have, however, receded somewhat from the latter conclusion, and it is now held that where a contract stipulates for special, unique, or extraordinary personal services or acts, or where the services to be rendered are purely intellectual, or are peculiar and individual in their character, the court will grant an injunction in aid of a specific performance. But where the services are material or mechanical, or are not peculiar or individual, the party will be left to his action for damages. The reason seems to be that services of the former class are of such a nature as to preclude the possibility of giving the injured party adequate compensation in damages, while the loss of services of the latter class can be adequately compensated by an action for damages. 2 Story, Eq. Jur. § 958*a*; 3 Wait, Act. & Def. 754; 3 Pom. Eq. Jur. § 1343; California Bank v. Fresno Canal, etc., Co., 53 Cal. 201; Singer Sewing-Machine Co. v. Union Button-Hole Co., 1 Holmes, 253, Lumley v. Wagner, 1 De Gex, M. & G. 604; Railroad Co. v. Wythes, 5 De Gex, M. & G. 880; Montague v. Flockton, L. R. 16 Eq. 189. The contract between the defendant and the plaintiffs is made a part of the complaint. The services which the defendant was to perform for the plaintiffs are not specified therein, otherwise than that they were to be such as should be devolved upon him by the general manager; "it being understood that such duties may include traveling for said companies whenever, in the judgment of said general agent, the interests of the business will be thereby promoted;" and also "including such duties as traveling for said companies as said general agent may devolve upon him, including also any duties as secretary or other officer of either or both of said companies as said companies may desire to have him perform." These services, while they may not be material and mechanical, are certainly not purely intellectual, nor are they special, or unique, or extraordinary; nor are they so peculiar or individual that they could not be performed by any person of ordinary intelligence and fair learning. If this was all there was in the contract it would be almost too plain for argument that the plaintiffs should not have an injunction.

The plaintiffs, however, insist that the negative part of the contract, by which

the defendant stipulated and agreed that he would not be engaged in or allow his name to be employed in any manner in any other hardware, cutlery, flatware or hollow-ware business, either as a manufacturer or seller, fully entitles them to an injunction against its violation. They aver in the complaint, on information and belief, that the defendant is planning with certain of their competitors to engage with them in business, with the intent and purpose of allowing his name to be used or employed in connection with such business as a stamp on the ware manufactured; and they say such use would do them great and irreparable injury. If the plaintiffs owned the name of the defendant as a trade-mark, they could have no difficulty in protecting their ownership; but they make no such claim, and all arguments or analogies drawn from the law of trade-marks may be laid wholly out of the case. There is no averment in the complaint that the plaintiffs are entitled to use, or that in fact they do use, the name of the defendant as a stamp on the goods of their own manufacture, nor any averment that such use, if it exists, is of any value to them. So far as the court is informed, the defendant's name on such goods as the plaintiffs manufacture is of no more value than the names of Smith or Stiles or John Doe. There is nothing from which the court can see that the use of the defendant's name by the plaintiffs is of any value to them, or that its use as a stamp by their competitors would do them any injury other than such as might grow out of a lawful business rivalry. If by reason of extraneous facts the name of the defendant does have some special and peculiar value as a stamp on their goods, or its use as a stamp on goods manufactured by their rivals would do them some special injury, such facts ought to have been set out so that the court might pass upon them. In the absence of any allegation of such facts we must assume that none exist. The plaintiffs also aver that the defendant intends to make known to their rivals the knowledge of their business, of their customers, etc., which he has obtained while in their employ. But here they have not shown facts which bring the case within any rule that would require an employe to be enjoined from disclosing business secrets which he has learned in the course of his employment, and which he has contracted not to divulge. Peabody v. Norfolk, 98 Mass 452. There is no error in the judgment of the superior court. The other judges concurred.

## DUNCOMBE v. FELT.

(45 N. W. 1004, 81 Mich. 332.)

Supreme Court of Michigan. June 6, 1890.

Appeal from circuit court, Van Buren county, in chancery; GEORGE M. BUCK, Judge.

*F. J. Atwell*, for appellant. *Spafford Tryon* and *A. J. Mills*, for complainant.

LONG, J. The bill was filed in this cause for an injunction to restrain the defendant from cutting and removing any of the timber or trees standing or growing upon the premises described in the bill, and from committing or permitting any waste of said premises. The bill alleges that complainant is the owner in fee of the premises, containing about 160 acres subject to a life-estate in the defendant. That the complainant derived his title through a sheriff's deed, upon an execution sale to satisfy a judgment against Seth H. Felt. That said Seth H. Felt derived his title through a deed made and executed to him by the defendant, Horatio O. Felt, and his wife. That at about the time of conveyance of said premises to Seth H. Felt he made, executed, and delivered a lease in writing to Horatio O. Felt and wife. This lease is set out in full in the record. The bill also alleges that said Horatio O. Felt is in actual possession and occupancy of the premises under and by virtue of said lease, and that his wife is now deceased. That upon about nine acres of said premises is growing and standing a large amount of valuable oak and other timber, fit for sawing and lumbering purposes, and that said timber constitutes a large portion of the value of said premises. The bill then states: "Your orator further shows that the said Horatio O. Felt has caused to be cut, and is causing to be cut, and is cutting, lumbering, and removing from said premises, a large portion of said timber and trees growing thereon, and threatens to continue so to do, and has already cut about five acres of said timber. Your orator further shows that thereby the said Horatio O. Felt is committing waste upon said premises and irreparable injury thereto, and materially lessening the value thereof. Your orator further shows that if the said Horatio O. Felt is permitted to continue to cut down said timber and lumber, and commit waste upon said premises, as aforesaid, and is not restrained from so doing by an order and injunction of this honorable court, the value thereof will be depreciated to the amount of at least five hundred dollars. And your orator further shows that said cutting and removing of said timber and said lumber upon said premises by said Felt has been and is being done without the authority or consent of your orator, and against his wishes and direction thereon, and without any authority or right in said Felt so to do. All of which actings and doings of the said Horatio O. Felt, who is made defendant herein, are contrary to equity and good conscience, and tend to the manifest wrong, injury, and oppression of your orator." The lease set out in the bill of complaint was executed before the complainant derived his title under the sheriff's deed, and contains the following clause. "To have and to hold the said demised premises, with the appurtenances, unto the said parties of the second part, their executors, administrators, and assigns, for and during and until the full end and term of their natural lives, so long as either of them shall live, yielding and paying therefor, during the continuance of the lease, unto the said party of the first part, nothing; this lease being given in consideration of the second parties having conveyed the premises herein described to the first party, and under no consideration whatever are the second parties to be removed from the possession of the said premises except as they shall voluntarily surrender their rights under this lease. And it is expressly understood that the second parties are to have as full and complete control of said premises, while they or either of them shall live, as though such conveyance had not been made." A general demurrer was filed, and on the hearing in the court below was overruled, and decree entered for complainant making the injunction perpetual. Defendant appeals.

The claim of counsel for the complainant is that on the premises there are only about nine acres of growing timber; that this timber is needed for the use of the farm, and its destruction makes a case of actionable waste, to be restrained by injunction. The rights of the parties must be determined by the construction given to these clauses in the lease above quoted. The title to the premises was in defendant, Horatio O. Felt. When he and his wife deeded the same, they took back this lease, by the terms of which they were to have and to hold the premises "for and during and until the full end and term of their natural lives, so long as either of them shall live, yielding and paying * * * nothing." The consideration was the conveyance of the premises to Seth H. Felt. It is further provided in the lease that the lessees are not to be removed from the premises on any consideration whatever, except as they might voluntarily surrender their rights under the lease. Then follows the clause which it is claimed gives the defendant the right to take the timber in question. "And it is expressly understood that the second parties are to have as full and complete control of said premises, while they or either of them shall live, as though such conveyance had not been made." The complainant acquired all the rights in the premises under his purchase at the execution sale that Seth H. Felt had, but with notice of all the conditions in this lease. It is therefore contended by counsel that the lease gave defendant the same interest or property in the estate as he had before he and his wife conveyed the lands to Seth H. Felt, and that he can deal with it in all respects as though he was the owner, the only limitation being that of duration of the estate, and that the clauses in the lease above set out in effect are equivalent in meaning with the old clause in leases without impeachment for waste.

Counsel for defendant insists that the doctrine laid down in Stevens v. Rose, 69

Mich. 260, 37 N. W. Rep. 205, fully sustains his claim that the defendant has the right to remove this timber, and do all other acts that he could have done as owner in fee, and that the defendant's estate is not impeachable for waste. His claim is not sustained by that case. It was there held that the words "to have and to hold, and to use and control as the lessee thinks proper for his benefit during his natural life," clearly import a lease without impeachment for waste, and that the defendant had the right to do all those acts which such a tenant may exercise, but that the words were not to be treated as importing a license to destroy or injure the estate, but to do all reasonable acts consistent with the preservation of the estate which otherwise might in law be waste. In the present case it is conceded that there are only 9 acres of timber on the whole 160-acre tract, that the defendant has already cut about 5 acres, and threatens to cut and carry away the remainder. I have never understood the rule of the common law to be so broad as contended for by counsel for defendant. The clause "without impeachment for waste" never was extended to allow the very destruction of the estate itself, but only to excuse permissive waste. 10 Bac. Abr. p. 468, tit. "Waste." In Packington v. Packington, decided in 1744, and cited by Bacon, (reported 3 Atk. 215,) the plaintiff alleged that the defendant, Sir H. Packington, had cut down a great number of trees, and had threatened to cut down and destroy them all. Lord HARDWICKE granted an injunction to restrain the waste. The lease in the case was made without impeachment of waste. Mr. Greenleaf in his Cruise on Real Property, (volume 1, p. 129,) lays down the rule thus: "The clause without impeachment of waste, is, however, so far restrained in equity that it does not enable a tenant for life to commit malicious waste so as to destroy the estate, which is called 'equitable waste,' for in that case the court of chancery will not only stop him by injunction, but will also order him to repair if possible the damage he has done." In 10 Bac. Abr. tit. "Waste," p. 469, it is said: "So, where a lease was made by a bishop for twenty-one years without impeachment of waste, of land that had many trees upon it, and the tenant cut down none of the trees till about half a year before the expiration of his term, and then began to fell the trees, the court granted an injunction; for, though he might have felled trees every year from the beginning of his term, and then they would have been growing up again gradually, yet it is unreasonable that he should let them grow till towards the end of his term, and then sweep them all away; for, though he had power to commit waste, yet this court will model the exercise of that power" citing Abraham v. Bubb, Freem. Ch. 53. At the common law no prohibition against waste lay against the lessee for life or years deriving his interest from the act of the party. The remedy was confined to those tenants who derived their interest from the act of the law, but the timber cut was, at common law, the property of the owner of the inheritance, and the words in the lease "without impeachment of waste" had the effect of transferring to the lessee the property of the timber. Bowles' Case, 11 Coke, 79; Co. Litt. 220a. The modern remedy in chancery by injunction is broader than at law, and equity will interpose in many cases, and stay waste where there is no remedy at law. Chancery will interpose when the tenant affects the inheritance in an unreasonable and unconscientious manner, even though the lease be granted without impeachment of waste. 4 Kent, Comm. (13th. Ed.) 78; Perrot v. Perrot, 3 Atk. 94; Aston v. Aston, 1 Ves. Sr. 264; Vane v. Barnard, 2 Vern. 738; Kane v. Vanderburgh, 1 Johns. Ch. 11. In the case of Kane v. Vanderburgh, supra, it was said: "Chancery goes greater lengths than the courts of law in staying waste. It is a wholesome jurisdiction, to be liberally exercised in the prevention of irreparable injury, and depends on much latitude of discretion in the court." In this state an action on the case for waste is authorized by chapter 271, How. St. This has superseded the common-law remedy, and relieves the tenant from the penal consequences of waste under the statute of Gloucester, as the owner now recovers no more than the actual damages which the premises have sustained, while that statute gave by way of penalty the forfeiture of the place wasted, and treble damages, and this harsh rule was adopted by many of the American states by the early statutes. This statute giving a right of action in courts of law for waste does not, however, deprive the court of chancery of jurisdiction in proceedings to restrain threatened waste.

There can be no doubt that the defendant in the present case has much of the character of a tenant in fee, but he cannot destroy the inheritance. He may taken the timber for his own use, and do all those acts which a prudent tenant in fee would do. He cannot pull down the buildings or destroy them, or cut and destroy fruit trees, or those planted for ornament and shelter; neither can he be permitted to entirely strip the land of all timber, and convert it into lumber, and sell it away from the inheritance. It is not claimed that the timber is being used for betterments on the premises, but it is admitted that the life-tenant is selling it for his own gain and profit. The demurrer was properly overruled. The decree of the court below will be affirmed, with costs. The other justices concurred.

GRIFFITH v. HILLIARD.

(25 Atl. 427, 64 Vt. 643.)

Supreme Court of Vermont, General Term. Nov. 5, 1892.

Appeal from chancery court, Rutland county; TAFT, Chancellor.

Action by Silas L. Griffith against John H. Hilliard. From a decree sustaining a demurrer to plaintiff's bill for an injunction and dismissing the bill *pro forma*, orator appeals. Reversed and modified.

*J. C. Baker*, for orator. *H. A. Harman*, for defendant.

START, J. The defendant, John H. Hilliard, by the demurrer contained in his answer, claims that a court of equity has no jurisdiction of the matters alleged in the bill. The bill alleges, among other things, that the orator is the owner of the land in question; that its substantial value is made up of the wood and timber growing thereon; that some of the defendants, under a license from the defendant, Hilliard, have entered upon the land, are engaged in cutting and drawing timber therefrom, and threaten to continue to do so. For the purpose of determining the question now before the court, these allegations must be taken as true. To permit this wood and timber to be cut in the manner the defendants are doing, and threatening to do, under a license from defendant, Hilliard, is to permit a destruction of the orator's estate as it has been held and enjoyed. The power of a court of equity to interpose by injunction to prevent irreparable injury and the destruction of estates is well established, and this power has been construed to embrace trespasses of the character complained of in the orator's bill. Where trespass to property consists of a single act, and it is temporary in its nature and effect, so that the legal remedy of an action at law for damages is adequate, equity will not interfere; but if, as in this case, repeated acts are done or threatened, although each of such acts, taken by itself, may not be destructive to the estate, or inflict irreparable injury, and the legal remedy may, therefore, be adequate for each single act if it stood alone, the entire wrong may be prevented or stopped by injunction. Smith v. Rock, 59 Vt. 232, 9 Atl. Rep. 551; Langdon v. Templeton, 61 Vt. 119, 17 Atl. Rep. 839; Erhardt v. Boaro, 113 U. S. 539, 5 Sup. Ct. Rep. 595; Iron Co. v. Reymert, 45 N. Y. 703; Power Co. v. Tibbetts, 31 Conn. 165; Irwin v. Dixion, 9 How. 28; Livingston v. Livingston, 6 Johns. Ch. (Law Ed.) 496; High, Inj. 724-727; Shipley v. Ritter, 7 Md. 408; Scudder v. Trenton Delaware Falls Co., 1 N. J. Eq. 694; 1 Pom. Eq. Jur. § 245; 3 Pom. Eq. Jur. § 1357; Murphy v. Lincoln, 63 Vt. 278, 22 Atl. Rep. 418.

In the case of Murphy v. Lincoln, supra, the bill charged the committing of several trespasses by the defendants by drawing wood and logs across the orator's land. The defendants claimed a right of way. The court found the issue of fact in favor of the orator, and held that a court of equity had jurisdiction to enjoin the commission of a series of trespasses, although the legal remedy be adequate for each single act if it stood alone. It is said by Judge Story in his work on Equity Jurisprudence, (volume 2, §§ 928, 929:) "If the trespass be fugitive and temporary, and adequate compensation can be obtained in an action at law, there is no ground to justify the interposition of courts of equity. Formerly, indeed, courts of equity were extremely reluctant to interpose at all, even in regard to cases of repeated trespasses; but now there is not the slightest hesitation if the acts done or threatened to be done to the property would be ruinous or irreparable, or would impair the just enjoyment of the property in the future. In short, it is now granted in all cases of timber, coals, ores, and quarries, where the party is a mere trespasser, or where he exceeds the limited right with which he is clothed, upon the ground that the acts are, or may be, an irreparable damage to the particular species of property." In Iron Co. v. Reymert, supra, it is said that mines, quarries, and timber are protected by injunction, upon the ground that injuries to and depredations upon them are, or may cause, an irreparable damage, and also with a view to prevent a multiplicity of actions for damages, which might accrue from continuous violations of the rights of the owners; and that it is not necessary that the right should be first established in an action at law. In Erhardt v. Boaro, supra, Mr. Justice FIELD says: "It is now a common practice in cases where irremediable mischief is being done or threatened, going to the destruction of the substance of the estate, such as the extracting of ores from a mine, or the cutting down of timber, or the removal of coal, to issue an injunction, though the title to the premises be in litigation. The authority of the court is exercised in such cases, through its preventive writ, to preserve the property from destruction pending legal proceedings for the determination of the title."

When it appears that the title is in dispute, the court may, in its discretion, issue a temporary injunction, and continue it in force for such time as may be necessary to enable the orator to establish his title in a court of law, and may make the injunction perpetual when the orator has thus established his title; or the court may proceed and determine which party has the better title; or it may dismiss the bill, and leave the orator to his legal remedy. Bacon v. Jones, 4 Mylne & C. 433; Duke of Beaufort v. Morris, 6 Hare, 340; Campbell v. Scott, 11 Sim. 31; Kerr, Inj. 209; Ingrabam v. Dunnell, 5 Metc. (Mass.) 118; Rooney v. Soule, 45 Vt. 303; Wing v. Hall, 44 Vt. 118; Lyon v. McLaughlin, 32 Vt. 423; Hastings v. Perry, 20 Vt. 278; Barnes v. Dow, 59 Vt. 530, 10 Atl. Rep. 258; Barry v. Harris, 49 Vt. 392. In Bacon v. Jones, supra, Lord COTTENHAM says: "The jurisdiction of this court is founded upon legal right. The plaintiff coming into court on the assumption that he has the legal right, and the court granting its assistance on that ground. When a party applies for the aid of a court, the application for an injunction is made either during the progress of the suit or at the hear-

ing; and in both cases, I apprehend, great latitude and discretion are allowed to the court in dealing with the application. When the application is for an interlocutory injunction, several courses are open. The court may at once grant the injunction *simpliciter*, without more,—a course which, though perfectly competent to the court, is not very likely to be taken where the defendant raises a question as to the validity of the plaintiff's title; or it may follow the more usual, and, as I apprehend, more wholesome, practice in such a case, of either granting an injunction, and at the same time directing the plaintiff to proceed to establish his title at law, and suspending the grant of the injunction until the result of the legal investigation has been ascertained, the defendant, in the mean time, keeping an account. Which of these several courses ought to be taken must depend entirely upon the discretion of the court, according to the case. When the cause comes to a hearing, the court has also a large latitude left to it; and I am far from saying that a case may not arise in which, even at that stage, the court will be of opinion that the injunction may properly be granted without having recourse to a trial at law. The conduct and dealings of the parties, the frame of the pleadings, the nature of the patent right and of the evidence by which it is established, these and other circumstances may combine to produce such a result, although this is certainly not very likely to happen, and I am not aware of any case in which it has happened. Nevertheless it is a course unquestionably competent to the court, provided a case be presented which satisfies the mind of the judge that such a course, if adopted, will do justice between the parties. Again, the court may at the hearing do that which is the more ordinary course,—it may retain the bill giving the plaintiff the opportunity of first establishing his right at law. There still remains a third course, the propriety of which must also depend upon the circumstances of the case,—that of dismissing the bill at once." Although Bacon v. Jones was a case relative to a patent right, the remarks of the lord chancellor are applicable to any case in which the orator's title is in dispute. The case of the Duke of Beaufort v. Morris, supra, was a bill for an injunction to protect the orator's coal mines from injury from the water flowing into them from the defendant's colliery; and it was ordered that the bill be retained for 12 months, with liberty to the orator to bring such actions as he might be advised were necessary, and that the injunction issued in the cause be continued for such time.

We think the granting of the temporary injunction in this case was a proper exercise of the discretionary power which the court possessed. The orator, by his bill, makes out a strong case for equitable consideration. The sole value of the premises in question is in the wood and timber growing thereon. The orator has heretofore held and occupied them for the purpose of manufacturing lumber and charcoal from such timber and wood. He has expended large sums of money in the erection of mills and coal kilns, in building roads, and in procuring teams and workmen for the prosecution of said business, and has made contracts for the sale of said manufactured products. The defendants are engaged in cutting and removing that which constitutes the chief value of the estate, and threaten to continue to do so. These acts, if continued, will work a destruction of the estate, and render it of no value for the purpose for which it has been held and enjoyed. The case is one peculiarly within the province of a court of equity, through its preventive writ, to interpose and stop the mischief complained of, and preserve the property from destruction. The defendant, John H. Hilliard, having, before any evidence has been taken or hearing had, put in issue the orator's title, insisted that this issue be tried in a court of law, the case is one in which the court may properly, in its discretion, require the orator to establish his title in such court before proceeding further with the cause, and such will be the order of this court. The *pro forma* decree of the court of chancery is reversed; the demurrer contained in the answer of the defendant, John H. Hilliard, is overruled; the orator's bill is adjudged sufficient, and defendant's (Hilliard's) answer is ordered brought forward, from which it appears that the orator's title to the premises is in controversy; therefore the cause is remanded to the court of chancery, with direction to that court to retain the cause, and continue in force the injunction for such time as, in the opinion of said court, may be necessary to enable the orator to bring and prosecute to final judgment such action or actions as may be necessary to establish his title in a court of law; and, in default of the orator so establishing his title within the time aforesaid, the orator's bill to be dismissed, as against the defendant, John H. Hilliard, with costs. But if the orator shall, within the time aforesaid, by a final judgment in his favor in a court of law, establish his title to the premises as against the defendant, John H. Hilliard, then the court will enter a decree making perpetual the temporary injunction, and make such order in relation to costs as to the court shall seem meet.

TAFT, J., did not sit.

CARLISLE et al. v. COOPER.
COOPER v. CARLISLE et al.
(21 N. J. Eq. 576.)
Court of Errors and Appeals of New Jersey.
Nov. Term, 1870.

Mr. Pitney, for appellants Carlisle and others. Mr. Vanatta and Mr. Shipman, for respondent Cooper.

DEPUE, J. The counsel of the defendant, as a preliminary matter, submitted to the court the question, whether the court of chancery has jurisdiction to try the question of nuisance or no nuisance, involved in this cause.

Upon the abstract question whether a court of equity has jurisdiction over nuisances, whether they come within the class of public or of private nuisances, very little need be said. Whatever contention there is at the bar, or disagreement among judicial minds, as to the principles on which that jurisdiction should be administered, there is no room for controversy that such jurisdiction pertains to courts of equity. It is a settled principle that courts of equity have concurrent jurisdiction with courts of law in cases of private nuisances; the interference of the former in any particular case being justified, on the ground of restraining irreparable mischief, or of suppressing interminable litigation, or of preventing multiplicity of suits. Ang. Water Courses, § 444; 2 Story, Eq. Jur. § 925; Society for Establishing Useful Manufactures v. Morris Canal & Banking Co., 1 N. J. Eq. 157; Scudder v. Trenton Del. Falls Co., Id. 694; Burnham v. Kempton, 44 N. H. 79.

The doctrine of the English courts is that the jurisdiction of courts of equity over nuisances, not being an original jurisdiction for the purpose of trying a question of nuisance, but being merely a jurisdiction in aid of the legal right for the purpose of preserving and protecting property from injury pending the trial of the right, or of giving effect to such legal right when it has been established in the appropriate tribunal, the court will not, as a general rule, entertain jurisdiction to finally dispose of the case, where the right has not been previously established and is in any doubt, and the defendant disputes the right of the complainant or denies the fact of its violation. Under such circumstances the court will, ordinarily, do nothing more than preserve the property in its present condition, if that be necessary, until the question of right can be settled at law. Semple v. London & B. R. Co., 1 Eng. Ry. Cas. 120; Blakemore v. Glamorganshire Canal Navigation, 1 Mylne & K. 154; Broadbent v. Imperial Gas Co., 7 De Gex, M. & G. 436; Same Case on appeal, 7 H. L. Cas. 600; Elmhirst v. Spencer, 2 Macn. & G. 45; Kerr, Inj. 332, 340; 2 Story, Eq. Jur. § 925b; Ang. Water Courses, § 452.

It is said in the ninth edition of Story on Equity Jurisprudence that in the American courts the rule of the English law requiring the complainant's legal rights to be first established in a court of law before a court of equity will give relief, has, in general, not been enforced in its strictness. 2 Story, Eq. Jur. § 925d. In our own state it has been somewhat relaxed. The mere denial of the complainant's right by the defendant in his answer will not oust the court of its jurisdiction by injunction. Shields v. Arndt, 4 N. J. Eq. 235; Holsman v. Boiling Spring Bleaching Co., 14 N. J. Eq. 335. So, also, when the complainant has for a long time been in the undisputed possession of the property or enjoyment of the right with respect to which he complains, and the acts of the defendant which constitute the injury to such property or the invasion of such right have been done recently before the filing of the bill, the court of chancery has entertained jurisdiction to decide and dispose of the entire litigation. The language of Chancellor Pennington on this subject in Shields v. Arndt has been very generally approved, and the principle he states has been adopted by the courts of this state. He says: "It was not so much against the general jurisdiction of the court that the objection is raised, as to its exercise when the defendant, as in this case, denies the complainant's right. It is the province of this court, as the defendant's counsel insist, not to try this right, that belonging alone to a court of law, but to quiet the possession whenever that right has been ascertained and settled. If it be intended to say that a defendant setting up this right by his answer thereby at once ousts this court of jurisdiction, I cannot assent to it, for it would put an end very much to the exercise of an important branch of the powers of the court. * * * If it be intended to go no further than that it is a question which should be sent to law in cases of doubt, and often should, before injunction, be first there established by trial and judgment, then I agree to the proposition. A long enjoyment by a party of a right will entitle him to restrain a private nuisance, even though the defendant may deny the right, and the court will exercise its discretion whether to order a trial at law or not, always inclining to put the case to a jury if there be reasonable doubt."

The decree in that case was against complainant, on the ground that he had not established by the proofs in the cause his right to the stream in question as an ancient water course. On appeal to the senate, sitting as a court of appeal, the decree was reversed by a vote of eleven to seven, and a perpetual injunction was decreed. Minutes of the Court of Errors and Appeals, June 19, 1844.

In Shields v. Arndt the complainant had been in the enjoyment of the flow of water upon his land without interruption, until just before the bill was filed. In the other cases

in which chancery has granted relief on final decree by injunction the complainant was either in the full enjoyment of the right, which was protected from threatened invasion when the bill was filed, or his right originally was not disputed, and its continued existence was clearly established at the hearing, and the act of the defendant which interrupted the enjoyment of it had been done within a recent period before the bill was filed. Robeson v. Pittenger, 2 N. J. Eq. 57; Brakely v. Sharp, 10 N. J. Eq. 206; Earl v. DeHart, 12 N. J. Eq. 280; Holsman v. Boiling Spring Bleaching Co., 14 N. J. Eq. 335; Delaware & R. Canal Co. v. Camden & A. R. Co., 16 N. J. Eq. 321; Same Case on appeal, 18 N. J. Eq. 546; Morris Canal & Banking Co. v. Central R. Co., 16 N. J. Eq. 419.

In Holsman v. Boiling Spring Bleaching Co. the bill was filed to enjoin the defendants from polluting a stream, which flowed in its accustomed channel through the lands of the complainant. The defendants were incorporated in the year 1859 for the purpose of carrying on the business of bleaching and finishing cotton and woolen goods, and soon after became the owners of a tract of land, pond, and mill premises above the lands of the complainants, and erected thereon a large mill and works, which were put in operation in the summer of 1860. The bill charged that in the fall of 1860, in consequence of large quantities of chemical matter and other impurities discharged from the defendants' works into the stream, the water was filled with offensive matter, discolored and polluted, and rendered unfit for domestic purposes, producing offensive odors, which infected the air of the neighborhood, and penetrated the dwellings, so that the complainants were compelled to refrain from all use of the water for family or other purposes; by reason whereof they were unable to use or enjoy their said property as they had been accustomed and of right ought to do, or to sell the same at a fair price. The bill was filed on the 5th day of February, 1861. The defendants, in their answer, did not deny the erection of their works, or the discharge of chemicals and other matter therefrom into the stream, but insisted that the nuisances of which the complainants complained were not occasioned thereby, but by other causes. They further alleged that the lands and mill site used and occupied by them had been used and occupied as a mill site for more than twenty years, and that the business of fulling and dying had been there carried on for more than that period of time, and that they had thereby acquired a prescriptive right to use said stream for manufacturing purposes, although the same might taint and discolor the water. The cause was brought to a hearing on the pleadings and evidence, and the chancellor decreed a perpetual injunction. That the water in the stream upon the complainants' land had, since the erection of the defendants' works, become discolored, polluted, and unfit for domestic or ornamental purposes, and that the complainants' premises had thereby been rendered uncomfortable, inconvenient, and undesirable, for the purposes for which they were designed and used, were not denied by the answer, and were fully established by the evidence. The chancellor decided that where a complainant seeks protection in the enjoyment of a natural water course upon his land, the right will ordinarily be regarded as clear, and that the mere fact that the defendant denies the right by his answer or sets up title in himself by adverse user will not entitle him to an issue before the allowance of an injunction. With respect to the defendants' claim of a prescriptive right to pollute the waters along the complainants' lands, he examined the evidence, and found that although the mill site occupied by the defendants may have been used for the purpose of dying for the period of twenty years, there was no evidence in the cause that the materials discharged into the stream anterior to the erection of the defendants' works were such in character or quantity as to pollute the waters in front of the complainants' lands, and that consequently there was no proof whatever of any adverse user in the defendants, or those under whom they claimed. In this aspect of the evidence touching the adverse right set up by the defendants, this case, like those which preceded it, is an illustration of the practice of the courts of equity in this state to take complete cognizance of matters of nuisance, where the complainant has previously been in the undisputed enjoyment of a right, and the bill is filed promptly upon the commission of the act of interference with such right, and the evidence does not raise any serious question as to the fact of the existence of the complainants' right when the bill is filed. That it was not intended to assert the power of the court of chancery to ultimately dispose of questions of nuisance, without regard to the state of the evidence bearing on the question as to the existence of the complainants' right, and the situation of the parties previous to the filing of the bill, is shown by the remarks of the chancellor in his opinion as to the necessity that the party's right should be clear to entitle him to the remedy by injunction in cases of private nuisance, as well as by the opinion of the same chancellor in the case of New Jersey Zinc Co. v. New Jersey Franklinite Co., 13 N. J. Eq. 322, in which he expresses his repugnance to deciding a question of right in real property, where the defendant was in possession, and a real controversy arose as to the superiority of the titles of the respective parties; a repugnance which was only overcome by the fact that no motion had been made to dissolve the preliminary injunction, and that both parties were desirous that the question of the rights of the parties should be decided. The same doctrine has repeatedly been enunciated by the courts of this state as the controlling prin

ciple by which the court of chancery is guided in exercising its undoubted jurisdiction over the subject of private nuisances. Scudder v. Trenton Del. Falls Co., 1 N. J. Eq. 694; Southard v. Morris Canal & Banking Co., Id. 519; Shreve v. Voorhees, 3 N. J. Eq. 25; Outcalt v. Disborough, Id. 214; Hulme v. Shreve, 4 N. J. Eq. 116; Shreve v. Black, Id. 177; Cornelius v. Post, 9 N. J. Eq. 196; Wolcott v. Melick, 11 N. J. Eq. 204; Haight v. Morris Aqueduct, 4 Wash. C. C. 601, Fed. Cas. No. 5,902.

The principle supported by these cases was not impaired by the decision of this court in Morris & E. R. Co. v. Prudden, 20 N. J. Eq. 530. In that case the appeal was from an order of the chancellor for a preliminary injunction, on depositions taken under a rule to show cause. The premises on which the defendants were about to lay their track were within the limits of an old turnpike, which had been vacated under legislative authority to enable the defendants to use a part of the same for their purposes, on the faith of which they acquired the title to the fee, and for twenty years had occupied it for a single track, and other purposes connected with their business. The right of the complainant for the protection of which the bill was filed was not at all clear, and the injury on which he based his claim to equitable relief was slight, and the injunction stopped an important public work. As already observed, the jurisdiction of courts of equity over the subject-matter of nuisances is not an original jurisdiction. It does not arise from the fact that a nuisance exists, but results from the circumstance that the equitable power of the court is necessary to protect the party from an injury, for which no adequate redress can be obtained by an action at law, or its interference is necessary to suppress interminable litigation for the recovery of damages for an actionable wrong. As a condition to the exercise of that power, it is essential that the right shall be clearly established, or that it should previously have been determined by the action of the ordinary tribunals for the adjudication of the rights of the parties; and the injury must be such in its nature or extent as to call for the interposition of a court of equity.

In the case now under consideration the defendant had been in the use of his dam, as it was at the time of the filing of the bill, since 1853, unmolested by the complainants or their ancestor, until 1861, when the first of the actions at law was brought. It is therefore insisted by the defendant's counsel, that the suit is prosecuted not for relief in aid of a legal right, but for establishing a legal right, the appropriate tribunal for the determination of which is a court of law. But the decisive answer to this position of counsel lies in the fact that the right of the complainants at the time of the filing of the bill, and the invasion of those rights by the defendant, are admitted by the answer. The bill alleges the seisin of the farm in question by the complainants, and that the same bounds on Black river, which from time immemorial had been used and accustomed to flow and run by and along the said farm in its natural and accustomed channel, free and clear of all obstructions whatever; and that prior to 1846 the flow of the said river along the complainants' said farm was not in any wise affected by the defendant's dam, or the pondage thereof. The charge is that the defendant, in October or November, 1846, increased the height of his dam and its appendages, the exact amount of such increase being unknown to the complainants, and that since that time the farm of the complainants has been overflowed by water backed upon it by the defendant's dam. The bill was filed on the 17th of September, 1866. The answer was filed on the 28th of November, 1866. In it the seisin of the complainants of the farm was admitted. It was also admitted that the efficient height of the dam was increased in 1846, and that thereby the backwater on the complainants' farm was increased. The insistment was that the increase in the height of the dam in 1846 was only nine inches, and that on the 23d of November, 1866 (two months after the filing of the bill), the defendant had reduced his dam nine inches, whereby its efficient height was made what it was before 1846. Upon this branch of the case the defendant put his defence on the ground that, having complied with the object of the bill, there was no reason for continuing the litigation.

Furthermore, at the time of the filing of the bill two suits at law, brought by Eliza Carlisle, one of the complainants, and who was in possession, were pending against the defendant, to recover damages for injuries sustained by reason of the overflow of these lands by the raising of the dam in 1846. One of these suits was brought in 1861, the other in 1866. These causes having been taken down for trial to the Morris circuit, at the term of January, 1867, the defendant relinquished his plea to one of the courts of the declaration in each case, in which such injury was complained of, and confessed the cause of action, and submitted to pay substantial damages. Judgments were accordingly entered for the plaintiff in those suits on the 6th of June, 1867, transcripts whereof were made exhibits in this cause.

The extent to which the complainants were entitled to have the defendant's dam reduced in order to effect an entire abatement of the nuisance could not be settled by an ordinary action at law for overflowing the complainants' land. The facts necessary to fix the proper measure of such relief could only be ascertained by the verdict of a jury upon an issue specially framed for that purpose.

The complainants' right to such relief as is sought by the bill being admitted by the answer, and also having been established

in the suit at law, the sole question of fact in controversy was whether the defendant had effected an abatement of the admitted nuisance by lowering his dam to its level before the increase of 1846. The inquiry necessary to decide that controversy may be made in the court of chancery; at least there is nothing in the subject-matter of that investigation, that by established rules of equity procedure would entitle the party to an issue as of course. Even in the case of an heir at law, who is entitled to an issue as a matter of course when the controversy is as to the factum of a will, if he does not dispute the will, but merely denies that certain portions of the land passed by the words of description, a court of equity has full jurisdiction to determine the question thus raised without granting an issue, or may grant such issue, at its discretion. Ricketts v. Turquand, 1 H. L. Cas. 472. A court of equity has jurisdiction to ascertain and determine the rights of parties under a reservation, in a grant of a water privilege, of so much water "as is necessary for the use of a forge and two blacksmith's bellows," without requiring the right to be settled at law. Olmstead v. Loomis, 9 N. Y. 423.

In Broadbent v. Imperial Gas Co., which was before Vice Chancellor Wood (2 Jur. [N. S.] 1132), and afterwards before Lord Chancellor Cranworth (3 Jur. [N. S.] 221, 7 De Gex, M. & G. 436), and subsequently before the house of lords (5 Jur. [N. S.] 1319, 7 H. L. Cas. 600), the complaint was that the complainant, who was a market gardener, was injured by a nuisance arising from the manufacture of gas by the defendants on the premises adjoining his garden. The complainant, in 1854, brought his action at law to recover damages for such nuisance. The cause came on for trial before Lord Chief Justice Jervis, and by consent was referred to Sergeant Channel to settle the amount of damage (if any) which had been occasioned, with power to order what, if anything, should be done between the parties. In January, 1856, the arbitrator reported the amount of damages, for which judgment was entered, but he failed to make any report as to what should be done by the defendants to obviate the injury to the plaintiff. In May, 1857, a bill was filed by Broadbent to enjoin the company from continuing the nuisance. The vice chancellor decreed a perpetual injunction. This decree was affirmed on appeal by Lord Chancellor Cranworth, and was sustained on appeal by the house of lords. It appeared in evidence that after the submission in 1854, and before the date of the award, alterations had been made in the works, which, it was insisted, made the award as to the state of things in 1854 no longer conclusive as to the state of things in 1856; and the objection was taken that no relief could be obtained by injunction until the fact whether, under the existing condition of the defendants' works a nuisance was created, was ascertained by the verdict of a jury. The objection was overruled. In moving the judgment of affirmance, Lord Chancellor Campbell says: "It is said that a new trial was necessary here, because there had been some alterations. That there had been some alterations after the submission is proved. I consider that that is a point upon which it is for an equity judge to form his opinion. If there has once been a trial at law, and the plaintiff's right has been established at law, I think it is for the equity judge to determine, when the application is made for the injunction, whether the nuisance continues or whether it has been abated; and if he is of opinion that it has not been abated, but that it still continues, then it is his duty to grant an injunction. It seems to me very strange to contend that because a party who commits a nuisance chooses to make some alteration, even although he may do it bona fide, it is to be laid down as a rule that there must be another trial, and that toties quoties as often as the parties shall make any alteration there must still be another trial. I think the vice chancellor did well in investigating whether the nuisance continued, and that it was quite unnecessary for him to order a second trial in order to try a fact which had been already investigated and established." Lord Kingsdown, in expressing his concurrence, is equally explicit. His language is: "I perfectly admit that if it could have been shown upon the application for the injunction that alterations had been made which had had the effect of removing the evil which the plaintiff had complained of in the action, he would, of course, not have obtained any injunction. But I am not at all prepared to admit that the court was bound to ascertain that fact by directing the trial of an action at law. It remained for the party who resisted that application to show that those alterations had been made which were effectual for the purpose; and if the court, upon the evidence, had reasonable doubt upon that subject, it might, for the information of its conscience, have directed a trial; but it was equally competent to do it, and in my opinion it was its duty, if it saw, upon the examination of that evidence, that the evil had not been diminished, to act upon that conviction, and to grant the injunction which it actually did grant."

The case, from the opinions in which these extracts have been taken, is the same as that now before the court, except that this case is strengthened by the fact that the nuisance complained of is admitted by the answer, and the alterations which are claimed to have removed it were made after the bill was filed.

It was further urged upon the argument with much earnestness that although it might be competent for the court to de-

termine the question in controversy, yet that, under the circumstances of this case, an issue should have been allowed for the determination of the disputed facts by the verdict of a jury.

The power of courts of equity to order the trial of an issue of fact which the court is itself competent to try, ought to be sparingly exercised, and a practice of sending ordinary matters to the decision of a jury, ought not to be established. Where the truth of facts can be satisfactorily ascertained by the court without the aid of a jury, it is its duty to decide as to the facts, and not subject the parties to the expense and delay of a trial at law. But in cases where the evidence is so contradictory as to leave the decision of a question of fact in serious doubt, and superior advantages of testing the credit of witnesses by viva voce examination in open court, and of applying the facts and circumstances proved in the cause to the decision of disputed points, may be obtained by means of a trial before a jury, it is proper that an issue should be awarded. Trenton Banking Co. v. Woodruff, 2 N. J. Eq. 118; Miller v. Wack, 1 N. J. Eq. 205; Bassett v. Johnson, 3 N. J. Eq. 417; Hildreth v. Schillenger, 10 N. J. Eq. 196; Lucas v. King, Id. 277; Fisler v. Porch, Id. 243; Black v. Lamb, 12 N. J. Eq. 108; same case nomine; Black v. Shreve, 13 N. J. Eq. 455; 2 Daniell, Ch. Prac. 1086, 1285; Short v. Lee, 2 Jac. & W. 465; Dexter v. Providence Aqueduct Co., 1 Story, 387, Fed. Cas. No. 3,864; Dale v. Roosevelt, 6 Johns. Ch. 255; Hammond v. Fuller, 1 Paige, 197; Apthorpe v. Comstock, 2 Paige, 482; Townsend v. Graves, 3 Paige, 453.

The granting or refusing an issue is a matter of discretion, and no application was made to the chancellor for an issue. The case of Carlisle v. Cooper, 18 N. J. Eq. 241, in which the question of jurisdiction was raised, was not between these parties. The subject matter of the controversy there, was the dam complained of in this case, but the complainant in that cause was John D. G. Carlisle, and the application to the chancellor was not an application for a feigned issue. In the answer in this case, the defendant, after stating the abatement of his dam nine inches, submits and insists "that if the complainant shall insist that the defendant has not reduced his dam to the height it was prior to the year 1846, and insists upon trying that question in this honorable court, that this honorable court is not the appropriate tribunal in which to try and decide that question." A replication was filed, and the parties proceeded to take their evidence. A court of equity is an appropriate tribunal to decide that question. The case was submitted to the chancellor for decision on its merits, without objection to the mode of trial. The submission of it to him without applying for an issue, concludes the parties from objection now to the mode of trial. Belknap v. Trimble, 3 Paige, 577.

The position was also taken that the complainants had lost their right to relief by long delay. Mere delay in applying to the court is frequently a ground for denying a preliminary injunction, and is also a reason for courts of equity refusing to take cognizance of a case where there is a remedy at law. But where the legal right is settled, and the more efficacious remedy of a court of equity is necessary to complete relief, delay is no ground for a denial of its aid, unless it is coupled with such acquiescence as deprives the party of all right to equitable relief. A person may so encourage another in the erection of a nuisance, as not only to be deprived of the right of equitable relief, but also to give the adverse party an equity to restrain him from recovering damages at law for such nuisance. Williams v. Earl of Jersey, 1 Craig & P. 91. So a party who knowingly, though passively, encourages another to expend money under an erroneous opinion of his rights, will not be permitted to assert his title, and thereby defeat the just expectation upon which such expenditure was made. Dann v. Spurrier, 7 Ves. 231; Rochdale Canal Co. v. King, 2 Sim (N. S.) 78; Same Case, on final hearing, 21 Eng. Law & Eq. 178; Ramsden v. Dyson, L. R. 1 H. L. 140; Dawes v. Marshall, 10 C. B. (N. S.) 697; Wendell v. Van Rensselaer, 1 Johns. Ch. 354; Ross v. Elizabeth-Town & S. R. Co., 2 N. J. Eq. 422; Hulme v. Shreve, 4 N. J. Eq. 116; Morris & E. R. Co. v. Prudden, 20 N. J. Eq. 531; Raritan Water-Power Co. v. Veghte, 21 N. J. Eq. 463. The defendant's case is not within either of these principles. He did not make his expenditure in erecting his dam, and increasing the capacity of his mill, either upon the encouragement of the complainants' ancestor, or under an impression that he had the right to cast the water back to the extent it was held by his dam. He knew that by so doing he would interfere with the complainants' farm. He claims that he obtained that privilege from the complainants' ancestor, under a verbal agreement that he was to be permitted to flow as much of his lands as he, the defendant, saw fit, if he paid him therefor at the same rate as the defendant paid one Horton for lands on the opposite side of the stream. Upon such alleged agreement the defendant sought his remedy, after the actions at law were brought, by a bill for its specific performance, and was denied relief. Carlisle v. Cooper, 18 N. J. Eq. 241. The adjudication and decision of that question in that case concludes the rights of these parties.

The damages paid by the defendant in the two suits at law amounted to $500. The injury done to the farm of the complainants by the backwater, rendered a part of their land comparatively useless, and the evidence shows that a nuisance was created on it deleterious to health, and that the enjoy-

ment of the premises was thereby impaired. For such injuries an action at law furnishes no adequate remedy, and the party enjoined is entitled to the protection of a court of equity by abatement of the nuisance. Holsman v. Boiling Spring Bleaching Co., 14 N. J. Eq. 335; 2 Story, Eq. Jur. § 926.

As the facts were when the bill was filed, the nature and extent of the injury sustained by the complainants were such as to entitle them to relief in a court of equity, and it would be an extraordinary proposition that a defendant, after the institution of the suit for such relief, should be enabled to defeat complete redress by a partial abatement of the nuisance, thus mitigating but not removing the evil, upon an insistment that the effects of such portion of the nuisance as still remained were not of sufficient consequence to entitle the complainant to ask that perfect relief which he was entitled to when he sought his remedy.

The prayer of the bill is that the exact amount of the increase in the height of the dam in 1846 may be ascertained, and that the defendant may be ordered and decreed to abate said dam, and reduce it to its original height, as it was prior to the year 1846, and remove the obstructions caused thereby to the flow of the river; or that the same may be abated and reduced in height under the directions of the court. The complainants are entitled to the relief prayed for.

The appeal upon the merits raises the question whether the relief which was granted by the chancellor, is such as is warranted by the evidence.

The exact import of the decree is that the defendant is entitled to maintain his dam at the height of the present stonework and the mudsill thereon and the sheathing, with the right to place on the mudsill, for the whole length thereof, movable gates of plank of the width of seven inches, reaching a line nine inches above the said mudsill, and no higher; and that by means of these contrivances the defendant shall be entitled to use the water of said river, subject to the obligation in times of freshets or high water, to so raise the said gates as that the surface of the water shall not be raised above a line drawn twelve and a quarter inches above the top of the mudsill.

The dam was built originally in 1827. It then consisted of a stone wall with a sill upon it, and was about thirty-six feet long. In 1828 or 1829, the superstructure was increased by the addition of posts twelve inches long, with a cap piece on the top nine inches wide. The space between the cap piece and the sill, at each end, was boarded up tight. The rest of the space was occupied by gates nine or ten inches wide, leaving a space between the top of these gates and the underside of the cap, through which the water flowed under the cap piece. In 1846 it is admitted that the structure of the dam was raised, and in 1852 changes were made which increased its power of retaining and throwing back the water. In 1866, when the bill was filed, the superstructure consisted of a sill nine inches in height, on which were set posts twenty-one inches high, on which was placed a cap piece nine inches in height, and the space between the sill and cap piece was closed by solid planking at each end, and movable gates in the intermediate space, thus making the efficient height of the superstructure above the stone wall thirty-nine inches. It was reduced nine inches in 1866, leaving its present height thirty inches, and the decree of the chancellor directs a further reduction of twelve inches, reducing the height of the superstructure above the stone wall to eighteen inches, which consists of the height of the sill of nine inches, and the height of the sheathing and gates upon it of nine inches additional. The effect of these operations will be to reduce the height of the dam, including the stone wall, sheathing, sill, and gates, to about what was originally in 1828, including the stone wall, sill, and gates, which then made up the dam, but without taking into account the fact that the solid planking between the cap piece and the sill at each end, joined close up to the cap piece.

The principle of law stated by the chancellor, that the extent of the right acquired by adverse user is not determined by the height of the structure, but is commensurate with the actual enjoyment of the easement, as evidenced by the extent to which the land of the owner of the servient tenement was habitually or usually flowed during the period of prescription, rests upon sound reasoning, and is supported by authority. Ang. Water Courses, §§ 224, 379; Burnham v. Kempton, 44 N. H. 78. The introduction into the rule requiring continuity of enjoyment to acquire a prescriptive right of the qualification of habitual use, as applied to the effect of the structure, is the only qualification that is permissible where the easement is such that its enjoyment is profitable only from a continuous use, as an easement to overflow lands.

That the decree of flowage upon the lands of another fixes the extent of the right, is shown by a variety of cases. The owner of the easement is not bound to use the water in the same manner, or to apply it to the same mill. He may make alterations or improvements at his pleasure, provided no prejudice thereby arises to the owner of the servient tenement, in the increase of the burden upon his land. Luttrel's Case, 4 Coke, 87; Saunders v. Newman, 1 Barn. & Ald. 258. So it is not necessary that the dam should have been maintained for the whole period upon the same spot, if the extent of flowage is at all times the same. Davis v. Brigham, 29 Me. 391; Stackpole v. Curtis, 32 Me. 383. A change in the mode of use, or the purpose for which it is used, or an increase in capacity of the machinery which is propelled by the water, will not effect the right, if the quantity used is not increased, and the change is not

to the prejudice of others. Ang. Water Courses, §§ 228–230; Hale v. Oldroyd, 14 Mees. & W. 789; Baxendale v. McMurray, 2 Ch. App. 790; Casler v. Shipman, 35 N. Y. 533; Whittier v. Cocheco Co., 9 N. H. 455; Washb. Easem. p. 279, § 38; Hulme v. Shreve, 4 N. J. Eq. 116.

This rule is clearly stated by Chancellor Green in the Holsman Case, thus: "Where an action is brought for overflowing the plaintiff's lands by backwater from the defendant's mill dam, it establishes no title by adverse enjoyment to prove that the defendant's mill has been in existence over twenty years, or that the dam has been in existence for that period. The question is not how high the dam is, but how high the water has been held, whether it has been held for twenty years so high as to affect the land of the plaintiff as injuriously as it did at the time the action was brought."

As a general rule the height of the dam when in good repair and condition, including such parts and appendages as make its efficient height in its ordinary action and operation, fixes the extent of the right to flow, without regard to fluctuations in the flowage which are due to accidental causes, such as a want of the usual repairs, or the variation in the quantity of water in the stream in times of low water or drought, or in the pondage of the dam by its being drawn down by use. Washb. Easem. p. 105, § 54; Cowell v. Thayer, 5 Metc. (Mass.) 253; Jackson v. Harrington, 2 Allen, 242; Wood v. Kelley, 30 Me. 47. But an user, to be adverse, must be under a claim of right, with such circumstances of notoriety as that the person against whom the right is exercised may be made aware of the fact, so as to enable him to resist the acquisition of such right before the period of prescription has elapsed. Cobb v. Davenport, 32 N. J. Law, 369. Occasional use of flash boards for short periods, when little or no injury may be done, as an exception to the general rule not to keep them on, does not amount to the open, uninterrupted, and notorious adverse use necessary to establish a prescriptive right. Pierce v. Travers, 97 Mass. 306. If used for the full period of twenty years, only during times of low water, a prescriptive right will not be acquired thereby to keep the water up to the height of such boards during the whole year. Marcly v. Schults, 29 N. Y. 346. There may be such continuity of use of flash boards as that they, in effect, are part of the permanent structure, and by such user a right to flow by means of a permanent dam, to the height of such boards may be acquired. Whether the user has been such as to establish the right, is a question of fact for the jury. Noyes v. Sillman, 24 Conn. 15.

In the dam of 1828 there were two gates, each fourteen feet long, and the solid planking between the mudsill and the cap piece occupied four feet at each end. The difference between the superstructure of the dam of 1828, in its effect in flowing the lands of the complainants, and that ordered by the chancellor in his decree, is quite inconsiderable. But with respect to the condition of the superstructure of the dam, and the mode of its use between 1828 and 1846, and from 1846 to 1853, there is a great contrariety in the evidence. The conflict relates to the use of boards to close up the space between the tops of the gates and the cap piece, thus making the top of the cap piece the line of the tumble; to the washing away of the superstructure of 1828, and its being replaced by a structure of a different construction; to the use of gates of variable widths, and at times of nothing more than boards upon the sill, kept in place by pegs and starts. With this conflict in the evidence the case was submitted to the chancellor on its merits.

The evidence touching the extent of the prescriptive right to flow the lands of the complainants by means of the permanent structure of the dam and movable gates, and also to the use of flash boards, is reviewed by the chancellor.

His conclusion is, that there is not sufficient proof of an use of the flash boards in such a definite manner, or at certain fixed times or occasions, as to establish a qualified right to use them, when they operate to raise the water to any extent on the land of the complainants, and that the right to maintain the permanent structure of the dam, and to raise the water upon the complainants' lands by the use of the gates, is such as I have mentioned as the substance of the decree.

It is not proposed to examine the evidence in detail; a portion of it has been referred to by the chancellor in his opinion. It is sufficient to say that his conclusions on all these points are supported by direct testimony, and are consistent with the collateral facts proved, and in my judgment are sustained by the weight of the evidence in the cause.

Objection was made to that portion of the decree which provided for the raising of the gates in times of freshets and high water. As the prescriptive right to the use or flow of water originates from its accustomed use, the right may be qualified as to times, seasons, and mode of enjoyment, by the character of the use from which the right has originated. Ang. Water Courses, §§ 222, 224, 382; Bolivar Manuf'g Co. v. Neponset Manuf'g Co., 16 Pick. 241; Marcly v. Schults, 29 N. Y. 346; Burnham v. Kempton, 44 N. H. 78. Prescriptions may be upon condition in restraint of the mode in which the prescriptive right is to be enjoyed, or may have annexed to them a duty to be performed for the benefit of the person against whom the prescription exists. Kenchin v. Knight, 1 Wils. 253, 1 W. Bl. 49; Brook v. Willet, 2 H. Bl. 224; Gray's Case, 5 Coke, 79; Lovelace v. Reynolds, Cro. Eliz.

546, 563; Colton v. Smith, Cowp. 47; Paddock v. Forrester, 3 Man. & G. 903.

In the lease to Thompson for the year 1829, the defendant inserted a covenant requiring the tenant to hoist the gates in time of high water, if need be, so that no damage should be done. Similar covenants are contained in subsequent leases, and the evidence is that it was the uniform practice of the tenants, in the use of the dam and its appendages, to control the height of the water in the pond in times of high water by raising the gates, and permitting it to flow off. Like the use of flash boards, only in times of low water, this mode of user qualifies the right which the defendant acquired from user, and the portion of the decree which regulates the management of the gates is necessary to restrain the flowage of the complainants' lands to what it was accustomed to be during the time of prescription.

In Robinson v. Lord Byron the injunction was to restrain the defendant from using dams, weirs, shuttles, flood gates, or other erections, otherwise than he had done before the 4th of April, 1785, so as to prevent the water flowing to the complainants' mill in such regular quantities as it had ordinarily done before the said 4th of April. 1 Brown, Ch. 588. A decree of a like nature was made by Lord Eldon in Lane v. Newdigate, 10 Ves. 192.

The decree, by its reference to the cap piece as fixing the extreme height to which the water may be raised by the use of the gates when shut, is probably more specific in its directions than is usual; but it removes all uncertainty in the adjudication of the court as to the extent of the rights of the respective parties. The complaint that the exercise of the defendant's right to the water is thereby made impracticable is without foundation. That it might be more conveniently exercised if his right was enlarged, is no reason why it should be enlarged by the sacrifice of the rights of the complainants without compensation. The objection that the decree fixes the form and construction of the dam perpetually, seems to me to be of greater force. The expression in the decree on which this objection is founded was probably used through inadvertence. Let the decree be amended by declaring the defendant's rights as therein in substance declared, and directing the abatement of so much of the present dam as the chancellor has declared to be unlawful.

The appeal of the complainants is based on the allegation that the stonework of the dam was raised by the defendant in 1846. The chancellor decides that it was not, and he is supported in this by the clear weight of the evidence.

With the exception of the formal modification above mentioned the decree is affirmed in all respects. Both parties having appealed, and neither party succeeding on the appeal, the affirmance is without costs to either in this court.

The decree was affirmed.

BOSTON DIATITE CO. v. FLORENCE MANUF'G CO. et al.

(114 Mass. 69.)

Supreme Judicial Court of Massachusetts. Nov., 1873.

T. W. Clarke, for plaintiff. D. W. Bond, for defendants.

GRAY, C. J. The jurisdiction of a court of chancery does not extend to cases of libel or slander, or of false representations as to the character or quality of the plaintiff's property, or as to his title thereto, which involve no breach of trust or of contract. Huggonson's Case, 2 Atk. 469, 488; Gee v. Pritchard, 2 Swanst. 402, 413; Seeley v. Fisher, 11 Sim. 581, 583; Fleming v. Newton, 1 H. L. Cas. 363, 371, 376; Emperor of Austria v. Day, 3 De Gex, F. & J. 217, 238–241; O'Mulkern v. Ward, L. R. 13 Eq. 619. The opinions of Vice Chancellor Malins in Springhead Spinning Co. v. Riley, L. R. 6 Eq. 551, in Dixon v. Holden, L. R. 7 Eq. 488, and in Rollins v. Hinks, L. R. 13 Eq. 355, appear to us to be so inconsistent with these authorities, and with well-settled principles, that it would be superfluous to consider whether, upon the facts before him, his decisions can be supported.

The jurisdiction to restrain the use of a name or a trade-mark, or the publication of letters, rests upon the ground of the plaintiff's property in his name, trade-mark or letters, and of the defendant's unlawful use thereof. Routh v. Webster, 10 Beav. 561; Leather-Cloth Co. v. American Leather-Cloth Co., 4 De Gex, J. & S. 137, and 11 H. L. Cas. 523; Maxwell v. Hogg, 2 Ch. App. 307, 310, 313; Gee v. Pritchard, 2 Swanst. 402.

The present bill alleges no trust or contract between the parties, and no use by the defendants of the plaintiff's name; but only that the defendants made false and fraudulent representations, oral and written, that the articles manufactured by the plaintiff were infringements of letters patent of the defendant corporation, and that the plaintiff had been sued by the defendant corporation therefor, and that the defendants further threatened divers persons with suits for selling the plaintiff's goods, upon the false and fraudulent pretence that they infringed upon the patent of the defendant corporation. If the plaintiff has any remedy, it is by action at law. Barley v. Walford, 9 Q. B. 197; Wren v. Weild, L. R. 4 Q. B. 730.

Demurrer sustained, and bill dismissed.

## DAVIS et al. v. BROWNE.

(2 Del. Ch. 188.)

Court of Chancery of Delaware. Feb. Term, 1859.

Bill for the removal of a testamentary executor and trustee, and for other relief. The defendant was appointed executor and trustee by the will of Samuel B. Davis, deceased, and held a large estate, real and personal, as executor and in trust for the children of the testator. Among the acts of the defendant alleged in the bill as ground for his removal were the sale of a specific legacy of stock bequeathed to one of the testator's sons; neglect to pay interest on a debt which was a lien upon part of the real estate held by him; unnecessary sale of the family plate at a sacrifice; that he was speculating in the securities of the estate; and that he threatened to sell unimproved land of the estate which would probably increase in value if it should be held for the cestuis que trustent. The prayer of the bill was that the defendant be removed as trustee, and be enjoined from further interference with the estate, and particularly from selling the trust property; that a receiver be appointed; and that the defendant be required to account.

The complainants moved before answer for a temporary injunction and removal of the defendant.

Mr. Hood, for complainants. D. M. Bates, for defendant.

HARRINGTON, Ch. The ultimate object of this bill is to bring the executor and trustee of Samuel B. Davis, deceased, to an account of his trusteeship, and to prevent his so administering the trust as to defeat the will of the testator and injure the devisees and legatees.

The object of the present motion is for immediate action, before answer, by injunction and temporary removal of the trustee. I think the case made by the bill sufficient to ground the application. It charges not merely such maladministration of the trust that it would be sufficient to rest upon the responsibility of the trustee and his sureties, but it is alleged that acts are threatened which might be irremediable.

I observe that the bill is defective in charging the defendant only as executor, in which character he is responsible to another tribunal. He should be charged as trustee.

Mr. Hood, upon leave granted, amended the bill, according to the chancellor's suggestion; and the orders moved for were then granted.

## TOWN OF VENICE v. WOODRUFF.

(62 N. Y. 462.)

Court of Appeals of New York. 1875.

Appeal from supreme court, general term.

This was an action to secure the cancellation of certain bonds issued by the supervisor and railroad commissioners of the plaintiff town, and to restrain the defendants, who were the holders of those bonds, from transferring them. There was a finding of fact by a referee, the material part of which appears in the opinion.

RAPALLO, J. The referee has found that all of the bonds, which the plaintiff seeks by this action to have delivered up and canceled, were made and issued without the requisite consent of two-thirds of the tax payers of the town. That fact, according to the decisions of this court, rendered the bonds void, even in the hands of bona fide holders. Starin v. Town of Genoa, 23 N. Y. 439; People v. Mead, 24 N. Y. 114, 36 N. Y. 224. It was further held in these cases that the burden of proving the requisite consent of the tax payers rested upon the party seeking to enforce payment of the bonds, and that the affidavit directed by the act under which the bonds purported to be issued, to be filed with the consent, was not evidence of the requisite consent. It is therefore settled by the adjudications of this court that no recovery can be had in an action upon these bonds, without affirmative extrinsic proof of the requisite consent. The fact being found that such consent was not given, it is clear that a perfect defense to the bonds exists, should an action be brought upon them in any court of this state, either by the present holders of the bonds, or by any person to whom they may be transferred.

Upon this state of facts the question arises, whether an equitable action can be maintained by the town to restrain the holders of the bonds from suing upon or transferring them, and to compel the surrender and cancellation of the instruments.

The cases in which a court of equity exercises its jurisdiction to decree the surrender and cancellation of written instruments are, in general, where the instrument has been obtained by fraud, where a defense exists which would be cognizable only in a court of equity, where the instrument is negotiable, and by a transfer the transferee may acquire rights which the present holder does not possess, and where the instrument is a cloud upon the title of the plaintiff to real estate. Under the chancery system, where a bill of discovery was necessary to establish a defense, the court having acquired jurisdiction of the case for the purpose of discovery, might proceed and award relief, but this ground of jurisdiction no longer exists. It is true that the jurisdiction of the court of chancery has been asserted to decree the surrender of every instrument which ought not to be enforced, whether void at law or not, and whether void from matter appearing on its face, or from matter which must be established by extrinsic proof. Hamilton v. Cummings, 1 Johns. Ch. 520–522, 523. But Chancellor Kent in the case cited, in asserting this jurisdiction recognizes the necessity of showing strong grounds for the exercise of the power, and endeavors to reconcile the apparently conflicting English authorities by adverting to the general principle that the exercise of the power is to be regulated by sound discretion, as the circumstances of the individual case may dictate, and that a resort to equity, to be sustained, must be expedient either because the instrument is liable to abuse from its negotiable nature; or because the defense not arising on its face may be difficult or uncertain at law; or from some other special circumstances peculiar to the case, and rendering a resort to equity highly proper. And it is now well established that equity will not interpose to decree the cancellation of an instrument, the invalidity of which appears upon its face. Story, Eq. Jur., § 700, a.

There must exist some circumstance establishing the necessity of a resort to equity, to prevent an injury which might be irreparable, and which equity alone is competent to avert. If the mere fact that a defense exists to a written instrument were sufficient to authorize an application to a court of equity to decree its surrender and cancellation, it is obvious that every controversy in which the claim of either party was evidenced by a writing could be drawn to the equity side of the court, and tried in the mode provided for the trial of equitable actions, instead of being disposed of in the ordinary manner by a jury.

Whether therefore the question be regarded as one of jurisdiction or of practice, it is established by the later decisions that some special ground for equitable relief must be shown, and that the mere fact that the instrument ought not to be enforced is insufficient, standing alone, to justify a resort to an equitable action. Grand Chute v. Winegar, 15 Wall. 374; Minturn v. Farmers' Loan & Trust Co., 3 N. Y. 498; Perrine v. Striker, 7 Paige, 508; Morse v. Hovey, 9 Paige, 197; Field v. Holbrook, 6 Duer, 597; Allerton v. Belden, 49 N. Y. 373; Reed v. Bank of Newburgh, 1 Paige, 215, 218.

In the present case in so far as the invalidity of the bonds results from the want of consent of the tax payers, there is no ground whatever shown for resorting to an equitable action. Not only is the want of the consent a perfect defense at law, but the onus of proving the consent is upon the party seeking to enforce the bond; and the court cannot assume that he will be able to establish a fact that does not exist, and of which there is no documentary evidence. If it be said that the town may by delay lose evidence now existing, which would be avail-

able to meet and rebut false testimony, one decisive answer is that the statutes now provide a summary mode of perpetuating testimony in all cases, and an action is not necessary for that purpose. The case is analogous to those of Field v. Holbrook, 6 Duer, 597, and Allerton v. Belden, 49 N. Y. 373.

It is urged that the action should be sustained for the purpose of preventing a transfer of the bonds to a bona fide holder. This court has held that such a transfer could not prejudice the plaintiff, as the defense would be available even against a bona fide holder. Starin v. Town of Genoa, 23 N. Y. 439. But it is said that although such is the rule in this state, a different rule has been adopted in the courts of the United States, and the bonds might be transferred to a bona fide holder, who might sue in those courts. There would be force in this argument provided it were established in the case that the present holders of the bonds were not bona fide holders. In that case it might be proper for a court of equity to prevent their subjecting the town to liability by a transfer of the bonds. But if they are themselves bona fide holders, there is no justification for interfering with the right of transfer. In contemplation of law the transferees would acquire no greater rights than are possessed by the present holders.

The real purpose of the litigation seems to be to prevent a resort to the courts of the United States for the collection of these bonds; and the question is, whether it is the province of a court of equity in a state to interfere for the purpose of preventing a resort to the federal courts for the enforcement of obligations on the ground that they may be held in those courts to be valid, while according to the decisions of the state courts the same obligations are held to be void. I apprehend that the power of a court of equity to decree the surrender and cancellation of instruments has never before been appealed to or exercised for such a purpose. Equity will interfere to control the action of parties and restrain them from transferring negotiable obligations, on the ground that it is against conscience to allow them to create in their transferee a right or equity which they themselves do not possess. But where the effect of a transfer is not to change in any respect the rights or equities of the parties, I am not prepared to hold that the allegation that the transferee might resort to a tribunal in which a rule of decision prevails, or may prevail, differing from that of the court which is asked to enjoin the transfer, is sufficient to justify the interference asked. The wrong sought to be prevented by such a proceeding is not any wrongful act of any party, but a decision of another court. The facts of the case and the abstract rights of the parties are not changed by the transfer. The greatest effect it can have is to enable a transferee to sue in a court to which the present holder could not resort. This, in general, would not be regarded as any wrong which a court of equity would restrain. If it is a wrong in this case it must be on the assumption that the federal court will render a decision at variance with the decision of this court. I am of opinion that such an apprehension is not a legitimate ground for the action of a court of equity in restraining a transfer or directing the cancellation of the instrument. There is no finding that the present holders are not bona fide holders of the bonds. As the judgment entered upon the report of the referee was in favor of the defendants it could not be disturbed unless facts were found showing that the conclusions of law were erroneous. We have held over and over again that the facts showing error in the legal conclusions must be found, and that the appellate court will not search for them in the evidence. In this case the findings are in favor of the bona fides of the defendants. As to five of the bonds it is found that they were sold and delivered by the supervisor and railroad commissioner to Hutchinson & Murdock, who paid for them par in cash. This finding is not weakened by the further finding that the money was in the first instance advanced on a pledge of the bonds which was subsequently converted into a sale. As to the twenty bonds which were issued direct to the railroad company, the referee finds that the holders purchased them without being informed that they had been delivered directly to the company. No fact is found impeaching the bona fides of the holders of any of the bonds, and therefore it does not appear that any transfer of them can be made which will confer upon the transferees any greater equities than are possessed by the present holders.

The fact that twenty of the bonds were delivered directly to the railroad company instead of being sold by the railroad commissioners, is relied upon as a ground for granting relief as to those bonds. In the case of People v. Mead, 24 N. Y. 124, 125, it seems to be considered that this fact would not constitute a defense, even in the state court, as against a bona fide holder of the bonds. But to entitle the town to affirmative equitable relief on that ground, it should have been made to appear that the defendants were not bona fide holders; which, as has already been shown, the plaintiff has failed to do.

Another ground urged in support of the claim to equitable relief is, that it is necessary for the purpose of avoiding a multiplicity of suits; and the case of New York & N. H. R. Co. v. Schuyler, 17 N. Y. 592, and 34 N. Y. 30, is referred to as an authority in point. But that case was essentially different from the present. There the defendants all claimed shares in the same corporation, which had authority to issue only a limited number; shares had been issued in excess of that limit, and some of them

must be rejected. The spurious shares were held to be a cloud upon the title of the holders of the genuine shares, and the corporation was held to be the proper representative of the genuine stockholders to seek the interposition of the court to remove that cloud. Here was a solid ground upon which the plaintiff could found its application for relief. The plaintiff having this standing in court, it was held that all the alleged spurious shareholders were properly joined as defendants. But jurisdiction was not entertained on the sole ground that the holders of spurious shares were numerous. In the present case there is no question of any cloud upon the title. The plaintiff seeks to have canceled certain written instruments purporting to be obligations for the payment of money, which are held by various independent owners. If it fails to make out a case which would sustain an action for that purpose against any one of them alone, the mere fact that there are several such holders is not of itself sufficient ground for entertaining the suit. If the facts were such as would have sustained the action against one person had he been the holder of all the bonds, then the case of the New Haven Railroad Company would be an authority in favor of the position, that if there were several holders all might be joined as defendants. But it does not support the position, that the mere fact that numerous independent parties hold separate instruments upon which they might bring separate suits is sufficient to justify a court of equity in entertaining an action by the debtor to compel them to litigate their claims in an action in the form which he selects.

Under any circumstances, I am inclined to concur with Judge Talcott, in the opinion that a court of equity would not interfere affirmatively to relieve the plaintiff against these bonds, except upon condition that it surrendered what it had received for them. The relief sought is discretionary with the court; and the plaintiff is not entitled to it as matter of absolute right. Actions of this class are in that respect governed by the same rules which apply to actions for specific performance; and relief will never be granted except upon equitable terms, where the case is such as to call for the imposition of terms. Story, Eq. Jur., §§ 692, 693, 696, and cases cited section 742. But the reasons before given I deem sufficient to sustain the conclusion of the referee dismissing the complaint.

There is great doubt whether the defense of the statute of limitations is available in this case. In respect to the limitation of time it is analogous in principle to an action to remove a cloud upon the title to land; and in such cases I do not understand the rule to be that the statute runs from the time the cloud was first created. See Miner v. Beekman, 50 N. Y. 338; Hubbell v. Medbury, 53 N. Y. 99; Arnold v. Hudson R. R. Co., 55 N. Y. 661.

On the ground that the facts of the case are insufficient to justify the interposition of a court of equity to decree the surrender and cancellation of the bonds, or to restrain their transfer, so much of the judgment as is appealed from should be affirmed, with costs.

All concur; CHURCH, C. J., not sitting.

Judgment affirmed.

## DULL'S APPEAL.

(6 Atl. 540, 113 Pa. St. 510.)

Supreme Court of Pennsylvania. Oct. 4, 1886.

Appeal from decree of the court of common pleas, Fayette county.

Bill for relief quia timet. Bill dismissed. Plaintiff appeals.

Edward Campbell, for complainant.
A. D. Boyd, for appellee.

GREEN, J. The master found as facts in this case that the plaintiff held title to the land in question by deed from the assignee of the former owner; that he subsequently occupied the land, built a house upon it, in which he dwelt from October, 1879, to August, 1882, and from that time on he was in possession by his tenants. He also found that, when the land was sold as unseated land for taxes, the plaintiff owed 63 cents taxes, but that there was personal property on the premises sufficient to make the tax. This tax title which the defendant bought, and took and held a deed for, was therefore apparently an invalid title. Nevertheless, the defendant had the deed recorded, and, by his answer to the plaintiff's bill, claims title under the treasurer's deed in himself, and denies the matters of fact which are alleged in the plaintiff's bill as the grounds of the invalidity of the defendant's deed. These are: (1) That, at the time of the tax sale, the plaintiff resided in the borough where the land is situated; (2) that the plaintiff owned a large amount of personal property in said borough; (3) that there was personal property on the lot out of which the tax could have been made; and (4) that the plaintiff was in possession of the premises from 1879 to the time of filing the bill. All these are matters of fact resting in parol, and the evidence to prove them dies with the witnesses who know them.

The plaintiff is in possession, and therefore cannot bring an action of ejectment to recover the land or prove his title. The treasurer's deed is regular on its face, and in accordance with the requirements of the law, so far as can be judged by anything apparent in its language. The master found that the defendant had not asserted his title, except as stated in his answer; but it cannot be doubted that it is there asserted emphatically and adversely. What, then, is the plaintiff's situation? He is prevented from establishing his title by any proceeding at law, but he is threatened with an adverse paper title placed upon record by the defendant, and by him asserted and pleaded in a judicial proceeding. It is beyond all question that the defendant's deed is a cloud, and a serious one, upon the plaintiff's title. Unless he can remove the cloud by the present proceeding he is without remedy. The master held that no relief could be granted, because there was no relation of trust or contract between the parties, and cites Barclay's Appeal, 93 Pa. St. 53, as authority. The court below sustained this conclusion, though without an opinion. A very slight examination of Barclay's Appeal shows that it was not a case in any respect like the present, or raising the same questions. There was no claim of adverse title to the plaintiff's land, and the bill was brought to obtain a decree for the removal of certain machinery from the premises of the plaintiff. The remarks quoted from the opinion were made in reference to the facts of that case, and are entirely correct as expressing the general state of the law upon the subject named, But they did not affect to discuss, or even state, the law upon the subject of the equity jurisdiction to remove clouds upon titles, and could not have been so intended without conflicting with repeated decisions of this court. Not a single authority was cited, either by the counsel concerned or in the opinion of this court, nor was any proposition expressed respecting this kind of equity jurisdiction.

Our own cases show that we have adopted and fully recognize the equity jurisdiction to remove clouds upon title as fully and as broadly as it is described in the equity textbooks and decisions. Thus in Kennedy v. Kennedy, 43 Pa. St. 417, Mr. Justice Strong said: "And there are very many cases analogous to bills of peace, in which a chancellor has interfered to quiet the enjoyment of a right, or to establish it by a decree, or to remove a cloud from the title. Indeed, this is one of the well-recognized branches of equitable jurisdiction, though its extent is not clearly defined."

This was said in a case in which there was no relation of trust or contract, and the title was legal only. Relief was denied for want of proof, but not for want of jurisdiction.

The same remark is true of the case of Stewart's Appeal, 78 Pa. St. 88, in which the late Chief Justice Sharswood sums up a discussion of the subject thus: "The best expression of the rule, as it seems to me, is to be found in an opinion of the supreme court of Massachusetts, in Martin v. Graves, 5 Allen, 661, by Merrick, J.: 'Whenever a deed or other instrument exists which may be vexatiously or injuriously used against a party, after the evidence to impeach or invalidate it is lost, or which may throw a cloud or suspicion over his title or interest, and he cannot immediately protect or maintain his right by any course of proceeding at law, a court of equity will afford relief by directing the instrument to be delivered up and canceled, or by making any other decree which justice or the rights of the parties may require.'"

It will be observed that the rule thus stated is without any limitation to cases of trust or contract.

In the principal case of Martin v. Graves there was no relation of trust or contract

between the parties to the suit, and the titles claimed by the respective parties were legal only. The plaintiffs alleged fraud in the defendants in procuring the deed sought to be set aside, but the jurisdiction was not put upon the ground of fraud, but on the general ground of cloud upon the plaintiff's title. In 2 Story, Eq. § 700, the writer, after stating the jurisdiction to be undoubted, says: "If an instrument ought not to be used or enforced, it is against conscience for the party holding it to retain it, since he can only retain it for some sinister purpose. * * * If it is a deed purporting to convey lands or other hereditaments, its existence in any uncanceled state necessarily has a tendency to throw a cloud over the title."

In the first note, a, entitled "Cloud upon Title," the annotator has discussed the whole subject of equitable jurisdiction upon this ground, gathering together and classifying a great number of decisions, English and American, illustrating the circumstances in which relief will be given or refused. He says on page 12, (Ed. 1886:) "Assuming, however, that the plaintiff is in a position to ask for relief, he will be entitled to it upon establishing the existence of any such facts as the following: (1) An invalid deed or instrument relating to the title to land, the invalidity of which does not appear therein, as, e. g., an invalid tax deed or receipt;" citing a number of cases, among which is Russell v. Deshon, 124 Mass. 342. Upon referring to this case it is found to be identical in principle, and almost identical in its facts, with the present case. The defendant bought the plaintiff's land at a tax sale for nonpayment of taxes. The plaintiff alleged that he did not know that the tax was unpaid, but supposed it was paid when he acquired his title. He applied to the defendant to release his tax title, but the latter refused to do so, and the plaintiff then filed a bill to remove the cloud on his title and compel a release. It happened that the tax title was invalid because the sale was made more than two years after the warrant to collect the tax was issued. The bill was demurred to for want of equity, but the court overruled the demurrer, and granted the relief prayed for. On page 344 the court says: "The collector's sale was therefore void, and his deed conveyed to the defendant no valid title. But as the defendant has caused the deed to be recorded, and refuses to release to the plaintiff, and claims that he owns the premises, the collector's deed to him creates a cloud on the plaintiff's title. The plaintiff, having continued in possession of the premises since he took his deed, in November, 1875, cannot try his title by writ of entry, and can maintain a bill in equity to remove the cloud from his title."

In Clouston v. Shearer, 99 Mass. 209, it was held that a person in possession of land, and taking the rents and profits, may maintain a bill in equity to quiet his title against one who, as to him, is dispossessed and disseized, but asserts an adverse title under a mortgage, the validity of which is denied by the plaintiff. The same doctrine was applied, in the case of a mortgage of personal property, in Shearman v. Fitch, 98 Mass. 59, and the court said in the opinion, sustaining the bill: "But where a title to real estate is claimed, against which there is no present remedy by action at law, a bill in equity may be maintained to set it aside."

In Hayward v. Dimsdale, 17 Ves. Jr. 111, Lord Chancellor Eldon held that there was jurisdiction in equity to order a deed forming a cloud upon the title to be delivered up, though the deed is void at law.

In 3 Pom. Eq. Jur. § 1398, it is said: "The jurisdiction to remove clouds from title is well settled; the relief being granted on the principle quia timet,—that is, that the deed or other instrument or proceeding constituting the cloud may be used to injuriously or vexatiously embarrass or affect a plaintiff's title."

In the foot-notes very numerous cases are collected; the substance of them being thus expressed: "When the estate or interest to be protected is equitable, the jurisdiction should be exercised, whether the plaintiff is in or out of possession; but, where the estate or interest is legal in its nature, the exercise of the jurisdiction depends upon the adequacy of legal remedies. Thus, for example, a plaintiff out of possession, holding the legal title, will be left to his remedy by ejectment under ordinary circumstances; * * * but when he is in possession, and thus unable to obtain any adequate legal relief, he may resort to equity, [citing many cases.] When, on the other hand, a party out of possession has an equitable title, or when he holds the legal title under circumstances that the law cannot furnish him full and complete relief, his resort to equity to have a cloud removed ought not to be questioned, [quoting numerous decisions.]"

The references to authorities may be closed with a single citation from one of our own cases, Eckman v. Eckman, 55 Pa. St. 269, in which we said, (Woodward, C. J.): "Not only are accident, mistake, and fraud recognized grounds of relief, but, if an instrument ought not to be used or enforced, it is against conscience for the party holding it to retain it, since he can only retain it for a sinister purpose; and, according to Judge Story, the modern decisions entitle him to relief quia timet. 1 Story, Eq. § 700."

In none of the cases have we been able to discover that this kind of relief has been withheld unless there was a relation of trust or contract between the parties. The jurisdiction has been asserted and enforced as an independent source or head of jurisdiction, not requiring any accompaniment of fraud, accident, mistake, trust, or account, or, indeed, any other basis of equitable intervention. Of course, it must be exercised

only in plain cases, and with much care, and not at all where the party has an adequate remedy at law. But where there is no adequate legal remedy available to the party, and the facts are clearly such that he ought to be relieved, there can be no doubt of his right to relief in equity in the manner invoked in the present case.

We are of opinion that upon the facts found by the master, and upon the testimony taken before him, the plaintiff is entitled to be relieved against the tax deed held and set up by the defendant.

We regard the deed as invalid. It is most certainly a serious cloud upon the plaintiff's title. The defendant asserts it, but brings no action upon it. The plaintiff is in possession, and therefore can bring no ejectment. His evidence to prove the invalidity of the defendant's deed rests in parol, and may be lost, and the defendant's deed may be used vexatiously and injuriously, to his disadvantage. These being the clear facts of the case, the plaintiff is entitled to relief by having the defendant's deed delivered up to be canceled.

Now, to-wit, October 4, 1886, the decree of the court below is reversed, at the cost of the appellee; and it is further ordered, adjudged, and decreed that the plaintiff's bill be reinstated, and that the defendant do forthwith surrender and deliver up to the plaintiff for cancellation the treasurer's deed held by him, from Levi Bradford, treasurer, dated the seventh day of September, A. D. 1882, and mentioned in the plaintiff's bill, and that the plaintiff do thereupon pay to the defendant the purchase money, $4.30, paid for the land, and the fees paid for recording the same, and interest on both sums from the date of their payment; and, further, that the costs of the case other than the costs of this appeal be paid equally by the parties.

GORDON, J., dissents.

BASSETT et al. v. LESLIE et al.

(25 N. E. 386, 123 N. Y. 396.)

Court of Appeals of New York. Oct. 28, 1890.

Appeal from supreme court, general term, first department.

*Joseph A. Shoudy*, for appellants. *C. E. Rushmore*, for respondents.

EARL, J. This is an action of interpleader, and the plaintiffs prayed judgment that the defendants might be decreed to interplead touching their several claims, and that the plaintiffs might be at liberty to pay the sum admitted by them to be due into court, and that both defendants might be perpetually enjoined from the further prosecution of actions commenced by them against the plaintiffs. As the case is presented by the demurrer to the complaint, we must assume that all the facts alleged therein are true. This, under the old chancery practice, would have been called "a strict bill of interpleader," and to maintain such an action it is necessary to allege and show that two or more persons have preferred a claim against the plaintiff; that they claimed the same thing, whether a debt or a duty; that the plaintiff has no beneficial interest in anything claimed; and that it cannot be determined without hazard to himself to which of the two defendants the money or thing belongs. There must also be an offer to bring the money or thing into court. Railroad Co. v. Clute, 4 Paige, 384; Dorn v. Fox, 61 N. Y. 268; Railroad Co. v. Arthur, 90 N. Y. 234. Such an action always supposes that the plaintiff is a mere stakeholder for one or the other of the defendants who claim the stake, and the case must be such that he can pay or deposit the money or property into court, and be absolutely discharged from all liability to either of the defendants, and thus pass utterly out of the controversy, leaving that to proceed between the several claimants; and an action of interpleader cannot be sustained where from the complaint itself it appears that one of the claimants is clearly entitled to the debt or thing claimed, to the exclusion of the other. Railroad Co. v. Clute, supra.

Upon the facts alleged in this complaint, it is entirely clear that the plaintiffs are indebted to Alcock & Co. Goods were purchased by them of Alcock & Co., and delivered by the latter in precise conformity with their agreement. It was arranged that Alcock & Co. should procure payment for the goods by means of a draft drawn upon the American Exchange, which was again to be reimbursed by a draft drawn by it upon the plaintiffs. There is no allegation in the complaint that Alcock & Co. took the accepted draft drawn upon the Exchange in payment for their goods, and there can be no presumption, from any facts alleged in the complaint, that they did. It is therefore clear that the plaintiffs are indebted to Alcock & Co., and that, upon the facts alleged in the complaint, they have no defense to the action brought by them for the price of the goods. It is also clear, from the facts alleged in the complaint, that Frank Leslie has no claim whatever against the plaintiffs upon the draft held by her. That draft was drawn by the American Exchange upon the plaintiffs for the purpose of placing it in funds to meet the draft drawn upon it by Alcock & Co.; and, while it neglected and refused to pay the draft accepted by it, it had no cause of action against the plaintiffs upon the draft accepted by them. Its transfer thereof to Mrs. Leslie was a diversion thereof from the purpose for which it was accepted; and, as she took it, without parting with any value, to apply upon a pre-existing indebtedness of the American Exchange to her, she stands in no better position than it, and can no more compel payment by the plaintiffs of the draft than it could if it had brought an action thereon. There can be no doubt, therefore, that, upon the facts alleged in the complaint, the plaintiffs have a perfect defense to the action brought against them by Mrs. Leslie. Upon the facts alleged, there is no controversy between Alcock & Co. and Mrs. Leslie. They claim payment for the goods sold by them to the plaintiffs. Mrs. Leslie claims payment of the draft drawn by the American Exchange upon the plaintiffs, and accepted by them. Alcock & Co., therefore, have nothing to litigate with her, and have no interest in her controversy with the plaintiffs. They are in any event, upon the facts alleged, entitled to payment for the goods purchased of them by the plaintiffs, and no litigation between them and her could in any way affect their rights to such payment. If Mrs. Leslie claims precisely what is alleged in the complaint, her claim is good for nothing, and she cannot recover upon the draft against these plaintiffs. If, however, as may be inferred, she in fact claims that she is a *bona fide* holder of the draft for value, then she can recover thereon against the plaintiffs; and, if they should be compelled to pay her the amount of the draft, they would still be liable to pay Alcock & Co. the price of the goods. It is true that Alcock & Co. and Mrs. Leslie both claim the same amount of the plaintiffs, but the one claims it for goods sold, and the other claims it upon a draft; and, if the plaintiffs should pay the money into court, would it be paid to apply upon the price of the goods, or upon the draft? Undoubtedly the plaintiffs are exposed to the hazard of paying the sum claimed of them twice. But that hazard does not spring out of their liability to pay Alcock & Co., but out of the question whether Mrs. Leslie is a *bona fide* holder of the draft for value; and whether she is or not is a matter solely between them and her. If the two defendants were both claiming the money due upon the draft, or both claiming the money due for the price of the goods, the case would be different. But one defendant claims payment for the goods, and the other claims payment upon the draft, and payment of the one would be no defense to an action for the other.

We may imagine still another state of things. Suppose the plaintiffs claim, and are able to establish, that Alcock & Co. took the acceptance of the American Exchange in absolute payment for the goods sold to the plaintiffs; then the only par-

ties interested in that matter are the plaintiffs and Alcock & Co. Mrs. Leslie has no concern with it, and she and Alcock & Co. cannot be compelled to engage in a litigation over it. As has been stated, if she is a *bona fide* holder for value, her claim upon the draft cannot be defeated by showing payment for the goods. If she is not a *bona fide* holder for value, she cannot recover, as the sole purpose of the draft was to put the American Exchange in funds to pay the accepted draft of Alcock & Co., and it could not lawfully transfer this draft to her to apply upon a precedent debt. For all these reasons, therefore, it is entirely clear that this is not a case for interpleader, and the judgment below should be affirmed, with costs. All concur, RUGER, C. J., in result.

Judgment affirmed.

MAYS v. ROSE et al.

(Freem. Ch. [Miss.] 703.)

Superior Court of Mississippi.

The bill charges that Frederick C. Rose, one of the defendants, had in his possession a large estate, consisting of town lots, in the city of Jackson, goods, wares, and merchandise, choses in action, and money; that he was indebted to several persons in a large amount, and being so indebted, he designed to defraud his creditors; that in pursuance of this design, on the 5th of November, 1839, he executed his deed to Benjamin Rose, another of the defendants, and his brother, conveying to him, purporting to be for the sum of nineteen thousand dollars, the lots in the city of Jackson; that he retained the possession of said property; and as a means of doing so, and as a cover for the fraud, and to enable the said F. C. Rose to carry on the business, and to have the sole control, management, and beneficial interest in the said property, the said Benjamin Rose, on the 2nd of December, 1839, made a power of attorney to him, giving him a general and unlimited power to transact all his business, and to use, sell, or dispose of the property at his will and pleasure; that, under colour of this power of attorney, said Frederick conducted and carried on an extensive business in buying and selling various articles, and particularly in the purchase of cotton; and that all these transactions were carried on by the money of said Frederick in reality, though he professed to act as the agent of said Benjamin; that said Benjamin is a young man, recently arrived in the country, scarcely able to speak the English language; that he was very poor, had been acting in the capacity of a clerk for his brother, was dependent for support solely upon his own exertions and the bounty of his brother, and had no means of his own whatever to have enabled him to become the purchaser of property for so large an amount; and that this pretended sale and conveyance of the property was fraudulent, and designed to hinder and defraud the creditors of said Frederick; that by virtue of several executions, in favor of Elihu Shields, Scott & Avery, and the complainant, amounting in all to about the sum of eight or nine thousand dollars, the said houses and lots were levied on and sold by the sheriff of Hinds county, and complainant became the purchaser, and received the deed of the sheriff for the same; that said Frederick, as the pretended agent of his brother, retains the possession of said property, and has rented out the same to various individuals, and is receiving the rents and profits of the same, and refuses to relinquish said pretended claim, and thereby throws a cloud upon the title of said complainant, and who, by reason of said refusal, is compelled to submit to a loss of the rents and profits which arise from the said houses and lots. The bill prays that a receiver be appointed to collect the rents and profits arising out of the said houses and lots, during the pendency of this suit, to hold them subject to the order of the court, upon its decision; to keep said premises in repair, and rent out the same; and also that the title of complainant be quieted, and he be put in possession of the same, &c.

Upon the motion to appoint a receiver, the complainant also produced the affidavits of E. M. Avery and William H. Elam, who certify that in 1839 they were in the employment of said Frederick C. Rose, as clerks in his store; that some time in October, between the fifth and tenth, Benjamin Rose came also into the employment of his brother, who had accidentally met him as he went on to the north to purchase goods; that Frederick had to purchase clothes and pay his expenses to this state; that they had every opportunity of knowing about the circumstances of said Benjamin, and that he had no means whatever of his own; that he never spoke of any money that he had, nor did they know of any money ever having passed from said Benjamin to said Frederick, for said houses and lots; and that they are confident no such sum of money, as nineteen thousand dollars, could have passed without their knowing it. Notice of the motion to appoint a receiver was also given.

Rucks & Yergers, for motion to appoint a receiver. Wm. Thompson and John B. Forester, contra.

BUCKNER, Ch. An application for the appointment of a receiver is one which is addressed to the sound discretion of the court, to be exercised as an auxiliary to the attainment of the ends of justice. It is one of the modes in which the preventive justice of a court of equity is administered. The great object is to secure the property or thing in controversy, so that it may be subjected to such order or decree as the court may make in the particular case. It is intended equally for the security of both plaintiff and defendant. The possession of the receiver is not adverse to or in hostility to the rights of the defendant; that possession is the possession of the court, held equally for the greater safety of all the parties concerned. Verplank v. Caines, 1 Johns. Ch. 58. A reference to the various decisions upon motions for the appointment of receivers, shows that each case has been made to depend upon its own peculiar features, and throws but little light upon any new case, except so far as they establish the general principles, which should govern the court in the exercise of its discretion upon these motions. These principles are: That the plaintiff must show, first, either that he has a clear right to the property itself; or that he has some lien upon it; or that the property constitutes a special fund to which

he has a right to resort, for the satisfaction of his claim. And, secondly, that the possession of the property by the defendant was obtained by fraud; or that the property itself, or the income arising from it, is in danger of loss from the neglect, waste, misconduct or insolvency of the defendant. These are believed to be the general rules governing all applications of this kind. Orphan Asylum Soc. v. McCartee, 1 Hopk. Ch. 423; Hugonin v. Basely, 13 Ves. 105; Lloyd v. Passingham, 16 Ves. 69. The question here is, does the plaintiff's case come within the application of the principles referred to?

The bill charges that the defendant F. C. Rose was seized of certain town lots in the city of Jackson, with a quantity of merchandise and other property, and that being largely indebted, and wishing to delay and defraud his creditors, he conveyed to his brother Benjamin Rose, the other defendant, by deed of date the 5th of November, 1839, the whole of said property for the nominal sum of one thousand nine hundred dollars; that, in order to more effectually conceal the fraud intended, said F. C. Rose, a short time thereafter, took from said Benjamin Rose a power of attorney, authorising him to transact all his business, and to use, sell or dispose of said property at the will and pleasure of said F. C. Rose, who, pretending to act under said power of attorney, controlled and enjoyed the proceeds of said property, bought and sold various articles in his line as a merchant, and carried on the whole business for his own benefit, without accounting to his brother therefor; that Benjamin Rose was a foreigner, a young man just then come to the country, without property, and dependent mainly upon the bounty and kindness of F. C. Rose for his support; that he was wholly unable to pay, and never did pay, any part of said nominal sum of money; that shortly after the making of said deed, various judgments were obtained against said F. C. Rose, at the instance of pre-existing creditors, upon which judgments executions were issued and levied upon said town lots, and afterwards regularly sold, at which sale the complainant became the purchaser; that there are several tenements on said lots, which have been rented out in part by said F. C. Rose, and in part occupied by him. The bill prays for an injunction against the defendants, as to the receipt of rents, for the appointment of a receiver, and for general relief.

I entertain no doubt that a purchaser of real estate at a sheriff's sale may come into this court for the purpose of setting aside a deed of the property which had been made to defraud the judgment creditor. The purchaser in such case succeeds to all the rights which the judgment creditor had against such fraudulent deed (Frakes v. Brown, 2 Blackf. 295); and the court will extend to him the same remedies and measure of relief that would have been afforded to the judgment creditor himself.

Upon a creditor's bill to reach the property of his insolvent debtor, nothing is more usual than to appoint a receiver to collect and preserve the property pending the litigation. Osborn v. Heyer, Paige, 342. In Bloodgood v. Clark, 4 Paige, 575, Chancellor Walworth says: "In these cases of creditors' bills, where the return of execution unsatisfied pre-supposes that the property of the defendant, if any he has, will be misapplied, it seems to be almost a matter of course to appoint a receiver." I take it to be clear, that the creditors of Rose, under whose judgments the complainant purchased, could have come into this court, to set aside the deed in question; and that upon allegations like those in the complainant's bill, they would have been entitled to ask for the appointment of a receiver; if so, then from the view I have taken of the authorities, the plaintiff's right to do so is equally clear. I think, then, whether we test this application by its analogy to adjudged cases, or by reference to the general principles to which I have adverted, its claim to success is equally clear. The bill shows the complainant's right to the lots in question, by his purchase at sheriff's sale; that the possession of them by the defendant Benjamin Rose was obtained by fraud; and that the rents and profits of the property are in danger of being lost to the complainant, by reason of the fraud, insolvency, or irresponsibility of the defendants; thus embodying all the elements necessary to the success of the motion.

It is worthy of remark, that none of these allegations are attempted to be met and denied by either answers or affidavits from the defendants, although one of them at least was apprised of the pendency of this motion by special notice. It is said by the defendant's counsel, that the motion should not be entertained, because no notice appeared to have been given to Benjamin Rose. It is no doubt the settled practice not to entertain a motion for the appointment of a receiver until the defendant has had notice, if it be practicable to give one; and I should have held this objection as fatal if it were not expressly stated in the bill that the defendant F. C. Rose, upon whom notice was served, was the authorised agent of Benjamin Rose, managing and controlling the very property over which a receiver is sought to be placed. This notice I think sufficient. Notice to an agent is notice to the principal.

The motion for an injunction and for a receiver must be sustained.

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