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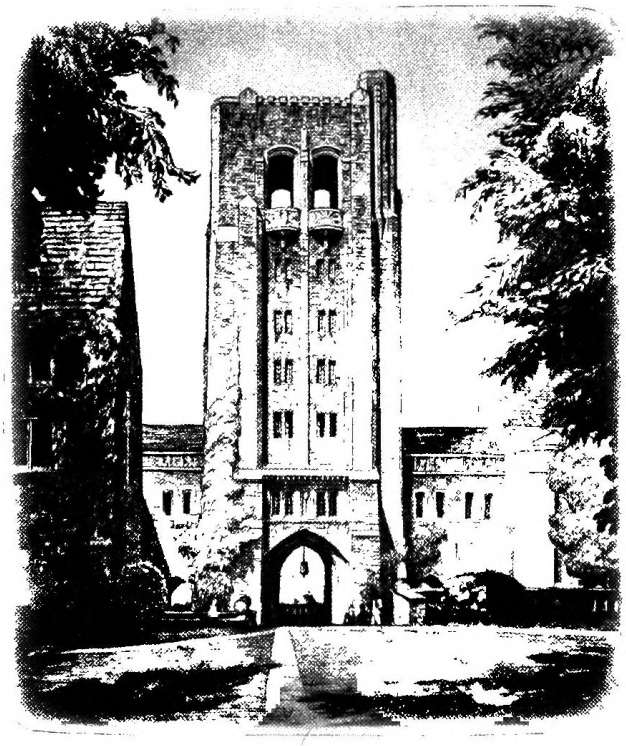

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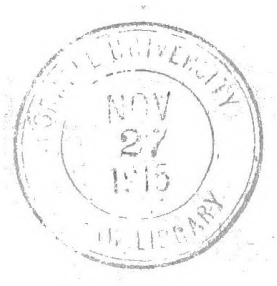

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ON

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TEFT v. STEWART et al.

(31 Mich. 367.)

Supreme Court of Michigan. Jan. Term, 1875.

Appeal from circuit court, Berrien county; in chancery.

Edward Bacon, for complainant. George S. Clapp and D. Darwin Hughes, for defendants.

GRAVES, C. J. The real grievance alleged by complainant is, that defendants combined to defraud him, and the substance of the transaction, and its incidents, which he relates at much length, may be stated from the bill as follows:

The defendant Stewart resided in St. Joseph, Berrien county, and owned a stock of goods, including a quantity of boots and shoes. This property was at Bangor, Van Buren county, and was valued by Stewart at some fourteen thousand dollars, and he wished to sell it. One Sherwin, residing in Illinois, owned a tract of about two hundred acres of land in Berrien county, which he desired to dispose of. Complainant was an acquaintance of Sherwin, and after some negotiations, it was agreed between the different parties, that Stewart should transfer to complainant the boots and shoes and one-half of the remainder of the stock, and that complainant, in consideration thereof, should procure Sherwin, upon certain terms agreed on between Sherwin and complainant, to convey the land to Stewart, but subject to an existing mortgage on it of one thousand dollars; that Carroll should buy the remaining half of the stock of Stewart, at two thousand five hundred dollars; that complainant in a few days received from Sherwin the deed going to Stewart, and called on the latter to deliver it, and get possession of the boots and shoes and his share of the other goods; whereupon Stewart stated that complainant would have no trouble about the goods, as Carroll was at Bangor, in charge of them and making an inventory; that complainant expressed himself as unwilling to deliver the deed unless Stewart would give him some writing which would assure to him his portion, as he had nothing to do with Carroll; that Stewart then stated his readiness to give such a paper, and one Devoe, a brother-in-law of complainant, being present, it was arranged that the writing should run to Devoe instead of complainant; although, as was understood, complainant was solely interested; that Stewart then made a bill of sale to Devoe of the boots and shoes, and half of the rest of the stock, and added an order to Carroll to make delivery; that complainant then gave up the deed to Stewart, who subsequently put it on record, and Devoe received the bill of sale and order, and proceeded to Bangor for the property; that complainant and Devoe then called on Carroll for it, when he refused to deliver any of it, or to allow any of it to be taken, and claimed the whole in virtue of a purchase by himself of Stewart; that complainant succeeded in getting a part of the boots and shoes, but was precluded by Carroll from getting anything more; that complainant discovered, after this claim by Carroll, that subsequent to the conclusion of the terms of the bargain as before mentioned, but before the delivery of Sherwin's deed to Stewart, and the making of the bill of sale and order by Stewart to Devoe, Carroll and Stewart had fraudulently, and without complainant's knowledge, and with intent to cheat him, made an arrangement by which Stewart had given a bill of sale of the whole property to Carroll, and had taken back a mortgage on it for two thousand five hundred dollars; that complainant had neither knowledge nor notice of this transaction when the deed was delivered to Stewart, and the bill of sale and order received from him, and first became aware of it when Carroll refused to allow anything to be taken; that Stewart and Carroll refused to recognize any right of complainant in or to the property, and refused to allow him to have any of it; that Stewart and Carroll, or one of them, have converted a portion of it and appropriated the proceeds, and mixed with the rest of the old stock other goods since procured; that Devoe has assigned to complainant, but that Stewart and Carroll wholly deny his right.

The bill waived answer on oath, and asked no preliminary or final relief by injunction. Neither did it seek to get rid of the deed made to Stewart, or to obtain the land conveyed by Stewart to complainant.

The defendants answered separately, and denied the fraud charged, and most of the material matter tending to show the grievance alleged in the bill. Their account of the transaction was in substance, that complainant was not known to Stewart in the transaction as vendee, or as a party in any way to the trade concerning the goods, and that Carroll was sole vendee.

They further explicitly claimed that the bill did not make a case of equitable cognizance, and insisted that his remedy, if any, was at law.

Proofs having been taken, the court on final hearing decreed that the defendants, within forty days after the 11th of August, 1874, should pay to complainant, or his solicitor, two thousand nine hundred and fifty dollars, with interest from that date at seven per cent., together with complainant's costs, and that he should have execution therefor. The defendant Stewart thereupon appealed, whilst the defendant Carroll acquiesced in the decree.

It appears to me quite impossible, in the face of the objection taken and insisted on, to sustain this decree without sanctioning the right to come into equity in all cases to recover damages where the grievance asserted is a fraud committed by one upon another in a dealing in personal property.

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If the right contended for and carried out by the decree can be maintained, no reason is perceived why, upon the same principle, a party claiming to have been cheated in a horse trade, or in a purchase of any chattels where the amount is sufficient, may not at his election proceed to sue in chancery for damages, and preclude an investigation before a jury.

The principles and course of practice of the court are, however, not in harmony with any such procedure.

It is admitted that the books commonly say that equity has jurisdiction in all cases of fraud, but every one knows that the proposition is not to be accepted literally. It must always be understood in connection with the general and specific remedial powers of the court. These confine it absolutely to civil suits. They also confine it, when the point is seasonably and properly made and insisted on, to transactions where, in consequence of the indicated state of facts, there appears to be ground for employing some mode of action, or some kind of aid or relief not practicable in a court of law, but allowable in equity.

In the present case no injunction was called for, and there was no ground for discovery, and no discovery was sought, as the bill waived an answer on oath.

No claim was set up to have the deed from Sherwin to Stewart set aside, or to have the land conveyed to complainant, and no case is made to warrant such a claim, since the bill contains nothing to show that third persons may not have acquired interests on the faith of Stewart's title.

Indeed, no circumstances are set forth to call specially for equitable intervention or for any assistance or mode of redress peculiar to chancery procedure.

The facts as given, and the case as shaped, point to just the action and relief peculiar to a court of law. They look to a single judgment for damages, and nothing else.

The case, then, was really of legal, and not in strict propriety of equitable cognizance.

The objection was timely made and urged, and complainant was bound to regard it; and unless it is to be maintained that in all cases standing on the same principle, a complaining party is to be allowed by his election to try in chancery, and prevent an investigation by jury, the point made by appellant must be sustained, and in my judgment it should be. Story, Eq. Jur. §§ 72–74; 1 Spence, Eq. Jur. 691–700; Adams, Eq. Introduction, pp. 57, 58; Shepard v. Sanford, 3 Barb. Ch. 127; Bradley v. Bosley, 1 Barb. Ch. 125; Monk v. Harper, 3 Edw. Ch. 109; Pierpont v. Fowle, 2 Woodb. & M. 23, Fed. Cas. No. 11,152; Vose v. Philbrook, 3 Story, 335, Fed. Cas. No. 17,010; Insurance Co. v. Bailey, 13 Wall. 616; Hipp v. Babin, 19 How. 271; Parker v. Manufacturing Co., 2 Black, 545; Jones v. Newhall, 115 Mass. 244; Suter v. Matthews, Id. 253; Foley v. Hill, 2 H. L. Cas. 28; Crampton v. Varna R. Co., 7 Ch. App. 562, 3 Eng. R. 509; Hoare v. Bremridge, L. R. 14 Eq. 522, 3 Eng. R. 824, cited by Lord Hatherly with approbation in Ochsenbein v. Papelier, 8 Ch. App. 695, 6 Eng. R. 576; Kemp v. Tucker, 8 Ch. App. 369, 5 Eng. R. 596; Warne v. Banking Co., 5 N. J. Eq. 410; Haythorn v. Margerem, 7 N. J. Eq. 324.

There would be more reason than there is for wishing to escape from the objection noticed, if complainant's version of the affair was placed by the proofs beyond fair controversy; but it is not. The evidence is extremely conflicting in regard to the true nature of the transaction, and there is room for arguing in favor of the theory advanced on each side. The case is, then, specifically suited for investigation by jury, where the witnesses can be seen and their trustworthiness be better understood.

I think that, so far as the defendant Stewart is concerned, who alone has appealed, the decree should be reversed, and the bill dismissed, with his costs of both courts, but that the dismissal should be without prejudice to any proceedings at law against him the complainant may think proper to take.

CAMPBELL and COOLEY, JJ., concurred. CHRISTIANCY, J., did not sit in this case.

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GREEN et al. v. SPRING.

(43 Ill. 280.)

Supreme Court of Illinois. Jan. Term, 1867.

Error to Richland county; Aaron Shaw, Judge.

J. G. Bowman, for plaintiffs in error. Hayward & Kitchell, for defendant in error.

LAWRENCE, J. This was a bill in chancery for dower and partition, filed in October, 1864, by Henry Green, and Elizabeth M. Green, his wife, alleging that, on the 20th of August, 1843, one Asahel L. Powers died seized in fee simple of two lots in the town of Olney, leaving said Elizabeth, his widow, and without lineal descendants; that the said Elizabeth, in August, 1845, intermarried with one Henry Green, and that she is entitled to an undivided half of said real estate in fee, and a right of dower in the other half; and that said lots were held under claim of title by one Henry Spring, who was made defendant to the bill. Elizabeth M. Green died pending the suit, and her heirs were made parties, and so much of the bill as prayed dower was dismissed by complainants.

After the bill, so far as it related to dower, was dismissed, there was nothing left upon which the jurisdiction of a court of chancery could be maintained. It became, in substance, simply an action of ejectment. The defendant Spring was in possession, claiming title to the entire lots under a sale made in 1845, by the administrator of Powers for the payment of debts.

If this sale, as alleged by the complainant, was illegally made, and one undivided half of the lots belonged to the heirs of Mrs. Green, the other half belonged to the heirs of Powers, who are not parties to this proceeding, and not to the defendant. If he has any interest in the lots, he owns the entirety. This bill professes to be for dower and partition. The claim for dower is abandoned, and the only persons with whom partition can be made are not parties. So far as Spring is concerned, it stands a naked bill to turn him out of possession of land adversely claimed by him, and to compel an account of rents and profits. If this bill can be maintained, we are at a loss to perceive why a bill in chancery cannot be maintained in every instance to recover possession of land adversely held. It is not as if the bill were filed to set aside the administrator's sale for fraud. No fraud is alleged, nor other head of chancery jurisdiction. Indeed, in the bill it does not appear that there has ever been an administrator's sale. It is merely alleged that Spring is in possession claiming adversely, and that complainants know of no title which Spring has to any part of the lots; but that, if he has any, it is only to one-half. In the answer, Spring sets up the title claimed by him under the administrator's sale, which is attacked in the argument, on the ground that there was no jurisdiction to make the order, for want of notice. But the bill was not filed to set this sale aside, and when set up in the pleadings and proof of defendant it is insisted that it was void. The bill was properly dismissed as a bill of partition, for want of proper parties, and, so far as it sought to evict an adverse claimant without title, there was nothing, either in the bill or proofs, to give the court jurisdiction. A court of chancery will sometimes decree an adverse claimant to deliver possession to the rightful owner, but only when such relief is incidental to the main object of the bill, and when the power of the court has been called into action for some purpose that belongs to its legitimate jurisdiction.

Decree affirmed.

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FRUE v. LORING.

(120 Mass. 507.)

Supreme Judicial Court of Massachusetts. Sept. 9, 1876.

Bill in equity to establish a trust. The defendant demurred to the bill for want of equity, and on the ground that there was an adequate remedy at law. The case was reserved by Wells, J., for the consideration of the full court.

B. F. Thomas, for plaintiff. C. A. Welch, for defendant.

COLT, J. The equity jurisdiction of this court, by the terms of the statute, embraces suits and proceedings for enforcing and regulating the execution of trusts, whether the trusts relate to real or personal estate, subject to the general provision which excludes such jurisdiction where the parties have a plain, adequate and complete remedy at common law. Gen. St. c. 113, § 2.

The plaintiff seeks to charge the defendant as trustee for the appropriation to his own use of certain shares of stock held in trust. The bill alleges an agreement between the parties and certain other persons named for the purchase of mining lands on Lake Superior and the formation of mining corporations; the subsequent formation of two companies, and the conveyance to them of the land purchased; the allotment of shares among the proprietors; and the agreement between the plaintiff and the defendant that the plaintiff's shares should be issued to the defendant as trustee, to be held by him until the assessments, to become due from the plaintiff thereon, were paid. It then alleges the plaintiff's payment of more than was due on his shares, referring to annexed exhibits for the state of the account; and charges the defendant with the wrongful sale of the shares and the appropriation of the proceeds. It expressly waives the defendant's oath to his answer, and seeks no discovery as incidental to the relief. The prayer is for an account, for payment of the balance due over the assessments paid, and payment of the highest value of the stock since the plaintiff became entitled to it with all dividends, and for general relief. The question is whether the bill shows a case in which there is not an equally effectual remedy at law.

It is plain, from the allegations in the bill, that the only matter in controversy is the plaintiff's title to the shares of stock in question, and his right to claim that the defendant shall make their value good to him. He does not seek to obtain the control of trust property in the possession of the trustee; but he avers that it has been sold, and we assume that it is now held by the purchaser by good title, discharged of the trust. His claim is reduced to a claim for compensation in damages for the conversion of property of which he claims to have been owner. His right will be determined by settling his title to the property. He seeks no discovery, and there is nothing in the case to show that his right to compensation may not be the same in measure, and that his title may not be as completely and adequately enforced at law as in equity. The jurisdiction in equity extends, it is said, equally to express and implied trusts (Wright v. Dame, 22 Pick. 55); and yet it has never been contended that it embraced all such cases of implied trust as arise out of the relations created by a pledge or mortgage of personal property, or a transfer of choses in action, or shares in a corporation to be held as collateral security for the payment of money, or which might arise between principal and agent, or between bailor and bailee, unless there were facts alleged showing either the need of a discovery in support of the bill, or relief in some form peculiar to courts of equity. In none of the cases cited by the plaintiff, in which the objection has been taken by demurrer, will be found a clear departure from this rule. In most of them an account of the trust, or a discovery, or a delivery of trust property, was prayed for. Hobart v. Andrews, 21 Pick. 526; Raynham Congregational Soc. v. Trustees of Fund in Raynham, 23 Pick. 148; Burlingame v. Hobbs, 12 Gray, 367.

The rule of damages in equity cannot be more favorable than at law to the plaintiff, when he asks compensation only for the conversion of his property.

Nor can this bill be maintained under the jurisdiction given to this court in suits upon accounts, when the nature of the account is such that it cannot be conveniently and properly adjusted and settled in an action at law. It is not shown by sufficiently distinct allegations that there is any peculiar difficulty in ascertaining the true state of the account between the parties. It is not charged that there has been any refusal to render an account; the charge is rather that the defendant refused to account for the proceeds of the stock sold. The elements and means of stating the account appear to be accessible to the plaintiff, for he annexes to his bill a full statement of its items. The real question is of the ownership of the stock, and that question does not appear by the bill to depend upon "long complicated and cross accounts." It is said that courts of equity will decline to take jurisdiction under this head where the accounts are all on one side; or where there is a single matter on the side of the plaintiff and mere set-offs on the other side, and no discovery is sought. 1 Story, Eq. Jur. § 459, note, and cases cited; Adams, Eq. 222. See, also, Locke v. Bennett, 7 Cush. 445, 449; Foley v. Hill, 2 H. L. Cas. 28.

The construction, which we here give to the general clause restricting jurisdiction to cases where the remedy is imperfect at law, is that which has been in many cases recently given under other heads of equity jurisdiction. Thus a bill to redeem a mortgage of per-

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sonal property was dismissed because it did not show that, from the nature of the property, the peculiar relations of the parties, or the difficulty of ascertaining the amount to be paid or tendered, the mode of redemption pointed out by the statute was not sufficient to protect the plaintiff's rights (Gordon v. Clapp, 111 Mass. 22), although a similar bill, containing such averments, was maintained in Boston & Fairhaven Iron Works v. Montague, 108 Mass. 248. So in Jones v. Newhall, 115 Mass. 244, the court refused to entertain a bill in favor of the vendor for the specific performance of a contract, when all that remained to be done was the payment of money by the defendant; and in Suter v. Matthews, 115 Mass. 253, it was declared that there was no concurrent jurisdiction in case of fraud where there is a plain and adequate remedy at law. See, also, Ward v. Peck, 114 Mass. 121.

Demurrer sustained.

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WATSON v. SUTHERLAND.

(5 Wall. 74.)

Supreme Court of the United States. Dec., 1866.

Appeal from circuit court of the United States for the district of Maryland.

Watson & Co., appellants in the suit, having issued writs of fieri facias on certain judgments which they had recovered in the circuit court for the district of Maryland against Wroth & Fullerton, caused them to be levied on the entire stock in trade of a retail dry goods store in Baltimore, in the possession of one Sutherland, the appellee. Sutherland, claiming the exclusive ownership of the property, and insisting that Wroth & Fullerton had no interest whatever in it, filed a bill in equity, to enjoin the further prosecution of these writs of fieri facias, and so to prevent, as he alleged, irreparable injury to himself. The grounds on which the bill of Sutherland charged that the injury would be irreparable, and could not be compensated in damages, were these: that he was the bona fide owner of the stock of goods, which were valuable and purchased for the business of the current season, and not all paid for; that his only means of payment were through his sales; that he was a young man, recently engaged on his own account in merchandising, and had succeeded in establishing a profitable trade, and if his store was closed, or goods taken from him, or their sale even long delayed, he would not only be rendered insolvent, but his credit destroyed, his business wholly broken up, and his prospects in life blasted.

The answer set forth that the goods levied on were really the property of Wroth & Fullerton, who had been partners in business in Baltimore, and who, suspending payment in March, 1861, greatly in debt to the appellants and others, had, on the 27th October, 1862, and under the form of a sale, conveyed the goods to Sutherland, the appellee; that Sutherland was a young man, who came to this country from Ireland a few years ago; that when he came he was wholly without property; that since he came he had been salesman in a retail dry goods store, at a small salary, so low as to have rendered it impossible for him to have saved from his earnings any sum of money sufficient to have made any real purchase of this stock of goods from Wroth & Fullerton, which the answer set up was accordingly a fraudulent transfer made to hinder and defeat creditors.

It further stated that the legislature of Maryland had passed acts staying executions from the 10th of May, 1861, until the 1st of November, 1862; that previous to the 1st November, 1862, Wroth & Fullerton had determined to pay no part of the judgments rendered against them; and that from the 10th May, 1861, until the 1st November, 1862, judgments, amounting to between $30,000 and $40,000 had been rendered against them; that between the date of the suspension, March, 1861, and the 27th October, 1862, they had sold the greater portion of their goods, and collected a great many of the debts due them, but had paid only a small portion of those which they owed; secreting for their own use the greater portion of the money collected, and with the residue obtaining the goods levied upon.

It added that there was no reason to suppose that the levy aforesaid, as made by said marshal, would work irreparable injury to the appellee, even if the goods so levied on were the property of the complainant, as property of the same description, quantity, and quality, could be easily obtained in market, which would suit the appellee's purpose as well as those levied upon, and that a jury would have ample power, on a trial at common law, in an action against the respondents, now appellants, or against the marshal on his official bond, to give a verdict commensurate with any damages the said appellee could sustain by the levy and sale of the goods aforesaid.

On the filing of the bill a temporary injunction was granted, and when the cause was finally heard, after a general replication filed and proof taken, it was made perpetual.

These proofs, as both this court and the one below considered, hardly established, as respected Sutherland, the alleged fraud on creditors.

The appeal was from the decree of perpetual injunction.

Mason, Campbell & McLaughlin, for defendants. Wallis & Alexander, contra.

Mr. Justice DAVIS delivered the opinion of the court.

There are, in this record, two questions for consideration. Was Sutherland entitled to invoke the interposition of a court of equity? and, if so, did the evidence warrant the court below in perpetuating the injunction?

It is contended that the injunction should have been refused, because there was a complete remedy at law. If the remedy at law is sufficient, equity cannot give relief, "but it is not enough that there is a remedy at law; it must be plain and adequate, or in other words, as practical and efficient to the ends of justice, and its prompt administration, as the remedy in equity."[1] How could Sutherland be compensated at law, for the injuries he would suffer, should the grievances of which he complains be consummated?

If the appellants made the levy, and prosecuted it in good faith, without circumstances of aggravation, in the honest belief that Wroth & Fullerton owned the stock of goods (which they swear to in their answer), and it should turn out, in an action at law instituted by Sutherland for the trespass, that the merchandise belonged exclusively to him, it is well settled that the measure of dam-

[1] Boyce's Ex'rs v. Grundy, 3 Pet. 210.

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ages, if the property were not sold, could not extend beyond the injury done to it, or, if sold, to the value of it, when taken, with interest from the time of the taking down to the trial.[2]

And this is an equal rule, whether the suit is against the marshal or the attaching creditors, if the proceedings are fairly conducted, and there has been no abuse of authority. Any harsher rule would interfere to prevent the assertion of rights honestly entertained, and which should be judicially investigated and settled. "Legal compensation refers solely to the injury done to the property taken, and not to any collateral or consequential damages, resulting to the owner, by the trespass."[3] Loss of trade, destruction of credit, and failure of business prospects, are collateral or consequential damages, which it is claimed would result from the trespass, but for which compensation cannot be awarded in a trial at law.

Commercial ruin to Sutherland might, therefore, be the effect of closing his store and selling his goods, and yet the common law fail to reach the mischief. To prevent a consequence like this, a court of equity steps in, arrests the proceedings in limine; brings the parties before it; hears their allegations and proofs, and decrees, either that the proceedings shall be unrestrained, or else perpetually enjoined. The absence of a plain and adequate remedy at law affords the only test of equity jurisdiction, and the application of this principle to a particular case, must depend altogether upon the character of the case, as disclosed in the pleadings. In the case we are considering, it is very clear that the remedy in equity could alone furnish relief, and that the ends of justice required the injunction to be issued.

The remaining question in this case is one of fact.

The appellants, in their answers, deny that the property was Sutherland's, but insist that it was fraudulently purchased by him of Wroth & Fullerton, and is subject to the payment of their debts. It seems that Wroth & Fullerton had been partners in business in Baltimore, and suspended payment in March, 1861, in debt to the appellants, besides other creditors. Although the appellants did not recover judgments against them until after their sale to Sutherland, yet other creditors did, who were delayed in consequence of the then existing laws of Maryland, which provided that executions should be stayed until the 1st of November, 1862. Taking advantage of this provision of law, the answer charges that Wroth & Fullerton, after their failure, collected a large portion of their assets, but appropriated to the payment of their debts only a small portion thus realized, and used the residue to buy the very goods in question, which Sutherland fraudulently purchased from them on the 27th of October, 1862, in execution of a combination and conspiracy with them to hinder, delay, and defraud their creditors. The answers also deny that the injury to Sutherland would be irreparable, even if the stock were his, and insist that he could be amply compensated by damages at law. After general replication was filed, proofs were taken, but, as in all contests of this kind, there was a great deal of irrelevant testimony, and very much that had only a remote bearing on the question at issue between the parties. It is unnecessary to discuss the facts of this case, for it would serve no useful purpose to do so. We are satisfied, from a consideration of the whole evidence, that Wroth & Fullerton acted badly, but that Sutherland was not a party to any fraud which they contemplated against their creditors, and that he made the purchase in controversy, in good faith, and for an honest purpose.

The evidence also shows conclusively, that had not the levy been arrested by injunction, damages would have resulted to Sutherland, which could not have been repaired at law.

The decree of the circuit court is, therefore, affirmed.

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[2] Conard v. Pacific Ins. Co., 6 Pet. 272, 282.

[3] Pacific Ins. Co. v. Conard, 1 Baldw. 142, Fed. Cas. No. 10,647.

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LYNCH v. METROPOLITAN EL. RY. CO. et al.

(29 N. E. 315, 129 N. Y. 274.)

Court of Appeals of New York. Dec. 15, 1891.

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

Action by Lawrence Lynch against the Metropolitan Elevated Railway Company and others to restrain the maintenance and operation of defendants' roads in front of plaintiff's premises, and for damages. Plaintiff obtained judgment, which was affirmed by the general term. Defendants appeal. Affirmed.

Samuel Blythe Rogers and Julien T. Davies, for appellants. Charles Gibson Bennett, for respondent.

GRAY, J. This action was brought to restrain the maintenance and operation of the defendants' roads in front of the plaintiff's premises, and the prayer for such a judgment included also a demand for the amount of loss and damage which might be ascertained to have been already sustained by the plaintiff. The complaint sets out the title and ownership of the plaintiff, and his rights in and to the street in front of his premises; the construction of the elevated railroad, and the operation of trains over it, and the annoying results therefrom; the illegal and unauthorized nature of the trespass upon the plaintiff's premises and easements, and the failure of the defendants to acquire or to make compensation for them; the injuries sustained, and that they will be constant and continuous; and, finally, that, to prevent a multiplicity of suits, to protect against irreparable damages, and to afford complete relief, the plaintiff is compelled to seek the equitable interference of the court. When the action came on for trial the defendants' counsel moved for a trial of the plaintiff's claim for past damages by jury, and the exception to the denial of that motion raises the main question presented upon this appeal.

The clause of the constitution upon which the demand for a jury trial was based reads: "The trial by jury, in all cases in which it has heretofore been used, shall remain inviolate forever." The argument for the appellants is, in substance, that there were two independent causes of action stated in the complaint, of which one was for past damages, which, prior to the constitution of 1846, was cognizable solely in a court of law, and that, under the Code, it comes within the equity jurisdiction of the court only by reason of the permission to join in one complaint legal and equitable causes of action. By section 970 of the Code of Civil Procedure, which was a new enactment, it is provided that "where a party is entitled by the constitution, or by express provision of law, to a trial by a jury of one or more issues of fact, * * * he may apply upon notice to the court for an order directing all the questions arising upon that issue to be distinctly and plainly stated for trial accordingly," whereupon the court must so order, etc. If the defendants believed that they had a constitutional right to a jury trial of some issue of fact in this action, it would have been the natural and orderly way for them to make an application to the court under this section. The complaint appears to be but one consecutive narrative of the grounds upon which the equitable interference of the court is alleged to be necessary. The pretense that there is a separate cause of action rests only upon the demand of the complainant that, if he is entitled to the equitable relief of an injunction, the court shall adjudge to him such an amount for the loss sustained by the defendants' acts as shall be ascertained. Undoubtedly the claim for past damages sustained by plaintiff in his property rights from the defendants' acts could have been made the subject of an action at law, but that was not the cause of action which the plaintiff elected to assert in his complaint, and to bring to trial. What he attempted by instituting his action was to restrain the continuance of acts, which were constantly injuring, and would, to all appearances, constantly in the future continue to injure, him in ways and in a manner which he described in his complaint. That was a form of relief demandable and cognizable only on the equity side of the court. Hence, as upon the face of the complaint the plaintiff alleged a cause of action for equitable relief, if the defendants conceived that they were entitled to a trial by jury of any issue of fact involved in the statements of the complaint, they might have moved the court under section 970, and then the question could have been opportunely and properly met. Appellants cite upon this point the decision in Colman v. Dixon, 50 N. Y. 572; but that was made in 1872, and section 970 was a new provision, and was enacted in 1877.

But, whatever the effect of the omission to take this course of procedure, we need not determine it now, inasmuch as the conclusion we have reached holds the right to a separate trial by jury, as to the amount of past damages, in such an action, not to be within the purview of the constitutional guaranty. The action was one purely for a court of equity, for the main relief sought was an injunction against the defendants, restraining them from maintaining and operating their elevated railroad. To the assertion of this ground for the equitable interference of the court the facts in the complaint were marshaled, and to the necessity for granting that species of relief every allegation of the complaint was framed and calculated to lead. There was but one cause of action stated in this complaint, and that was the claim for relief against the continued trespass upon the complainant's properties. The demand for past damages, included in the prayer for judgment, does not have the effect to set up an independent cause of action. It is nothing more than a demand that the court, having adjudged the plaintiff entitled to the equitable relief prayed for, and having acquired entire jurisdiction of the action, will assess the damages which appear to have been sustained down to the trial. It has always been a well-settled and familiar rule that when a court of

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equity gains jurisdiction of a cause before it for one purpose it may retain it generally. To do complete justice between the parties, a court of equity will further retain the cause for the purpose of ascertaining and awarding the apparent damages, as something which is incidental to the main relief sought. While this is done on the ground that the remedy for the damage done is deemed to be incidental to the relief of injunction, the principle is in perfect harmony with the theory of the jurisdiction of a court of equity. Its power is invoked, and it interferes to restrain a trespass which is continuous in its nature, in order to prevent a multiplicity of suits; and, taking jurisdiction of the cause for such a purpose, it may retain it to the end, and close up all matters for legal dispute between the parties by assessing the loss sustained from the acts which it has restrained. The power and practice of courts of equity were, as it was forcibly remarked by Judge EARL in the case of Madison Avenue Baptist Church, 73 N. Y. 82, 95, "when they have once obtained jurisdiction of a case, to administer all the relief which the nature of the case and the facts demand, and to bring such relief down to the close of the litigation between the parties." The fact that a money judgment is ordered against the defendant for the plaintiff's loss affords no peculiar ground for attacking equity's jurisdiction. That is frequently the case in actions of an unquestioned equitable nature. Quite recently, Judge FINCH, in Van Rensselaer v. Van Rensselaer, 113 N. Y. 207, 21 N. E. Rep. 75, observed, with respect to an objection to the jurisdiction of a court of equity that the final relief would be a personal judgment, that it would not in that manner lose its jurisdiction of an action of an equitable character. The jurisdiction "once acquired," he said, "it retains to the end, even though it may turn out that adequate relief is reached by a merely personal judgment. That is not an uncommon occurrence." Instances are frequent in which a court of equity decrees the payment of money as an incident of the grant of equitable relief, and that feature does not suffice to qualify the jurisdiction. But I think we should consider the question to have been settled, upon the authority of several decisions of this court. In the case of Williams v. Railroad Co., 16 N. Y. 97, the opinion was delivered by Judge SAMUEL SELDEN. That was a suit in equity, brought to restrain the defendants from using the street with their railway, and to recover damages for past use. The conclusion arrived at, as expressed in the opinion, was that "it follows that the defendants, in constructing their road, * * * were guilty of an unwarrantable intrusion and trespass upon plaintiff's property, and that he is entitled to relief. Although he had a remedy at law for the trespass, yet, as the trespass was of a continuous nature, he had a right to come into a court of equity, and to invoke its restraining power, to prevent a multiplicity of suits, and can, of course, recover his damages as incidental to this equitable relief. There may be doubt as to his right to recover in this suit the damages upon the lots which have been sold, because as to those lots there was no occasion to ask any equitable relief, and to permit the damages to be assessed in this suit, in effect, deprives the defendants of the right to have them assessed by a jury. But, as this question has not been raised, it is unnecessary to consider it." There are two things to be noted in that opinion. In the first place, the damages already sustained were deemed within the power of a court of equity to award as an incident of its jurisdiction over the action. This idea is, in fact, emphasized by the suggestion as to the lots which had been sold, because it is clear that the court regarded its right to award the damages as a matter connected with or dependent upon the ground for granting any equitable relief; that is to say, as to the property to be protected by the decree of the court against the defendants' acts, the damages caused to it could be assessed by the court; but as to that portion withdrawn by the sale it might be doubtful, because not the subject of, or entitled to, the equitable relief. It is very obvious that the court had in mind the question as to the right of trial by jury. In the second place, it may be noted that the opinion speaks of the assessment of the damages. This definition of an assessment of the damages seems to me to put the action of the court in line with just what courts of equity have always done in cases over which they have gained jurisdiction; that is to say, they proceed to inquire directly, or by reference, or otherwise, as to the damages sustained, and assess them accordingly. When, later, the same case, entitled as Henderson et al., after a new trial, came up again, (78 N. Y. 423,) the opinion of the court was delivered by Judge DANFORTH, who again upheld the plaintiff's right to invoke the equitable power of the court, and held that he could, "of course, recover his damages as incidental to this equitable relief;" and he stated it to be "an elementary principle" that "when a court assumes jurisdiction in order to prevent a multiplicity of suits it will proceed to give full relief both for the tortious act and the resulting damages." The opinion was carefully written, and based upon the authority of many cases. Recently, again, in the case of Shepard v. Railroad Co., 117 N. Y. 442, 23 N. E. Rep. 30, it was said of these actions that they were necessarily "on the equity side of the court, as the main relief sought was the injunction against the defendants," and that in them the complainants could "recover the damages they have sustained as incidental to the granting of the equitable relief." This view, as stated in that opinion, was expressly based upon the Williams and Henderson Cases, and upon the supposed equitable principles governing such actions. The Shepard Case somewhat conspicuously illustrates the powers a court of equity may arrogate to itself with the object of completely determining and quieting the questions before it when it has once acquired jurisdiction of the action. It follows, in that respect, a rule long established by authority. It is true that in these cases the right to demand a jury trial as to past

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damages was not precisely or in terms stated as the proposition advanced; but that, as it seems to me, would be a very narrow evasion of the effect of the opinions delivered. They did consider the nature of such actions, and deliberately declared the power of the court in equity, as an incident of the main relief of injunction, to assess the damages sustained. In Carpenter v. Osborn, 102 N. Y. 552, 7 N. E. Rep. 823, the court, in an action to set aside certain conveyances as fraudulent, granted the equitable relief prayed for, and, in addition, decreed the judgment a lien upon the land for some unpaid installments of interest, to the payment of which the defendant had obligated himself in a certain agreement. Chief Judge RUGER delivered the opinion of this court in affirmance of the judgment, and said: "This principle has been applied in many cases in awarding judgment for pecuniary damages, even when the party had an adequate remedy at law, if the damages were connected with a transaction over which the courts had jurisdiction for any purpose; although for the purpose of collecting damages merely they would not have had jurisdiction." In support of the principle declared by him, the learned judge cited Pom. Eq. Jur. § 181, and various cases.

I think some confusion of thought concerning the constitutional guaranty of a trial by jury may arise in a misapprehension as to its proper application. That provision relates to the trial of issues of fact in civil and criminal proceedings in the courts, as it was held by the chancellor in the case of Beekman v. Railroad, 3 Paige, 45. Where the trial of a civil proceeding presents for determination a question of fact the right of trial by jury is proper, and can be invoked. But an action brought to restrain the commission of trespasses which are continuous in their nature is necessarily in equity, and the court interferes to prevent multiplicity of suits, and grants equitable relief by way of an injunction. The question presented for determination in such an action is one of law, whether, upon the facts to be established upon the trial, the plaintiff is entitled to such relief. Upon the proofs, showing the nature of the trespasses, and the consequent injury to the complainant's property, the court decides the question of plaintiff's right to an injunction. It does not seem to me that it can be said that any issue of fact as to damage remains. That was necessarily decided in the action, and all that remains is to fix its amount; and I do not think the constitutional provision was aimed at such a proceeding. As defined by the chancellor in the case above referred to, it seems difficult to rationally give it an application to what is simply an assessment of the damages. I may extract, and may appositely quote here, a remark of Judge ANDREWS in his opinion in Cogswell v. Railroad Co., 105 N. Y. 319, 11 N. E. Rep. 518: "We think," he says, "it is a reasonable rule, and one in consonance with the authorities, that where a plaintiff brings an action for both legal and equitable relief, in respect to the same cause of action, the case presented is not one of right triable by jury under the constitution." The case was one wherein the plaintiff's complaint demanded judgment for damages and an abatement of a nuisance, and also for an injunction against its continuance. The learned judge's opinion is upon the question of whether such an action was one for a nuisance, under section 968 of the Code, which must be tried by jury, unless waived or referred, and he held that it differed from Hudson v. Caryl, 44 N. Y. 553, which was a common-law action, in that equitable relief by way of injunction was asked, and not simply the relief obtainable by writ of nuisance for damages and an abatement. His remark upon the right to a jury trial in equitable actions is not out of place, however, here. To carry this discussion backwards, and to a time anterior to decisions of this court, we find warrant in the opinions then held by our own and the English chancery courts for holding that a trial by jury was not usual in cases where equity had acquired jurisdiction, and that the court would administer all the relief which the facts warranted, including the assessment and awarding of compensation for injury sustained. In Watson v. Hunter, 5 Johns. Ch. 169, the bill was filed to enjoin the cutting of timber and to restrain the removal of that which had already been cut. Chancellor KENT confined the relief of injunction to the timber standing, and refused it as to the removal of the cut timber, on the ground that it would be an application to an "incidental remedy." He said that "the practice of granting injunctions in cases of waste is to prevent or stay the future commission of waste, and the remedy for waste already committed is merely incidental to the jurisdiction in the other case, assumed to prevent multiplicity of suits, and to save the party the necessity of resorting to trover at law." The chancellor's exposition of the principle upon which equity acts in cases of waste obviously is as applicable to cases of trespass. If the action at law in trover was deemed unnecessary for the personal property already converted in that case, it seems unnecessary in such an action as this, in order to recover the loss sustained from the trespass. The chancellor in the Watson Case relied upon the practice followed by the English chancellors. Lord HARDWICKE, in Garth v. Cotton, 1 Ves. Sr. 528, had held that the decree for the waste already committed was an incident to the injunction to stay waste. Before that, in Jesus College v. Bloom, 3 Atk. 262, where the bill was filed for an account and satisfaction for waste in cutting trees, and no injunction was prayed for, Lord HARDWICKE said that the bill was improper, and that an action of trover was the remedy. He asserted the rule, however, that where the bill was for an injunction to prevent waste, and for waste already committed, the court, to prevent a double suit, would award an injunction to prevent future waste, and decree an account and satisfaction for what was past. He held that to prevent multiplicity of suits the court will, on bills for injunction, make a complete decree, and give the injured party a satisfaction

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for what had been done, and not oblige him to bring another action at law. In the subsequent case of Smith v. Cooke, Id. 381, the same lord chancellor declared the same doctrine, as did also Lord THURLOW in Lee v. Alston, 1 Ves. Jr. 78. I quote a remark of Lord NOTTINGHAM in Parker v. Dee, 2 Ch. Cas. 201, that when a court of chancery has once gained possession of the cause, if it can determine the whole matter, it will not be the handmaid of other courts, "nor beget a suit to be ended elsewhere."

In our former court of errors Chancellor (then Judge) KENT held, in Armstrong v. Gilchrist, 2 Johns. Cas. 424, 431, (decided in 1800,) that "the court of chancery, having acquired cognizance of a suit, for the purpose of discovery or injunction, will, in most cases of account, whenever it is in full possession of the merits, and has sufficient materials before it, retain the suit in order to do complete justice between the parties and to prevent useless litigation and expense." That case was upon a bill for specific relief, and to restrain an action at law brought to recover the value of certain bank-stock, and it set up certain equitable considerations as against the justice of a recovery in the other action. The chancellor below decided against the whole relief sought by the bill, and decreed in favor of the defendants that the complainants should pay them the value of the stock, and ordered a reference to state the account. This procedure the court of errors upheld as being right, and the duty of the chancellor to follow. I do not consider the cases cited by the appellants to be at all controlling upon the question. In Murray v. Hay, 1 Barb. Ch. 59, the bill was filed by two persons, who were owners of different dwelling-houses in severalty, having no joint interest in either of them, to restrain a nuisance which was a common, but not a joint, injury to both complainants. The objection to the prayer for an account and compensation for their respective damages was upon the ground of multifariousness, and so considered. Another case, of Hudson v. Caryl, 44 N. Y. 553, was an action to recover damages for the overflowing of plaintiff's lands, and to compel the removal of the dam; and the decision turned upon the ancient right to a jury trial in such an action of nuisance, which the Code had not affected. It was not an action in equity to restrain a nuisance, which, according to Judge ANDREWS' opinion in the Cogswell Case, supra, would not be an action for a nuisance directed by the Code to be tried by jury. But the judge who delivered the opinion of the majority of the commission of appeals in Hudson v. Caryl spoke *obiter* in his remarks upon the general right of trial by jury, as his opinion indicates, for he says (page 555:) "But, whatever may be said or decided in regard to the trial of other actions, in which two causes of action—one exclusively of legal, and another exclusively of equitable, cognizance, arising out of the same transaction—are united, this action should, for an independent reason, have been tried by jury, and that is that the action, when brought for the double object of removing the nuisance and recovering the damages occasioned by it, was always tried by jury;" and he proceeds to refer to Blackstone and to the old Revised Statutes. As, therefore, "a case is presented in which a trial by jury has been heretofore used," the commissioner concluded it was error to refuse it.

It does not seem to me necessary to pursue further the consideration of authorities. The respondent's counsel has cited others in this and the lower courts. In a note to Armstrong v. Gilchrist, supra, will be found reference to other early cases in this state and in the United States supreme court in support of the "settled rule that when the court of chancery has gained jurisdiction of a cause for one purpose, it may retain it generally for relief." Underlying the system upon which courts of equity have exercised their power, as I understand it, is the principle that when they have gained jurisdiction of a cause by reason of the infirmity of the courts of law to entertain it, or to give full relief, they will retain their control of the cause generally, and settle up the whole matter between the parties. I have discussed the question here at considerable length, in order that a rule, long settled by careful judicial utterances, and in itself reasonable and commendable as promoting the public convenience in the disposition of litigated causes, might not, at this day, be shaken by doubts. The conclusion which I think we must reach is that, in this complaint, the cause of action is single, and constitutes a claim for equitable relief, and there is not mixed up with it a cause of action for legal relief. The facts alleged as a basis for an appeal to the court to exert its equitable power may well have constituted a claim for legal relief, and might have been set up in an action at law; but that consideration cannot affect nor change the equitable nature of the action itself. It was not error, therefore, to deny the motion for a trial by jury as to past damages, and the court could competently proceed with the trial of the cause in equity. The only other point presented to us upon this appeal is that it was error to award damages for portions of the property which were in the possession of tenants. As to this question the case is controlled by the decision of the Kernochan Case, 29 N. E. Rep. 65, (at this term.) The judgment should be affirmed, with costs. All concur, except EARL and PECKHAM, JJ., dissenting.

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MORSS v. ELMENDORF.

(11 Paige, 277.)

Court of Chancery of New York. Dec. 3, 1844.

This was an appeal from a decree of the late assistant vice chancellor of the first circuit. The bill was filed for the specific performance of a contract under the following circumstances: The defendant, Lucus Elmendorf, and Dutcher & Hogeboom, all supposing that there was a gore of land, containing about 183 acres, between lot No. 11 of the subdivisions of great lot No. 49, in the Hardenburgh patent, and the south line of great lot No. 50, in the same patent, and that Elmendorf was the owner thereof, an agreement was entered into between them, in the following words: "I do by these presents, agree to and with G. Dutcher and C. Hogeboom, to lease to them the gore lot, of about 183 acres, situate in the town of Prattsville, Greene county, lying between lot No. 11 in great lot No. 49, and the south line of great lot No. 50, in the Hardenburgh patent; by a durable lease to them, either jointly, or to each a separate lease, which shall contain a reservation on the whole lot of 32 bushels of good, merchantable winter wheat, after three years rent free; the lease or leases to contain the usual reservations and covenants of my durable leases on my Stratsburgh tract, in Schoharie county. They have my permission immediately to move on to the same, provided they shall take and execute leases within three years, rent free, from this date. March 1, 1839." Shortly afterwards, Dutcher and Hogeboom assigned all their interest in the contract to G. B. Morss, the complainant, upon condition that they should have all the bark upon the land at the market price, to be peeled, and drawn and delivered by them to Morss, and to be paid for by him in the manner in the assignment specified. The instrument called an assignment then concluded in these words: "If this memorandum is not sufficiently strong to hold the bark, we are to give the said Morss another one as soon as requested." Soon afterwards, the complainant ascertained that it was doubtful whether Elmendorf had title to any such land as was referred to in the agreement; and neither he, nor Dutcher and Hogeboom, ever went into possession of the supposed gore, under the contract. In 1840, Elmendorf became satisfied that there was no such gore as the parties at the time of entering into the agreement, supposed existed; and he refused to execute a lease to Morss, who demanded the execution of the same to him, under such agreement. The complainant thereupon filed his bill in this cause, for a specific performance of the contract. The defendant, by his answer, stated that there was no such gore of land as, by the contract for a lease, was supposed to exist, and that there was no land between lot No. 11, of the subdivision of great lot No. 49 and the line of great lot No. 50. The testimony of a surveyor, who was well acquainted with the corners and locations of the several lots, also showed that there was no such gore; but that great lot No. 50, and lot No. 11 of the subdivisions of great lot No. 49, were bounded upon one and the same line, and upon each other. The cause was heard upon pleading and proofs, and the assistant vice chancellor decreed that the complainant was entitled to relief against the defendant, in this court. And he further decreed that it be referred to a master to ascertain the location and boundaries of what was designated as the gore lot, and to make a map thereof if he should be able to locate the same; and if he could not locate the same, or should find that the supposed gore was within the bounds of great lot No. 50, or of some other lot than great lot No. 49, then to ascertain whether the defendant, at the date of the contract, was the owner of lot No. 11 of the subdivision of great lot No. 49, or of any and what part thereof, and if so, whether he was still the owner, or when he ceased to be such owner; and if the defendant was such owner, the master was directed to set off a strip of lot No. 11, on the westerly side thereof, equal in contents and value to the gore of 183 acres, as it was at the date of the contract. And the defendant was directed to execute to the complainant a perpetual lease hereof, according to the terms of the contract. It was further decreed, in case the master should find that the defendant did not then own lot No. 11, or any part thereof, and was not the owner thereof at the date of the contract, that such master proceed to assess the damages which should be allowed and paid to the complainant by the defendant, for the non-performance of the contract. From this decree the defendant appealed to the chancellor.

M. McDonald, for appellant. A. J. Parker, for respondent.

WALWORTH, Ch. There is no principle upon which this decree or any part thereof can be sustained. The question whether there was in fact any gore, between lot No. 20 of the subdivisions of great lot No. 49 and the line of great lot No. 50, was distinctly put in issue by the defendant's answer, and by the replication filed to the same; so that each party had a full opportunity to take testimony to that point. And the evidence of Keirstead, the surveyor, and the map of the location of the lots, produced by him, show conclusively that no such gore ever existed except in the imaginations of the inhabitants of the neighborhood, and in that of the defendant who resided at some considerable distance from the supposed premises intended to be leased. It, therefore, was useless and improper to direct a reference, and subject the parties to further expense, when the complainant had not attempted to controvert this fact, stated in the defendant's answer, by any testimony whatever in

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opposition to the positive evidence of Keirstead; who established the fact beyond all doubt. Another surveyor who surveyed the supposed gore for the complainant, and who was examined by him as a witness, does not pretend to dispute the fact sworn to by Keirstead, that the supposed gore is in fact within the bounds of great lot No. 50, as actually run out and located upon the land by Tappan and Cockburn; the commissioners who made the partition of the patent more than fifty years since. It must, therefore, be considered as settled, for all the purposes of this suit, that all the parties to the contract of the first of March, 1839, were under a mistake in supposing that there was any such gore as is described in that contract. It is true the letters of the defendant, written soon after the contract was made, and when he supposed great lots No. 20 and No. 49 cornered together, state that there was a gore. But the answer and the evidence show that the defendant was then laboring under a mistake. And as the lease, if executed in conformity with that contract, and purporting to convey land which has in fact no existence, would have been a mere nullity, there was nothing of which a specific performance could be decreed. I am also satisfied, from the evidence, that the complainant must have been aware of the fact that there was no such gore of land, at the time of filing this bill.

The assistant vice chancellor has indeed attempted to make a new contract for the parties, and to decree a specific performance thereof, provided the defendant owns any land in lot No. 11. That, however, is land which neither of the parties supposed was to be included in the lease. For by the terms of the contract the whole of great lot No. 50, and the whole of lot No. 11 of the subdivisions of great lot No. 49, are necessarily excluded from the operation of such contract. See Jackson v. Woodruff, 1 Cow. 276. Where the vendor has contracted to convey a tract of land the title to a part of which fails, the vendee may claim a specific performance of the contract as to the residue of the land, with a compensation in damages in relation to the part as to which the vendor is unable to give a good title. At least courts of equity have in some instances acted upon that principle. But I am not aware of any case in which the vendor has been decreed to convey an entirely different piece of land from that which the parties had in contemplation at the time of making their contract, and which is not in fact embraced in such contract. Here it is perfectly evident that neither party, at the time of making this contract, expected that Elmendorf was to lease to Dutcher and Hogeboom any part of lot No. 11. That part of the decree which directs the master to set off to the complainant 183 acres of lot No. 11, to be leased to him by Elmendorf, provided it shall be found by the master that the defendant is the owner of lot No. 11, is therefore clearly erroneous.

Nor do I think this is a proper case for the court to decree a compensation in damages to the complainant; even if this court has jurisdiction to entertain a suit for damages merely, where the defendant never had the title to land which he has positively agreed to convey, or where he has parted with his title before the commencement of the suit, and that fact is known to the complainant at the time of filing of his bill. Here the evidence shows that the parties were acting under a mutual mistake, as to the actual existence of the gore between lots No. 20 and 50, at the time the contract was made. If the contract has any legal force or effect whatever, which is at least doubtful, there is no reason why Dutcher and Hogeboom, or the complainant who claims the benefit of the contract under them, should not be left to their action at law to recover damages for the non-performance of the contract, if any damages have in fact been sustained. Nothing had been done by them, or either of them, under the contract, and nothing had been paid. Nor was there any mutuality in it. For the defendant could not have sustained any suit or action, against Dutcher and Hogeboom, if they had refused to take a lease of the supposed gore of land; which, in fact, had no existence. The most that can be said in this case is, that Dutcher and Hogeboom have lost the speculation which they supposed they were making when they entered into the contract of March, 1839. The means of ascertaining whether the supposed gore had any existence was equally accessible to both parties, as the lines of the lots were run out and marked upon the land. And the defendant being misled by the reports in the neighborhood of the existence of a gore, when there was no such gore, no fault is attributable to him. In such a case, the proper course is to leave the parties to their legal remedies, if they have any.

It is also perfectly evident in this case, that the complainant, at the time he filed his bill, was aware that the supposed gore had no actual existence, and that no specific performance of the agreement could be obtained in this court. And, in a case of that kind, Chancellor Kent correctly decided that this court ought not to entertain the suit merely for the assessment of damages. Hatch v. Cobb, 4 Johns. Ch. 559. Kempshall v. Stone, 5 Johns. Ch. 193. But where the defendant deprives himself of the power to perform the contract specifically, during the pendency of a suit to compel such performance, this court may very properly retain the suit, and award to the complainant a compensation in damages; to prevent a multiplicity of suits. And I am not prepared to say that such a decree might not be proper, where the defendant had deprived himself of the power to perform the con-

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tract prior to the filing of the bill, but without the knowledge of the complainant; or even where he never had the power to perform, if the complainant had filed his bill in good faith, supposing at the time he instituted his suit here that a specific performance of the contract could be obtained under the decree of this court. But this court does not entertain jurisdiction where the sole object of the bill is to obtain a compensation in damages for the breach of a contract, except where the contract is of equitable cognizance merely. Nor can the complainant entitle himself to the interference of this court, to give him a compensation in damages for the non-performance of a contract, by neglecting to state, in his bill, that the defendant is unable to perform the contract specifically; where that fact is known to him at the time of filing his bill in this court. For if the facts which were then known to him had been fully stated in his bill, the defendant might have demurred, upon the ground that the complainant's remedy, if any he had, was at law and not in equity. Or he might have raised that objection in his answer. In this case, therefore, the complainant's bill cannot be retained, for the purpose of obtaining a compensation in damages merely, when he knew that he could expect nothing more than such a compensation in damages at the time of filing his bill. And the complainant having made a case, by his bill, apparently entitling him to a specific performance, he cannot now insist that the defendant has waived the objection, that the remedy of the complainant was at law; because he did not demur to the bill, or state that objection in his answer.

The decree appealed from is erroneous, and must be reversed. And the complainant's bill must be dismissed, with costs in the court below; but without prejudice to the complainant's remedy at law, upon the contract, if he has any such remedy there. The defendant having died since this cause was submitted upon the appeal, the decree to be entered upon this decision must be entered nunc pro tunc, as of the time of such submission.

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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.

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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.

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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.

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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.

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BERRY v. MUTUAL INSURANCE CO.

(2 Johns. Ch. 603.)

Court of Chancery of New York. 1817.

KENT, Ch. The equitable rights of the parties, in this case, must have reference to the time when the knowledge of their respective mortgages was communicated to each other, in the winter of 1814, and prior to the registry of the elder mortgage. The subsequent registry by the plaintiffs was of no avail. The rights of the parties had become fixed, by means of the notice, previously, mutually and concurrently given, and which notice, as to them, answered all the purpose and object of a registry. Priority of registry never prevails over a previous notice of an unregistered mortgage. 10 Johns. 461, 462. In considering this case, then, I shall place entirely out of view the fact of the registry. The real point in the case is, which of the unregistered mortgages had the preference in equity, when the information of their existence was given and received.

If there be several equitable interests affecting the same estate, they will, if the equities are otherwise equal, attach upon it, according to the periods at which they commenced; for it is a maxim of equity, as well as of law, that qui prior est tempore potior est jure. This rule has been repeatedly declared; (Clarke v. Abbott, 2 Eq. Cas. Abr. 606, pl. 41; Bristol v. Hungerford, 2 Vern. 525; Symmes v. Symonds, 1 Brown, Parl. Cas. 66; [4 Brown, Parl. Cas. (2d Ed.) 328]; Brace v. Marlborough, 2 P. Wms. 492, 495,) and we are to see if there be any thing in this case to prevent the application of it.

There is no fraud charged or proved upon the plaintiffs, and if they are to be postponed, notwithstanding they have the elder mortgage, it must be on the ground of culpable negligence, either in leaving the lease with the mortgagor, when they took the mortgage of his term, or in not causing their mortgage to be seasonably registered. I feel strongly disposed to give to these circumstances all the weight to which they can be entitled.

1. It is understood to have been the old rule in the English chancery, that if a person took a mortgage, and voluntarily left the title deeds with the mortgagor, he was to be postponed to a subsequent mortgagee, without notice, and who was in possession of the title deeds. The reason of the rule was, that, by leaving the title deeds, he enabled the mortgagor to impose upon others who have no registry to resort to, except in the counties of Yorkshire and Middlesex, and who, therefore, can only look for their security to the title deeds, and the possession of the mortgagor. The rule was so understood and declared, by Mr. Justice Burnet, in Ryall v. Rolle, 1 Atk. 168, 172; 1 Ves. Sr. 360, and by Mr. Justice Buller, in Goodtitle v. Morgan, 1 Term R. 762, and there are decisions which have given great weight to the circumstance of the title deeds being in possession of the junior mortgagee. Thus, in Head v. Egerton, 3 P. Wms. 279, the lord chancellor said, it was hard enough upon a subsequent mortgagee, that he had lent his money upon lands subject to a prior mortgage, without notice of it, and, therefore, he could not add to his hardship, by taking away from him the title deeds, and giving them to the elder mortgagee, unless the first mortgagee paid him his money; especially as the first mortgagee, by leaving the title deeds with the mortgagor, had been, in some measure, accessory in drawing in the defendant to lend him money. This case, however, so far from establishing what was supposed to be the old rule of equity, evidently contradicts it, and admits the better title in the first mortgagee. So, in the case of Stanhope v. Verney, 2 Eden, 81, before Lord Northington, (Butler's note to Co. Litt. 290, 296, § 13,) the second mortgagee, without notice, had possession of the title deeds, but the chancellor did not give him the preference on that single circumstance, but because he also had got possession of an outstanding term. There does not seem, therefore, to be the requisite evidence of the existence of any such rule in equity, as has been stated by some of the judges; and if there was, a different rule has been since established. It is now the settled English doctrine, that the mere circumstance of leaving the title deeds with the mortgagor, is not, of itself, sufficient to postpone the first mortgagee, and to give the preference to a second mortgagee, who takes the title deeds with his mortgage, and without notice of the prior encumbrance. There must be fraud, or gross negligence, which amounts to it, to defeat the prior mortgage. There must be something like a voluntary, distinct, and unjustifiable concurrence, on the part of the first mortgagee, to the mortgagor's retaining the title deeds, before he shall be postponed. Lord Thurlow, in Tourle v. Rand, 2 Brown, 650, said, he did not conceive of any other rule by which the first mortgagee was to be postponed, but fraud or gross negligence, and that the mere fact of not taking the title deeds was not sufficient; and that if there were any cases to the contrary, he wished they had been named. So the rule was also understood by Chief Baron Eyre, in Plumb v. Fluitt, 2 Anst. 432, and has since been repeatedly recognized. Lord Eldon, in 6 Ves. 183, 190. Sir William Grant, in 12 Ves. 130. 1 Fonbl. Eq. 153, 155, note. It is admitted, by these same high authorities, to be just, that the mortgagee, who leaves the title deeds with the mortgagor, so as to enable him to commit a fraud, by holding himself out as absolute owner, should be postponed; but the established doctrine is, that nothing but fraud, express or implied, will postpone him.

2. The hardship and abuse complained of in the English cases, arise from the want of a general registry act, under which a second mortgagee can always secure himself. I be-

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lieve there are no registry acts in England, except in certain counties, as Yorkshire and Middlesex; and the provision in such cases, (see Stat. 3 and 4 Anne c. 4,) is similar to that in our act concerning mortgages, and gives the subsequent purchaser, or mortgagee, the preference, if the memorial of his deed be first registered. It has been decided, in Johnson v. Stagg, 2 Johns. 510, that our act concerning the registry of mortgages extends to leases for years, assigned by way of mortgage; and that the leaving of the lease with the mortgagor, was no evidence of fraud, because the registry of the mortgage was a beneficial substitute for the deposit of the deed, and gave better and more effectual security to subsequent mortgagees. The registry of the mortgage is notice; and if the first mortgagee neither takes the title deeds, nor registers his mortgage, he only exposes himself, and not the subsequent purchaser, or mortgagee. The statute expressly secures the bona fide purchaser, and it equally enables the subsequent mortgagee to secure himself, by registering his mortgage.

We have seen that the leaving the title deeds with the mortgagor is no prejudice to the first mortgage; and there is the less necessity for it with us than in England, because, with us, the creditor who subsequently, and without notice of any prior unregistered mortgage, deals with the mortgagor, can always protect himself in the easiest and most effectual manner; and, supposing he omits to do it, by a misplaced confidence in the mortgagor, has he any equitable claim to be preferred to a prior mortgagee, who, under the same misplaced confidence, has equally omitted to do it? This is the turning point in the present case.

The first mortgage was valid without registry. The statute does not render a registry indispensable. The omission of the registry only exposes the mortgagee to the hazard of a loss of his lien by a subsequent bona fide purchase, or to the hazard of a postponement of his lien to a subsequent registered mortgage. A second mortgage will not, per se, and without registry, gain a preference. There is no such principle to be deduced from the statute, and there is no reason or necessity for it in the nature of the case. The reason why a bona fide purchaser is expressly excepted from the operation of an unregistered mortgage is, that he could not otherwise deal with safety, and would be exposed, even with the utmost vigilance, to the frauds of the mortgagor. The act does not provide for the registry of his deed, but only for the registry of mortgages, and gives them a preference according to the priority of the registry. The second mortgagee protects himself by his registry, but the purchaser does not, and cannot; and, therefore, the statute declares that his deed shall absolutely prevail over the unregistered mortgage. The statute of 3 and 4 Anne, relative to the west riding of Yorkshire, provides for the registry of deeds and mortgages promiscuously, and, therefore, places them upon an equal footing.

Though, in one sense, every mortgage is a purchase, yet the mortgage act evidently speaks of purchasers, in the popular sense, as those who take an absolute estate in fee. There is no pretext for considering a mere mortgagee as a purchaser, within the meaning of the second section of the act concerning mortgages.

I have not been able to discover any principle of law or equity that will enable me to say, that the first mortgage is to be deprived of its advantage of priority of time. The omission to register the mortgage was not capable of producing any mischief to third persons, who would use ordinary diligence and precaution. The defendants ought not to charge a negligence upon the plaintiffs of which they have been equally guilty. It was their own fault or folly that they were not protected. They trusted to the assurances of the mortgagor that his land was unencumbered; and the plaintiffs trusted equally in the mortgagor, that he would not, afterwards, sell or mortgage the land. It is a common rule, say the books, that where of two persons, equally innocent, or equally blamable, one must suffer, the loss shall be left with him on whom it has fallen; and here comes in the other rule, that the equities being otherwise equal, the priority of time must determine the right.

It is very clear that the first mortgagee was not bound to register his mortgage, because the law makes it valid, as between the parties, without registry. The registry is only a matter of precaution, and the statute has provided against all the mischief of the omission. If the party will not avail himself of the means of safety provided by statute, he cannot expect that this court will grant him further aid, and especially against a party whom he charges with no fraud. If relief is ever given in any case, on the ground of policy, or constructive fraud, against the sale or mortgage of property, it is because, from the non-delivery of possession, or from other circumstances, imposition had or might have been practised, which could not be detected or guarded against by the exercise of ordinary diligence. No such ground for relief exists in this case.

I am, accordingly, of opinion, that the plaintiffs are entitled to relief, according to the prayer of their bill, and that the defendants are either to account to them for the amount due on their bond and mortgage, or that the residue of the term be sold for the satisfaction of their debt. The costs of suit are to be paid out of the property mortgaged.

Decree accordingly.

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SHIRRAS v. CAIG.

(7 Cranch, 34.)

Supreme Court of the United States. 1812.

MARSHALL, C. J., delivered the opinion of the court as follows:

This is an appeal from a decree rendered by the circuit court for the district of Georgia.

Shirras and others, the appellants, brought their bill to foreclose the equity of redemption on two lots lying in the town of Savannah, alleged to have been mortgaged to them by Edwin Gairdner. The deed of mortgage is dated the first of December, 1801, and purports to be a conveyance from Edwin Gairdner and John Caig, by Edwin Gairdner his attorney in fact. Edwin Gairdner not appearing to have possessed any power to act for John Caig, the conveyance as to him, is void, and could only pass that interest which was possessed by Gairdner himself. The court will proceed to inquire what that interest was.

It appears that, on the 17th May, 1796, the premises were conveyed to James Gairdner, Edwin Gairdner and Robert Mitchel, merchants and co-partners of the city of Savannah.

In 1799, this partnership was dissolved; and, in December in the same year, James Gairdner made an entry on the books of the company charging this property to Edwin Gairdner & Co. of Charleston, at the price of 20,000 dollars. This firm consisted of Edwin Gairdner alone. James Gairdner also executed a power of attorney authorizing Edwin Gairdner to sell and convey his interest in this and other real property.

In March, 1801, a partnership was formed between Edwin Gairdner and John Caig to carry on trade in Savannah, under the firm [name] of Edwin Gairdner & Co.; and in the same month, Robert Mitchel, conveyed his one third of the lots in question to Edwin Gairdner and John Caig.

About the same time it was agreed between the house at Charleston and that in Savannah to transfer the Savannah property to the firm trading at that place; and entries to that effect were made in the books of both companies; and possession was delivered to Edwin Gairdner & Co. of Savannah.

Such was the state of title in December, 1801, when the deed of mortgage bears date.

The plaintiffs claim the whole property, or, if not the whole, five sixths; because they suppose Edwin Gairdner to have been equitably entitled to his own third, to that of James Gairdner, and to half of the third of Robert Mitchel. But for this claim the court is of opinion that there can be no just pretension, because he did not affect to convey by virtue of the power from James Gairdner—he did not affect to pass the interest of James Gairdner, but to pass the estate of John Caig and himself. Consequently the power of attorney may be put out of the case, and the conveyance could only operate on his own legal or equitable interest.

In law, he was seized under the original deed, and the deed from Robert Mitchel of one undivided moiety of the property.

Under the various agreements and entries on the books of the firms at Charleston and Savannah which have been stated, his equitable interest was precisely equal to his legal interest. In law and equity he held one moiety of the premises in question. The other moiety was in John Caig. To one sixth Caig was legally entitled by the conveyance from Robert Mitchel, and to two sixths he was equitably entitled by the agreement with Edwin Gairdner and the consequent entries on the books.

Of the equitable interest of John Caig the mortgagees were bound to take notice, because the purchaser of an equitable interest, purchases at his peril, and acquires the property burdened with every prior equity charged upon it, because the deed itself gives notice of Caig's title, and because Caig was in possession of the property.

The mortgage deed of December, 1801, could not, then, in law or equity, pass more than one moiety of the property it mentions.

A question arises on the face of the deed respecting the extent of the property comprehended in it. The plaintiffs contend that both lots are within the description; the defendants that only the wharf lot is conveyed.

The property conveyed is thus described: "All that lot of land, houses and wharfs in the city of Savannah as is particularly described by the annexed plat, and is generally known by the name of Gairdner's wharf."

The plat was not annexed, nor was it recorded with the deed. It is, however, filed as an exhibit in the cause, and appears to be a plat of a part of the town of Savannah, including the lot on which Gairdner's wharf was, and also one other lot belonging to the same persons, which was designated as No. 6, and which does not adjoin the property on which the wharves are erected.

The words descriptive of the property intended to be conveyed do not appear to the court to be applicable to more than the wharf lot. The word "lot" is in the singular number; the term "houses" is satisfied by the fact that there are houses on the wharf lot; and there is no evidence in the cause, nor any reason to believe that lot No. 6 was "generally known by the name of Gairdner's Wharf." The court, therefore, cannot consider that lot as comprehended within the conveyance.

The mortgaged property is in possession of the defendants Caig and Mitchel, who derive their title thereto in the following manner.

On the 7th of January, 1802, a new part

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nership was formed between Gairdner, Caig and Mitchel, and, by the articles of co-partnery, which are under seal, the Savannah property is declared to be stock in trade, and an entry was made on the books of the old firm transferring this property to the new concern. On the 12th of the same month, the co-partnership of Gairdner and Caig was dissolved.

On the 27th of July, 1802, by deeds properly executed, one third of the property became vested in John Caig, and one other third in Robert Mitchel.

On the 3d of November, 1802, Edwin Gairdner became a bankrupt; and this bill is brought by his mortgagees and assignees.

The claim to foreclose is resisted by Caig and Mitchel, because they say,

1st. The mortgage was not executed at the time it bears date, but long afterwards, and on the eve of bankruptcy.

2d. That the transaction is not bona fide, there being no real debt, nor any money actually advanced by the mortgagees.

3d. That the mortgage was kept secret, instead of being committed to record.

4th. That the whole transaction is totally variant from that stated in the deed.

They therefore claim the property for the creditors of Gairdner, Caig and Mitchel.

1st. From the testimony in the cause it appears that the deed, if not executed on the day, was executed about the day of its date; and that Gairdner, at the time, was believed to be solvent.

2d. It appears, also, that the mortgage was executed, in part, to secure the payment of money actually due at the time, and, in part, to secure sums to be advanced, and to indemnify some of the mortgagees for liabilities to be incurred.

3d. The mortgage is dated the 1st of December, 1801, and was recorded in September, 1802.

By the laws of Georgia, a deed is valid if recorded within twelve months; but any deed recorded within ten days after its execution takes preference of deeds not recorded within that time, or previously on the record.

It appears to the court, that neither negligence, nor that fraud which is inferred from the mere fact of omitting to place a deed on record, can, with propriety, be imputed to the person who has used all the despatch which the law requires. If subsequent purchasers without notice, sustain an injury within the time allowed for recording a deed, the injury is to be ascribed to the law, not to the individual who has complied with its requisition.

In this case the subsequent purchasers might have proceeded to record their deeds within ten days, and have thereby obtained the preference they claim, but they have failed to do so. They are themselves chargeable with the very negligence which they ascribe to their adversaries; and, were they to be preferred, the court would invert the well established rule of law, and postpone, under similar circumstances, a prior to a subsequent deed.

4th. It is true that the real transaction does not appear on the face of the mortgage. The deed purports to secure a debt of £30,000 sterling due to all the mortgagees. It was really intended to secure different sums, due at the time from particular mortgagees, advances afterwards to be made, and liabilities to be incurred to an uncertain amount.

It is not to be denied, that a deed, which misrepresents the transaction it recites, and the consideration on which it is executed, is liable to suspicion. It must sustain a rigorous examination. It is certainly, always advisable fairly and plainly to state the truth.

But if, upon investigation, the real transaction shall appear to be fair, though somewhat variant from that which is described, it would seem to be unjust and unprecedented to deprive the person claiming under the deed, of his real equitable rights, unless it be in favor of a person who has been, in fact, injured and deceived by the misrepresentation.

That cannot have happened in the present case.

There is the less reason for imputing blame to the mortgagees, in this case, because the deed was prepared by the mortgagor himself, and executed without being inspected by them, so far as appears in the case.

It is then, the opinion of the court that the plaintiffs, Shirras and others, have a just title, under their mortgage deed, to subject one moiety of the lot, or parcel of ground, commonly known by the name of Gairdner's Wharf, to the payment of the debts still remaining due to them, which were either due at the date of the mortgage, or were afterwards contracted upon its faith, either by advances actually made or incurred prior to the receipt of actual notice of the subsequent title of the defendants, Caig and Mitchel; and that the decree of the circuit court of Georgia, so far as it is inconsistent with this opinion, ought to be reversed.

The following is the decree of this court:

This cause came on to be heard on the transcript of the record, and was argued by counsel. On consideration whereof it is the opinion of this court, that the deed of mortgage in the proceedings mentioned, and dated on the 1st of December, 1801, is, in law, a valid conveyance of one moiety of that lot of land, houses and wharves in the city of Savannah, which was generally known by the name of Gairdner's Wharf, being the parcel of ground lying between the river and the street, and that the mortgagees in the said deed mentioned, are entitled to foreclose the equity of redemption in the said mortgaged property, and to obtain a sale thereof, and to apply the proceeds of the said sale to the payment of what remains unsatisfied of their respective debts, which were either due at the date of the mortgage, or have been since contracted, either on account of monies advanced,

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or liabilities incurred prior to their receiving actual notice of the title of the defendants, John Caig, and Robert Mitchel. And the decree of the circuit court for the district of Georgia, so far as it is inconsistent with this opinion, is reversed and annulled, and in all other things is affirmed; and the cause is remanded to the said circuit court for the district of Georgia, that further proceedings may be had therein according to equity.

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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

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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

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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 out 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

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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.

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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.

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McLAUGHLIN v. McLAUGHLIN et al.

(20 N. J. Eq. 190.)

Court of Chancery of New Jersey. Oct. Term, 1869.

Bill in equity for partition and an accounting. Heard on exceptions to the master's reports as to the account and as to the value of a dower interest.

W. A. Lewis, for complainant. Mr. Dixon, for one of the defendants.

ZABRISKIE, Ch. John G. McLaughlin died intestate, May 2, 1861, seised of a number of houses and lots in Jersey City, in one of which he resided at his death. He left his widow, Abby Ann McLaughlin, and six children, his heirs at law. Two of these children were minors at his death. Some of these children were children of his widow, the others were children of his first wife. The widow remained in possession of the mansion house until her death, on the 20th of August, 1868. Dower was never formally assigned to her. The administration of the personal estate of her husband was granted to her. By tacit consent of all the heirs who were of age, she assumed the management of the real estate, collected the rents, paid the taxes and repairs, and rented out such parts as it was necessary to rent.

The bill in this case was filed in her lifetime for a partition, and for an account by her of the rents of the estate.

The master reported that a partition could not be made without great injury, and that the property should be sold, and that the dower of the widow should be sold with the lands. The lands were all sold in the life of the widow, and all conveyed except one lot in Green street, which, upon refusal of the purchaser to comply with his contract, was ordered to be re-sold, and was re-sold after her death. On the 28th of June, 1868, the widow filed her petition electing to accept a gross sum in lieu of her dower, and an order was made on July 7, 1868, to refer it to the master to ascertain and compute the value of her dower. She had, in compliance with the prayer of the bill, rendered her account of the rents and profits of the estate, in which she charged five per cent. for collecting them, and claimed one third as due to her in her right as dowress, but did not charge herself with the rent of the mansion house, and the office on the adjoining lot, which had been occupied as such by her husband, in his lifetime. It was also referred to the master to examine and state her account.

The master made a separate report upon each order of reference to him. In the report upon the order to state the accounts, he charged her with the value of the mansion house from the death of her husband, or rather from May 1st, the day before his death. To this the complainant, as executrix of her mother, the widow, excepts, claiming that as dower was never assigned, the widow was entitled by virtue of the statute, to remain in possession of the mansion house and messuage attached, without rent, until dower was assigned.

The master admits the right under the statute, and bases his action on the ground that dower was virtually and equitably assigned to the widow in the whole property by her taking possession of the whole, with the assent of the heirs, and appropriating one third of the rents of the whole to her own use; and that the provision of the statute which was intended to protect the widow in her estate as dowress, an estate favored at law, against the injustice or delay of the heirs, was not intended to secure to her more than one third of the rents, and more than her due in a case like this, where the heirs left in her hands the whole estate to retain, by her own action, the amount due to her; that assignment of dower requires no particular form, and may, in some cases, be of one third of the tolls of a mill or of the produce of lands, which, if assigned and accepted as dower, should be equivalent to an assignment at law or in equity. To this conclusion of the master I assent. And even without such equitable assignment, I am of opinion that a widow who claims one third of the rents of the lands other than the mansion house and messuage, must be willing to account for the value of the part occupied by her.

Damages for the detention of dower were not recovered at common law, but only by the statute of Merton; and after that statute the rule was settled by the courts of common law, that if the widow died before the damages for detention were assessed, they could not be recovered. 2 Bac. Abr. 395, tit. "Dower," I; Park, Dower, 309. Nor could damages be recovered, if the widow died before dower was assigned; nor if she accepted the dower assigned by the heir, or by proceedings in chancery. Park, Dower, 310; Co. Litt. 33a. But in such cases the value of the dower for the time it was wrongfully detained may be recovered in equity. Curtis v. Curtis, 2 Brown, Ch. 629, 632; Dormer v. Fortescue, 3 Atk. 130; Park, Dower, 332; Johnson v. Thomas, 3 Paige, 377; 2 Bac. Abr. 396, "Dower," I; Vin. Abr. "Dower," S, a, § 20; Hamilton v. Ld. Mohun, 1 P. Wms. 118.

The courts of law in assessing damages for the detention, allow, as reprises, for the occupation by the widow. In Walker v. Nevil, Leon. 56, quoted in 2 Bac. Abr., "Dower," I, p. 394, the court reversed the judgment, because the damages were for eight years, and the widow had occupied for part of the eight years. And in Woodruff v. Brown, 17 N. J. Law, 246, three of the judges in their opinions say that what had been received by the widow might be deducted from the value. This was approved in Keeler v. Tatnell, 23 N. J. Law, 62. And in the case of Hopper

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v. Hopper, 22 N. J. Law, 715, although the court of errors refused to order the judgment of a previous term to be altered, so as to allow a plea to be added that the defendant had satisfied the demandant for the value of her dower, yet at the inquisition which was taken under the direction of Chief Justice Green, at the Bergen circuit, the defendant was allowed to prove, as part satisfaction of the value, or in mitigation of the damages, that the demandant had occupied one half the mansion house from the death of her husband. And it could never be permitted, where the only land out of which dower is claimed is the mansion house and messuage, that a widow, who had occupied the whole as quarantine from the death of her husband, should recover in addition one third of the value as damages; and yet this would be the result, if the value assessed must be one third of the whole value without regard to occupation by the widow.

And a court of equity, in such case, will not give damages beyond the amount established by law, especially when such damages are inequitable. But, on the other hand, where a widow comes into this court to claim the value of her dower, in a case where such value could not be recovered at law, she will be required to do equity, and will be allowed only to recover the value of the dower detained, that is the value of one third of the whole estate, deducting the value of the part occupied by her. This may be done by allowing her to occupy the mansion house free of rent, and by giving her out of the residue of the estate so much as will make her part one third of the value of the whole, if anything be required for that end. On both grounds the report of the master must be sustained, and this exception overruled. The claim of the widow is unjust and inequitable. The excess of one day's rent charged by the master by mere inadvertence, may be corrected without a re-stating of the account.

The next exception to the account is that of Samuel C. McLaughlin and wife. It is to the charge of $150, and interest on it for one year's rent of No. 147, and the upper part of No. 149, Green street. The only evidence as to this is that of Samuel C. McLaughlin himself. He testifies that he had rented of his father both premises for the year ending May 1st, 1861, at the rent of $300; that he continued to occupy them the next year without any new bargain. This usually would be a continuance of the former tenancy at the same rent, and I see nothing in this case to prevent the application of this rule. I am of opinion that this exception must be sustained.

The next exception is by the complainant as executrix and legatee of the widow, to the master's report on the value of her dower.

The report finds that she is not entitled to have a gross sum in lieu of her dower in the Green street lot, which was not sold until after her death. The report is founded on the decision of Chancellor Green, in Mulford v. Hiers, 13 N. J. Eq. 13, and is fully sustained by that decision; and I concur entirely with the late chancellor in the principles upon which that conclusion is based.

Another exception to that report is to the principle upon which the master estimated the value of the life of the widow, and the gross value of her dower. It was held in the case of Mulford v. Hiers, above referred to, that when a dowress had, in a partition case, consented to take a gross sum in lieu of her dower, the right to have such sum estimated in proportion to the value of her life at the time of consent, became a vested right, and was not lost by her death before the value was ascertained and settled. That principle is admitted by the master, and is not disputed by the counsel for the heirs. But as she died two months after the election, and before the making of the report, the master has assumed that the value of her life is settled by its actual duration. This assumption is strictly, and in fact, correct. The actual value of her life was at that election only two months. But this is not the manner in which the value of such a life is, in practice, ascertained in judicial proceedings. Where one is in a state of ordinary good health, and has an average expectancy of life, the value of the life is ascertained by calculation from tables prepared for annuities and life insurances, which give, with great reliability, the gross value of an annuity for a person in ordinary good health, at any given age. In such computation, death by accident, or by disease subsequently contracted, are, on principle, disregarded. It is a risk that forms part of the basis of the computation. But these tables are not a safe guide where a person is not in ordinary good health, and more especially when afflicted with a disease incurable in its nature, and so advanced as to render it probable that death will soon ensue from it. In such case the rule here applied by the master that the actual duration of the life is the best measure of its probability, is perhaps the correct rule. But this is not such a case. Mrs. McLaughlin had some time before been afflicted, in a mild form, with the disease of which she died, but at the time of her election it had left her, and she was apparently free from it, and had the value of her life been ascertained within a month after her election, with all the evidence that could then have been produced, it might have been adjudged of an average value at her age. But although the fact of her subsequent death, within two months, ought not, in this case, to be taken as the test of the value of her life, yet the fact of a recurrence of the same disease which had previously attacked her in a milder form, and that from its virulence and rapid prog-

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ress she soon died, is a most important element in judging of the value of the life. It may be with probability inferred, that the tendency to that disease had not been eradicated from her system, and that its lurking seeds only awaited development to make it fatal. Her subsequent fever, and the great and almost unnatural appetite to which the complainant testifies, may have been and probably were the effect and the indication of the continuance of the malady. Its development may have been started and continued by accidental causes, and its termination caused or hastened by want of skill in medical or surgical treatment; and therefore, even assuming that she was not a healthy person at the time of her election, it does not follow that her actual life is the true legal measure of its value. I am satisfied, from the evidence, that her health was not what may be called ordinary good health, and that her life was not of the average value, at the time of the election. But it is impossible to lay down, with any accuracy, or any approach to accuracy, from the testimony, what ratio her life bore to the average value of life at her age; and I do not think that the opinions or speculations of physicians in this case, would take away much from the uncertainty. In such cases, the life insurance offices generally decline to insure at all; but this court cannot decline to act, and allow only the annual value. The statute requires that some estimate shall be made. I do not feel willing to apply the rule adopted by the master, or to estimate her life at the average value at her age. In this situation, I must adopt some mean. The adoption must be arbitrary, and without any reason that can be assigned with certainty why it should not be a little greater or a little less. Under these circumstances I shall adopt the exact mean between the value of her dower as calculated by the master, and that calculated upon the value of a life of a person at her age in ordinary health.

The errors pointed out in the seventh exception of the complainant to the master's account being mere mistakes in carrying forward figures in the computation, and being admitted by the defendants, will of course be corrected.

The matters contained in both reports must be referred back to the master to be corrected on the principles above stated.[1]

[1] Decree reversed, 22 N. J. Eq. 505.

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BLEAKLEY'S APPEAL.

(66 Pa. St. 187.)

Supreme Court of Pennsylvania. Oct. 27, 1870.

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 Pa. St. 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, 50 Pa. St. 244, 245.

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

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PLUMMER v. KEPPLER et al.

(26 N. J. Eq. 481.)

Court of Chancery of New Jersey. Oct. Term, 1875.

Bill in equity for specific performance of a contract to convey lands.

F. W. Leonard, for complainant. W. J. Magie and Robert E. Chetwood, for defendants.

VAN FLEET, V. C. The complainant asks the specific performance of a contract whereby he agreed to convey to Mr. Keppler a house and lot on Grier avenue, in Elizabeth City, at a valuation of $15,750, and the defendant, in payment of that sum, agreed to pay $750 in money, to assume the payment of a mortgage for $7,500 on the property to be conveyed to him, and to convey to the complainant a house and lot on Anna street, in the same city, valued at $7,500. The cash payment was made at the execution of the contract.

Among the defences set up it is alleged the complainant procured the contract by fraudulent representations as to the cost of the house which he had recently built, and as to the value of the lot whereon it stood. If these facts are established, the complainant's prayer must be denied. On a bill for specific performance the court will grant or refuse its aid according to the justice of the case; it will never extend its aid to a suitor who has practiced a fraud, or procured the contract by a misrepresentation of a material fact. Miller v. Chetwood, 2 N. J. Eq. 208; 2 Chit. Cont. (11th Am. Ed.) 1473.

An intentional misrepresentation of a fact materially affecting the value or use of the property, will deprive the party making it of all right to a remedy in equity. Wuesthoff v. Seymour, 24 N. J. Eq. 69.

The remedy by specific performance is discretionary; the question is not, what must the court do, but what, in view of all the circumstances of the case in judgment, should it do to further justice. When the contract has been fairly procured and its enforcement will work no injustice or hardship, it is enforced almost as a matter of course; but, if it has been procured by any sort of fraud or falsehood, or its enforcement will be attended with great hardship or manifest injustice, the court will refuse its aid. Seymour v. Delancey, 6 Johns. Ch. 222; King v. Morford, 1 N. J. Eq. 281; Rodman v. Zilley, Id. 324; Conover v. Wardell, 20 N. J. Eq. 273; Story, Eq. Jur. §§ 750a, 751.

In view of the evidence there can be no doubt that on the evening the contract was executed, and just before it was signed, the complainant represented to the defendant that his house had cost from $10,000 to $11,000, besides the outlay for gas fixtures, summer pieces, inlaid doors, and the value of his services as architect, and that land adjacent to his lot had been sold a few days before for $100 a foot. Five persons were present,—the defendant and his wife; the complainant; George L. Meyer, the broker negotiating the contract, and who has been called as a witness for the complainant; and Mr. William H. Pooler, who had owned the lot on which the house was built, having conveyed it to the complainant with an understanding he should be paid for it on its sale with the house, at the rate of $70 a foot, and also that he should then be entitled to one-half of the profit made on the house. The defendant and his wife testify, clearly and positively, to the foregoing representations. The complainant says, generally, he never represented to the defendant that the house had cost $11,000, but when required to repeat the conversation at the signing of the contract, says the defendant and he had the usual conversation occurring between parties dealing, but declares he cannot give the particulars. Mr. Meyer makes no allusion to the occurrences preceding or attending the signing of the contract. While Mr. Pooler denies hearing any representations respecting the value of the property made by the complainant, he so far corroborates the defendant and his wife as to say that just before the execution of the contract Mr. Meyer stated to the defendant, with the complainant's knowledge, and without eliciting any sign of disapproval, that the lot was worth $100 a foot, and that the house must have cost from $10,000 to $12,000, as it was unusually well built. These representations of cost and value correspond exactly with the sum fixed as the purchase money to be paid to the complainant,—lot, fifty feet front, $5,000; house, $10,750; total, $15,750. They embraced material facts. That pretending to state the cost of the house rested exclusively in the knowledge of the complainant. It was not open to inspection or examination. If he said anything, he was bound to speak the truth. It is obvious they influenced the action of the defendant. When the contract was produced at his residence on the evening it was signed, the sum named as the purchase money was $15,500. Before it was signed, this sum was raised to $15,750. Something occurred there before the signing, which induced the defendant to consent to the increase.

Were these representations true? The complainant has not attempted to show their truth. No attempt has been made to show that any lands on Grier avenue were ever sold for $100 a foot. The complainant admits the contract price for building his house was $6,666. The conviction is irresistible that these representations were known to be untrue at the time they were uttered, and that they were made to entrap the defendant into a contract to take complainant's property at a valuation of one-fourth, or at least one-fifth, in excess of its fair value. A court whose delight it is to do justice, will not give its aid to a suitor whose title to relief rests upon an engagement procured by false words.

Let the bill be dismissed, with costs. I will so advise.

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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.

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RUSSELL v. FAILOR.

(1 Ohio St. 327.)

Supreme Court of Ohio. Jan., 1853.

G. J. & J. M. Smith, for plaintiff. Mr. Ward, for defendant.

BARTLEY, C. J. The errors assigned in this case are substantially the following:

1st. That the court erred in holding that the note was void, and that the payment of the same by the plaintiff gave him no right of action against the defendant for contribution.

2d. That the court erred in overruling the motion for a new trial, &c.

Two questions are here presented for determination:

1st. Was the note void on the ground of usury?

2d. Can a surety on a promissory note which is absolutely void, by the voluntary payment thereof, entitle himself to contribution against the cosurety?

The first question has been determined in the affirmative by adjudications already made in this state. See the case of Preble Branch of State Bank of Ohio v. Russell, 1 Ohio St. 313; also, Chillicothe Bank v. Swayne, 8 Ohio, 257; Creed v. Commercial Bank, 11 Ohio, 489; Miami Exporting Co. v. Clark, 13 Ohio, 1; Commercial Bank v. Reed, 11 Ohio, 498; Bank of U. S. v. Owens, 2 Pet. 538.

The second question is one which does not appear to have been very frequently presented for adjudication.

The right of contribution among sureties is founded not in the contract of suretyship, but is the result of a general principle of equity which equalizes burdens and benefits. The common law has adopted and given effect to this equitable principle, on which a surety is entitled to contribution from his cosurety. This equitable obligation to contribute, having been established, the law raises an implied assumpsit on the part of the cosurety to pay his share of the loss, resulting from a concurrent liability to pay a common debt. This jurisdiction, by an action at law, is, therefore, resorted to, when the case is not complicated; and the more extensive and efficient aid of a court of equity is thus rendered unnecessary. It follows that this action can only be sustained where there exists a just and equitable ground for contribution.

A contract of suretyship is accessory to an obligation contracted by another person, either contemporaneously, or previously, or subsequently. It is of the essence of the contract, that there be a subsisting valid obligation of a principal debtor. Without a principal, there can be no accessory; and by the extinction of the former, the latter becomes extinct. This results from the nature of the obligation of suretyship. Burge, Sur. 3, 6; Theo. Prin. & Sur. 2.

It would seem to follow, from the very nature of the undertaking, that if the principal contract is absolutely void, the obligation of the surety would likewise be void. But it is said, that where the contract of the principal debtor is only voidable on account of incapacity or otherwise, and the person undertaking as surety contracted with a knowledge of the incapacity or other cause making the principal obligation voidable, he must be understood as incurring not merely a collateral, but a principal, obligation. How far this may extend, as between surety and principal, it is not necessary here to enquire; but there seems to be sound reason in the doctrine, that where the surety has knowledge of that which amounts to a valid defence for him against the creditor, he is bound either to avail himself of it, or to give notice to the principal debtor, so as to enable him to set up the defence; and in default of doing either, he would be deprived of recourse against the principal. Burge, Sur. 367.

The utmost extent to which a surety, who has made payment can claim, is a subrogation to the rights of the creditor, so that he will rank against the debtor in the same degree as the creditor would have done, if he had not been paid. Where, therefore, a surety could have no remedy against the principal, he clearly could have none against his cosurety, against whom he would have less equity in his favor.

Such, then, being the nature of the contract of suretyship, to what right of contribution was the plaintiff entitled in this case against the defendant? The claim set up by the branch bank was absolutely void; and it could have acquired no validity from the execution of the mortgage by the plaintiff before he had notice of the usury, especially as against the defendant. And it appears that the plaintiff had knowledge of the usury before he paid the debt. With what pretence of equity can the plaintiff, who was not bound himself, by voluntarily paying a void note, claim to impose an obligation upon the defendant as his cosurety, who was under no obligation before, either legal or equitable? Had the creditor instituted a suit on the note against the defendant, his remedy was clear and complete; and he could not certainly have been deprived of his means of defence by the voluntary act of the plaintiff. This is clearly not a case where an implied assumpsit could have been raised against a cosurety for contribution.

The principle laid down in the case of Skillin v. Merrill, 16 Mass. 40, would seem to be in point in this case, and fatal to the plaintiff's cause of action. And it is not shaken by the case of Ford v. Keith, 1 Mass. 139, and the case decided upon its authority, of Cave v. Burns, 6 Ala. 780, to which reference has been made. The two last cases are not strictly analogous to the present one. Upon no principle of justice or sound reason can a surety, by voluntarily paying money on a void note, impose an obligation upon a cosurety for contribution.

Judgment affirmed.

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CRAIG v. LESLIE.

(3 Wheat. 563–576.)

Supreme Court of the United States. 1818.

Robert Craig's will contained the following clause: "I give and bequeath to my brother, Thomas Craig, of Baith parish, Ayrshire, Scotland, all the proceeds of my estate, both real and personal, which I have herein directed to be sold, to be remitted to him, according as the payments are made." Thomas Craig being an alien, the question was, could he take the proceeds of this land, which had been devised to one Leslie, in trust, the proceeds from the sale of which were to be paid to him?

Mr. Justice WASHINGTON delivered the opinion of the court. The incapacity of an alien to take, and to hold beneficially, a legal or equitable estate in real property, is not disputed by the counsel for the plaintiff; and it is admitted by the counsel for the state of Virginia, that this incapacity does not extend to personal estate. The only inquiry, then, which this court has to make is, whether the above clause in the will of Robert Craig is to be construed, under all the circumstances of this case, as a bequest to Thomas Craig of personal property, or as a devise of the land itself.

Were this a new question, it would seem extremely difficult to raise a doubt respecting it. The common sense of mankind would determine, that a devise of money, the proceeds of land directed to be sold, is a devise of money, notwithstanding it is to arise out of land; and that a devise of land, which a testator by his will directs to be purchased, will pass an interest in the land itself, without regard to the character of the fund out of which the purchase is to be made.

[1] The settled doctrine of the courts of equity corresponds with this obvious construction of wills, as well as of other instruments, whereby land is directed to be turned into money, or money into land, for the benefit of those for whose use the conversion is intended to be made. In the case of Fletcher v. Ashburner, 1 Brown, Ch. 497, the master of the rolls says, that "nothing is better established than this principle, that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted, and this, in whatever manner the direction is given." He adds, "the owner of the fund, or the contracting parties, may make land money or money land. The cases establish this rule universally." This declaration is well warranted by the cases to which the master of the rolls refers, as well as by many others. See Doughty v. Bull, 2 P. Wms. 320; Yates v. Compton, Id. 308; Trelawney v. Booth, 2 Atk. 307.

The principle upon which the whole of this doctrine is founded is, that a court of equity, regarding the substance, and not the mere forms and circumstances of agreements and other instruments, considers things directed or agreed to be done, as having been actually performed, where nothing has intervened which ought to prevent a performance. This qualification of the more concise and general rule, that equity considers that to be done which is agreed to be done, will comprehend the cases which come under this head of equity.

[2] Thus, where the whole beneficial interest in the money in the one case, or in the land in the other, belongs to the person for whose use it is given, a court of equity will not compel the trustee to execute the trust against the wishes of the cestui que trust, but will permit him to take the money or the land, if he elect to do so before the conversion has actually been made; and this election he may make, as well by acts or declarations, clearly indicating a determination to that effect, as by application to a court of equity. It is this election, and not the mere right to make it, which changes the character of the estate so as to make it real or personal, at the will of the party entitled to the beneficial interest.

If this election be not made in time to stamp the property with a character different from that which the will or other instrument gives it, the latter accompanies it, with all its legal consequences, into the hands of those entitled to it in that character. [3]So that in case of the death of the cestui que trust, without having determined his election, the property will pass to his heirs or personal representatives, in the same manner as it would have done had the trust been executed, and the conversion actually made in his lifetime.

In the case of Kirkman v. Milles, 13 Ves. 338, which was a devise of real estate to trustees upon trust to sell, and the moneys arising as well as the rents and profits till the sale, to be equally divided between the testator's three daughters, A. B. and C. The estate was, upon the death of A. B. and C., considered and treated as personal property, notwithstanding the cestui que trusts, after the death of the testator, had entered upon,

[1] Equity considers land, directed to be sold and converted into money, as money; and money directed to be employed in the purchase of land, as land.

[2] Where the whole beneficial interest in the land in one case, or in the money in the other, belongs to the person for whose use it is given, a court of equity will permit the cestui que trust to take the money or land at his election, if he elect before the conversion is made.

[3] But if the cestui que trust die, without having determined his election, the property will pass to his heirs or personal representatives, in the same manner as it would have done if the conversion had been made, and the trust executed in his lifetime.

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and occupied the land for about two years prior to their deaths; but no steps had been taken by them, or by the trustees, to sell, nor had any requisition to that effect been made by the former to the latter. The master of the rolls was of opinion, that the occupation of the land for two years was too short to presume an election. He adds: "The opinion of Lord Rosslyn, that property was to be taken as it happened to be at the death of the party from whom the representative claims, had been much doubted by Lord Eldon, who held that without some act, it must be considered as being in the state in which it ought to be; and that Lord Rosslyn's rule was new, and not according to the prior cases."

The same doctrine is laid down and maintained in the case of Edwards v. Countess of Warwick, 2 P. Wms. 171, which was a covenant on marriage to invest £10,000, part of the lady's fortune, in the purchase of land in fee, to be settled on the husband for life, remainder to his first and every other son in tail male, remainder to the husband in fee. The only son of this marriage having died without issue, and intestate, and the investment of the money not having been made during his life, the chancellor decided that the money passed to the heir at law; that it was in the election of the son to have made this money, or to have disposed of it as such, and that, therefore, even his parol disposition of it would have been regarded; but that something to determine the election must be done.

[4] This doctrine, so well established by the cases which have been referred to, and by many others which it is unnecessary to mention, seems to be conclusive upon the question which this court is called upon to decide, and would render any farther investigation of it useless, were it not for the case of Roper v. Radcliffe, which was cited, and mainly relied upon, by the counsel for the state of Virginia.

The short statement of that case is as follows: John Roper conveyed all his lands to trustees and their heirs, in trust, to sell the same, and out of the proceeds, and of the rents and profits till sale, to pay certain debts, and the overplus or the money to be paid as he, the said John Roper, by his will or otherwise, should appoint, and for want of such appointment, for the benefit of the said John Roper, and his heirs. By his will reciting the said deed, and the power reserved to him in the surplus of the said real estate, he bequeathed several pecuniary legacies, and then gave the residue of his real and personal estate to William Constable and Thomas Radcliffe, and two others, and to their heirs. By a codicil to this will, he bequeathed other pecuniary legacies; and the remainder, whether in lands or personal estate, he gave to the said W. C. and T. R.

Upon a bill filed by W. C. and T. R. against the heir at law of John Roper, and the other trustees, praying to have the trust executed, and the residue of the money arising from the sale of the lands to be paid over to them; the heir at law opposed the execution of the trust, and claimed the land as a resulting trust, upon the ground of the incapacity of Constable and Radcliffe to take, they being papists. The decree of the court of chancery, which was in favour of the papists, was, upon appeal to the house of lords, reversed, and the title of the heir at law sustained; six judges against five, being in his favour.

Without stating at large the opinion upon which the reversal took place, this court will proceed, 1st. To examine the general principles laid down in that opinion; and then, 2d. The case itself, so far as it has been pressed upon us as an authority to rule the question before the court.

In performing the first part of this undertaking, it will not be necessary to question any one of the premises laid down in that opinion. They are, 1. That land devised to trustees, to sell for payment of debts and legacies, is to be deemed as money. This is the general doctrine established by all the cases referred to in the preceding part of this opinion. [5] 2. That the heir at law has a resulting trust in such land, so far as it is of value, after the debts and legacies are paid, and that he may come into equity and restrain the trustee from selling more than is necessary to pay the debt and legacies; or he may offer to pay them himself, and pray to have a conveyance of the part of the land not sold in the first case, and the whole in the latter, which property will, in either case, be land, and not money. This right to call for a conveyance is very correctly styled a privilege, and it is one which a court of equity will never refuse, unless there are strong reasons for refusing it. The whole of this doctrine proceeds upon a principle which is incontrovertible, that where the testator merely directs the real estate to be converted into money, for the purposes directed in his will, so much of the estate, or the money arising from it, as is not effectually disposed of by the will, (whether it arise from some omission or defect in the will itself, or from any subsequent accident, which prevents the devise from taking effect,) results to the heir at law, as the old

[4] The case of Roper v. Radcliffe, 9 Mod. 167, examined.

[5] Land, devised to trustees, to sell for payment of debts and legacies, is to be deemed as money.

The heir at law has a resulting trust in such lands, after the debts and legacies are paid, and may come into equity and restrain the trustee from selling more than sufficient to pay them, or may offer to pay them himself, and pray a conveyance of the part of the land not sold in the first case, and the whole in the latter, which property in either case will be land, and not money.

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use not disposed of. Such was the case of Cruse v. Barley, 3 P. Wms. 20, where the testator having two sons, A. and B., and three daughters, devised his lands to be sold to pay his debts, &c., and as to the moneys arising by the sale, after debts paid, gave £200 to A. the eldest son, at the age of 21, and the residue to his four younger children. A. died before the age of 21, in consequence of which the bequest to him failed to take effect. The court decided that the £200 should be considered as land to descend to the heir at law of the testator, because it was in effect the same as if so much land as was of the value of £200 was not directed to be sold, but was suffered to descend. The case of Ackroyd v. Smithson, 1 Brown, Ch. 503, is one of the same kind, and establishes the same principle. So, likewise, a money provision under a marriage contract, to arise out of land, which did not take effect, on account of the death of the party for whose benefit it was intended, before the time prescribed, resulted as money to the grantor, so as to pass under a residuary clause in his will. Hewitt v. Wright, 1 Brown, Ch. Cas. 86.

[6] But even in cases of resulting trusts, for the benefit of the heir at law, it is settled that if the intent of the testator appears to have been to stamp upon the proceeds of the land described to be sold, the quality of personalty, not only to subserve the particular purposes of the will, but to all intents, the claim of the heir at law to a resulting trust is defeated, and the estate is considered to be personal. This was decided in the case of Yates v. Compton, 2 P. Wms. 308, in which the chancellor says, that the intention of the will was to give away all from the heir, and to turn the land into personal estate, and that that was to be taken as it was at the testator's death, and ought not to be altered by any subsequent accident, and decreed the heir to join in the sale of the land, and the money arising therefrom to be paid over as personal estate to the representatives of the annuitant, and to those of the residuary legatee. In the case of Fletcher v. Ashburner, before referred to, the suit was brought by the heir at law of the testator, against the personal representatives and the trustees claiming the estate upon the ground of a resulting trust. But the court decreed the property, as money, to the personal representatives of him to whom the beneficial interest in the money was bequeathed, and the master of the rolls observes, that the case of Emblyn v. Freeman, and Cruse v. Barley, are those where real estate being directed to be sold, some part of the disposition has failed, and the thing devised has not accrued to the representative, or devisee, by which something has resulted to the heir at law.

It is evident, therefore, from a view of the above cases, that the title of the heir to a resulting trust can never arise, except when something is left undisposed of, either by some defect in the will, or by some subsequent lapse, which prevents the devise from taking effect; and not even then, if it appears that the intention of the testator was to change the nature of the estate from land to money, absolutely and entirely, and not merely to serve the purposes of the will. But the ground upon which the title of the heir rests is, that whatever is not disposed remains to him, and partakes of the old use, as if it had not been directed to be sold.

The third proposition laid down in the case of Roper v. Radcliffe, 9 Mod. 167, is, that equity will extend the same privilege to the residuary legatee which is allowed to the heir, to pay the debts and legacies, and call for a conveyance of the real estate, or to restrain the trustees from selling more than is necessary to pay the debts and legacies.

[7] This has, in effect, been admitted in the preceding part of this opinion; because, if the cestui que trust of the whole beneficial interest in the money to arise from the sale of the land, may claim this privilege, it follows, necessarily, that the residuary legatee may, because he is, in effect, the beneficial owner of the whole, charged with the debts and legacies, from which he will be permitted to discharge it, by paying the debts and legacies, or may claim so much of the real estate as may not be necessary for that purpose.

[8] But the court cannot accede to the conclusion, which, in Roper v. Radcliffe, is deduced from the establishment of the above principles. That conclusion is, that in respect to the residuary legatee, such a devise shall be deemed as land in equity, though in respect to the creditors and specific legatees it is deemed as money. It is admitted, with this qualification, that if the residuary legatee thinks proper to avail himself of the privilege of taking it as land, by making an election in his life time, the property will then assume the character of land. But if he does not make this election, the property retains the character of personalty to every intent and purpose. The cases before cited

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[6] But if the intent of the testator appears to have been to stamp upon the proceeds of the land directed to be sold, the quality of personalty, not only for the particular purposes of the will, but to all intents, the claim of the heir at law to a resulting trust is defeated, and the estate is considered to be personal.

[7] Equity will extend the same privilege to the residuary legatee which is allowed to the heir, to pay the debts and legacies, and call for a conveyance of the real estate, or to restrain the trustees from selling more than is necessary to pay the debts and legacies.

[8] The conclusion—which, in Roper v. Radcliffe, is deduced from the above principles, that in respect to the residuary legatee such a devise shall be considered as land in equity, though in respect to the creditors and specific legatees, it is deemed as money—denied.

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seem to the court to be conclusive upon this point; and none were referred to, or have come under the view of the court, which sanction the conclusion made in the unqualified terms used in the case of Roper v. Radcliffe.

As to the idea that the character of the estate is affected by this right of election, whether the right be claimed or not, it appears to be as repugnant to reason, as we think it has been shown to be, to principle and authorities. Before any thing can be made of the proposition, it should be shown that this right of privilege of election is so indissolubly united with the devise, as to constitute a part of it, and that it may be exercised in all cases, and under all circumstances. This was, indeed, contended for with great ingenuity and abilities by the counsel for the state of Virginia, but it was not proved to the satisfaction of the court.

It certainly is not true, that equity will extend this privilege in all cases to the cestui que trust. It will be refused if he be an infant. In the case of Seeley v. Jago, 1 P. Wms. 389, where money was devised to be laid out in land in fee, to be settled on A. B. and C., and their heirs, equally to be divided: On the death A., his infant heir, together with B. and C., filed their bill, claiming to have the money, which was decreed accordingly as to B. and C.; but the share of the infant was ordered to be put out for his benefit, and the reason assigned was, that he was incapable of making an election, and that such election, if permitted, would, in case of his death, be prejudicial to his heir.

In the case of Foone v. Blount, Cowp. 467, Lord Mansfield, who is compelled to acknowledge the authority of Roper v. Radcliffe in parallel cases, combats the reasoning of Chief Justice Parker upon this doctrine of election, with irresistible force. He suggests, as the true answer to it, that though in a variety of cases this right exists, yet it was inapplicable to the case of a person who was disabled by law from taking land, and that therefore a court of equity would, in such a case, decree that he should take the property as money.

This case of Walker v. Denne, 2 Ves. Jr 170, seems to apply with great force to this part of our subject. The testator directed money to be laid out in lands, tenements, and hereditaments, or on long terms, with limitations applicable to real estate. The money not having been laid out, the crown, on failure of heirs, claimed the money as land. It was decided that the crown had no equity against the next of kin to have the money laid out in real estate in order to claim it by escheat. It was added that the devisees, on becoming absolutely entitled, have the option given by the will; and a deed of appointment by one of the cestui que trusts, though a feme covert, was held a sufficient indication of her intention that it should continue personal against her heir claiming it as ineffectually disposed of for want of her examination. This case is peculiarly strong, from the circumstance, that the election is embodied in the devise itself; but this was not enough, because the crown had no equity to force an election to be made for the purpose of producing an escheat.

Equity would surely proceed contrary to its regular course, and the principles which universally govern it, to allow the right of election where it is desired, and can be lawfully made, and yet refuse to decree the money upon the application of the alien, upon no other reason, but because, by law, he is incapable to hold the land: In short, to consider him in the same situation as if he had made an election, which would have been refused had he asked for a conveyance. The more just and correct rule would seem to be, that where the cestui que trust is incapable to take or to hold the land beneficially, the right of election does not exist, and consequently, that the property is to be considered as being of that species into which it is directed to be converted.

Having made these observations upon the principles laid down in the case of Roper v. Radcliffe, and upon the arguments urged at the bar in support of them, very few words will suffice to show that, as an authority, it is inapplicable to this case.

[9] The incapacities of a papist under the English statute of 11 & 12 Wm. III., c. 4, and of an alien at common law, are extremely dissimilar. The former is incapable to take by purchase, any lands, or profits out of lands; and all estates, terms, and any other interests or profits whatsoever out of lands, to be made, suffered, or done, to, or for the use of such person, or upon any trust for him, or to, or for the benefit, or relief of any such person, are declared by the statute to be utterly void.

Thus, it appears that he cannot even take. His incapacity is not confined to land, but to any profit, interest, benefit, or relief, in or out of it. He is not only disabled from taking or having the benefit of any such interest, but the will or deed itself, which attempts to pass it, is void. In Roper v. Radcliffe, it was strongly insisted, that the money given to the papist, which was to be the proceeds of the land, was a profit or interest out of the land. If this be so, (and it is not material in this case to affirm or deny that position,) then the will of John Roper in relation to the bequest to the two papists, was void under the statute; and if so, the right of the heir at law of the testator, to the residue, as a resulting trust, was incontestable. The cases above cited have fully established that principle. In that case, too, the rents and profits, till the sale, would have belonged to the papists, if they were capable

[9] The case of Roper v. Radcliffe distinguished from the present case.

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of taking, which brought the case still more strongly within the statute; and this was much relied on, not only in reasoning upon the words, but the policy of the statute.

[10] Now, what is the situation of an alien? He cannot only take an interest in land, but a freehold interest in the land itself, and may hold it against all the world but the king, and even against him until office found, and he is not accountable for the rents and profits previously received.[11] In this case the will being valid, and the alien capable of taking under it, there can be no resulting trust to the heir, and the claim of the state is founded solely upon a supposed equity, to have the land by escheat as if the alien had, or could upon the principles of a court of equity, have elected to take the land instead of the money. The points of difference between the two cases are so striking that it would be a waste of time to notice them in detail.

It may be further observed, that the case of Roper v. Radcliffe has never, in England, been applied to the case of aliens; that its authority has been submitted to with reluctance, and is strictly confined in its application to cases precisely parallel to it. Lord Mansfield in the case of Foone v. Blount, speaks of it with marked disapprobation; and we know, that had Lord Trevor been present, and declared the opinion he had before entertained, the judges would have been equally divided.

The case of the Attorney General and Lord Weymouth, Amb. 20, was also pressed upon the court, as strongly supporting that of Roper v. Radcliffe, and as bearing upon the present case.

The first of these propositions might be admitted; although it is certain that the mortmain act, upon which that case was decided, is even stronger in its expression than the statute against papists, and the chancellor so considers it; for he says, whether the surplus be considered as money or land, it is just the same thing, the statute making void all charges and encumbrances on land, for the benefit of a charity.

But if this case were, in all respects, the same as Roper v. Radcliffe, the observations which have been made upon the latter would all apply to it. It may be remarked, however, that in this case, the chancellor avoids expressing any opinion upon the question, whether the money to arise from the sale of the land, was to be taken as personalty or land; and, although he mentions the case of Roper v. Radcliffe, he adds, that he does not depend upon it, as it is immaterial whether the surplus was to be considered as land or money under the mortmain act.

Upon the whole we are unanimously of opinion, that the legacy given to Thomas Craig, in the will of Robert Craig, is to be considered as a bequest of personal estate, which he is capable of taking for his own benefit.

Certificate accordingly.

[10] An alien may take, by purchase, a freehold, or other interest in land, and may hold it against all the world except the king; and even against him until office found; and is not accountable for the rents and profits previously received.

[11] Vide 3 Wheat. 12. Jackson ex dem. State of New York v. Clarke, note c.

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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

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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.

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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

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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.

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HAUGHWOUT et al. v. MURPHY.

(22 N. J. Eq. 531.)

Court of Errors and Appeals of New Jersey. 1871.

Mr. Pitney (with whom was C. Parker), for appellants. Mr. Vanatta, for respondent.

DEPUE, J. The bill of complaint filed in this cause, after setting out the proceedings in the suit in chancery between Haughwout and Boisaubin, charges that the deed of conveyance from Boisaubin to Murphy, though bearing date on the 7th of August, 1865, was not actually delivered until the 5th day of October of that year, and after the filing of the bill of complaint by Haughwout against Boisaubin, and after the filing of notice of the pendency of that suit in the clerk's office of the county of Morris. It further charges that the said Murphy had actual knowledge of the contract of purchase made by Haughwout with Boisaubin, and of the intention of Haughwout to commence suit for specific performance, long before the delivery of his deed and the payment of any part of the consideration money therefor; and that the defendant accepted the said conveyance, and paid the purchase money therefor, with actual knowledge of the existence of the complainants' contract, and of the pendency of the suit for the specific performance thereof.

The prayer of the bill is that the title of the complainants to the said three lots may be ratified and established, and declared to be good and valid as against the claim of title made to the same by said Murphy, and be declared paramount thereto; and that the claim of title to the said lots by the said Murphy, under his deed of conveyance from Boisaubin, be declared invalid and of no effect against the title of the complainants, and that the defendant may be directed to release and convey to the complainants; and that the complainants may have such other and further relief, &c.

A suit in chancery, duly prosecuted in good faith, and followed by a decree, is constructive notice to every person who acquires from a defendant, pendente lite, an interest in the subject matter of the litigation, of the legal and equitable rights of the complainant as charged in the bill and established by the decree.

This effect of a successful litigation in subordinating the title of a purchaser pending a litigation, to the rights of the complainant as established in the suit, is not derived from legislation. It is a doctrine of courts of equity, of ancient origin, and rests not upon the principles of the court with regard to notice, but on the ground that it is necessary to the administration of justice that the decision of the court in a suit should be binding not only on the litigant parties, but also upon those who acquire title from them during the pendency of the suit. Bellamy v. Sabine, 1 De Gex & J. 566; Metcalfe v. Pulvertoft, 2 Ves. & B. 205; Walden v. Bodleys' Heirs, 9 How. 49; Murray v. Lylburn, 2 Johns. Ch. 441. Such a purchaser need not be made a party, and will be bound by the decree which shall be made. 1 Story, Eq. Jur. § 406; Story, Eq. Pl. §§ 106, 351; Bishop of Winchester v. Paine, 11 Ves. 196.

Before any statutory provision was made requiring notice of the pendency of the suit to be filed in order to charge a subsequent purchaser from the defendant with notice of the litigation, it became the established practice that subpœna served and bill filed were necessary before the suit was considered as commenced, so as to make its pendency constructive notice to persons deriving title from the parties, and to give the decree a conclusive effect against such persons. 1 Vern. 318; 2 Madd. Ch. Prac. 325; 2 Sugd. Vend. 280; Hill, Trustees, *511; Hayden v. Bucklin, 9 Paige, 512; Dunn v. Games, 1 McLean, 321, Fed. Cas. No. 4,176; Id., 14 Pet. 322, 333. An assignee who takes an assignment from the defendant after bill filed, but before subpœna served, is a necessary party. Powell v. Wright, 7 Beav. 444. By the fifty-seventh section of the chancery practice act, (the provisions of which are similar to the New York act of 1834, and to the English statute of 2 Vict. c. 11, § 7,) another requisite is superadded in order that the proceedings in the suit shall affect a bona fide purchaser or mortgagee; a written notice of the pendency of the suit must be filed in the clerk's office of the county in which the lands to be affected lie. Nix. Dig. p. 102.[1] This section is expressed in negative terms, and has not changed the former practice except in prescribing that notice of the lis pendens shall be filed before a bona fide purchaser or mortgagee shall be chargeable with notice of the pendency of the suit, notwithstanding the bill has been filed and the subpœna served.

But the defendant was not a purchaser pendente lite. He acquired title by a deed which bears date on the 7th day of August, 1865, and was acknowledged on the next day. The defendant testifies that it was delivered on the 7th of August. Boisaubin's testimony is that it was delivered on the 7th or 8th. From the date of the acknowledgment of the mortgage, it is probable that it was not finally delivered before the 19th. The proof, however, is full and clear that it was executed and delivered to Murphy before the bill was filed in the case of Houghwout v. Boisaubin.[2] The commencement of a suit in chancery is constructive notice of the pendency of such suit only as against persons who have acquired some title to or interest in the property involved in the litigation, under the defendant, after the suit is commenced. Stuyvesant v. Hall, 2 Barb. Ch. 151; Hopkins v. McLaren, 4 Cow. 667; Parks v. Jackson, 11 Wend. 442. A person

[1] Revision, p. 114, § 57.

[2] 18 N. J. Eq. 315.

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whose interest existed at the commencement of the suit is a necessity party, and will not be bound by the proceedings unless he be made a party to the suit. Ensworth v. Lambert, 4 Johns. Ch. 605.

The complainants' right to relief on the ground that the defendant was a purchaser from Boisaubin pendente lite having failed, it must be considered whether, in the other aspect of the case, he will be entitled to relief. In this aspect the bill is to be taken to have been filed for the execution of the trust arising from the prior contract between Haughwout and Boisaubin for the purchase of the lands, by the conveyance to the complainant, by Murphy, of the legal title which he acquired by his deed. In this aspect of the case, the bill is a bill for specific performance.

In equity, upon an agreement for the sale of lands, the contract is regarded, for most purposes, as if specifically executed. The purchaser becomes the equitable owner of the lands, and the vendor of the purchase money. After the contract, the vendor is the trustee of the legal estate for the vendee. Crawford v. Bertholf, 1 N. J. Eq. 460; Hoagland v. Latourette, 2 N. J. Eq. 254; Huffman v. Hummer, 17 N. J. Eq. 264; King v. Ruckman, 21 N. J. Eq. 599. Before the contract is executed by conveyance, the lands are devisable by the vendee, and descendible to his heirs as real estate; and the personal representatives of the vendor are entitled to the purchase money. 1 Story, Eq. Jur. § 789; 2 Story, Eq. Jur. § 1213. If the vendor should again sell the estate of which, by reason of the first contract, he is only seized in trust, he will be considered as selling it for the benefit of the person for whom, by the first contract, he became trustee, and therefore liable to account. 2 Spence, Eq. Jur. 310. Or the second purchaser, if he have notice at the time of the purchase of the previous contract, will be compelled to convey the property to the first purchaser. Hoagland v. Latourette, 2 N. J. Eq. 254; Downing v. Risley, 15 N. J. Eq. 94. A purchaser from a trustee, with notice of the trust, stands in the place of his vendor, and is as much a trustee as he was. 1 Eq. Cas. Abr. 384; Story v. Lord Windsor, 2 Atk. 631. The cestui que trust may follow the trust property in the hands of the purchaser, or may resort to the purchase money as a substituted fund. Murray v. Ballou, 1 Johns. Ch. 566, 581. It is upon the principle of the transmission by the contract of an actual equitable estate, and the impressing of a trust upon the legal estate for the benefit of the vendee, that the doctrine of the specific performance of contracts for the sale and conveyance of lands mainly depends.

The defendant insists that he holds the lands discharged of any trust in favor of Haughwout or the complainants, by reason of his being a bona fide purchaser for a valuable consideration, without notice.

The proof is, that at the time of the delivery of the deed, $400 of the consideration money was paid, and the balance secured by mortgage. Conceding that the $400 was actually paid before Murphy had notice of Haughwout's claim, the defence of a bona fide purchase is not supported. Before the mortgage became due, Murphy had actual notice of the existence and nature of Haughwout's claim.

The defence of a bona fide purchase may be made by plea, in bar of discovery and relief, or by answer, in bar of relief only. If made by plea, the payment of the whole of the consideration money must be averred. An averment that part was paid and the balance secured by mortgage, will not be sufficient. Wood v. Mann, 1 Sumn. 506, Fed. Cas. No. 17,951. Proof of the payment of the whole purchase money is essential to the defence, whether it be made by plea or answer. Jewett v. Palmer, 7 Johns. Ch. 65; Molony v. Kernan, 2 Dru. & War. 31; Losey v. Simpson, 11 N. J. Eq. 246. Notice before actual payment of all the purchase money, although it be secured and the conveyance executed, or before the execution of the conveyance, notwithstanding the money is paid, is equivalent to notice before the contract. 2 Sugd. Vend. 533 (1037); Hill, Trustees, 165. If the defendant has paid part only, he will be protected pro tanto only. 1 Story, Eq. Jur. § 64c; Story, Eq. Pl. § 604a.

What the measure of relief shall be in cases where the deed has been executed and delivered and part of the purchase money paid before notice of the previous contract to sell to another, was elaborately discussed by the counsel of the appellants. The chancellor held, upon the authority of Flagg v. Mann, 2 Sumn. 487, Fed. Cas. No. 4,847, that a contract of purchase, executed by delivery of the deed and payment of part of the purchase money without notice of the previous contract, gave the purchaser a right to hold the land, and that the equity of the person with whom the previous contract was made, was merely to have the unpaid purchase money.

The law of the English courts is, that until the defence of a bona fide purchase is perfected by the delivery of the deed of conveyance, and the payment of the entire consideration money, such purchaser is without any protection as against the estate of the equitable owner under a prior contract, even though he contracted to purchase, and accepted his deed and paid part of the purchase money in good faith; his only remedy being against his vendor to recover back what he has paid on a consideration which has failed. In some of the American courts this doctrine has been qualified to the extent of enforcing specific performance of the prior contract, on condition that the purchaser shall be indemnified for the purchase money paid, and also for permanent improvements put upon the property before notice,

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on the principle that he who asks equity must do equity. The cases are collected in 2 Lead. Cas. Eq. 1; notes to Basset v. Nosworthy.

The doctrine of the English courts is necessary to give effect to the principle that in equity, immediately on the contract to purchase, an equitable estate arises in the vendee, the legal estate remaining in the vendor for his benefit. Qualified by the obligation to make compensation to any subsequent bona fide purchaser, who has paid part only of the consideration money, for all disbursements made before notice, the rule is every way consonant with correct principles. Such indemnity is protection pro tanto.

But whatever the nature of the relief may be in cases where the naked question of the acceptance of a deed and payment of part of the consideration before notice is presented, the relief indicated by the chancellor is the only relief the complainants are entitled to under the circumstances of this case. The rule of law which deprives a subsequent purchaser who has contracted for and accepted a conveyance, and paid part of the purchase money in good faith, of the fruits of his purchase without indemnity, is exceedingly harsh, and often oppressive in its application. Mitigated by the obligation to make indemnity for payments and expenditures before actual notice, its operation is nevertheless frequently inequitable. A party who asks the enforcement of a rule of this nature against another who is innocent of actual fraud, must seek his remedy promptly. He may lose his right to specific relief against the lands by laches, and be remitted to the unpaid purchase money as the only relief which will be equitable. In cases where the prayer is for the specific performance of a contract between the immediate parties to the suit, delay in filing the bill is often of itself a bar to relief. Merritt v. Brown, 21 N. J. Eq. 401.

The agreement between Haughwout and Boisaubin was made on the 24th of September, 1863. In February, 1864, Haughwout gave Boisaubin notice of his election to take the property under the agreement. After this notice was given, Boisaubin laid the property out in lots and publicly offered them for sale. Murphy's deed for the three lots of which he became the purchaser, was executed and delivered in August, 1865. The bill in the suit of Haughwout v. Boisaubin, was filed the last day in the same month. The solicitor who appeared for Haughwout in that suit, had notice of the existence of Murphy's deed within a few days after his bill was filed. Boisaubin, in his answer, which was filed on the 3d of November, 1865, specifically sets out the fact of the conveyance to Murphy and the circumstances connected therewith. Murphy was himself examined as a witness on the 5th of April, 1866, and testified in relation to the conveyance to him. Haughwout must be charged with notice as early as April, 1866, that Murphy intended to assert his right to the land. The bill in this case was not filed until the 4th of April, 1868. After this long delay it would be inequitable to enforce specific performance against the defendant. The fact that there were delays in the prosecution of that suit to final decree, which were unavoidable, ought not to prejudice Murphy. He should have been made a party to that suit.

Besides that, the bond and mortgage which were given by Murphy to Boisaubin for the unpaid purchase money, were assigned by Boisaubin to one Geoffrey, on the 16th of April, 1866, and by Geoffrey further assigned to William Davidson, on the 2d of July of the same year, and notice of such assignment given to Murphy by the solicitor of Davidson. The money due on the mortgage was paid at its maturity by Murphy to Davidson's solicitor. That Davidson, in the transaction, was acting for Haughwout, and that the money wherewith this assignment was procured was paid by Haughwout, and that the proceeds when collected were realized by him, are indisputable.

That the assignment was made by Geoffrey to Davidson, as collateral security, will not affect the case. When Murphy received notice of the prior equitable title of Haughwout, he was entitled to have the security he had given for the unpaid purchase money surrendered. Tourville v. Naish, 3 P. Wms. 307. The subsequent assignments were taken and the money received, with full notice of all the circumstances. The money received on the mortgage, Haughwout still retains. It is no answer to say that in decreeing specific performance Murphy may have the money refunded to him. Haughwout might have insisted upon having the land itself, or at his option, pursued the proceeds of the sale. He cannot have both. By accepting a security given for the purchase money, he is deemed to have affirmed the sale so far as respects the purchaser. Murray v. Lylburn, 2 Johns. Ch. 441; 2 Story, Eq. Jur. § 1262; Scott v. Gamble, 9 N. J. Eq. 218.

The complainants are not entitled to relief. The decree of the chancellor is affirmed, with costs.

The whole court concurred.

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CLEMENTS v. TILLMAN et al.

(5 S. E. 194, 79 Ga. 451.)

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.

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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.

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URANN v. COATES et al.

(109 Mass. 581.)

Supreme Judicial Court of Massachusetts. March, 1872.

A. conveyed to B. certain land by an absolute conveyance, B. agreeing orally to hold in trust for A. after satisfying claims he held against A. At B.'s death the following writing was found among his papers.

"Boston, July 21, 1865. I, Benjamin Rand, having purchased the estate of Isaac P. Rand, of Roxbury, said estate being situated partly in Roxbury and partly in Dorchester, in the state of Massachusetts, for his deed delivered to me on July 21, 1865, do hereby agree and bind myself and my heirs to pay over to the said Isaac P. Rand whatever balance shall remain over and above the amount necessary to discharge my original claims against Isaac P. Rand, and the charges against the said estate, which by my purchase of the same have become vested in me, the said payment to be made when all such claims and charges shall have been fully liquidated and discharged. * * * And also in all charges and expenses which have been or shall be incurred by me or my heirs in discharging the above claims and charges and in carrying on the estate. Benjamin Rand."

This was followed by the memorandum which is given in the opinion. The plaintiff, who is the assignee of A., brings this action against the heir and administrator of B. to recover the balance remaining after the satisfaction of the claims of B.

H. F. French & J. E. Maynadier, for plaintiff. E. D. Sohier & C. A. Welch, for defendants.

COLT, J. The bill charges that Benjamin Rand held the land conveyed to him by the absolute deed of Isaac P. Rand, upon trust to apply the avails of it to the payment of certain incumbrances and debts due him, and to account for any surplus to Isaac P. Rand, the grantor, to whose right the plaintiff, as assignee, has succeeded. The writings by which it is claimed that this trust is declared are fully set forth, and it is alleged that under the trust sales have been made of more than enough to pay all demands and charges, leaving a surplus, to which the plaintiff is entitled.

The defendants file a plea denying that Benjamin in his lifetime held the land upon any such trust, or that any trust was devolved upon them, as his representatives, by his death. The purpose, no doubt, is to obtain first the decision of the court upon the question whether, upon the facts disclosed, any trust is raised which can be enforced; for, if no trust shall be found to exist, then the investigation of long and detailed accounts will be avoided. This is the point which was argued at the bar, and we proceed to its consideration without regard to supposed irregularities in the pleadings.

The land in question was conveyed by an absolute quitclaim deed, dated on the 15th, but delivered on the 21st day of July, 1865, to Benjamin, who then held large demands against Isaac P. Rand, secured by mortgage on the same premises. The evidence sufficiently proves that Benjamin orally agreed, at and before the time of the delivery of the deed of the equity, and as part of the transaction, that any surplus over and above his claim that might remain of the estate or its proceeds should belong to Isaac P. No written memorandum of the agreement was made before the delivery of the deed, but it was suggested at the time that Benjamin should put it in the shape of a memorandum, safely deposited, in case anything should happen to him. And Benjamin afterwards informed Isaac P. that soon after the transaction he made a memorandum of the agreement. No such paper was ever delivered to, or came into the possession of, Isaac P., but after the death of Benjamin a writing of that description was found safely deposited in his bank trunk. By the terms of this writing, he agreed to pay over any balance of the estate remaining, substantially in accordance with the oral agreement. It was signed by Benjamin, and dated July 21, 1865; and underneath the first signature was an additional statement, also signed, in these words: "This memorandum is made by me for the use of my executor or administrator only. Neither Isaac P. Rand, nor those claiming under him, have any legal or equitable claim against me or my estate; but upon the payment of my debt, interest, and all charges, as above mentioned, any balance shall enure to the benefit of Isaac P. Rand and those claiming under him."

We are of opinion that this writing is sufficient as a declaration of trust, within the meaning of our statute. It is much more formal and particular in its statement than declarations of this description by letter, by answer in chancery, affidavit, recital in bond or deed, or in pamphlet, which have all been held sufficient, and with reference to which it is held to be no objection that they were drawn up for another purpose and not addressed to, nor intended for the use of, the cestui que trust. See cases cited in Browne, St. Frauds, §§ 98, 99.

It is not essential that the memorandum relied on should have been delivered to any one as a declaration of trust. It is a question of fact, in all cases, whether the trust had been perfectly created; and upon that question the delivery or nondelivery of the instrument is a significant fact, of greater or less weight according to the circumstances. If the alleged trust arises from mere gift, delivery of the writing by which it is declared is not always required as proof that the gift was perfected, for the court will consider all the facts bearing upon the question of intention, and it has been held that if a party execute a voluntary settlement, and the deed

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recites that it is sealed and delivered, it will be binding on the settlor, even if he never parts with it and keeps it in his possession until his death. Bunn v. Winthrop, 1 Johns. Ch. 329; Perry, Trusts, § 103, and cases cited. It must always, however, appear that the fiduciary relation is completely established, and not left as a matter of executory agreement only, regard being had to the situation of the property, the relations of the parties, and the purposes and objects had in view. In this case the verbal agreement in which the trust originated was made in consideration of the conveyance by Isaac P. of his interest in the real estate, and the trust is founded on a good consideration. The fact is of weight in aiding the court to carry out the intentions of the parties; and the want of a delivery of the memorandum becomes of less significance.

The law as thus laid down is to be found mainly in decisions under the words of the English statute, which requires that all declarations and creations of trust shall be manifested or proved in writing. These were the words of our earlier law (St. 1783, c. 37, § 3), and they remained until the first general revision of the statutes; the requirement of the present statute being that the trust shall be created or declared in writing. Gen. St. c. 100, § 19. The same change has been made in other states; and in those in which the question has been incidentally before the courts the tendency is to rule that this abbreviation in the words does not change the law, and that "created or declared" are equivalent to "manifested or proved." Trusts may be created in the first instance in writing. They more commonly originate in the oral agreements and transactions of the parties, and are subsequently declared in writing. Our statute embraces both descriptions. It had been settled by repeated decisions under the old statute, when this change was made, that an express trust was sufficiently declared if shown by any proper written evidence disclosing facts which created a fiduciary relation. Under this construction, the additional words of the old statute seemed immaterial, and are omitted. And we are of opinion that no change in the meaning or effect of it was intended or made. Perry, Trusts, § 81, and cases cited.

In view of the law thus stated, the fact that there was no delivery of the memorandum in this case is not of controlling importance. It is impossible to account for its existence and safe preservation, unless there was an intention that it should be used, if necessary, to prove a trust. The statement that it is made for the use of the executor or administrator of the trustee implies this. The cestui que trust was informed of its existence; and by its terms a perfect trust is declared. It is, indeed, declared that neither Isaac P., nor those claiming under him, have any legal or equitable claim against the maker or his estate. But this statement, if such was its intention, cannot control the effect of the memorandum in establishing the trust. That results, as matter of law, from the proof. We are inclined to think that its intention was not to defeat an equitable claim to the proceeds of the estate conveyed, but only to protect the maker against personal responsibility beyond the actual receipts in administering the trusts.

Decree for the plaintiff.

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BATES et al. v. HURD.

(65 Me. 180.)

Supreme Judicial Court of Maine. Franklin. May 2, 1876.

Bill in equity to declare a trust and for an account.

P. H. Stubbs, for plaintiff. H. L. Whitcomb, for defendants.

BARROWS, J. In 1847 one Kennedy gave to Nicholas Bates and his brother Thomas, the plaintiff, a bond conditioned for the conveyance of certain parcels of land (estimated at about two hundred and fifty acres) upon payment of the obligee's notes. In 1851, before the maturity of all the notes, an adjustment was made, by which, in satisfaction of the bond, he made conveyances of the bonded land in two separate parcels,—one to Wm. W. Bates, a third brother, and the other to Nicholas, who (with Wm. W. and the plaintiff) subscribed and delivered to Kennedy a receipt indorsed upon the bond, setting forth that he had received the deed of his portion, "for himself and in trust for his brother Thomas Bates, according to what the said Thomas has or may pay towards the same real estate, which amounts at present to seventy-five dollars." The price of the parcel thus conveyed to Nicholas was $450, and Nicholas seems to have admitted a resulting trust in favor of the plaintiff to the amount of one-sixth of the purchase, which was binding upon him and all claiming under him with notice.

Indeed the writing subscribed by Nicholas Bates seems to be tantamount to a declaration of an express trust, so as to satisfy Rev. St. c. 73, § 11.

The words "created and declared" in that statute seem to be construed by the courts to be synonymous with "manifested and proved" as they stood in the original seventh section of the statute of frauds,—29 Car. II. c. 3. Forster v. Hale, 3 Ves. 707, 5 Ves. 308; Unitarian Society v. Woodbury, 14 Me. 281; Barrell v. Joy, 16 Mass. 221; Pinnock v. Clough, 17 Vt. 508.

From the cases just cited and numerous others we see that a letter, memorandum, or recital subscribed by the trustee, whether addressed to or deposited with the cestui que trust or not, or whether intended, when made, to be evidence of the trust or not, will be sufficient to establish the trust when the subject, object, and nature of the trust, and the parties and their relations to it and each other, appear with reasonable certainty.

The existence of a trust in favor of the plaintiff, which he may enforce against Nicholas Bates and his representatives, and all claiming under him with notice of the trust, may be regarded as established.

Nicholas Bates mortgaged the property to Kennedy to secure a balance of the purchase money, and subsequently made two other mortgages thereon to Philip M. Stubbs, the scrivener who drew the conveyances from Kennedy and wrote the indorsement upon the bond containing the declaration of the trust. Both of these last-named mortgages were assigned to Prince Thompson, who had no knowledge of the trust, and has given notice of foreclosure, but has never been in possession of the property.

Nicholas Bates died in January, 1866, leaving a widow, Keziah M. Bates, now Keziah M. Hurd, who is one of the respondents, and who took out letters of administration on his estate, inventoried the land as subject to the mortgage to Prince Thompson, "and being also held as a trust estate for Thomas Bates to the amount of about $140." This sum is apparently the amount of the $75 originally paid in by the plaintiff towards the purchase money, with interest up to the time of the making of the inventory. The widow continued in possession of the land, receiving the rents and profits until November, 1868, when she made sale thereof by license from the probate court, without making mention of the trust, to Daniel Day, who mortgaged it back to her for part of the purchase money, and took possession. The widow married George Hurd, the other respondent, and on September 9, 1870, took a quitclaim deed from Day, and since then the two defendants have occupied or had the exclusive use, income, and profit of the premises.

The plaintiff does not claim any rights as against the mortgagees. The heirs of Nicholas Bates are no longer interested, as the sale by the administratrix devested them of all right and title in the premises.

The administratrix, in her inventory, admitted the plaintiff's rights, and is fully chargeable with notice of them. The other respondent, her husband, seems to have occupied only under her. But a joint reception by them of the rents and profits is admitted in the agreed statement. He is therefore responsible to the plaintiff on this score with her. The testimony establishes the fact that the plaintiff made a claim upon the administratrix for his interest, and that there was more or less negotiation between them looking to an adjustment. It is unfortunate for both that an equitable adjustment could not be reached without litigation.

In the hands of these respondents it is obvious that the property is subject to the trust which the plaintiff seeks to enforce.

They object that he might have had an adequate remedy at law by a suit for his share of the income. But cases of trust are, under our statute, specially made the subject of remedies in equity, and, moreover, it might be desirable for him to have the decree to which he is entitled in equity as against them, in view of the possibility of a redemption.

Unless the parties can agree as to the

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proper sum to be allowed for the past rents and profits, a master must be appointed to ascertain them.

Bill sustained. Estate declared subject, in the hands of these respondents, to the trust asserted. Costs for the complainant. Master to be appointed at nisi prius, if required.

APPLETON, C. J., and WALTON, DANFORTH, and PETERS, JJ., concurred.

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PATTON et al. v. CHAMBERLAIN et al.

(5 N. W. 1037, 44 Mich. 5.)

Supreme Court of Michigan. June 11, 1880.

Appeal from Detroit.

Joslyn & Freeman, for complainants. Atkinson & Atkinson, for defendants.

COOLEY, J. We have not been brought by the evidence in this case to the conclusion reached by the judge of the superior court. We are convinced that the testimony of Francis J. Chamberlain is truthful, and that it defeats the complainants' case. From this evidence it appears that, some twelve years or more ago Chamberlain's first wife caused to be conveyed to him an 80-acre lot of land in St. Joseph county, which she had purchased with money received from her father, on a trust, declared orally, that he would hold the same for their infant daughter, then six years of age or thereabouts. This the wife did in expectation of her speedy decease, and she actually deceased six months thereafter. In Chamberlain's hands this lot was occupied and cultivated as part of a farm of 131 acres; the remaining 51 acres being owned by himself. It was all mortgaged by him for some $2,000. Becoming embarrassed in his circumstances he made an arrangement with his brother, A. H. Chamberlain, whereby he exchanged the farm for certain property in Detroit, and caused the Detroit property to be conveyed to the defendant Jane E. Chamberlain, who is cousin to his daughter, on a verbal understanding that it should be held in trust for the daughter.

It is this Detroit property which complainants, as judgment creditors of Francis J. Chamberlain, seek to reach. If the farm in St. Joseph county had been in equity the property of Francis J. Chamberlain, a trust in respect to the Detroit property would have arisen in favor of his creditors when the exchange was made. Maynard v. Hoskins, 9 Mich. 485. But he had encumbered the farm to an extent that exhausted his interest, and in equity the daughter was entitled to the avails of the encumbered place when it should be disposed of. So far as concerns the controversy with these complainants, it is immaterial that the trust was a verbal one; it could not have been enforced against him, but it was nevertheless his duty to recognize and execute it; and when he did recognize it, in the exchange made for other property, his creditors could not complain. The claim of his daughter that he should perform the trust was quite as strong in equity as any claim of creditors can be.

Jane E. Chamberlain defends this suit in the interest of the daughter, and avows the trust in her answer. That is a sufficient declaration of trust in writing to answer the requirements of the statute of frauds. McLaurie v. Partlow, 53 Ill. 340; Whiting v. Gould, 2 Wis. 552; Woods v. Dille, 11 Ohio, 455; Cozine v. Graham, 2 Paige, 177; Chitwood v. Britain, 2 N. J. Eq. 450; Wynn v. Albert, 2 Md. Ch. 169; Kingsbury v. Burnside, 58 Ill. 310.

The decree must be reversed, and the bill dismissed, with the costs of both courts.

The other justices concurred.

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CRISSMAN v. CRISSMAN et al.

(23 Mich. 217.)

Supreme Court of Michigan. July Term, 1871.

Appeal from circuit court, Macomb county; in chancery.

G. Hubbard and Ashley Pond, for complainant. E. F. Mead and A. B. Maynard, for defendants.

COOLEY, J. This is a bill to establish a trust in the favor of complainant, in certain personal property alleged to have been conveyed by her father, Francis Smith, to the defendant, Frederick S. Crissman, who is her husband, for her use.

The averments in the bill are that the said Francis Smith, becoming aged and feeble in health, was desirous of making a proper disposition of his property, and his wife Dinah Smith, the mother of complainant, having become much weakened in mind and body, so as to be unfit to manage or control property for her own benefit or for the benefit of others, and being so deranged mentally, and childish, and nervous, that it had become impossible to please or satisfy her, the said Francis Smith, without consulting with, and the knowledge of, his said wife as to the disposition of his personal property, concluded to make the disposition of his whole estate as follows:

His lands and tenements were in due form of law deeded to complainant (his sole child), by deed bearing date December 31, 1863; and his personal property was transferred to said Frederick S. Crissman, in trust, for complainant, to be by him kept at interest, used and preserved as such trustee, for the use and benefit of complainant, and in case any of such property, or the proceeds thereof, should remain after the death of complainant and not disposed of during her life, by her or for her benefit, then the remainder to go to her heirs; that such transfer of personal property was not mentioned or disclosed to said Dinah Smith, or to complainant, for the reason, as alleged by said Francis Smith, that it might create a jealousy on the part of said Dinah towards complainant; she the said Dinah, being then in a feeble and childish state of mind, and then being unfit and incapable of managing property matters, the said Francis Smith then and there declaring and stating that the use and proceeds of said farm during the life of the said Dinah Smith (which was reserved for her), would be all she would need and require for her support and maintenance, and it being his, the said Francis Smith's, desire that his estate should be secured to complainant, her heirs and assigns forever.

This is the whole statement of the trust, but the bill proceeds to aver that said Francis Smith died intestate, May 31, 1866, and on August 11, 1866, said Frederick S. Crissman was appointed by the probate court of Macomb county, administrator upon his estate, and took upon himself that trust; that complainant is informed and believes that said Frederick S. Crissman, soon after the transfer of said personal property to him, in trust, without authority of law, returned and delivered to said Francis Smith certain portions thereof, amounting in value to about five thousand dollars; that at or about the time of the death of said Francis Smith, said Frederick S. Crissman, without the consent or knowledge of complainant, and without authority of law, delivered and entrusted to said Dinah Smith a portion of said personal property, for the sole gratification of the said Dinah Smith, under the expectation and belief on the part of said Frederick, that she would preserve and take care of the same during her life, and at her death the same would come to complainant and her heirs; that the said Frederick, further to gratify said Dinah, and without the knowledge or consent of complainant, agreed with said Dinah to employ no attorney and take no counsel in the settlement of said estate; and the said Frederick, being ignorant of his legal responsibility and duty as such trustee, and further expecting to please and gratify said Dinah, made an inventory of all the trust property and proceeds thereof, as the property and effects of the estate of said Francis Smith deceased.

The bill further avers that one Elisha S. Day, a nephew of said Dinah (who is made a defendant), intermarried with a daughter of complainant and afterwards, by undue influence, induced said Dinah Smith to make her will, by which, after certain other gifts, said Day and his wife were made residuary legatees of her property; that this will was dated May 4, 1867, and that after making it, said Dinah was and continued to be of weak and unsound mind and memory, and was controlled by said Day; that she had, at the time of her death, about four thousand dollars of said personal property in her hands, of which said Day took possession under the pretense that it had been given to him and his wife, or to one of them.

The bill after other averments that need not be here repeated, prays that the transfer of such personal property so made by said Francis Smith to said Frederick S. Crissman, may be declared to be a legal, equitable and bona fide conveyance to said Frederick, in trust for complainant, without power or authority of revocation, and that a re-delivery of said property, or the proceeds thereof, to the said Francis Smith, was without authority of law and contrary to equity, and that a transfer of any of the said trust property to said Dinah Smith and by her to said Day, or to the executors named in her will, was a violation of said trust; and that said Day and such executors may be enjoined from transferring, expending or disposing of

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any of the money, property or the proceeds thereof so received by them through, and by, said Dinah Smith, or since her death, except as they shall return the same to Frederick S. Crissman, and that said Frederick may be enjoined from in any way, as such administrator of the estate of said Francis Smith, representing, inventorying or accounting with the estate of said Francis for the said property so conveyed to him in trust, as belonging to the said estate, and that complainant may have other and further relief.

For the purposes of a preliminary injunction, this bill was verified by the oath of the defendant, Frederick S. Crissman, who, though one of the parties to be enjoined, appears to have acted in the whole litigation, in concert with complainant, and to have been the witness upon whom she principally relied to establish the trust. The case was heard on pleadings and proofs in the court below and the bill dismissed.

In reviewing the testimony as it appears in the record, we are strongly impressed that if the case were to stand upon the testimony introduced by complainant, it would not establish such a trust as is alleged. So far from there being any reasonable pretense that the arrangement—whatever it was—was to be kept secret from Dinah Smith, on account of her defective understanding, or for any other reason, the complainant herself appears to have taken testimony to prove that Dinah Smith understood and was satisfied with the arrangement, and there is other very conclusive evidence to the same effect. Nor would complainant's testimony convince us that the trust, if any was created, was to be irrevocable; but, on the contrary, it is clear enough that Francis Smith believed he had a right to withdraw from the hands of Frederick S. Crissman any portion of the property transferred to him, at any time when he saw fit, and that when he did withdraw any, it was not in violation of any trust, but of right. And perhaps, on the ground that complainant's testimony tends to support a different case from that made by the bill, we should be justified in affirming the decree of the court below without examining the record further.

But we are not disposed to place our decision on any technical ground, inasmuch as we think there is no sufficient showing that any trust whatever was ever created. Where a party undertakes to establish a trust upon parol evidence, especially after a considerable lapse of time, the evidence ought to be very clear and satisfactory, and it ought to find some support in the subsequent conduct of the parties and in the surrounding circumstances. In the case before us, the parol evidence is not clear or satisfactory, and the conduct of the parties and the surrounding circumstances tend to overthrow rather than to support it. It appears that Crissman, before this alleged transfer in trust, had been acting as the agent of Francis Smith in the management of his personal property and the collection of his dues, and there was nothing in the externals of the new arrangement which was inconsistent with a continuance of the same relation. It appears also that after the transfer was made to Crissman, he gave back a receipt in which he undertakes to account to said Francis Smith for the mortgages assigned, or to his administrator or assigns whenever called upon. Crissman testifies that this receipt was given in consequence of the importunities of Mrs. Smith, but this is not very material; the important fact is that it bears strongly against the complainant's case. The justice who drew the deed from Francis Smith to complainant, and also the papers on the transfer of the personal property, was sworn for complainant, but could give but a very imperfect account of the transaction. He remembers Smith saying, "He was doing this for the benefit of Eliza;" and to the question, "Do you or do you not recollect the fact that there was something said by Smith in regard to his personal property being conveyed in trust?" he replies, "There was a little something said—a very little—but I cannot now remember what it was." Now, Smith at this time was conveying the real property to Eliza, and it is not clear that what he said about "doing this for the benefit of Eliza," did not have exclusive reference to that conveyance; but, if not, the fact that he regarded the agency of Crissman in his affairs as beneficial to his own interests, might well have induced him to speak of the arrangement as for the benefit of his only child, to whom, as he was already an old man, he would expect his property or a portion of it to pass in a brief period. And the use of the word "trust" in reference to the personal property, was not at all unnatural or unlikely if he understood it to be held for his own use and subject to his orders.

Crissman testifies more distinctly to a trust declared in favor of his wife. If he testifies truly, it seems to us matter of astonishment that he did not mention it to his wife for nearly three years; that he should procure himself to be appointed administrator on the estate of his father-in-law on the supposition that all this property belonged to that estate; and that he should inventory it all as pertaining to the estate. It is incredible that he could have understood in 1863 that the property was put into his hands to hold for his wife, and, without consulting with any one on the subject, could have supposed it his duty in 1866 to inventory it as the property of her father's estate. We look in vain for any satisfactory explanation of this circumstance, though we think we are not without the means of some insight into the motives which have impelled Crissman and his wife to the course they have taken. "I had been told," Crissman testifies, "that the old lady could not, in any way, dispose of [the property], and I suppose it was the case." It was

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only after it was ascertained that Francis Smith's widow was entitled of right to a portion of his property, and might dispose of it by will, that Crissman advanced to his wife and to the judge of probate this theory of a conveyance to him in trust; a theory wholly inconsistent with all his actions in respect to the property, both before and since the death of Francis Smith, and inconsistent also with the only writing which evidenced any part of the transaction.

This is a most unfortunate family controversy, and we regret the necessity of having to dispose of it; but we are of opinion that the circuit court made the only decree warranted by the law and the evidence, and it must be affirmed, with costs.

The other justices concurred.

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STEERE et al. v. STEERE et al.

(5 Johns. Ch. 1.)

Court of Chancery of New York. Oct. 2, 1820.

The original bill, filed February 21st, 1818, stated, among other things, that Stephen Steere, father of the plaintiffs, Timothy, Smith, and T. Steere, was seized in fee, prior to the 18th of October, 1802, of various parcels of land in the county of Chenango, and which were particularly described, amounting in the whole to 739 acres, and all of which, except 47 acres, was situate in the town of Norwich.

That on the 18th of October, 1802, S. Phettiplace obtained a judgment against Stephen Steere, for 1,258 dollars, on which a fi. fa. was issued in 1805, and all the lands of Stephen Steere, in the county of Chenango, advertised for sale. That Richard Steere and Mark Steere, defendants, sons of Stephen Steere, in August, 1806, bid off all the real estate of Stephen Steere, at the sheriff's sale, for 1,600 dollars, and paid 1,400 dollars, the amount of the judgment, interest, and costs, and took a deed from the sheriff for "the whole of the real estate of Stephen Steere, in the county of Chenango, and his right and title thereto:" and the levy and advertisement of the lands, by the sheriff, were in the same general terms of description. The bill alleged that the deed was taken in trust, pursuant to a previous agreement with Stephen Steere, to loan him the amount of the judgment, and to hold the land as security, to be reconveyed, on repayment of the loan, with interest and expenses, and of such other sums as might thereafter be loaned to Stephen Steere, by Richard and Mark Steere. That the Cole lot, containing 120 acres, belonging to Stephen Steere, was sold by the sheriff, under a judgment and execution in favour of James Glover, in December, 1799, to James Glover, for 140 dollars, being much less than its value; and that James Glover agreed to reconvey the land to Stephen Steere, on the payment of the 140 dollars, and interest. That in August, 1809, Mark Steere released to Richard Steere, all his interest in the lands under the sheriff's deed of August, 1805, and became insolvent. That on the 30th of April, 1808, James Glover conveyed to Asel Steere, defendant, another son of Stephen Steere, the Cole and Glover farms. That Asel Steere conveyed the same farms to Richard and Mark Steere. That the purchase was made pursuant to an agreement with Stephen Steere, and that Asel Steere acted merely as the agent of Richard and Mark Steere, and the land was to be held in trust for Stephen Steere. That on the 14th of August, 1809, Asel Steere made a new conveyance to Richard Steere, of the Cole and Glover farms. The bill then proceeded to state sales and conveyances of various parcels of the lands by Richard Steere, to different persons, and of the sums of money received by him on such sales, and for rents; all of which sales and conveyances were alleged to be made by Richard Steere, as trustee, &c.

The bill alleged, that the deed of August, 1805, from the sheriff to Richard and Mark Steere, was void at law, as the description of the lands sold was too general and undefined. That in 1806, Stephen Steere requested Richard and Mark Steere to reconvey to him all the property, except the Unadilla farm, being 325 acres, which he agreed that they might retain in satisfaction for their advances, &c.; and which far exceeded the value of all their advances, which they neglected to do. That Stephen Steere requested Richard and Mark Steere to account to him for all the moneys received by them, as trustees, from the sales, rents, and profits of the lands, after allowing the money advanced by them on the judgment of Phettiplace, and all their just expense and demands; but that Richard and Mark Steere presented unjust and false accounts of moneys, which they pretended to have advanced, the items of which were particularly set forth; and insisted on holding the property to cover the same.

That on the 25th of October, 1815, Stephen Steere made his will, reciting the lands of which he was seized in Norwich, and particularly describing the same, and declaring, that "it was his intention to dispose of all his real and personal estate wheresoever, to his three sons, plaintiffs, viz: the one moiety thereof to Timothy, and the other moiety to Smith and Thomas. That he appointed James Birdsall his executor. That the testator died April 22d, 1816, without being in debt, and the plaintiffs were thus devisees and legatees of all his real and personal estate. That Richard and Mark Steere refused to account and convey to them the property, so held in trust; that the trusts had been acknowledged by Richard and Mark, in letters and accounts. That the plaintiffs were willing to confirm all the sales made by Richard and Mark, not confirmed by Stephen Steere, in his life time, but that Richard and Mark ought to account for the moneys, and assign the securities received by them. That Richard Steere had brought a suit at law against the plaintiff Timothy Steere, on his bond for 540 dollars, given to Richard Steere, for a part of the trust property sold and conveyed by him to Timothy Steere, but that the plaintiff, Timothy, cannot plead at law, the various and complicated trusts above mentioned. The bill prayed that the defendants, Richard and Mark Steere, may be decreed to account to the plaintiffs for the rents and profits received by them on the lands so held in trust, and for the moneys and securities received on sales, &c., making to them all just allowances for loans, advances, and expenses; and to pay over the balance to the plaintiffs, and reconvey to them the lands so held in trust and undisposed of, and for general relief, and for an injunction against the suit at law. By an amendment to the original bill, the accounts and letters, said to contain an acknowledgment of the

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trust, were set forth at large and several special interrogations added.

The defendants, Richard and Mark Steere, in their answers, the whole of which it is unnecessary to state, denied the trusts alleged in the bill, or any agreement whatever, to advance money, and to purchase and hold the property in trust, or any conversation, before or after the sale, with Stephen Steere, relative to a purchase in trust. Richard Steere admitted, that Asel Steere informed him of the execution, and that it was the wish of all the brothers that he and Mark Steere should attend the sale and buy in the property, so as to deprive S. Steere of all control over it, as he was then much embarrassed. They admitted that Stephen Steere acquiesced in the sale, under the idea that it would be better for the defendants, Richard and Mark Steere, to have the land than strangers; that it might have been the hope and expectation of Stephen Steere, and his children, that Richard and Mark Steere, would give a share of the property to them. That Richard and Mark Steere had often advanced large sums of money to Stephen Steere, to save his stock, &c., and permitted him to reside on part of the estate. That the defendant, Richard Steere, may have promised the plaintiffs to distribute part of the real estate among them, and may have said and written things for that purpose; and had made gifts of land and money with that view; but they denied that these acts of kindness amounted to a trust. That pursuant to an agreement between Richard and Mark Steere, Timothy and Stephen Steere, jun., of January, 1814, by which Richard Steere agreed to convey to Mark Steere, and Timothy Steere, each, land to the value of 1,000 dollars, he conveyed 43 acres to Stephen Steere, jun., 33 acres to Mark Steere, and 38 acres to Timothy Steere, and that he took the bond of Timothy Steere, for 540 dollars, being the excess in the value of the land conveyed to him, over and above the 1,000 dollars. That these deeds were gratuitous. That by that agreement he was to convey the residue of the land to Timothy Steere and Mark Steere, who were to sell the same, and pay the defendant his expenses and advances; but owing to the failure of Mark Steere, the agreement was only in part carried into effect. But he denied that any of these gifts and conveyances were made with the understanding or belief, that he was bound as trustee to Stephen Steere. The defendants, Richard and Mark, admitted the account of the 28th of January, 1809, but denied that it was made up and presented by them as trustees; that the account of the estate was on loose papers, prior to 1809, and the account was made out from those papers, which are now mislaid, or in the possession of the plaintiffs. That the name of Stephen Steere was used in the account to distinguish the estate from the other estate of Richard and Mark, and that the name of Stephen Steere was used as a debtor, because the estate was looked upon as a family patrimony, in which, from the gratuities of Richard Steere, they expected to share. That Mark Steere, at that time, proposed to release his share, on being paid his advances, &c., and the account was made up to ascertain the consideration to be paid to Mark Steere, which was found to amount to 3,901 dollars and 80 cents, which Richard Steere paid to Mark Steere. That Richard Steere then made an estimate of what further advances he had made, and in the same form, using the name of Stephen Steere as a debtor, and Richard Steere as creditor, for the sake of convenience. That the account was made out for the satisfaction of the plaintiffs and the family, and to show that any further demands on him were unreasonable. That the account was retained by him as a private memorandum, until February, 1814, and to assist in the gratuitous disposition of the property among the family. That in January, 1814, an agreement by parol was entered into between Richard Steere, Mark Steere, and the plaintiffs, of which a memorandum was reduced to writing by James Birdsall, and which was acceded to by Richard Steere, on the ground that it would be satisfactory; and to facilitate it, and not as trustee, he wrote the letter mentioned in the amended bill, to Mark Steere, dated February 12th, 1814, containing the account, &c., of January 28th, 1809, but he denied that the letter was written at the request of Stephen Steere, or as trustee. That in 1815 Stephen Steere was nearly eighty years old, and was induced by the plaintiffs, his younger children, to make his will in their favour, to the exclusion of his eight other children then living.

One of the accounts of the 28th of January, 1809, referred to in the bill, made Stephen Steere debtor to Mark Steere, for his bond dated September 3d, 1803, and the interest thereon at 8 per cent. and for various sums advanced, and for expenses of two journeys to Chenango, the whole amounting to 3,901 dollars and 80 cents. The other account was against Stephen Steere, as debtor to Richard Steere, containing different charges for sums advanced, among which were the expenses of several journeys to Chenango, and at the foot were added various charges for advances, under subsequent dates, among which was one of 1,000 dollars, towards a mortgage to Glover, the whole amount being 3,016 dollars and 26 cents. In a letter from Richard to Mark Steere, dated Smithfield, February 12th, 1814, the former writes, as follows: "I herewith present you with the amount of my account against the estate of Stephen Steere, as follows: Richard and Mark Steere's account against Stephen Steere, as appears by the original account, and your casting up to 28th of May, 1810, amounts to 7,840 dollars and 46 cents, four years interest, 3,126 dollars 16 cents, the Glover debt when settled, in March, 1813, and costs, 2,600 dollars, and interest thereon, 286 dollars." Certain credits were also stated, among which was 500 dollars, on

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a sale of land to Gunn, and for the Unadilla farm, 6,000 dollars, leaving a balance of 6,085 dollars and 62 cents due Richard Steere. A note of the sums due for lands sold was subjoined, amounting to 6,720 dollars. The letter continued as follows: "So that you will see by this statement, that you will pay me and retain 110 acres on the south side of the way, to pay you and Stephen, and the remainder divide. I think you may do as well, or nearly as well, as above stated. I send the original account, for the satisfaction of Stephen and Timothy, together with a paper, on which you have heretofore cast it, both of which papers I wish you to keep, as they may hereafter be wanted. The old account had been agreed to by father." In a letter, dated Smithfield, October 19th, 1806, Richard Steere writes to Asel Steere, as follows: "I wish you to assist father in every possible way in acquiring a good title to his land from Glover, and likewise to get White's lease on the Unadilla farm settled, as there is a prospect of selling that this fall."—"If in case we sell it, I don't know but it will be necessary for father to come down and take a quit claim from us, and give a warrantee deed, but if we trade, I will write you further on this subject; at any rate, I wish to have it clear of White's lease, but, as it seems some fatality attends all father's business, I am not in much expectation of its being soon done."—"It is particularly necessary for father to attend to this business, as we are called upon for the money advanced, and shall be under the disagreeable necessity of selling other land, in order to reimburse ourselves, and which father and the family would choose to keep in preference to the Unadilla farm. I am particularly unfortunate in all my dealings with father; for at the time we were up last year, a little before which I understood by him, that his object in redeeming his land was on account of its going to the family, and not to strangers; I inferred from that, if in case it came into our hands, he would certainly have no objections to our deeding a part to his children; under those circumstances, I assisted in raising the money, with a promise to many of the family, that it should not go out of my hands without their having a part, which I believe you will very well recollect. Now, it seems, I must either break my promise with my brethren, or incur the heavy displeasure of my father. I must confess that the situation of the Glover lot, lying so long, when the probability of its going to strangers was so great, with the averseness to deeding to his sons, does not, in my opinion, square with his conversation last year, above written."—"If there is any compromise that can take place between father and my brothers, whether in lands or any otherwise, so that I may escape the heavy sin of a breach of promise, I shall with all cheerfulness acquiesce in it; but, by the way, Jane would expect to be included." In another letter, dated Smithfield, 9th of July, 1807, Richard writes to his brother Asel, as follows: "Father wishes very much for Mark and I to reconvey back all the land in your county, in our purchases, except the Unadilla farm, which we cannot at this time comply with. As there seems to be a willingness on Mark's part to reconvey, whenever he is paid, it makes it hard, on my part, to perform my engagements with my brethren, and give father satisfaction. He appears to be willing to give Stephen and Timothy a 1,000 dollars each, Jane 500 dollars, and defray Simon's expenses at Doctor Bellows. Timothy is willing to take his, and I wish you to use your influence with Stephen to consent to take his, or agree with father some other way, for really, I wish the matter settled."

In a letter, dated Smithfield, 8th of August, 1809, from Richard Steere, to Stephen, Asel, and Timothy Steere, after mentioning the loss of a vessel and cargo belonging to Mark, and that all his property was attached, and that he, Richard, was left bound with him for a large amount, without security, unless he could be secured in Chenango county, Richard adds: "I herewith send a deed from Mark to me, last winter, which I hope you will lose no time in having acknowledged and recorded. You will see the necessity of this; for otherwise, Mark holds more than treble the land which is justly due to him, which is wholly lost to his family, if his creditors here should attach it, before my deed should be recorded. The deed or deeds made to Mark and I of the Cole and Glover lots from Asel, now in the hands of Stephen, must be given up or destroyed, and a deed or deeds made to me, at the same prices, which last must be recorded," —"I wish his creditors to have all his property, but to have the other property, which he holds to a large amount for security, torn from the family, would be distressing indeed." Several witnesses were examined on both sides, the material part of whose testimony is stated in the opinion of the court.

Mr. Henry, for plaintiffs. Mr. Van Buren, contra.

KENT, Ch. The bill charges that the purchase by the defendants, Richard and Mark Steere, at the sheriff's sale, on the 16th of August, 1805, was in trust for the plaintiffs' testator, and those defendants are called upon to account to the plaintiffs, as devisees, for the rents and profits, and for the proceeds of that part of the lands which have since been conveyed to others, and to reconvey to the plaintiffs that part of the lands which [they] still retain.

It is intimated in the bill, and it was made a point at the hearing by the counsel for the plaintiffs, that the sheriff's sale was void, and that the deed in pursuance of it was invalid, for want of designation and description of the lands sold. If this were so, then the plaintiffs, as devisees of Stephen Steere, the original owner, in August, 1805, would have their

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fit and adequate remedy at law, for the lands now sought by the bill. In respect to any claim for the proceeds of the estate, I apprehend the executor of Stephen Steere ought to have been a party to the bill; for these proceeds in the hands of the defendants were personal property, and if they were bequeathed at all to the plaintiffs by the will, (which cannot very readily be admitted,) the executor is the proper person to call the defendants to account, and to distribute the personal estate under the directions of the will.

But I shall not dwell upon this difficulty in the case, but proceed at once to the examination of the question on which the whole foundation of the bill rests, viz. is there a trust sufficiently manifested in writing, to be recognized and enforced in this court?

To take the case out of the statute of frauds, the trust must appear in writing, under the hand of the party to be charged, with absolute certainty as to its nature and terms, before the court can undertake to execute it. The words of the statute of frauds are, "That all declarations or creations of trusts or confidences, of any lands, &c. shall be manifested and proved by some writing, signed by the party who is or shall be by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void, & of none effect." A trust need not be created by writing, but it must be manifested and proved by writing; and the doctrine in Forster v. Hale, 3 Ves. 696, is that the nature of the trust, and the terms and conditions of it, must sufficiently appear, so that the court may not be called upon to execute the trust in a manner different from that intended.

In this case, the testator, Stephen Steere, at the age of seventy, was much in debt and embarrassed; and among other debts there was a judgment against him, amounting with interest and costs, to 1,400 dollars. He was utterly unable to satisfy it, and his lands in the county of Chenango were advertised for sale on execution. He had eleven children, at the time, and the defendants, Richard and Mark Steere, (who were two of them,) attended the sale and purchased the property for 1,600 dollars, and advanced the money out of their own funds, and took the sheriff's deeds in their own names. This was in August, 1805, and it appears to have been a fair purchase at public auction. The natural consequence of such a transaction is, that these two sons would not be inclined to speculate upon their aged father's misfortunes, and make a profitable bargain to themselves, to the injury of him and his other children. Considerations arising from the ties of blood and the dictates of family affection, would ordinarily lead such a purchaser to offer to restore the property, on being reimbursed his advances and indemnified for his trouble, or else to engage that all the profits of the purchase should be applied justly, and equitably, to the common benefit of the family. But intentions and intimations of that kind cannot well be considered as amounting to a clear and absolute trust, which a court of equity will recognize and enforce, unless the declaration of it be quite positive and free from all ambiguity. Parents will usually make declarations and express intentions of holding their property for their children, but a technical trust would not easily be deduced from them, unless they were contained in a last will and testament made on purpose to dispose of the estate. It would be injurious to that freedom of intercourse, and to the operation of those kind and generous affections, which ought to be cherished in the circle of the domestic connexions, to make such deductions from loose and general expressions, in a confidential correspondence between one member of a family and another, and to give them the force and rigour of legal obligations. It ought also to be remembered, in respect to the obligations resulting from family connexion, and the effect to be given to them in courts of justice, that the duty of benevolence, to borrow an expression of Lord Kames, is much more limited than the virtue. "Sanguinis conjunctio benevolentia devincit homines et caritate."

The first item of testimony from whence the plaintiffs undertake to show the trust, is a letter from the defendant, Richard Steere, to Asel Steere, dated October 19th, 1806, upwards of one year after the purchase under the sheriff's sale. This letter is not addressed to the testator, whom the bill alleges to have been the cestui que trust, and in that respect it differs essentially from the evidence from which a trust was deduced, in the cases of O'Hare v. O'Neil, 2 Brown, Parl. Cas. 39, and Forster v. Hale, 3 Ves. 696. It is addressed to a stranger to the alleged trust, through a brother of the defendant, and it was evidently a letter on private and confidential business. The letters in the other cases were addressed to the cestui que trust, and there was then a reasonable ground of inference, (which is wanted in this case,) that the writer of the letters [intended] to give a manifestation or evidence of the trust. This same Asel Steere declares, in his answer, that the understanding between him and the defendants, Richard and Mark Steere, was, that the land was not to be reconveyed to the testator after the repayment of the money advanced and their expenses and trouble, but that the surplus should be held for the testator and his wife, and the seven children then residing in Chenango county.

This letter corresponds with the general view of the case, as given by Asel Steere, in his answer, and shows evidently that Richard Steere considered himself as holding the land in the first place, for his reimbursement, and then, under some general and vague promise, to distribute the surplus among his brethren of the family. He says, he inferred that to be his father's wishes, even before he purchased, and that the land should go "to the family, and not to strangers." He

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says, therefore, he made "a promise to many of the family, that it (the land) should not go out of his hands without their having a part," and that he was not willing to "break his promise with his brethren."

The next letter addressed to Asel Steere, is dated July 9th, 1807, in which he says, his father "wished him and his brother Mark to reconvey back all the land except the Unadilla purchase. This, he said, he could not then do, because he could not "perform his engagements with his brethren and give his father satisfaction." The third letter of this defendant is dated August 8th, 1809, and is addressed to three of his brothers, of whom the plaintiff Timothy is one, and is material only for the idea which prevails through all the letters, that he and his brother Mark held the property for their security and for "the family."

There is not, therefore, in either of these three letters, any sufficient manifestation and evidence of the specific trust charged in the bill. The trust charged is in favour of Stephen Steere, the testator, but the trust vaguely intimated in these letters is one in favour of the family at large of Stephen Steere; and admitting a trust to have been duly manifested in favour of the children of Stephen Steere, (and this is an admission which the evidence does not demand, for the suggestions and intimations in the letters are too indefinite and loose to be the foundation of a bill for specific execution,) yet the bill calls upon the court to support the will of the testator, and to "execute the trust in a manner very different from that intended." This, Lord Alvanley admits, cannot be done.

The strongest evidence in favour of the trust charged, is contained in the letter from the defendant, Richard Steere, to his brother, the defendant, Mark Steere, dated February 12th, 1814, inclosing the account of these two defendants against Stephen Steere, of the date of January 28th, 1809.

In that account, Stephen Steere is charged as a debtor, with payments by R. and M. to the sheriff, at the time of the purchase by them in August, 1805, and with some expenses in relation to that business, and he is likewise credited with the sale part of the lands held under the sheriff's deed. He says in the letter that the original account was sent "for the satisfaction of Stephen and Timothy Steere," and that "the old account had been agreed to by father."

The defendants, in their answer, admit, that the account of 1809 was once, and only once, shown to Stephen Steere, and then casually, and that it was made up with the intent to show how expensive the estate had been to them, and what advances had been made, and that it was made up from loose papers now mislaid, or in possession of the plaintiffs, and that the name of Stephen Steere was used as a debtor for convenience, and to distinguish the real estate derived from the sheriff's deed from the other estate of the defendants, and because the estate was looked upon as a family patrimony, in which the family expected to share. They aver in their answer, that the account was made out for the satisfaction of the plaintiffs and the family, and to show that further demands were unreasonable, and that the account of 1809 was retained by them, as a private memorandum, until February, 1814, and that additions were made to it from time to time, to assist in the gratuitous dispositions of the property among the family.

These explanations were given in answer to interrogatories specially pointed to those accounts, and by which they were required to answer, "whether the said accounts were not made out in the usual form of accounts."

It appears to me that the explanation is consistent with the proof applicable to those accounts, and with the general complexion of the entire transactions of the estate.

James Birdsall, a witness, states that in January, 1814, the defendants, Richard Steere and Mark Steere, entered into a parol agreement in relation to the lands so purchased at the sheriff's sale, with their brothers, Stephen Steere, jun., and the plaintiff, Timothy Steere. The substance of the agreement was reduced to writing, at the time, by the witness, at the request of the parties to it, and was approved of by them. That agreement was considered as a final settlement of all questions and claims in respect to that property, and it provided for a distribution of what remained of the estate, among certain of the children. The memorandum begins with these words: "Richard Steere will state his account to Mark, Stephen, and Timothy Steere:" and here we have the origin of the publication of the account produced by the plaintiffs as evidence of the trust. The account was sent to Mark Steere, in the letter of Richard Steere, of the 12th of February, 1814, and now we can understand the meaning of that paragraph in the letter, in which he says, "I send the original account for the satisfaction of Stephen and Timothy;" and also the force of another paragraph in which it is said: "So you will see by my statement that you will pay me and retain 110 acres on the south side of the way, to pay you and Stephen, and the remainder to divide."

This account and letter could not have been intended as a manifestation or declaration of a trust in favour of the testator. The manner in which it arose, and was transmitted, and the contents of the letter, are pretty satisfactory proof, that the explanation given of the account in the answer is the just and true explanation, and the only one of which the whole transaction is susceptible. The way in which these accounts came to the knowledge and possession of the plaintiffs, was by taking copies of the originals while in the hands of the defendant Mark Steere, and there was never any free and voluntary delivery for the purpose to which they have been applied. The only part of the letter

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which shows that the defendants considered themselves as acting in the purchase and management of the estate, as trustees for their father, the testator, is the expression that "the old account had been agreed to by father." This probably referred to the account of 1809; and though a loose paragraph, it would be difficult to understand it in any other sense than as an admission of the trust sought after, if it was not accompanied with other paragraphs in the same letter absolutely inconsistent with that fact. The account was sent only for the satisfaction of the two sons, (of whom the plaintiff Timothy was one,) and in pursuance of an agreement to distribute the surplus property among the children. The letter says, that after Mark's and Stephen's debts were satisfied, the remainder was to be divided. The whole letter must be taken together, and one expression checked and balanced by another. And when we take into consideration the manner in which that real estate had been dealt with by these two defendants, for ten years together, under the eye, and with the approbation of their father, the notion of any other trust than that founded upon brotherly good will, spontaneous promises, and gratuitous acts of benevolence to the family at large, including their father and all his other children, is utterly inadmissible. We have conveyances from the defendants of parts of the estate between 1809 and 1815, to strangers, for a valuable consideration, and to several of the children, as gifts, and all these acts confirmed by the testator. The agreement of 1814 was partly executed by the defendants, and the several voluntary transfers to the children, to the amount of 5,000 dollars in value, are decisive proofs, that the defendants have acted according to their original suggestions and intentions of applying the surplus property, after their indemnity, to the benefit of the family. The idea of a technical trust binding in equity in favour of the father, was never heard of in the family, or put forward by any branch of it, until after the two plaintiffs, Thomas and Timothy Steere, had obtained from Mark Steere copies of the accounts above referred to. I cannot easily reconcile this claim with good faith, after the agreement of 1814, and the extent to which it had been carried into execution by the defendants Richard and Mark. It also strikes me, considering the manner in which the purchase had been received and treated by the family of the testator, from the time it was made, down to the testator's death, and the many gifts and conveyances which the family have been content to receive at the hands of the defendants, that to enforce a strict trust with all the legal responsibilities attached to it, according to the bill, would be extremely unjust and oppressive.

A question has been raised, whether the parol evidence given in the case be admissible, to contradict the inference drawn by the plaintiffs from the accounts and the letters. If the written proof was clear and positive, it could not be rebutted by parol proof; but considering the loose and ambiguous nature of it, I am inclined to think the parol evidence is competent in support of the sheriff's deed, and to explain the obscurity of the case, by showing what was the understanding of all the parties concerned. In Forster v. Hale, parol proof was received, and taken into consideration by the master of the rolls, in forming his opinion; and in Redington v. Redington, 3 Ridg. App. 182, parol evidence was held, by Lord Clare, to be admissible to support a deed in the name of the son, but inadmissible to create a trust against it. The cases of Lamplugh v. Lamplugh, 1 P. Wms. 111, and of Taylor v. Taylor, 1 Atk. 386, were referred to by the lord chancellor of Ireland, in confirmation of this principle. The parol proof in this case puts an end to all pretension of a trust in favour of the testator, and shows that by the acknowledgment of the testator and of all the family, the purchase at the sheriff's sale was absolute, without any trust or qualification whatsoever, and that none was ever heard of, or suggested in the family, until about the time that the testator made the will, giving all the undisposed part of the estate to the plaintiffs. It was the uniform and universal understanding in the family, for ten years, that the property was not to be reconveyed to the father, but was to be held, in the first place, for the indemnity of the two purchasers, and then, it was submitted to their discretion and justice, in what manner and mode, and to what extent, the surplus should be appropriated to the wishes and wants of the family. I am aware, however, of the dangerous nature of such proof, and should not willingly rest upon it, if it did not appear to corroborate the reasonable inferences to be drawn from the written testimony in the case.

I do not perceive any ground for a distinction between the case of the estate generally, and the Cole and Glover lots. If any trust exists as to them, distinct from what is attempted to be established as to the rest of the estate, it is a trust by implication or operation of law, and such a trust cannot be made out but by showing the actual payment of the money by the cestui que trust, or an actual loan by him for that purpose; and in this case no such payment or loan is pretended. The mere charge of the payment to the third person who sets up the trust will not be sufficient; and actual payment, or an actual loan of the money at the time, and not subsequent to the purchase, is indispensable. Botsford v. Burr, 2 Johns. Ch. 409. "If you merely employ a man by parol," says Mr. Sugden, "to buy an estate for you, although he buy it accordingly, yet if he hold himself out as the real purchaser, and no part of the purchase money was paid by you, you cannot compel him to convey the estate to you, because that would be directly in the teeth of the statute of frauds." And if the entry

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in the account communicated to Mark Steere, in 1814, is assented to as evidence in writing of a trust, it is no longer the case of a resulting trust, but rests precisely upon the same ground with the general trust set up by the bill, and must partake of the same fate.

I am, accordingly, of opinion, that the bill cannot be sustained, because,

1. The plaintiffs, upon their own showing, have a remedy at law for the land possessed by the defendant Richard Steere, inasmuch as neither the sale nor the sheriff's deed contained any description or location of the land sold.

If, however, the plaintiffs, or the testator under whom they hold, may be considered (and I think he may justly) as having waived that objection, and as having affirmed the sale, by repeated acts, then,

2. The plaintiffs have not made out a trust sufficiently clear and certain, to enable this court to act upon it, and to take the case out of the statute of frauds.

Bill dismissed, without costs.

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TOBIAS v. KETCHUM.

(32 N. Y. 319.)

Court of Appeals of New York. March, 1865.

Action to recover dower and mesne profits. Defendant pleaded a provision by will in lieu of dower, and failure of the widow to elect. There was a judgment for plaintiff, from which defendant appealed.

T. W. Dwight, for appellant. Charles Tracy, for respondent.

DAVIS, J. The testator not having declared in express terms that the provisions made by his will for his widow are given in lieu of dower, she is not put to her election unless the devises of the will "be so repugnant to the claim of dower, that they cannot stand together." Lewis v. Smith, 9 N. Y. 502; Church v. Bull, 2 Denio, 430; Jackson v. Churchill, 7 Cow. 287; Savage v. Burnham, 17 N. Y. 562. This rule is a familiar one, and needs no further citation of authority.

In this case the provisions made by the will and codicil for the widow are as follows: 1. The will gives her all the household furniture and jewelry of every kind in use by her and the testator, or either of them. 2. One-third of the net income of all the real estate belonging to the testator, after payment of all taxes, assessments and interest due thereon, to commence to be paid to her six months after the testator's decease, and to be paid to her every six months thereafter, during her life. The codicil adds, "a suitable provision in money," "to be paid to her during the first six months, till the payment of her provisions under the will shall commence," and the use during her natural life of the apartments in the house No. 615 Fourth street, New York, as occupied by her and her husband, as a residence at the date of the codicil, with the election to have such other suitable residence in any other house belonging to him at the time of his decease that she might prefer.

After making these provisions the will disposes of all the "rest, residue and remainder of the estate," by directing in substance that it be divided equally among his surviving children and the children of his deceased children, if any there should be, six months after the death of his widow.

The will then nominates executors, and clothes them "with full power and authority to carry out all the provisions of the will," and if they deem it necessary or proper to a fair division of the property among the parties entitled thereto, to sell either at public or private sale the personal and real estate, or any portion thereof, and execute deeds thereof, and to divide the proceeds as thereinbefore directed; but no sale to be made till six months subsequent to the death of the testator and his wife. It also clothes the executors, "the survivor or survivors of them, with full power and authority to rent, lease, repair and insure any portion of the estate during any period of time the same may remain unsold or undivided."

In Savage v. Burnham, 17 N. Y. 561, the testator devised and bequeathed all of his estate, real and personal, to trustees; the real estate upon trust to sell after the death of his wife. The will provided that during her life, the widow should "receive and take to her own use one-third part of the clear yearly rents and profits of the real estate, and that the residue of the clear yearly rents and profits should be deemed a part of the personal estate, and subject to the dispositions of the will concerning the personal estate."

The entire estate, with all its income, except the one-third of the rents and profits of the land, was given (through the trusts) to the testator's children and the children of his daughters. It was held that a claim of dower could not stand consistently with these provisions, and that the widow was put to her election.

Upon the authority of that case, if the will in question creates a trust and vests the entire legal estate in the trustees, the provision made for the widow is inconsistent with the right of dower, and she was bound to elect. In that case her claim of dower, if allowed, would inevitably defeat the scheme of the will, for it would prevent the trustees from holding the legal title of the whole estate, and receiving the entire rents and profits for the purpose of paying taxes, assessments, interest, repairs and insurance, and ascertaining the net income, of which one-third is to be paid to the widow, and the residue ultimately to the other beneficiaries.

The first question then is, are the executors, under this will, made trustees of an express trust? The word "trust" or "trustee" is not used in the will, but that is only a circumstance to be noted in considering the question. "It is by no means necessary that the donee should be expressly directed to hold the property to certain uses or in trust, or as a trustee. * * * It is one of the fixed rules of equitable construction, that there is no magic in particular words; and any expressions that show unequivocally the intention of the parties to create a trust will have that effect. It was said by Lord Eldon, that the word 'trust' not being made use of, is a circumstance to be alluded to, but nothing more; and if the whole frame of the will creates a trust, the law is the same though the word 'trust' is not used." Hill, Trustees (3d Am. Ed.) 99; (Orig. Ed. 65) and cases there cited.

We are in this case to determine the question by the authority conferred and the duties imposed. The executors are clothed "with full power and authority to rent, lease, repair and insure" the estate "during any period of the time it shall remain unsold and undivided." That period is, at all

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events, to last until six months after the decease of the widow. They are also in general language clothed "with full power and authority to carry out all the provisions of this will." It is apparent that the "net income of all the real estate" is to be ascertained by some person or persons once in six months during the life of the widow, "after all taxes, assessments and interest due thereon are paid." One-third of this net income is to be paid to the widow. By whom is this duty to be performed? It is clearly impracticable for the various tenants of the estate to perform it; neither collectively nor individually have they the means of determining the facts upon which the net income is ascertained, and it would be extremely embarrassing so to frame leases that each tenant should be subject to pay to the widow an amount of his rent that should discharge the proportion his rent bore to the net income of the whole estate, after payment of all taxes, assessments and interest due on the whole. Collating the power to rent, lease, repair, and insure, with the duty that rests somewhere to pay all taxes, assessments and interest, and then to pay to the widow one-third of the net income after such payment, there seems to be no embarrassment in determining where the duty rests. To my mind it is apparent that the scheme of this will requires that the whole income, rents and profits of the real estate shall be received by the executors until the sale and division provided for; and that they are the persons on whom the duty to pay one-third of the net income to the widow is imposed. They are to make the ultimate division, and consequently to retain for that purpose the income not paid semi-annually to the widow. The rents and profits of all the real estate are given to them for several purposes: 1. To keep down taxes, assessments and interest by paying them; 2. To ascertain the "net income" by deducting from the gross receipts the amount paid for those purposes; 3. To pay one-third of the net income thus ascertained to the widow every six months; 4. To repair and insure the premises out of the residue; and 5. To retain the balance for division, and finally divide it among the daughters or their children after the decease of the widow. The imposition of these various duties by the will make the acting executors trustees for their performance to the same extent as though declared to be so by the most explicit language. The authority to sell the real estate and execute deeds thereof, as given by the will, standing by itself, would confer nothing but a power; but coupled as it is with the various provisions for leasing, repairing and insuring, with the obligation to give to the widow a residence as she may elect in any of the houses of the testator, it goes far to show that it was the testator's intention to vest the fee of the estate in the trustees. But however that may be, it is well settled that trustees take the legal estate whenever they are clothed with the authority which the foregoing construction of the will gives to the executors in this case.

"If land be devised to three persons and their heirs in trust to permit A. to receive the net profits for her life for her own use, and after her death to permit B. to receive the net profits for her life, etc., it has been held that the legal estate is in the trustees, for that they are to receive the rents and thereout pay the land tax and other charges on the estate, and hand over the net rents only to the tenant for life." Lewin, Trusts, 248; Baker v. Greenwood, 4 Mees. & W. 421; White v. Parker, 1 Bing. N. C. 573.

In White v. Parker, the trustees were to permit the testator's wife and daughters to receive the clear rents of three parts and his son the clear rent of one part—the trustees to pay all outgoings, to repair and let the premises. It was held that the legal estate vested in the trustees. In the note to 2 Wms. Saund. 11, the rule is thus laid down: "Where something is to be done by the trustees which makes it necessary for them to have the legal estate, such as payment of the rents and profits to another's separate use, or of the debts of the testator, or to pay rates and taxes, and keep the premises in repair, the legal estate is vested in them, and the grantee has only a trust estate."

In Birmingham v. Kerivan, 2 Schoales & L. 444, Lord Redesdale said that a direction to keep a house in repair applied to the whole house, and could not be considered an obligation on a person claiming dower. When therefore the testator authorized his executors to repair, he did not expect that they would control two-thirds of the estate and the widow one-third, but that they would manage the entire property.

The authority to rent and lease, to repair and to insure, by necessary implication vests the trustees with the legal title. They must not only execute leases, but enforce them, put in tenants and dispossess them, the proper performance of which requires the title of the estate. So to repair there must be such a right of entry and control in the trustees as gives them complete dominion; and to insure involves the necessity of ownership, for the policy must be taken in the name of the trustees. But to repair and to insure necessarily involve expenses chargeable upon the rents and profits; and an executor who is authorized to lease, repair and insure by necessary implication may so lease that rents will come to his hands out of which to pay repairs and insurance, and if a net income is to be paid out of such rents, the executor becomes the party whose duty it is to ascertain and pay it. In Leggett v. Perkins, 2 N. Y. 297, the testator constituted his executors trustees of the estate devised to his daughters for life, and authorized them to take charge of, manage and improve the same, and pay over to them from time to

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time the rents, interest and income thereof. It was held to be "very obvious that the legal estate in the premises was necessary to enable the trustees to discharge their duties," and that the trust was a valid one under the third subdivision of section 55 of the statutes of uses and trusts (1 Rev. St. 729), and that by section 60 of the same statute, the whole estate in law and equity vested in the trustees.

In Brewster v. Striker, 2 N. Y. 19, the testator devised his real estate to his grandchildren, and then provided that the lands should not be sold or alienated, but that his executors should lease or rent the same and pay the rents, issues and profits to his said grandchildren, etc.; it was held that the executors were trustees for the purposes of the will, and took, by implication, the legal estate during the lives of the grandchildren.

These authorities are conceived to be abundant to establish the proposition that the authority to lease, rent, repair, insure, pay taxes, assessments and interest, and pay net income to devisees, carried the legal title to the executors in this case, and created a trust in them valid under the statute.

It follows therefore from the decision of this court in Savage v. Burnham, that a claim of dower is totally inconsistent with the provisions of the will, and the plaintiff was not at liberty to take both the provisions of the will and dower.

In the language of Comstock, J., in the case cited: "During her life she was to have one-third of the clear rent and profits, and the other two-thirds were to go into a general fund for distribution. The entire estate, with all its income, except the one-third, is given in the clearest possible terms, to the testator's children and the children of his daughters. It is therefore impossible for her to receive any part of it, except what is expressly given to her, without subverting the will to that extent."

The circuit judge erred in directing a verdict for plaintiff.

I have considered the question as to the effect of the alleged release of dower. In my opinion, the instrument was not designed for any such purpose as a release of dower, and ought not to be so construed. Its objects are apparent on its face; to-wit, to dispose of the vexed question as to her rights under the provision of the will directing moneys to be paid to her for her suitable support the first six months, and protecting the executors on paying her a sum which might prove larger than was designed by the surrogate's decree, and the instrument ought to be construed accordingly.

I am not embarrassed by the question of parties, nor the form of the judgment. The Code authorizes all persons having conflicting claims to be made parties. Code, § 118. The defendants who appeared and answered, admitted the receipt of the rents and profits as alleged in the complaint, putting nothing but the amount in issue. They are the heirs at law, and the statute authorizes the verdict for rents and profits against them.

The judgment below should be reversed, and new trial ordered, costs to abide event.

All the judges concurring, the judgment was reversed and a new trial ordered.

Judgment reversed.

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YOUNG v. YOUNG.

(80 N. Y. 422.)

Court of Appeals of New York. 1880.

Appeal from judgment of the general term of the supreme court, in the Third judicial department, reversing a decree of the surrogate of the county of Sullivan upon the accounting of plaintiff, as administrator of the estate of Joseph Young, deceased.

Upon such accounting the administrator claimed that certain United States and town coupon bonds belonged to himself and to his brother, John N. Young. The surrogate disallowed the claim, and charged him with said bonds.

These bonds, upon the death of the intestate, were found in two packages inclosed in envelopes, upon which were indorsed memoranda signed by him, one dated March 14, the other March 14, 1874, each of which described the bonds inclosed by numbers, and stated that certain of them belonged to William H. Young, that the others belonged to John N. Young. Then followed a statement of the indorsements, of which the following is a copy: "But the inst. to become due thereon is owned and reserved by me for so long as I shall live; at my death they belong absolutely and entirely to them and their heirs." The other was similar.

The circumstances under which the memoranda were made, and the further material facts, are set forth in the opinion.

Hezekiah Watson, for appellant. Homer A. Nelson, for respondent.

RAPALLO, J. The intention of Joseph Young, deceased, to give the bonds in controversy on this appeal to his son, William H. Young, reserving to himself only the interest during his life-time, was so clearly manifested, that we have examined the case with a strong disposition to effectuate that intention and sustain the gift, if possible.

The transaction is sought to be sustained in two aspects: First, as an actual executed gift, and secondly, as a declaration of trust. These positions are antagonistic to each other, for if a trust was created, the possession of the bonds, and the legal title thereto, remained in the trustee. In that case there was no delivery to the donee, and consequently no valid executed gift; while if there was a valid gift, the possession and legal title must have been transferred to the donee, and no trust was created. As each of these theories thus necessarily excludes the other, they must be separately considered.

To establish a valid gift, a delivery of the subject of the gift to the donee or to some person for him, so as to divest the possession and title of the donor, must be shown, and the first question which arises under the peculiar circumstances of this case is, whether it is practicable to make a valid gift in præsenti of an instrument securing the payment of money, reserving to the donor the accruing interest, and if so, by what means this can be done. The purpose of such a gift may undoubtedly be accomplished by a proper transfer to a trustee and perhaps by a written transfer delivered to the donee, but the question now is, can it be done in the form of a gift, without any written transfer delivered to the donee, and without creating any trust? I can conceive of but one way in which this is possible, and that is by an absolute delivery of the security which is the subject of the gift, to the donee, vesting the entire legal title and possession in him, on his undertaking to account to the donor for the interest which he may collect thereon. But if the donor retains the instrument under his own control, though he do so merely for the purpose of collecting the interest, there is an absence of the complete delivery which is absolutely essential to the validity of a gift. A gift cannot be made by creating a joint possession of donor and donee, even though the intention be that each shall have an interest in the chattel, especially where, as in this case, the line of division between these interests is not ascertainable. The reservation of the interest on the bonds to the donor was for an uncertain period; that is, during his life-time, and until his death it was impossible to determine the precise proportion of the money secured by the bonds, to which the donee was entitled.

If therefore the donor retained the custody of the bonds for the purpose of collecting the accruing interest, or even if they were placed in the joint custody or possession of himself and the donee, there was no sufficient delivery to constitute a gift. But if an absolute delivery of the bonds to the donee, with intent to pass the title, was made out, the donor reserving only the right to look to the donee for the interest, the transaction may be sustained as an executed gift. Doty v. Willson, 47 N. Y. 580.

This brings us to an examination of the evidence. The written memoranda attached by the donor to the envelopes containing the bonds, evinced his intention to make a present gift to the respondent of an interest in the bonds, and shows that the disposition was not intended to be of a testamentary character. He declares that the bonds are owned by William H. Young, but the interest to become due on the same is owned and reserved by the donor for so long as he shall live, and that at his death the bonds are owned by the donee "absolutely and entirely" in one case, and "wholly and entirely" in the other. There are some verbal differences in the two memoranda, but the purport of both is the same. They both express in the same words that the interest to become due on the bonds is "owned and reserved" by the donor for so long as he shall live, and that the bonds are not to be-

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long "wholly" or "absolutely" to the donees till after his death.

The exhibition of these memoranda to the wife of the donee, and the declarations of the donor, show that what he had thus done was in pursuance of a settled purpose, and that he believed that he had made a valid disposition of the bonds according to the memoranda, but they do not satisfy the requirement of an actual delivery.

The evidence touching the point of delivery is that the deceased for several years before his death resided at the house of his son, William H. Young, where there was a safe which had formerly belonged to the deceased, but which he is said to have presented to his grandson, James C. Young, a son of William H., reserving to himself the right to use the safe, and in fact using it as a place of deposit for his valuable papers. That William H. Young also kept papers in the same safe, but rarely went to it himself, the deceased being in the habit of depositing therein for him such things as he desired, and removing them for him at his request.

The upper part of this safe was divided into pigeon-holes, where the deceased usually kept his papers and was in the habit, up to the time of the transaction now in question, of keeping the bonds in controversy. The lower part of the safe was divided into larger open compartments, one of which had been appropriated as the receptacle of the papers of William H. Young.

After affixing to the two envelopes in which the bonds were contained, the memoranda showing the dispositions in favor of his sons William H. Young and John N. Young, and after exhibiting these memoranda to the respective wives of the donees, the deceased replaced the two packages of bonds in this safe, and after his death they were found, not in the pigeon-hole where they had formerly been kept, but in the compartment where William H. Young's papers were kept. After the memoranda had been made, the bonds were generally kept in that compartment, but the deceased had been seen by William H. to put them in the pigeon-holes and take them out with the indorsements on.

On the occasion of exhibiting the packages of bonds and the indorsements to Mrs. William H. Young, the deceased asked her to take them in her hands and see what he had written on them. But this was not intended as a delivery to her, for she asked him whether he wanted her to take them and put them up, and he said, "No." After having thus exhibited them he took them back and placed them in the safe. The memoranda were made on the 14th March, 1874. The testator died November 12, 1875. In the meantime installments of interest on the bonds became due. The deceased cut off the coupons, and on some occasions William H. Young assisted him in so doing, but William H. testified that he never asserted any ownership over the bonds as against his father. And the testimony shows that they were at all times under the control of the deceased, although William H. Young and his son, James C. Young, also had access to the safe. Those three however were the only persons having access to the safe, and it does not appear that John N. Young, the other donee named in the memoranda, ever had any control over the bonds or access thereto. It was also shown that after the alleged gift, when solicited for a loan, the deceased said that he supposed he might with the boys' consent take some of their bonds. Also that he called the attention of his grandson, James C. Young, to the memoranda and said, "you see what I have done with them." That he declared to a witness, Benjamin Grant, that what he had left he had given to William and Newton. That in September, 1875, he took from one of the envelopes a bond of $1,000, being one of those stated in the memorandum indorsed to belong to John N. Young, and gave it to a third party, but it also appeared that he had, before making the memorandum, presented John N. Young with $1,000.

This is the substance of all the testimony by which a delivery to the donee is sought to be established. It shows that the deceased at no time parted with the possession or control of the bonds, but merely confirms the intention expressed in the memoranda. The change of the position of the bonds in the safe where they were kept, from the pigeon-hole to the compartment, might have been significant had William H. been the only donee, and had the intended gift been unaccompanied by any reservation. But under the existing circumstances it cannot be construed into a delivery of the bonds. In the first place, part of the bonds were stated in the memoranda to be given to William H., and part to John N. Young. The intention of the donor toward each of his sons was the same. Yet no attempt appears to have been made to effect any sort of delivery to John N. Moreover, the form of the intended gift shows that no immediate delivery could have been contemplated by the deceased. The memorandum on each envelope says that the interest to become due on the bonds is "owned and reserved" by the donor. This interest, up to the dates of the maturity of the bonds respectively, was represented by coupons attached to the bonds. It clearly could not have been intended to deliver them, for so many of them as might become due during the life of the donor were reserved from the gift, as the interest was expressly declared to be "owned" by the donor, and not parted with. The possession of these coupons was necessary to enable him to collect the interest, and he availed himself of it for that purpose from time to time. No intention was manifested to deliver up these vouchers and look to the donees for the interest. No divi-

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sion of the coupons could be made, for the period of the donor's life was uncertain; and further, if all the coupons were retained by the donor, they might not represent the entire interest reserved by him. The bonds matured in 1887 and 1888, and some were redeemable earlier; and if he had lived until the maturity of the bonds, or until the United States bonds were called in by the government, as they were liable to be, the donees would not then have been entitled to the possession of the bonds or their proceeds. The reservation accompanying the gift would entitle the donor to possession of the fund. The intention of the donor, as deducible from the memoranda and the evidence, was, not to part with his title to the accruing interest, but to keep the bonds and collect the interest for his own use till he should die; and that then, and not before, his sons should have possession of them and own them absolutely. That although he meant that their right to this interest in remainder should be vested and irrevocable from the time of the supposed gift, yet that at no time during his life did the donees have exclusive possession of the bonds or the legal right to such possession.

The declarations of the donor that he had given the bonds to his sons must be understood as referring to the qualified gift which he intended to make. There is nothing to indicate that he ever relinquished his right to the interest, and all the circumstances of the case show that he could not have intended to admit that he had made an absolute gift, free from the qualification expressed in the memoranda. The cases of Grangiac v. Arden, 10 Johns. 295; Davis v. Davis, 8 Nott & McC. 226, and kindred cases, consequently have no application. The principle of those cases was applied in the late case of Trow v. Shannon, 78 N. Y. 446, but in that case the gift was intended to be absolute. No qualification was attached to it, and the bonds were placed where they were accessible to the donee, and he had himself collected the interest for his own use. There was nothing inconsistent with a full delivery, but there was no direct evidence of such delivery, and the admissions of the donor that she had given the bonds and they belonged to the donee, were received, and weight given to them, as some evidence from which the jury might infer that the gift had been completed by an absolute delivery.

It is impossible to sustain this as an executed gift, without abrogating the rule that delivery is essential to gifts of chattels inter vivos. It is an elementary rule that such a gift cannot be made to take effect in possession in futuro. Such a transaction amounts only to a promise to make a gift, which is nudum pactum. Pitts v. Mangum, 2 Bailey, 588. There must be a delivery of possession with a view to pass a present right of property. "Any gift of chattels which expressly reserves the use of the property to the donor for a certain period, or (as commonly appears in the cases which the courts have had occasion to pass upon) as long as the donor shall live, is ineffectual." 2 Schouler, Pers. Prop. p. 118, and cases cited; Vass v. Hicks, 3 Murph. (N. C.) 494. This rule has been applied even where the gift was made by a written instrument or deed purporting to transfer the title, but containing the reservation. Sutton's Ex'r v. Hallowell, 2 Dev. 186; Lance v. Lance, 5 Jones Law, 413.

The only question remaining therefore is whether a valid declaration of trust is made out.

The trust contended for, if put into words, would be that the donor should hold the bonds and their proceeds for his own benefit during his life and to the use of the donees from the time of his own death.

Of course no trust was created of the interest for the donor's own life, for he was the legal owner of the income of the bonds, and never parted with this right—nor could he be at the same time trustee and cestui que trust. The trust then would be to hold to the use of the donees an estate in remainder in the bonds, which should vest in possession in the donees, at the time of his death.

The difficulty in establishing such a trust is that the donor did not undertake or attempt to create it, but to vest the remainder directly in the donees. Assuming, for the purposes of the argument, that he might have created such a trust in himself, for the benefit of his sons, and, further, that he might have done so by simply signing a paper to that effect and retaining it in his own possession, without ever having delivered it to the donees, or any one for them, yet he did not do so. He simply signed a paper certifying that the bonds belonged to his sons. He did not declare that he held them in trust for the donees, but that they owned them subject to the reservation, and were at his death to have them absolutely. If this instrument had been founded upon a valuable consideration, equity might have interfered and effectuated its intent by compelling the execution of a declaration of trust, or by charging the bonds, while in his hands, with a trust in favor of the equitable owner. Day v. Roth, 18 N. Y. 448. But it is well settled that equity will not interpose to perfect a defective gift or voluntary settlement made without consideration. If legally made, it will be upheld, but it must stand as made or not at all. When therefore it is found that the gift which the deceased attempted to make failed to take effect for want of delivery, or a sufficient transfer, and it is sought to supply this defect and carry out the intent of the donor by declaring a trust which he did not himself declare, we are encountered by the rule above referred to. Story, Eq. Jur. 706, 787, 793b–793d; Antrobus v. Smith, 12 Ves. 39, 43; Edwards v. Jones, 1 Mylne & C. 226; 7 Sim. 325; Price v. Price, 8 Eng. Law & Eq. 281; Hughes v. Stubbs, 1 Hare, 476. It

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established as unquestionable law that a urt of equity cannot by its authority nder that gift perfect which the donor has ft imperfect, and cannot convert an imperct gift into a declaration of trust, merely account of that imperfection. Heartley v. icholson, 44 L. J. Ch. 279. It has in some ses been attempted to establish an exceptn in favor of a wife and children on the ound that the moral obligation of the donor provide for them constituted what was lled a meritorious consideration for the ft, but Judge Story (2 Eq. Jur. § 987, and 1 q. Jur. § 433) says that that doctrine seems w to be overthrown, and that the general inciple is established that in no case whatver will courts of equity interfere in favor mere volunteers, whether it be upon a luntary contract, or a covenant, or a setement, however meritorious may be the conderation, and although the beneficiaries and in the relation of a wife or child. Holway v. Headington, 8 Sim. 325; Jeffreys v. effreys, 1 Craig & P. 138, 141.

These positions are sustained by many auorities. To create a trust, the acts or words lied upon must be unequivocal, implying at the person holds the property as trustee r another. Martin v. Funk, 75 N. Y. 134, er Church, C. J. Though it is not necessary at the declaration of trust be in terms exlicit, the donor must have evinced by acts hich admit of no other interpretation, that ch legal right as he retains is held by him s trustee for the donee. Heartley v. Nichson, 44 L. J. Ch. 277, per Bacon, V. C. he settler must transfer the property to a ustee, or declare that he holds it himself in ust. Milroy v. Lord, 4 De Gex, F. & J. 264, er Lord Knight Bruce. In cases of volunry settlements or gifts, the court will not pute a trust where a trust was not in fact e thing contemplated. The distinction beveen words importing a gift and words creing a trust is pointed out by Sir Geo. Jessel Richards v. Delbridge, L. R. 18 Eq. Cas. , as follows: "The making a man trustee volves an intention to become a trustee, hereas words of gift show an intention to ve over property to another, and not to rein it in the donor's hands for any purpose, luciary or otherwise."

The words of the donor in the present case e that the bonds are owned by the donees, t that the interest to accrue thereon is vned and reserved by the donor for so long s he shall live, and at his death they belong solutely to the donees. No intention is here pressed to hold any legal title to the bonds trust for the donees. Whatever interest as intended to be vested in them was transrred to them directly, subject to the reservtion in favor of the donor during his life, d free from that reservation at his death. othing was reserved to the donor, to be held trust or otherwise, except his right to the cruing interest which should become payle during his life. It could only be by reforming or supplementing the language used, that a trust could be created, and this, as has been shown, will not be done in case of a voluntary settlement without consideration. There are two English cases where indeed the circumstances were much stronger in favor of the donees than in the present case, which tend to sustain the position that a settlement of this description may be enforced in equity by constituting the donor trustee for the donee. They are Morgan v. Malleson, L. R. 10 Eq. Cas. 475, and Richardson v. Richardson, L. R. 3 Eq. Cas. 686. In the first of these cases, Morgan v. Malleson, L. R. 10 Eq. Cas. 475, the intestate signed and delivered to Dr. Morris a memorandum in writing: "I hereby give and make over to Dr. Morris one India bond," but did not deliver the bond. Sir John Romilly sustained this gift as a declaration of trust. The case is referred to by Church, C. J., in Martin v. Funk as an extreme case. In Richardson v. Richardson, an instrument purporting to be an assignment, unsupported by a valuable consideration, was upheld as a declaration of trust. In speaking of these cases in Richards v. Delbridge, L. R. 18 Eq. Cas. 11, Sir Geo. Jessel, M. R., says: "If the decisions of Lord Romilly (in Morgan v. Malleson), and of Wood, V. C. (in Richardson v. Richardson) were right, there never could be a case where the expression of a present gift would not amount to an effectual declaration of trust." And it may be added that there never could be a case where an intended gift, defective for want of delivery, could not, if expressed in writing, be sustained as a declaration of trust. Both of the cases cited are now placed among overruled cases. Fisher, Ann. Dig. (1873 and 1874) 24, 25. In Moore v. Moore, 43 L. J. Ch. 623, Hall, V. C., says: "I think it very important indeed to keep a clear and definite distinction between these cases of imperfect gifts and cases of declarations of trust; and that we should not extend beyond what the authorities have already established, the doctrine of declarations of trust, so as to supplement what would otherwise be mere imperfect gifts." If the settlement is intended to be effectuated by gift, the court will not give effect to it by construing it as a trust. 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. Milroy v. Lord, 4 De Gex, F. & J. 264.

The case of Martin v. Funk and kindred cases cannot aid the respondent. In all those cases there was an express declaration of trust. In the one named the donor delivered the money to the bank, taking back its obligation to herself in the character of trustee for the donee; thus parting with all beneficial interest in the fund, and having the legal title vested in her in the character of trustee only. No interposition on the part of the

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court was necessary to confer that character upon her; nor was it necessary, by construction or otherwise, to change or supplement the actual transaction. None of the difficulties encountered in the present case stood in the way of carrying out her intention. It was capable of being executed in the form in which it was expressed.

The question whether a remainder in a chattel may be created and given by a donor by carving out a life estate for himself and transferring the remainder, without the intervention of a trustee, is learnedly discussed in the appellant's brief; but the views we have expressed render it unnecessary to pursue that inquiry. We are satisfied that it is impossible to hold that the facts as they appear establish a valid transfer of any interest in the bonds in question to the donee, and that the attempted gift cannot be sustained as a declaration of trust. It follows that the judgment of the general term must be reversed and the decree of the surrogate affirmed. Costs of all the parties in this court and in the supreme court to be paid out of the estate.

All concur.

Judgment reversed.

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ELLISON v. ELLISON.

(6 Ves. 656.)

High Court of Chancery. 1802.

By indentures, dated the 1st of July, 1791, reciting a lease, dated the 6th of June preceding, of collieries at Hebburn and Jarrowood in the county of Durham, for thirty-one years to Charles Wren, and others; and that the name of Wren was used in trust for Nathaniel Ellison and Wren in equal shares, it was declared, that Wren, his executors and administrators would stand possessed of the lease in trust as to one moiety for Ellison, his executors, &c.

By another indenture, dated the 18th of June, 1796, reciting, that Ellison was interested in and entitled to one undivided eighth part of certain collieries at Hebburn and Jarrowood, held by two several leases for terms of thirty-one years; and that he was desirous of settling his interest, he assigned and transferred all his interest in the said collieries and all the stock, &c. to Wren, his executors, administrators, and assigns, in trust for Nathaniel Ellison and his assigns during his life; and after his decease in trust to manage and carry on the same in like manner as Wren should carry on his own share; and upon further trust out of the profits to pay to Margaret Clavering during the remainder of the term, in case she should so long live, the yearly sum of £103. 2s. 8d.; which sum is thereby mentioned to be secured to her by an indenture, dated the 14th of May last; and subject thereto in trust to pay thereout to Jane Ellison, in case she should survive Nathaniel Ellison, during the remainder of the term, during the joint lives of Jane Ellison and Anne Furye, the clear yearly sum of £180; and after the decease of Anne Furye then the yearly sum of £90 during the remainder of the term, in case Jane Ellison should so long live; and subject, as aforesaid, upon trust to pay thereout to each of the children of Nathaniel Ellison, that should be living at his decease, during the remainder of the term, during the joint lives of Jane Ellison, and Anne Furye, and the life of the survivor, the yearly sum of £30 a-piece, and after the decease of the survivor the yearly sum of £15; and upon further trust to pay the residue of the profits arising from the collieries to the eldest son of Nathaniel Ellison, who should attain the age of twenty-one; and upon the death of Margaret Clavering then upon trust to pay to each of the children of Nathaniel Ellison the further yearly sum of £10; with survivorship, in case any of the children should die before twenty-one, or marriage of daughters, provided none except the eldest should be entitled to a greater annuity than $50; and upon further trust to pay the residue to the eldest son; provided further, in case all the children die before twenty-one or the marriage of daughters, upon trust to pay the whole to such only child at twenty one, or marriage of a daughter: provided further, in case the profits to arise from the colliery should not be sufficient to pay all the annuities, the annuitants except Margaret Clavering should abate; to be made up, whenever the profits should be sufficient; and upon further trust, in case Wren, his executors, or administrators, should think it more beneficial for the family to sell and dispose of the collieries, upon trust to sell and dispose of the same for the most money, that could reasonably be got, and to apply the money in the first place in payment of all debts due from the colliery in respect of the share of Ellison; and subject thereto to place out the residue on real securities and apply the interest in the first place in payment of the annuity of £103. 2s. 8d. to Margaret Clavering, then to the annuities of £180 or £90; then to pay all the children of Ellison during the life of Margaret Clavering the yearly sum of £22. 10s. and to pay the residue of the dividends, and interest to the eldest son of Ellison in manner aforesaid; and if the dividends, &c. should not be sufficient for the annuities, the two annuitants except Margaret Clavering to abate; and after her death to pay to each of the children of Nathaniel Ellison the further yearly sum of £2. 10s. for their lives; and after the decease of Margaret Clavering and Jane Ellison upon trust to pay to each of the children of Nathaniel Ellison the sum of £500 in case the money arising from the sale should be sufficient; then upon trust to divide the same equally among all the children, share and share alike; and subject, as aforesaid, to pay over the residue to the eldest son on his attaining twenty-one; and it was declared, that the portions of the children should be paid to the sons at twenty-one, to the daughters at twenty-one or marriage; and in case of the death of any before such period to pay that share to the eldest son at twenty-one; and if only one child should survive, to pay the whole to such one at twenty-one, or marriage, if a daughter; and in case all die before twenty-one, &c. then the said Charles Wren, his executors and administrators, shall stand possessed of the said collieries and the money to arise by sale thereof, subject as aforesaid, in trust for Nathaniel Ellison, his executors, administrators, and assigns. It was further declared, that the annuities should be paid half-yearly; and that upon any such sale the receipt of Wren, his executors or administrators should be a sufficient discharge to the purchasers. Then followed this proviso:

"Provided always and it is hereby further declared that it shall and may be lawful for the said Nathaniel Ellison by any deed or deeds writing or writings to be by him signed sealed and delivered in the presence of and attested by two or more credible witnesses, to revoke determine and make void all and every the uses trusts limitations and powers hereinbefore limited and created of and concerning the said collieries and coal mines,

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and by the same deed or deeds or by any other deed to be by him executed in like manner to limit any new or other uses of the said collieries and coal mines as he the said Nathaniel Ellison shall think fit."

By another indenture dated the 3d of July, 1797, but not attested by two witnesses, reciting the leases of the collieries, and that the name of Charles Wren was used in trust for Nathaniel Ellison and himself in equal shares; and that Ellison had advanced an equal share of the monies supplied for carrying on the collieries, amounting to £9037. 10s. it was witnessed, that in consideration of £4518. 15s. Wren assigned to Nathaniel Ellison one undivided moiety or half part of all the said collieries demised to him by the said several leases, with a like share of the stock; to have and to hold the said collieries to Ellison, his executors, administrators, and assigns, for the residue of the said terms, subject to the rents, covenants, and agreements, in the said leases; and to have and to hold the stock unto Ellison, his executors, administrators, and assigns, to and for his and their own proper use for ever; with the usual covenants from Wren as to his title to assign, &c. and from Ellison to indemnify Wren, his executors, &c.

Nathaniel Ellison, by his will, dated the 22d of June, 1796, after several specific and pecuniary legacies, gave all the rest and residue of his personal estate and effects of what nature or kind soever not before disposed of, to his wife and Wren and the survivor and the executors and administrators of such survivor; upon trust to call in and place the same out in the funds or on real securities; and he directed, that all sums of money, which should come to the hands of his wife and Wren or of the executors, &c. of either of them under the said trusts, should be equally divided between all his children, sons and daughters, born and to be born, share and share alike: the shares to become vested and be payable upon marriage with consent of their guardians, and not otherwise until the age of twenty-one: such part of the interest in the mean time as the guardians shall think proper to be applied for maintenance: the residue to accumulate; with a direction for payment of part of the principal for advancement; and survivorship upon the death of any, before the respective shares should be payable; and in case of the death of all under age and unmarried he gave the dividends and interest to his wife for life; and upon her death he gave the principal and a sum of £3000 charged upon her estates, to his sister Margaret Clavering and his nephew. Then after some further dispositions of stock in favour of his children, he gave a legacy of twenty guineas to Wren; and appointed his wife and Wren executors and guardians.

The testator died in 1798; leaving his widow and ten children surviving; one of whom, Charles Ellison, died in 1799, an infant, Wren also died in that year. The bill was filed by the testator's widow and Margaret Clavering; praying that the trusts of the deed of June, 1796, may be established; and that new trustees may be appointed.

The younger children by their answer submitted, whether the trusts of that deed were not varied or revoked by the deed of July, 1797.

Mr. Romilly and Mr. Bell, for plaintiffs. Mr. Richards, Mr. Steele, and Mr. W. Agar, for defendants.

LORD CHANCELLOR. I had no doubt, that from the moment of executing the first deed, supposing it not to have been for a wife and children, but for pure volunteers, those volunteers might have filed a bill in equity on the ground of their interests in that instrument; making the trustees and the author of the deed parties. I take the distinction to be, that if you want the assistance of the court to constitute you cestuy que trust, and the instrument is voluntary, you shall not have that assistance for the purpose of constituting you cestuy que trust; as upon a covenant to transfer stock, &c. if it rests in covenant, and is purely voluntary, this court will not execute that voluntary covenant; but if the party has completely transferred stock, &c. though it is voluntary, yet the legal conveyance being effectually made, the equitable interest will be enforced by this court. That distinction was clearly taken in Coleman v. Sarrel, independent of the vicious consideration. I stated the objection that the deed was voluntary; and the lord chancellor went with me so far as to consider it a good objection to executing what remained in covenant. But if the actual transfer is made, that constitutes the relation between trustee and cestuy que trust, though voluntary, and without good or meritorious consideration; and it is clear in that case, that if the stock had been actually transferred, unless the transaction was affected by the turpitude of the consideration, the court would have executed it against the trustee and the author of the trust.

In this case, therefore, the person claiming under the settlement might maintain a suit, notwithstanding any objection made to it as being voluntary; if that could apply to the case of a wife and children: considering also, that Mrs. Clavering was an annuitant, and not a mere volunteer. But it was put for the defendants thus; that though the instrument would have been executed originally, if the subject got back by accident into the author of the trust, and was vested in him, then the objection will lie in the same manner, as if the instrument was voluntary. I doubt that for many reasons; the trust being once well created; and whether it would apply at all, where the trust was originally well created; and did not rest merely in engagement to create it. Suppose Wren had

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died, and had made Ellison his executor, it would be extraordinary to hold, that though an execution would be decreed against him as executor, yet, happening to be also author of the trust, therefore an end was to be put to the interest of the cestuy que trust. But it does not rest there; for Ellison clothes the legal estate remaining in Wren with the equitable interests declared by the first deed; making him therefore a trustee for Ellison himself first, and after his death for several other persons; and he has said, he puts that restraint upon his own power; not only, that he shall not have a power of revocation, whenever he changes his intention, but, that he shall not execute that power, nor be supposed to have that change of intention, unless manifested by an instrument executed with certain given ceremonies. My opinion is, that, if there is nothing more in this transaction than taking out of Wren the estate clothed with a trust for others, with present interests, though future in enjoyment, and that was done by an instrument with no witness, or only one witness, it is hardly possible to contend, that such an instrument would be a revocation according to the intention of the party, the evidence of whose intention is made subject to restrictions that are not complied with. The only difficulty is, that the declaration of the trusts in the first instrument could not be executed, the second instrument being allowed to have effect. It is said, a power was placed in Wren, his executors and administrators, not his assigns, if in sound discretion thought fit, to sell, and to give a larger interest to the younger children than they otherwise would take. If Wren had not after the reassignment that discretion still vested in him, I think, it would not be in the executors of Ellison, and it could not be exercised by the court; though in general cases trusts will not fail by the failure of the trustee. But though the effect would be to destroy the power of Wren, which I strongly doubt, attending to the requisition of two witnesses, I do not know that it would destroy the other interests. I think therefore, upon the whole, this trust does remain notwithstanding this reassignment of the legal estate to Ellison. I do not think, consistently with the intention expressed in the first instrument, and the necessity imposed upon himself of declaring a different intention under certain restrictions, that if a different intention appeared clearly upon the face of the instrument, the latter would have controlled the former. But I do not think his acts do manifest a different intention. Supposing one witness sufficient, the second deed does not sufficiently manifest an intention to revoke all the benefits given by the first deed to the children; and it is not inconsistent that he might intend to revoke some and not all.

As to the will, it is impossible to maintain, that the will is a writing within the meaning of the power: considering how the subject is described. The word "residue" there means that estate, of which he had the power of disposing, not engaged by contracts, declarations of trusts, &c. It was necessary for him to describe the subject in such a way, that there could be no doubt he meant to embrace that property.

Upon the whole, therefore, this relief must be granted; though I agree, that, if it rested in covenant, the personal representative might have put them to their legal remedies, he cannot where the character of trust attached upon the estate, while in Wren; which character of trust therefore should adhere to the estate in Ellison, unless a contrary intention was declared; and the circumstance of one witness only, when the power reserved required two witnesses, is also a circumstance of evidence, that he had not the intention of destroying those trusts which had attached, and were then vested in the person of Wren.

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RICHARDSON v. RICHARDSON.

(L. R. 3 Eq. 686.)

February 26, 1876.

Mr. G. M. Giffard and Mr. Kay, Q. C., for plaintiff. Mr. Willcock, Q. C., and Mr. Faber, for defendants.

WOOD, V. C. The sole question in this case is whether a legatee, under the will of the testator, Richard Richardson, of a sum of £1250, ought or ought not to submit to a deduction of £450, in respect of two promissory notes given by him to his sister, which involves the further question whether the testator was or was not the absolute owner of the notes. If he was the owner, though he demanded no interest upon the notes, and made no application for payment of them, yet, as is conceded, the statute of limitations cannot be set up, and the plaintiff must be considered as having received on account of his legacy so much of the assets of the testator as his debt amounted to.

Whether or not the notes were the property of the testator depends upon a certain voluntary assignment, whereby the sister, shortly before her death, assigned the whole of her personal estate to her brother, the testator, and in the same instrument she gave him a power of attorney to ask, sue for, and recover the thereby assigned moneys and premises, and to do and execute such further acts and deeds as should be deemed necessary for deriving the full benefit of the assignment.

Now, there is no specific description in the deed of the promissory notes, and, if they passed at all, they passed under the description of "all other the personal estate and effects, whatsoever and wheresoever," of Elizabeth Richardson. She did not indorse the notes, and the defendants, the executors, by their answer, say they believe that if she had not died so soon the testator would have applied to her to indorse the notes, but she did not do so. The questions are: First, whether they passed by the deed at all; and, secondly, if they passed, whether they passed to the testator as trustee or in his own right.

After the decision in Kekewich v. Manning, 1 De Gex, M. & G. 176, I think it is impossible to contend that these notes did not pass by this instrument, because the rule laid down in that case, the decision in which was supported by reference to Ex parte Pye, 18 Ves. 140, was not confined merely to this: that a person who, being entitled to a reversionary interest, or to stock standing in another's name, assigns it by a voluntary deed, thereby passes it, notwithstanding that he does not in formal terms declare himself to be trustee of the property; but it amounts to this: that an instrument executed as a present and complete assignment (not being a mere covenant to assign on a future day) is equivalent to a declaration of trust.

It is impossible to read the argument in that case, and the judgment of Lord Justice Knight Bruce, without seeing that his mind was directed to Meek v. Kettlewell, 1 Hare, 464; on appeal, 1 Phil. Ch. 342, and that class of cases, where it had been held (such was the nicety upon which the decisions turned) that an actual assignment is nothing more than an agreement to assign in equity, because it merely passes such equitable interest as the assignor may have, and some further step must be taken by the assignee to acquire the legal interest. That further step being necessary, the assignment was held to be, in truth, nothing but an agreement to assign; and, being so, was not enforceable in this court, the court having often decided that it will not enforce a mere voluntary agreement.

The distinction, undoubtedly, was very fine between that and a declaration of trust; and the good sense of the decision in Kekewich v. Manning, 1 De Gex, M. & G. 176, I think, lies in this: that the real distinction should be made between an agreement to do something when called upon, something distinctly expressed to be future in the instrument, and an instrument which effects to pass everything independently of the legal estate. It was held in Kekewich v. Manning that such an instrument operates as an out and out assignment, disposing of the whole of the assignor's equitable interest, and that such a declaration of trust is as good a form as any that can be devised. The expression used by the lords justices is this: "A declaration of trust is not confined to any express form of words, but may be indicated by the character of the instrument."

In that case reference was made in the argument principally to the case of Ex parte Pye, 18 Ves. 140, which was a decision of Lord Eldon to the same effect. Reliance is often placed on the circumstance that the assignor has done all he can; that there is nothing remaining for him to do; and it is contended that he must, in that case only, be taken to have made a complete and effectual assignment. But that is not the sound doctrine on which the case rests; for if there be an actual declaration of trust, although the assignor has not done all that he could do,—for example, although he has not given notice to the assignee,—yet the interest is held to have effectually passed as between the donor and donee. The difference must be rested simply on this: Aye or no, has he constituted himself a trustee?

In Ex parte Pye, 18 Ves. 140, the testator had written to one Dubost, authorizing him to purchase in France an annuity for the benefit of a lady named Garos, for her life, with power to draw on him for £1,500 for such purchase. The agent, finding the lady was a married woman, exercised his own dis-

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cretion, and bought the annuity in the name of the testator. Then, shortly before his death, the testator sent to Dubost, by his desire, a power of attorney, authorizing him to transfer the annuity to the lady. The testator died before anything more was done, and after his death the annuity was transferred. There was a question whether, by the law of France, the exercise of a power of attorney by the person to whom it is given, without knowledge of the death of his principal, is good. I think the master found that it was so; but Lord Eldon expressly declined to rely upon that, as he says in his judgment (Id. 150): "These petitions" (the question came on upon petition) "call for the decision of points of more importance and difficulty than I should wish to decide in this way, if the case was not pressed upon the court. With regard to the French annuity, the master has stated his opinion as to the French law, perhaps without sufficient authority, or sufficient inquiry into the effect of it, as applicable to the precise circumstances of this case; but it is not necessary to pursue that, as upon the documents before me it does appear that, though in one sense this may be represented as the testator's personal estate, yet he has committed to writing what seems to me a sufficient declaration that he held this part of the estate in trust for the annuitant."

Now, the testator had done nothing more than execute the power of attorney. It is true, he had written a letter directing the stock to be purchased in the lady's name; but that was not done; it was purchased in his name. The decision, therefore, could only be rested upon this: that this was not an agreement to assign, not an agreement to become a trustee at some future period, but an actual constitution by the testator of himself as trustee.

Following, therefore, Kekewich v. Manning, 1 De Gex, M. & G. 176, I must regard this instrument as having effectually assigned the promissory notes, although they were not indorsed. The instrument is an actual assignment with a power immediately vested in the assignee to make himself master of the property; and I do not know in what way the assignor could have more effectually declared that she was a trustee of that property for Richard Richardson.

The next question is whether the testator took these notes upon trust, for, if he did, there can be no set-off of the debt due to him qua trustee, against the legacy given by his will. It appears to me there is nothing whatever on the face of the instrument to create a trust. The property is given out and out, absolutely. Nor do I find anything like evidence to authorize me to say that it is fixed with a trust. [His honor reviewed the evidence, and came to the conclusion that a will had been executed in 1855, although the instrument itself had not been produced, nor its absence accounted for. His honour thought it very possible that the assignment was executed for the purpose of avoiding the duty, and disposing of the property through the medium of a trust; but he did not think the evidence sufficient to fasten that trust upon the property, no right having been asserted, during the period from 1858 to 1864, as against the testator. His honour continued:]

It was said by Mr. Giffard, in another part of his argument, relying on the case of Freeman v. Lomas, 9 Hare, 109, that if the testator could not take this property, except through the executors of Elizabeth Richardson, if he could not take the notes specifically, but could only take their value as an ordinary legacy after a settlement of accounts with the executors of Elizabeth Richardson, the testator's executors are not in a position to assert a right of set-off as regards these specific notes. But I have already stated my reasons for considering that there is no evidence to show that the testator did not take these notes absolutely by the deed; and, as regards the application of the moneys secured on the notes to the payment of debts, that would only arise in consequence of the possibility of the statute of Elizabeth intervening, which might take out for the benefit of the creditors as much of the property as might be wanted for the payment of debts; but, as regards the donee and donor, the deed would remain absolute, no debt ever having been asserted, and the property having been completely and effectually assigned.

As regards some faint evidence of the testator's wish that this debt might not be enforced, no doubt the testator never received interest, and he was in a vacillating frame of mind about it; but unfortunately that vacillation never amounted to anything definite or precise, amounting to a gift of the property.

[His honour went through the evidence on this head, and continued:]

Although I am very reluctant to come to this conclusion, I must say the testator does not appear to me to have made up his mind; and, as he did not do so, I cannot do anything for the plaintiff. Therefore the legacy must be paid, deducting the value of the notes; but of course there will be no interest on them. The order will be to pay the plaintiff his legacy of £1,250, less £450, with interest at £4 per cent. on the difference, from one year after the testator's death. There will be no costs on either side, except that the defendants will have their costs out of the estate.

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MORGAN v. MALLESON.

(L. R. 10 Eq. 475.)

July 28, 1870.

The following memorandum was given by John Saunders, the testator in the cause, to his medical attendant, Dr. Morris: "I hereby give and make over to Dr. Morris an India bond, No. D., 506, value £1000, as some token for all his very kind attention to me during illness.

"Witness my hand, this 1st day of August, 1868.

"(Signed) John Saunders."

The signature was attested by two witnesses, and the memorandum was handed over to Dr. Morris, but the bond, which was transferable by delivery, remained in the possession of Saunders. There was no consideration for it.

Saunders died more than a year afterwards, having, by his will, bequeathed the residue of his personal estate to charities. A suit was instituted for the administration of his estate, and a summons was taken out by the attorney general on behalf of absent charities for the direction of the court on the question whether this memorandum was or was not a valid declaration of trust in favor of Dr. Morris.

Mr. Jessel, Q. C., Mr. Speed, and Tucker & Lake, for Dr. Morris. Raven & Bradley and Mr. Wickens, for the attorney general.

Lord ROMILLY, M. R. I am of opinion that the paper writing signed by Saunders is equivalent to a declaration of trust in favor of Dr. Morris. If he had said, "I undertake to hold the bond for you," or if he had said, "I hereby give and make over the bond in the hands of A.," that would have been a declaration of trust, though there had been no delivery. This amounts to the same thing; and Dr. Morris is entitled to the bond, and to all interest accrued due thereon.

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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

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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.

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MARTIN v. FUNK.

(75 N. Y. 134.)

Court of Appeals of New York. Nov. 12, 1878.

Nehemiah Millard, for appellants. M. W. Divine, for respondent.

CHURCH, C. J. The facts in this case are substantially undisputed, as found by the judge before whom the case was tried. The intestate Mrs. Boone, in 1866, deposited in the Citizens' Savings Bank $500, declaring at the time that she wanted the account to be in trust for Lillie Willard, who is the plaintiff. The account was so entered, and a pass-book delivered to the intestate, which contained these entries: "The Citizens' Savings Bank in account with Susan Boone, in trust for Lillie Willard. 1866, March 23, $500."

A deposit of the same amount and in the same manner was made in trust for Kate Willard, now Mrs. Brown. This money belonged to the intestate at the time of the deposits. The plaintiff and Mrs. Brown are sisters, and were at the time of the age respectively of eighteen and twenty, and were distant relatives of the intestate, their mother being a second cousin. The intestate retained possession of the pass-books until her death in 1875, and the plaintiff and her sister were ignorant of the deposits until after that event. The money remained in the bank with its accumulated interest until the death of the intestate, except that she drew out one year's interest. Mrs. Brown assigned to the plaintiff her interest in the deposit purporting to have been made for her benefit, and the action is brought against the administrator of the intestate and the bank for the delivery of the pass-books and the recovery of the money. The question involved has been very much litigated, and many refinements may be found in the books in respect to it. Many cases have been found difficult of solution, not so much on account of the general principles which should govern, as in applying those principles to a particular state of facts. It is clear that a person sui juris, acting freely and with full knowledge, has the power to make a voluntary gift of the whole or any part of his property, while it is well settled that a mere intention, whether expressed or not, is not sufficient, and a voluntary promise to make a gift is nudum pactum, and of no binding force. Kekewich v. Manning, 50 Eng. Ch. 175, and cases cited. The act constituting the transfer must be consummated, and not remain incomplete, or rest in mere intention, and this is the rule whether the gift is by delivery only, or by the creation of a trust in a third person, or in creating the donor himself a trustee. Enough must be done to pass the title, although when a trust is declared, whether in a third person or the donor, it is not essential that the property should be actually possessed by the cestui que trust, nor is it even essential that the latter should be informed of the trust. In Milroy v. Lord, 4 De Gex, F. & J. 264, Lord Chief Justice Turner, who adopted the most rigid construction of trusts, in delivering an opinion against the validity of the trust in that case, laid down the general principles as accurately perhaps as is practicable. He said: "I take the law of this court to be well settled, that in order to render a voluntary settlement valid and effectual the settler must have done every thing which according to the nature of the property comprised in the settlement was necessary to be done in order to transfer the property, and render the settlement binding upon him. He may of course do this by actually transferring the property to the persons for whom he intended to provide, and the provision will then be effectual, and it will be equally effectual if he transfer the property to a trustee for the purpose of the settlement, or declare that he himself holds it in trust for those purposes, and if the property be personal, the trust may I apprehend be declared either in writing or by parol."

The contention of the defendant is that the transaction did not transfer the property, and that there was no sufficient declaration of trust and that by retaining the pass-books the intestate never parted with the control of the property. If what she did was sufficient to constitute herself a trustee, it must follow that whatever control she retained would be exercised as trustee, and the right to exercise it would not be necessarily inconsistent with the completeness of the trust. The question involving substantially the same facts has been several times before different courts of the state, and in every instance the transaction has been sustained as a good gift.

The Case of Wetzel before Surrogate Bradford, and Millspaugh v. Putnam, 16 Abb. Prac. 380, were deposits in the same form, and in the former the cestui que trust had no notice of the deposit, and in both cases the gift was held effectual. In Smith v. Lee, 2 Thomp. & C. 591, money was deposited with the defendant, and a note taken payable to the depositor for another person, and it was held that the depositor constituted himself a trustee. The case of Kelly v. Manhattan Inst. for Savings (not reported) was a special term decision of the New York common pleas before Robinson, J., where precisely such a deposit was made as in this, and it was upheld as an absolute gift. These decisions although not controlling upon this court are entitled to respect, and they show the tendency of the judicial mind to give these transactions the effect which on their face they import. So in Minor v. Rogers, 40 Conn. 512, a similar deposit was upheld as a declaration of trust. Park, J., noticed the point urged there as here of the retention of the pass-book, and said: "She retained possession therefore be-

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cause the deposit was made in her name as trustee, and not because she had not given the beneficial interest of the deposit to the plaintiff," and in that case the depositor had drawn out the deposit, and the action was sustained against her administrator. So in Ray v. Simmons, 11 R. I. 266; the facts were precisely like the case at bar, except that the cestui que trust was informed of the gift, and the court held the trust valid.

But the supreme court of Massachusetts in two cases (Brabrook v. Boston Five Cent Sav. Bank, 104 Mass. 228, and Clark v. Clark, 108 Mass. 522) seem to hold a different doctrine. In the first case the circumstances were deemed controlling, adverse to an intent to create a trust, and in the last, which was similar in its facts to this, the court express the opinion that the trust was not complete, but without giving any reasons for the opinion. The last decision, although entitled to great respect, is exceptional to the general current of authority in this country.

In the English courts I do not find any case where these precise facts appeared, but the cases are numerous where the general principles have been elaborately discussed and applied to particular facts. It is only deemed necessary to refer to a few of them. In Richardson v. Richardson, L. R. 3 Eq. Cas. 684, it was held that an instrument executed as a present and complete assignment (not being a mere contract to assign at a future day) is equivalent to a declaration of trust. Morgan v. Malleson, L. R. 10 Eq. Cas. 475, was decided upon this principle, and is an extreme case in support of a declaration trust. It appeared that the testator gave to his medical attendant the following memorandum: "I hereby give and make over to Dr. Morris, an Indian bond No. D 506, value £1,000, as some token for all his very kind attention to me during my illness." This was held to constitute the testator a trustee for Dr. Morris of the bond which was retained by him. These cases are commented upon, and the latter somewhat criticised in Warriner v. Rogers, L. R. 16 Eq. 340, but Sir James Bacon, in delivering the opinion, substantially adheres to the general rule before stated. He requires only "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." This case was decided against the validity of the trust, mainly upon the ground that the memoranda produced were upon their face testamentary in character. In Pye's Case, 18 Ves. 140, money was transmitted to an agent in France to purchase an annuity for a lady. Owing to circumstances which the agent supposed prevented its purchase in her name, he purchased it in the name of the principal. When the latter learned this fact, he executed and transmitted to the agent a power of attorney to transfer the annuity, but before its arrival the principal died. Lord Eldon held that a declaration of trust was established.

Wheatley v. Purr, 1 Keen, 551, is quite analogous to the case at bar. A testatrix directed her brokers to place £2,000, in the joint name of the plaintiffs, and herself as a trustee for the plaintiffs. The sum was placed to the account of the testatrix alone, as trustee of the plaintiffs, and a promissory note was given by them to her as such trustee. The note remained in her possession until her death, when her executor received the money. It was held that the transaction amounted to a complete declaration of trust.

Mr. Hill, in his work on Trustees, after saying "that it is extremely difficult, in the present state of authorities, to define with accuracy the law affecting this very intricate subject," lays down the following as the result: "When the author of the voluntary trust is possessed of the legal interest in the property, a clear declaration of trust contained in or accompanying a deed or act which passes the legal estate will create a perfect executed trust, and so a declaration or direction by a party that the property shall be held in trust for the object of his bounty, though unaccompanied by a deed or other act divesting himself of the legal estate, is an executed trust." Hill, Trustees, 130.

If there is a valid declaration of trust, that is sufficient of itself, I apprehend, to transfer the title, but the difficulty is in determining what constitutes such a declaration, and whether a mere formal transfer of the property, as in the case of the medical attendant, is sufficient, is a question upon which there is some difference of opinion. No particular form of words is necessary to constitute a trust, while the act or words relied upon must be unequivocal, implying that the person holds the property as trustee for another.

Let us now consider the case in hand. In form at least the title to the money was changed from the intestate individually to her as trustee. She stated to the bank that she desired the money to be thus deposited. It was so done by her direction, and she took a voucher to herself in trust for the plaintiff. Upon these facts what other intent can be imputed to the intestate than such as her acts and declarations imported, and did they not import a trust? There was no contingency or uncertainty in the circumstances, and I am unable to see wherein it was incomplete. The money was deposited unqualifiedly and absolutely in trust, and the intestate was the trustee. It would scarcely have been stronger if she had written in the pass-book: "I hereby declare that I have deposited this money for the benefit of the

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plaintiff and I hold the same as trustee for her."

This would have been a plain declaration of trust, and accompanied as it was with a formal transfer to herself in the capacity of trustee, would have been deemed sufficient under the most rigid rules to be found in any of the authorities. It seems to me that this was the necessary legal intendment of the transaction, and that it was sufficient to pass the title. The retention of the pass-book was not necessarily inconsistent with this construction. She must be deemed to have retained it as trustee. The book was not the property, but only the voucher for the property, which after the deposit consisted of the debt against the bank.

There are many cases where the instrument creating the trust has been retained by the author of it until his death, especially when he made himself the trustee, and yet the trust sustained. Exton v. Scott, 6 Sim. 31; Fletcher v. Fletcher, 4 Hare, 67; Souverbye v. Arden, 1 Johns. Ch. 240; Bunn v. Winthrop, Id., 329. This circumstance, among others, has been considered upon the question of intent, but is never deemed decisive against the validity of the trust. Id. See, Hill, Trustees, supra. Some confusion has been created by judicial expression, that the author of such a trust must do all in his power to carry out his intention, that the nature of the property will admit of. This general proposition requires some qualification. In this case the intestate might have notified the objects of her bounty, but this is not regarded as indispensable by any of the authorities, and she might have made the deposits in their name, and delivered to them the books, or delivered to them the money. The rule does not require that the gift shall be made in any particular way, it only requires that enough shall be done to transfer the title to the property, and one of the modes of doing this is by an unequivocal declaration of trust. In Richardson v. Richardson, supra, the court, in noticing this point, said: "Reliance is often placed on the circumstance that the assignor has done all he can, and that there is nothing remaining for him to do, and it is contended that he must in that case only be taken to have made a complete and effectual assignment. But that is not the sound doctrine on which the case rests; for if there be an actual declaration of trust, although the assignor has not done all that he could do, for example, although he has not given notice to the assignee, yet the interest is held to have effectually passed as between the donor and donee. The difference must be rested simply on this: aye or no, has he constituted himself a trustee."

As notice to the cestui que trust was not necessary, and as the retention of the pass-books was not inconsistent with the completeness of the act, the case is peculiarly one to be determined by this test: did the intestate constitute herself a trustee? After a careful consideration of the case in connection with the established rules applicable to the subject, and the authorities, I think this question must be answered in the affirmative. It was not done in express formal terms, but such is the fair legal import of the transaction. I have considered the case thus far upon what appears from the face of the transaction, without evidence aliunde, bearing upon the intent. It is not necessary to decide that surrounding circumstances may not be shown to vary or explain the apparent character of the acts, and the intent with which they were done. The facts developed may not be so unequivocal as to be regarded as conclusive. It is sufficient to say that there is no finding of an intent contrary to the creation of a trust, and the facts found do not establish such an adverse intent. But looking at the evidence it is fairly inferable that the intestate designed that the plaintiff and her sister should have the benefit of these deposits, and there are some circumstances from which an inference may be drawn that she regarded the gifts as fixed and complete. The circumstance that she did not intend that the objects of her bounty should know of her gift until after her death is not inconsistent with it, and the most that can be said is that she may have believed that the deposits might be withdrawn during her life, and the money converted to her own use. It is not clear that she entertained such a belief, but if she did, it would not change the legal effect of her acts.

The judgment must be affirmed.

All concur except MILLER and EARL, JJ., absent at argument.

Judgment affirmed.

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DELANEY v. McCORMACK et al.

(88 N. Y. 174.)

Court of Appeals of New York. Feb. 28, 1882.

Appeal from judgment of the general term of the supreme court, in the Second judicial department, entered upon an order made the second Monday of December, 1881, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial at special term. Reported below, 25 Hun, 574.

This action was brought to obtain a construction of the will of John Walsh, late of the city of New York, deceased. The clauses of the will as to which there was any controversy are as follows:

"Thirdly. I give, devise, and bequeath unto my said son James, during his natural life, all the rents, issues, and profits of my real estate, and in case he marries and has lawful issue, then and in the last-mentioned event and thereupon I give, devise, and bequeath to my said son James all and singular my real estate, whatsoever and wheresoever, to have and to hold, the same to my said son, his heirs and assigns forever.

"Fourthly. I desire my executors to keep the buildings on my real estate insured against loss or damage by fire, and in repair, and to pay all taxes, assessments, and other charges thereon, and also the interest on incumbrances by mortgage thereon; and, if necessary, they are authorized to receive sufficient of the rents to enable them so to do; and in case of damage or loss by fire they are to receive the avails of the insurance, and to repair or rebuild; but this clause of my will is only to have effect until my said son James shall have lawful issue; and I also authorize my said executors, until that event, to raise, by mortgage of my real estate, or any part thereof, whenever and as often as shall be necessary, a similar amount as is now on mortgage of my said estate, wherewith to discharge the present mortgage if necessary.

"Fifthly. In case of the death of my son James without ever having had any lawful issue, I desire my executors who shall then be surviving, or the last survivor, to sell all my real estate, and to distribute the proceeds thereof amongst my next of kin as personal estate, according to the laws of the state of New York for the distribution of intestate personal estate; and for that purpose I authorize my said surviving executors or the last survivor to execute good, valid, and sufficient conveyances in the law to transfer said estate, and vest the same in the purchaser and purchasers in fee simple.

"Lastly. I appoint my beloved wife, and my beloved son James, and my friend Tighe Davey to be the executors of this my last will and testament."

The testator died in 1836, leaving, surviving him, his son James, one nephew, the plaintiff herein, and four nieces. James died in 1880, unmarried, and having had no lawful issue. The two other executors died before him, as did also the four nieces of the testator. The defendants are the children of said nieces.

John W. Goff, for appellant McCormack. Luke F. Cozans and J. Woolsey Shephard, for appellants Walker et al. John R. Kuhn, for respondent.

FINCH, J. The testator gave to his son James the whole of his real estate for life, and absolutely and in fee, in case the son married and had issue; but if he died without having had lawful issue, the testator directed his executors who should then be surviving, or the last survivor of them, to sell his real estate and distribute the proceeds among the testator's "next of kin, as personal estate, according to the laws of the state of New York, for the distribution of intestate personal estate." The executors named were the testator's wife, his son James, and his friend Tighe Davey; all of whom are dead. James died without having had lawful issue. At testator's death his next of kin were his son James, four nieces, and a nephew, who is the present plaintiff. The four nieces died during the lifetime of James, but leaving children who are defendants here, and claim an interest in the proceeds of the real estate, or in the real estate itself. At the date of the death of James the plaintiff was the sole next of kin of the testator, and claiming the entire proceeds of the real estate, brought an action for a construction of the will and the appointment of a trustee to carry out its unexecuted provisions. The trial court determined that it had jurisdiction to appoint a trustee, and made such appointment, and that the plaintiff was entitled to the entire proceeds of the real estate after payment of the liens thereon. That judgment was affirmed, and the children of two of the nieces bring this appeal.

It is contended in their behalf that the devise to James, before marriage and the birth of issue, was but a life estate; that the remainder in fee vested at the death of testator in his heirs at law; that the four nieces and plaintiff took such remainder in fee as tenants in common, subject to be divested by the marriage of James and birth of lawful issue; that this contingency not having occurred the fee was not divested; and that it cannot be divested by a sale of the real estate and disposition of the proceeds as personalty because the power of sale given to the executors was a mere naked power, not coupled with any interest; died with the donees to whom it was given; and cannot be executed by a court of equity.

It might prove to be the better opinion that James took a base, or determinable fee, subject to be divested upon his death without having had lawful issue, so that during his life there was no fragment of the estate

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to descend upon his heirs at law, but the character of his interest need not be particularly discussed if the power of sale survived the death of the executors, and the real estate is to be distributed as personalty. That is the vital point in the case, and the appellant's view of it is sought to be sustained by a reference to the rule at common law, which, it is said, the Revised Statutes have not seriously changed, but have omitted any provision, express or implied, which gives the court authority to appoint a trustee to execute a naked power. The argument turns in the end upon the single inquiry whether the authority given to the executors to sell is a mere naked power, or a power in trust and its execution imperative. The statutory provisions must control and determine the result, and render unnecessary any discussion or examination of the cases previously decided, which were not always harmonious and in some instances not easily reconciled. They were very ably and patiently examined in Dominick v. Sayre, 3 Sandf. 555, resulting in a general conclusion that the statutory revision substantially followed and adopted the rules of the common law, departing from them only to remove doubts and secure greater accuracy and precision. But in any event the statutes must furnish the rule by which we are to be guided to a conclusion, for they begin with a comprehensive provision abolishing all powers as then existing by law, and making their creation, construction and execution to be governed by the succeeding enactments. 1 Rev. St. pt. 2, c. 1, tit. 2, art. 3, § 73. A power is there defined to be "an authority to do some act in relation to lands, or the creation of estates therein, or of charges thereon, which the owner granting or reserving such power might himself lawfully perform." Section 74. The authority here given to the executors of John Walsh to sell the lands and distribute the proceeds in the event of the death of James without having had issue was clearly a power within the statutory definition. It was also a general and not a special power, for the former exists where the authority permits the alienation in fee by means of a conveyance, will or charge of the lands embraced in the power to any alienee whatever (section 77), and the latter when the alienation must be to designated persons, or of a less estate or interest than a fee. Section 78. A distinction is then drawn between cases in which no person other than the grantee of the power has any interest in its execution, in which case the power, whether general or special, is denominated beneficial (section 79), and cases in which the grantee has no interest in its execution, but holds it for the benefit of others. A general power is in trust "when any person or class of persons, other than the grantee of such power, is designated as entitled to the proceeds, or any portion of the proceeds, or other benefits to result from the alienation of the lands according to the power." Within this definition the general power conferred upon the executors to sell the lands and distribute the proceeds to testator's next of kin was a power in trust, in the execution of which the grantees had no interest, for, although James was one of them, the power, by its terms, was to be exercised upon his death, and in an event which left him without any interest in its execution. These statutory definitions seem to us entirely accurate and clear and scarcely need, at least for present purposes, the "authoritative exposition" invoked. A power to be exercised by the grantee, not at all for his own benefit but wholly and entirely for the benefit of some other person or class of persons, is necessarily exercised by such grantee in a trust capacity. The element of trust inheres in its substance and is its essential and vital characteristic. The statutes then provide that every trust power shall be imperative, and impose a duty upon the grantee, the performance of which may be compelled in equity, unless in a case where its execution or non-execution is made expressly to depend upon the will of the grantee, and does not cease to be such even though he may have the right to select some and exclude others from among the objects of the trust. Sections 96, 97. So far, it is determined for us, that the authority granted to the executors of John Walsh is a general power in trust, and imperative. Being such, a further provision, reaching the emergency of the death of the grantees, becomes applicable. It is enacted (section 102) that the provisions of sections 66 to 71 of article 2, relating to express trusts, shall apply to powers in trust, and section 68 of that article confers upon the court, upon the death of the surviving trustee, his powers and duties, and permits them to be exercised by some person appointed for that purpose under the direction of the court. The statutes therefore answer the whole argument of the appellants. The power in trust conferred upon the executors did not die with them, but survived and vested in the courts of equity having full power to compel the execution of the trust. If in Catton v. Taylor, 42 Barb. 578, there is any thing to the contrary, which seems to be the fact, it was decided without reference to the statutes and does not alter or modify our conclusion. The power in this case was general, in trust and imperative. It was not of a character personal to the trustees as involving the exercise of their individual choice and discretion, and might as well be executed by persons other than themselves. Probably it would have survived before the Revised Statutes, but certainly remains and is enforceable since.

Assuming then the validity of the trust power and the jurisdiction of equity to provide for its exercise, the appellants still contend that the "next of kin," to whom the proceeds of the real estate were to be distributed, are the persons or their representa-

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tives who were such at the date of the death of the testator, and not those who were such at the date of the death of James. There is no question here of the suspension of the power of alienation, for the sale and distribution awaited only the termination of a single life; but nevertheless the argument of the appellants proceeds, and must necessarily proceed, upon the idea that the next of kin of the testator at his death took vested interests in a legacy, payable in the future, since otherwise the right of each would lapse and nothing would pass to their representatives. But there is no gift to the next of kin, and no language importing such gift, except in the direction to convert the real estate into money and then make distribution; and in such case the rule is settled that time is annexed to the substance of the gift and the vesting is postponed. Much more is that true where the gift is only to vest upon the happening of a future contingency, until the occurrence of which it is uncertain whether a gift will be made at all. Warner v. Durant, 76 N. Y. 136; Leake v. Robinson, 2 Mer. 387; Smith v. Edwards, 88 N. Y. 92. Here a future condition or contingency attached to the substance of the gift. It was conditioned upon the death of James without having had lawful issue, so that the vesting was plainly postponed and the gift was future. There is the further and important fact that at the death of James the land was to be converted into personalty and be distributed as such, and the very subject of the gift was not to come into existence until the prescribed contingency. Vincent v. Newhouse, 83 N. Y. 511; Hoghton v. Whitgreave, 1 Jac. & W. 145. The case therefore falls within the rule that where the gift is money, and the direction for the conversion absolute, the legacy given to a class of persons vests in those who answer the description and are capable of taking at the time of distribution. Teed v. Morton, 60 N. Y. 506. Adding to these considerations the incongruity of a construction which would include James himself among the next of kin in the testator's mind and intention, we are entirely clear that the courts below correctly decided that the next of kin entitled were those who answered that description at the date of the distribution. We discover therefore no error in the disposition of the case.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

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JACKSON v. PHILLIPS et al.

(14 Allen, 539.)

Supreme Judicial Court of Massachusetts. Suffolk. Jan. Term, 1867.

Bill in equity by the executor of the will of Francis Jackson, of Boston, for instructions as to the validity and effect of the following bequests and devises:

"Article 4th. I give and bequeath to William Lloyd Garrison, Wendell Phillips, Edmund Quincy, Maria W. Chapman, L. Maria Child, Edmund Jackson, William I. Bowditch, Samuel May, Jr., and Charles K. Whipple, their successors and assigns, ten thousand dollars; not for their own use, but in trust, nevertheless, for them to use and expend at their discretion, without any responsibility to any one, in such sums, at such times and such places, as they deem best, for the preparation and circulation of books, newspapers, the delivery of speeches, lectures, and such other means, as, in their judgment, will create a public sentiment that will put an end to negro slavery in this country; and I hereby constitute them a board of trustees for that purpose, with power to fill all vacancies that may occur from time to time by death or resignation of any member or of any officer of said board. And I hereby appoint Wendell Phillips president, Edmund Jackson treasurer, and Charles K. Whipple secretary, of said board of trustees. Other bequests, hereinafter made, will sooner or later revert to this board of trustees. My desire is that they may become a permanent organization; and I hope and trust that they will receive the services and sympathy, the donations and bequests, of the friends of the slave.

"Article 5th. I give and bequeath to the board of trustees named in the fourth article of this will, their successors and assigns, two thousand dollars, not for their own use, but in trust, nevertheless, to be expended by them at their discretion, without any responsibility to any one, for the benefit of fugitive slaves who may escape from the slaveholding states of this infamous Union from time to time.

"Disregarding the self-evident declaration of 1776, repeated in her own constitution of 1780, that 'all men are born free and equal,' Massachusetts has since, in the face of those solemn declarations, deliberately entered into a conspiracy with other states to aid them in enslaving millions of innocent persons. I have long labored to help my native state out of her deep iniquity and her barefaced hypocrisy in this matter. I now enter my last protest against her inconsistency, her injustice, and her cruelty, towards an unoffending people. God save the fugitive slaves that escape to her borders, whatever may become of the commonwealth of Massachusetts!

"Article 6th. I give and bequeath to Wendell Phillips of said Boston, Lucy Stone, formerly of Brookfield, Mass., now the wife of Henry Blackwell of New York, and Susan B. Anthony of Rochester, N. Y., their successors and assigns, five thousand dollars, not for their own use, but in trust, nevertheless, to be expended by them, without any responsibility to any one, at their discretion, in such sums, at such times, and in such places, as they may deem fit, to secure the passage of laws granting women, whether married or unmarried, the right to vote; to hold office; to hold, manage, and devise property; and all other civil rights enjoyed by men; and for the preparation and circulation of books, the delivery of lectures, and such other means as they may judge best; and I hereby constitute them a board of trustees for that intent and purpose, with power to add two other persons to said board if they deem it expedient. And I hereby appoint Wendell Phillips president and treasurer, and Susan B. Anthony secretary, of said board. I direct the treasurer of said board not to loan any part of said bequest, but to invest, and, if need be, sell and re-invest, the same in bank or railroad shares, at his discretion. I further authorize and request said board of trustees, the survivors and survivor of them, to fill any and all vacancies that may occur from time to time by death or resignation of any member or of any officer of said board. One other bequest, hereinafter made, will, sooner or later, revert to this board of trustees. My desire is that they may become a permanent organization, until the rights of women shall be established equal with those of men; and I hope and trust that said board will receive the services and sympathy, the donations and bequests, of the friends of human rights. And being desirous that said board should have the immediate benefit of said bequest, without waiting for my exit, I have already paid it in advance and in full to said Phillips, the treasurer of said board, whose receipt therefor is on my files.

"Article 8th. I now give to my three children equally the net income of the residue of my estate, during the term of their natural lives, in the following manner, namely: After the payment of my debts and the foregoing gifts and bequests, I give, bequeath and devise one undivided third part of the residue of my estate, real, personal and mixed, to my brother Edmund Jackson of said Boston, his successors and assigns, not for his or their own use, but in trust, nevertheless, with full power to manage, sell and convey, invest and re-invest, the same at his discretion, with a view to safety and profit;" and "the whole net income thereof shall be paid semi-annually to my daughter Eliza F. Eddy, during her natural life;" and at her decease, one-half of such income to be paid semi-annually "to the board of trustees constituted in the sixth article of this will, to be expended by them to promote the intent and purpose therein directed," and the other half to Lizzie F. Bacon, her daughter, during her

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natural life; and at the decease of both mother and daughter, "to pay and convey the whole of said trust fund to said board of trustees constituted in the sixth article of this will, to be expended by them in the manner, and for the intent and purpose, therein directed."

By article 9th, the testator gave another undivided third part of the said residue to his brother Edmund, his successors and assigns, in trust, with like powers of management and investment, "and the whole net income thereof shall be paid semi-annually to my son James Jackson, during the term of his natural life; at his decease, I direct said trustee, or whoever may then be duly qualified to execute this trust, to pay semi-annually one-half part of the net income thereof to the board of trustees constituted in the fourth article of this will, and the other half-part of said net income shall be paid semi-annually to his children equally, during their natural lives; at the decease of all his children, if they survive him, I direct said trustee, or whoever shall then be duly authorized to execute this trust, to pay and convey the whole of said trust fund to said board of trustees constituted in said fourth article in this will, to be expended by them for the intent and purpose directed in said fourth article; but, in case my said son James should leave no child living at the time of his decease, then, at his decease, I direct said trustee, or whoever shall then be duly authorized to execute this trust, to pay and convey the whole of said trust fund to said board of trustees constituted in the fourth article of this will, to be expended by them for the intent and purpose therein directed."

By article 10th, the testator made a similar bequest and devise of the remaining undivided third part of said residue to his brother George Jackson, his successors and assigns, and in trust to pay the whole net income thereof semi-annually to the testator's daughter Harriette M. Palmer, during her natural life, and at her decease, one half of such income "to the board of trustees constituted in the fourth article of this will, to be expended by them in the manner and for the intent and purpose therein directed;" and the other half, in equal proportions, to all her children that may survive her, during the term of their natural lives; and, at their decease, to pay and convey the whole of said trust fund to said board of trustees; "but, in case my said daughter Harriette M. Palmer should outlive all her children, then, at her decease, I direct said trustee, or whoever shall then be duly authorized to execute this trust, to pay and convey the whole of said trust fund to the board of trustees constituted in said fourth article in this will, to be expended by them as aforesaid."

S. E. Sewall, for one of the trustees. G. W. Phillips, for others of the trustees. S. Bartlett and J. G. King, for certain heirs at law.

GRAY, J. This case presents for decision many important and interesting questions, which have been the subject of repeated discussion at the bar and of much deliberation and reflection by the court. The able and elaborate arguments of counsel have necessarily involved the consideration of the fundamental principles of the law of charities, and of a great number of the precedents from which they are to be derived; and have disclosed such diversity of opinion upon the extent and application of those principles, and the just interpretation and effect of the adjudged cases, as to require the principles in question to be fully stated, and supported by a careful examination of authorities, in delivering judgment.

I. By the law of this commonwealth, as by the law of England, gifts to charitable uses are highly favored, and will be most liberally construed in order to accomplish the intent and purpose of the donor; and trusts which cannot be upheld in ordinary cases, for various reasons, will be established and carried into effect when created to support a gift to a charitable use. The most important distinction between charities and other trusts is in the time of duration allowed and the degree of definiteness required. The law does not allow property to be made inalienable, by means of a private trust, beyond the period prescribed by the rule against perpetuities, being a life or lives in being and twenty-one years afterwards; and if the persons to be benefited are uncertain and cannot be ascertained within that period, the gift will be adjudged void, and a resulting trust declared for the heirs at law or distributees. But a public or charitable trust may be perpetual in its duration, and may leave the mode of application and the selection of particular objects to the discretion of the trustees. Sanderson v. White, 18 Pick. 333; Odell v. Odell, 10 Allen, 5, 6, and authorities cited; Saltonstall v. Sanders, 11 Allen, 446; Lewin, Trusts, c. 2.

Each of the bequests in the will of Francis Jackson, which the court is asked in this case to sustain as charitable, is to a permanent board of trustees, for a purpose stated in general terms only. The question of the validity of these trusts is not to be determined by the opinions of individual judges or of the whole court as to their wisdom or policy, but by the established principles of law; and does not depend merely upon their being permitted by law, but upon their being of that peculiar nature which the law deems entitled to extraordinary favor because it regards them as charitable.

It has been strenuously contended for the heirs at law that neither of the purposes declared by the testator is charitable within the intent and purview of St. 43 Eliz. c. 4, which all admit to be the principal test and evidence of what are in law charitable uses. It becomes necessary therefore to consider the spirit in which that statute has been construed and applied by the courts.

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The preamble of the statute mentions three classes of charitable gifts, namely, First: For the relief and assistance of the poor and needy, specifying only "sick and maimed soldiers and mariners," "education and preferment of orphans," "marriages of poor maids," "supportation, aid and help of young tradesmen, handicraftsmen and persons decayed," "relief or redemption of prisoners and captives," and assistance of poor inhabitants in paying taxes, either for civil or military objects. Second: For the promoting of education, of which the only kinds specified in the statute (beyond the "education and preferment of orphans," which seems more appropriately to fall within the first class) are those "for maintenance of schools of learning, free schools, and scholars of universities." Third: For the repair and maintenance of public buildings and works, under which are enumerated "repair of ports, havens," and "seabanks," for promoting commerce and navigation and protecting the land against the encroachments of the sea; of "bridges," "causeways" and "highways," by which the people may pass from one part of the country to another; of "churches," in which religion may be publicly taught; and of "houses of correction."

It is well settled that any purpose is charitable in the legal sense of the word, which is within the principle and reason of this statute, although not expressly named in it; and many objects have been upheld as charities, which the statute neither mentions nor distinctly refers to. Thus a gift "to the poor" generally, or to the poor of a particular town, parish, age, sex, race, or condition, or to poor emigrants, though not falling within any of the descriptions of poor in the statute, is a good charitable gift. Saltonstall v. Sanders, 11 Allen, 455–461, and cases cited; Magill v. Brown, Brightly, N. P. 405, 406; Barclay v. Maskelyne, 4 Jur. (N. S.) 1294; Chambers v. St. Louis, 29 Mo. 543. So gifts for the promotion of science, learning and useful knowledge, though by different means and in different ways from those enumerated under the second class; and gifts for bringing water into a town, for building a town-house, or otherwise improving a town or city, though not alluded to in the third class; have been held to be charitable. American Academy v. Harvard College, 12 Gray, 594; Drury v. Natick, 10 Allen, 177–182, and authorities cited. By modern decisions in England, gifts towards payment of the national debt, or "to the queen's chancellor of the exchequer for the time being, to be applied for the benefit and advantage of Great Britain," are legal charities. Tudor, Char. Trusts (2d Ed.) 14, 15, and cases cited. Sergeant Maynard, long before, gave an opinion that a bequest "to the public use of the country of New England" was a good disposition to a charitable use. 1 Hutch. Hist. Mass. (2d Ed.) 101, note. And it may be mentioned as evidence of the use of the word "charitable" by the founders of Massachusetts, that it was applied by the Massachusetts Company in 1628, before they crossed the ocean, to "the common stock" to be "raised from such as bear good affection to the plantation and the propagation thereof, and the same to be employed only in defrayment of public charges, as maintenance of ministers, transportation of poor families, building of churches and fortifications, and all other public and necessary occasions of the plantation." 1 Mass. Col. Rec. 68.

No kind of charitable trusts finds less support in the words of St. 43 Eliz. than the large class of pious and religious uses, to which the statute contains no more distinct reference than in the words "repair of churches." Such uses had indeed been previously recognized as charitable, and entitled to peculiar favor, by many acts of parliament, as well as in the courts of justice. St. 13 Edw. I. c. 41; 17 Edw. II. c. 2; 23 Hen. VIII. c. 10; 1 Edw. VI. c. 14; Anon., And. 43, pl. 108; Pitts v. James, Hob. 123; Cheney's Case, Co. Litt. 342; Gibbons v. Maltyard, Poph. 6, Moore, 594; Coke's note to Porter's Case, 1 Coke, 26a; Bruerton's Case, 6 Coke, 1b, 2a; Barry v. Ley, Dwight, Char. Cas. 92. In the latest of those acts, the "erecting of grammar schools for the education of youth in virtue and godliness, the further augmenting of the universities, and better provision for the poor and needy," were classed with charities for the maintenance of preachers, and called "good and godly uses;" and grammar schools were considered in those times an effectual means of forwarding the progress of the Reformation. St. 1 Edw. VI. c. 14, §§ 1, 8, 9; Attorney General v. Downing, Wilm. 15; Boyle, Char. 7, 8. Sir Francis Moore, who drew St. 43 Eliz., indeed says that a gift to maintain a chaplain or minister to celebrate divine service could not be the subject of a commission under the statute; but "was of purpose omitted in the penning of the act," lest, in the changes of opinion in matters of religion, such gifts might be confiscated in a succeeding reign as superstitious. Yet he also says that such a gift might be enforced by "the chancellor by his chancery authority;" and cites a case in which it was so decreed. Duke, Char. Uses (Bridgman's Ed.) 125, 154. And from very soon after the passage of the statute, gifts for the support of a minister, the preaching of an annual sermon, or other uses connected with public worship and the advancement of religion, have been constantly upheld and carried out as charities in the English courts of chancery. Anon., Cary, 39; Nash, Char.; Dwight, Char. Cas. 114; Pember v. Inhabitants of Knighton, Herne, Char. Uses, 101, Toth. (2d Ed.) 34; Duke, Char. Uses, 354, 356, 381, 570, 614; Boyle, Char. 39–41; Tudor, Char. Trusts, 10, 11. So in this commonwealth, trusts for the support of public worship and religious instruction, or the spreading of religion at home or abroad, have always been deemed charitable uses. 4 Dane, Abr. 237; Bartlet v. King, 12 Mass. 536; Go-

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ing v. Emery, 16 Pick. 107; Sohier v. St. Paul's Church, 12 Metc. (Mass.) 250; Brown v. Kelsey, 2 Cush. 243; Earle v. Wood, 8 Cush. 445. It is not necessary in this connection to speculate whether the admission of pious uses into the rank of legal charities in modern times is to be attributed to the influence of the civil law; to their having been mentioned in the earlier English statutes; to a more liberal interpretation, after religion had become settled in England, of the words "repair of churches," or, possibly, of the clauses relating to gifts for the benefit of education, in St. 43 Eliz.; or to the support given by the court of chancery to public charitable trusts, independently of any statute. It is sufficient for our present purpose to observe that pious and religious uses are clearly not within the strict words of the statute, and can only be brought within its purview by the largest extension of its spirit.

The civil law, from which the English law of charities was manifestly derived, considered wills made for good and pious uses as privileged testaments, which were not, like other wills, void for uncertainty in the objects, and which must be carried into effect even if their conditions could not be exactly observed; and included among such uses (which it declared to be in their nature perpetual) bequests for the poor, orphans, widows, strangers, prisoners, the redemption of captives, the maintenance of clergymen, the benefit of churches, hospitals, schools and colleges, the repairing of city walls and bridges, the erection of public buildings, or other ornament or improvement of a city. Poth. Pand. lib. 30–32, Nos. 57–62; Code, lib. 1, tit. 2, cc. 15, 19; Id., tit. 3, cc. 24, 28, 42, 46, 49, 57; Godol. Leg. pt. 1, c. 5, § 4; 2 Kent, Comm. (6th Ed.) 257; 2 Story, Eq. Jur. §§ 1137–1141; McDonough v. Murdoch, 15 How. 405, 410, 414.

Charities are not confined at the present day to those which were permitted by law in England in the reign of Elizabeth. A gift for the advancement of religion or other charitable purpose in a manner permitted by existing laws is not the less valid by reason of having such an object as would not have been legal at the time of the passage of the statute of charitable uses. For example, charitable trusts for dissenters from the established church have been uniformly upheld in England since the toleration act of 1 Wm. & M. c. 18, removed the legal disabilities under which such sects previously labored. Attorney General v. Hickman, 2 Eq. Cas. Abr. 193, W. Kel. 34; Loyd v. Spillet, 3 P. Wms. 344, 2 Atk. 148; Attorney General v. Cock, 2 Ves. Sr. 273. And in this country since the Revolution no distinction has been made between charitable gifts for the benefit of different religious sects.

Gifts for purposes prohibited by or opposed to the existing laws cannot be upheld as charitable, even if for objects which would otherwise be deemed such. The bounty must, in the words of Sir Francis Moore, be "according to the laws, not against the law," and "not given to do some act against the law." Duke, Char. Uses, 126, 169. So Mr. Dane defines, as undoubted charities, "such as are calculated to relieve the poor, and to promote such education and employment as the laws of the land recognize as useful." 4 Dane, Abr. 237. Upon this principle, the English courts have refused to sustain gifts for printing and publishing a book inculcating the absolute and inalienable supremacy of the pope in ecclesiastical matters; or for the support of the Roman Catholic or the Jewish religion, before such gifts were countenanced by act of parliament. De Themmines v. De Bonneval, 5 Russ. 288; Tudor, Char. Trusts, 21–25, and cases cited. And a bequest "towards the political restoration of the Jews to Jerusalem and to their own land," has been held void, as tending to create a political revolution in a friendly country. Habershon v. Vardon, 4 De Gex & S. 467. In a free republic, it is the right of every citizen to strive in a peaceable manner by vote, speech or writing, to cause the laws, or even the constitution, under which he lives, to be reformed or altered by the legislature or the people. But it is the duty of the judicial department to expound and administer the laws as they exist. And trusts whose expressed purpose is to bring about changes in the laws or the political institutions of the country are not charitable in such a sense as to be entitled to peculiar favor, protection and perpetuation from the ministers of those laws which they are designed to modify or subvert.

A precise and complete definition of a legal charity is hardly to be found in the books. The one most commonly used in modern cases, originating in the judgment of Sir William Grant, confirmed by that of Lord Eldon, in Morice v. Bishop of Durham, 9 Ves. 405, 10 Ves. 541—that those purposes are considered charitable which are enumerated in St. 43 Eliz. or which by analogies are deemed within its spirit and intendment—leaves something to be desired in point of certainty, and suggests no principle. Mr. Binney, in his great argument in the Girard Will Case, 41, defined a charitable or pious gift to be "whatever is given for the love of God, or for 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." And this definition has been approved by the supreme court of Pennsylvania. Price v. Maxwell, 28 Pa. St. 35. A more concise and practical rule is that of Lord Camden, adopted by Chancellor Kent, by Lord Lyndhurst, and by the supreme court of the United States—"A gift to a general public use, which extends to the poor as well as the rich." Jones v. Williams, Amb. 652; Coggeshall v. Pelton, 7 Johns. Ch. 294; Mitford v. Reynolds, 1 Phil-

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191, 192; Perin v. Carey, 24 How. 506. A charity, in the legal sense, may be more fully defined as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government. It is immaterial whether the purpose is called charitable in the gift itself, if it is so described as to show that it is charitable in its nature.

If the words of a charitable bequest are ambiguous or contradictory, they are to be so construed as to support the charity, if possible. It is an established maxim of interpretation, that the court is bound to carry the will into effect, if it can see a general intention consistent with the rules of law, even if the particular mode or manner pointed out by the testator is illegal. Bartlet v. King, 12 Mass. 543; Inglis v. Sailor's Snug Harbor, 3 Pet. 117, 118. If the testator uses a word which has two meanings, one of which will effect and the other defeat his object, the first is to be adopted. Saltonstall v. Sanders, 11 Allen, 455. When a charitable intent appears on the face of the will, but the terms used are broad enough to allow of the fund being applied either in a lawful or an unlawful manner, the gift will be supported, and its application restrained within the bounds of the law. The most frequent illustrations of this in the English courts have arisen under St. 9 Geo. II. c. 36 (commonly called the "Statute of Mortmain"), prohibiting devises of land, or bequests of money to be laid out in land, to charitable uses. In the leading case, Lord Hardwicke held that a direction to executors to "settle and secure, by purchase of lands of inheritance, or otherwise, as they shall be advised, out of my personal estate," two annuities to be paid yearly forever for charitable objects, was valid, because it left the option to the executor to make the investment in personal property, which was not prohibited by the statute; and said, "This bequest is not void, and there is no authority to construe it to be void, if by law it can possibly be made good," or (according to another and perhaps more accurate report) "no authority to construe it to be void by law, if it can possibly be made good." Sorresby v. Hollins, 9 Mod. 221, 1 Coll. Jurid. 439. The doctrine of that case has ever since been recognized as sound law. Attorney General v. Whitchurch, 3 Ves. 144; Curtis v. Hutton, 14 Ves. 539; Dent v. Allcroft, 30 Beav. 340; Mayor, etc., of Faversham v. Ryder, 5 De Gex, M. & G. 353; Edwards v. Hall, 11 Hare, 12, 6 De Gex, M. & G. 89. In a like spirit the house of lords recently decided that a bequest to erect buildings for charitable purposes if other lands should be given was valid, and could not be held to be impliedly prohibited by St. 9 Geo. II. Philpott v. St. George's Hospital, 6 H. L. Cas. 338. The rule stated in Attorney General v. Williams, 2 Cox, Ch. 388, and Tatham v. Drummond, 11 L. T. (N. S.) 325, upon which the heirs at law rely, that "the court will not alter its conception of the purposes of a testator, merely because those intentions happen to fall within the prohibition of the statute of mortmain," shows that no forced construction of the testator's language is to be adopted to avoid illegality, but does not affect the principle that a bequest which according to the fair meaning of the words may include a legal as well as an illegal application is to be held valid.

In the light of these general principles, we come to the consideration of the language of the different bequests in this will.

II. The first bequest which is drawn in question is that contained in the fourth article of the will, by which the sum of ten thousand dollars is given in trust to be used and expended at the discretion of the trustees, "in such sums, at such times and such places as they deem best, for the preparation and circulation of books, newspapers, the delivery of speeches, lectures and such other means as in their judgment will create a public sentiment that will put an end to the negro slavery in this country;" and the testator expresses a desire that they may become a permanent organization, and a hope "that they will receive the services and sympathy, the donations and bequests, of the friends of the slave."

Among the charitable objects specially designated in St. 43 Eliz. is the "relief or redemption of prisoners and captives." And this was not a peculiarity of the law of England or of that age. The civil law regarded the redemption of captives as the highest of all pious uses—in the words of Justinian, causa piissima—and not only declared that no heir, trustee or legatee should infringe or unjustly defeat the pious intentions of the testator by asserting that a legacy or trust for the redemption of captives was uncertain, and provided for the appointment of a trustee when none was named in the will, and for informing him of the bequest, but even authorized churches to alienate their sacred vessel and vestments for this one purpose, upon the ground that it was reasonable that the souls or lives of men should be preferred to any vessels or vestments whatsoever—"Quoniam non absurdum est animas hominum quibuscunque vasis vel vestimentis preferri." Code, lib. 1, tit. 2, c. 22; Id., tit. 3, cc. 28, 49; Id., lib. 8, tit. 54, c. 36; Nov. 7, c. 8; Id., p. 115, c. 3; Id., p. 120, c. 10; Id., p. 131, c. 11; Godol. Leg. pt. 1, c. 5, § 4.

The captives principally contemplated in St. 43 Eliz. were doubtless Englishmen taken and held as slaves in Turkey and Barbary. And the relief of our own citizens from such captivity was always deemed charitable in

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Massachusetts, an illustration of which is found in the records of the governor and council in 1693, by whom a petition of the relations of two inhabitants of the province, "some time since taken by a Salley man of war, and now under Turkish captivity and slavery," for permission "to ask and receive the charity and public contribution of well disposed persons for redeeming them out of their miserable suffering and slavery," was granted; "the money so collected to be employed for the end aforesaid, unless the said persons happen to die before, make their escape, or be in any other way redeemed; then the money so gathered to be improved for the redemption of some others of this province, that are or may be in like circumstances, as the governor and council shall direct." Council Rec. 1693, fol. 323. But there is no more reason for confining the words of the statute of Elizabeth to such captives, than for excluding from the class of religious charities gifts for preaching the gospel to the heathen, which have uniformly been sustained as charitable, here and in England. Boyle, Char. 41; Bartlet v. King, 12 Mass. 536. Indeed it appears by Sir Francis Moore's reading upon the statute, that even in his time the word "captives" might include captive enemies. Duke, Char. Uses, 158.

It was argued that the slave trade was fostered and rewarded by the English government in the reign of Elizabeth, and therefore gifts for the relief of negro slaves could not be deemed within the purview of the statute of charitable uses. The fact is undoubted; but the conclusion does not follow. The permission of slavery by law does not prevent emancipation from being charitable. A commission of manumission, granted by Queen Elizabeth, twenty-seven years before the statute, recites that in the beginning God created all men free by nature, and afterwards the law of nations placed some under the yoke of slavery, and that the queen believed it would be pious and acceptable to God and according to Christian charity—"pium fore credimus et Deo acceptabile Christianæque charitati consentaneum"—to wholly enfranchise the villeins of the crown on certain royal manors. 20 Howell, St. Tr. 1372. See, also, Bar. Ob. (5th Ed.) 305, 308. The spirit of the Roman law upon this point is manifested by an edict of Constantine, which speaks of those who with a religious sentiment in the bosom of the church grant their slaves that liberty which is their due—Qui religiosâ mente in ecclesiæ gremio servis suis meritam concesserint libertatem." Code, lib. 1, tit. 13, c. 2. That the words of the statute of charitable uses may be extended to negro slaves of English masters is clearly shown by the decision of Lord Cottenham, when master of the rolls, applying for the benefit of negroes in the British colonies in the West Indies the accumulations of a bequest made in 1670 "to redeem poor slaves." Attorney General v. Gibson, 2 Beav. 317, note; Id., cited Craig & P. 226. In dealing with such a question, great regard is to be had to the favor which the law gives to liberty, so eloquently expressed by Chief Justice Fortescue: "Crudelis enim necessario judicabitur lex, quæ servitutem augmentat et minuit libertatem. Nam pro eâ natura semper implorat humana. Quia ab homine et pro vitio introducta est servitus. Sed libertas a Deo hominis est indita naturæ. Quare ipsa ab homine sublata semper redire gliscit, ut facit omne quod libertati naturali privatur. Quo ipse et crudelis judicandus est, qui libertati non favet. Hæc considerantia Angliæ jura in omni casu libertati dant favorem." Fortes. De Laud. c. 42.

But the question of the lawfulness of this gift, if falling within the class of charitable uses, depends not upon the laws and the public policy of England at the time of the passage of the statute, but upon our own at the time of the death of the testator. It was seriously argued that, before the recent amendment of the constitution of the United States, "a trust to create a sentiment to put an end to negro slavery, would, having regard to the constitution and laws under which we live, be against public policy and thus be void;" but the court is unable to see any foundation for this position in the constitution and laws, either of the United States or of this commonwealth.

The law of Massachusetts has always been peculiarly favorable to freedom, as may be shown by a brief outline of its history. The "rights, liberties and privileges," established by the general court of the colony in 1641, to be "impartially and inviolably enjoyed and observed throughout our jurisdiction forever," declared: "There shall never be any bond slavery, villenage or captivity amongst us, unless it be lawful captives taken in just wars, and such strangers as willingly sell themselves or are sold to us. And these shall have all the liberties and Christian usages which the law of God established in Israel concerning such persons doth morally require. This exempts none from servitude who shall be judged thereto by authority." The last proviso evidently referred to punishment for crime. Body of Liberties, art. 91. This article, leaving out the word "strangers" in the clause as to slaves acquired by sale, was included in each revision of the laws of the colony. Mass. Col. Laws (Ed. 1660) 5; Id. (Ed. 1672) 10; 4 Mass. Col. Rec. pt. 2, p. 467. It is worthy of observation, that the tenure upon which the Massachusetts Company held their charter, as declared in the charter itself, was as of the manor of East Greenwich in the county of Kent; that no one was ever born a villein in Kent (Y. B. 30 Edw. I, p. 168; Fitzh. Abr. "Villenage," 46; 3 Seld. Works, 1876); and that the Body of Liberties contained articles upon each of the principal points distinctive of the Kentish tenure of gavelkind—freedom from escheats on attainder and execution for felony, the power to devise, the

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age of alienation, and descent to all the sons together—adopting some and modifying others. Body of Liberties, arts. 10, 11, 53, 81; 2 Bl. Comm. 84.

In the laws of Europe, at the time of the foundation of the colony, descent was named first among the sources of slavery. The common law, following the civil law, repeated "Servi aut nascuntur aut fiunt," and differed only in tracing it through the father, instead of the mother; and each system recognized that a man might become a slave by capture in war, or by his own consent or confession in some form. Just. Inst. lib. 1, tit. 3; Bract. 4b; Fleta, lib. 1, c. 3; Eedes v. Holbadge, Act. Can. 393; Swinb. Wills, pt. 2, § 7; Co. Litt. 117b. And such was then the established law of nations. Gro. De Jure B. lib. 2, c. 5, §§ 27, 29; Id. lib. 3, c. 7. In parts of England, hereditary villenage would seem to have still existed in fact; and it was allowed by law until since the American Revolution. Pigg v. Caley, Noy, 27; Co. Litt. 116–140; 2 Inst. 28, 45; 2 Rolle, Abr. 732; Smith v. Brown, 2 Salk. 666, Holt, 495; Smith v. Gould, 2 Salk. 667, 2 Ld. Raym. 1275; Trebleock's Case, 1 Atk. 633; The King v. Ditton, 4 Doug. 302. Lord Bacon, in explaining the maxim, "Jura sanguinis nulla jure civili dirimi possunt," with a coolness which shows that in his day and country the illustration was neither unfamiliar nor shocking, says, "If a villein be attainted, yet the lord shall have the issue of his villein born before or after his attainder; for the lord hath them jure naturæ but as the increase of a flock." Bac. Max. reg. 11.

The Massachusetts Body of Liberties, as Governor Winthrop tells us, was composed by Nathaniel Ward, who had been "formerly a student and practiser in the course of the common law." 2 Winthrop's Hist. New England, 55. In view of the other laws of the time, the omission, in enumerating the legal sources of slavery, of birth, the first mentioned in those laws, is significant. No instance is known in which the lawfulness of hereditary slavery in Massachusetts under the charter of the colony or the province was affirmed by legislative or judicial authority; and it has been denied in a series of judgments of this court, beginning in the last century, in each of which it was essential to the determination of the rights of the parties. Littleton v. Tuttle, 4 Mass. 128, note; Lanesborough v. Westfield, 16 Mass. 74; Edgartown v. Tisbury, 10 Cush. 408. The case of Perkins v. Emerson, 2 Dane, Abr. 412, did not touch this question; but simply determined that a person received into a house as a slave of the owner was not received "as an inmate, boarder or tenant," so that notice of the place whence such person last came must be given to the selectmen under Prov. St. 10 Geo. II.; Anc. Chart. 508. No doubt many children of slaves were in fact held as slaves here, especially after the Province Charter, during the period of which all acts of the general court were required to be transmitted to England for approval. Earlier ordinances which had not been so approved were hardly recognized by the English government as of any force. The policy of England restrained the colonists from abolishing the African slave trade, and the number of slaves (which had been very small under the comparatively independent government of the colony) was much increased. The practice of a whole people does not always conform to its laws. Thousands of negroes were held as slaves in England and commonly sold in public at the very time when Lord Mansfield and other judges decided such holding to be unlawful. Sommersett's Case, 20 Howell, St. Tr. 72, 79, Lofft, 17; Quincy, 97, note; The Slave Grace, 2 Hagg. Adm. 105, 106.

While negro slavery existed in Massachusetts, it was in a comparatively mild form. The marriages of slaves were protected by the legislature and the courts; according to the opinion of Hutchinson and of Dane, slaves might hold property; they were admitted as witnesses, even on capital trials of white persons, and on suits of other slaves for freedom; they might sue their masters for wounding or immoderately beating them; and indeed hardly differed from apprentices or other servants except in being bound for life. See authorities and records cited in Quincy, 30, 31, note; 2 Dane, Abr. 313. The annual tax acts show that before the Declaration of Independence they were usually taxed as property, always afterwards as persons. The general court in September 1776 forbade the sale of two negroes taken as prize of war on the high seas and brought into this state, and resolved that any negroes so taken and brought in should not be allowed to be sold, but should be treated like other prisoners. Res. Sept. 1776, c. 83.

It was in Massachusetts, by the first article of the declaration of rights prefixed to the constitution adopted in 1780, as immediately afterwards interpreted by this court, that the fundamental axioms of the Declaration of Independence—"that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness"—first took at once the form and the force of express law; slavery was thus wholly abolished in Massachusetts; and it has never existed here since, except so far as the constitution and laws of the state were held to be prevented by the constitution and laws of the United States from operating upon fugitive slaves. Caldwell v. Jennison, Rec. 1781, fol. 79, 80; Jennison's Petition, Jour. H. R. June 18, 1782, fol. 89; Com. v. Jennison, Rec. 1783, fol. 85; Parsons, C. J., in Winchendon v. Hatfield, 4 Mass. 128; 4 Mass. Hist. Coll. 203, 204; Com. v. Aves, 18 Pick. 208, 210, 215, 217; 2 Kent, Comm. (6th Ed.) 252; Betty v. Horton, 5 Leigh, 623.

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The doctrine of our law, upon this subject, as stated by Chief Justice Shaw in delivering the judgment of the court in Com. v. Aves, just cited, is that slavery is a relation founded in force, contrary to natural right and the principles of justice, humanity and sound policy; and could exist only by the effect of positive law, as manifested either by direct legislation or settled usage. The same principle has been recognized by Chief Justice Marshall and Mr. Justice Story, speaking for the supreme court of the United States. The Antelope, 10 Wheat. 120, 121; Prigg v. Pennsylvania, 16 Pet. 611.

The constitution of the United States uniformly speaks of those held in slavery, not as property, but as persons; and never contained anything inconsistent with their peaceable and voluntary emancipation. As between master and slave, it would require the most explicit prohibition by law to restrain the right of manumission. M'Cutchen v. Marshall, 8 Pet. 238. We cannot take judicial notice of the local laws of other states of the Union except so far as they are in proof. Knapp v. Abell, 10 Allen, 488. But it appears by cases cited at the bar that bequests of manumission were formerly favored in Virginia; and that it was more recently decided in Mississippi that a trust created by will for paying the expenses of transporting the testator's slaves to Africa and maintaining them in freedom there was lawful. Charles v. Hunnicutt, 5 Call, 311; Wade v. American Colonization Soc., 7 Smedes & M. 663. A state of slavery, in which manumission was wholly prohibited, has never been known among civilized nations. Even when slavery prevailed throughout the world, the same common law of nations, jus gentium, which justified its existence, recognized the right of manumission as a necessary consequence. Just. Inst. lib. 1, tit. 5.

We fully concur with the learned counsel for the heirs at law that if this trust could not be executed according to the intention of the testator without tending to excite servile insurrections in other states of the Union, it would have been unlawful; and that a trust which looked solely to political agitation and to attempts to alter existing laws could not be recognized by this court as charitable. But such does not appear to us to be the necessary or the reasonable interpretation of this bequest. The manner stated of putting an end to slavery is not by legislation or political action, but by creating a public sentiment, which rather points to moral influence and voluntary manumission. The means specified are the usual means of public instruction, by books and newspapers, speeches and lectures. Other means are left to the discretion of the trustees, but there is nothing to indicate that they are not designed to be of a kindred nature. Giving to the bequest that favorable construction to which all charitable gifts are entitled, the just inference is that lawful means only are to be selected, and that they are to be used in a lawful manner.

It was further objected that "to create a public sentiment" was too vague and indefinite an object to be sustained as a charitable use. But "a public sentiment" on a moral question is but another name for public opinion, or a harmony of thought—idem sentire. The only case cited for the heirs at law in support of this objection was Browne v. Yeall, 7 Ves. 50, note, in which Lord Thurlow held void a perpetual trust for the purchase and distribution in Great Britain and its dominions of such books as might have a tendency to promote the interests of virtue and religion and the happiness of mankind. But the correctness of that decision was doubted by Sir William Grant and Lord Eldon in Morice v. Bishop of Durham, 9 Ves. 406, 10 Ves. 534, 539; and it is inconsistent with the more recent authorities, here and in England. The bequest now before us is quite as definite as one "for the increase and improvement of Christian knowledge and promoting religion," and the purchase from time to time of such bibles and other religious books, pamphlets and tracts as the trustees should think fit for that purpose, which was upheld by Lord Eldon in Attorney General v. Stepney, 10 Ves. 22; or "to the cause of Christ, for the benefit and promotion of true evangelical piety and religion," through the agency of trustees, to be by them "appropriated to the cause of religion as above stated, to be distributed in such divisions and to such societies and religious charitable purposes as they may think fit and proper," which was sustained by this court in Going v. Emery, 16 Pick. 107; or "for the promotion of such religious and charitable enterprises as shall be designated by a majority of the pastors composing the Middlesex Union Association," as in Brown v. Kelsey, 2 Cush. 243; or to be distributed, at the discretion of trustees, "in aid of objects and purposes of benevolence or charity, public or private," as in Saltonstall v. Sanders, 11 Allen, 446; or "for the cause of peace," to be expended by an unincorporated society, whose object, as defined in its constitution, was "to illustrate the inconsistency of war with Christianity, to show its baleful influence on all the great interests of mankind, and to devise means for insuring universal and permanent peace," as in Tappan v. Deblois, 45 Me. 122; or to found "an establishment for the increase and diffusion of knowledge among men;" or "for the benefit and advancement and propagation of education and learning in every part of the world, as far as circumstances will permit;" as in Whicker v. Hume, 7 H. L. Cas. 124, 155, and President of U. S. v. Drummond, there cited. See, also, McDonough v. Murdoch, 15 How. 405, 414.

The bequest itself manifests its immediate

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purpose to be to educate the whole people upon the sin of a man's holding his fellowman in bondage; and its ultimate object, to put an end to negro slavery in the United States; in either aspect, a lawful charity.

It is universally admitted that trusts for the promotion of religion and education are charities. Gifts for the instruction of the public in the cure of the diseases of quadrupeds or birds useful to man, or for the prevention of cruelty to animals (either by publishing newspapers on the subject, or by providing establishments where killing them for the market might be attended with as little suffering as possible), have been held charitable in England. London University v. Yarrow, 23 Beav. 159, 1 De Gex & J. 72; Marsh v. Means, 3 Jur. (N. S.) 790; Tatham v. Drummond, 11 L. T. (N. S.) 325. To deliver men from a bondage which the law regards as contrary to natural right, humanity, justice and sound policy, is surely not less charitable than to lessen the sufferings of animals. The constitution of Massachusetts, which declares that all men are born free and equal, and have the natural, essential and unalienable rights of enjoying and defending their lives and liberties, of acquiring, possessing and protecting property, of seeking and obtaining their safety and happiness; also declares that a frequent recurrence to the fundamental principles of the constitution, and a constant adherence to those of piety and justice, are absolutely necessary to preserve the advantages of liberty and to maintain a free government; that "the encouragement of arts and sciences, and all good literature, tends to the honor of God, the advantage of the Christian religion, and the great benefit of this and the other United States of America;" and that "wisdom and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties, and as these depend on spreading the opportunities and advantages of education in the various parts of the country, and among the different orders of the people, it shall be the duty of legislatures and magistrates, in all future periods of this commonwealth," besides cherishing the interests of literature and the sciences, "to countenance and inculcate the principles of humanity and general benevolence, public and private charity," "and all social affections and generous sentiments among the people." Declaration of Rights, arts. 1, 18; Const. Mass. c. 5. This bequest directly tends to carry out the principles thus declared in the fundamental law of the commonwealth. And certainly no kind of education could better accord with the religion of Him who came to preach deliverance to the captives, and taught that you should love your neighbor as yourself and do unto others as you would that they should do unto you.

The authorities already cited show that the peaceable redemption or manumission of slaves in any manner not prohibited by law is a charitable object. It falls indeed within the spirit, and almost within the letter, of many clauses in the statute of Elizabeth. It would be an anomaly in a system of law, which recognized as charitable uses the relief of the poor, the education and preferment of orphans, marriages of poor maids, the assistance of young tradesmen, handicraftsmen and persons decayed, the relief of prisoners and the redemption of captives, to exclude the deliverance of an indefinite number of human beings from a condition in which they were so poor as not even to own themselves, in which their children could not be educated, in which marriages had no sanction of law or security of duration, in which all their earnings belonged to another, and they were subject, against the law of nature, and without any crime of their own, to such an arbitrary dominion as the modern usages of nations will not countenance over captives taken from the most barbarous enemy.

III. The next question arises upon the bequest in trust for the benefit of fugitive slaves who might from time to time escape from the slaveholding states of the Union.

The validity of this bequest must be determined according to the law as it stood at the time when the testator died and from which his will took effect. It is no part of the duty of this court to maintain the constitutionality, the justice, or the policy of the fugitive slave acts, now happily repealed. But the constitution of the United States, at the time of the testator's death, declared that no person held to service or labor in one state should be discharged therefrom by escaping into another. It may safely be assumed that, under such a constitution, a bequest to assist fugitive slaves to escape from those to whom their service was thus recognized to be due could not have been upheld and enforced as a lawful charity. The epithets with which the testator accompanied this bequest show that he set his own ideas of moral duty above his allegiance to his state or his country; and warrant the conjecture that he would have been well pleased to have the fund applied in a manner inconsistent with the constitution and laws of the United States. But he has used no words to limit its use to illegal methods, and has left his trustees untrammelled as to the mode of its application.

Whether this bequest is or is not valid, is to be ascertained from a fair construction of its language, in the light of the maxims of interpretation stated in the earlier part of this opinion, by which the court is bound to carry into effect any charitable bequest in which can be seen a general intention consistent with the law, even if the particular mode pointed out is illegal; and there is no authority to construe it to be void if it can be applied in a lawful manner consistently with the intention of the testator as manifested in

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the words by which it is expressed. One illustration of these maxims may be added in this connection.

In Isaac v. Gompertz, Amb. (2d Ed.) 228, note, the will contained one bequest for the support and maintenance of a Jews' synagogue; and another bequest of an annuity "to the gabas of the said synagogue," who were found, upon inquiry by a master, to be treasurers of the synagogue, whose office it was to collect and receive the annual subscriptions for the support of poor Jews belonging to the synagogue, and to apply the same to the expenses of supporting the synagogue and to the maintenance of such poor Jews. This last bequest was upheld, and referred to a master to report a scheme, although the support of the synagogue was adjudged to be an unlawful use; and thus a bequest manifestly intended for the benefit of persons professing a religion not tolerated by law, and which might, according to its terms, be applied either in an unlawful or a lawful manner, was sustained as charitable, and its application confined to the lawful mode.

A bequest for the benefit of fugitive slaves is not necessarily unlawful. The words "relief or redemption of prisoners and captives" have always been held in England to include those in prison under condemnation for crime, as well as persons confined for debt; and to support gifts for distributing bread and meat among them annually, or for enabling poor imprisoned debtors to compound with their creditors. Duke, Char. Uses, 131, 156; Attorney General v. Ironmongers' Co., Coop. Prac. Cas. 285, 290; Attorney General v. Painterstainers' Co., 2 Cox, Ch. 51; Attorney General v. Drapers' Co., Tudor, Char. Trusts, 591, 592, 4 Beav. 67; 36th Report of Charity Commissioners to Parliament, pt. 6, pp. 856–868. It would be hardly consistent with charity or justice to favor the relief of those undergoing punishment for crimes of their own committing, or imprisonment for not paying debts of their own contracting; and yet prohibit a like relief to those who were in equal need, because they had withdrawn themselves from a service imposed upon them by local laws without their fault or consent.

It was indeed held in Thrupp v. Collett, 26 Beav. 125, that a bequest to be applied to purchasing and procuring the discharge of persons committed to prison for non-payment of fines under the game laws was not a lawful charity. But such persons were convicted offenders against the law of England, who would by such discharge be wholly released from punishment. A fugitive slave was not a criminal by the laws of this commonwealth or of the United States.

To supply sick or destitute fugitive slaves with food and clothing, medicine or shelter, or to extinguish by purchase the claims of those asserting a right to their service and labor, would in no wise have tended to impair the claim of the latter or the operation of the constitution and laws of the United States; and would clearly have been within the terms of this bequest. If, for example, the trustees named in the will had received this fund from the executor without question, and had seen fit to apply it for the benefit of fugitive slaves in such a manner, they could not have been held liable as for a breach of trust.

This bequest therefore, as well as the previous one, being capable of being applied according to its terms in a lawful manner at the time of the testator's death, must, upon the settled principles of construction, be held a valid charity.

It is hardly necessary to remark that the direction of the testator that his trustees shall not be accountable to any one is simply void. No testator can obtain for his bequests that support and permanence which the law gives to public charities only, and at the same time deprive the beneficiaries and the public of the safeguards which the law provides for their due and lawful administration.

As the trustees named in the will are not a corporation established by law, and these two bequests are unlimited in duration, and by their terms might cover an illegal as well as a legal appropriation, it is the duty of the court, before ordering the funds to be paid to the trustees, to refer the case to a master to settle a scheme for their application in a lawful manner. Isaac v. Gompertz, Amb. 228, note; Attorney General v. Stepney, 10 Ves. 22; Boyle, Char. 100, 217.

IV. It is quite clear that the bequest in trust to be expended "to secure the passage of laws granting women, whether married or unmarried, the right to vote, to hold office, to hold, manage and devise property, and all other civil rights enjoyed by men," cannot be sustained as a charity.

No precedent has been cited in its support. This bequest differs from the others in aiming directly and exclusively to change the laws; and its object cannot be accomplished without changing the constitution also. Whether such an alteration of the existing laws and frame of government would be wise and desirable is a question upon which we cannot, sitting in a judicial capacity, properly express any opinion. Our duty is limited to expounding the laws as they stand. And those laws do not recognize the purpose of overthrowing or changing them, in whole or in part, as a charitable use. This bequest therefore, not being for a charitable purpose, nor for the benefit of any particular persons, and being unrestricted in point of time, is inoperative and void.

For the same reason, the gift to the same object, of one third of the residue of the testator's estate after the death of his daughter Mrs. Eddy and her daughter Mrs. Bacon, is also invalid, and will go to his heirs at law as a resulting trust.

It is proper to add that the conclusion of the court upon this point, as well as upon the

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gift to create a public sentiment which would put an end to negro slavery in the United States, had the concurrence of the late Mr. Justice Dewey, whose judicial experience and large acquaintance with the law of charitable uses give great weight to his opinion, and whose lamented death, while this case has been under advisement, has deprived us of his assistance in determining the other questions in controversy.

V. The validity of the other residuary bequests and devises depends upon the law of perpetuities as applied to private trusts. The principles of this branch of the law have been so fully considered by the court in recent cases as to require no extended statement.

The general rule is that if any estate, legal or equitable, is given by deed or will to any person in the first instance, and then over to another person, or even to a public charity, upon the happening of a contingency which may by possibility not take place within a life or lives in being (treating a child in its mother's womb as in being) and twenty-one years afterwards, the gift over is void, as tending to create a perpetuity by making the estate inalienable; for the title of those taking the previous interests would not be perfect, and until the happening of the contingency it could not be ascertained who were entitled. Brattle Square Church v. Grant, 3 Gray, 142; Odell v. Odell, 10 Allen, 5, 7. If therefore the gift over is limited upon a single event which may or may not happen within the prescribed period, it is void, and cannot be made good by the actual happening of the event within that period.

But if the testator distinctly makes his gift over to depend upon what is sometimes called an alternative contingency, or upon either of two contingencies, one of which may be too remote and the other cannot be, its validity depends upon the event; or, in other words, if he gives the estate over on one contingency which must happen, if at all, within the limit of the rule, and that contingency does happen, the validity of the distinct gift over in that event will not be affected by the consideration that upon a different contingency, which might or might not happen within the lawful limit, he makes a disposition of his estate, which would be void for remoteness. The authorities upon this point are conclusive. Longhead v. Phelps, 2 W. Bl. 704; Sugden and Preston, arguendo, in Beard v. Westcott, 5 Barn. & Ald. 809, 813, 814; Minter v. Wraith, 13 Sim. 52; Evers v. Challis, 7 H. L. Cas. 531; Armstrong v. Armstrong, 14 B. Mon. 333; 1 Jarm. Wills, 244; Lewis, Perp. c. 21; 2 Spence, Eq. Jur. 125, 126.

By the ninth and tenth articles of the will, the income of one third of the residue of the testator's estate, real and personal, is to be paid to his son James and to his daughter Mrs. Palmer, respectively, during life. Each of these articles contains a distinct direction that, in case such son or daughter shall die leaving no child surviving, the principal of his or her share shall be paid and conveyed to the board of trustees named in the fourth article, to be expended for the intent and purpose therein directed. As the first tenant for life in each bequest is living at the death of the testator, the event of such tenant's dying, leaving no child then living, must happen within the period of a life in being, if at all; and, if it does happen, the gift over to the charity will be valid. Neither James Jackson nor Mrs. Palmer therefore is entitled to a present equitable estate in fee. But as James, though now unmarried, may marry and have children who survive him, and as Mrs. Palmer's children may survive her, in either of which cases half of the income of the share would by the will go to such children during their lives and the bequest over to the charity be too remote, the validity and effect of that bequest over cannot be now determined. If the contingency upon which it is valid should hereafter occur, namely, the death of the testator's son or daughter, respectively, leaving no children surviving, the whole remainder of the share will then go to the charity established by the fourth article, and be paid, after the settlement of a scheme for its lawful application, to the trustees therein named.

VI. By the thirteenth amendment of the constitution of the United States, adopted since the earlier arguments of this case, it is declared that "neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction." The effect of this amendment upon the charitable bequests of Francis Jackson is the remaining question to be determined; and this requires a consideration of the nature and proper limits of the doctrine of cy pres.

It is contended for the heirs at law, that the power of the English chancellor, when a charitable trust cannot be administered according to its terms, to execute it so as to carry out the donor's intention as nearly as possible—cy pres—is derived from the royal prerogative or St. 43 Eliz. and is not an exercise of judicial authority; that, whether this power is prerogative or judicial, it cannot, or, if it can, should not, be exercised by this court; and that the doctrine of cy pres, even as administered in the English chancery, would not sustain these charitable bequests since slavery has been abolished.

Much confusion of ideas has arisen from the use of the term "cy pres" in the books to describe two distinct powers exercised by the English chancellor in charity cases, the one under the sign manual of the crown, the other under the general jurisdiction in equity; as well as to designate the rule of construction which has sometimes been applied to executory devises or powers of appointment to individuals, in order to avoid the objec-

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tion of remoteness. It was of this last, and not of any doctrine peculiar to charities, that Lord Kenyon said, "The doctrine of cy pres goes to the utmost verge of the law, and we must take care that it does not run wild;" and Lord Eldon, "It is not proper to go one step farther." Brudenell v. Elwes, 1 East, 451, 7 Ves. 390; 1 Jarm. Wills, 261–263; Sugd. Powers, c. 9, § 9; Coster v. Lorillard, 14 Wend. 309, 348.

The principal, if not the only, cases in which the disposition of a charity is held to be in the crown by sign manual, are of two classes; the first, of bequests to particular uses charitable in their nature, but illegal, as for a form of religion not tolerated by law; and the second, of gifts of property to charity generally, without any trust interposed, and in which either no appointment is provided for, or the power of appointment is delegated to persons who die without exercising it.

It is by the sign manual and in cases of the first class, that the arbitrary dispositions have been made, which were so justly condemned by Lord Thurlow in Moggridge v. Thackwell, 1 Ves. Jr. 469, and Sir William Grant in Cary v. Abbot, 7 Ves. 494, 495; and which, through want of due discrimination, have brought so much discredit upon the whole doctrine of cy pres. Such was the case of Attorney General v. Baxter, in which a bequest to Mr. Baxter to be distributed by him among sixty pious ejected ministers, (not, as the testator declared, for the sake of their nonconformity, but because he knew many of them to be pious and good men and in great want,) was held to be void, and given under the sign manual to Chelsea College; but the decree was afterwards reversed, upon the ground that this was really a legacy to sixty individuals to be named. 1 Vern. 248; 2 Vern. 105; 1 Eq. Cas. Abr. 96; 7 Ves. 76. Such also was the case of Da Costa v. De Pas, in which a gift for establishing a jesuba or assembly for reading the Jewish law was applied to the support of a Christian chapel at a foundling hospital. Amb. 228; 2 Swanst. 489, note; 1 Dickens, 258; 7 Ves. 76, 81.

This power of disposal by the sign manual of the crown in direct opposition to the declared intention of the testator, whether it is to be deemed to have belonged to the king as head of the church as well as of the state, "intrusted and empowered to see that nothing be done to the disherison of the crown or the propagation of a false religion" (Rex v. Portington, 1 Salk. 162, 1 Eq. Cas. Abr. 96); or to have been derived from the power exercised by the Roman emperor, who was sovereign legislator as well as supreme interpreter of the laws (Dig. 33, 2, 17; 50, 8, 4; Code, lib. 1, tit. 2, c. 19; Id., tit. 14, c. 12); is clearly a prerogative and not a judicial power, and could not be exercised by this court; and it is difficult to see how it could be held to exist at all in a republic, in which charitable bequests have never been forfeited to the use or submitted to the disposition of the government, because superstitious or illegal. 4 Dane, Abr. 239; Gass v. Wilhite, 2 Dana, 176; Methodist Church v. Remington, 1 Watts, 226.

The second class of bequests which are disposed of by the king's sign manual is of gifts to charity generally, with no uses specified, no trust interposed, and either no provision made for an appointment, or the power of appointment delegated to particular persons who die without exercising it. Boyle, Char. 238, 239; Attorney General v. Syderfen, 1 Vern. 224, 1 Eq. Cas. Abr. 96; Attorney General v. Fletcher, 5 Law J. Ch. (N. S.) 75. This too is not a judicial power of expounding and carrying out the testator's intention, but a prerogative power of ordaining what the testator has failed to express. No instance is reported, or has been discovered in the thorough investigations of the subject, of an exercise of this power in England before the reign of Charles II. Moggridge v. Thackwell, 7 Ves. 69–81; Dwight's Argument in the Rose Will Case, 272. It has never, so far as we know, been introduced into the practice of any court in this country; and, if it exists anywhere here, it is in the legislature of the commonwealth as succeeding to the powers of the king as parens patriæ. 4 Kent, Comm. 508, note; Fontain v. Ravenel, 17 How. 369, 384; Moore v. Moore, 4 Dana, 365, 366; Witman v. Lex, 17 Serg. & R. 93; Attorney General v. Jolly, 1 Rich. Eq. 108; Dickson v. Montgomery, 1 Swan, 348; Lepage v. Macnamara, 5 Iowa, 146; Bartlet v. King, 12 Mass. 545; Sohier v. Massachusetts General Hospital, 3 Cush. 496, 497. It certainly cannot be exercised by the judiciary of a state whose constitution declares that "the judicial department shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men." Declaration of Rights, art. 30.

The jurisdiction of the court of chancery to superintend the administration and decree the performance of gifts to trustees for charitable uses of a kind stated in the gift stands upon different grounds; and is part of its equity jurisdiction over trusts, which is shown by abundant evidence to have existed before the passage of the statute of charitable uses. Sir Francis Moore records a case in which a man sold land to another upon confidence to perform a charitable use, which the grantor declared by his last will that the grantee should perform; "the bargain was never enrolled, and yet the lord chancellor decreed that the heir should sell the land to be disposed according to the limitation of the use; and this decree was made the 24th of Queen Elizabeth, before the statute of charitable uses, and this decree was made upon ordinary and judicial equity in chancery." Symon's Case, Duke, Char. Uses, 163. About the same time the court of chancery entertained a suit between two parties, each claim-

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ing to be trustee, to determine how bequests for the weekly relief of the poor of certain towns, for the yearly preferment of poor children to be apprentices, and for the curing of divers diseased people lying by the highway's side, should be "employed and bestowed according to the said will." Reade v. Silles (27 Eliz.) Act. Can. 559. A decree in 16 Eliz., confirming a report of the master of the rolls and others to whom a suit for enforcing a charitable trust founded by will had been referred, is cited in 1 Spence, Eq. Jur. 588, note. For years before St. 43 Eliz., or the similar act of 39 Eliz., suits in equity by some in behalf of all of the inhabitants of a parish were maintained to establish and enforce bequests for schools, alms or other charitable purposes for the benefit of the parish, which would have been too indefinite to be enforced as private trusts. Parker v. Browne (12 Eliz.) 1 Cal. Pro. Ch. 81, 1 Mylne & K. 389, 390; Dwight, Char. Cas. 33, 34; in which the devise was in trust to a corporation incapable at law of taking. Parrot v. Pawlet (21 Eliz.) Cary, 47; Elmer v. Scot (24 Eliz.) Cho. Cas. Ch. 155; Matthew v. Marow (32–34 Eliz.); and Hensman v. Hackney (38 Eliz.) Dwight, Char. Cas. 65, 77; in which the decrees approved schemes settled by masters in chancery. Many other examples are collected in the able and learned arguments, as separately printed in full, of Mr. Binney in the Case of Girard's Will, and of Mr. Dwight in the Rose Will Case. And the existence of such a jurisdiction anterior to and independent of the statute is now generally admitted. Vidal v. Girard, 2 How. 194–196, and cases cited; Perin v. Carey, 24 How. 501; Magill v. Brown, Brightly, N. P. 346; 2 Kent, Comm. 286–288, and note; Burbank v. Whitney, 24 Pick. 152, 153; Preachers' Aid Soc. v. Rich, 45 Me. 559; Derby v. Derby, 4 R. I. 436; Urmey v. Wooden, 1 Ohio St. 160; Chambers v. St. Louis, 29 Mo. 543; 1 Spence, Eq. Jur. 588; Tudor, Char. Trusts, 102, 103.

The theory that St. 43 Eliz. enlarged the discretion of the chancellor to depart from the expressed intention of the founder of a charity is refuted by the words of the statute itself. After reciting that many gifts and appointments for the charitable purposes therein named "have not been employed according to the charitable intent of the givers and founders thereof, by reason of frauds, breaches of trust, and negligence in those that should pay, deliver and employ the same;" it then, for redress and remedy thereof, authorizes the lord chancellor or lord keeper to make such decrees that the property "may be duly and faithfully employed to and for such of the charitable uses and intents before rehearsed respectively for which they were given, limited, assigned or appointed by the donors and founders thereof;" which decrees, "not being contrary or repugnant to the orders, statutes or decrees of the donors or founders," shall "stand firm and good, according to the tenor and purpose thereof, and shall be executed accordingly," until altered by the lord chancellor or lord keeper upon complaint by any party aggrieved; and upon such complaint the chancellor or keeper may "by such course as to their wisdoms shall seem meetest, the circumstances of the case considered, proceed to the examination, hearing and determining thereof; and upon hearing thereof shall and may annul, diminish, alter or enlarge" the decrees of the commissioners as "shall be thought to stand with equity and good conscience, according to the true intent and meaning of the donors and founders thereof." These last qualifications are specially marked by Lord Coke, who was attorney general at the passage of the statute and for some time before and after, and who adds, by way of note to the final clause, "This is the lapis ductitius, whereby the commissioners and chancellors must institute their course." 2 Inst. 712. See, also, Duke, Char. Uses, 11, 156, 169, 372, 619.

In cases of bequests to trustees for charitable uses, the nature of which is described in the will, the chancellor acts in his equity jurisdiction over trusts; and the prerogative of the king finds its appropriate exercise through his attorney general in bringing the case before the court of chancery for a judicial determination. This has been well explained by Lord Eldon. "It is the duty of a court of equity, a main part, originally almost the whole, of its jurisdiction, to administer trusts; to protect not the visible owner, who alone can proceed at law, but the individual equitably, though not legally, entitled. From this principle has arisen the practice of administering the trust of a public charity: persons possessed of funds appropriated to such purposes are within the general rule; but, no one being entitled to an immediate and peculiar interest to prefer a complaint, who is to compel the performance of these obligations, and to enforce their responsibility? It is the duty of the king, as parens patriæ, to protect property devoted to charitable uses; and that duty is executed by the officer who represents the crown for all forensic purposes. On this foundation rests the right of the attorney general in such cases to obtain by information the interposition of a court of equity." Attorney General v. Brown, 1 Swanst. 291, 1 Wils. 354. To the like effect are the opinions of Lord Redesdale in Attorney General v. Mayor, etc., of Dublin, 1 Bligh (N. S.) 347, 348, and Corporation of Ludlow v. Greenhouse, Id. 48, 62; of Lord Keeper Bridgman in Attorney General v. Newman, 1 Ch. Cas. 158; of Sir Joseph Jekyll in Eyre v. Shaftsbury, 2 P. Wms. 119; and of Lord Hardwicke in Attorney General v. Middleton, 2 Ves. Sr. 328; which also state that the jurisdiction of the court of chancery over charities was exercised on such informations before St. 43 Eliz. See, also, Attorney General v. Carroll, Act. Can. 729; Dwight's Ar-

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gument in the Rose Will Case, 259–268. This duty of maintaining the rights of the public, and of a number of persons too indefinite to vindicate their own, has vested in the commonwealth, and is exercised here, as in England, through the attorney general. Going v. Emery, 16 Pick. 119; County Attorney v. May, 5 Cush. 338–340; Gen. St. c. 14, § 20. It is upon this ground that, in a suit instituted by the trustees of a charity to obtain the instructions of the court, the attorney general should be made a party defendant, as he has been by order of the court in this case. Harvard College v. Society for Promoting Theological Education, 3 Gray, 280; Tudor, Char. Trusts, 161, 162. The power of the king or commonwealth, thus exercised, is simply to present the question to a court of justice, not to control or direct its judicial action.

A charity, being a trust in the support and execution of which the whole public is concerned, and which is therefore allowed by the law to be perpetual, deserves and often requires the exercise of a larger discretion by the court of chancery than a mere private trust; for without a large discretionary power, in carrying out the general intent of the donor, to vary the details of administration, and even the mode of application, many charities would fail by change of circumstances and the happening of contingencies which no human foresight could provide against; and the probabilities of such failure would increase with the lapse of time and the remoteness of the heirs from the original donor who had in a clear and lawful manner manifested his will to divert his estate from his heirs for the benefit of public charities.

It is accordingly well settled by decisions of the highest authority, that when a gift is made to trustees for a charitable purpose, the general nature of which is pointed out, and which is lawful and valid at the time of the death of the testator, and no intention is expressed to limit it to a particular institution or mode of application, and afterwards, either by change of circumstances the scheme of the testator becomes impracticable, or by change of law becomes illegal, the fund, having once vested in the charity, does not go to the heirs at law as a resulting trust, but is to be applied by the court of chancery, in the exercise of its jurisdiction in equity, as near the testator's particular directions as possible, to carry out his general charitable intent. In all the cases of charities which have been administered in the English courts of chancery without the aid of the sign manual, the prerogative of the king acting through the chancellor has not been alluded to, except for the purpose of distinguishing it from the power exercised by the court in its inherent equitable jurisdiction with the assistance of its masters in chancery.

At the time of the settlement of the Massachusetts Colony, this power was most freely exercised by the court of chancery, either on information by the attorney general, or on proceedings by commission under the statute of charitable uses. Attorney General v. Warwick (1615, 1638) Dwight, Char. Cas. 140, 141, West, Ch. 60, 62; Bloomfield v. Stowemarket (1619) Duke, Char. Uses, 644. In the last case, lands had been given before the Reformation to be sold, and the proceeds applied, one half to the making of a highway from the town in which the lands were, one fourth to the repair of a church in that town, and the other fourth to the priest of the church to say prayers for the souls of the donor and others; and Lord Bacon decreed the establishment of the uses for making the highway and repairing the church, and directed the remaining fourth (which could not, by reason of the change in religion, be applied as directed by the donor) to be divided between the poor of the same town, and the poor of the town where the donor inhabited.

In the Case of Baliol College, this doctrine was enforced by successive decrees of the greatest English chancellors between the English Revolution and our own, which have been recently confirmed by the unanimous decision of the house of lords. Attorney General v. Guise, 2 Vern. 166; Attorney General v. Baliol College, 9 Mod. 407; Attorney General v. Glasgow College, 2 Colly. 665, 1 H. L. Cas. 800. The case is of such importance and reported at different stages in so many books and at such length, that it may be well to state it. John Snell, an Episcopalian, who made his last will and died in 1679, while the form of religion established by law in Scotland as well as in England was Episcopal, gave lands in trust to apply the income for the maintenance and education at the university of Oxford of Scotchmen to be designated by the vice chancellor of that university and the heads of certain colleges therein, and who should, upon their admission, give security to enter into holy orders and to be sent into Scotland and there remain. After the Revolution of 1688, Presbyterianism was reëstablished in Scotland by act of parliament; and in 1690 an information was filed by the attorney general, at the relation of the vice chancellor and heads of colleges named in the will, against the testator's heiress at law, suggesting a pretence by her that as Episcopacy and Prelacy had been abolished in Scotland, and the Presbyterian form of worship established instead, the testator's intentions could not be carried into effect, the devise became void, and the property reverted to her. But the lords commissioners of the great seal, by a decree passed in 1692, established the devise against her, ordered an account, and reserved all directions for the establishment of the charity. 2 Vern. 267, note; 2 Colly. 665-670, 1 H. L. Cas. 802–804, 820, 822. In 1693 the cause came on for further directions before

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Lord Keeper Somers, who, acting upon the doctrine that it was within the province of a court of equity to administer the trust upon the principle of cy pres, ordered the estate to be conveyed to the six senior fellows of Baliol College, one of the colleges named in the will, to maintain a certain number of Scotch scholars at that college, and, in consideration of the privileges enjoyed by such scholars, to apply the surplus income to its library; and this decree was made subject to such alteration and disposition as the court should from time to time make, upon the application of any person concerned, for the better and more effectual execution of the trust, as near as could be to the testator's will and intentions. 2 Vern. 267, note; 2 Colly. 670, 671, 1 H. L. Cas. 804, 805, 824. In 1744 Lord Hardwicke, in the execution of the directions in the decree of Lord Somers, referred the cause to a master to approve of a scheme "for the better establishment and regulation of the charity, and carrying the same into effect for the future as near to the will and intention of the testator as the alteration of circumstances since the making of the will would admit;" and upon his report, and against the exceptions of the heads of colleges in Oxford, confirmed a scheme which did not impose any condition of the scholars taking holy orders—thus carrying out the general intention of the trust so far as to educate Scotch scholars at Oxford, although the testator's ultimate object that they should be educated in the Episcopal form of church government to take part in the established religion in Scotland could not, by reason of the change of law since his death, be effected. 9 Mod. 407; 1 H. L. Cas. 805, 806, 825–827. In 1759 Lord Keeper Henley (afterward Lord Northington) varied the scheme in other particulars, but declined to vary it in this; and further orders were afterwards made in chancery as the revenues increased. 2 Colly. 672–674, 1 H. L. Cas. 806, 807, 825, 826; 3 Ves. 650, note. Upon a new information filed at the relation of some Scotch Episcopalians, the house of lords in 1848, reversing an order of Vice Chancellor Knight Bruce, held that the charity must continue to be administered according to the earlier decrees. 1 H. L. Cas. 800.

In another case, Queen Elizabeth, by letters patent, established a hospital for forty lepers, and made the inmates a corporation. After leprosy had become almost extinct in England, and the members of the corporation reduced to three, an information was filed, alleging that the corporation was dissolved, and praying for a new application of the revenues agreeably to the letters patent and the donor's intention, or as near thereto as circumstances would permit and the court should direct. Lord Eldon held that neither the donor's heirs at law nor the crown took the land discharged of the charity; referred the case to a master to report a scheme; and confirmed the report of the master, approving a scheme for the application of the revenues to a general infirmary, reserving a preference to all lepers who might offer themselves. Attorney General v. Hicks, Highm. Mortm. 336–354, 3 Brown, Ch. 166, note.

Sir John Romilly, M. R., afterwards made a like decision, holding that a gift made in 1687 of land (for which in 1774 other land had been substituted by leave of parliament) in trust out of the income to keep it ready for a hospital and burial place for patients sick of the plague, was a present gift for charitable purposes, and valid, although the plague had not reappeared in England for more than one hundred and eighty years; and, after alluding to a class of cases, cited for the heirs at law in that case, as they have been in this, in which the charitable bequest could never have taken effect, added, "But who can say, when this deed was executed or the act passed, that this was not a charitable trust, capable of being performed;" "and if it were ever wholly devoted to charity, those cases do not apply." Attorney General v. Craven, 21 Beav. 392, 408.

The principle that a bequest to trustees for charitable purposes indicated in the will, which are lawful and capable of being carried out at the time of the testator's death, will not be allowed to fail and result to the heirs at law upon a change of circumstances, but will be applied by the court according to a scheme approved by a master to carry out the intent of the testator as nearly as possible, has been affirmed and acted on in many other English cases. Attorney General v. Pyle, 1 Atk. 435; Attorney General v. Green, 2 Brown, Ch. 492; Attorney General v. Bishop of London, 3 Brown, Ch. 171; Moggridge v. Thackwell, Id. 517, 1 Ves. Jr. 464; Attorney General v. Glyn, 12 Sim. 84; Attorney General v. Lawes, 8 Hare, 32; Attorney General v. Vint, 3 De Gex & S. 705. The dicta of Lord Alvanley, upon which the heirs at law much rely, do not, in the connection in which they were uttered, substantially differ from the general current of authority. Attorney General v. Boultbee, 2 Ves. Jr. 387, 388; Attorney General v. Whitchurch, 3 Ves. 143, 144; Attorney General v. Minshull, 4 Ves. 14.

By the opinion of Lord Eldon, formed after great doubt and hesitation, the principle has been held to extend to the case of a bequest of property to a person named, in trust for such charitable purposes, not otherwise described, as he should appoint. Moggridge v. Thackwell, 7 Ves. 96, 13 Ves. 416; Paice v. Archbishop of Canterbury, 14 Ves. 364; Mills v. Farmer, 19 Ves. 483, 1 Mer. 55. Such a trust has been held valid in this commonwealth, so far as to vest a title in the trustee as against the next of kin. Wells v. Doane, 3 Gray, 201. Whether, in case of his death, it could properly be administered by a court of chancery, without the aid of the prerogative power, need not be considered in this

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case. See Fontain v. Ravenel, 17 How. 387, 388; Moore v. Moore, 4 Dana, 366.[1]

In most of the cases cited at the argument, in which the heirs at law were held to be entitled to the property, the charitable gift never took effect at all; either because it could not be carried out as directed, without violating the mortmain act of 9 Geo. II., as in Jones v. Williams, Amb. 651; Attorney General v. Whitchurch, 3 Ves. 141, and Smith v. Oliver, 11 Beav. 481; or because the testator had in terms limited it to a special object which could not be accomplished at the time of his death; as in the case of a bequest to build a church in Wheatley, which could not be done without the consent of the bishop, and he refused (Attorney General v. Bishop of Oxford, 1 Brown, Ch. 444, note; Id., cited 2 Cox, Ch. 365; 2 Ves. Jr. 388; and 4 Ves. 431, 432); or of a direction to contract with the governors of a hospital for the purchase of a presentation of a boy to that charity, if the residuary assets should prove sufficient for that purpose, and they proved to be insufficient (Cherry v. Mott, 1 Mylne & C. 123).

In Marsh v. Means, 3 Jur. (N. S.) 790, the testator gave a legacy, after the death of his wife, "for continuing the periodical published under the title of 'The Voice of Humanity,' according to the objects and principles which are set forth in the prospectus contained in the third number of that publication." "The Voice of Humanity" had been published quarterly by an association for the protection of animals, but no number had appeared for nearly a year before the date of the will. Upon the death of the widow twenty years later, Vice Chancellor Wood held that the gift was not to support the principles of the publication, but only the publication itself, and, the publication having ceased and the association perished, that the legacy lapsed. But he added, "It would, I think, have fallen within the description of charity, if this periodical had been subsisting at the date of the will, and afterwards ceased. That would be simply a case where, the particular intention having failed, the general intention must be carried out."

Two striking cases upon this subject have arisen in England under charities for the redemption of captives.

In the Case of Betton's Charity, Thomas Betton in 1723 bequeathed the residue of his estate to the Ironmongers' Company, in trust, "positively forbidding them to diminish the capital sum by giving away any part, or that the interest and profit arising be applied to any other use or uses than hereinafter mentioned and directed," namely, one half of the income yearly unto the redemption of British slaves in Turkey or Barbary, one fourth unto charity schools in the city and suburbs of London where the education is according to the church of England, and one fourth "unto necessitated decayed freemen of the company, their widows and children." The first half of the income of the fund greatly accumulated, few such slaves having been found for a century. Lord Brougham, reversing the decree of Sir John Leach, M. R., held that the court had jurisdiction to apply the surplus income of this moiety and its accumulations as near as might be to the intentions of the testator; having regard to the bequest touching British captives, and also to the other charitable bequests in the will; and that the case should be referred back to the master to approve a proper scheme for such application. Attorney General v. Ironmongers' Co., 2 Mylne & K. 576. Sir Christopher Pepys, M. R. (afterwards Lord Cottenham,) accordingly ordered it to be so referred. On the return of the master's report, Lord Langdale, M. R., approved a scheme to apply the whole fund to the second and third purposes declared in the will. 2 Beav. 313. Lord Chancellor Cottenham on appeal reversed this decree; and upon the ground that the testator had not limited the first charity, like the others, to persons in London, ordered the first moiety to be applied to supporting and assisting charity schools in England and Wales, and referred it back to the master to settle a scheme for that purpose. Craig & P. 208. And this decree was affirmed in the house of lords with the concurrence of Lord Chancellor Lyndhurst, and Lords Brougham, Cottenham and Campbell. 10 Clark & F. 908. In that case, though there were differences of opinion as to the details of the scheme, the jurisdiction of the court of chancery to frame one in such a case was thus affirmed by the deliberate judgments of five law lords; and all agreed that, for the purpose of ascertaining what was cy pres to the particular object which had failed, the court might look at all the charitable bequests in the will; applying in this respect the principle upon which Lord Bacon had acted more than two centuries before in the case of Bloomfield v. Stowemarket, above cited.

But the case most like that now before us is that of Lady Mico's Charity, Lady Mico, by her will made in 1670, gave a thousand pounds "to redeem poor slaves in what manner the executors should think most convenient." This charity was established by decree in chancery in 1686. Upon an information filed in 1827, after the fund had accumulated a hundred fold, it was referred to a master to approve of a scheme for the application of the income according to the will of the testatrix, or, if he should find that it could not be executed according to her will, then as near the intent of the will as could be, regard being had to the existing circumstances and to the amount of the fund. The master, by his general report in 1835, stated that the relators had laid before him a scheme for applying the fund to the enfranchisement of slaves in the British Colonies

[1] See, also, Lorings v. Marsh, 6 Wall. 337.

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who were too poor to purchase their own freedom; which application, in consequence of St. 3 & 4 Wm. IV. c. 73, abolishing slavery (which took effect in 1834), had become impracticable; that he was of opinion that the testatrix by her will contemplated the redemption of poor slaves in the Barbary States, but that intention could not be carried into effect; and he approved a scheme to apply the capital and income in purchasing and building school-houses for the education of the emancipated apprentices and their issue, qualifying teachers, paying the salaries of masters and other expenses, and to apply the surplus rents to the support of any other schools, and generally in promoting education in the British Colonies. Sir Christopher Pepys, M. R., confirmed this scheme by a decree; and, after he had become lord chancellor, stated the reasons to have been that "in this there was no restriction as to the description of slaves, or the countries in which the slaves were to be looked for;" that upon the reference to the master "it appeared that there were not within any part of the British dominions any poor slaves to be redeemed, but that there were in the colonies many thousands of human beings from whom the odious appellation of slaves had been removed, but whose state was very far short of that of freemen, from whose bodies the chains of slavery had been struck, but whose minds and morals were still in that state of degradation which is inseparable from the unfortunate situation from which they had recently been in part rescued; it was proposed to the master to apply, and he approved of a scheme for the completion of that holy work, by assisting in the education of those poor beings. If, before the slavery abolition act, these funds could properly have been applied to procuring the redemption of slaves in the colonies, the proposed application for the benefit of the apprentices was doubtless cy pres to the intention of the donor." And his reason for not applying Betton's Charity in the same manner was that it was in terms limited to slaves in Turkey or Barbary. Attorney General v. Gibson, 2 Beav. 317, note; Attorney General v. Ironmongers' Co., Craig & P. 226, 227.

There is no adjudication of this question by the supreme court of the United States. The dicta of Chief Justice Marshall in Baptist Ass'n v. Hart's Ex'rs, 4 Wheat. 1, were based upon an imperfect survey of the authorities, were not required by the decision, and are hardly reconcilable with the more recent judgments of the same court; and that case, as well as Wheeler v. Smith, 9 How. 79, arose under the law of Virginia. Vidal v. Girard's Ex'rs, 2 How. 192; Perin v. Carey, 24 How. 501; Bartlett v. Nye, 4 Metc. (Mass.) 380; American Academy of Arts & Sciences v. President, etc., of Harvard College, 12 Gray, 593; 2 Kent, Comm. 287. In Fontain v. Ravenel, 17 How. 369, the testator authorized his executors or the survivor of them to dispose of the residue of his estate "for the use of such charitable institutions in Pennsylvania and South Carolina, as they or he may deem most beneficial to mankind," and they died without appointing; and it was held that the title did not vest in the executors as trustees, and that according to the English law the disposition would have been in the crown by sign manual. As Mr. Justice McLean, delivering the opinion of the court, said: "Nothing short of the prerogative power, it would seem, can reach this case. There is not only uncertainty in the beneficiaries of this charity, but behind that is a more formidable objection. There is no expressed will of the testator. He intended to speak through his executors or the survivor of them, but by the acts of Providence this has become impossible. It is then as though he had not spoken. Can any power now speak for him, except the parens patriæ?" The further remarks about the power of cy pres, if intended to cover a case in which the charitable purposes were described or indicated in the will, were upon a question not before the court. The separate opinion of Chief Justice Taney in Fontain v. Ravenel was but his own, based mainly upon that of Chief Justice Marshall in Baptist Ass'n v. Hart's Ex'rs. And it is impossible to avoid the inference that the impressions of both of those eminent magistrates were derived from the laws of Maryland and Virginia in which they had been educated, and by which St. 43 Eliz. has been expressly repealed, and charities are not recognized as entitled to any favor, either in duration or construction, beyond other trusts. Dashiell v. Attorney General, 5 Har. & J. 392; Gallego v. Attorney General, 3 Leigh, 450. In North Carolina, the supreme court once declared that it had all the powers exercised by the English chancellor, either in the equity jurisdiction or under the sign manual; and since, rebounding from that extreme opinion, seems to have adopted the view of Maryland and Virginia. Griffin v. Graham, 1 Hawks, 96; McAuley v. Wilson, 1 Dev. Eq. 276; Holland v. Peck, 2 Ired. Eq. 255. There is a dictum to a like effect in Carter v. Balfour, 19 Ala. 830. So in New York, the court of appeals, after some division and vacillation of opinion in the course of the frequent changes in the composition of the court, has recently adjudged that in that state the English law of charitable uses has been wholly abrogated by statute, and that charities are within the rule against perpetuities, and have no privileges about private trusts. Bascom v. Albertson, 34 N. Y. 584.

On the other hand, the court of appeals of Kentucky, in an able judgment delivered by Chief Justice Robertson, marked the distinction between the power exercised under the sign manual, and that inherent in the equity jurisdiction; and, after speaking of the former as not judicial, added: "The cy pres doctrine of England is not, or should not be, a

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judicial doctrine, except in one kind of case; and that is, where there is an available charity to an identified or ascertainable object, and a particular mode, inadequate, illegal or inappropriate, or which happens to fail, has been prescribed. In such case, a court of equity may substitute or sanction any other mode that may be lawful and suitable and will effectuate the declared intention of the donor, and not arbitrarily and in the dark, presuming on his weakness or wishes, declare an object for him. A court may act judicially as long as it effectuates the lawful intention of the donor." Moore v. Moore, 4 Dana, 366. See, also, Gass v. Wilhite, 2 Dana, 177; Curling v. Curling, 8 Dana, 38. The power of cy pres, which was declared by the supreme court of Pennsylvania in Methodist Church v. Remington, 1 Watts, 226, and Witman v. Lex, 17 Serg. & R. 93, not to exist in that state, was the power exercised under the sign manual in case of a gift to superstitious uses, or of an expression of general intention to devote a sum to charitable purposes not designated. In a very recent case, the same court said: "The rule of equity on this subject seems to be clear, that when a definite charity is created, the failure of the particular mode in which it is to be effectuated does not destroy the charity; for equity will substitute another mode, so that the substantial intention shall not depend upon the formal intention." "And this is the doctrine of cy pres, so far as it has been expressly adopted by us"—"a reasonable doctrine, by which a well defined charity, or one where the means of definition are given, may be enforced in favor of the general intent, even where the mode or means provided for by the donor fail by reason of their inadequacy or unlawfulness." Philadelphia v. Girard, 45 Pa. St. 27, 28. Like principles have been maintained in South Carolina and Illinois. Attorney General v. Jolly, 1 Rich. Eq. 99, 2 Strob. Eq. 395; Gilman v. Hamilton, 16 Ill. 231. The existence of a judicial power to administer a charity cy pres where the expressed intention of the founder cannot be exactly carried out has been either countenanced or left an open question in all the New England states except Connecticut. Burr v. Smith, 7 Vt. 287, 288; Second Congregational Soc. v. First Congregational Soc., 14 N. H. 330; Brown v. Concord, 33 N. H. 296; Derby v. Derby, 4 R. I. 439; Tappan v. Deblois, 45 Me. 131; Howard v. American Peace Soc., 49 Me. 302, 303; Treat's Appeal, 30 Conn. 113. See, also, 2 Redf. Wills, 815, note; McCord v. Ochiltree, 8 Blackf. 15; Beall v. Fox, 4 Ga. 427; Chambers v. St. Louis, 29 Mo. 590, 592; Lepage v. Macnamara, 5 Iowa, 146; McIntyre v. Zanesville, 17 Ohio St. 352.

The narrow doctrines which have prevailed in some states upon this subject are inconsistent with the established law of this commonwealth. Our ancestors brought with them from England the elements of the law of charitable uses, and, although the form of proceeding by commission under St. 43 Eliz. has never prevailed in Massachusetts, that statute, in substance and principle, has always been considered as part of our common law. 4 Dane, Abr. 6, 239; Earle v. Wood, 8 Cush. 445. Under the Colony charter, charities were regulated and administered, according to the intent of the donors, under the direction of the general court, the court of assistants, and the county courts; and under the Province charter, although no court was vested with equity jurisdiction, charitable bequests were not the less valid. Anc. Chart. 52; Drury v. Natick, 10 Allen, 180, 181, and authorities cited; Winslow v. Trowbridge, stated in 11 Allen, 459, 460. The English mortmain act of 9 Geo. II. c. 36, did not extend to Massachusetts; and the similar provision in Prov. St. 28 Geo. II. c. 9, was repealed immediately after our Revolution by St. 1785, c. 51. Odell v. Odell, 10 Allen, 6. Charities are held not to be within the common rule limiting perpetuities and accumulations. Dexter v. Gardner, 7 Allen, 243; Odell v. Odell, 10 Allen, 1. Charitable bequests to an unincorporated society here, to a foreign corporation or society, or to a particular religious denomination in a certain county, have been carried into effect, even where no trustees have been named in the will. Burbank v. Whitney, 24 Pick. 146; Bartlett v. Nye, 4 Metc. (Mass.) 378; Washburn v. Sewall, 9 Metc. (Mass.) 280; Universalist Soc. v. Fitch, 8 Gray, 421. See, also, Wells v. Doane, 3 Gray, 201; Saltonstall v. Sanders, 11 Allen, 446.

The intention of the testator is the guide, or, in the phrase of Lord Coke, the lodestone, of the court; and therefore, whenever a charitable gift can be administered according to his express directions, this court, like the court of chancery in England, is not at liberty to modify it upon considerations of policy or convenience. Harvard College v. Society for Promoting Theological Education, 3 Gray, 280; Baker v. Smith, 13 Metc. (Mass.) 34; Trustees of Smith Charities v. Inhabitants of Northampton, 10 Allen, 498. But there are several cases, where the charitable trust could not be executed as directed in the will, in which the testator's scheme has been varied by this court in such a way and to such an extent as could not be done in the case of a private trust. Thus bequests to a particular bible society by name, whether a corporation established by law or a voluntary association, which had ceased to exist before the death of the testator, have been sustained, and applied to the distribution of bibles through a trustee appointed by the court for the purpose. Winslow v. Cummings, 3 Cush. 358; Bliss v. American Bible Soc., 2 Allen, 334. At a time when the general chancery jurisdiction of this court over trusts was limited to those arising under deeds and wills, the legislature by a special statute authorized it to hear and determine in equity any

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and all matters relating to a certain gift to a scientific corporation, to be invested in a certain manner, and paid in premiums for discoveries or improvements on heat or light published in America within two years before each award. Upon a bill being filed, and it appearing that it had become impracticable to carry out the intent of the donor in the mode prescribed, Chief Justice Shaw authorized a different investment of the fund; and, in accordance with a scheme reported by a master, authorized the corporation to apply the surplus income, after paying such premiums, to purchasing books, papers and philosophical apparatus, and making such publications or procuring such lectures, experiments or investigations as should facilitate and encourage the making of such discoveries and improvements; and said: "Whenever it appears that a general object of charity is intended, and the purpose is not unlawful and void, the right of the heir at law is divested." "It is now a settled rule in equity that a liberal construction is to be given to charitable donations, with a view to promote and accomplish the general charitable intent of the donor, and that such intent ought to be observed, and when this cannot be strictly and literally done, this court will cause it to be fulfilled as nearly in conformity with the intent of the donor as practicable. Where the property thus given is given to trustees capable of taking, but the property cannot be applied precisely in the mode directed, the court of chancery interferes, and regulates the disposition of such property under its general jurisdiction on the subject of trusts, and not as administering a branch of the prerogative of the king as parens patriæ." "What is the nearest method of carrying into effect the general intent of the donor must of course depend upon the subject matter, the expressed intent, and the other circumstances of each particular case, upon all of which the court is to exercise its discretion." American Academy v. Harvard College, 12 Gray, 582. The same principle was also recognized or assumed in 4 Dane, Abr. 242, 243, in Sanderson v. White, 18 Pick. 333, and other cases already cited. Baker v. Smith, 13 Metc. (Mass.) 41; Harvard College v. Society for Promoting Theological Education, 3 Gray, 282, 298; Trustees of Smith Charities v. Inhabitants of Northampton, 10 Allen, 501, 502.

By Gen. St. c. 113, § 2, this court may hear and determine in equity all suits and proceedings for enforcing and regulating the execution of trusts, whether the trusts relate to real or personal estate, "and shall have full equity jurisdiction, according to the usage and practice of courts of equity, in all other cases, where there is not a plain, adequate and complete remedy at law." The powers usually exercised by the court of chancery in the course of its jurisdiction in equity have thus been expressly conferred upon this court by the legislature. The authority of administering a charitable trust according to the expressed intention of the donor, and, when that cannot be exactly followed, then as nearly as possible, is a part of this jurisdiction, which the court is not at liberty to decline. The only question is, whether the facts of the case show a proper occasion for its exercise according to the settled practice in chancery.

In all the cases cited at the argument, in which a charitable bequest, which might have been lawfully carried out under the circumstances existing at the death of the testator, has been held, upon a change of circumstances, to result to the heirs at law or residuary legatees, the gift was distinctly limited to particular persons or establishments. Such was Russell v. Kellett, 3 Smale & G. 264, in which the gift was of five pounds outright to each poor person of a particular description in certain parishes, and Vice Chancellor Stuart held that the shares of those who died before receiving them went to the residuary legatees. Such, also, was Clark v. Taylor, 1 Drew. 642, in which it was held that a legacy to a certain orphan school by name, which ceased to exist after the death of the testator, failed and fell into the residue of the estate; and which can hardly be reconciled with the decisions in Incorporated Soc. v. Price, 1 Jones & L. 498, 7 Ir. Eq. 260; In re Clergy Society, 2 Kay & J. 615; Marsh v. Attorney General, 2 Johns. & H. 61; Winslow v. Cummings, 3 Cush. 358, and Bliss v. American Bible Soc., 2 Allen, 334. So in Easterbrooks v. Tillinghast, 5 Gray, 17, the trust was expressly limited, not only in object, but in duration, to the maintenance of the pastor of a certain church of a specified faith and practice in a particular town, "so long as they or their successors shall maintain the visibility of a church in said faith and order;" and could not have been held to have terminated, had it not been so limited. Attorney General v. Columbine, Boyle, Char. 204, 205; Potter v. Thurston, 7 R. I. 25; Dexter v. Gardner, 7 Allen, 243.

The charitable bequests of Francis Jackson cannot, in the opinion of the court, be regarded as so restricted in their objects, or so limited in point of time, as to have been terminated and destroyed by the abolition of slavery in the United States. They are to a board of trustees for whose continuance careful provision is made in the will, and which the testator expresses a wish may become a permanent organization and may receive the services and sympathy, the donations and bequests, of the friends of the slave. Their duration is not in terms limited, like that of the trust sought to be established in the sixth article of the will, by the accomplishment of the end specified. They take effect from the time of the testator's death, and might then have been lawfully applied in exact conformity with his expressed intentions. The retaining of the funds in the custody of the court while this case has been

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under advisement cannot affect the question. The gifts being lawful and charitable, and having once vested, the subsequent change of circumstances before the funds have been actually paid over is of no more weight than if they had been paid to the trustees and been administered by them for a century before slavery was extinguished.

Neither the immediate purpose of the testator—the moral education of the people; nor his ultimate object—to better the condition of the African race in this country; has been fully accomplished by the abolition of slavery.

Negro slavery was recognized by our law as an infraction of the rights inseparable from human nature; and tended to promote idleness, selfishness and tyranny in one part of the community, a destruction of the domestic relations and utter debasement in the other part. The sentiment which would put an end to it is the sentiment of justice, humanity and charity, based upon moral duty, inspired by the most familiar precepts of the Christian religion, and approved by the constitution of the commonwealth. The teaching and diffusion of such a sentiment are not of temporary benefit or necessity, but of perpetual obligation. Slavery may be abolished; but to strengthen and confirm the sentiment which opposed it will continue to be useful and desirable so long as selfishness, cruelty, the lust of dominion, and indifference to the rights of the weak, the poor and the ignorant, have a place in the hearts of men. Looking at the trust established by the fourth article of this will as one for the moral education of the people only, the case is within the principle of those, already cited, in which charities for the relief of leprosy and the plague were held not to end with the disappearance of those diseases; and is not essentially different from that of Attorney General v. Baliol College, in which a trust for the education at Oxford of Scotch youths, to be sent into Scotland to preach Episcopalianism in the established church there, was applied by Lords Somers and Hardwicke and their successors to educate such youths, although, by the change of faith and practice of the Church of Scotland, the donor's ultimate object could no longer be accomplished.

The intention of Francis Jackson to benefit the negro race appears not only in the leading clause of the fourth article, and in his expression of a hope that his trustees might receive the aid and the gifts of the friends of the slave, but in the trust for the benefit of fugitive slaves in the fifth article of the will, to which, according to the principle established by the house of lords in the Case of Betton's Charity, resort may be had to ascertain his intent and the fittest mode of carrying it out. The negroes, although emancipated, still stand in great need of assistance and education. Charities for the relief of the poor have been often held to be well applied to educate them and their children. Bishop of Hereford v. Adams, 7 Ves. 324; Wilkinson v. Malin, 2 Cromp. & J. 636, 2 Tyrw. 544; Anderson v. Wrights of Glasgow, 12 L. T. (N. S.) 807. The Case of Mico Charity is directly to the point that a gift for the redemption of poor slaves may be appropriated, after they have been emancipated by law, to educate them; and the reasons given by Lord Cottenham for that decision apply with no less force to those set free by the recent amendment of the constitution in the United States, than to those who were emancipated by act of parliament in the West Indies.

The mode in which the funds bequeathed by the fourth and fifth articles of the will may be best applied to carry out in a lawful manner the charitable intents and purposes of the testator as nearly as possible must be settled by a scheme to be framed by a master and confirmed by the court before the funds are paid over to the trustees. In doing this, the court does not take the charity out of the hands of the trustees, but only declares the law which must be their guide in its administration. Shelf. Mortm. 651–654; Boyle, Char. 214–218. The case is therefore to be referred to a master, with liberty to the attorney general and the trustees to submit schemes for his approval; and all further directions are reserved until the coming in of his report.

Case referred to a master.

The case was then referred to John Codman, Esquire, a master in chancery for this county, who, after notice to the trustees and the attorney general, and hearing the parties, made his report, the results of which were approved by the attorney general; and upon exceptions to which the case was argued by W. Phillips for himself and other excepting trustees, and by J. A. Andrew in support of the master's report, before Gray, J., with the agreement that he should consult the whole court before entering a final decree. No account was asked by any party of sums already expended by the trustees.

As to the bequest in the fifth article, the master reported that the unexpended balance (amounting to $1049.90) was so small that it was reasonable that it should be confined to a limited territory; and that it should therefore be applied by the trustees, in accordance with their unanimous recommendation, to the use of necessitous persons of African descent in the city of Boston and its vicinity. This scheme was approved and confirmed by the court, with this addition: "Preference being given to such as have escaped from slavery."

As to the sum bequeathed in the fourth article of the will, the master reported that a portion had been expended by the trustees before any question arose as to its validity; and that but two schemes had been suggested to him for the appropriation of the residue, namely, first, (which was approved by four of the seven trustees who had accepted the trust,) in part to the support of the Anti-

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Slavery Standard, and in part to the New England Branch of the American Freedmen's Union Commission; or, second, (which was approved by the remaining trustees,) that the whole should be applied to the last named object.

The master disapproved of the first of these schemes; and reported that the Anti-Slavery Standard was a weekly newspaper published in the city of New York with a circulation of not more than three thousand copies, which was established nearly thirty years ago for the purpose of acting upon public opinion in favor of the abolition of slavery; that in his opinion, since the abolition of slavery, and the passage of the reconstruction acts of congress, "the support of a paper of such limited circulation as hardly to be self-sustaining would do very little for the benefit of the colored people in their present status, and its direct influence would be almost imperceptible on the welfare of that class most nearly corresponding to those whom the testator had in view in making this bequest;" and that the argument, that it was evidently the intention of the testator to accomplish the object indicated in the fourth article of his will by means of which a newspaper like this might be considered an example, was answered by the fact that the object for which these means were to be used had been already accomplished without them. The master returned with his report a few numbers of the Anti-Slavery Standard, (taken without selection as they were given to him by the chairman of the trustees,) by which it appeared that it was in large part devoted to urging the passage of laws securing to the freedmen equal political rights with the whites, the keeping of the southern states under military government, the impeachment of the president, and other political measures.

The master reported that he was unable to devise any better plan than the second scheme suggested; that this mode of appropriation was in his opinion most in accordance with the intention of the testator as expressed in the fourth article of the will, because the intention nearest to that of emancipating the slaves was by educating the emancipated slaves to render them capable of self-government; and this could best be done by an organized society, expressly intended and exactly fitted for this function, and which, if the whole or any part of this fund was to be applied to the direct education and support of the freedmen, was admitted at the hearing before him to be the fittest channel for the appropriation. The master returned with his report printed documents by which it appeared that the object of the American Freedmen's Union Commission, as stated in its constitution, was "the relief, education and elevation of the freedmen of the United States, and to aid and coöperate with the people of the South, without distinction of race or color, in the improvement of their condition, upon the basis of industry, education, freedom and Christian morality;" and that the New England and other branches of the commission were now maintaining large numbers of teachers and schools for this purpose throughout the southern states.

The master accordingly reported that what remained of the fund bequeathed by the fourth article of the will should be "ordered to be paid over to the New England Branch of the Freedmen's Union Commission, to be employed and expended by them in promoting the education, support and interests generally of the freedmen (late slaves) in the states of this Union recently in rebellion." And this scheme was by the opinion of the whole court accepted and confirmed, modified only by directing the executor to pay the fund to the trustees, to be by them paid over at such times and in such sums as they in their discretion might think fit to the treasurer of the branch commission; and by substituting for the words "recently in rebellion" the words "in which slavery has been abolished, either by the proclamation of the late President Lincoln or the amendment of the constitution."

Final decree accordingly.

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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

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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

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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

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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

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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

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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

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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

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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-

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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.

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FISHER v. FOBES.

(22 Mich. 454.)

Supreme Court of Michigan. April Term, 1871.

Bill in equity to establish a resulting trust. There was a decree for complainant, from which defendant appealed.

A. C. Baldwin, for complainant. Crofoot & Brewer, for defendant.

COOLEY, J. The facts in this case are few and simple, and in regard to most of them there is no dispute. In the fall of 1854, complainant resided in Bennington, New York, upon a parcel of land which he had purchased of the Holland Land Company, and upon which he was then owing about thirteen hundred dollars, which he was unable to pay. The company were demanding payment, and had sent an officer, whether with legal process or simply as their agent, we are not informed, to remove him from the premises, when one Stillman Goodenough, complainant's brother-in-law, intervened, and succeeded in obtaining two weeks' time, in which to make some arrangement if possible. Complainant seems to have been quite discouraged, and put himself entirely into the hands of Goodenough, telling him to go on and make a saving for the family if he could do so. Goodenough did go on as agent for complainant, and succeeded in making an arrangement with one Patchin, then residing in Steuben county, New York, to exchange the interest of complainant in the Bennington land for an eighty-acre lot owned by Patchin in Milford, Oakland county, Michigan. Complainant signed some writing expressing his satisfaction with this arrangement, and it would seem to have been closed up at once, so far as complainant was concerned, but the deed from Patchin was executed at his home, and was not sent on until some weeks afterwards. It does not distinctly appear that there was any understanding between complainant and Goodenough, as to who should be named as grantee in the deed from Patchin, but the deed, when received, named Goodenough as grantee, and complainant does not appear to have expressed any dissatisfaction with it. He, however, took possession of the Milford land, claiming it as his own, and has ever since been in possession under the like claim, and made valuable improvements.

Stillman Goodenough, it appears, conveyed the Milford land to his brother, John R. Goodenough, in 1855, on an understanding, as he claims, that the title should still be held for complainant, and there have been several subsequent conveyances, until the legal title has become vested in the defendant, who claims to be a grantee in good faith, and for value. It is not claimed, however, that defendant or any of the intermediate grantees has or had any greater equities than were possessed by Stillman Goodenough, and as the complainant's continuous possession must be regarded as notice of his actual rights (McKee v. Wilcox, 11 Mich. 358), we need not consider the merits of any of the alleged subsequent purchases.

The bill in this case avers that Stillman Goodenough took the title to the Milford land in his own name without the consent of complainant, and in fraud of his rights; and its purpose is to compel the defendant to release to the complainant the title which, it is claimed, is held for him under an implied or constructive trust. The defendant insists that the conveyance to Stillman Goodenough was made with the full approval of complainant, and that consequently under our statute he is entitled to no relief.

As the consideration for the conveyance to Stillman Goodenough was furnished by complainant, there can be no doubt that at the common law there would have been a resulting trust in complainant's favor. But our statute provides that, "when a grant for a valuable consideration shall be made to one person, and the consideration therefor shall be paid by another, no use or trust shall result in favor of the person by whom such payment shall be made; but the title shall vest in the person named as the alienee in such conveyance, subject only" to a trust in favor of creditors, when the effect would otherwise be to defraud them: Comp. Laws, §§ 2637, 2638.

This provision, however, must be understood as applicable only to those cases in which the deed has assumed the form it has by consent of the party furnishing the consideration. It has no application to a case where one has taken a deed in his own name in fraud of the rights of another, nor to a case where, though no fraud was designed, the conveyance has been made to some person other than the purchaser without his consent. The purpose is to preclude parties from asserting equitable interests in land where they must rest upon parol evidence, in opposition to the written instruments of title, which have been made with their consent and approval. If, therefore, it shall appear that complainant assented to the conveyance to Stillman Goodenough, without demanding or receiving any written declaration or other evidence of a trust in his own favor, no such trust can be declared, however clearly it may appear from the parol evidence that the transaction was entered into for his benefit, and that, between the parties, it was understood that the title was to be held in trust for him. If he has trusted himself entirely to the good faith of Goodenough, and suffered an arrangement to rest in parol which the statute declares shall be evidenced by writing only, it will not be in our power to relieve him even if we were disposed so to do.

It has already been seen that there is no direct evidence of any understanding between complainant and Goodenough as to

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who was to be made the grantee in Patchin's deed, and we must therefore see what legal inferences are deducible from the situation of the parties, or may fairly be drawn from the facts which appear. The following facts, as we have before said, are unquestioned: 1, That in the arrangement Goodenough acted as agent for complainant; 2, that he was intrusted with the whole management of the negotiation with Patchin; and, 3, that it was distinctly understood between him and complainant that the conveyance made by Patchin was to be for the benefit of complainant. Supposing this to be the whole of their understanding, the duty of Goodenough was plain. It was to have the conveyance made directly to complainant, or, if made to himself for any other person, then to have a trust in favor of complainant distinctly declared in the conveyance, so that it might be legally enforced; and if he failed to have conveyance made in proper form for the protection of complainant's interests, he would have been chargeable with constructive fraud, and a court of equity would have given complainant the proper relief.

We cannot infer, in the absence of evidence to that effect, that complainant understood Goodenough was to take the deed to himself and without expressing therein any trust in favor of complainant. The contrary is the only reasonable inference. When it distinctly appears that the conveyance was to be for his benefit, we must suppose that he expected it to be in such form that the law would protect his enjoyment of the premises under it. We cannot assume that his agent, into whose hands he placed himself, was understood to be empowered to take conveyance in a form which would defeat the very purpose of the arrangement, or that complainant, without any occasion whatever, so far as the evidence shows, was to trust his interests for an indefinite period solely to the continued good will, good faith, and sense of honor and justice of the agent who was negotiating for him.

Goodenough testifies that after the arrangement with Patchin was agreed upon, complainant was informed of it, and expressed his satisfaction. But he does not state that complainant was then told to whom the deed was to be made, and we have no reason to infer that the information went any further than that an even exchange was to be made of the Bennington interest for the Milford land; but after the deed was made by Patchin, it was shown to complainant, and he read it and made no objection, and this is claimed to be very conclusive evidence that it was in accordance with his expectation and desire. Of this evidence it is to be observed, that if complainant had not previously assented, this failure to object to the deed after it had been made, could not operate as a waiver of his rights. If a constructive trust existed in his favor when the deed was first taken, by reason of its being taken in Goodenough's name, without his consent, he was under no such obligation to assert his rights immediately on learning the facts, as to be barred of his equities by failure to do so. An inference of assent may be drawn from his silence, but there is nothing in the case in the nature of an estoppel.

And we think any such inference of assent is not very conclusive. Goodenough had been giving his services to complainant, and though he had taken the deed in his own name, he had evinced no disposition to appropriate the property. He allowed complainant to take possession and appropriate the profits without account. His possession would preclude any bona fide purchase by strangers, and if we suppose complainant to be fully aware of his legal rights, we must assume that he knew he had nothing to gain or lose by demanding or failing to demand an immediate conveyance. His silence, consequently, after the transaction was completed does not seem to us such evidence of previous assent as to warrant our finding that an understanding is proved that the arrangement Goodenough was engaged to make for the benefit of complainant, might be put in such form as to inure exclusively to the benefit of Goodenough himself.

After careful consideration of this record, we are of opinion that the decree was correct, and that it should be affirmed.

The other justices concurred.

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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-

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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

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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.

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OCEAN BANK OF NEW YORK v. OLCOTT.

(46 N. Y. 12.)

Court of Appeals of New York. Sept. 2, 1871.

Appeal from judgment of the general term of the First department, reversing an order of the special term overruling demurrer to plaintiff's reply and sustaining demurrer to the fourth and fifth counts of defendant's answer.

This action is in the nature of a creditors' bill on a judgment recovered by the plaintiff against the defendant, Cornelius Olcott, on the 15th of April, 1861. And the allegations in the complaint are that since the judgment said defendant has paid, of his own moneys, for certain real estate, the conveyance of which was taken by and in the name of the defendant, Kate G. Olcott, the wife of the other defendant, in fraud of his creditors. The answer denies all these allegations of fraud, and sets up the defence that since the judgment, and before this action was commenced, the defendant, Cornelius Olcott, obtained a discharge in bankruptcy, under the act of congress of 1867, and was thereby fully discharged from all his debts, the aforesaid judgment included.

The plaintiff replied to the defence of the discharge in bankruptcy, alleging that said discharge was fraudulently obtained, and setting forth the frauds complained of.

The defendant demurred to the reply that it does not state facts sufficient to constitute a reply.

P. J. Gage, for appellant. Richard H. Huntley, for respondent.

CHURCH, C. J. The two principal questions in this case are: 1. Whether a certificate of discharge in bankruptcy, issued under the bankrupt act of 1867, can be impeached in a state court, on the ground that it was improperly granted? and, 2. Whether the plaintiff can enforce the judgment, against the property conveyed to the defendant, Kate G. Olcott, wife of the other defendant, Cornelius Olcott, notwithstanding his discharge in bankruptcy?

The constitution of the United States confers upon congress power to establish uniform laws on the subject of bankruptcies throughout the United States. This, like all other powers, is exclusive when exercised by congress. By the thirty-fourth section of the bankrupt act of 1867, a mode of attacking the discharge is prescribed in the court which issued it, on the ground that it was fraudulently obtained. A creditor therefore seeking to invalidate the discharge for that reason, must pursue the remedy prescribed in the act. Otherwise the certificate is declared to be "conclusive evidence" in favor of such bankrupt of the fact, and the regularity of the discharge. It follows that neither in any other mode, nor in any other court can the discharge be questioned, on the ground that it was improperly granted. Besides the plaintiffs have alleged in the reply, that they have made application to the United States court to set aside the discharge for the frauds alleged to invalidiate it in this case, and if the state court should entertain concurrent jurisdiction to try the same questions, a conflict of judgment and authority might result in a case clearly within the cognizance of the federal courts. In this respect the act of 1867 is unlike the act of 1841, which contained no provision for setting aside the discharge, but permitted its impeachment whenever it was interposed as a defense. We must therefore regard the discharge as valid for the purposes of this action.

The second point represents the important question in the case. It comes up on demurrer to the reply, and the plaintiff seeks to attack the answer, setting up the discharge, on the ground that it constitutes no defense to the action. In determining this question, we must take the allegations in the complaint as true. It is alleged in substance that after the plaintiff's debt was contracted, the defendant, Cornelius Olcott, purchased and paid the consideration for a large quantity of real estate, which was conveyed to his wife, and which by this action, the plaintiffs seek to reach, for the purpose of satisfying their demand. Judgment was obtained against Olcott before the bankrupt discharge was obtained, but this action was not commenced until after that time. A discharge in bankruptcy extinguishes the debt against the bankrupt. The judgment becomes extinguished, and the demands upon which it was rendered. Ruckman v. Cowell, 1 N. Y. 505; Depuy v. Swart, 3 Wend. 135; Baker v. Wheaton, 5 Mass. 509. In the language of the act, the discharge releases "the bankrupt from all debts, claims, liabilities and demands which were or might have been proved against his estate in bankruptcy, and may be pleaded * * * as a full and complete bar to all suits brought on any such debts, claims, liabilities or demands."

It is claimed by the plaintiffs, that as creditors they had, by virtue of the fifty-first and fifty-second sections of the statute of uses and trusts, a lien upon the property held by the wife, the consideration for which was paid by the debtor, and that such lien existed at the time the discharge was granted and was not affected by it.

Prior to the Revised Statutes, where the consideration for land was paid by one person, and the land was conveyed to another, a trust resulted to the person paying the consideration, and the interest of such person might be taken and sold on execution, and the legal title thereby transferred to the purchaser. 1 Rev. St. 74; Guthrie v. Gardner, 19 Wend. 414; Jackson v. Walker, 4 Wend. 462. The Revised Statutes changed this rule, by providing in the fifty-first section that no

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use or trust shall result in favor of the person by whom the payment is made, but that the title shall vest in the person named as alienee in such conveyance, subject only to the provisions of section 52, which declares that every such conveyance "shall be presumed fraudulent as against the creditors, at the time, of the person paying the consideration, and that when a fraudulent intent is not disproved, a trust shall result in favor of such creditors to the extent that may be necessary to satisfy their just demands." This change was probably made to prevent an evasion of the general policy of the statute prohibiting trusts, except for a few specified purposes. It is obvious that the interest or right, or whatever it may be termed, secured to creditors by this statute, is an equitable interest, enforceable only in equity. A trust results, not of the whole property, but sufficient only to satisfy the just claims of creditors; not of one creditor only, but of all creditors. Except as against creditors, the title is perfect in the grantee, and as against them it is perfect, if the grantee can disprove a fraudulent intent. The rights of both creditors and grantee can only be properly adjusted and enforced, in a proceeding in equity, where all interested persons can be made parties, and a sale and proper distribution of the proceeds can be made. That this is an equitable and not a legal interest, to be enforced in a court of equity, was decided in this court in Garfield v. Hatmaker, 15 N. Y. 475.

The bankrupt act preserves the rights of creditors by mortgage, pledge or other lien upon the property of the bankrupt, and the assignee takes the property subject to it (sections 14, 20), and of course a valid lien against the property of a third person would not be affected by the discharge.

Although there may be some apparent confusion from the use of terms, I do not think the interest of the creditors constitutes a lien, within the meaning of the bankrupt act; nor in any such legal sense as to give creditors a priority, except by means of the usual equitable remedies. A lien is not a property in the thing itself, nor does it constitute a mere right of action for the thing. It more properly constitutes a charge upon the thing. 1 Story, Eq. Jur. § 506; 1 Burrill, Law Dict. tit. "Lien." In some general sense creditors have an equitable lien upon the property thus situated. So they would have, if a general liability instead of a resulting trust had been declared. So debts are an equitable lien upon property fraudulently transferred by a debtor; and it may be said that every debtor is a trustee for his creditors and bound to use his property for their benefit, and that creditors have an equitable lien upon the property of the debtor. But in all these cases the usual remedies are to be pursued to create and enforce the lien before a specific charge constituting an incumbrance is created. There is no mystery in the term "resulting trust." After adopting the fifty-first section, it was indispensable to make some provision to preserve the rights of creditors, otherwise the grantee would have held the title absolutely against creditors and all others. Hence the fifty-second section was adopted, which placed the property in the same relation to creditors as it would have been if the debtor himself had fraudulently transferred it, and the words used were appropriate for that purpose. The object of the statute was to cut off all interest in the person paying the consideration, and then to declare property liable for his debts; but this liability can only be enforced in the usual mode. A creditor at large cannot enforce the liability without a preliminary judgment and execution. When the legislature transformed this from a legal into an equitable interest, we must presume that they intended to apply equitable rules and principles existing at the time for its enforcement. One of them is that before the equitable interests of a debtor can be reached in equity all available legal remedies must be exhausted. It is not necessary to hold that such an action is in strictness a creditor's bill, and that jurisdiction depends upon a technical compliance with the statute. The general powers of a court of equity over trusts and frauds may be conceded as sufficient to confer jurisdiction, but this concession does not dispense with the rule of equity which existed prior to and independently of the statute, that creditors must exhaust available, legal remedies before resorting to courts of equity to reach equitable interests. In Beck v. Burdett, 1 Paige, 305, the chancellor laid down the rule of equity established before the Revised Statutes, as follows: "There are two classes of cases where a plaintiff is permitted to come into this court for relief after he has proceeded to judgment and execution at law, without obtaining satisfaction of his debt. In one case the issuing of an execution gives to the plaintiff a lien upon the property; but he is compelled to come here for the purpose of removing some obstruction, fraudulently or inequitably interposed, to prevent a sale on the execution. In the other, the plaintiff comes here to obtain satisfaction of his debt, out of property which cannot be reached by execution at law. In the latter case, his right to relief here depends upon the fact of his having exhausted his legal remedies without being able to obtain satisfaction of his judgment." Wiggins v. Armstrong, 2 Johns. Ch. 144, 283; Brinkerhoff v. Brown, 4 Johns. Ch. 671, and cases there cited.

The foundation of courts of equity is to exercise jurisdiction "in cases of rights recognized and protected by municipal jurisprudence, where a plain, adequate and complete remedy cannot be had in courts of law." 1 Story, Eq. Jur. § 33. Legal remedies are the cheapest and most expeditious for creditors,

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and in this class of cases they protect both creditor and the person holding the title.

As between the grantor and debtor, the latter is bound, both in law and equity, to pay his debts from other property if he has it; and the dictates of propriety, as well as the established rules of equity, require that resort should in the first instance be had to such other property, if it can be reached by the ordinary process of law. This question is only pertinent in this case, as an argument to elucidate the nature of the interest of creditors under this statute. Although the indorsement of the execution "nulla bona" was not filed, it was actually made, which, with the other facts alleged, may be regarded a substantial compliance with the equity rule referred to. But neither the judgment nor execution constituted a lien upon equitable interests. The commencement of the equitable action and the filing of the lis pendens was necessary for that purpose. This is well settled in analogous cases. In Edgell v. Haywood, 3 Atk. 357, Lord Chancellor Hardwicke held that a bona fide assignment of such property after judgment and execution would be valid, and added: "But after a bill brought, and a lis pendens created, as to this thing, such assignment could not prevail." Weed v. Pierce, 9 Cow. 722; Corning v. White, 2 Paige, 567; Spader v. Davis, 5 Johns. Ch. 280; Edmeston v. Lyde, 1 Paige, 637. Judge Story lays down the general rule that "courts will also enforce the security of a judgment creditor against the equitable interest in the freehold estate of his debtor, treating the judgment as in the nature of a lien upon such equitable interest. But in all cases of this sort, the judgment creditor must have pursued the same steps as he would have been obliged to do to perfect his lien, if the estate had been legal." Story, Eq. Jur. § 1216; Neate v. Duke of Marlborough, 3 Mylne & C. 407, 415.

The nature of the interest of creditors under this statute, and the remedy to enforce such interest, have not been definitely settled by the courts of this state. Brewster v. Power, 10 Paige, 562, was a case where the only point involved, and the only one decided, was whether the plaintiff was and must be a creditor at the time of the conveyance, in order to avail himself of the interest secured to creditors under the statute. The chancellor dismissed the bill, but in the course of his opinion, made the following remark: "I am not prepared to say that a judgment for such a debt would not create a preferable lien in equity upon such real property, except as against a purchaser for a valuable consideration."

In McCartney v. Bostwick, 32 N. Y. 53, the plaintiff had prosecuted the defendant to judgment and execution in Minnesota, where he resided, and then commenced an action in this state, to reach property which had been paid for by the debtor and transferred to his wife.

I infer from the opinions that the court declined to decide whether in such a case it was necessary to exhaust the legal remedies. At all events, such is the most favorable construction of the case for the plaintiffs.

Porter, J., who delivered one of the opinions, said: "The case presented being one of pure trust, we are not prepared to say that the action might not have been maintained without recourse in the first instance to all attainable legal remedies against the principal debtor; but it is unnecessary to determine this question, as the fact is admitted that all remedies at law were exhausted against the debtor in the state in which he resided, and that in this state no legal remedy was available." Davis, J., who also delivered an opinion, said: "The case is an anomalous one. There exists concededly in the farm held by the respondent a pure trust in favor of the appellants. But to reach and apply this trust estate a general rule of equity requires that they should have exhausted their legal remedy." The case was decided upon the ground that the plaintiffs had exhausted all available legal remedies, and that the court would entertain jurisdiction by virtue of its inherent equitable powers.

The opinions of the learned judges in the two cases referred to, although not at all decisive, and not very explicit upon the main point, are not antagonistic to the views above expressed. The most that can be said is that one or two of them entertained an undefined impression that the words "resulting trust," as used in this statute, meant something more than a declaration that the property was liable for existing debts to be enforced in the mode prescribed for reaching other equitable interests.

The learned chancellor was not prepared to say but a judgment might constitute a "preferable lien;" but as it was unnecessary to decide it, he refrained from expressing an opinion, and Porter, J., was not prepared to say but the claim might be enforced without resort to any legal remedies, but he expressly declined on behalf of the court any intention to determine the question, while Davis, J., held that although the court could exercise jurisdiction independently of the statute, the general rules of equity required that the legal remedies should be exhausted. The decision in both cases was undoubtedly right, and it is quite unnecessary in this case to criticise any of the intimations. The question of a lien was not involved in either case. If it should be conceded that it was not indispensable to exhaust the legal remedies, and that an action would lie by a creditor at large, no lien would exist until an action was actually commenced for that purpose. The statute does not restrict the creditor to this property. It gives him a right to pursue the property in the hands of the fraudulent grantee, but he is not obliged to do so; and until he takes some decisive legal step evincing his purpose to do so no lien is created any more

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than would have been upon property fraudulently transferred by the debtor himself.

The harmony and analogies of the law are better preserved by requiring all available legal remedies to be resorted to as a preliminary requisite to an action for the application of the trust property. It is difficult to perceive any distinction, or any reason for it, between the rights of creditors as to property fraudulently transferred by the debtor himself, and property paid for by him and transferred to a third person. Why should creditors have different and superior rights to enforce their debts in the latter case to those enjoyed in the former? I can see no reason for any distinction, and I do not believe the statute has created any. But in either case the commencement of an equitable action is necessary to constitute a lien or charge, in any legal sense, upon the land.

These views dispose of the plaintiffs' case. The judgment or debt is the foundation of this action. Both were extinguished before the action was commenced. The plaintiffs sought to enforce and secure a lien against this property by virtue of their rights as creditors. The debt having been discharged, they were not creditors, and could not avail themselves of the resulting trust, which was secured to creditors only. The relation must exist at the time of the conveyance, and at the time when the action is commenced, to establish the lien.

The judgment must be affirmed.

All concur, except GROVER, J., dissenting.

Judgment affirmed.

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MITCHELL v. READ.

(61 N. Y. 123.)

Court of Appeals of New York. May 21, 1874.

Appeal from judgment of the general term of the supreme court in the First judicial department, affirming a judgment in favor of defendant, entered upon decision of the court at special term. Reported below, 61 Barb. 310.

This action was brought to have certain leases, obtained by the defendant during the existence of a copartnership between him and plaintiff, for terms to commence at its termination, of premises leased and occupied by the firm, declared to have been taken for the partnership, and to have it adjudged that the defendant held them as trustee for the partnership. The facts found were substantially as follows:

The plaintiffs were copartners, conducting and carrying on the Hoffman House, in the city of New York. The copartnership, by its terms, expired May 1, 1871; it owned various leases of premises which were used for the partnership business. All of the leases expired at the same time with the copartnership. The firm had spent large sums of money in making valuable improvements and in fitting up the leasehold premises so that they could be beneficially used in connection, and also in fixtures and furnishing, and by their joint efforts had built up a profitable business, and largely enhanced the rental value of the premises. In 1869 the defendant, without any notice of his intent to apply therefor, and without the knowledge of plaintiff, procured renewal leases, in his own name, of the premises, for terms commencing at the termination of the partnership leases and of the partnership, which, upon discovery thereof having been made by plaintiff, defendant claimed were his property exclusively, and refused to recognize or acknowledge that the partnership or plaintiff had any right or interest therein. Other facts appear in the opinion.

The court found as conclusions of law that the defendant Read was the sole owner of the leases executed to him as aforesaid, and that the plaintiff had no right, title, nor interest in or to them, or either of them, and that the defendants have judgment accordingly, to which plaintiff duly excepted. Judgment was rendered accordingly.

The plaintiff commenced this action soon after he ascertained that the defendant had taken the new leases, to wit, in March, 1870, and the cause was brought to trial in February, 1871.

A. J. Vanderpoel and J. E. Burrill, for appellant. John K. Porter and Willard O. Bartlett, for respondents.

EARL, C. The relation of partners with each other is one of trust and confidence. Each is the general agent of the firm, and is bound to act in entire good faith to the other. The functions, rights and duties of partners in a great measure comprehend those both of trustees and agents, and the general rules of law applicable to such characters are applicable to them. Neither partner can, in the business and affairs of the firm, clandestinely stipulate for a private advantage to himself; he can neither sell to nor buy from the firm at a concealed profit to himself. Every advantage which he can obtain in the business of the firm must inure to the benefit of the firm. These principles are elementary, and are not contested. Story, Partn. §§ 174, 175; Colly. Partn. 181, 182. It has been frequently held that when one partner obtains the renewal of a partnership lease secretly, in his own name, he will be held a trustee for the firm as to the renewed lease. It is conceded that this is the rule where the partnership is for a limited term, and either partner takes a lease commencing within the term; but the contention is that the rule does not apply where the lease thus taken is for a term to commence after the expiration of the partnership by its own limitation, and whether this contention is well founded is one of the grave questions to be determined upon this appeal.

It is not necessary, in maintaining the right of the plaintiff in this case to hold that in all cases a lease thus taken shall inure to the benefit of the firm, but whether, upon the facts of this case, these leases ought to inure to the benefit of this firm I will briefly allude to some of the prominent features of this case. These parties had been partners for some years; they were equal in dignity, although their interests differed. The plaintiff was not a mere subordinate in the firm, but so far as appears, just as important and efficient in its affairs as the defendant. They procured the exclusive control of the leases of the property, to terminate May 1, 1871, and their partnership was to terminate on the same day. They expended many thousand dollars in fitting up the premises, a portion thereof after the new leases were obtained, and they expended a very large sum in furnishing them. By their joint skill and influence they built up a very large and profitable business, which largely enhanced the rental value of the premises. More than two years before the expiration of their leases and of their partnership, the defendant secretly procured, at an increased rent, in his own name, the new leases, which are of great value. Although the plaintiff was in daily intercourse with the defendant, he knew nothing of these leases for about a year after they had been obtained. There is no proof that the lessors would not have leased to the firm as readily as to the defendant alone. The permanent fixtures, by the terms of the leases at their expiration, belonged to the lessors. But the movable

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fixtures and furniture were worth vastly more to be kept and used in the hotel than to be removed elsewhere. Upon these facts I can entertain no doubt, both upon principle and authority, that these leases should be held to inure to the benefit of the firm. If the defendant can hold these leases, he could have held them if he had secretly obtained them immediately after the partnership commenced, and had concealed the fact from the plaintiff during the whole term. There would thus have been, during the whole term, in making permanent improvements and in furnishing the hotel, a conflict between his duty to the firm and to his self-interest. Large investments and extensive furnishing would add to the value of his lease, and defendant would be under constant temptation to make them. While he might not yield to the temptation, and while proof might show that he had not yielded, the law will not allow a trustee thus situated to be thus tempted, and therefore disables him from making a contract for his own benefit. Terwilliger v. Brown, 44 N. Y. 237, and cases cited. It matters not that the court at special term found upon the evidence that the improvements were judicious and prudent for the purposes of the old term. The plaintiff was entitled to the unbiased judgment of the defendant as to such improvements, uninfluenced by his private and separate interest. But, further, the parties owned together a large amount of hotel property in the form of furniture and supplies, considerably exceeding, as I infer, $100,000 in value. Assuming that the partnership was not to be continued after the 1st day of May, 1871, this property was to be sold, or in some way disposed of for the benefit of the firm, and each partner owed a duty to the firm to dispose of it to the best advantage. Neither could, without the violation of his duty to the firm, place the property in such a situation that it would be sacrificed, or that he could purchase it for his separate benefit, at a great profit. Much of this property, such as mirrors, carpets, etc., was fitted for use in this hotel, and it is quite manifest that all of it would sell better with a lease of the hotel, than it would to be removed therefrom. It is clear that one or both of these parties could obtain advantageous leases of the hotel for a term of years, and hence, if the parties had determined to dissolve their partnership, it would have been a measure of ordinary prudence to have obtained the leases and transferred the property with the leases as the only mode of realizing its value. This was defeated by the act of the defendant, if he is allowed to hold these leases, and thus place himself in a position where the proprty must be largely sacrificed or purchased by himself at a great advantage. This the law will not tolerate. The language of Lord Eldon, in Featherstonhaugh v. Fenwick, 17 Ves. 311, a case in many respects resembling this, is quite in point. He says: "If they [the defendants] can hold this lease and the partnership stock is not brought to sale, they are by no means on equal terms. The stock cannot be of equal value to the plaintiff, who was to carry it away and seek some place in which to put it, as to the defendants who were to continue it in the place where the trade was already established, and if the stock was sold the same construction would give them an advantage over the bidders. In effect they would have secured the good-will of the trade to themselves in exclusion of their partner." For these reasons, independently of the consideration that the leases themselves had a value to which the firm was entitled upon other grounds and upon authorities to be hereafter cited, the plaintiff, who commenced his suit about one year before the term of the partnership expired, was upon undisputed principles and authorities applicable to all trustees and persons holding a fiduciary relation to others, entitled to the relief he prayed for.

It has long been settled by adjudications, that generally when one partner obtains the renewal of a partnership lease secretly, in his own name, he will be held a trustee for the firm, in the renewed lease, and when the rule is otherwise applicable, it matters not that the new lease is upon different terms from the old one, or for a larger rent, or that the lessor would not have leased to the firm. The law recognizes the renewal of a lease as a reasonable expectancy of the tenants in possession, and in many cases protects this expectancy as a thing of value. I will briefly notice a few of the cases upon this subject. In Holridge v. Gillespie, 2 Johns. Ch. 30, Chancellor Kent says: "It is a general principle pervading the cases, that if a mortgagee, executor, trustee, tenant for life, etc., who has a limited interest, gets an advantage by being in possession, 'or behind the back' of the party interested in the subject, or by some contrivance or fraud, he shall not retain the same for his own benefit, but hold it in trust." That was a case where a lease was assigned as security, and the assignees surrendered it to the lessor and took a new lease for an extended term of years. In Phyfe v. Wardell, 5 Paige, 268, Chancellor Walworth lays down the general rule: "That if a person who has a particular or special interest in a lease obtains a renewal thereof from the circumstance of his being in possession as tenant, or from having such particular interest, the renewed lease is in equity considered as a mere continuance of the original lease, subject to the additional charges upon the renewal, for the purpose of protecting the equitable rights of all parties who had any interest, either legal or equitable, in the old lease." That case was followed in Gibbes v. Jenkins, 3 Sandf. Ch. 131, where it was held that one purchasing a leasehold which was subject to a mortgage and contained no covenant of renewal, could not escape the lien of the mortgage by suffering the lease to expire and afterward obtaining a new lease of

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the premises; that the new lease in such case, though not a renewal, was a continuance of the original lease for the purpose of protecting the rights of the parties interested in the original lease, both legal and equitable. In these two cases church leases were involved, and some stress was laid upon that fact, as the continuance of such leases was expected as a matter of course, without any covenant of renewal. But the fact that they were church leases could make no real difference in the principle upon which the decisions were based. The fact that a renewal or continuance of a lease is more or less certain can make no difference with the principle; that springs from the fact that the party obtained a new lease from the position he occupied, being in possession and having the good-will which accompanies that, or being connected with the old lease in some way, and thus enabled to take an inequitable advantage of other parties also interested, to whom he owed some duty.

In Struthers v. Pearce, 51 N. Y. 357, it was held that when during the existence of a continuing copartnership of undetermined duration, three or four copartners, without the knowledge of the other, obtained a new lease in their own names, of premises leased and used by the firm, the same became partnership property, and upon dissolution the other partner was entitled to his proportion of the value. In that case the defendants intended to dissolve the copartnership as early as August, and gave written notice on the 18th day of September, 1865, for the dissolution on the 31st day of December following. On the 11th day of September, the defendants secretly obtained a new lease, in their own names, of the same premises, for a term of five years, to commence May 1, 1866. I think that case is fairly decisive of this. It is true that a period for a dissolution of the partnership had not been fixed when the new lease was taken, but negotiations were pending for its dissolution, and a few days after the new lease was taken, a time for its dissolution was fixed by a written notice. But it can make no difference that the partnership might have been continued by the parties until after the new term commenced. So it might here, if the parties had so willed. There they had the right to dissolve it at any time. The principle which lies at the foundation of the decision of that and all similar cases must be the one above stated, that the defendants in possession took advantage of their position to procure the new lease, and thus deprived the plaintiff of a benefit to which he, with them, was equally entitled. In a note to Moody v. Matthews, 17 Ves. (Sumn. Ed.) 185, the learned editor says, as a deduction from adjudged cases, that "with a possible exception in favor of a bona fide purchaser, it seems to be an universal rule that no one who is in possession of a lease or a particular interest in a lease, which lease is affected with any sort of equity in behalf of third persons, can renew the same for his own use only; but such renewal must be construed as a graft upon the old stock." In Clements v. Hall, 2 De Gex & J. 173, where one partner in a mining partnership died in 1847, and the surviving partner thereafter worked the mine without a new lease thereof, claiming to do so for his own benefit, until 1850, when the lessor gave him notice to quit in March, 1851, when he entered into new negotiations with the lessor for a new lease, and obtained one of the greater part of the mine, on terms much more burdensome than those of the old tenancy, it was held that those who claimed under the will of the deceased partner were entitled to a share of the benefit of the new lease. In Clegg v. Fishwick, 1 Macn. & G. 294, one of several partners working a mine under a lease died, and the firm business was thereafter carried on for several years between the surviving partners and the plaintiff, widow of the deceased partner. Finally the old lease expired, and some of the partners took a new lease of the mine without the privity of the plaintiff. It was held that the estate of the deceased partner was interested in the new lease. The lord chancellor says: "The old lease was the foundation of the new lease, and the tenant's right of renewal arising out of the old lease giving the partners the benefit of this new lease; at least, the law assumes it to be so. Without saying at all what circumstances there may be to interfere with that ordinary right, we know that the rule of equity is that parties interested jointly with others in a lease cannot take to themselves the benefit of a renewal to the exclusion of the other parties interested with them." In Clegg v. Edmondson, 8 De Gex, M. & G. 787, the managing partners of a mining partnership at will gave notice of dissolution to the rest, and intimated their intention, after the dissolution, to apply for a new lease for their own exclusive benefit, and did so and obtained a lease, and it was held to inure to the benefit of the partnership. See, also, the leading cases of Featherstonhaugh v. Fenwick, 17 Ves. 298, and Keech v. Sandford, 2 Eq. Cas. Abr. 741, and notes to the latter case in 1 Lead. Cas. Eq. 32, where the whole doctrine is discussed, and conclusion reached in harmony with the views above expressed. I therefore conclude that it makes no difference that these leases were obtained for a term to commence after the partnership, by its own limitation, was to terminate. I can find no authority holding that it does, and there is no principle sustaining the distinction claimed. The defendant was in possession as a member of the firm, and the firm held the good-will for a renewal, which ordinarily attaches to the possession. By his occupancy, and the payment of the rent, he was brought into intimate relations with the lessors; he became well acquainted with the value of the premises, and he took advantage of his position, during the partnership, secretly to obtain the new leases. He must hold them for the firm.

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I am therefore of opinion that the judgment should be reversed, and new trial granted, costs to abide the event.

DWIGHT, C. The question at issue in this case is, whether a member of a commercial partnership, during its continuance, and without the consent or knowledge of his associate, can take a renewal of a lease of property used in the business, in his own name and for his own benefit, the partnership having a definite termination, and the renewal lease commencing at its expiration.

The general power of a partner to take a lease of such property for his own benefit must be considered as settled in this court by the decision in Struthers v. Pearce, 51 N. Y. 357. In that case the lease was taken during the existence of the partnership, which was of indefinite duration. No notice had been given of its termination when this lease was taken. The facts presented the case of a lease taken during the existence of the partnership, and to begin in enjoyment during that time. The court expressely distinguished it from the present case, which had then been decided in the supreme court. Page 362.

The only point now open for discussion is, whether the fact that when Read took the renewal of the lease the partnership had a precise limit, and was to terminate before the lease commenced, is material. Before considering that point, it may fairly be claimed that this case comes within the precise decision in Struthers v. Pearce, on a ground not mentioned in the argument. Read, though his lease was not to commence in possession until after the expiration of the original lease, acquired an immediate interest by way of an interesse termini. This precise point was decided in Smith v. Day, 2 Mees. & W. 684, 699; 2 Platt, Leas. 60. This, it is true, is not an estate, but a right. Still it is the subject of grant before entry. 1 Steph. Comm. 268; Burt. Real Prop. 18, pl. 61; 2 Crabb, Real Prop. 227. If the partnership had acquired this interesse termini, it might, as the facts of the case show, have been disposed of for a large sum of money. If the doctrine of Struthers v. Pearce establishes that the partner cannot acquire a lease in his own behalf, to commence while the partnership lasts, by parity of reasoning he cannot obtain an interesse termini under the same circumstances.

If however this view is not correct, the main question must be disposed of. Can a partner take a lease for himself, to commence in possession after the partnership has expired? In order to settle this point it is essential to give the subject a more full examination than was requisite in Struthers v. Pearce, and to consider more at large the principles on which this branch of the law rests. It grows out of the relation of trust and confidence between partners, and is a branch of the rule that a trustee cannot profit from the estate for which he acts. It largely has its roots in a principle of public policy, as shown in one of the early decisions. Keech v. Sandford, Sel. Cas. Ch. 61; Griffin v. Griffin, 1 Schoales & L. 352, per Lord Redesdale. The general rule is so well settled that it would be a waste of time to refer to authorities. The text-writers on the law of partnership, without exception, assert the applicability of this rule of law to partnership transactions. Lindl. Partn. 495; Story, Partn. §§ 174, 175; Parsons, Partn. §§ 224–226; Colly, Partn. §§ 281, 282.

The special rule that a trustee cannot take, for his own benefit, a renewal of a lease which he holds in trust, is enforced in a great number of cases. The principle on which it rests is nowhere more fully or clearly stated than in the argument of Sir Francis Hargrave in Lee v. Vernon, 5 Brown, Parl. Cas. (10th Eng. Ed.) 1803. Although the passage is somewhat long, it is quoted as shedding much light on a subject, the principle of which has in course of time, become somewhat obscure. He said: "It has long been an established practice to consider those who are in possession of lands under leases for lives or years as having an interest beyond the subsisting term, and this interest is usually termed the tenant right of renewal, which though according to language and ideas strictly legal, is not any certain or even contingent estate; but only a chance, there being no means of compelling a renewal, yet is so adverted to in all transactions relative to leasehold property, that it influences the price in sales, and is often an inducement to accept of it in mortgages and settlements. This observation is more especially applicable to leases from the crown, the church, colleges or other corporations, and indeed from private persons, where the tenure is of ancient date. * * * This 'tenant right' of renewal as it is termed, however imperfect or contingent in its nature, being still a thing of value, ought to be protected by the courts of justice, and when those who are entitled to its incidental advantages, whether by purchase or other derivation, are disappointed of them by fraud, imposition, misrepresentation, or unfair practice of any kind, it is fit and reasonable that this injury should have redress. Accordingly courts of equity have so far recognized the tenant right of renewal as frequently to interpose in its favor by decreeing that new or reversionary leases gained by means or supposition of the tenant right of renewal should be for the benefit of the same persons as were interested in the ancient lease, and those who procured such new leases and were legally possessed of them, should be trustees for that purpose. There is a great variety of authorities on this head, but the cases which have hitherto occurred have been principally of two kinds, some being cases of persons not having any beneficial interest in the old lease, as guardians and executors, and others being cases of persons having only partial and limited interests, as tenants for life, mort-

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gagees and mortgagors, and in cases of both descriptions those who have procured a new lease in such situations have been uniformly declared trustees for the persons beneficially interested in the ancient lease, either wholly or in part, according to the particular circumstances, the court ever presuming that the new lease was obtained by means of a connection with and a reference to the interest in the ancient one, without in the least regarding whether the persons renewing intended to act as trustees, or for their own emolument."

From this exposition so luminous and judicial in its tone, which is fully sustained by the authorities, it is clear that the rule under consideration is not confined to crown, church or college leases, but embraces those of every kind. The same principle appertains to all. The cestui que trust has a right to the chance of renewal. Though this is termed a "tenant right" as between the lessee and the landlord, that is a mere phrase. It is a hope, an expectation, rather than a right. Such as it is the trustee shall not take it to himself, but if it results in any substantial benefit he shall hold it for his beneficiary. Phyfe v. Wardell, 5 Paige, 268; Bennett v. Van Syckel, 4 Duer, 162; Gibbes v. Jenkins, 3 Sandf. Ch. 130; Davoue v. Fanning, 2 Johns. Ch. 252; Armour v. Alexander, 10 Paige, 572; Dickinson v. Codwise, 1 Sandf. Ch. 226. Some of these were instances of church or other corporation leases, and others were not. In no case has it been held that the rule is confined to these, as it certainly cannot be on principle.

The whole doctrine is extended to the case of partners in Featherstonhaugh v. Fenwick, 17 Ves. 298; Clegg v. Edmondson, 8 De Gex, M. & G. 787; Clements v. Hall, 2 De Gex & J. 173; Clegg v. Fishwick, 1 Macn. & G. 294; Struthers v. Pearce, supra.

The principle cannot depend on the fact whether the lease is made to begin during the continuance of the partnership or at its close. Once admit the general principle, and it must result in this. While the relation lasts, one partner cannot clandestinely and exclusively profit by the trust relation. There may perhaps be cases where the act is openly done by the trustee and acquiesced in by the beneficiary that would admit of different considerations. It is not now necessary to decide that in no case can a partner take a lease for his own benefit. What is now to be decided is, whether he can do so behind the back of his associate and without his consent. The bad consequences of making any such distinction as the defendant seeks to maintain in the present case is easily shown by a reference to the relation of a guardian and his ward. A guardian, we may suppose, holds a lease in his official character which is to expire at his ward's majority. While the relation of guardian and ward exists, he takes a lease to himself to commence at the termination of the existing lease. Could that be sustained? Has he not profited by the trust relation? When he takes a lease to himself, can a tenable distinction be taken between one commencing immediately and one beginning at a future day, even though that day be postponed until the trust relation expires? The sound rule is that he cannot make any profit to himself from a secret transaction initiated while the relation of trustee and cestui que trust exists, no matter when it springs into active operation. It must never be forgotten that on general principles of the law of contracts his right to the lease, as between him and his landlord, commences as soon as he has made his agreement for it. This is an immediate subject of sale, and if the trustee can hold it he will be allowed to profit by the trust relation which, as has been shown, he cannot do. The cestui que trust may accordingly say: "All the value of this lease you hold in trust for me. Grant that it is not yet an estate but only a right—make it over to me in the condition in which you hold it." While no case has been found presenting the precise facts in the case at bar, the principles which should govern it may be derived from the result in Featherstonhaugh v. Fenwick, supra, Clegg v. Edmondson, and Clegg v. Fishwick, supra.

In the first of these cases the partnership was for an indefinite period, and might be dissolved at the pleasure of either party, on notice. It was dissolved November 22, 1804, the day on which the lease expired. Two of the partners, without communication with the plaintiff, had applied for a renewal of the lease, and obtained it before giving notice of the dissolution of the partnership. The new lease was to run for eight years from the expiration of the old one. On October 19 they gave notice to dissolve the partnership. The court held that the new lease belonged to the partnership and was assets of the firm. Much stress was laid on the fact that the transaction was a clandestine one, and the court thought if notice had been given the case might have admitted of different consideration. The case is not in all respects parallel in its facts with the case at bar, for at the time the lease was taken the period for the termination of the partnership had not been fixed, and only became subsequently ascertained by notice.

In the case of Clegg v. Edmondson, which was also an instance of a partnership to be dissolved at the pleasure of the parties, the effect of a notice to dissolve, preceding the execution of the renewal lease, came before the court. In that case five managing partners had determined to dissolve their partnership, and had communicated their intent in June, 1846, and their determination to take a renewal to themselves. To this two other partners objected, claiming that the renewal should be for the benefit of all. Formal notice of dissolution was given in July, to take effect on September 30. On the suc-

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ceeding 11th of December a new lease was executed for twenty-one years to the managing partners, to take effect from September 29, 1846. The defendants endeavored to distinguish this case from that of Featherstonhaugh v. Fenwick, on the ground of the openness and fairness of the transaction. The court however held that the mere communication of an intent on the part of the managing partners to apply for a lease for their own benefit was not sufficient to give them an exclusive right to it. This case, on the point of time, is stronger than the case at bar, for the new lease was taken after the partnership was dissolved, though some stress was laid upon a point which does not appear here, that the act was that of managing partners.

On principle, in many cases, it is of but little consequence whether the partnership is dissolved or not before the renewal, since, if the former partners become tenants in common, the result is the same. Clements v. Hall, 2 De Gex & J. 173; Van Horne v. Fonda, 5 Johns. Ch. 388; Baker v. Whiting, 3 Sumn. 475, Fed. Cas. No. 787. The case of Clegg v. Fishwick is still nearer to the one under consideration. In this instance, the renewal lease was obtained during the existence of the partnership, and the lease commenced at its expiration. This lease was declared to be held in trust for the firm.

Without further collation of authorities, the fair deductions from the principles on which they rest may be summed up as follows:

1. A trustee holding a lease, whether corporate or individual, holds the renewal as a trustee, and as he held the original lease.

2. This does not depend upon any right which the cestui que trust has to the renewal, but upon the theory that the new lease is, in technical terms, a "graft" upon the old one; and that the trustee "had a facility," by means of his relation to the estate, for obtaining the renewal, from which he shall not personally profit.

3. This doctrine extends to commercial partnerships, and one of several partners cannot, while a partnership continues, take a renewal lease clandestinely, or "behind the backs" of his associates, for his own benefit. It is not material that the landlord would not have granted the new lease to the other partners, or to the firm.

4. It is of no consequence whether the partnership is for a definite or an indefinite period. The disability to take the lease for individual profit grows out of the partnership relation. While that lasts, the renewal cannot be taken for individual purposes, even though the lease does not commence until after the expiration of the partnership.

5. It cannot necessarily be assumed that the renewal can be taken by an individual member of the firm, even after dissolution. The former partners may still be tenants in common; or there may be other reasons, of a fiduciary nature, why the transaction cannot be entered into.

The authorities cited on behalf of the defendant do not disprove these conclusions.

In Lee v. Vernon, supra, there was no trust. The question arose between a stranger to the lease and the claimant. The point made by the plaintiff was that the "tenant right" of renewal had become strictly a right, so that even a stranger could not take a renewal and hold it for his own benefit. It was an extraordinary claim, having no foundation in principle, and was rejected.

In Van Dyke v. Jackson, 1 E. D. Smith, 419, the party had made a special contract with his partner to abandon the place where the business was carried on. The case turned on the special contract to leave the business in the hands of the other party.

Musselman's Appeal, 62 Pa. St. 81, does not raise the question. It was not sought there to charge a partner with the value of a renewal lease which he had taken to himself during the existence of the partnership, but rather with that of the good-will as it existed after the partnership was dissolved. In fact the place where the business was carried on was sold for the benefit of the firm, and it was held, in substance, that the goodwill had been realized in the enhanced value of the property sold.

It is said, in the present case, that Read was not authorized, by the articles of partnership, to contract for Mitchell after the expiration of the firm; and that therefore Mitchell cannot take advantage from the renewal lease. The answer is that he made the contract while the firm was in existence, and Mitchell may adopt and ratify it. The objection also proves too much, as it applies to all the cases in which the partner, acting clandestinely, has been declared a trustee.

In Phillips v. Reeder, 18 N. J. Eq. 95, one of the partners, R., prior to the partnership, owned the lease, exclusively, of certain stone quarries. He entered into a partnership with P. for three years, and so much longer as R. should continue lessee of the quarries. In the lease, there was a covenant of renewal at the option of R. He having declined to renew, it was held that the partnership expired; or, in other words, that R. was under no obligation to renew, and thus to continue the partnership. There could be no pretense in this case that the doctrine under the review applied, since the original lease did not itself belong to the firm. It was the private property of one of the partners, which he was under no obligation to preserve for the firm's benefit.

In Achenson v. Fair, 3 Dru. & War. 512, the point decided was, that the doctrine was not to be extended to additional lands purchased by trustee; in other words, the rule was fully recognized, but nothing was to be governed by it except that which could be fairly regarded as a graft on the former lease.

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In Nesbitt v. Tredennick, 1 Ball & B. 29, 48, a mortgagee, not in possession, obtained a renewal, the original lease having been forfeited, both in law and equity, for nonpayment of rent. Here there was no violation of trust. The rule under discussion was fully recognized, but its application to the existing case denied. The court said: "In all the cases upon this subject, either the party, by being in possession, obtained the renewal, or it was done behind the back, or by some contrivance in fraud of those who were interested in the old lease; and there was either a remnant of the old lease, or a tenant right of renewal, on which a new lease could be engrafted." There could be no plainer recognition of the general principle maintained by the plaintiff.

In Munsell v. O'Brien, 1 Jones, Ir. 184, the facts were, that there was an under-tenant who took a new lease from the original landlord without advising his own immediate landlord. The court held that there was no fiduciary relation between these parties. The principle was fully admitted, but the facts did not raise a case for its application. Joy, C. B., said: "It is admitted that there is no authority which can be produced where such a lease as the present has been declared to be a trust; and that we are now called upon to go further than any decision has ever gone before, and to make an authority for future decisions. We are called upon to do this on what are called the principles of a court of equity; namely, that where a person is clothed with a fiduciary character, and in that character becomes possessed of an interest in land, held under a determinable lease, any acquisition by him of a new interest in those lands is a continuation of the old lease, and a 'graft' upon it. This however is the first time that I have heard it asserted that if an under-tenant obtains a lease of his lands from the head landlord without consulting his own immediate landlord that lease is a trust for his immediate landlord, because that person had a tenant right of renewal. But there is no fiduciary character imposed on an under-tenant, in reference to his landlord, by the creation of the relation of landlord and tenant, which would entitle the plaintiff to the relief he seeks, on the ground of his having a tenant right of renewal. A cestui que trust is entitled to the benefit of a new lease, obtained by a trustee by means of a tenant right of renewal, which the latter became entitled to as trustee, but there is no such person in the present case." This language plainly shows that the court was but following in the wake of Lee v. Vernon; and holding that the doctrine of tenant right of renewal, and that the new lease is a graft on the old stock, are not to be extended to strangers, but confined to persons acting in a fiduciary character.

The only other case that will be noticed is Anderson v. Lemon, 8 N. Y. 236, which holds, that one partner may in good faith purchase and hold, for his own use, the reversion of real estate occupied by the copartnership, under a lease for years, with the qualification that if he secretly makes such purchase in his own name while the other partner with his concurrence is negotiating with the owner to obtain the property for the use of the firm, the purchaser will be declared a trustee.

This decision carefully admits the general doctrine, but considers it not applicable to the case where one of the partners purchases in good faith the landlord's interest as distinguished from taking a new lease. It is simply a case of an exception to a general rule. It can scarcely be considered as a decision in favor of a partner's right to purchase, since he was, under the circumstances, a trustee. Should the question be distinctly presented, it will deserve consideration whether the view in Anderson v. Lemon, that one partner may even in good faith buy the reversion for himself, is correct. There is a great cogency in the remarks of Sir William Grant, that the partner may in this way intercept and cut off the chance of future renewals and consequently make use of his situation to prejudice the interests of his associates. Randall v. Russell, 3 Mer. 190, 197. There appears to be no direct decision allowing the partner thus to purchase, and the right to do so is treated as doubtful by approved text-writers. 1 Lead. Cas. Eq. (3d. Am. Ed.) 43, 44, marg. paging.

The application of the principles discussed in this opinion to the case at bar is obvious.

The plaintiff and defendant were owners, as partners, of a lease of premises in the city of New York, on which a hotel business was carried on, yielding a large profit. These consisted of Nos. 1111, 1113, 1115 Broadway and Nos. 1 and 3 West Twenty-fourth street. The leases of the Twenty-fourth street property were made directly to them, November 17, 1866. The Broadway property, through a series of transactions not necessary to be detailed, becames vested, according to the fair construction of the various agreements respecting it, in the partnership. The leases expired on the same day, May 1, 1871, when the partnership terminated. While the partnership continued, both parties thought it necessary to provide a place for a bar-room, and with this view the premises No. 3 West Twenty-Fourth street were connected with the rear of the premises fronting on Broadway, known as the "Hoffman House," and the first story fitted up and used for that purpose. A considerable expenditure was made with this view, and large profits were realized, as the course taken was judicious. While all of the leases owned by the firm were still in existence, viz. April 20, 1869, and on January 21, 1869, the owners of the hotel property made leases to the defendant, to commence from May 1, 1871, and to continue as to part of the property for five years, and as to another portion for ten years from that date, at specified rents. The leases

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were obtained by Read without notice to the plaintiff, and he now claims that they are his exclusive property. They are of great value, and the hotel at the commencement of the action, March, 1870, was still in operation. The furniture, fixtures, stock, etc., were valuable, and the business carried on was profitable.

The case has in it every element of the equity which has been already considered. The partnership is undisputed; the leases were in existence when the renewal was made. The act of renewal was clandestine, or occurred "behind the back" of the plaintiff. It took place while the partnership was in force. The right to renewal was immediate and vested in Read during the partnership's continuance. The property belonging to the firm, and which will be prejudiced by the prospect of disposing of it at a sacrifice at the close of the existing lease, is large and valuable.

Common justice and a due regard to rules of public policy demand that the renewal lease should be declared to belong to the firm, and that the defendant should be required to account to the plaintiff for his portion of its value. The clauses in the leases to Read that there shall be no assignment without the consent of the landlord do not stand in the way of the plaintiff's relief. This does not consist in an assignment in the ordinary sense of that term. On the contrary, the ground of relief is that the defendant acted inequitably when he entered into the contract; that he must therefore be considered as a trustee, while the assignment to the firm simply follows as an incident to the giving complete effect to the trust relation declared by the court to exist between the parties. Featherstonhaugh v. Fenwick, supra.

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

All concur; REYNOLDS, C., not sitting.

Judgment reversed.

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NEWTON v. PORTER et al.

(69 N. Y. 133.)

Court of Appeals of New York. March 27, 1877.

Action to recover proceeds of stolen bonds. There was a judgment for plaintiff, from which defendants appealed.

M. Goodrich, for appellants. M. M. Waters, for respondent.

ANDREWS, J. This is an equitable action brought to establish the right of the plaintiff to certain securities, the proceeds of stolen bonds, and to compel the defendants to account therefor.

In March, 1869, the plaintiff was the owner of $13,000 of government bonds, and of a railroad bond for $1,000, negotiable by delivery, which, on the 12th of March, 1869, were stolen from her, and soon afterward $11,500 of the bonds were sold by the thief and his confederates, and the proceeds divided between them. William Warner loaned a part of his share in separate loans and took the promissory notes of the borrower therefor. George Warner invested $2,000 of his share in the purchase of a bond and mortgage, which was assigned to his wife Cordelia without consideration.

In January, 1870, William Warner, George Warner, Cordelia Warner and one Lusk were arrested upon the charge of stealing the bonds, or as accessories to the larceny, and were severally indicted in the county of Cortland. The Warners employed the defendants, who are attorneys, to defend them in the criminal proceedings, and in any civil suits which might be instituted against them in respect to the bonds, and to secure them for their services and expenses, and for any liabilities they might incur in their behalf; William Warner transferred to the defendants Miner and Warren promissory notes taken on loans made by him out of the proceeds of the stolen bonds, amounting to $2,250 or thereabouts, and Cordelia Warner, for the same purpose, assigned to the defendant Porter the bond and mortgage above mentioned.

The learned judge at special term found that the defendants had notice at the time they received the transfer of the securities, that they were the avails and proceeds of the stolen bonds, and directed judgment against them for the value of the securities, it appearing on the trial that they had collected or disposed of them and received the proceeds.

The doctrine upon which the judgment in this case proceeded, viz.: that the owner of negotiable securities stolen and afterward sold by the thief may pursue the proceeds of the sale in the hands of the felonious taker or his assignee with notice, through whatever changes the proceeds may have gone, so long as the proceeds or the substitute therefor can be distinguished or identified, and have the proceeds or the property in which they were invested subjected, by the aid of a court of equity, to a lien and trust in his favor for the purposes of recompense and restitution, is founded upon the plainest principles of justice and morality, and is consistent with the rule in analogous cases acted upon in courts of law and equity. It is a general principle of the law of personal property that the title of the owner cannot be divested without his consent. The purchaser from a thief, however honest and bona fide the purchase may have been, cannot hold the stolen chattel against the true proprietor, but the latter may follow and reclaim it wherever or in whosesoever hands it may be found. The right of pursuit and reclamation only ceases when its identity is lost and further pursuit is hopeless; but the law still protects the interest of the true owner by giving him an action as for the conversion of the chattel against any one who has interfered with his dominion over it, although such interference may have been innocent in intention and under a claim of right, and in reliance upon the title of the felonious taker. The extent to which the common law goes to protect the title of the true owner has a striking illustration in those cases in which it is held that where a willful trespasser converts a chattel into a different species, as for example, timber into shingles, wood into coal, or corn into whisky, the product in its improved and changed condition belongs to the owner of the original material. Silsbury v. McCoon, 3 N. Y. 380, and cases cited. The rule that a thief cannot convey a good title to stolen property has an exception in case of money or negotiable securities transferable by delivery, which have been put into circulation and have come to the hands of bona fide holders. The right of the owner to pursue and reclaim the money and securities there ends, and the holder is protected in his title. The plaintiff was in this position. The bonds, with the exception stated, had, as the evidence tends to show, been sold to bona fide purchasers, and she was precluded from following and reclaiming them.

The right of the plaintiff in equity to have the notes and mortgage while they remained in the possession of the felons or of their assignees with notice, subjected to a lien and trust in her favor, and to compel their transfer to her as the equitable owner, does not, we think, admit of serious doubt. The plaintiff, by the sale of the bonds to bona fide purchasers, lost her title to the securities. She could not further follow them. She could maintain an action as for a conversion of the property against the felons. But this remedy in this case would be fruitless, as they are wholly insolvent. Unless she can elect to regard the securities in which the bonds were invested as a substitute, pro tanto, for the bonds, she has no effectual remedy. The thieves certainly have no claim to the securities in which the proceeds of the bonds were invested as against the plaintiff. They, without her consent, have disposed of her property, and put it beyond

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her reach. If the avails remained in their hands, in money, the direct proceeds of the sale, can it be doubted that she could reach it? It is not necessary to decide that in the case supposed she would have the legal title to the money, but if that question was involved in the case I should have great hesitation in denying the proposition. That she could assert an equitable claim to the money I have no doubt. And this equitable right to follow the proceeds would continue and attach to any securities or property in which the proceeds were invested, so long as they could be traced and identified, and the rights of bona fide purchasers had not intervened.

In Taylor v. Plumer, 3 Maule & S. 562, an agent, intrusted with a draft for money to buy exchequer bills for his principal, received the money and misapplied it by purchasing American stocks and bullion, intending to abscond and go to America, and absconded, but was arrested before he quitted England, and surrendered the securities and bullion to his principal, who sold them and received the proceeds. It was held that the principal was entitled to withhold the proceeds from the assignee in bankruptcy of the agent, who became bankrupt on the day he received and misapplied the money. Lord Ellenborough, in pronouncing the opinion in that case, said: "It makes no difference, in reason or law, into what other form different from the original the change may have been made, whether it be into that of promissory notes for the security of money produced on the sale of the goods of the principal, as in Scott v. Surman, Willes, 400, or into other merchandise, as in Whitecomb v. Jacob, Salk. 160, for the product or substitute for the original thing still follows the nature of the thing itself so long as it can be ascertained to be such, and the right only ceases when the means of ascertainment fails."

If, in the case now under consideration, the plaintiff had intrusted the Warners with the possession of the bonds, and they had sold them in violation of their duty, for the purpose of embezzling the proceeds, and invested them in the notes and mortgage in question, the plaintiff could, within the authority of Taylor v. Plumer, have claimed them while in their hands, or in the hands of their assignees with notice, and would be adjudged to have the legal title.

In courts of equity the doctrine is well settled and is uniformly applied that when a person, standing in a fiduciary relation, misapplies or converts a trust fund into another species of property, the beneficiary will be entitled to the property thus acquired. The jurisdiction exercised for the protection of a party defrauded by the misappropriation of property, in violation of a duty, owing by the party making the misappropriation, is exceedingly broad and comprehensive. The doctrine is illustrated and applied most frequently in cases of trusts, where trust moneys have been, by the fraud or violation of duty of the trustee, diverted from the purposes of the trust and converted into other property. In such case a court of equity will follow the trust fund into the property into which it has been converted, and appropriate it for the indemnity of the beneficiary. It is immaterial in what way the change has been made, whether money has been laid out in land, or land has been turned into money, or how the legal title to the converted property may be placed. Equity only stops the pursuit when the means of ascertainment fail, or the rights of bona fide purchasers for value without notice of the trust, have intervened. The relief will be moulded and adapted to the circumstances of the case, so as to protect the interests and rights of the true owner. Lane v. Dighton, Amb. 409; Mansell v. Mansell, 2 P. Wms. 679; Lench v. Lench, 10 Ves. 511; Lewis v. Madocks, 17 Ves. 56; Perry, Trusts, § 829; Story, Eq. Jur. § 1258.

It is insisted by the counsel for the defendants that the doctrine which subjects property acquired by the fraudulent misuse of trust moneys by a trustee to the influence of the trust, and converts it into trust property and the wrong-doer into a trustee at the election of the beneficiary, has no application to a case where money or property acquired by felony has been converted into other property. There is, it is said, in such cases, no trust relation between the owner of the stolen property and the thief, and the law will not imply one for the purpose of subjecting the avails of the stolen property to the claim of the owner. It would seem to be an anomaly in the law if the owner who has been deprived of his property by a larceny should be less favorably situated in a court of equity, in respect to his remedy to recover it, or the property into which it had been converted, than one who by an abuse of trust has been injured by the wrongful act of a trustee to whom the possession of trust property has been confided. The law in such a case will raise a trust in invitum out of the transaction, for the very purpose of subjecting the substituted property to the purposes of indemnity and recompense. "One of the most common cases," remarks Judge Story, "in which a court of equity acts upon the ground of implied trusts in invitum, is when a party receives money which he cannot conscientiously withhold from another party." Story, Eq. Jur. § 1255. And he states it to be a general principle that "whenever the property of a party has been wrongfully misapplied, or a trust fund has been wrongfully converted into another species of property, if its identity can be traced, it will be held in its new form liable to the rights of the original owner, or the cestui que trust." Id. § 1258. See, also, Hill, Trustees, p. 222.

We are of opinion that the absence of the conventional relation of trustee and cestui que trust between the plaintiff and the War-

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ners is no obstacle to giving the plaintiff the benefit of the notes and mortgage, or the proceeds in part of the stolen bonds. See Bank of America v. Pollock, 4 Edw. Ch. 215.

It is however strenuously insisted that the defendants had no notice when they received the securities that they were the avails or proceeds of the bonds. That if they had notice they would stand in the position of their assignors, and that the property in their hands would be affected by the same equities as if no transfer had been made, is not denied. Murray v. Ballou, 1 Johns. Ch. 566; Hill, Trustees, p. 259. The learned judge at special term found as has been stated, that the defendants had notice of the larceny of the bonds, and the use made of the money arising from their sale, at the time they received the notes and mortgage. The duty of this court upon the question of notice is limited to the examination of the case, with a view of ascertaining whether there was evidence to support the finding of fact. If such evidence exists, the finding of the trial judge is conclusive.

We have examined with much care the voluminous record before us, and are of opinion that the finding is sustained by the evidence. The testimony was conflicting. The circumstances under which the defendants took the transfer of the securities were certainly unusual, and the facts then known by the defendants were calculated to create a strong presumption that the notes and mortgage came from investments of the stolen property. It was for the trial court to weigh the testimony, and in the light of all the facts developed on the trial, to determine the question of notice. It would be a useless labor to collate the testimony on this subject, and we content ourselves with stating our conclusion, that the finding was warranted by the evidence.

The objection to the evidence, under a commission issued to William Jessup of Montrose, Pennsylvania, and which was executed by William H. Jessup as commissioner was, we think, properly overruled. In support of the objection, one of the defendants testified that he resided at Montrose in 1858, and that at that time two attorneys resided there, named respectively William and William H. Jessup, and an offer was made to prove that the judge who granted the order for the commission consulted a register of attorneys in which both names appeared, and selected the name of William Jessup, and inserted it in the order. The commission was executed two years and a half before the trial. It does not appear at what time it was returned to the clerk, but the presumption is that it was returned within a reasonable time after its execution. The objection that the commission was not executed by the person intended was not made until the evidence taken under it was offered on the trial. That the defendants were apprised of the facts upon which the objection was founded before the trial is quite evident.

Prima facie a commission directed to a person, omitting any mention of a middle name, and returned executed by a person of the same name, with the addition of a middle name, is executed by the person named in the order. Franklin v. Talmadge, 5 Johns. 84. The ruling of the judge, in respect to the objection made to the commission, was clearly in furtherance of justice. The defendant had ample opportunity to raise the objection to the commission before the trial by a motion to suppress, and it should not be permitted that a party may lie by, and spring an objection of this kind on the trial for the first time, when the other party may be unable to meet it by proof, and when there is no opportunity to issue a new commission, or send it back to be executed by the proper person. It is we think a wholesome rule that objections to the execution of a commission where the party has an opportunity to make them before the trial, should be raised by motion, and if not raised in that way when such opportunity exists, they should be deemed to have been waived. Whether such objection is to formal defects merely, or as in this case goes to the right of the person who executed the commission to act as commissioner, makes, we think, no difference in the application of the rule, if the fact of disqualification is known to the party who seeks to exclude the evidence a sufficient time before the trial, to enable him to make his motion. See Kimball v. Davis, 19 Wend. 438; Sturm v. Atlantic Mut. Ins. Co., 63 N. Y. 77; Drury v. Foster, 2 Wall. 33; Sheldon v. Wood, 2 Bosw. 267; Zellweger v. Caffe, 5 Duer, 100.

The judgment should be affirmed.

All concur.

Judgment affirmed.

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McLEOD v. EVANS, Assignee, etc.

(28 N. W. 173, 214, 66 Wis. 401.)

Supreme Court of Wisconsin. May 15, 1886.

Appeal from circuit court, Grant county.

A. W. & W. E. Bell, Bushnell & Watkins, and J. W. Murphy, for appellant, Robert E. McLeod. Carter & Cleary, for respondent, Jonathan H. Evans, assignee, etc.

COLE, C. J. This is a suit in equity to recover in full from the defendant, who is an assignee of one Hodges, the proceeds of a draft of $1,500. The first most serious question of law we have to consider arises upon these facts found by the learned circuit court: The plaintiff had a draft for $1,500, drawn on the Ninth National Bank of New York City. Desiring to cash this draft, he went to the bank of Mr. Hodges, in the city of Platteville, on the thirtieth of January, 1884, to get the money upon it. Hodges told him that he was not in funds at the time so as to cash the draft, but said he would collect it for him. Thereupon the plaintiff left with Hodges the draft for collection, and took a receipt, which reads as follows: "Platteville, Wis. 1-30-84. By Robert E. McLeod, for collection. Currency, ——; coin, ——; checks, ——. Ninth National, New York. $1,500. O. F. Griswold, Cashier." Mr. Hodges told the plaintiff to return in a week, when he expected the money would be there for him; that at the end of the week the plaintiff came to the bank, but was informed by Hodges that the money had not yet come from the Ninth National Bank of New York; that it took some time to make collections of this kind; whereupon the plaintiff went away, and did not again return until after Hodges had suspended banking business, which was on the evening of the eighth of February, 1884; that as a matter of fact the draft was not sent by Hodges to the Ninth National Bank of New York for collection, but was sent to the National Bank of America, Chicago, with which bank Hodges did his business in that city. The Chicago bank did not, for such draft, send the cash to Mr. Hodges, but gave him credit for the amount on its books, and Mr. Hodges drew on that bank, after this, drafts, which were cashed by the bank; and that at the time Hodges suspended banking business there was nothing due him from the Chicago bank. It is admitted that on the eleventh of February, 1884, Hodges assigned to the defendant all his property for the benefit of his creditors. Among the assets, there was $500 cash in Hodges' bank which came to the hands of the defendant, but it does not appear that this sum was a part of the proceeds of the $1,500 draft.

Now, the first question upon this state of facts is, does the plaintiff stand upon the same ground as the other creditors of Hodges in respect to the estate in the hands of the assignee, or has he a paramount right to be paid first out of such assets? The argument of the plaintiff's counsel in support of his superior right in equity is briefly this: That the collection of the draft was a trust assumed by Hodges; that neither the draft nor its proceeds belonged to him; that it was his plain duty to collect it, and keep its proceeds separately, and deliver them to the plaintiff when demanded; that it was a gross fraud on his part not to do so; that he knew when he received the draft for collection he was in failing circumstances, and largely insolvent; that the testimony indisputably shows that it was a mere pretense that he had sent the draft to New York for collection; that he really had the avails of it when the plaintiff called for his money at the end of the week as he was directed to do, and was told that it had not come. It is said the relation between Hodges and the plaintiff was not that of debtor and creditor, but that a fiduciary relation existed between them; that the proceeds of the draft was a trust fund in his hands which did not belong to him, and which the assignee could not take as a part of his estate. Counsel says that "the general proposition which is maintained, both at law and in equity, upon this subject is that if any property, in its original state and form, is covered with a trust in favor of the principal, no change of that state and form can divest it of such trust, or give the agent or trustee converting it, or those who represent him in any right, (not being bona fide purchasers for a valuable consideration, without notice,) any more valid claim in respect to it than they respectively had before such change. An abuse of a trust can confer no rights on the party abusing it, or those who claim in privity with him." 2 Story, Eq. Jur. § 1258; Snell, Eq. Prac. 155.

The counsel on the other side does not challenge the correctness of this argument, or the soundness of the principle of law relied on, but he says they have no just application to the facts here, because the proceeds of the draft cannot be traced to, or identified in respect to, any property which has come to the hands of the assignee. Consequently, he says the plaintiff's claim is simply this: because he left his draft for collection with the assignor, which the latter wrongfully converted, that this gives him a lien in equity upon the general property of the wrong-doer for its value. The able counsel frankly admits if the proceeds of the draft had been found in the safe of Mr. Hodges when the assignment was made, with marks to identify the fund, that then such proceeds would not have passed to the defendant. He also concedes if the proceeds could be traced into any other property into which they had been converted, or had been mixed by Hodges with his own funds, that then the plaintiff could claim such property, or follow and reclaim the proper amount of money, as against the world. This would be so, because he was the real owner; Hodges holding the proceeds

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only as his agent, as trust funds; or the property into which the proceeds had been converted would be impressed with the trust. But it is said none of the proceeds of that draft are in the hands of the assignee, nor is there any security bought or obtained by the draft in his possession. Still, these facts are indisputable: The Chicago bank to which Hodges sent the $1,500 draft gave him credit for the amount on its books. Hodges drew against that credit in the regular course of his business as a banker, and his drafts were honored by the drawee. Presumably, Hodges obtained money for his drafts which he used in the transaction of his business, or applied to the payment of his debts. So, these funds which he obtained by his own drafts against the $1,500 credit were substituted for the proceeds of the $1,500 draft, and went into his estate. The conclusion is irresistible, from the facts, that the proceeds of the trust property found its way into Hodges' hands, and were used by him either to pay off his debts or to increase his assets. In either case, it would go to the benefit of his estate. It is not to be supposed the trust fund was dissipated and lost altogether, and did not fall into the mass of the assignor's property; and the rule in equity is well established that so long as the trust property can be traced and followed into other property into which it has been converted, that remains subject to the trust.

The authorities cited by plaintiff's counsel fully sustain this proposition. We do not understand that it is necessary to trace the trust fund into some specific property in order to enforce the trust. If it can be traced into the estate of the defaulting agent or trustee, this is sufficient. The decisions in Frith v. Cartland, 2 Hem. & M. 417; Pennell v. Deffell, 4 De Gex, M. & G. 372; Knatchbull v. Hallett, 13 Ch. Div. 696; National Bank v. Insurance Co., 104 U. S. 54; Van Alen v. American Nat. Bank, 52 N. Y. 1; People v. City Bank of Rochester, 96 N. Y. 32; Farmers' & M. Nat. Bank v. King, 57 Pa. St. 202; Peak v. Ellicott, 30 Kan. 156, 1 Pac. 499,—in principle sustain this conclusion. The cases in 96 N. Y., 30 Kan., and 1 Pac., are directly in point. In People v. Bank of Rochester the head-note states the decision as follows: "The Bank of R. having discounted certain notes for the firm of S., H. & F., a depositor with it, and that firm wishing to anticipate payment, gave to the bank its checks for the amount of the notes, less rebate of interest, which checks the bank received and charged in the firm account, and entries were made in the bank-books to the effect that the notes were paid. The firm at the time supposed that the bank held the notes, but they had in fact been previously sold by it. Before the notes became due the bank failed, and, in an action brought by the attorney general in the name of the people, a receiver was appointed of its property and effects. Held, that an order requiring the receiver to pay the notes out of the funds in his hands was properly granted; that the transaction between the bank and said firm was not in their relation of debtor and creditor, nor in that of bank and depositor, but by it a trust was created, the violation of which constituted a fraud by which the bank could not profit, and to the benefit of which the receiver was not entitled." The ruling in the Kansas case was to the same effect, upon a similar state of facts. The court say in the opinion, by Horton, C. J., that "the defendant, as assignee of the bank, succeeds to all the rights of the bank, but as such assignee he has no lawful authority to retain a trust fund in his hands belonging to the plaintiff, and which the bank at the time of receiving the same promised and agreed to apply in payment of plaintiff's note. As the money was a trust fund, and never belonged to the bank, its creditors will not be injured if it is turned over by the assignee to its owner."

The case of People v. Merchants' & M. Bank, 78 N. Y. 269, to which we were referred by defendant's counsel, as we understand it, contains nothing in conflict with the Rochester Bank Case, supra. In the former case the Chemical Bank of New York received a check on the M. & M. Bank of Troy, drawn by the T. & B. R. R. This check the Chemical Bank sent by mail to the M. & M. Bank for the purpose of being paid. The latter bank debited the railroad company in its account, which was good, with the amount of the check, and returned it to that company as paid. It also sent to the Chemical Bank a draft on a New York bank for the amount of the check. Two days after the M. & M. Bank closed its doors, and a receiver of its assets was appointed. The draft on the New York bank was not paid. The Chemical Bank applied for an order directing the receiver to pay the amount of the check on the ground that the assets came to his hands impressed with a trust in its favor. On these facts the court held that "to authorize the relief prayed for it was necessary to trace into the hands of the receiver money or property belonging to the Chemical Bank, or which had before the receivership been set apart and appropriated to the payment of the check; that charging said check, and returning it to the drawer, did not amount to a payment, and setting apart of sufficient of the drawer's deposit to cover it; nor did it impress a special trust on any part of the drawer's assets; but by the transaction the drawee simply reduced its indebtedness to its depositor to the amount of the check, and constituted itself a debtor to the holder to a corresponding amount." The case is clearly distinguishable from the one we have before us.

The same counsel has referred us to numerous cases where the simple relation of creditor and debtor or bank and depositor existed, and where all preference of one cred-

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itor over another for payment out of assets has been denied. But this case stands on entirely different grounds. The evidence is entirely conclusive that the plaintiff left his draft with Hodges for collection, and for no other purpose. Hodges was merely his agent to perform that specific duty. He had no more right to use the proceeds of the draft in his business than a merchant or lawyer would have who had been intrusted with it for a like purpose. Beyond all controversy the proceeds of the draft in Hodges' hands were a trust fund. He having used them in his business,—having benefited his estate by such use,—as we must assume, a trust attaches to that estate which came to the defendant under the assignment.

It appears that the plaintiff learned of the assignment which was made by Hodges, and in due time filed his claim as a creditor of the assignor to the amount of $1,500; that at the time he filed his claim he believed from reports that the bank of Hodges would pay dollar for dollar to its creditors; that subsequently, when a 6 per cent. dividend was declared, he, as a creditor, took the 6 per cent. upon his claim allowed, and at that time had learned that the bank could not pay in full, but that there would be a large deficiency. The question is, has the plaintiff, by proving his claim as an ordinary creditor, waived or lost his right to insist upon his equitable lien? We think not. The plaintiff, doubtless, acted not only in ignorance of his legal rights, but also under a mistake as to the solvency of Hodges' bank. He had a right to suppose from the schedule of its assets and liabilities that all debts would be paid in full. It is said he knew to the contrary when he received the dividend, which he retains. But he has only received a portion that was due him. The rights of no one have been prejudiced by this. No one has changed his position, or lost any advantage which the law gave him, in consequence of what the plaintiff did in the matter; and there are no facts upon which a waiver or equitable estoppel can be fairly predicated.

There is no defect of parties.

It follows from the views that we have expressed that the judgment of the circuit court must be reversed and the cause remanded, with directions to grant the relief asked.

CASSODAY, J. (dissenting). I fully indorse what is termed the "progressive" or "modern rule" of equity, as stated by Jessel, the late learned master of the rolls, in Re Hallett's Estate, 13 Ch. Div. 696, to the effect that if a person holding money as a trustee, or in a fiduciary character, pays it to his account at his banker's, where it is mixed with his own money, and thereafter draws out sums by checks in the ordinary manner, he must be taken to have drawn out his own money in preference to the trust money. In that case the trustee, Hallett, died, and the action was for the administration of his estate. The question arose upon claims by several persons against moneys in the hands of Hallett's bankers. There was no question as to the solvency of the estate. There was no dispute that the money received by Hallett for the bonds he improperly sold was deposited with his bankers to the credit of his account, and "that the money remained at his banker's mixed with his own money at the time of his death." It was simply held that the cestui que trust could take the proceeds of the sale if they could be identified, and, if not identified, but traceable into other property, or a mixed fund, then she could have a charge or equitable lien upon such other property or fund for the payment of the amount which her money had increased the fund. Such seems to be the well-established rule. Here the draft did not go into the assets of Hodges' bank. He sent it to the Chicago bank, where it was credited to his general account. Whether his account with the Chicago bank was then overdrawn or not does not appear, but when he failed, a few days later, it was overdrawn $1,200. At that time there was only $600 in the bank. The assets which went into the hands of the assignee included nothing dated within a month.

It conclusively appears from the undisputed evidence, and is, in effect, found by the court, that the assets which came into the hands of the assignee neither include the draft nor the proceeds arising therefrom, nor anything taken in exchange for it, or any part of it, unless it was the $600. Of course, the plaintiff has no right of action against the assignee personally. He seeks to charge the assets in the hands of the assignee only by reason of a supposed equitable lien. Upon what theory was he entitled to it? If so, for what amount? The mere wrongful conversion of the draft by Hodges certainly gave the plaintiff no equitable lien upon property belonging to him prior to such conversion, nor upon assets subsequently acquired from sources entirely outside and independent of, and wholly foreign to, the draft, or the proceeds of it. To say that it does, is to hold that such wrongful conversion of itself gave the plaintiff a preference over all other creditors, regardless of what became of the draft, or the proceeds of it. I am not aware of any adjudicated case sanctioning such a preference. An equitable lien exists only when the trust money is directly or indirectly traceable to the fund sought to be charged. Such, as I understand, are the cases cited in the opinion of the chief justice.

It is probable, as claimed, that the draft, or the proceeds of it, were used by Hodges prior to the assignment in payment of some of his debts. But this would in no way swell the volume or value of his assets which went into the hands of the assignee. It would merely diminish the amount of his indebtedness to the extent of such payment. That would, in a general way, benefit the

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estate to the extent that it increased the per cent. that the other creditors would in consequence receive. But as this estate is badly insolvent, the aggregate amount of such increase would necessarily be very much less than the amount of the draft. The amount of the equitable charge upon the assets ought not, upon any principle of equity, to exceed the amount of benefit to the estate derived from the draft or its proceeds. None of the authorities cited, as it seems to me, go any further, and some of them not as far. In so far as the assets of the estate in the hands of the assignee are held chargeable beyond the amount of benefit which the estate derived from the draft or its proceeds, the equitable doctrine of the cases cited, and many others which might be cited, has, as it seems to me, been misapplied. I cannot join in sanctioning such a departure from a rule so well established and so thoroughly equitable.

TAYLOR, J. I concur in the opinion of Justice CASSODAY.

BY THE COURT. The judgment of the circuit court is reversed, and the cause is remanded, with directions to grant the relief asked.

A motion for a rehearing was denied September 21, 1886.

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MYERS v. BOARD OF EDUCATION OF CITY OF CLAY CENTER.

(32 Pac. 658, 51 Kan. 87.)

Supreme Court of Kansas. March 11, 1893.

Error from district court, Clay county; R. B. Spilman, Judge.

Action by the board of education of the city of Clay Center against D. H. Myers, assignee of the estate of John Higinbotham, to recover the amount of a trust fund belonging to plaintiff. There was judgment for plaintiff, and defendant brings error. Affirmed.

The other facts fully appear in the following statement by JOHNSTON, J.:

Action brought by the board of education of the city of Clay Center against D. H. Myers, as the assignee of the estate of John Higinbotham, to recover $3,265.71, alleged to be a trust fund in the hands of the assignee, to which it was entitled. Upon the evidence submitted, the district court made the following findings of fact and conclusions of law:

Findings of fact: "(1) For several years prior to the 8th day of June, 1889, John Higinbotham was doing business as a private banker at Clay Center, Kansas, and carrying on a private bank under the name of the Clay County Bank, and H. G. Higinbotham, was cashier of said bank and manager of said John Higinbotham's banking business, having full supervision and control of the same. (2) On the 8th day of June, 1889, and for ten years prior thereto, said H. G. Higinbotham had been treasurer of the board of education of the city of Clay Center, the plaintiff herein, and, as such treasurer, had received and disbursed large sums of money belonging to said board of education, and during all the time he was such treasurer he was also cashier and manager of said private bank of John Higinbotham. (3) During all the time said H. G. Higinbotham was acting as such treasurer he had an account on the books of said Clay County Bank as 'H. G. Higinbotham, Treasurer,' and all moneys which came into his hands as treasurer of the board of education of the city of Clay Center were deposited by him in said bank, and credited to said account, and mingled with the general funds of the bank, and orders drawn on him as such treasurer were paid out of the general funds of the bank, and charged to said account. No other money except such as came into his hands as such treasurer was credited to said account, nor were any payments, except such as were made on orders drawn on him as such treasurer, charged to said account. (4) During the time he was treasurer of the board of education of the city of Clay Center, and prior to the 8th day of June, 1889, the said H. G. Higinbotham, as such treasurer, had deposited in said bank, to the credit of said account, $3,265.71 more than had been paid out and charged to said account, which said sum $3,265.71 had been mingled with the general funds of said bank, and used in the ordinary course of the private banking business of said John Higinbotham, in the payment of the debts of the bank. (5) The last money coming into the hands of said H. G. Higinbotham, as such treasurer, which was so deposited in said bank and credited to said account, was deposited on the 3d day of April, 1889. On the 8th day of May, 1889, the total amount of cash in said bank was $544.15 and no more. After said 8th day of May, 1889, there was paid out of the funds of said bank, on orders drawn on said H. G. Higinbotham and charged to said account, $1,236.02; and on the 8th day of June, 1889, when the business was closed, the total amount of cash in said bank was $1,535.57. (6) Said John Higinbotham knew that said H. G. Higinbotham was depositing the money coming into his hands as such treasurer in said bank, and that such money was being used in the same manner as other funds of said bank, in the ordinary course of its business. (7) The board of education of the city of Clay Center never authorized said H. G. Higinbotham to deposit the funds coming into his hands as its treasurer in the Clay County Bank, and never consented thereto, but some of the members of said board of education had actual knowledge that said funds were so deposited for some time before the 8th day of June, 1889. (8) On the 8th day of June, 1889, said John Higinbotham made an assignment of all his property and assets of every kind, including said banking business, to D. H. Myers, for the benefit of his creditors, and on that day said Clay County Bank was closed, and thereafter no further business was done therein. (9) Said D. H. Myers, who is the defendant in this action, took possession, as temporary assignee, of all the property and assets of every kind belonging to said John Higinbotham; and being afterwards duly elected permanent assignee of said John Higinbotham, and duly qualified as such assignee, he retained possession of said property and assets, and still has the same in his possession, or so much thereof as have not been paid out in the due course of the administration of said estate; and there was at the time this suit was commenced in his hands, as such assignee, belonging to said estate so assigned to him, real estate of the value of $7,000 or more. (10) At the time said assignment was made, there was in said bank cash to the amount of $1,535.57, and no more; and said assignee has never received from the assets of said estate so assigned to him any cash other than said sum, except such as was derived from the sale of some of the assets of said estate; and all the cash so coming into his hands, including said sum of $1,535.57, had, prior to the commencement of this action, been used in paying a dividend on claims allowed against said estate, and other legitimate charges against the same. (11) On the 12th day of June, 1889, said H. G. Higinbotham re-

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signed the office of treasurer of the board of education of the city of Clay Center, and at the time there was in his hands as such treasurer the sum of $3,265.71, which said sum had been by him deposited in the Clay County Bank, as heretofore stated in the fourth finding of fact, and which said sum he then, and has ever since, failed to pay over to his successor in office, or to any one authorized by said board to receive the same, except $210 thereof, and of said sum there is still unpaid $3,055.71. (12) At the time said H. G. Higinbotham resigned said office of treasurer there was not, and for a long time prior thereto there had not been, in existence, any valid bond executed by him for the faithful performance of his duties as such treasurer. (13) On the 14th day of June, 1889, said H. G. Higinbotham, in order to secure to said board of education payment of said sum of $3,265.71, executed to said board, pursuant to a demand made by it upon said H. G. Higinbotham to secure the same, a chattel mortgage on certain personal property, and also a mortgage on his homestead, consisting of certain lots in the city of Clay Center, which lots were subject to two prior mortgages of $1,200 and $120. Afterwards said personal property so mortgaged was sold under said mortgage, and the proceeds arising therefrom, amounting to $210, were applied by said board in part payment of said sum of $3,265.71, and said real-estate mortgage is still in full force, and no action has been taken by said board to realize anything thereon. (14) In said real-estate mortgage H. G. Higinbotham and Lillie G. Higinbotham, his wife, were the parties of the first part, and the board of education of the city of Clay Center was the party of the second part, and in said mortgage the following conditions were written, to wit: 'Provided, nevertheless, and these presents are upon the following conditions expressly made, to wit: that whereas, the said H. G. Higinbotham is justly indebted to the said party of the second part in the sum of thirty-two hundred and sixty-five and seventy-one one hundredths dollars, ($3,265.71), the same being the balance of the funds and moneys of the said party of the second part now remaining in the hands of said H. G. Higinbotham, deposited with him as treasurer of the said party of the second part; and whereas, said H. G. Higinbotham has resigned said office, and, upon legal demand made upon him for said funds and moneys by his duly-qualified successor in said office, said H. G. Higinbotham has failed and refused to pay over and deliver said funds and moneys to his successor in office; and whereas, a claim for said funds and moneys, made in behalf of the treasurer of the said party of the second part, against the estate of John Higinbotham and D. H. Myers, assignee thereof, is pending, and may be paid in whole or in part by said assignee: Now, if the said first parties shall, on or before the 14th day of June, 1890, pay or cause to be paid to the qualified treasurer of said party of the second part the funds and sums of moneys aforesaid, with interest thereon from the date hereof, at ten per cent. per annum, or such part thereof as shall not previous to said 14th day of June, 1890, be paid by the assignee of John Higinbotham's estate, in that case this deed shall become void, and the premises hereby conveyed shall be released at the proper cost of the said parties of the first part or their legal representatives; and it is hereby agreed and understood that the execution and delivery of this instrument by said parties of the first part to said party of the second part does not and shall not in any way lessen the obligation of said H. G. Higinbotham respecting the funds and moneys of said second party heretofore delivered to him as treasurer as aforesaid, and this instrument is intended as security for the payment of said funds and moneys as aforesaid, in addition, and in no way affecting the rights of the said second party under any bond or bonds which may have been heretofore given to said party of the second part or under any of the laws of the state of Kansas on and after June 14, 1890.' The conditions above recited are followed by a provision that, in case the parties of the first part shall fail to pay said funds and sums of money or the interest thereon or the taxes or insurance on the mortgaged premises, then the party of the second part might proceed to foreclose and mortgage and sell the mortgaged premises, and apply the proceeds of such sale to the payment of said sums of money. (15) Said D. H. Myers, as assignee of said John Higinbotham, gave notice by advertisement, published as required by law, of the time and place when he would hear and allow claims against said estate, and also notified by mail H. G. Higinbotham, treasurer of the board of education of Clay Center, as one of the creditors of said John Higinbotham, of the time and place when he would hear and allow claims, but no notice of said time and place of hearing and allowing claims was given to the board of education of the city of Clay Center or any officer or member thereof except as above stated, and, at the time said notice by mail was given to H. G. Higinbotham, he was not treasurer of said board of education. (16) Neither said H. G. Higinbotham nor any one for him, nor any one acting for the board of education of the city of Clay Center, presented any claim or demand for said sum of $3,265.71 to said assignee at the time and place fixed by him in said notices for hearing and allowing by said assignee as a claim by said estate, and said sum of $3,265.71 was not allowed by said assignee as a claim against said estate. (17) On the 15th day of May, 1891, and before the commencement of this action, demand was made by the plaintiff upon said D. H. Myers, as assignee of John Higinbotham, for the payment of said sum of $3,265.71, as a trust fund in his hands as

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such assignee belonging to the plaintiff, and payment thereof was refused; and no other demand was ever made by plaintiff or in its behalf on said D. H. Myers, as such assignee, for the payment of said money as a trust fund or otherwise. (18) When said demand was made by plaintiff on the 15th day of May, 1891, said D. H. Myers did not have in his hands, as such assignee, any of the money which was in the Clay County Bank on the 8th day of June, 1889, when said assignment was made, and which he then received as such assignee."

Conclusions of law: "(1) That money of the board of education of the city of Clay Center deposited by H. G. Higinbotham, while treasurer of said board, in the private bank of John Higinbotham, was impressed with the character of trust funds, and was held as a trust fund by said John Higinbotham; (2) that the assets of John Higinbotham in the hands of D. H. Myers, as his assignee, are subject to a charge of $3,055.71, as a trust in favor of the board of education of the city of Clay Center; (3) that the plaintiff is entitled to a decree for the payment to it by D. H. Myers, assignee of John Higinbotham, of the sum of $3,055.71 out of the assets of said John Higinbotham, in his hands as such assignee."

Judgment was accordingly given, and to reverse the same the assignee brings this proceeding in error.

Harkness & Godard, for plaintiff in error. C. C. Coleman, F. L. Williams, and B. B. Tuttle, for defendant in error.

JOHNSTON, J. (after stating the facts). There is no doubt or question about the character of the moneys, amounting to $3,055.71, sought to be recovered in this action. They were school funds, collected and held for specific public purposes, and the bank, its owners and manager, all knew of the trust character of the funds, and hence there is no excuse for their misappropriation. The treasurer of the board of education, who placed these trust funds in the bank, was its manager; and, without authority from the board of education, he mingled them with the funds of the bank, and used them in paying the creditors of that institution. At one time, subsequent to the last deposit of school money, the total amount of cash on hand in the bank was $544.15, and subsequent to that time $1,236.08 was drawn from the funds of the bank upon the order of the board of education. When the bank closed, the whole amount of cash on hand was $1,535.57. It is said that no portion of this sum was the identical money received from the board of education, and that neither the money nor any specific property into which it had been converted can be clearly traced to the hands of the assignee. Under these circumstances, has the board of education a preferred right over general creditors to the assets in the hands of the assignee? It is not denied that the school funds were impressed with a trust, and, if susceptible of identity, could be followed and reclaimed from the assignee. It is also admitted that, if they could be traced into any other specific property, the cestui que trust might claim such property or a lien upon it; but it is insisted that, unless the trust funds can be traced and identified, the cestui que trust is to be treated as a simple creditor, and not entitled to an equitable preference in the distribution of the assets of the estate. The view of the plaintiff in error is not without support, and many of the older cases, while holding that a trust fund wrongfully converted into another species of property, of whatever form, will be held liable to the rights of the beneficial owner in its new form if its identity can possibly be traced, still adopt the old doctrine stated by Judge Story as follows: "The right to follow a trust fund ceases when the means of ascertainment fail, which, of course, is the case when the subject-matter is turned into money, and mixed and confounded in a general mass of property of the same description." Story, Eq. Jur. § 1259. The modern doctrine of equity, and the one more in consonance with justice, is that the confusion of trust property so wrongfully converted does not destroy the equity entirely, but that, when the funds are traced into the assets of the unfaithful trustee or one who has knowledge of the character of the funds, they become a charge upon the entire assets with which they are mingled. This principle was fully recognized, and the question in the present case was substantially decided, in Peak v. Ellicott, 30 Kan. 156, 1 Pac. 499. In that case it was said: "As the money was a trust fund, and never belonged to the bank, its creditors will not be injured if it is turned over by the assignee to its owner. Even if the trust fund has been mixed with other funds of the bank, this cannot prevent the plaintiff from following and reclaiming the fund; because, if a trust fund is mixed with other funds, the person equitably entitled thereto may follow it, and has a charge on the whole fund for the amount due." It would seem to be immaterial whether the property with which the trust funds were mingled was moneys, or whether it was bills, notes, securities, lands, or other assets. The bank which assigned in this case appears to have been engaged in a general business, and its assets consisted of moneys, securities, and lands; and, as the estate was augmented by the conversion of the trust funds, no reason is seen under the equitable principle which has been mentioned why they should not become a charge upon the entire estate. In McLeod v. Evans, 66 Wis. 410, 28 N. W. 173, 214, an unfaithful trustee made an assignment, and among the assets there was a small amount of cash, and it was not shown that it was a part of the proceeds of the draft or trust fund. The question was whether the owner of the

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trust fund stood upon the same ground as the general creditors of the trustee, or whether he had a paramount right to be first paid out of the assets of the estate. It was found that the proceeds of the trust property were used by the trustee either to pay off his debts or to increase his assets, and it was held to be unnecessary to trace the trust fund into any specific property in order to enforce the trust; and that, if it could be traced into the estate of the defaulting agent or trustee, that was sufficient. It was further decided that, whether the trust funds were used to increase the assets or to pay off the debts, in either case it would be for the benefit of the estate; and, having been so used, it was held that a trust attached to the entire estate which came into the hands of the assignee. The court in that case cites Peak v. Ellicott, supra, and expressly approves the dictrine of that case. In Independent Dist. v. King, 80 Iowa, 497, 45 N. W. 908, the treasurer of a school district, as in this case, wrongfully deposited the funds of the district in a bank which knew the character of the funds. Subsequently the bank failed, and made an assignment for the benefit of its creditors. It was there insisted that, as none of the identical money deposited went into the possession of the assignee, no trust could be enforced against the estate of the assignor to the prejudice of other general creditors. Speaking of the bankers, the court said that they "were fully advised as to the material facts, and therefore could acquire no title to the deposit adverse to the plaintiff. As to them, the money constituted a trust fund, which they had no right to convert to their own use; and the fact that they mingled it with other money, so that the identity of that deposited was lost, would not destroy the trust character of the deposits, nor prevent the enforcement of the trust against property to which they had contributed. To hold otherwise would be to ratify a willful violation of law, at the expense of an innocent party, and thus perpetrate a wrong. The defendant [who was the assignee] acquired no property rights, as against plaintiff, which the Cadwells [the bankers] could not have enforced, and he had no special interest which requires protection. The same is true of the general creditors. They are entitled to only so much of the estate of the insolvents as remains after liens paramount to their claims and other preferred charges are satisfied." In Plow Co. v. Lamp, 80 Iowa, 722, 45 N. W. 1049, the supreme court of Iowa considered the same question in a case where the trust funds had been used, as in the present case, by the trustee for the payment of debts. The trustee having become insolvent, and made an assignment, the assignee contended that the estate in his hands was not chargeable with the trust funds, but that the owner of the funds should be placed on an equal footing with general creditors, and only receive a pro rata payment out of the estate. The court said: "The money was used by the Globe Company in its business, and in payment of its debts. It became liable to the plaintiff to replace the trust funds with other money in its possession or with money realized out of other property. Of course the Globe Company and its stockholders can urge no equity nor reason against the enforcement of these rules. Can its creditors? We think not, for these reasons: The money was wrongfully mingled, as it were, with the assets of the company. The money did not belong to the Globe Company. The creditors, if permitted to enforce their claims as against the trust, would secure the payment of their claims out of trust moneys. If they are not permitted to do this, they are simply denied the remedy of enforcing their claims against property acquired by the use of trust money. They are deprived of no right, for the property acquired by the trust money became subject to the trust, and therefore could not have been subject to the claims." In Harrison v. Smith, 83 Mo. 210, where trust money was wrongfully mingled with the funds of a bank which became insolvent, and subsequently made an assignment, it was held that, although the trust money was not clearly traceable to any particular asset of the bank, the fact that it went into and swelled the volume of its assets, gave the beneficial owner an equitable right to have his demand first paid out of the assets of the estate, and before distribution was made to the general creditors. The same court, in a later case, held that, while it might "be impossible to follow the fund in its diverted uses, it is always possible to make it a charge upon the estate or assets to the increase or benefit of which it has been appropriated. The general assets of the bank having received the benefit of the unlawful conversion, there is nothing inequitable in charging them with the amount of the converted fund, as a preferred demand." Stoller v. Coates, 88 Mo. 514. This principle of equity was approved by the supreme court of the United States in National Bank v. Insurance Co., 104 U. S. 54, where it was held that, "if a man mixes trust funds with his, the whole will be treated as trust property, except so far as he may be able to distinguish what is his. This doctrine applies in every case of a trust relation, and as well to moneys deposited in bank, and to the debt thereby created, as to every other description of property." See, also, Knatchbull v. Hallett, 13 Ch. Div. 696; People v. Bank, 96 N. Y. 32; Bank v. Hummel, 14 Colo. 259, 23 Pac. 986; Smith v. Combs (N. J. Ch.) 24 Atl. 9; San Diego Co. v. California Nat. Bank, 52 Fed. 59. These authorities are in line with Peak v. Ellicott, supra, and fully sustain the ruling of the district court in this case, making the trust fund a charge on the assets in the hands of the assignee.

The court below held that the fact that the board of education sought and obtained some security from H. G. Higinbotham who had been the treasurer of the board, for the pay-

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ment of the money which he had misappropriated, did not prevent the board from following and recovering the trust fund. In this we see no error. As treasurer of the board, he was personally liable for the wrongful conversion of the money intrusted to him. The collateral security for the payment of the money was taken soon after the assignment was made, and before it was known whether the trust money could be reclaimed; and probably it was not then known whether there were sufficient assets against which the trust might be enforced. The taking of collateral security for the whole of the trust fund which the board was seeking to find, or for that part which they might ultimately fail to recover, does not appear to us to be inconsistent with the remedy sought in this action, and should not prevent it from insisting upon its equitable lien against the assets of the estate. The rights of no creditor of the bank have been prejudiced by the taking of the security, and it does not appear that any proceeding to enforce the same has been begun.

Another point made by plaintiff in error is that the board, having failed to present its claim to the assignee for special allowance, is precluded from availing itself of its equitable lien against the assets of the estate. This contention is based on the provisions of section 21 of the assignment act. It provides that the assignee shall give certain notice to the creditors of the estate of the time for the presentation and allowance of demands; and, further, that all creditors who, after being notified, fail to attend and present the nature and amount of their demands, shall be precluded from any benefit in the estate. This point cannot be sustained. Under the view which we have taken, the board of education can hardly be regarded as a "creditor," within the meaning of the statute. The funds sought to be recovered were never the property of the bank. The title and beneficiary interest in the same remained in the board of education, so that the relation of debtor and creditor never in fact existed between the bank and the board. Bank v. Hummel, supra. But, even if the board was to be treated as a creditor under this statute (which we need not decide now), it is not concluded by its failure to present a claim for the trust money to the assignee. No written notice, as required by section 21, was given to the board of education or any officer or member thereof of the time when claims would be heard and allowed by the assignee. A notice was sent to H. G. Higinbotham, but at that time he was not the treasurer of the board. If the board of education is to be regarded as an ordinary creditor, it should have been notified; and, as the notice was not given, there can be no claim that it is estopped to avail itself of the remedy which it is now seeking. The judgment of the district court will be affirmed. All the justices concurring.

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CAVIN v. GLEASON.[1]

(11 N. E. 504, 105 N. Y. 256.)

Court of Appeals of New York. April 19, 1887.

J. B. Gleason, for appellant. W. H. Johnson, for respondents.

ANDREWS, J. It may properly be conceded that the $3,000, received by White from the petitioners on the third day of January, 1883, for investment in the Gould mortgage, constituted in his hands a quasi trust fund, which White was bound to use for the specific purpose contemplated, and which he could not divert to any other use without committing a breach of trust. The securities which formed the greater part of the fund were immediately convertible into money, and authority in White to make such conversion was implied, but only as a means of realizing the money with which to make the mortgage loan. The securities, while in the hands of White, remained the property of the petitioners; and, when converted by him, their title attached to the proceeds of the converted property. White collected the securities actually or constructively. He collected the notes against third persons, and drew the money deposited in the Delaware National Bank. The two certificates of deposit issued by himself, amounting in the aggregate to $780, he accepted as money.

It is material to a proper understanding of the question presented, to state a few other facts which appear in the record. White was a private banker. On the fifth of January, 1883, two days after the transaction with the petitioners to which we have alluded, he was taken sick, and on or about the ninth of January a run commenced on the bank, and on the twelfth of January he made a general assignment to the defendant, Gleason, for the benefit of creditors, having at the time on hand in cash assets only the sum of $64.75. The Gould mortgage was never procured by White, and he made no investment for the petitioners of the $3,000 received on the third day of January. On the contrary, it was found by the judge at special term that White, after receiving and collecting the securities, and prior to the eleventh day of January, in violation of his trust, used the entire fund of $3,000 excepting the sum of $30, which came to the hands of the assignee, in paying his personal debts and liabilities. But on the eleventh of January, the day prior to the making of the assignment, for the purpose of securing the claim of the petitioners, he transferred to them a land contract, from which and other sources the petitioners have realized sufficient to reduce their claim to the sum of $877.27. It was admitted on the hearing of the petition, which took place in January, 1885, that the assignee had then on hand proceeds of the assigned estate sufficient to pay the said sum of $877.27, but it was conceded by the petitioners that the assigned estate was insufficient to pay in full the debts of the assignor.

The special term granted the prayer of the petitioner, and made an order directing the assignee to pay the claim of the petitioners out of the money in his hands, and this order was affirmed by the general term. The order in effect appropriates out of the assigned estate the sum of $877.27 to the payment of the claim of the petitioners, in preference to the claims of the general creditors.

The petitioners, to maintain the order in question, rely upon the rule in equity that, as between cestui que trust and trustee, and all parties claiming under the trustee otherwise than by purchase for valuable consideration, without notice, all property belonging to a trust, however much it may be changed or altered in its nature or character, and all the fruit of such property, whether in its original or altered state, continues to be subject to or affected by the trust. Pennell v. Deffell, 4 De Gex, M. & G. 387, Turner, L. J. This settled doctrine of equity has its basis in the right of property. The owner of personal property which, by the wrongful act of his agent or trustee, has been changed and converted into chattels of another description, may elect to treat the property into which the conversion has been made as his own. Upon such election the title to the substituted property is vested in him as fully as if he had originally authorized the wrongful act, which title he may assert in a legal action to the same extent as he could have asserted title in respect to the original property. The reason of the doctrine is stated by Lord Ellenborough in the leading case of Taylor v. Plumer, 3 Maule & S. 562, in language often quoted: "For," he says, "the product or substitute for the original thing still follows the nature of the thing itself, so long as it can be ascertained to be such, and the right only ceases when the means of ascertainment fail." The question in that case involved the legal title to certain stock and bullion which an agent of the defendant, intrusted by his principal with money to invest in exchequer bills, had wrongfully misapplied to the purchase of the stock and bullion, intending to abscond with it and go to America, and the court sustained the defendants' title.

Courts go very far to protect rights of property as against a wrong-doer. They follow it through whatever changes and transmutations it may undergo in his hands, and as against him, transferred to the changed and altered product the original title, however much the original property has been increased in value by his labor or expenditure, provided only that the product is still a chattel, and is composed of the original materials. Silsbury v. McCoon, 3 N. Y. 379. But a court of law, as a general rule, deals only with the legal title; and when the legal identity of the property is destroyed, or the property cannot be traced specifically into another thing, it is

[1] Modifying 39 Hun, 655.

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powerless to give relief, except by action for damages against the wrong-doer. The language of Lord Ellenborough, already quoted, that the right to follow property only ceases when the means of ascertainment fail, is illustrated by what follows, "which," he adds, "is the case when the subject is turned into money and mixed and compounded in a general mass of the same description."

It is not important to inquire whether later decisions have not established, even in respect to strictly legal actions, a somewhat less stringent limitation upon the right of pursuit than that indicated in the language just quoted. But it is unnecessary to pursue this inquiry here. It is clear that in this case the trust fund has been dissipated and lost by the act of the trustee. It is neither specifically in the hands of the trustee or of his assignee, nor it is represented by other property into which it has been converted. The fund, according to the finding, (with the exception of the sum of $30,) was paid out on the debts of White before the assignment. Plainly, there is no room for any contention that the petitioners have legal title to any of the assigned property. The sole inquiry is whether a case is made for equitable intervention in favor of the petitioners in the administration of the insolvent estate. It is clear, we think, that, upon an accounting in bankruptcy or insolvency, a trust creditor is not entitled to a preference over general creditors of the insolvent, merely on the ground of the nature of his claim; that is, that he is a trust creditor as distinguished from a general creditor. We know of no authority for such a contention. The equitable doctrine that, as between creditors, equality is equity, admits, so far as we know, of no exception founded on the greater supposed sacredness of one debt, or that it arose out of a violation of duty, or that its loss involves greater apparent hardship in one case than another, unless it appears, in addition, that there is some specific recognized equity founded on some agreement, or the relation of the debt to the assigned property, which entitles the claimant, according to equitable principles, to preferential payment. If it appears that trust property specifically belonging to the trust is included in the assets, the court doubtless may order it to be restored to the trust. So, also, if it appears that trust property has been wrongfully converted by the trustee, and constitutes, although in a changed form, a part of the assets, it would seem to be equitable, and in accordance with equitable principles, that the things into which the trust property has been changed, should, if required, be set apart for the trust, or, if separation is impossible, that priority of lien should be adjudged in favor of the trust-estate for the value of the trust property or funds, or proceeds of the trust property, entering into and constituting a part of the assets. This rule simply asserts the right of the true owner to his own property.

But it is the general rule, as well in a court of equity as in a court of law, that, in order to follow trust funds, and subject them to the operation of the trust, they must be identified. A court of equity, in pursuing the inquiry and in administering relief, is less hampered by technical difficulties than a court of law; and it may be sufficient, to entitle a party to equitable preference in the distribution of a fund in insolvency, that it appears that the fund or property of the insolvent remaining for distribution includes the proceeds of the trust-estate, although it may be impossible to point out the precise thing in which the trust fund has been invested, or the precise time when the conversion took place. The authorities require at least this degree of distinctness in the proof before preference can be awarded. See Van Alen v. American Nat. Bank, 52 N. Y. 1; Newton v. Porter, 69 N. Y. 133; Ferris v. Van Vechten, 73 N. Y. 113; Pennell v. Deffell, supra; Frith v. Cartland, 2 Hem. & M. 417.

The facts in this case fall short of the proof required within any case which has come to our notice. The trust fund, with the single exception mentioned, was misappropriated by White to the payment of his private debts prior to the assignment. It cannot be traced into the property in the hands of the assignee, for the plain reason that it is shown to have gone to the creditors of White in satisfaction of their debts. The courts below seem to have proceeded upon a supposed equity springing from the circumstance that, by the application of the fund to the payment of White's creditors, the assigned estate was relieved pro tanto from debts which otherwise would have been charged upon it, and that thereby the remaining creditors, if entitled to distribution without regard to the petitioner's claim, will be benefited. We think this is quite too vague an equity for judicial cognizance, and we find no case justifying relief upon such a circumstance. In a very general sense, all creditors of an insolvent may be supposed to have contributed to the assets which constitute the residuum of his estate.

The case of People v. City Bank of Rochester, 96 N. Y. 32, seems to have been misunderstood. The question considered in this case was not raised there, and it was not claimed in that case that the proceeds of the checks of Sartwell, Hough & Co., the petitioners, had not gone into the general fund of the bank, or that they had not passed in some form to the receiver. The court did not decide that the petitioners would have been entitled to a preference in case the proceeds of the checks had been used by the bank, and were not represented in its assets in the hands of the receiver.

For the reasons stated, we are of opinion that the orders of the special and general terms should be modified by reducing the sum directed to be paid by the assignee to the sum of $30, with interest from April 19, 1883, but without costs to either party.

All concur.

Ordered accordingly.

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RYAN v. DOX.

(34 N. Y. 307.)

Court of Appeals of New York. Jan., 1866.

Henry R. Selden, for appellants. Alexander S. Johnson, for respondent.

DAVIES, C. J. This action was tried by a referee who held as matter of law, that unless the agreement set out in the complaint in relation to the purchase by the defendant at the master's sale of the premises in question, or some note or memorandum thereof, expressing the consideration be in writing, the same was void, and created no interest in the plaintiffs in said premises, and could not be enforced against said defendant in law or equity. And he further reported, as matter of fact, that no proof was made or offered on said trial by or in behalf of the plaintiff of any such agreement in writing, or of any note or memorandum in writing of such an agreement, or of any deed, conveyance or instrument in writing subscribed by the defendant or his lawful agent, creating or declaring any trust or interest in said premises in favor of said plaintiffs, and that no proof was made or testimony or evidence offered on the part of the defendant. The judgment entered for the defendant upon the report of the referee was affirmed at the general term, and the plaintiffs now appeal to this court.

We are at liberty to assume from this finding, that the agreement set out in the complaint was proven on the trial before the referee. To ascertain what that agreement was, we must have reference to the complaint and the offer made by the plaintiffs on the trial. The plaintiffs averred in the complaint that the plaintiff Michael Ryan, being seized of certain lands in the town of Seneca, made and executed a mortgage thereon in the year 1839, to secure the sum of $800, part of the purchase-money thereof, and that in the month of October, 1841, said plaintiff Ryan conveyed to the said Nevins, the other plaintiff, an equal undivided half of the said premises; that plaintiffs being unable to pay the installments on said mortgage as they became due, the said mortgage was foreclosed, and said plaintiffs procured of one Lewis the sum of $300, which was paid on account of said judgment of foreclosure, and a portion thereof, to the extent of $300, was assigned to said Lewis as his security for such advance; that said Lewis becoming importunate for his money, and the plaintiffs being unable to raise the same for him, Lewis proceeded to advertise said premises for sale on the 12th day of October, 1843, for the purpose of raising said sum of about $300, while said premises were worth the sum of $4,000. The complaint further averred that while said premises were thus advertised for sale, and before the day of sale had arrived, the plaintiffs being men of limited means, and unable to raise the money which would be needed to stop the said sale, and to pay up the amount due on the said decree for the debt and the costs which had accrued, applied to the defendant Dox, reported to be a man of ready money, and who had always professed to be interested in their behalf, and asked him to assist them, and aid them to raise the money to pay the amount due on said decree and save the said premises from being sold away from them, and from being sacrificed for the small amount, compared with their value, which was claimed upon said decree. That said Dox did then profess and declare a willingness to help said plaintiffs for such purpose, and did then and there agree with the said plaintiffs that on the day of said sale, he, the said Dox, would attend the same and bid off and purchase the said premises at such sale, upon the express agreement and understanding, between the plaintiffs and said Dox, that such bidding and purchase, if made by the said Dox, should be for the benefit and advantage of these plaintiffs, and the plaintiffs upon such agreement and understanding agreed that they would not find any other one to go their friend at the said sale, and to bid in and purchase the said premises for them; and that it was expressly understood and agreed between the plaintiffs and said Dox, that if he became the purchaser of said premises at said sale he should take the deed of the same from the said master in his own name, but only by way of and as security to himself for what money he should have to advance and pay on such purchase, and with the agreement, promise and undertaking between said Dox and these plaintiffs, that whenever these plaintiffs should repay him the amount which he should pay to procure and effect such purchase and to get the deed therefor, with the interest thereon, and a reasonable compensation for his services therein, he, the said Dox, should convey the said premises to these plaintiffs and again vest the title thereto in them, and should in the mean time hold the said premises in his own name as security only for the said moneys, and always subject to the above agreement and defeasance. That in pursuance of said agreement, said Dox attended said sale and bid off the same for the sum of $100, he being the only bidder at said sale, and the same was struck off to him and he received the deed therefor. That at said sale it was talked about and understood by those present thereat, that said Dox was bidding for the benefit of these plaintiffs, and that said premises were struck off to him only as security to him for the repayment to him by these plaintiffs of the moneys he should advance and pay for the same and interest thereon, and his reasonable charges for his attention thereto. And the plaintiffs averred that such was the fact, and that in truth said Dox did bid off and purchase the said premises for these plain-

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tiffs, and to save the same for them, and took the deed in his own name, only as such security as aforesaid, and that in consequence of such understanding other persons abstained from bidding on said premises, and the same was struck off to said Dox without any opposing bid, although the plaintiffs aver that the same were then worth $4,000 and upwards. And the plaintiffs also averred that if they had not relied upon said agreement, promise and undertaking of said Dox, they would not have allowed the said premises to have been struck off for the said sum of $100, but would have found other persons to have purchased the said premises, and saved the same from sacrifice, but that as said agreement was made more than a month before said sale, these plaintiffs relied upon it and made no other effort to procure the money, or the assistance of friends to save and buy said premises.

That at the time of said sale these plaintiffs were in the possession of said premises, and continued in possession thereof and made payments on account of the incumbrances thereon until some time in the year 1849, with the knowledge, privity and consent of said Dox. And that during all that time said Dox never exercised any acts of ownership over said premises, or interfered with the ownership, use, occupation or possession thereof by the plaintiffs, and that during all that time the assessments and taxes thereon were paid by the plaintiffs, with the knowledge, privity and assent of said Dox. That in the year 1849, the said plaintiffs were induced by said Dox to surrender the possession of said premises to him, and in the year 1851 he refused to come to a settlement with the plaintiffs, and denied that he held the said premises for their benefit, or that they had any interest therein. The referee excluded such evidence, and decided that he would not receive any parol evidence to establish, or tending to establish, the said agreement, and that upon the case made by the pleadings, assuming there was no agreement in writing as stated in the answer, there can be no recovery by the plaintiffs. To this decision and ruling, the plaintiffs' counsel duly excepted.

This exception presents the main question for consideration and decision upon this appeal, and the referee in his report states the ground or reason of his decision to be that unless the agreement mentioned, or some note or memorandum thereof expressing the consideration be in writing the same was void, and could not be enforced against the defendant. If the referee was right in this conclusion, then the plaintiffs were properly nonsuited, and the judgment for the defendant should be affirmed. If in error then it follows that there must be a reversal and a new trial. The Revised Statutes declare that no estate or interest in lands, nor any trust or power over or concerning lands, or in any manner relating thereto, shall be created, granted or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party creating, granting or declaring the same. 1 Rev. St. p. 134, § 6. It is manifest that the referee had this provision before him, and that his decision was based upon the assumption of its applicability to the case in hand. In arriving at this conclusion he entirely ignored all consideration of fraud or of part performance, as elements of the transaction. Section 10 of the same title declares that "nothing in this title contained shall be construed to abridge the powers of a court of equity to compel the specific performance of agreements in cases of part performance of such agreements." 1 Rev. St. p. 135, § 10. It is well settled that courts of equity will enforce a specific performance of a contract within the statute when the parol agreement has been partly carried into execution. 2 Story, Eq. Jur. § 759. And the distinct ground upon which courts of equity interfere in cases of this sort is, that otherwise one party would be enabled to practice a fraud upon the other, and it could never be the intention of the statute to enable any party to commit such a fraud with impunity. Indeed fraud in all cases constitutes an answer to the most solemn acts and conveyances, and the objects of the statutes are promoted instead of being obstructed by such a jurisdiction for discovery and relief. And when one party has executed his part of the agreement in the confidence that the other party would do the same, it is obvious that if the latter should refuse it would be a fraud upon the former to suffer his refusal to work to his prejudice.

In Fonblanque's Equity it is said: "If the contract be carried into execution by one of the parties, as by delivering possession, and such execution be accepted by the other, he that accepts it must perform his part, for when there is a performance the evidence of the bargain does not lie merely upon the words but the facts performed, and it is unconscionable that the party that received the advantage should be admitted to say that such contract was never made." Fonbl. bk. 1, p. 181, c. 338. And the universal rule is correctly enunciated by Brown on Frauds, when he says: "The correct view appears to be that equity will at all times lend its aid to defeat a fraud, notwithstanding the statute of frauds." Brown, St. Frauds, § 438. In the present case we are to assume that the agreement was made as set out in the complaint, and performed on the part of the plaintiffs as therein stated. We then have a distinct and unequivocal agreement established, and performance by one party of all that was to be done in pursuance of it on his part. We find the other party, by reason of the acts and omissions of this party, obtaining the possession and title to a large amount of real estate for a trifling sum compared to its actual value, and refusing

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to fulfill the agreement on his part. He interposes the statute of frauds as a shield, thus using a statute designed to prevent frauds as an instrument whereby one can be perpetrated with impunity. This a court of equity cannot tolerate. Wetmore v. White, 2 Caines, Cas. 87, was an action brought in chancery to compel the specific performance of a contract by parol relating to lands. The chancellor dismissed the bill, but the court of errors unanimously reversed his decree. Thompson, J., in delivering the opinion of the court, says: "The appellant's claim resting altogether upon parol contract, it becomes necessary to examine whether any obstacle to relief is interposed by the statute for the prevention of fraud. I think there is not. It is an established rule in equity that a parol agreement in part performed is not within the provisions of the statute. Citing 1 Fonbl. Eq. 182, and cases there noted. To allow a statute having for its object the prevention of frauds to be interposed in bar of the performance of a parol agreement in part performed, would evidently encourage the mischief the legislature intended to prevent. * * * Possession delivered in pursuance of an agreement is such a decree of performance as to take a contract out of the statute." The same doctrine was reaffirmed in Parkhurst v. Van Cortlandt, 14 Johns. 15, 35, 36. In Lowry v. Tew, 3 Barb. Ch. 407, 413, the chancellor said the principle upon which courts of equity hold that a part performance of a parol agreement is sufficient to take a case out of the statute of frauds is, that a party who has permitted another to perform acts on the faith of an agreement shall not be allowed to insist that the agreement is invalid, because it was not in writing, and that he is entitled to treat those acts as if the agreement, in compliance with which they were performed, had not been made. In other words, upon the ground of fraud in refusing to execute the parol agreement after a part performance thereof by the other party, and when he cannot be placed in the same situation that he was before such part performance by him." See, also, Phillips v. Thompson, 1 Johns. Ch. 131; Murray v. Jayne, 8 Barb. 612.

In Hodges v. Tennessee Marine & Fire Ins. Co., 8 N. Y. 416, this court held that in equity parol evidence was admissible to show that a deed absolute on its face was in fact a mortgage, and so intended by the parties thereto. And in Despard v. Walbridge, 15 N. Y. 374, this court also held that an assignment of a lease, absolute on its face, was in fact made for the purpose of securing a debt, and that such debt had been fully paid; and that under the Code of Procedure, parol evidence is admissible to show that such assignment, though absolute in its terms, was intended as a mortgage.

The case of Brown v. Lynch, 1 Paige, 147, is so like to that now under consideration that it may be profitable to refer to it at length. A mortgage upon a farm was foreclosed in chancery and advertised for sale by a master. Before the sale, Brown, the defendant, made an arrangement with the plaintiffs, the Lynches, whereby he agreed to purchase the farm in for their benefit, for which he was to receive a stipulated compensation. The mortgagee, in order to favor the Lynches, agreed with Brown that he might bid off the property for about half the amount of the mortgage. Brown, at the sale, prevented others bidding by representing that he intended to buy for the Lynches, and he purchased the farm at the master's sale for $1,500, about $1,000 below its value. Afterward Brown refused to convey the farm to the Lynches, or to account to them for the value, although they tendered to him the amount of his bid, with interest, and the sum agreed for his services. And it was held by the court of chancery that Brown was a trustee for the Lynches, and had no other interest in the farm than that of mortgagee to secure the repayment of the purchase-money, and of the payment of the sum agreed to be allowed him for his services. And that the court of chancery would relieve against a fraud by converting the person guilty of it into a trustee for those who have been injured thereby. Emott, vice chancellor, decreed for the plaintiffs, holding the defendant had committed a fraud upon the plaintiffs by agreeing to purchase for their benefit, when, in truth, he meant to purchase for himself, and that he had committed a fraud upon the plaintiffs, by his acts and representations, in preventing bidding at the sale. And he proceeds to show, by the citation of numerous authorities, that a court of equity can provide adequate relief by declaring the purchaser a trustee for the person defrauded. And he quotes with approbation the remarks of Lord Eldon, in Mestaer v. Gillespie, 11 Ves. 626, where he says:

"Upon the statute of frauds, though declaring that interest shall not be barred except by writing, cases in this court are perfectly familiar, deciding that a fraudulent use shall not be made of that statute; when this court has interfered against a party meaning to make it an instrument of fraud, and said he should not take advantage of his own fraud, even though the statute has declared that in case these circumstances do not exist, the instrument shall be absolutely void." The chancellor affirmed the decree, and observed, that the Lynches had an interest in the premises which they had a right to protect and preserve, and it would have been a gross fraud for any one to hold out to them, under such circumstances, that he was bidding off the property for their benefit, when he in fact intended to appropriate it to his own use. If the appellant did in fact bid it off for them, under the agreement, he held it in trust for them, and had no

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other interest in it than that of a mortgagee, to secure the repayment of the purchase-money and the $60 agreed to be paid him for his trouble. But if he had no such intention, and did not in fact bid off the property in trust for them, he was guilty of a fraud which the court will relieve against. The cases referred to by the circuit judge (vice-chancellor), fully establish the principle that this court has power to relieve against such fraud, and the means to be employed is to convert the person who has gained an advantage by means of his fraudulent act, into a trustee for those who have been injured thereby." This case was cited with approbation in Anderson v. Lemon, 8 N. Y. 239, and the principle of it adopted by this court in that case.

Its principle was also adopted and approved of in Sandford v. Norris, decided at special term of supreme court in May, 1859, and affirmed at general term in the First district in June, 1861. 4 Abb. Dec. 144. In that case, certain premises were owned by the plaintiff's husband, and he made an assignment thereof, and his assignees advertised the same for sale. The plaintiff was anxious to purchase them in at the sale, and made an arrangement with the defendant, Norris, by which he agreed to attend the sale and bid them off in his name for the plaintiff, and on payment of the sum bid convey the same to the plaintiff. In consequence of this arrangement, the plaintiff refrained from bidding at the sale, and the premises were struck off to the defendant for the sum of $20, subject to the prior incumbrances. The defendant subsequently sold the premises so purchased for the sum of $2,000, of which the plaintiff had received one-half, and the action was brought to recover the residue. It was held that the plaintiff was entitled to recover, and that the defense of the statute of frauds, interposed by the defendant, was no bar to the relief sought by the plaintiff; that the agreement was established beyond controversy, and the defendant was bound as well by sound morals as established principles of law to the performance of it. On the hearing of that case, the opinion of Mr. Justice Emott, in the case of Bergen v. Nelson (not reported), was read, distinctly affirming the doctrine of Brown v. Lynch, supra. The case of Osborn v. Mason, before the vice-chancellor of the first circuit (not reported), also affirming the doctrine of that case, was also cited.

Mason in that case agreed with Osborn to attend a sale of certain premises, Osborn being either owner or a subsequent incumbrancer, Mason also having a claim upon the premises as an incumbrancer. Mason agreed to bid in the premises at the sale, and then to let Osborn have them for the amount at which they stood him in, including his own incumbrance. Mason bid off the premises and then refused to fulfill his agreement which was by parol. The vice-chancellor held that the statute of frauds was no bar to the suit for a specific performance of the agreement which was decreed, and on appeal to the chancellor the same was affirmed. Voorhies v. St. John was argued and decided in this court in December, 1863. It was an action brought to recover moneys received by the defendant on a sale of a house and lot in the city of New York, and a leasehold estate in two buildings on other lots therein, and for an account of the rents and profits received therefrom. The property had formerly belonged to the husband of the plaintiff, and consisted of three parcels, and upon a sale thereof by his assignees, the plaintiff requested two of her friends to attend the sale and bid off two of said parcels for her benefit. They subsequently, at her request, transferred their bids to the defendant, St. John, and he took the conveyance therefor to himself, and paid the assignee for the same, declaring at the time that the plaintiff wished him to buy that property for her. At the sale of the other parcel, St. John attended the assignee's sale and bid off the same himself, and the assignments of the two bids and the titles to all the three pieces of property made out to him together in his own name. All these acts were done by St. John for Mrs. Voorhies, at her request and for her benefit. The referee reported in favor of the plaintiff, and the judgment thereon was affirmed at the general term of the First district, on the authority of Sandford v. Norris, supra. On appeal to this court, that judgment was affirmed in December, 1863, and distinctly on the ground that the statute of frauds was no bar to the performance of the agreement. We must hold this case as decisive of that now under consideration. The same doctrine has frequently been affirmed in other cases.

In Cox v. Cox, 5 Rich. Eq. 365, the owner of land, in danger of being summarily dispossessed by a sheriff's sale, agreed with his brother, the defendant, that the latter should bid off the land and pay the bid and make a reconveyance on repayment. This agreement was declared to the bystanders at the sale, and competition being thus prevented, the land was bought by the brother for one-tenth of its actual value. The whole transaction was alleged to be "a fraudulent contrivance on the part of the defendant to obtain his brother's land for one-tenth of its value." The court enjoined the defendant from proceeding at law under the title thus fraudulently obtained, saying: "This court has often repeated that the statute of frauds should never be perverted to an instrument of fraud. Thus, in a case of an agreement such as the statute plainly declares void, if not reduced to writing, yet if this was omitted by fraud, the defendant would not be permitted to avail himself of the statute. In Whitchurch v. Bevis, 2 Brown Ch. 565,

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Lord Thurlow says, if you interpose the medium of fraud, by which the agreement is prevented from being put in writing, I agree the statute is inapplicable. See Keith v. Purvis, 4 Desaus. Eq. 114."

In the case cited of Keith v. Purvis, a creditor induced his debtor's agent not to bid at a sale of his debtor's land by promising to give the debtor time to pay the debt, and then to reconvey the land. This agreement was disclosed at the sale, and prevented other bids, whereby the creditor bought the land at one-third of its value, but afterward refusing to reconvey, the debtor brought his bill for relief. To this it was objected that the agreement was void by the statute of frauds; but the court held, "that if the agreement was void, the creditor must surrender up his advantage under it and be liable to make good the loss sustained by the adverse party from his conduct." "Can it be tolerated," says the court at page 121, "that a creditor shall, at a sale of his debtor's property, lull him to sleep and keep off other purchasers by an agreement under which he buys in the land for a small sum much below the value, and then that he should declare that the agreement was void under the statute of frauds, and that the other party should have no benefit from the agreement, whilst he reaped all the fruits? Surely not. Courts of justice would be blind indeed if they could permit such a state of things."

In Peebles v. Reading, 8 Serg. & R. 492, the supreme court of Pennsylvania said: "If by the artifice of the purchaser declaring he was to buy for the owner, others were prevented from bidding, and the land was sold at a great undervalue, this would make him a trustee." And in Trapnall v. Brown, 19 Ark. 49, property of the value of $5,000 was, by agreement similar to the one in the present case, bought in for $176, other persons declining to bid on being informed of the object of the agreement. "Under these circumstances," the court said, "we think it would be a fraud in the purchaser to keep the property in violation of the agreement. That the statute which was designed to prevent fraud would be used as a shield and in the commission of fraud, which the courts of equity will not tolerate. We think therefore that the court below did not err in treating the purchaser as a trustee." These observations, made in these cases, are as pertinent to that now under consideration, as they were in them. Many of these cases are identical in all important particulars with this, and there is no good reason why the same rules of law and morals enunciated in them should not govern and control the decision in this case. The fact that an agreement is void, under the statute of frauds, does not entitle either party to relief in equity, but other facts may; and when they do, it is no answer to the claim for relief, that the void agreement was one of the instrumentalities through which the fraud was effected. Ormond v. Anderson, 2 Ball & B. 369. Where one of the parties to a contract, void by the statute of frauds, avails himself of its invalidity but unconscientiously appropriates what he has acquired under it, equity will compel restitution; and it constitutes no objection to the claim, that the opposite party may happen to secure the same practical benefit, through the process of restitution, which would have resulted from the observance of the void agreement. Floyd v. Buckland, 2 Freem. Ch. 268; Oldham v. Litchford, Id. 284; Devenish v. Baines, Finch, Prec. 3; Thynn v. Thynn, 1 Vern. 296; Reech v. Kennegal, 1 Ves. Sr. 125; Davis v. Walsh, 2 Har. & J. 329; Wilcox v. Morris, 1 Murph. 116; Stoddard v. Hart, 23 N. Y. 560.

It is very clear to my mind, both upon principle and authority, that the referee erred in excluding the evidence offered, and that the judgment must be reversed and a new trial ordered, with costs to abide the event.

PORTER, WRIGHT, LEONARD, and MORGAN, JJ., concurred. HUNT, J., dissented.

Judgment reversed, and new trial ordered.

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HUN v. CARY.

(82 N. Y. 65.)

Court of Appeals of New York. 1880.

E. Ellery Anderson, for appellants. Francis C. Barlow, for respondent.

EARL, J. This action was brought by the receiver of the Central Savings Bank of the city of New York against the defendants, who were trustees of the bank, to recover damages which, it is alleged, they caused the bank by their misconduct as such trustees.

The first question to be considered is the measure of fidelity, care and diligence which such trustees owe to such a bank and its depositors. The relation existing between the corporation and its trustees is mainly that of principal and agent, and the relation between the trustees and the depositors is similar to that of trustee and cestui que trust. The trustees are bound to observe the limits placed upon their powers in the charter, and if they transcend such limits and cause damage, they incur liability. If they act fraudulently or do a willful wrong, it is not doubted that they may be held for all the damage they cause to the bank or its depositors. But if they act in good faith within the limits of powers conferred, using proper prudence and diligence, they are not responsible for mere mistakes or errors of judgment. That the trustees of such corporations are bound to use some diligence in the discharge of their duties cannot be disputed. All the authorities hold so. What degree of care and diligence are they bound to exercise? Not the highest degree, not such as a very vigilant or extremely careful person would exercise. If such were required, it would be difficult to find trustees who would incur the responsibility of such trust positions. It would not be proper to answer the question by saying the lowest degree. Few persons would be willing to deposit money in savings banks, or to take stock in corporations, with the understanding that the trustees or directors were bound only to exercise slight care, such as inattentive persons would give to their own business, in the management of the large and important interests committed to their hands. When one deposits money in a savings bank, or takes stock in a corporation, thus divesting himself of the immediate control of his property, he expects and has the right to expect that the trustees or directors who are chosen to take his place in the management and control of his property, will exercise ordinary care and prudence in the trusts committed to them—the same degree of care and prudence that men prompted by self-interest generally exercise in their own affairs. When one voluntarily takes the position of trustee or director of a corporation, good faith, exact justice, and public policy unite in requiring of him such a degree of care and prudence, and it is a gross breach of duty—crassa negligentia—not to bestow them.

It is impossible to give the measure of culpable negligence for all cases, as the degree of care required depends upon the subjects to which it is to be applied. First Nat. Bank v. Ocean Nat. Bank, 60 N. Y. 278. What would be slight neglect in the care of a quantity of iron might be gross neglect in the care of a jewel. What would be slight neglect in the care exercised in the affairs of a turnpike corporation or even of a manufacturing corporation, might be gross neglect in the care exercised in the management of a savings bank intrusted with the savings of a multitude of poor people, depending for its life upon credit and liable to be wrecked by the breath of suspicion. There is a classification of negligence to be found in the books, not always of practical value and yet sometimes serviceable, into slight negligence, gross negligence, and that degree of negligence intermediate the two, attributed to the absence of ordinary care; and the claim on behalf of these trustees is that they can only be held responsible in this action in consequence of gross negligence, according to this classification. If gross negligence be taken according to its ordinary meaning—as something nearly approaching fraud or bad faith—I cannot yield to this claim; and if there are any authorities upholding the claim, I emphatically dissent from them.

It seems to me that it would be a monstrous proposition to hold that trustees, intrusted with the management of the property, interests and business of other people who divest themselves of the management and confide in them, are bound to give only slight care to the duties of their trust, and are liable only in case of gross inattention and negligence; and I have found no authority fully upholding such a proposition. It is true that authorities are found which hold that trustees are liable only for crassa negligentia, which literally means gross negligence; but that phrase has been defined to mean the absence of ordinary care and diligence adequate to the particular case. In Scott v. De Peyster, 1 Edw. 513, 543—a case much cited—the learned vice-chancellor said: "I think the question in all such cases should and must necessarily be, whether they (directors) have omitted that care which men of common prudence take of their own concerns. To require more, would be adopting too rigid a rule and rendering them liable for slight neglect; while to require less, would be relaxing too much the obligation which binds them to vigilance and attention in regard to the interests of those confided to their care, and expose them to liability for gross neglect only—which is very little short of fraud itself." In Spering's Appeal, 71 Pa. St. 11, Judge Sharswood said: "They [directors] can only be regarded as mandataries—persons who have gratuitously undertaken to perform certain duties, and who are therefore bound to apply ordinary skill and diligence, but no more." In Hodges v. New England Screw Co., 1 R.

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I. 312, Jenckes, J., said: "The sole question is, whether the directors have or have not bestowed proper diligence. They are liable only for ordinary care; such care as prudent men take in their own affairs." And in the same case, Ames, J., said: "They should not therefore be liable for innocent mistakes, unintentional negligence, honest errors of judgment, but only for willful fraud or neglect, and want of ordinary knowledge and care." The same case came again under consideration in 3 R. I. 9, and Green, C. J., said: "We think a board of directors, acting in good faith and with reasonable care and diligence, who nevertheless fall into a mistake, either as to law or fact, are not liable for the consequences of such mistake." In the case of Liquidators of Western Bank v. Douglas, 11 Sess. Cas. (Scot.) 112, it is said: "Whatever the duties (of directors) are, they must be discharged with fidelity and conscience, and with ordinary and reasonable care. It is not necessary that I should attempt to define where excusable remissness ends and gross negligence begins. That must depend to a large extent on the circumstances. It is enough to say that gross negligence in the performance of such a duty, the want of reasonable and ordinary fidelity and care, will impose liability for loss thereby occasioned." In Charitable Corp. v. Sutton, 2 Atk. 405, Lord Chancellor Hardwicke said, that a person who accepted the office of director of a corporation "is obliged to execute it with fidelity and reasonable diligence," although he acts without compensation. In Litchfield v. White, 3 Sandf. 545, Sandford, J., said: "In general a trustee is bound to manage and employ the trust property for the benefit of the cestui que trust with the care and diligence of a provident owner. Consequently he is liable for every loss sustained by reason of his negligence, want of caution or mistake, as well as positive misconduct."

In Spering's Appeal, Judge Sharswood said that directors "are not liable for mistakes of judgment, even though they may be so gross as to appear to us absurd and ridiculous, provided they were honest, and provided they are fairly within the scope of the powers and discretion confided to the managing body." As I understand this language, I cannot assent to it as properly defining to any extent the nature of a director's responsibility. Like a mandatary, to whom he has been likened, he is bound not only to exercise proper care and diligence, but ordinary skill and judgment. As he is bound to exercise ordinary skill and judgment, he cannot set up that he did not possess them. When damage is caused by his want of judgment, he cannot excuse himself by alleging his gross ignorance. One who voluntarily takes the position of director, and invites confidence in that relation, undertakes, like a mandatary, with those whom he represents or for whom he acts, that he possesses at least ordinary knowledge and skill, and that he will bring them to bear in the discharge of his duties. Story, Bailm. § 182. Such is the rule applicable to public officers, to professional men and to mechanics, and such is the rule which must be applicable to every person who undertakes to act for another in a situation or employment requiring skill and knowledge; and it matters not that the service is to be rendered gratuitously. These defendants voluntarily took the position of trustees of the bank. They invited depositors to confide to them their savings, and to intrust the safe-keeping and management of them to their skill and prudence. They undertook not only that they would discharge their duties with proper care, but that they would exercise the ordinary skill and judgment requisite for the discharge of their delicate trust.

Enough has now been said to show what measure of diligence, skill, and prudence the law exacts from managers and directors of corporations; and we are now prepared to examine the facts of this case, for the purpose of seeing if these trustees fell short of this measure in the matters alleged in the complaint.

This bank was incorporated by the act chapter 467 of the Laws of 1867, and it commenced business in the spring of that year, in a hired building on the east side of Third avenue, in the city of New York. It remained there for several years, and then removed to the west side of the avenue, between Forty-Fifth and Forty-Sixth streets, where it occupied hired rooms until near the time of its failure in the fall of 1875. During the whole time the deposits averaged only about $70,000. In 1867, the income of the bank was $942.12, and the expenses, including amounts paid for safe, fixtures, charter, current expenses and interest to depositors, were $5,571.34. In 1868, the income was $5,471.43, and the expenses including interest to depositors, $5,719.43. In 1869, the income was $3,918.27, and the expenses and interest paid, $5,346.05. In 1870 the income was $5,784.09, and expenses and interest, $7,040.22. In 1871 the income was $13,551.14; which included a bonus of $4,000, or $6,000 obtained upon the purchase of a mortgage of $40,000, which mortgage was again sold in 1874 at a discount of $2,000, and the expenses, including interest paid, were $9,124.05. In 1872 the income was $5,100.51, and the expenses, including interest paid, were $7,212.49. Down to the 1st day of January, 1873, therefore, the total expenses, including interest paid, were $5,046 more than the income. To this sum should be added $2,000, deducted on the sale of the large mortgage in 1874, which was purchased at the large discount in 1871, as above mentioned, and yet entered in the assets at its face. From this apparent deficiency should be deducted the value of the safe and furniture of the bank, from which the receiver subsequently realized $500. At the same date the amount due to over one thousand depositors was about $70,000, and the

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assets of the bank consisted of about $13,000 in cash and the balance mostly of mortgages upon real estate.

While the bank was in this condition, with a lease of the rooms then occupied by it expiring May 1, 1874, the project of purchasing a lot and erecting a banking-house thereon began to be talked of among the trustees. The only reason put on record in the minutes of the meetings held by the trustees for procuring a new banking-house was to better the financial condition of the bank. In February, 1873, at a meeting of the trustees a committee was appointed "on site for new building;" and in March the committee entered into contract for the purchase of a plot of land, consisting of four lots, on the corner of Forty-Eighth street and Third avenue, for the sum of $74,500; of which $1,000 was to be paid down, $9,000 on the 1st day of May then next, and $64,000 to be secured by a mortgage, payable on or before May 1, 1875, with interest from May 1, 1873, at seven per cent.; and there was an agreement that payment of the principal sum secured by the mortgage might be extended to May 1, 1877, provided a building should, without unavoidable delay, be erected upon the corner lot, worth not less than $25,000. This contract was reported by the committee to the trustees, at a meeting held April 7. On the 1st day of May, 1873, the real estate was conveyed and the cash payment was made, and four separate mortgages were executed to secure the balance, one upon each lot. The mortgage upon the lot upon which the bank building was afterward erected was for $30,500. At the same time the bank became obligated to build upon that lot a building covering its whole front, twenty-five feet, and sixty feet deep, and not less than five stories high, and have the same inclosed by the 1st day of November then next. Upon that lot the bank proceeded, in the spring of 1875, to erect a building covering the whole front, and seventy-six feet deep, and five stories high, at an expense of about $27,000. And the buiding was nearly completed when the receiver of the bank was appointed in November of that year. The three lots not needed for the building were disposed of, as we may assume, without any loss, leaving the corner lot used for the building to cost the bank $29,250; and we may assume that that was then the fair value of the lot. This case may then be treated as if the trustees had purchased the corner lot at $29,250, and bound themselves to erect thereon a building costing $27,000. When the receiver was appointed that lot and building, and other assets which produced less than $1,000, constituted the whole property of the bank; and subsequently the lot and building were swept away by a mortgage foreclosure, and this action was brought to recover the damages caused to the bank by the alleged improper investment of its funds, as above stated, in the lot upon which the building was erected.

At the time of the purchase of the lot the bank was substantially insolvent. If it had gone into liquidation, its assets would have fallen several thousand dollars short of discharging its liabilities, and this state of things was known to the trustees. It had been in existence about six years, doing a losing business. The amount of its deposits, which its managers had not been able to increase, shows that the enterprise was an abortion from the beginning, either because it lacked public confidence, or was not needed in the place where it was located. It had changed its location once without any benefit. It had on hand but about $13,000 in cash, of which $10,000 were taken to make the first payments. The balance of its assets was mostly in mortgages not readily convertible. One was a mortgage for $40,000, which had been purchased at a large discount, and we may infer that it was not very salable, as the trustees resolved to sell it as early as May, 1873, and in August, 1873, authorized it to be sold at a discount of not more than $2,500, and yet it was not sold until 1874. In this condition of things the trustees made the purchase complained of, under an obligation to place on the lot an expensive banking-house. Whether under the circumstances the purchase was such as the trustees, in the exercise of ordinary prudence, skill and care, could make; or whether the act of purchase was reckless, rash, extravagant, showing a want of ordinary prudence, skill and care, were questions for the jury. It is not disputed that, under the charter of this bank, as amended in 1868 (chapter 294), it had the power to purchase a lot for a banking-house "requisite for the transaction of its business." That was a power, like every other possessed by the bank, to be exercised with prudence and care. Situated as this moribund institution was, was it a prudent and reasonable thing to do, to invest nearly half of all the trust funds in this expensive lot, with an obligation to take most of the balance to erect thereon an extravagant building? The trustees were urged on by no real necessity. They had hired rooms where they could have remained; or if those rooms were not adequate for their small business, we may assume that others could have been hired. They put forward the claim upon the trial that the rooms they then occupied were not safe. That may have been a good reason for making them more secure, or for getting other rooms, but not for the extravagance in which they indulged. It is inferable however that the principal motive which influenced the trustees to make the change of location was to improve the financial condition of the bank by increasing its deposits. Their project was to buy this corner lot and erect thereon an imposing edifice, to inspire confidence, attract attention, and thus draw deposits. It was intended as a sort of advertisement of the bank, a very expensive

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one indeed. Savings banks are not organized as business enterprises. They have no stockholders, and are not to engage in speculations or money-making in a business sense. They are simply to take the deposits, usually small, which are offered, aggregate them, and keep and invest them safely, paying such interest to the depositors as is thus made, after deducting expenses, and paying the principal upon demand. It is not legitimate for the trustees of such a bank to seek deposits at the expense of present depositors. It is their business to take deposits when offered. It was not proper for these trustees—or at least the jury may have found that it was not—to take the money then on deposit and invest in a banking-house, merely for the purpose of drawing other deposits. In making this investment the interests of the depositors whose money was taken, can scarcely be said to have been consulted.

It matters not that the trustees purchased this lot for no more than a fair value, and that the loss was occasioned by the subsequent general decline in the value of real estate. They had no right to expose their bank to the hazard of such a decline. If the purchase was an improper one when made, it matters not that the loss came from the unavoidable fall in the value of the real estate purchased. The jury may have found that it was grossly careless for the trustees to lock up the funds in their charge in such an investment, where they could not be reached in any emergency which was likely to arise in the affairs of the crippled bank.

We conclude therefore that the evidence justified a finding by the jury that this was not a case of mere error or mistake of judgment on the part of the trustees, but that it was a case of improvidence, of reckless, unreasonable extravagance, in which the trustees failed in that measure of reasonable prudence, care and skill which the law requires.

This case was moved for trial at a circuit court, and before the jury was impaneled the defendants claimed that the case was improperly in the circuit, and that it should be tried at special term; and the court ordered that the trial proceed, and at the close of the evidence the defendants moved that the complaint be dismissed, on the ground that the action was not a proper one to be tried before a jury, and should be tried before the equity branch of the court. The motion was denied, and these rulings are now alleged for error. The receiver in this case represents the bank, and may maintain any action the bank could have maintained. The trustees may be treated as agents of the bank. In re German Min. Co., 27 Eng. Law & Eq. 158; Belknap v. Davis, 19 Me. 455; Bedford R. Co. v. Bowser, 48 Pa. St. 29; Butts v. Wood, 38 Barb. 181; Austen v. Daniels, 4 Denio, 299; Ohio & M. R. Co. v. McPherson, 35 Mo. 13. And for any misfeasance or non-feasance, causing damage to the bank, they were responsible to it, upon the same principle that any agent is for like cause responsible to his principal. It has never been doubted that a principal may sue his agent in an action at law for any damages caused by culpable misfeasance or non-feasance in the business of the agency. The only relief claimed in this complaint was a money judgment, and we think it was properly tried as an action at law. No equitable rights were to be adjusted, and there was no occasion to appeal to an equitable forum.

Treating this therefore as an action at law, it follows also that the objection taken that other trustees should have been joined as defendants cannot prevail. In actions ex delicto the plaintiff may sue one, some or all of the wrong-doers. Liquidators of Western Bank v. Douglas, 22 Sess. Cas. (Scot.) 475; Barb. Parties, 203.

The defendants Hoffman and Gearty filed petitions for their discharge in bankruptcy after the commencement of this action, and were discharged before judgment, and they alleged such discharge as a defense to the action. The trial judge and the general term held that the discharge furnished no defense, and we are of the same opinion. This claim was purely for unliquidated damages occasioned by a tort. Such a claim was not provable in bankruptcy, and therefore was not discharged. Rev. St. U. S. (2d Ed.) §§ 5115, 5119, 5067–5071; Zinn v. Ritterman, 2 Abb. Prac. (N. S.) 261; Kellogg v. Schuyler, 2 Denio, 73; Crouch v. Gridley. 6 Hill, 250; In re Wiggers, 2 Biss. 71, Fed. Cas. No. 17,623; In re Clough, 2 Ben. 508, Fed. Cas. No. 2,-905; In re Sidle, 2 N. B. R. 77, Fed. Cas. No. 12,844.

I conclude therefore that the judgment appealed from should be affirmed.

The appeal by the plaintiff from the order of the general term, granting a new trial as to defendant Smith, must, for reasons stated on the argument, be dismissed, with costs.

All concur.

Judgment affirmed, and appeal from order dismissed.

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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.

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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

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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-

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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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OGDEN v. MURRAY.

(39 N. Y. 202.)

Court of Appeals of New York. March, 1868.

M. S. Bidwell, for appellant. M. Sherwood, for respondent.

GROVER, J. It is settled by repeated adjudication in this state, acquiesced in for many years, although the question does not appear to have been passed upon in the court of last resort, that where an active trust for the care, management, conveyance and appropriation of personal property has been created, and the instrument creating the trust makes no provision for the compensation of the trustees, they are prima facie entitled to the same commissions as are by statute allowed to guardians, executors and administrators.

The terms of the instrument may be such as to negative the idea that any compensation to the trustees was contemplated; the relationship of the parties or other extrinsic facts may clearly indicate that the labor and responsibility of the trust were voluntarily assumed, and were intended by all parties to be gratuitously performed. Mason v. Roosevelt, 5 Johns. Ch. 534; Mumford v. Murray, 6 Johns. Ch. 452.

The subject is discussed by Chancellor Walworth in Meacham v. Sternes, 9 Paige, 398. The doctrine of that case is strongly reasserted in Matter of De Peyster, 4 Sandf. Ch. 511, by Vice-Chancellor Sandford, and held not to require, that the property held should be converted by the trustee into money; that though delivered in specie and in the very form in which it came to his hands, commissions should be allowed thereon. And the supreme court, in Wagstaff v. Lowerre, 23 Barb. 209, held the same rule, in favor of a trustee appointed by will. That the English rule and the law of this state was otherwise, prior to the statute of 1818, fixing the compensation of executors and administrators, appears in these cases, and in Manning v. Manning, 1 Johns. Ch. 534. See 2 Story, Eq. Jur. § 1268, and notes; Robinson v. Pitt, White & T. Lead. Cas. Eq. (Am. Notes) 70; Law Lib. p. 353 et seq.

Without affirming that the rule is so unqualified that the rate of compensation allowed by statute to executors, administrators and guardians must, in all cases where compensation is allowed to trustees, be the exact measure, without any consideration of the nature and extent of the duties and responsibilities imposed by the trust, or that in no case the court will inquire what less amount would be a reasonable compensation, I think the rule above stated should in general be regarded as reasonable and just, and therefore to be adopted, unless there are controlling considerations which forbid the allowance.

There is nothing in the language of the instruments by which the trust in this case was created and declared, indicating any agreement on the subject of commissions, nor manifesting any intent that the service with its responsibilities should be assumed or borne gratuitously.

The property in question consisted of seven steamships, transferred to the appellants and their associate, Snow (now deceased), to hold for the use and benefit of the Accessory Transit Company, and in trust and confidence that the trustees will account for and pay over to the company, or to whomsoever the company may appoint, all earnings, receipts and profits from or on account thereof, or of any or either of them, which they may receive, and any and all insurance moneys which may be received, on account of the ships, or either of them; and will assign, transfer and convey the said ships and any of them, on request of the company, to the said company or such appointee.

It is true that the trustees permitted the ships to be employed and run by other agents of the company, and the company received the earnings directly. But although this may be a reason for denying to them commissions on such receipts and earnings, it would not deprive them of their just claim to compensation for the discharge of the trust, in holding the property subject to a liability to account therefor, and to convey the same, and a further responsibility to third parties, who would have a right to look to the legal title to the ships, and charge the trustees as such.

I think therefore that there is nothing in the nature and terms of the trust which precludes the allowance of commissions to the trustees under the general rule above stated.

But the trustees were themselves directors of the company, and as such were already trustees bound to manage the affairs and property of the company for the interest of its stockholders, and by familiar and well-settled principles of law, as well as the most obvious rules of justice, forbidden to administer its affairs for their private emolument.

There were seven directors. The creation of the trust and the designation of the trustees was authorized by a resolution passed at a meeting of the directors, at which they were present and voted; and although they did not constitute a majority, their voice and influence was cast in favor of the arrangement by which property, to the amount of $1,350,000, purchased and paid for by the company, was placed in their hands. Prima facie, this act was itself a breach of trust. The directors had prima facie no right to place the property in the hands of third persons, and thus put the title beyond the proper control of the board of directors, who were by law trustees for the control, employment and management of the property of the company, for the benefit of its stockholders. True, they declared a trust to hold for the use of the company, but it is no part of the

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proper duty and power of the directors of the company to divest the company itself of the title to its property, and subject it to the hazard of the fidelity of trustees, or make the actual benefits to be derived by the stockholders depend upon the efficiency of proceedings in court to compel the performance of such a trust.

It is however not necessary to say that there may not be circumstances in the condition of an incorporated company, which will warrant the transfer of its property, or portions of it, to trustees, for purposes which are lawful and consistent with the duty owed to the company. I do say however that the creation of such a trust requires some legal and sufficient purpose to excuse it.

I find no facts stated in the case agreed upon here, as the reasons for creating the trust in question. The company was incorporated by the "state or republic of Nicaragua." Its "corporate object and business was the transportation of passengers and freight from the city of New York to certain ports on the Pacific, and it was necessary, in order to carry out the objects of its incorporation, that the said company should own or have the control of several steamships running on either side of the Isthmus of Nicaragua."

Nothing in the case agreed upon indicates that the company could not own, hold and run steamships agreed to be "necessary to carry out the object of its corporation," to-wit, "the transportation of passengers and freight."

What was then the impediment? It is suggested, in argument, that the laws of the United States prevented the company, a foreign corporation, from taking and holding the title to these ships. The case states, that in July, 1854, an act of congress was passed authorizing this company to hold steamships in their own name.

And the argument is therefore this: At the time this trust was created, the company could not, by law, take the legal title to itself. The conveyance to the trustees was therefore necessary; and if necessary, then as between the trustees and the company, was proper, in order to carry out the objects of the incorporation, and secure to the stockholders the means of carrying on the business for which it was created, and the profits and emoluments derivable therefrom.

It is doubtless true that a foreign corporation cannot take title to a vessel, and retain her registration as a vessel of the United States, entitled to the privileges and protection of a national as distinguished from a foreign ship. But I find no warrant for saying that the Accessory Transit Company had no legal capacity to take the title to these steamships, and hold and employ them for all purposes for which citizens of Nicaragua may hold and employ vessels, and among other purposes, the running them between their own ports, and the ports of the United States, subject to all the disadvantages, of course, of being treated as foreign vessels, and restricted in their trade, by all the disabilities to which foreign ships are subject. The objects of their incorporation declared in their charter import the power to hold and employ such ships.

The question thereupon arises, may a foreign corporation, in order to obtain and keep all the advantages derivable from a trade which can only be advantageously carried on in American vessels, registered as such, under a system which makes a fraudulent registry a forfeiture of the ship, and which requires the oath, that no foreigner has any interest in the ship,—purchase and employ ships for the sole use and benefit of the corporation, and with expressed authority to direct and control their use and disposition, and cover the ownership under a trust in American citizens, they taking the title for that purpose.

I cannot resist the conclusion that this is not only an evasion, but a fraud upon the laws of the United States, which ought not to be sustained or sanctioned, directly or indirectly, and that no court should hold that a trust for such a purpose should be upheld either to give compensation to the trustees or for any other object.

If there was any other purpose, or any other ground upon which the propriety of the trust may be vindicated (and for the purposes of this case it is not necessary to say that there may not have been), it is at least true that there was legal capacity in the company to take the steamships; and the expediency and propriety of doing so was a proper subject of consideration by the board of directors. Whether it was for the interest of the stockholders to pay the purchase-price, and leave the title in third persons, subject to a charge by way of compensation therefor, and subject to any of the hazards consequent thereupon, was a subject of grave consideration, in reference to which the directors, as trustees, were not at liberty to act under the influence of self-interest.

In this aspect of their relation to the subject, the appellants and their associates were not in a situation permitting them to secure to themselves a personal advantage in the matter. The stockholders and creditors were entitled, not only to their vote in the board, but to their influence and argument in the discussion which led to the passage of the resolution in pursuance of which they took title as trustees.

This brings the case within the rule, which rests in the soundest wisdom, and is sustained by the best consideration of the infirmities of our human nature, and called for by the only safe protection of the interests of cestuis que trust, or beneficiaries, viz.:

That trustees and persons standing in similar fiduciary relations, shall not be permitted to exercise their powers, and manage or appropriate the property of which they have control, for their own profit or emolu-

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ment, or as it has been expressed, "shall not take advantage of their situation to obtain any personal benefit to themselves at the expense of their cestuis que trust." Story, Eq. Jur. § 466a; Hill, Trustees, 535.

This by no means assumes that the trustees were not, in this case, in the actual exercise of the highest integrity. I cannot for a moment doubt that in reference to the particular case before us; but the principle is one of great importance, and it forbids any inquiry into the honesty of a particular case. If it would have been competent to select their trustees disconnected from the company, still it was not competent for the directors themselves to create a trust of this description, consider and determine its expediency, and thereby create a claim to compensation in their own favor for the performance of its duties.

For these reasons I think the judgment should be affirmed.

CLERKE, J. The defendant is the receiver of the Accessory Transit Company, now insolvent. It was a corporation created by the republic of Nicaragua; and it carried on business in the city of New York. A purchase was made, on its behalf, in December, 1852, of seven steamships from Mr. Cornelius Vanderbilt, for the purpose of running them on their line between New York and San Francisco, via Nicaragua. Being a foreign corporation, the company could not then take the title, and have the ships registered in its own name; and on the 30th of December, 1852, the board of directors, seven in number, passed a resolution that the vice-president of the company and two of the directors be appointed trustees to receive a transfer of the ships, and hold them subject to the control and disposition of the company. These were the two plaintiffs, Mr. Ogden, the vice-president, and Mr. Wright; and the third was Mr. Snow, since deceased. Mr. Ogden received as vice-president, a salary of $4,000 a year. They were all present at the meeting, and voted for the resolution. They received bills of sale of the ships in their names, and signed an instrument declaring that they had received the bills of sale, and held the ships for the company. On the 27th of July, 1854, the company indemnified each of the trustees by a bond in a penalty of $100,000, against any claims and demands on account of the ships; soon after, an act of congress was passed, authorizing the company to hold steamships in its own name; and thereupon Messrs. Ogden, Wright and Snow transferred the title in them to the company by bills of sale. After this transfer they addressed a letter to the president and directors, claiming compensation as trustees, which the company refused to pay. In 1858, the company became insolvent; and soon afterward the defendant was appointed receiver.

After the transfer to the trustees, they had no more to do with the control and management of the ships than any other members of the board; and the ships were actually run under the supervision of the whole board, by Mr. Vanderbilt, as the agent of the company.

The plaintiffs now claim, by way of compensation, the same commissions as are allowed to executors and administrators. They claim $3,950, being the amount of commission upon the sum of $1,350,000, the amount paid by the company to Vanderbilt, as the purchase-money. They also claim interest on this sum of $3,950, from the 27th of January, 1854, making in the whole $7,900.

It does not appear that the purchase-money, or any portion of it, passed through the hands of the trustees, or that they performed any services, or incurred any risks or responsibilities, beyond taking the bills of sale in their names, and holding them, and executing bills of sale to the company. So that no active duties devolved upon them; and for any responsibilities which they incurred, they were fully indemnified by having the legal title to the ships, and by the bond of indemnity which they subsequently received. They did not, like executors, administrators, guardians and other trustees, become the custodians of the funds of the company, receiving its earnings or paying them out. They demand this sum of $3,950, merely for allowing their names to be inserted in the bills of sale. In my opinion they are not entitled to compensation on any equitable grounds. In all probability, at the time of the passage of the resolution appointing them trustees, neither they, nor any other member of the board, had any idea that compensation would be required, or was necessary. Not a word was said on the subject at the time the resolution was passed, nor was any intimation given by them of a claim for services at any time, until they presented their demand, more than two years and six months afterwards; when they had transferred the ships to the company.

The judgment should be affirmed, with costs.

All concur, except HUNT, C. J., and DWIGHT, J.

Judgment affirmed.

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In re SCHELL.

(53 N. Y. 263.)

Court of Appeals of New York. Sept. 23, 1873.

Appeal from order on settlement of accounts of Edward Schell, trustee, etc., of the estate of Jacob Appley, which disallowed an item of $2,500 charged for his services as such trustee.

Jacob Appley died seized of a large real and personal estate. By his last will and testament he devised and bequeathed all his property, with certain exceptions, to his executors and the survivor of them, upon certain trusts therein named. The will, after reciting the trusts, contained this clause: "And also that my said executors retain and pay unto themselves out of said rents and incomes all costs, charges and expenses that they shall have to pay or be put unto in the fulfillment of this my will, and a reasonable compensation for their services."

By an order of the supreme court, Schell was appointed trustee in place of those named in the will. In his accounts he made a charge in gross of $2,500 for his services. The referee reported in favor of its allowance.

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

RAPALLO, J. The order appealed from shows upon its face that it was made upon the ground that the compensation of the trustee for his services should be limited to commissions, at the rate allowed by statute to executors and administrators, for receiving and paying out moneys.

This is the settled rule in cases where the creator of the trust has made no provision for compensation to the trustee. Under such circumstances the courts have by analogy allowed the same commissions which are by statute allowable to executors and administrators, and have restricted the allowances to those rates.

But where the instrument creating the trust provides that the trustee shall have a compensation for his services in executing the trust, such provision will be enforced. If the instrument declares the rate of compensation, it must be followed. If it establishes no rate, the value of the services should be ascertained by judicial investigation. Meacham v. Sternes, 9 Paige, 398.

The provision of the will in question is that the trustees (of whom the applicant is the successor) shall retain and pay unto themselves, out of the rents and income of the testator's estate, all costs, charges and expenses that they shall have to pay or be put unto in the fulfillment of his will, and a reasonable compensation for their services.

It would seem a sufficiently simple proposition that the question, what is a reasonable sum to be allowed to the trustee over and above his proper disbursements for his services, is a question of fact determinable upon the same principles which would regulate such an inquiry were the controversy one arising upon an employment inter vivos.

But it is claimed on the part of the respondent that the statute which regulates the commissions of executors, administrators and guardians determines that the rate thereby allowed is a reasonable compensation, and that the subject of the amount of compensation is closed to further inquiry. The learned court at special term seems to have adopted this view, and its decision has been affirmed at general term. We cannot concur in the soundness of these conclusions. In the first place, the provisions of the statute do not in terms apply to trustees. The original trustees in this case were the same persons who were named in the will as executors, but their offices as trustees were additional to and distinct from their legal duties as executors. The applicant succeeds to the office of trustee and not of executor. The decisions which apply to trustees the same rules as to compensation which the statute applies to executors, etc., rest upon the principle of analogy and not upon the command of the statute. They are confined to cases where no provision is made by the creator of the trust for the compensation of the trustees. In such cases, there being no express declaration of the creator of the trust that his appointees should be compensated, yet it being unreasonable under ordinary circumstances to require them to perform their responsible duties gratuitously, it is a fair presumption that the testator assumed that they would be entitled to the commissions established by law for similar services when rendered by executors, etc. Where however he expressly provides that they shall have a reasonable compensation for their services, he must be supposed to have intended that the compensation should be reasonable with reference to the special circumstances of his estate and the services which he has required them to perform.

The object of the statute is to furnish a general and arbitrary rule for cases not otherwise provided for; but it should not govern where the testator has, by reason of peculiar circumstances existing in reference to his estate, required extraordinary services on the part of those to whose care he has confided it, and has specially provided that their compensation shall be reasonable, which is equivalent to declaring that it shall be proportioned to the value of the services they may render. By such a direction the testator necessarily confides to the tribunals under whose jurisdiction the administration of his estate may come, the adjustment of the compensation of his trustees, and this is a duty which those tribunals must perform conscientiously upon the evidence before them. It was therefore the duty of the court below in the case to determine whether the sum claimed by the trustee was or was not

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reasonable under the circumstances, and to allow or reduce it according to their judgment, without being controlled by the statute. The case shows that the duties of the trustee were onerous, and involved more than the mere receipt and disbursement of money. He was intrusted with the management of forty houses and lots, the buildings being old and requiring frequent repairs, and the trustee swears that he has given them his personal care and attention, besides attending to the receipt and application of the funds.

Whether the sum of $2,500 allowed by the referee is a reasonable amount is a question for the court below. The report of the referee is not conclusive, but merely for the information of the court. The court, at special term, should exercise its discretion whether to confirm or modify it, and if the amount is in its judgment excessive, it should be reduced, but the amount should be determined with reference to the facts of the case and not by the statute.

The orders of the special and general terms should be reversed, and the proceedings remitted to the court below to rehear at special term the motion to confirm the report of the referee.

The costs of the appellant should be allowed to him out of the fund.

All concur, except GROVER, J., not voting. Ordered accordingly.

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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,

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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.

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HUNT v. ROUSMANIER'S ADM'RS.

(8 Wheat. 174.)

Supreme Court of the United States. March 14, 1823.

Appeal from circuit court of Rhode Island.

The original bill, filed by the appellant, Hunt, stated, that Lewis Rousmanier, the intestate of the defendants, applied to the plaintiff, in January, 1820, for the loan of $1,450, offering to give, in addition to his notes, a bill of sale, or a mortgage of his interest in the brig Nereus, then at sea, as collateral security for the repayment of the money. The sum requested was lent; and on the 11th of January the said Rousmanier executed two notes for the amount; and on the 15th of the same month, he executed a power of attorney, authorizing the plaintiff to make and execute a bill of sale of three-fourths of the said vessel to himself, or to any other person; and in the event of the said vessel, or her freight, being lost, to collect the money which should become due on a policy by which the vessel and freight were insured. This instrument contained also, a proviso, reciting, that the power was given for collateral security for the payment of the notes already mentioned, and was to be void on their payment; on the failure to do which, the plaintiff was to pay the amount thereof, and all expenses, out of the proceeds of the said property, and to return the residue to the said Rousmanier. The bill further stated, that on the 21st of March, 1820, the plaintiff lent to the said Rousmanier the additional sum of $700, taking his note for payment, and a similar power to dispose of his interest in the schooner Industry, then also at sea. The bill then charged, that on the 6th of May, 1820, the said Rousmanier died insolvent, having paid only $200 on the said notes. The plaintiff gave notice of his claim; and on the return of the Nereus and Industry, took possession of them, and offered the intestate's interest in them, for sale. The defendants forbade the sale; and this bill was brought to compel them to join in it. The defendants demurred generally, and the court sustained the demurrer; but gave the plaintiff leave to amend his bill. Hunt v. Ennis, 2 Mason, 244, Fed. Cas. No. 6,889.

The amended bill stated, that it was expressly agreed between the parties, that Rousmanier was to give specific security on the Nereus and Industry; and that he offered to execute a mortgage on them. That counsel was consulted on the subject, who advised, that a power of attorney, such as was actually executed, should be taken in preference to a mortgage, because it was equally valid and effectual as a security, and would prevent the necessity of changing the papers of the vessels, or of taking possession of them on their arrival in port. The powers were, accordingly, executed, with the full belief that they would, and with the intention that they should, give the plaintiff as full and perfect security as would be given by a deed of mortgage. The bill prayed, that the defendants might be decreed to join in a sale of the interest of their intestate in the Nereus and Industry, or to sell the same themselves, and pay out of the proceeds the debt due to the plaintiff. To this amended bill, also, the defendants demurred, and on argument, the demurrer was sustained, and the bill dismissed. From this decree, the plaintiff appealed to this court. The cause was argued at the last term.

Mr. Wheaton, for appellant. Mr. Hunter, for respondents.

MARSHALL, C. J., delivered the opinion of the court. The counsel for the appellant objects to the decree of the circuit court on two grounds. He contends, 1. That this power of attorney does, by its own operation, entitle the plaintiff, for the satisfaction of his debt, to the interest of Rousmanier in the Nereus and the Industry. 2. Or, if this be not so, that a court of chancery will, the conveyance being defective, lend its aid to carry the contract into execution, according to the intention of the parties.

1. We will consider the effect of the power of attorney. This instrument contains no words of conveyance or of assignment, but is a simple power to sell and convey. As the power of one man to act for another, depends on the will and license of that other, the power ceases, when the will, or this permission, is withdrawn. The general rule, therefore, is, that a letter of attorney may, at any time, be revoked by the party who makes it; and is revoked by his death. But this general rule, which results from the nature of the act, has sustained some modification. Where a letter of attorney forms a part of a contract, and is a security for money, or for the performance of any act which is deemed valuable, it is generally made irrevocable, in terms, or if not so, is deemed irrevocable in law. 2 Esp. 565. Although a letter of attorney depends, from its nature, on the will of the person making it, and may, in general, be recalled at his will; yet, if he binds himself, for a consideration, in terms, or by the nature of his contract, not to change his will, the law will not permit him to change it. Rousmanier, therefore, could not, during his life, by any act of his own, have revoked this letter of attorney. But does it retain its efficacy after his death? We think, it does not. We think it well settled, that a power of attorney, though irrevocable during the life of the party, becomes extinct by his death.

This principle is asserted in Littleton (section 66), by Lord Coke, in his commentary on that section (52b), and in Willes' Reports (105, note, and 565). The legal reason of the rule is a plain one. It seems founded on the presumption, that the substitute acts by virtue of the authority of his principal, existing at the time the act is performed;

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and on the manner in which he must execute his authority, as stated in Combes' Case, 9 Coke, 766. In that case, it was resolved, that "when any has authority, as attorney, to do any act, he ought to do it in his name who gave the authority." The reason of this resolution is obvious. The title can, regularly, pass out of the person in whom it is vested, only by a conveyance in his own name; and this cannot be executed by another for him, when it could not, in law, be executed by himself. A conveyance in the name of a person, who was dead at the time, would be a manifest absurdity.

This general doctrine, that a power must be executed in the name of a person who gives it, a doctrine founded on the nature of the transaction, is most usually engrafted in the power itself. Its usual language is, that the substitute shall do that which he is empowered to do, in the name of his principal. He is put in the place and stead of his principal, and is to act in his name. This accustomed form is observed in the instrument under consideration. Hunt is constituted the attorney, and is authorized to make, and execute, a regular bill of sale, in the name of Rousmanier. Now, as an authority must be pursued, in order to make the act of the substitute the act of the principal, it is necessary, that this bill of sale should be in the name of Rousmanier; and it would be a gross absurdity, that a deed should purport to be executed by him, even by attorney, after his death; for, the attorney is in the place of the principal, capable of doing that alone which the principal might do.

This general rule, that a power ceases with the life of the person giving it, admits of one exception. If a power be coupled with an "interest," it survives the person giving it, and may be executed after his death. As this proposition is laid down too positively in the books to be controverted, it becomes necessary to inquire, what is meant by the expression, "a power coupled with an interest?" Is it an interest in the subject on which the power is to be exercised? or is it an interest in that which is produced by the exercise of the power? We hold it to be clear, that the interest which can protect a power, after the death of a person who creates it, must be an interest in the thing itself. In other words, the power must be engrafted on an estate in the thing. The words themselves would seem to import this meaning. "A power coupled with an interest," is a power which accompanies, or is connected with, an interest. The power and the interest are united in the same person. But if we are to understand by the word "interest," an interest in that which is to be produced by the exercise of the power, then they are never united. The power, to produce the interest, must be exercised, and by its exercise, is extinguished. The power ceases, when the interest commences, and therefore, cannot, in accurate law language, be said to be "coupled" with it.

But the substantial basis of the opinion of the court on this point, is found in the legal reason of the principle. The interest or title in the thing being vested in the person who gives the power, remains in him, unless it be conveyed with the power, and can pass out of him only by regular act in his own name. The act of the substitute, therefore, which, in such a case, is the act of the principal, to be legally effectual, must be in his name, must be such an act as the principal himself would be capable of performing, and which would be valid, if performed by him. Such a power necessarily ceases with the life of the person making it. But if the interest, or estate, passes with the power, and vests in the person by whom the power is to be exercised, such person acts in his own name. The estate, being in him, passes from him, by a conveyance in his own name. He is no longer a substitute, acting in the place and name of another, but is a principal, acting in his own name, in pursuance of powers which limit his estate. The legal reason which limits a power to the life of the person giving it, exists no longer, and the rule ceases with the reason on which it is founded. The intention of the instrument may be effected, without violating any legal principle.

This idea may be in some degree illustrated by examples of cases in which the law is clear, and which are incompatible with any other exposition of the term "power coupled with an interest." If the word "interest," thus used, indicated a title to the proceeds of the sale, and not a title to the thing to be sold, then a power to A., to sell for his own benefit, would be a power coupled with an interest; but a power to A., to sell for the benefit of B., would be a naked power, which could be executed only in the life of the person who gave it. Yet, for this distinction, no legal reason can be assigned. Nor is there any reason for it in justice; for, a power to A., to sell for the benefit of B., may be as much a part of the contract on which B. advances his money, as if the power had been made to himself. If this were the true exposition of the term, then a power to A., to sell for the use of B., inserted in a conveyance to A., of the thing to be sold, would not be a power coupled with an interest, and, consequently, could not be exercised, after the death of the person making it; while a power to A., to sell and pay a debt to himself, though not accompanied with any conveyance which might vest the title in him, would enable him to make the conveyance, and to pass a title, not in him, even after the vivifying principle of the power had become extinct. But every day's experience teaches us, that the law is not, as the first case put would suppose. We know, that a power to A., to sell for the benefit of B., engrafted on an estate conveyed to

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A., may be exercised at any time, and is not affected by the death of the person who created it. It is, then, a power coupled with an interest, although the person to whom it is given had no interest in its exercise. His power is coupled with an interest in the thing, which enables him to execute it in his own name, and is, therefore, not dependent on the life of the person who created it.

The general rule, that a power of attorney, though irrevocable by the party, during his life, is extinguished by his death, is not affected by the circumstance, that testamentary powers are executed after the death of the testator. The law, in allowing a testamentary disposition of property, not only permits a will to be considered as a conveyance, but gives it an operation which is not allowed to deeds which have their effect during the life of the person who executes them. An estate given by will may take effect at a future time, or on a future contingency, and in the meantime, descends to the heir. The power is, necessarily, to be executed after the death of the person who makes it, and cannot exist during his life. It is the intention, that it shall be executed after his death. The conveyance made by the person to whom it is given, takes effect by virtue of the will, and the purchaser holds his title under it. Every case of a power given in a will, is considered in a court of chancery as a trust for the benefit of the person for whose use the power is made, and as a devise or bequest to that person.

It is, then, deemed perfectly clear, that the power given in this case, is a naked power, not coupled with an interest, which, though irrevocable by Rousmanier himself, expired on his death. It remains to inquire, whether the appellant is entitled to the aid of this court, to give effect to the intention of the parties, to subject the interest of Rousmanier in the Nereus and Industry to the payment of the money advanced by the plaintiff, on the credit of those vessels, the instrument taken for that purpose having totally failed to effect its object.

This is the point on which the plaintiff most relies, and is that on which the court has felt most doubt. That the parties intended, the one to give, and the other to receive, an effective security on the two vessels mentioned in the bill, is admitted; and the question is, whether the law of this court will enable it to carry this intent into execution, when the instrument relied on by both parties has failed to accomplish its object. The respondents insist, that there is no defect in the instrument itself; that it contains precisely what it was intended to contain, and is the instrument which was chosen by the parties, deliberately, on the advice of counsel, and intended to be the consummation of their agreement. That in such a case the written agreement cannot be varied by parol testimony. The counsel for the appellant contends, with great force, that the cases in which parol testimony has been rejected, are cases in which the agreement itself has been committed to writing; and one of the parties has sought to contradict, explain or vary it, by parol evidence. That in this case, the agreement is not reduced to writing. The power of attorney does not profess to be the agreement, but is a collateral instrument, to enable the party to have the benefit of it, leaving the agreement still in full force, in its original form. That this parol agreement, not being within the statute of frauds, would be enforced by this court, if the power of attorney had not been executed; and not being merged in the power, ought now to be executed. That the power being incompetent to its object, the court will enforce the agreement against general creditors. This argument is entitled to, and has received, very deliberate consideration.

The first inquiry respects the fact. Does this power of attorney purport to be the agreement? Is it an instrument collateral to the agreement? Or is it an execution of the agreement itself, in the form intended by both the parties? The bill states an offer on the part of Rousmanier to give a mortgage on the vessels, either in the usual form, or in the form of an absolute bill of sale, the vendor taking a defeasance; but does not state any agreement for that particular security. The agreement stated in the bill is, generally, that the plaintiff, in addition to the notes of Rousmanier, should have specific security on the vessel; and it alleges that the parties applied to counsel for advice respecting the most desirable mode of taking this security. On a comparison of the advantages and disadvantages of a mortgage, and an irrevocable power of attorney, counsel advised the latter instrument, and assigned reasons for his advice, the validity of which being admitted by the parties, the power of attorney was prepared and executed, and was received by the plaintiff as full security for his loans. This is the case made by the amended bill; and it appears to the court, to be a case in which the notes and power of attorney are admitted to be a complete consummation of the agreement. The thing stipulated was a collateral security on the Nereus and Industry. On advice of counsel, this power of attorney was selected, and given as that security. We think it a complete execution of that part of the agreement; as complete, though not as safe an execution of it, as a mortgage would have been.

It is contended, that the letter of attorney does not contain all the terms of the agreement. Neither would a bill of sale, nor a deed of mortgage, contain them. Neither instrument constitutes the agreement itself, but is that for which the agreement stipulated. The agreement consisted of a loan of money on the part of Hunt, and of notes for its repayment, and of a collateral security on the Nereus and Industry, on the part of Rousmanier. The money was advanced, the

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notes were given, and this letter of attorney was, on advice of counsel, executed and received as the collateral security which Hunt required. The letter of attorney is as much an execution of that part of the agreement which stipulated a collateral security, as the notes are an execution of that part which stipulated that notes should be given.

But this power, although a complete security, during the life of Rousmanier, has been rendered inoperative by his death. The legal character of the security was misunderstood by the parties. They did not suppose, that the power would, in law, expire with Rousmanier. The question for the consideration of the court is this: If money be advanced on a general stipulation to give security for its repayment on a specific article; and the parties deliberately, on advice of counsel, agree on a particular instrument, which is executed, but, from a legal quality inherent in its nature, that was unknown to the parties, becomes extinct by the death of one of them; can a court of equity direct a new security of a different character to be given? or direct that to be done which the parties supposed would have been effected by the instrument agreed on between them? This question has been very elaborately argued, and every case has been cited which could be supposed to bear upon it. No one of these cases decides the very question now before the court. It must depend on the principles to be collected from them.

It is a general rule, that an agreement in writing, or an instrument carrying an agreement into execution, shall not be varied by parol testimony, stating conversations or circumstances anterior to the written instrument. This rule is recognized in courts of equity as well as in courts of law; but courts of equity grant relief in cases of fraud and mistake, which cannot be obtained in courts of law. In such cases, a court of equity may carry the intention of the parties into execution, where the written agreement fails to express that intention. In this case, there is no ingredient of fraud. Mistake is the sole ground on which the plaintiff comes into court; and that mistake is in the law. The fact is, in all respects, what it was supposed to be. The instrument taken, is the instrument intended to be taken. But it is, contrary to the expectation of the parties, extinguished by an event not foreseen nor adverted to, and is, therefore, incapable of effecting the object for which it was given. Does a court of equity, in such a case, substitute a different instrument for that which has failed to effect its object?

In general, the mistakes against which a court of equity relieves, are mistakes in fact. The decisions on this subject, though not always very distinctly stated, appear to be founded on some misconception of fact. Yet some of them bear a considerable analogy to that under consideration. Among these, is that class of cases in which a joint obligation has been set up in equity against the representatives of a deceased obligor, who were discharged at law. If the principle of these decisions be, that the bond was joint, from a mere mistake of the law, and that the court will relieve against this mistake, on the ground of the pre-existing equity, arising from the advance of the money, it must be admitted, that they have a strong bearing on the case at bar. But the judges in the courts of equity seem to have placed them on mistake in fact, arising from the ignorance of the draftsman. In Simpson v. Vaughan, 2 Atk. 33, the bond was drawn by the obligor himself, and under circumstances which induced the court to be of opinion, that it was intended to be joint and several. In Underhill v. Horwood, 10 Ves. 209, 227, Lord Eldon, speaking of cases in which a joint bond has been set up against the representatives of a deceased obligor, says, "the court has inferred, from the nature of the condition, and the transaction, that it was made joint, by mistake. That is, the instrument is not what the parties intended in fact. They intended a joint and several obligation; the scrivener has, by mistake, prepared a joint obligation."

All the cases in which the court has sustained a joint bond against the representatives of the deceased obligor, have turned upon a supposed mistake in drawing the bond. It was not until the case of Sumner v. Powell, 2 Mer. 36, that anything was said by the judge who determined the cause, from which it might be inferred, that relief in these cases would be afforded on any other principle than mistake in fact. In that case, the court refused its aid, because there was no equity antecedent to the obligation. In delivering his judgment, the master of the rolls (Sir W. Grant) indicated very clearly an opinion, that a prior equitable consideration, received by the deceased, was indispensable to the setting up of a joint obligation against his representatives; and added, "so, where a joint bond has, in equity, been considered as several, there has been a credit previously given to the different persons who have entered into the obligation." Had this case gone so far as to decide, that "the credit previously given" was the sole ground on which a court of equity would consider a joint bond as several, it would have gone far to show, that the equitable obligation remained, and might be enforced, after the legal obligation of the instrument had expired. But the case does not go so far; it does not change the principle on which the court had uniformly proceeded, nor discard the idea, that relief is to be granted, because the obligation was made joint, by a mistake in point of fact. The case only decides, that this mistake, in point of fact, will not be presumed by the court, in a case where no equity existed antecedent to the obligation,

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where no advantage was received by, and no credit given to, the person against whose estate the instrument is to be set up. Yet, the course of the court seems to be uniform, to presume a mistake, in point of fact, in every case where a joint obligation has been given, and a benefit has been received by the deceased obligor. No proof of actual mistake is required; the existence of an antecedent equity is sufficient. In cases attended by precisely the same circumstances, so far as respects mistake, relief will be given against the representatives of a deceased obligor, who had received the benefit of the obligation, and refused against the representatives of him who had not received it. Yet the legal obligation is as completely extinguished in the one case as in the other; and the facts stated, in some of the cases in which these decisions have been made, would rather conduce to the opinion, that the bond was made joint, from ignorance of the legal consequences of a joint obligation, than from any mistake in fact.

The case of Lansdown v. Lansdown, Mos. 364, if it be law, has no inconsiderable bearing on this cause. The right of the heir-at-law was contested by a younger member of the family, and the arbitrator to whom the subject was referred decided against him. He executed a deed in compliance with this award, and was afterwards relieved against it, on the principle that he was ignorant of his title. The case does not suppose this fact, that he was the eldest son, to have been unknown to him; and if he was ignorant of anything, it was of the law, which gave him, as eldest son, the estate he had conveyed to a younger brother. Yet he was relieved in chancery against this conveyance. There are certainly strong objections to this decision in other respects; but, as a case in which relief has been granted on a mistake in law, it cannot be entirely disregarded.

Although we do not find the naked principle, that relief may be granted on account of ignorance of law, asserted in the books, we find no case in which it has been decided, that a plain and acknowledged mistake in law is beyond the reach of equity. In the case of Lord Irnham v. Child, 1 Brown, Ch. 91, application was made to the chancellor to establish a clause, which had been, it was said, agreed upon, but which had been considered by the parties, and excluded from the written instrument, by consent. It is true, they excluded the clause, from a mistaken opinion that it would make the contract usurious, but they did not believe that the legal effect of the contract was precisely the same as if the clause had been inserted. They weighed the consequences of inserting and omitting the clause, and preferred the latter. That, too, was a case to which the statute applied. Most of the cases which have been cited were within the statute of frauds, and it is not easy to say, how much has been the influence of that statute on them.

The case cited by the respondent's counsel from Precedents in Chancery, is not of this description; but it does not appear from that case that the power of attorney was intended, or believed, to be a lien. In this case, the fact of mistake is placed beyond any controversy. It is averred in the bill, and admitted by the demurrer, that "the powers of attorney were given by the said Rousmanier, and received by the said Hunt, under the belief that they were, and with the intention that they should create, a specific lien and security on the said vessels." We find no case which we think precisely in point; and are unwilling, where the effect of the instrument is acknowledged to have been entirely misunderstood by both parties, to say, that a court of equity is incapable of affording relief. The decree of the circuit court is reversed; but as this is a case in which creditors are concerned, the court, instead of giving a final decree on the demurrer, in favor of the plaintiff, directs the cause to be remanded, that the circuit court may permit the defendants to withdraw their demurrer, and to answer the bill.

Decree: This cause came on to be heard, on the transcript of the record of the circuit court of the United States for the district of Rhode Island, and was argued by counsel: on consideration whereof, this court is of opinion, that the said circuit court erred, in sustaining the demurrer of the defendants, and dismissing the bill of the complainant. It is, therefore, decreed and ordered, that the decree of the said circuit court in this case be, and the same is hereby, reversed and annulled. And it is further ordered, that the said cause be remanded to the said circuit court, with directions to permit the defendants to withdraw their demurrer, and to answer the bill of the complainants.

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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

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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

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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

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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.

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RENARD v. CLINK et al.

(51 N. W. 692, 91 Mich. 1.)

Supreme Court of Michigan. March 18, 1892.

Appeal from circuit court, Charlevoix county, in chancery; Jonathan G. Ramsdell, Judge.

Suit to foreclose a mortgage by Louisa Renard against Alice A. Clink, Eliza S. Fogg, John Nichols, and Walter L. French. Bill dismissed. Complainant appeals. Reversed.

Norton & Keat, for appellant. S. H. Clink, for appellees.

MONTGOMERY, J. The bill in this cause was filed to foreclose a mortgage executed by the defendant Alice A. Clink to one A. H. Van Dusen, and by him assigned to complainant. The other defendants are subsequent purchasers with notice, after the mortgage became due. A foreclosure at law was attempted, a sale made, and a deed executed to complainant; but, owing to the fact that the assignment of the mortgage to complainant was not of record at the time of said attempted foreclosure, that proceeding proved ineffectual. After the complainant had obtained her deed on the foreclosure at law, and before the filing of the present bill, the defendant Clink tendered to complainant the amount due upon the mortgage, exclusive of the costs of such former foreclosure; and in this proceeding it is claimed that such tender operated to discharge the lien of the mortgage. The court below sustained this defense, and dismissed the bill.

It is made clear by the testimony that the complainant, at the time she refused the tender, supposed that she had acquired title by her former foreclosure, and that, notwithstanding this, she was ready to accept the amount of the mortgage, interest, and costs. It also appears that she offered to take the money tendered so far as it would go, but that defendant refused to permit this unless she would accept it in full payment and discharge of the mortgage. Under these circumstances, we think the court below erred in dismissing the bill. Under the repeated rulings of this court, a tender of the full amount due upon the mortgage will operate to discharge the lien of the mortgage if the tender be refused without adequate excuse. Moynahan v. Moore, 9 Mich. 9; Eslow v. Mitchell, 26 Mich. 500; Sager v. Tupper, 35 Mich. 134; Stewart v. Brown, 48 Mich. 383, 12 N. W. 499. But in the present case it appears beyond question that the complainant had no purpose of exacting from the defendant any sum beyond what she believed to be her legal due. While it is a general rule that equity will not relieve against a mistake of law, this rule is not universal. Where parties, with knowledge of the facts, and without any inequitable incidents, have made an agreement or other instrument as they intended it should be, and the writing expresses the transaction as it was understood and designed to be made, equity will not allow a defense, or grant a reformation or rescission, although one of the parties may have mistaken or misconceived its legal meaning, scope, or effect. Martin v. Hamlin, 18 Mich. 354; Lapp v. Lapp, 43 Mich. 287, 5 N. W. 317. But where a person is ignorant or mistaken with respect to his own antecedent and existing private legal rights, interest, or estate, and enters into some transaction the legal scope and operation of which he correctly apprehends and understands, for the purpose of affecting such assumed rights, interests, or estates, equity will grant its relief, defensive or affirmative, treating the mistake as analogous to, if not identical with, a mistake of fact. 2 Pom. Eq. § 849, p. 314; Reynell v. Sprye, 8 Hare, 222; Blakeman v. Blakeman, 39 Conn. 320; Whelen's Appeal, 70 Pa. St. 410; Hearst v. Pujol, 44 Cal. 230; Morgan v. Dod, 3 Colo. 551; Cooper v. Phibbs, L. R. 2 H. L. 149; Lansdowne v. Lansdowne, 2 Jac. & W. 205. In Myer v. Hart, 40 Mich. 517, the mortgagor filed his bill to set aside a mortgage sale, and asked that the premises be relieved from the mortgage lien. The court found that the mortgagee was mistaken as to his legal rights, but was acting in good faith, and refused to enforce the statutory penalty, and decreed that the mortgagor pay the mortgage debt as a condition to relief. In Canfield v. Conkling, 41 Mich. 371, 2 N. W. 191, a bill was filed to set aside a mortgage, and to recover the penalty for refusal to discharge it on tender of the amount due. The court found that the tender was sufficient, and say: "He [defendant] was bound to accept the tender, and complainant had made out a sufficient case for relief. But the question was one on which he might be mistaken without any serious fault, and we do not think it one where the mortgage ought to be held canceled without payment; nor is it a case calling for the statutory penalty for a willful and knowing wrongful refusal to discharge the mortgage." The decree below should be reversed, and a decree entered in this court providing for a sale of the mortgaged premises to satisfy the amount due and unpaid upon the mortgage. The defendant will recover the costs of the court below, and the complainant will be entitled to the costs incurred in this court. The other justices concurred.

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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

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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.

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PETERSON v. GROVER et al.

(20 Me. 363.)

Supreme Judicial Court of Maine. July Term, 1841.

Bill in equity, heard on bill, answer, and proof. The facts are stated in substance in the opinion of the court.

Mr. Thacher, for plaintiff.
Mr. Hobbs, for defendants.

SHEPLEY, J. The bill alleges, in substance, that in the year 1821, the complainant made a mistake in writing a deed of release of a lot of land in the township now called Cutler, by writing the word "south-east" instead of "south-west," in stating the first bound of the lot. That the effect of this mistake was to describe the lot immediately easterly and adjoining, which was owned by the complainant in fee, instead of the one intended to be conveyed, in which he owned only the improvements. That the lot intended to be conveyed, or part of it, is now numbered twenty-one, and that conveyed is numbered twenty. That one of the grantees entered upon and has continued to possess the lot intended to be conveyed, while the complainant and his grantees have continued in the possession of the one conveyed. The mistake is clearly proved by the testimony, and is admitted by the answers. The rule, that parol testimony is not to be admitted to vary an instrument in writing, prevails as well in equity as at law. Courts of equity admit an exception to it, where a mistake is alleged; and if it be clearly proved or admitted, they give relief. This is a case in which, according to the rules of equity, the deed should be reformed by correcting the mistake, unless the matters set forth in the answers vary the rights of the parties. The grievances alleged by the respondents, and for which one of them claims to have compensation made before the error is corrected, so far as they are proved by their own testimony, are in substance these. That the complainant was employed by Jones and others, the owners in fee of the lot intended to be conveyed, to survey it, when, in the same year, 1821, one of the respondents purchased it of them. That he was instructed to run out one hundred acres of good land exclusive of the heath, and that he did so run it out. That there were about fifty acres of heath found in the lot, not computed as part of it. That eight or nine years ago the complainant was again employed to run out the land lying northerly of the lot, and that he ran the southerly line of the lot, now partially designated as lot numbered seven, so as to take off a large number of acres belonging to lot 21, as it was originally surveyed. That there was a large quantity of timber on the part so taken off, constituting the principal value of the whole lot. That when the fee of the lot was purchased of Jones and others, the deed was made by copying the boundaries of the lot described in the deed from the complainant. That Jones and others, in the year 1832, conveyed lot numbered seven to Marston and others, who prosecuted one of the respondents for cutting, where he alleges it should have been in his own lot, and that he was obliged to pay damages for it.

The argument for the respondents is, that if the deed from the complainant had described and conveyed lot 21, they should have acquired by that deed and by the deed of the fee of the same, a good title as far northerly as the spotted tree, named in the deed as the north-east corner, although it might have stood more than two hundred and seventy-one rods from the first bound. That in consequence of the deed from Jones and others to Marston and others, they cannot, if the mistake in their deed be now corrected, hold the title to that extent against them; and must lose the most valuable portion of their land, through an error originating with the complainant. The allegations and proofs, out of which this argument arises, are many of them strongly controverted: but let them for this purpose be regarded as proved. The inquiry will then arise, how far the complainant is responsible for such a result. It does not appear, that he made or had any connexion with the deed from Jones and others to one of the respondents. If the mistake in his deed to them be corrected, it will still convey, whatever change may have taken place since, all that it was intended to convey, the improvements on the lot. If the respondent, who received the deed from Jones and others with warranty, obtained no title, it is to be presumed he will obtain a full indemnity for the loss of it. Or if by any process the error in that should also be attempted to be corrected, and it should be found, that by reason of subsequent grants made by them, it could not be so corrected as to operate as it would have done, had it been correctly made, it is to be presumed, that the court would give relief only upon the principle of making one who seeks equity, do equity. It would be a hard rule to hold, that one who had committed an error, was responsible for all the remote and possible consequences, which might arise out of its leading others to commit errors by placing confidence in its accuracy, instead of examining for themselves. This would make him responsible not only for the consequences of his own errors, but for the negligence of others. There is little occasion for it here, where there is apparently a sufficient remedy for all losses against the parties, who conveyed the fee, and who are responsible for their own errors on their covenants. The complainant does not appear to have committed any fraud in the original survey of the lot, for the proof is, that it was run out according to his instructions. The surveys,

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which he has since made, cannot affect the title, and cannot therefore have occasioned any essential injury. The complainant is entled to have the mistake corrected by a reform of the deed so as to make it read as it should have done, and to a decree, that will secure the rights of the parties accordingly.

As he made the mistake, which has brought difficulties upon the other parties as well as upon himself, he is not entitled to costs. Nor are either of the respondents, for they had an opportunity of relieving themselves from expense and trouble by a voluntary correction of an admitted error.

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RIDER v. POWELL.

(28 N. Y. 310.)

Court of Appeals of New York. Sept., 1863.

Action to reform a bond and mortgage so as to conform to a previous oral agreement. There was a judgment for plaintiff, from which defendant appealed.

A. J. Parker, for appellant. James B. Olney, for respondents.

BALCOM, J. Rider and wife conveyed the farm to the defendant, and he took possession of it and also of the personal property he purchased with it. He paid Rider $1,100 in cash, and gave him an indorsed note for $500 in part payment of the purchase-money. The oral contract therefore was so far performed as to relieve it from the operation of the statute of frauds; and the defendant could not retain the farm and personal property without giving Rider such a bond and mortgage as their oral contract called for, unless the fact that there was no fraud or mistake on the part of the defendant, as to the terms of the bond and mortgage he gave to Rider, justified him in so doing.

Parsons says: "The question has often come before our courts, whether oral evidence can be received to show the mistake (in a written contract), and thereby make it in fact a new contract, when an oral contract would be void or not enforceable by the statute of frauds. The course of adjudication is not uniform on this point. But while it cannot be denied that numerous authorities support a disregard of the statute in such cases, others maintain its authority." 1 Pars. Cont. (3d Ed.) 555. Justice Story puts the case, "where the party plaintiff seeks, not to set aside the agreement, but to enforce it, when it is reformed and varied by the parol evidence;" and then says: "A very strong inclination of opinion has been repeatedly expressed by the English courts, not to decree a specific performance in this latter class of cases; that is to say, not to admit parol evidence to establish a mistake in a written agreement, and then to enforce it, as varied and established by that evidence. On various occasions such relief has, under such circumstances, been denied. But it is extremely difficult to perceive the principle upon which such decisions can be supported, consistently with the acknowledged exercise of jurisdiction in the court to reform written contracts, and to decree relief thereon. In America, Chancellor Kent, after a most elaborate consideration of the subject, has not hesitated to reject the distinction as unfounded in justice, and has decreed relief to a plaintiff, standing in the precise predicament." 1 Story, Eq. Jur. (7th Ed.) § 161. Archer, J., in delivering the opinion of the court in Moale v. Buchanan, 11 Gill & J. 325, said: "Had the agreement been entirely by parol, and a part performance, the complainant would have been entitled to relief. Shall he be in a worse situation by having attempted to reduce the whole agreement into the form of a conveyance, if he shall make an omission in the conveyance, by mistake of an essential part of the agreement?" He then answers this interrogatory in the negative, and refers to the opinions of Chancellor Kent, in Gillespie v. Moon, 2 Johns. Ch. 585, and Keisselbrack v. Livingston, 4 Johns. Ch. 144.

A judgment was given by this court in De Peyster v. Hasbrouck, 11 N. Y. 582, reforming a mortgage and enforcing it against premises not originally embraced therein.

The supreme court was therefore justified by authority as well as principle in reforming the bond and mortgage in this case, unless the fact that there was no fraud or mistake on the part of the defendant in fixing their terms, or respecting their terms, renders such decision erroneous. The decisions in Matthews v. Terwilliger, 3 Barb. 50, and Quick v. Stuyvesant, 2 Paige, Ch. 84, support this conclusion instead of militating against it.

I am not aware of any adjudged case, in which it has been held that there must be a mutual mistake of fact by the parties to a written contract or some fraud on the part of the party not mistaken, to entitle the party who made the mistake and who suffers by it, to have such contract reformed so that it will truly express the oral agreement of the parties which was to be carried into effect by the written contract; and such a doctrine would be contrary to good sense and sound principle. In Matthews v. Terwilliger, supra, Gridley, J., said: "Now if by the actual agreement of the parties, Matthews was to pay interest on the purchase-price of the farm, how did it happen that the written contract which should have truly expressed the agreement of the parties, wholly omitted all mention of interest? Was it by the fraudulent design of the complainant, or by the mistake and inadvertence of the defendant? If it was owing to either of these causes, then the complainant is not entitled to have the written contract, on which he has founded his bill, performed; but the defendant is entitled to have it reformed, and the mistake corrected." In that case the complainant endeavored to compel the defendant to specifically perform a contract for the sale of his farm, and the latter set up a mistake in the contract by the omission of an undertaking on the part of the complainant to pay interest on the portion of the purchase-money which was not to be paid down; and there was no mistake on the part of the complainant as to the terms of the contract as written and signed by the parties, and it was framed precisely as he intended it should be. See Haire v. Baker, 5 N. Y. 357. Also, see Waite v. Leggett, 8 Cow. 195; Mowatt v. Wright, 1 Wend. 355.

It seems to me to be entirely clear, upon

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principle, that Rider was entitled to have the bond and mortgage reformed so that they would conform to the oral agreement of the parties for the sale of the farm, although the defendant may have known, at the time they were executed, that they varied from such oral agreement, and did not say or do any thing to induce the scrivener to draw them differently from what they should have been drawn. And as there is no controlling authority to the contrary, I am of the opinion that this court should so hold, and affirm the judgment in the case, with costs.

DAVIES, ROSEKRANS, MARVIN, and SELDEN, JJ., concurred for affirmance.

WRIGHT, J. (dissenting). The action was to have the defendant's bond and mortgage reformed so as to conform to a parol contract between the parties, in pursuance of which it was alleged they were given. The bond and mortgage were to secure the payment of $3,000 (a part of the purchase-money of the plaintiff's farm), in ten annual installments of $300 each. As drawn, interest was to be paid annually on the different installments; but there was no provision for the payment of the interest on the whole principal remaining unpaid, at the time of the payment of such annual installments. In the latter particular the reformation or correction of the bond and mortgage was asked for. The pleadings admitted a parol contract between the plaintiff and defendant, for the sale of the farm of the plaintiff, for the price of $4,600, of which sum $3,000 was to be paid in ten annual installments of $300 each; the first payment to be made on the 1st of December, 1859, and the remaining payments on the 1st of December of each year thereafter; and which sum of $3,000 was to be secured by the defendant's bond and mortgage on the premises. The complaint alleged the contract to have been that the plaintiff was to have interest annually on the whole sum of $3,000; whereas the defendant, in his answer, averred that that sum was made payable in ten annual payments of $300 each, with interest on such annual payments. The judge who tried the cause found only the single fact, viz., that there was a mistake on the part of the plaintiff as to the interest he was to receive by the bond and mortgage; and decided that as matter of law he was entitled to have his mistake corrected, and the bond and mortgage amended or modified, so that he should recover annual interest on the whole sum unpaid, and directed a judgment accordingly.

We can only review the case upon the pleadings and facts found by the judge; and the question is, whether in a case where a contract between parties provides for the performance of a particular act by them, such contract is entitled to be reformed, in equity, because there has been a mistake on the part of one of the contracting parties, as to its terms, when such mistake is not occasioned by any fraud practiced by the other party.

I suppose the rule to be that when there is a mistake on one side (and not a mutual mistake), it may be a ground for rescinding a contract, or for refusing to enforce its specific performance, but not a ground for altering its terms. Adams, Eq. 171. A mistake by the plaintiff when he made the contract, as to the interest he was to receive on the bond and mortgage, would not entitle him to have the contract so modified as to conform to his mistaken impression, though it might be a reason for rescinding the contract on the ground that the minds of the parties never met in making it. In Lyman v. United Ins. Co., 17 Johns. 375, Chief Justice Spencer lays down the true rule of law to govern the case (whether the mistake found relates to the bargain or to the taking of the bond and mortgage) that "before a written contract can be amended or altered on the pretense of mistake, the proof must be entirely clear that that mistake has occurred; and secondly, that the amendment sought would conform the contract to the intention of both parties."

If we were to look, however, in this case, beyond the findings of fact by the court, it is clear that the deed, bond and mortgage constituted the true contract, and that all previous negotiations were merged in them. It would be a violation of the plainest elementary principles to permit a party who has entered into a written contract to have the written contract altered so as to conform to his understanding of a previous negotiation, when the opposite party understood it differently, and as it was set forth in the written contract. The parol bargain was void by the statute of frauds; neither possession being taken under it or consideration paid. It was after the deed, bond and mortgage were executed and delivered, and under them the money was paid and possession taken. The court was asked in the case not only to enforce an agreement void by the statute, but one that the parties did not understand alike.

The judgment of the supreme court should be reversed and a new trial ordered, with costs to abide the event.

DENIO, C. J., and EMOTT, J., concurred. Judgment affirmed on the ground that the judge's finding of facts must be construed as a finding of fraud or a mistake of fact on the part of the defendant.

Judgment affirmed.

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LUDINGTON et al. v. FORD et al.

(33 Mich. 123.)

Supreme Court of Michigan. Jan. Term, 1876.

Appeal from circuit court, Mason county; in chancery.

Shubael F. White and Mariner, Smith & Ordway, for complainants. E. N. Fitch, William L. Mitchell, and Robert Rae, for defendants.

MARSTON, J. The bill in this case was filed to correct a mistake. It is claimed that at the time of the agreement of April 5, 1859, referred to in the case of Ford v. Loomis, 33 Mich. 121, a certain description of land which was not embraced in the tax deeds to Durand, but which was embraced in the deeds from Ford to Durand of November 16, 1858, was by mistake omitted from the deed made by Durand to complainants.

In order for the complainants to obtain the relief sought, it must appear not only that there was an error on both sides, but the mistake must be admitted or distinctly proved. Tripp v. Hasceig, 20 Mich. 254; Case v. Peters, Id. 298.

The complainants have wholly failed in establishing either of these propositions. We are rather of opinion, on the contrary, that the only lands contracted to be conveyed by Durand to the complainants were those described in the tax deeds. None others are embraced in the deed from Durand, and it refers to the tax deeds "for a more full and perfect description of the lands and premises herein and hereby conveyed."

The decree of the court below must be reversed, and the bill be dismissed, with costs of both courts to defendants.

The other justices concurred.

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WELLES v. YATES.

(44 N. Y. 525.)

Commission of Appeals of New York. May, 1871.

Appeal from an order of the general term of the supreme court in the Sixth district, affirming a judgment of the special term in favor of the plaintiff.

The action was brought for the reformation of a deed executed by the plaintiff, he claiming that a reservation of certain timber had been omitted, through mistake on his part; and also for an accounting by the defendant for timber taken from the premises conveyed.

An account was ordered to ascertain the value of the lumber taken since March 10, 1851. The referee found the value at $2,041.72.

Upon the coming in of the referee's report, judgment was entered for the plaintiff that the deed be reformed and corrected, and that he have judgment for the value of the timber removed by the defendant. This judgment was affirmed by the general term in the Sixth district, and the defendant appeals to the court of appeals. The facts appear from the opinion of the court.

E. H. Benn, for appellant. Geo. Sidney Camp, for respondent.

HUNT, C. It will not be necessary to consider in detail the fifteen points presented by the appellant, and so ably argued by his counsel. The discussion of a few of them will settle principles that may serve to decide the case.

The complaint, in substance, alleged that on the 28th of May, 1846, the plaintiff was the owner of one hundred and ten acres of land, being lot No. 4; that on that day he sold the same by executory contract, with the timber thereon, to T. & T. Trevor, for $17 per acre.

That on the 7th day of December, 1846, he was the owner of lot No. 5, containing one hundred and forty-one acres, and then entered into an agreement with the same parties, by which they undertook to cut the timber standing thereon, manufacture the same into boards and planks, and to give the plaintiff one-half of the lumber thus manufactured. Certain other details were provided, which it is not necessary to specify. At the same time, the plaintiff entered into an executory contract with the same persons, for the sale of the one hundred and forty-one acres, at $4 per acre.

That these two pieces of land were of the same value; that the timber growing on the latter piece was of the value of $5,000, and that such timber, in the understanding of the parties, was reserved to the plaintiff by the manufacturing contract mentioned, and that the price of $4 per acre was for the land simply, the timber reserved to the plaintiff. That, after proceeding for some time in the manufacture of the lumber, the purchasers became embarrassed, and the defendant took their place in the contract, and without new or further negotiations, a calculation was made of their payments, the balance found due paid by the defendant, and an absolute deed of the two pieces of land, without reservation of the timber, made by the plaintiff to the defendant.

That the defendant well knew all of the facts in the complaint recited. The plaintiff then avers "that through and by mistake he failed to insert in the said last-mentioned deed (of the one hundred and forty-one acres) any reservation of the timber mentioned and embraced in the contract secondly above mentioned;" and also avers demand and refusal to amend. The prayer is that the deed may be corrected, so as to be made to contain a reservation of the timber, and that the plaintiff may have an accounting as to the timber taken and removed by the defendant.

The judge found that there was an error and mistake on the part of the plaintiff, as averred by him. He found also that there was no mistake on the part of the defendant, but that he well understood the plaintiff's error. He knew that the timber was not reserved, and he knew that the plaintiff supposed and understood that it was reserved. He received the deed, failing to correct the plaintiff's error, but intending to reap the profits of it. He knew that he received of the plaintiff's estate $4,000 or $5,000 more than the plaintiff intended to give him, or than he supposed he had given him. The mistake was unilateral; on the part of the plaintiff only. On the part of the defendant, there was no mistake, but something worse. It was a fraud, as palpable as if he had made affirmative representations to induce the error; as gross as if he had put his hands in the plaintiff's pocket and feloniously abstracted his money. 1 Story, Eq. Jur. §§ 187, 137, 140, 147, 152, 153, 167, 168, 191, 214–217; Waldron v. Stevens, 12 Wend. 100; Wiswall v. Hall, 3 Paige, 313; Hill v. Gray, 1 Starkie, 434; 2 E. C. L. 167.

The point here arises, can there be a judgment to reform the contract, there not being a mutual error, but error on one part and fraud on the other?

It is laid down in many authorities reported and elementary works, that there must be a mutual error, to authorize this interposition of a court of equity. See Story, Eq. Jur. § 155; Story v. Conger, 36 N. Y. 673; Nevius v. Dunlap, 33 N. Y. 676; Lyman v. United States Ins. Co., 17 Johns. 376. The cases where this general statement is made are very numerous, and it is well said that to exercise this power, where one party only has been in error and the other has correctly understood it, would be making a new contract for the parties, and would be doing injustice to the party who made no mistake. On this point two distinctions may be noticed. 1st. Those cases will be found to have in them the element of the honesty on the part of the one correctly understanding the contract. Where two parties enter into a contract, and an error is

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claimed by one party to exist on an important point, which is claimed to be correct by the other party, it cannot be amended, as against the party correctly understanding it, he acting in good faith, and supposing the other to have understood the contract as he did. This rule does not apply where there is fraud. Either fraud or mutual mistake will authorize the reformation. See authorities supra; De Peyster v. Hasbrouck, 11 N. Y. 582; and Gillespie v. Moon, 2 Johns. Ch. 585; Barlow v. Scott, 24 N. Y. 40; Rider v. Powell, 28 N. Y. 310. In his supplementary points the appellant expressly concedes this proposition.

2. This is the consummation of an existing contract, about the terms of which there was no dispute. This contract it was attempted to perform. There has been a failure to perform it, by the misunderstanding, on the part of the plaintiff, of the effect of the instrument by which performance was attempted. A reformation is permitted in such case, although the mistake be not mutual. See the cases before cited, and Coles v. Bowne, 10 Paige, 534.

The result of the cases justifies a reformation of a contract, when there is either a mutual mistake, that is, a mistake common to both parties, or when there is fraud. In his complaint, the plaintiff has simply stated the facts on which he claims relief. After setting forth the facts, he adds, that by mistake, he failed to insert in the deed a reservation of the timber. He does not charge that it was a mistake common to both parties. Nor does he charge it to have been a fraud. He gives no name to the conduct of the defendant. The facts, as found by the referee, and the judgment rendered by him, are in conformity to the allegations of the complaint. They establish, not a mutual or common error, but an error on the part of the plaintiff and fraud on the part of the defendant.

The defendant, by the judgment of the court upon the facts, occupied the place of the original contractors and undertook to perform their contract. This was the finding of the judge, and the evidence, with the circumstances, justified this finding. The fraud was in the deceitful performance. If the judgment of the court below is carried out, he will not be made a party to a new contract, which he would never have assumed. He did assume the original contract. He therefore became bound by it. When the court now compel him to abandon his fraudulent contract, he is remitted to the original agreement. He has no ground therefore to say that by being convicted of a fraud, he is compelled to enter into a new contract. Nor is he to be relieved by the rule that a party seeking to be relieved from fraud, must be ready, prompt and eager in his demand for redress. When a party seeks to rescind a contract, on the ground of fraud, he must undoubtedly be prompt and ready in his disaffirmance. He has the election to affirm or disaffirm. If he elects the latter he must do it at once. He is not permitted to hesitate and balance advantages. Masson v. Bovet, 1 Denio, 69; Beers v. Hendrickson, 6 Rob. (N. Y.) 54; Tomlinson v. Miller, *42 N. Y. 517.

In the present case the party does not ask to have the contract rescinded. He does not seek to have it declared void. On the contrary he insists that it is valid. He asks that it may read exactly as the parties originally agreed, and that all its parts may be completely performed. In such case the rule is that the party must show himself ready and eager for its performance. 1 Story, Eq. Jur. § 776. The plaintiff has given sufficient evidence of his readiness and eagerness to perform. If there has been an unreasonable delay in seeking relief, the court will refuse it. Id., and 1 Fonbl. Eq. bk. 1, c. 6, § 2, note e. It is a question of discretion in the court whether under all the circumstances of time, repeated applications and refusals, the condition, knowledge, expectations and hopes of the parties, the relief should be granted. There is no positive or rigid rule, like that existing in the case of an attempted rescission. I am satisfied with the decision on this point of the court below, and the judge trying the cause. 1 Story, Eq. Jur. § 529; Bidwell v. Insurance Co., 16 N. Y. 263.

The court having jurisdiction of the cause to amend the contract, thereby acquired the right incidentally to give relief in damages, or in such mode as justice required. Rathbone v. Warren, 10 Johns. 587; Kempshall v. Stone, 5 Johns. Ch. 193; Woodcock v. Bennett, 1 Cow. 711; Bidwell v. Insurance Co., 16 N. Y. 263; Story, Eq. § 794; Rundle v. Allison, 34 N. Y. 180.

The defendant contends further, that no damages can be recovered by the plaintiff for timber that was cut more than six years before the commencement of the action. The argument of the defendant's counsel is that the reformation of the deed is merely a means by which the plaintiff seeks to recover damages for the timber taken, and that its correction is simply a part of the evidence to authorize him thus to recover; that his claim is therefore a legal one and cannot extend back beyond six years. The authorities cited by the defendant do not sustain this position. The most plausible is that of Borst v. Corey, 15 N. Y. 505, which was an action to enforce in equity a lien for the unpaid purchase-money of land. The court held that the action could not be sustained, for the reason that the debt sought to be enforced was barred by the statute of limitations. The debt they held to be the principal, the lien the incident, and the principal being ended the incident could not be enforced. At the same time the court conceded that where a mortgage was given to secure the payment of a simple contract debt, the lapse of six years was no bar to an action to foreclose the mortgage. The authority of Mayor v. Colgate, 12 N. Y. 140, was conceded, where an assessment was attempted to be enforced more than six years after the assessment had become due and payable. In the present case the question is not what action can be sustained after the deed is reformed,

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but what action could have been sustained before its reformation? The reformation had not occurred when the suit was commenced, and the right of the parties was determined by the unreformed deed. That deed conveyed to the defendant without reservation, the one hundred and forty-one acres in question. It carried with it complete title to the trees. The plaintiff could not have sustained an action for their conversion. He would have been told that defendant had a legal title. The reformation of the deed in the present case is the principal and not the incident. Damages are the incident, not the principal. It is the title which the judgment of reformation gives that warrants the claim for damages; not the claim for damages that creates the legal title. Complete justice and nothing more is done by the judgment in this respect as it stands.

The defendant also insists that in the view that the recovery against the defendant is sustained upon the ground of fraud and not of mutual mistake, the cause of action is barred in six years from the discovery of the fraud. He further says that the judge has expressly found as a fact that the cause of action has not accrued within six years from the commencement of the suit. I have looked through the testimony carefully, and I do not find any evidence that the plaintiff discovered the fraud perpetrated upon him as early as six years before the commencement of the suit. He did undoubtedly discover his own error soon after its occurrence, and applied to the defendant's agents for its correction. He says that "he had confidence in them and expected all would have gone on as though it had been reserved." In other words, he had discovered his own mistake and believed it to be a mutual mistake, which the defendant would willingly rectify. He says further of the defendant's agent: "He seemed willing to do something. They proposed leaving it out. They never told me I could not have the timber. They always gave me to understand that they would settle it in some way. They always gave me to understand that they would do something about it. Neither of them ever told me I should not have so given the deed, if I did not mean to part with the timber." This evidence does not show a knowledge of the fraud. It does not show the plaintiff's knowledge that the defendant knew, when he took it, that the deed conveyed the absolute ownership of the trees, and that the plaintiff was ignorant of that fact, but supposed the trees were reserved, and that the defendant failed to correct his error. It does not even show that he supposed the defendant meant to insist upon retaining the benefits of the error. It shows rather that the plaintiff was constantly deluded with the idea that the mistake would be corrected. The judge has not found that the plaintiff discovered the fraud within more than six years before suit brought, and there was no evidence on which he could have been justified in so finding.

When the cause of action accrued in this case is a question of law. It was either when the transaction occurred or when the fraud was discovered.

The judge has found that the cause of action did not accrue within six years before suit brought. He states, in his opinion, that the action being to reform the contract, and the accounting being incidental, the action falls under the ninety-seventh section of the Code, which requires it to be brought within ten years after action accrued. He fixes the occurrence of the transaction as the time from which by law the statute begins to run. The defendant now asks us to hold this as a conclusive finding of fact, that the fraud was discovered more than six years before suit brought. This we cannot do. Upon the theory that the running of the statute begins with the date of the occurrence more than six years had elapsed, and such was the theory of the judge trying the cause. On the theory that it runs from the discovery of the fraud, there is no such finding, nor is there evidence to prove it. All presumptions are in favor of the judgment, and the contrary must be taken to be the fact.

I have thus considered the most important of the questions raised by the appellant. There are several other objections stated in the points, which I have also examined. They furnish no valid ground for asking a reversal of the judgment.

A majority of the court concur in the opinion that the plaintiff is entitled to relief. A majority of the court do not concur with me on the question of damages, and are of the opinion that the recovery of damages for a period exceeding six years prior to the commencement of the suit was erroneous. The judgment of the court will therefore be, that the judgment of the general term be affirmed, without costs of the court of appeals to either party, provided that the plaintiff shall, within thirty days after the entry of this order, serve on the defendant's attorney a stipulation, deducting from the judgment of April 6, 1863, the sum of $2,407.45 as of that date. If such stipulation be not served, then the judgment shall be reversed and a new trial ordered, with costs to abide the event. In case the attorneys do not agree as to the details of the judgment, the same can be settled before one of the commissioners.

EARL, C. (dissenting). As I cannot concur with my brethren in this case, I will briefly give the reasons for my dissent.

No mistake is alleged in the contracts, and no reformation of them is claimed. And under no allegations or proof could the contracts be reformed, as a cause of action, for such purpose, would be barred by the statute of limitations.

If, as claimed by the plaintiff in his complaint, and by his counsel on the argument before us, the deed was given in pursuance

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and in fulfillment of the contracts, then there can be no reformation of the deed, as it is in precise conformity to the contracts. If the two contracts of December 7, 1846, are construed together, they must be read as if embodied in one; and the timber is not reserved, and the contract does not provide for any reservation in the deed. The vendees were to get out certain lumber upon shares, and were to pay $4 per acre besides. The contract in reference to the lumber was a binding contract and, if performed as the parties contemplated, it would be fully performed before the deed was required to be given; and such was manifestly the intention of the parties, and hence no provision was made for any reservation in the deed. The deed was given without any mention of the lumber, and hence the only claim the vendor could thereafter have, upon the lumber contract, was to sue for damages on account of its non-performance.

The only contract the defendant ever made or intended to make, as found by the referee, is that which is embodied in the deed. He never intended or was willing to take a deed with any reservation in it. What right then has a court of equity to reform the deed, so as to give him such a deed as he was never bound to take? There was never a time when, by action for specific performance, he could have been compelled to take a deed with a reservation, and the court has no right to compel him to take such a deed by the reformation of the one he did take.

If by fraud or mistake on his part, the plaintiff was induced to give this deed, the only relief he could have was to set aside the deed; and to obtain this relief, it was his duty, on the discovery of the fraud or mistake, to proceed promptly and not ratify the deed by taking the money on the note given for the purchase-price, after he discovered the mistake or fraud.

As I understand the opinion in which my brethren have concurred, it sustains the relief granted to the plaintiff, upon the ground of fraud, and yet the complaint does not in any way intimate even that the defendant was guilty of any fraud, nor does it allege that the defendant used any artifices to procure the deed to be drawn with the reservation omitted, or that he knew it was omitted. The charge of fraud should have been distinctly made in the complaint, so that the defendant could have taken issue upon it.

And it does not appear that any claim was made, at the trial, that the defendant was guilty of fraud, and the case was manifestly not tried upon any such theory. The judge at special term did not put his decision upon the ground of fraud. If he had, he would certainly have decided against the plaintiff, under his finding as to the statute of limitations, as follows: "That within a month after the execution of said deed, the plaintiff discovered said mistake, and shortly thereafter applied to the defendant to correct the same, which he neglected and refused to do; but proceeded to cut large quantities of said timber and appropriate the same to his own use; that the cause of action for which this suit is brought has not accrued to the plaintiff within six years before the commencement of this suit."

The learned judge evidently proceeded and granted relief upon the ground that the scrivener made a mistake in drawing the deed, and this was the ground upon which the general term placed its decision of affirmance. The cause of action for the mistake was not barred by the statute of limitations, because the action was commenced within ten years from the time the alleged mistake occurred.

A cause of action, for such a fraud as is now alleged in this case, is deemed to accrue, when the aggrieved party discovers the facts constituting the fraud, and it is barred in six years from that time. Code, § 91. All the fraud, if any, that was perpetrated in this case was in procuring and taking the deed without the reservation, and this was discovered, according to the finding of the judge, more than nine years before the suit was commenced, and hence I cannot be mistaken in saying that relief was granted at Special Term upon the ground of mistake alone, and not of fraud.

And still further, the counsel for respondent in his argument before us, did not claim to sustain the judgment below upon the ground of fraud, but upon the ground of mistake alone.

Hence under all the circumstances I cannot consent to uphold this judgment, or any part of it, upon the ground of fraud, against the decisions of both courts below, the claims of plaintiff's counsel, and the explicit finding of the judge at special term, that the cause of action for fraud was barred by the statute of limitations. It was the duty of the plaintiff to show that he discovered the fraud within six years before the commencement of the suit, and there can be no pretense that he gave any evidence to show this.

I concur with my brethren in holding that in any view of the case the plaintiff could recover only for timber cut within six years before the suit was commenced.

For affirmance, as modified: LOTT, C. C., and HUNT and LEONARD, CC.

For reversal: EARL and GRAY, CC., not voting.

Judgment affirmed without costs to either party in the court of appeals, provided the plaintiff within thirty days after the entry of this order, serves on the defendant's attorney a stipulation reducing the judgment $2,407.45 and interest from the date of the judgment, April 6, 1863. If such stipulation be not served, then the judgment is reversed and a new trial ordered, costs to abide the event.

Judgment affirmed.

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GLASS v. HULBERT.

(102 Mass. 24.)

Supreme Judicial Court of Massachusetts. Sept. Term, 1869.

Bill in equity for the reformation of a conveyance of lands, and for further relief. The case was reserved by the chief justice "for the consideration and decision of the full court upon the question whether, upon the allegations of the bill, the plaintiff is entitled to relief in equity, and whether the plaintiff has not a full, adequate, and complete remedy at law; the defendant also relying in his answer upon the statute of frauds."

W. H. Swift and S. W. Bowerman, for plaintiff. M. Wilcox and W. T. Filley, for defendant.

WELLS, J. The plaintiff purchased certain lots of land of the defendant, received a deed, and paid the whole amount of the purchase money. This suit is brought for relief or redress in several particulars, dissimilar in character, but all connected with the alleged oral contract of purchase. He complains: First. That a proviso was inserted in his deed, imposing upon him the burden of supporting the whole fence upon the south line of the land conveyed; and that he was induced to assent to its insertion upon the consideration, and false representation of the defendant, that the whole fence upon the east side of said land was to be maintained by the adjoining proprietor, Patrick McDaniels, by virtue of a written obligation to that effect, and that the plaintiff would be relieved from all liability to maintain any fence upon that side; as well as by certain other false representations of the defendant in relation thereto. Second. That he delivered to the defendant, in part payment of said purchase money, three bonds of the United States of $1,000 each, upon the agreement of the defendant that he would allow the full market value of the same, including premium and accrued interest at the time of the transfer thereof; and that the defendant refuses to allow and pay him the value of such premium and interest, amounting together to the sum of $315; that sum being in excess of the whole purchase money due to the defendant. Third. That during the negotiations for the sale and purchase of said lands the defendant pointed out the southeast corner of the premises proposed for sale, and represented that the land of the adjoining proprietor, McDaniels, extended to that point, and that the southerly line of the land sold would extend from the same corner to a point on the highway near a bridge; that the deed was accordingly written and accepted, describing the land as bounded on the south by a line running from the southwest corner of land of said McDaniels, at right angles to the westerly line of said McDaniels, to the highway, the defendant representing said line to be the same line previously pointed out by him to the plaintiff, and that it would strike the highway within one rod of said bridge; whereas in fact the land of said McDaniels did not extend so far as to the southeast corner of the defendant's land as pointed out by him, and the south line, running at right angles therefrom to the highway, did not strike the same within one rod of said bridge; and the deed so written and accepted did not include a considerable part of the land so offered and represented to be sold, and intended and understood by the plaintiff to have been purchased by him; the part so excluded consisting of about 17 acres of land, comprising the greater part of the meadow land in the tract as pointed out by the defendant.

The plaintiff, by his bill, does not seek to rescind the contract and conveyance, and does not offer to reconvey or release to the defendant the land conveyed, nor pray that he may be allowed to do so, and recover back the purchase money paid and bonds delivered in payment. The relief prayed for is that the defendant may be required to convey to the plaintiff the portion of the tract which was so by fraud or mistake omitted from the conveyance already made to release the plaintiff from the proviso in his deed in regard to the fence, and to pay to the plaintiff the aforesaid amount of premium and interest upon said bonds.

The argument of the plaintiff is addressed mainly to the question of the equity jurisdiction of this court in cases of fraud or mistake like that alleged in the present suit. There can be no doubt upon that point. There is no ground upon which jurisdiction in equity is so readily entertained and freely exercised. It is given to this court without restriction, if the parties have not a plain, adequate, and complete remedy at law. Gen. St. c. 113, § 2. Having jurisdiction, the question is as to the appropriate remedy. Jurisdiction in equity is often maintained, even when there is a remedy at law, for the sake of the greater facility it affords for adapting the proper relief to the peculiar necessities of each case. If the party suing is entitled to no relief other than that which may be had in an action at law, he is remitted to his remedy in that form. Even in a proper case for an appeal to equity the remedy must be sought in reference to certain recognized rules and principles of chancery jurisprudence, and is often restricted by provisions of positive law. It is not administered arbitrarily. It must flow out of and accord with the agreements and obligations of the parties, and be adapted to the condition of facts to which it is to be applied.

In the present case, the principal ground of action is the fraud or mistake by which an important part of the subject-matter of the alleged contract of sale and purchase was omitted from the deed of conveyance. If the allegations of the bill should be sustained by

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the proofs, they would show a clear right to have a rescission of the contract; and, upon reconveyance of the land covered by the deed, to have restoration of the bonds and money that were delivered in payment. But this relief the plaintiff does not seek; and his bill contains no offer to reconvey, without which he cannot have such relief. The prayer of the bill, and its sole purpose in this particular, is that the defendant may be compelled to convey to the plaintiff the 17 acres of land which he alleges were included in the oral contract of sale, or represented by the defendant to be so included, but omitted from the deed.

If the case stood merely upon the oral contract of sale, with a conveyance of part and a neglect or refusal to convey another part of the land which was the subject of the alleged contract, we do not think it would be contended that the plaintiff could compel a conveyance of the other land, against a party denying the contract and setting up the statute of frauds. Courts are bound to regard that statute in equity as well as at law. The only remedy in equity, in such case, would be by a rescission of the entire contract, in which the aid of the court could be obtained, if necessary, upon proper grounds.

There has been no part performance here, such as, according to the general practice in courts of equity, would be held to take the case out of the statute of frauds.

1. Payment of the whole consideration is not sufficient for that purpose. Hughes v. Morris, 2 De Gex, M. & G. 356; Thompson v. Gould, 20 Pick. 134, 138; Browne, St. Frauds, § 461; Fry, Spec. Perf. § 403; Dale v. Hamilton, 5 Hare, 369; Clinan v. Cooke, 1 Schoales & L. 22, 41; Allen's Estate, 1 Watts & S. 383; Purcell v. Miner, 4 Wall. 513.

2. Possession by the purchaser, under such a deed as was given to the plaintiff, is possession according to the title thereby conveyed; and is not such a possession as to afford ground for enforcing an alleged oral agreement to convey other land, claimed to have been embraced in the same oral agreement with that conveyed. Moale v. Buchanan, 11 Gill & J. 314. The plaintiff does not appear to have been let into actual possession of the 17 acres, nor to have been induced to do any acts thereon, as owner, under his supposed rights as purchaser.

3. The conveyance of a portion of the land is neither a part performance, nor is it a recognition of the alleged oral contract, so far as it relates to the remaining land not included in the deed. On the contrary, it is in distinct disregard and implied disavowal of such a contract. The deed was given and accepted in execution of the entire contract of sale. Its terms are in literal conformity with the agreement as made. The plaintiff concedes that the southern boundary was stipulated to be described as it is written in the deed, to wit, running from the southwesterly corner of land of McDaniels, and at right angles with his westerly line, to the highway.

But the plaintiff claims that he in fact purchased the whole of a certain tract of land which included the 17 acres now in dispute; that the description of the boundaries, as agreed upon and inserted in the deed, was so agreed on and inserted upon the representation of the defendant and the belief of the plaintiff that it did include said 17 acres; and that the failure of the deed to embrace and convey that part of the land was occasioned either by the mutual mistake of the parties as to the position of the southwest corner of land of McDaniels, or else by the misrepresentation, deceit, and fraud of the defendant in relation thereto. In either alternative, the plaintiff contends that he is entitled to a reformation of the deed, to make it conform to the sale actually contracted by the parties.

Such a reformation not only requires a description of the subject-matter of the sale, different from the express terms of the oral contract, but would enlarge the effect and operation of the deed as a conveyance. It involves the transfer of the legal title to land not covered by the deed already given. It requires a new deed to be executed and delivered by the defendant to the plaintiff. Whether that deed shall embrace the entire subject of the alleged contract of purchase, with a corrected description to make it conform to facts and abuttals as they were represented to be, or merely convey the 17 acres omitted from the deed already given, the order for its execution will enforce the specific performance of a contract for the sale of lands, for which there exists no memorandum, note, or other evidence in writing signed by the party to be charged therewith. As to the 17 acres in dispute, the obligation to convey them rests solely in the oral contract. The defendant denies any contract which includes them. The plaintiff seeks to establish such a contract by parol evidence, and enforce it. The deed itself furnishes no means of making the correction sought for, and no evidence of the contract relied on for this purpose; nor is it in any sense an acknowledgment of the substance of the alleged oral agreement.

The power to rectify deeds and other written instruments undoubtedly exists in this court, under the clauses of the statute giving equity jurisdiction in cases of fraud, accident, and mistake, or the clause giving it generally where there is no adequate remedy at law. It has been exercised in several cases. Canedy v. Marcy, 13 Gray, 373; Metcalf v. Putman, 9 Allen, 97. But the power will be exercised in subordination to other fixed principles of law, and especially to statute provisions. If the rules, restricting the administration of judicial remedies, which are prescribed by the statute of frauds, were to be disregarded in this branch of equity procedure, it would open the door to all the

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forms of fraud which that statute was intended to prevent. The statute is not a mere rule of evidence, but a limitation of judicial authority to afford a remedy. It requires that contracts for the sale of lands, in order to be enforced by judicial proceedings, must be substantiated by some writing. This provision of law cannot be dispensed with merely for the reason that the want of such writing was occasioned by accident, mistake, or fraudulent representations, unless some other ingredient enters into the case to give rise to equities stronger than those which stand upon the oral contract alone, which estop the other party from setting up the statute.

It makes no difference whether the want of a writing was accidental or intentional, by way of refusal or by reason of mutual mistake; nor that there were false representations, and a pretence of conveying the land, but a fraudulent evasion, by means whereof there was no conveyance in fact, and no proper written evidence of the agreement to convey. From the oral agreement there can be derived no legal right, either to have performance of its stipulations or written evidence of its terms. So long, therefore, as the effect of the fraud or mistake extends no further than to prevent the execution, or withhold from the other party written evidence of the agreement, it does not furnish sufficient ground for the court to disregard the statute of frauds, and enter into the investigation of the oral agreement for the purpose of enforcing it. And we do not see that the present case stands otherwise in this respect than it would if there had been no conveyance of any part of the land. As already shown, that conveyance was not in execution or recognition of the contract which the plaintiff seeks, by this bill, to enforce; and does not furnish any reason for taking the case out of the statute, on the ground of part performance. Indeed, the rule seems to be that no part performance by the party sought to be charged will take an agreement out of the statute of frauds, except in those cases where the statute itself provides for such effect. It is part performance by the party seeking to enforce, and not by the other party, to which courts of equity look, in giving relief from the statute. Caton v. Caton, 1 Ch. App. 137, L. R. 2 H. L. 127; Mundy v. Jolliffe, 5 Mylne & C. 167; Buckmaster v. Harrop, 7 Ves. 369; Browne, St. Frauds, § 453.

When the proposed reformation of an instrument involves the specific enforcement of an oral agreement within the statute of frauds, or when the term sought to be added would so modify the instrument as to make it operate to convey an interest or secure a right which can only be conveyed or secured through an instrument in writing, and for which no writing has ever existed, the statute of frauds is a sufficient answer to such a proceeding, unless the plea of the statute can be met by some ground of estoppel to deprive the party of the right to set up that defence. Jordan v. Sawkins, 1 Ves. Jr. 402; Osborn v. Phelps, 19 Conn. 63; Clinan v. Cooke, 1 Schoales & L. 22.

The fact that the omission or defect in the writing, by reason of which it failed to convey the land or express the obligation which it is sought to make it convey or express, was occasioned by mistake, or by deceit and fraud, will not alone constitute such an estoppel. There must concur, also, some change in the condition or position of the party seeking relief, by reason of being induced to enter upon the execution of the agreement, or to do acts upon the faith of it as if it were executed, with the knowledge and acquiescence of the other party, either express or implied, for which he would be left without redress if the agreement were to be defeated.

Upon a somewhat extended examination of the decisions in regard to the effect of the statute of frauds upon the right to have equitable relief where the writing is defective, although many of them, where relief has been granted, hardly come within this definition in the apparent character of the particular facts upon which they were decided, yet we are satisfied that this principle of discrimination is the only one which can give consistency to the great mass of authorities upon this subject.

The case of Smith v. Underdunck, 1 Sandf. Ch. 579, is nearly like the present in its facts; and the opinion of the assistant vice-chancellor would seem to sustain the right of the plaintiff here. There was no fraud in the preparation of the deed. The judgment was based mainly upon the ground of part performance. It was held to be sufficient to take the case out of the statute that the plaintiff had been let into possession as purchaser; and the opinion indicates that possession under and in accordance with a deed of part would be a sufficient possession of the whole for the purpose of requiring a deed of the remainder. But the decision rests upon the fact of possession by the plaintiff of the entire premises, including the part for which the bill was brought. The case arose upon demurrer to the bill, which of course admitted the contract, and the alleged possession of the whole tract. The question of the statute of frauds did not arise therefore.

That the purchaser has been let into possession in pursuance of a parol agreement has been very generally recognized as sufficient to take it out of the statute. The reasoning by which this result was reached is far from satisfactory; and even where the rule prevails there are frequent intimations that it is regarded as trenching too closely upon the spirit as well as the letter of the statute. If it were now open to settle the rule anew, we cannot doubt that it would be limited to possession accompanied with or followed by such change of position of the

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purchaser as would subject him to loss for which he could not otherwise have adequate compensation or other redress; and that mere change of possession would not be held to take a case out of the statute. However it may be elsewhere, we are disposed to hold the rule to be so in Massachusetts.

Previously to the Statutes of 1855, c. 194, and 1856, c. 38 (Gen. St. c. 113, § 2), the power of the court to direct specific performance was confined to written contracts. Rev. St. c. 74, § 8. That power was held to be strictly limited to contracts in which the whole obligation to be enforced was expressed in the writing. Dwight v. Pomeroy, 17 Mass. 303; Brooks v. Wheelock, 11 Pick. 439; Leach v. Leach, 18 Pick. 68; Buck v. Dowley, 16 Gray, 555; Park v. Johnson, 4 Allen, 259. The provision conferring that power specifically in case of written contracts is still retained in the Gen. St. c. 113, § 2. If the subsequent clauses, conferring jurisdiction generally, are to be construed, as we think they are, to extend the power of the court, so as to give relief by way of specific performance, either of contracts wholly unwritten, or of stipulations proved by parol and incorporated into a contract by judicial rectification of a written instrument, as in Metcalf v. Putman, 9 Allen, 97, still that power ought to be exercised with constant reference and in subordination to the condition that "the party asking relief has not a plain, adequate, and complete remedy at common law," which accompanied each enlargement of the equity power of the court, and which prefaces and closes the enumeration of those powers in the General Statutes. The force of this consideration is not lessened when applied to agreements within the statute of frauds.

Mere possession of land does not expose the party to loss or danger of loss without redress at law. The parol agreement of sale and purchase, with permission to enter, though not to be enforced as a valid contract of sale, will constitute such a license as will protect the party from liability for acts done before the license is revoked, and for all acts necessary to enable him to remove himself and his property from the premises after such revocation. If possession be taken without such permission, express or implied, it is no foundation for relief in equity, according to any of the authorities. The argument, for the admission of parol evidence to prove an agreement within the statute of frauds in order to enforce it in equity, drawn from the admissibility of such evidence to maintain a defence, either at law or in equity, seems to be based upon a misconception of the purport and force of the statute, which reaches no farther than to deny the right of action to enforce such agreements.

In this commonwealth, the possession of land by a purchaser is not even notice to a third party of an unrecorded deed. The whole spirit of our laws in respect to real estate is against the policy of enabling parties to acquire or confer title, either legal or equitable, by mere parol and delivery of possession. The possession of the plaintiff, therefore, even if it extended to the tract in dispute, is not sufficient to entitle him to relief against the statute.

The principle, on which courts of equity rectify an instrument, so as to enlarge its operation, or to convey or enforce rights not found in the writing itself, and make it conform to the agreement as proved by parol evidence, on the ground of an omission, by mutual mistake, in the reduction of the agreement to writing, is, as we understand it, that in equity the previous oral agreement is held to subsist as a binding contract, notwithstanding the attempt to put it in writing; and upon clear proof of its terms the courts compel the incorporation of the omitted clause, or the modification of that which is inserted, so that the whole agreement, as actually intended to be made, shall be truly expressed and executed. Hunt v. Rousmaniere, 1 Pet. 1; Oliver v. Mutual Commercial Marine Ins. Co., 2 Curt. 277, Fed. Cas. No. 10,498. But when the omitted term or obligation is within the statute of frauds, there is no valid agreement which the court is authorized to enforce, outside of the writing. In such case, relief may be had against the enforcement of the contract as written, or the assertion of rights acquired under it contrary to the terms and intent of the real agreement of the parties. Such relief may be given as well upon the suit of a plaintiff seeking to have a written contract, or some of its terms, set aside, annulled, or restricted, as to a defendant resisting its specific performance. Canedy v. Marcy, 13 Gray, 373; Gillespie v. Moon, 2 Johns. Ch. 585; Keisselbrack v. Livingston, 4 Johns. Ch. 148.

Relief in this form, although procured by parol evidence of an agreement differing from the written contract, with proof that the difference was the result of accident or mistake, does not conflict with the provisions of the statute of frauds. That statute forbids the enforcement of certain kinds of agreement without writing; but it does not forbid the defeat or restriction of written contracts; nor the use of parol evidence for the purpose of establishing the equitable grounds therefor. The parol evidence is introduced, not to establish an oral agreement independently of the writing, but to show that the written instrument contained something contrary to or in excess of the real agreement of the parties, or does not properly express that agreement. Higginson v. Clowes, 15 Ves. 516; Clowes v. Higginson, 1 Ves. & B. 524; Squier v. Campbell, 1 Mylne & C. 459, 480.

But rectification by making the contract include obligations or subject-matter to which its written terms will not apply is a direct enforcement of the oral agreement, as

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much in conflict with the statute of frauds as if there were no writing at all. Moale v. Buchanan, 11 Gill & J. 314; Osborn v. Phelps, 19 Conn. 63; Elder v. Elder, 10 Me. 80. In Parkhurst v. Van Cortland, 14 Johns. 15, 32, it is said that, "where it is necessary to make out a contract in writing, no parol evidence can be admitted to supply any defects in the writing." Per Thompson, C. J. Such rectification, when the enlarged operation includes that which is within the statute of frauds, must be accomplished, if at all, under the other head of equity jurisdiction, namely, fraud. Irnham v. Child, 1 Brown, Ch. 92; 1 Story, Eq. Jur. § 770a; Davies v. Fitton, 2 Dru. & War. 225; Wilson v. Wilson, 5 H. L. Cas. 40, 65; Manser v. Back, 6 Hare, 443; Clarke v. Grant, 14 Ves. 519; Clinan v. Cook, 1 Schoales & L. 22.

The fraud most commonly treated as taking an agreement out of the statute of frauds is that which consists in setting up the statute against its performance, after the other party has been induced to make expenditures, or a change of situation in regard to the subject-matter of the agreement, or upon the supposition that it was to be carried into execution, and the assumption of rights thereby to be acquired; so that the refusal to complete the execution of the agreement is not merely a denial of rights which it was intended to confer, but the infliction of an unjust and unconscientious injury and loss. In such case, the party is held, by force of his acts or silent acquiescence, which have misled the other to his harm, to be estopped from setting up the statute of frauds. Hawkins v. Holmes, 1 P. Wms. 770; Parkhurst v. Van Cortlandt, 1 Johns. Ch. 274, 14 Johns. 15; Browne, St. Frauds, § 437 et seq.; Fry, Spec. Perf. §§ 384–388; Caton v. Caton, 1 Ch. App. 137, 147, L. R. 2 H. L. 127. In the last named case it is said that "the right to relief in such cases rests not merely on the contract, but on what has been done in pursuance of the contract." Per Lord Chancellor Cranworth. See, also, 1 Story, Eq. Jur. § 759. But the present case, as we have already seen, does not come within the principle of this ground of equitable relief.

Fraud, which relates only to the preparation, form, and execution of the writing, is sufficient to vitiate the instrument so made. It may be set aside either in equity or at law. If it is made to include land not the subject of the actual sale, it is inoperative as to such land; and the fraud may be shown, for the purpose of defeating its recovery, in an action at law. Walker v. Swasey, 2 Allen, 312, 4 Allen, 527; Bartlett v. Drake, 100 Mass. 174. It has been questioned whether any other effect can be given to such fraud than to defeat the operation of the instrument altogether; and whether a court of equity can reform by giving it a narrower operation, as modified by parol proof, in a case within the statute of frauds. Attorney General v. Sitwell, 1 Younge & C. Exch. 559. The difficulty is that, if the fraud vitiates and defeats the instrument, then the modified agreement to be enforced must be that which is proved by parol evidence; and this seems to violate the statute. But the instrument, in such case, is not void. It is voidable only; and that not at the election of the party who committed the fraud. He is not entitled to control the extent of the effect that shall be given to his fraudulent conduct; and it is not for him to object that the fraud is availed of only to defeat the rights, which he has secured by fraud, beyond what he is fairly entitled to by the terms of the real agreement between the parties. When those are separable, and the nature of the case will admit of it, the court may enforce the written contract in accordance with its terms, giving relief against the fraudulent excess, or the clause improperly inserted. Parol testimony, used to defeat a title or limit an interest acquired under a written instrument, or to convert it into a trust, does not necessarily conflict with the statute of frauds. It has been held that an absolute deed may, in this mode, be converted, in equity, into a mortgage. Washburn v. Merrill, 1 Day, 140; Taylor v. Luther, 2 Sumn. 228, Fed. Cas. No. 13,796; Jenkins v. Eldredge, 3 Story, 181, 293, Fed Cas. No. 7,266; Morris v. Nixon, 1 How. 118; 4 Kent, Comm. (6th Ed.) 143. Whether this can be done in Massachusetts has not yet been decided. Newton v. Fay, 10 Allen, 505. But if it were to be so held, it would not be upon the ground of enforcing a parol agreement to reconvey; but upon the ground that such an agreement, together with proof that the deed was given and accepted only as security for a debt, made out a case of fraud, or trust, which would warrant a decree vacating the title of the grantee, as far as he attempted to hold contrary to the purposes of the conveyance. In such cases the court acts upon the estate or rights acquired under the written instrument; and within the power over that instrument which is derived from the fraud or other ground of jurisdiction. But when it is sought to extend that power to interests in land not included in the instrument, and in relation to which there is no agreement in writing, the case stands differently. Fraud may vitiate the writing which is tainted by it, but it does not supply that which the statute requires. It may destroy a title or right acquired by its means; but it has no creative force. It will not confer title. In the absence of a legal contract by the agreement of the parties, it will not establish one, nor authorize the court to declare one, by its decree.

This distinction is illustrated by the analogous rule in regard to implied trusts. Gen. St. c. 100, § 19. Parol evidence may charge the grantee of lands conveyed with a resulting or implied trust, which equity will en-

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force. But such evidence will not create a trust in lands already held by an absolute title.

A fraudulent misrepresentation, although sufficient to sustain an action for damages, cannot be converted into a contract to be enforced as such. Neither will it furnish the measure by which a written contract may be reformed. In this discussion we have assumed that there was a clear agreement between the parties, which the deed fails to carry out, and to which it might properly be made to conform, but for the obstacle in the statute of frauds.

It has been often asserted that where one by deceit or fraudulent contrivance prevents an agreement intended to be put in writing from being properly written or executed, he shall not avail himself of the omission, and shall not be permitted to set up the statute of fraud against the proof and enforcement of the parol agreement, or of the parol stipulation improperly omitted. But in our opinion this doctrine would practically annul the statute. The tendency of the human mind, when fraud and injustice are manifest, is to strain every point to compass its defeat; and to render full redress to the party upon whom it has been practiced. Mundy v. Jolliffe, 5 Mylne & C. 167; Taylor v. Luther, 2 Sumn. 233, Fed. Cas. No. 13,796. This influence has led to decisions in which the facts of the particular case were regarded more than the general considerations, of public policy upon which the statute is founded and entitled to be maintained. Courts have sometimes regarded it as a matter of judicial merit to wrest from under the statute all cases in which the lineaments of fraud in any form were discernible. But the impulse of moral reprobation of deceit and fraud, however commendable in itself, is liable to mislead, if taken as the guide to judicial decrees.

We apprehend that in most instances where fraud occasioning a failure of written evidence of an agreement or particular stipulation has been held to take the case out of the statute of frauds, there was some fact of prejudice to the party, or change of situation consequent upon the fraud, which was regarded as sufficient to make up the elements of an equitable estoppel. In such case, the argument is transferred to the simple question of the sufficiency of the additional circumstance for that purpose. 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, 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. Maxwell v. Mountacute, Prec. Ch. 526; Browne, St. Frauds, §§ 441–445.

Another class of cases are those where a party acquires property by conveyance or devise secured to himself under assurances that he will transfer the property to, or hold and appropriate it for the use and benefit of, another. A trust for the benefit of such other person is charged upon the property, not by reason merely of the oral promise, but because of the fact that by means of such promise he had induced the transfer of the property to himself. Brown v. Lynch, 1 Paige, 147; Thynn v. Thynn, 1 Vern. 296; Oldham v. Litchfield, 2 Vern. 506; Devenish v. Baines, Prec. Ch. 3; 1 Story, Eq. Jur. § 768.

When these cases are cited in support of the doctrine that artifice or fraud in evading or preventing the execution of the writing is alone sufficient to induce a court of equity to disregard the statute and enforce the oral agreement, the subsequent change of situation or transfer of property, without which the deceit would be innocuous, seems to be overlooked, because it is not strictly in part performance of the agreement sought to be enforced. It must be manifest, however, that without such consequent act there would be no standing for the case in a court of equity. That which moves the court to a decree to enforce the agreement is not the artifice by which the execution of the writing has been evaded, but what the other party has been induced to do upon the faith of the agreement for such a writing. It is not that deceit, misrepresentation, or fraud, of itself, entitles a party to an equitable remedy; but that equity will interfere to prevent the accomplishment of the fraud which would result from the enforcement of legal rights contrary to the real agreement of the parties. Indeed, the fraud which alone justifies this exercise of equity powers by relief against the statute of frauds consists in the attempt to take advantage of that which has been done in performance or upon the faith of an agreement, while repudiating its obligations under cover of the statute. When a writing has been executed, the courts allow the fraud or mistake by which an omission or defect in the instrument has been occasioned to defeat the conclusiveness of the writing, and open the door for proof of the real agreement. But the obstacle of the statute of frauds to the enforcement of obligations, or the security of rights not expressed in the instrument remains to be removed in the same manner as if there were no writing. Phyfe v. Wardell, 2 Edw. Ch. 47; Moale v. Buchanan, 11 Gill & J. 314. The power to reform the instrument is not an independent power or branch of equity jurisdiction, but only a means of exercising the power of the court under its general jurisdiction in cases of fraud, accident, and mistake.

We are aware that the limitation which we

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have undertaken to define has not been uniformly observed or recognized.

In Wiswall v. Hall, 3 Paige, 313, Chancellor Walworth granted a perpetual injunction, and ordered a deed of release of title to land omitted from a deed by fraud and secret contrivance. There was no discussion of the authorities, nor of the principles upon which the case was decided; and no reference to the statute of frauds; and the statute does not appear, by the report, to have been set up against the prayer for relief.

In De Peyster v. Hasbrouck, 11 N. Y. 591, a similar decision was made in the court of appeals in New York. Here again there is no reference to the statute of frauds, no discussion of the principles involved in the decision, and no authority or precedent cited except that of Wiswall v. Hall. The mortgagor whose deed was reformed put in no answer whatever. The defence was made by parties claiming under him, and the statute of frauds does not appear to have been pleaded. Denio, C. J., in giving the opinion, proceeds to say: "It is unnecessary to refer to cases to establish the familiar doctrine that when through mistake or fraud a contract or conveyance fails to express the actual agreement of the parties, it will be reformed by a court of equity, so as to correspond with such actual agreement. The English cases have been ably digested by Chancellor Kent, and the principle has been stated with his accustomed care and accuracy, in Gillespie v. Moon, 2 Johns. Ch. 585."

But in Gillespie v. Moon the relief sought and granted was by way of restricting, and not by enlarging, the operation of the deed. Such relief would not, as already shown, conflict with the statute of frauds; and neither the discussion in that case nor the citation of authorities had reference to the bearing of the statute of frauds upon the question of affording relief upon contracts relating to land. Indeed, the English cases furnish but little aid upon that point, for the reason that the courts there have generally, without reference to the statute of frauds, refused to enforce written contracts with a modification or variation set up by parol proof. Woollam v. Hearn, 7 Ves. 211, and notes on the same in 2 Lead. Cas. Eq. 404; Nurse v. Seymour, 13 Beav. 254.

The principle which was maintained by Chancellor Kent, and upon which the English authorities were cited by him in Gillespie v. Moon, was that relief in equity against the operation of a written instrument, on the ground that by fraud or mistake it did not express the true contract of the parties, might be afforded to a plaintiff seeking a modification of the contract, as well as to a defendant resisting its enforcement. That proposition must be considered as fully established. 1 Story, Eq. Jur. § 161. It is quite another proposition, to enlarge the subject-matter of the contract, or to add a new term to the writing, by parol evidence, and enforce it. No such proposition was presented by the case of Gillespie v. Moon, and it does not sustain the right to such relief against the statute of frauds.

That Chancellor Walworth, in Wiswall v. Hall, did not intend to decide that the statute of frauds could be disregarded if properly set up against such an enlargement of the operation of the written contract is apparent from the remarks of the same learned judge in the subsequent case of Cowles v. Bowne, 10 Paige, 535. He says: "Whether a party can come into this court for the specific performance of a mere executory agreement for the sale of lands, which in its terms is materially variant from the written agreement between the parties that has been executed according to the statute, where there has been no part performance or other equitable circumstance sufficient to take the case out of the statute of frauds, as a mere parol contract between the parties, is a question which it will not be necessary for me to consider in this case."

In Gouverneur v. Titus, 1 Edw. Ch. 480, there was a deed of land described as being in the northwest corner of a township by mistake for the northeast corner. The grantor admitted the real contract, and had corrected the mistake by deed. The only question was whether equity would enforce the corrected deed against the lien of a judgment creditor, who had notice of the mistake. In the opinion it is said: "It is a case in which this court would interfere, as between the immediate parties, to correct the mistake." The judgment was clearly right. The dictum we are disposed to question, unless the deed itself contained some other description by means of which the land might be identified and the mistake corrected.

In Newson v. Bufferlow, 1 Dev. Eq. 379, a deed was reformed, which was made, by fraud, to include land not sold; and the fraudulent grantee was required to execute a reconveyance of the excess. The opinion contains a remark of the court that this power may be exercised as well by inserting what was omitted as by striking out what was wrongfully included. But this remark is clearly obiter dictum, and is not sustained by the authority cited, namely, Gillespie v. Moon.

In Blodgett v. Hobart, 18 Vern. 414, a mortgage was reformed by including other lands omitted by mistake. The statute of frauds was not set up in the answer nor referred to in the opinion of the court, and the answer was considered by the court to be evasive in regard to the alleged agreement for security upon such other lands.

In Tilton v. Tilton, 9 N. H. 385, the court controvert the doctrine of such a limitation, as declared in Elder v. Elder, 10 Me. 80; but the decision did not involve the question so discussed. The case arose from an attempted partition between tenants in common of real estate. There was a written agreement for partition according to the award of certain

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arbitrators named, and the only question was as to the effect of a substitution of other arbitrators by parol. Deeds had been executed, and the plaintiff had fully performed his part of the agreement. It was a case of part performance sufficient to take the case out of the statute of frauds, and was decided upon that ground. Besides, a partition of lands, though effected by mutual deeds of release, is not a contract for the sale of land.

Craig v. Kittridge, 3 Fost. (N. H.) 231, arose upon a partition, and was decided upon the authority of Tilton v. Tilton. Smith v. Greeley, 14 N. H. 378, was a decree upon default, without argument or opinion, against the executors and heirs of a party whose deed, by mutual mistake, failed to include certain land sold. It does not appear whether there was written evidence of the agreement, nor whether there was possession or acts of performance. It was sufficient, perhaps, that the statute was not pleaded, and the default admitted the agreement.

Caldwell v. Carrington, 9 Pet. 86, was an agreement for exchange of lands, and stands entirely upon the ground of part performance.

Notwithstanding contrary decisions and dicta, we are satisfied that upon principle the conveyance of land cannot be decreed in equity by reason merely of an oral agreement therefor against a party denying the alleged agreement and relying upon the statute of frauds, in the absence of evidence of change of situation or part performance creating an estoppel against the plea of the statute. This rule applies as well to the enforcement of such an agreement by way of rectifying a deed as to a direct suit for its specific performance. We are satisfied also that this is the rule to be derived from a great preponderance of the authorities. Whitchurch v. Bevis, 2 Brown, Ch. 559; Woollam v. Hearn, 7 Ves. 211; 2 Lead. Cas. Eq. (3d Am. Ed.) notes, [*414], Am. Notes, 691; Townshend v. Stangroom, 6 Ves. 328; Beaumont v. Bramley, Turn. & R. 41. See, also, Moale v. Buchanan, 11 Gill & J. 314; Osborn v. Phelps, 19 Conn. 63; and Elder v. Elder, 10 Me. 80, already cited above; Adams, Eq. 171, 172; Churchill v. Rogers, 3 T. B. Mon. 81; Purcell v. Miner, 4 Wall. 513.

The prayer in regard to the fence stands differently. If that stipulation had been fraudulently inserted in the deed, the agreement being otherwise, the deed might be reformed by striking out that provision, or requiring a release of it, so as to make the writing correspond with the actual agreement. But upon the allegations of the bill there is no other agreement by which to reform the deed, and to which to make it conform. The plaintiff admits that the stipulation in the deed is precisely in accordance with the actual agreement. The fraud which he alleges relates only to the consideration or inducement upon which he was led to make that agreement; not to the form of the agreement itself. If that stipulation were to be stricken out, the writing would then not express the agreement actually made by the parties. The court cannot rectify an instrument otherwise than in accordance with the actual agreement. It cannot make an agreement for the parties. Hunt v. Rousmaniere, 1 Pet. 1, 14; Brooks v. Stolley, 3 McLean, 523, Fed. Cas. No. 1,962. If the subject-matter of this stipulation were of sufficient materiality, the fraud alleged might have the effect to defeat the whole instrument. But this effect is not sought. The plaintiff's remedy, therefore, is at law, in damages for the deceit and false representation.

The alleged agreement in regard to the premium and accrued interest upon the bonds transferred in payment for the land will not sustain a bill in equity. If such an agreement was made and broken, we see no reason why an action of assumpsit will not lie upon the agreement, or for the overpayment of the agreed price of the purchase. The remedy at law is as effectual as it can be in equity.

The entry must therefore be, bill dismissed.

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HUNTER v. BILYEU et al.

(30 Ill. 228.)

Supreme Court of Illinois. Jan. Term, 1863.

W. H. Herndon, and S. P. Moore, for appellant. J. & D. Gillespie, for appellees.

BREESE, J. John B. Hunter, as administrator of Samuel W. Hunter, deceased, brought his action in the circuit court of Bond county, against Wesley A. and Finis Bilyeu, on a note executed by them to the intestate, dated March 30, 1850, and due March 30, 1855. Pending the action the defendants obtained an injunction on their bill of complaint, to which the administrator, and the heirs-at-law of the intestate, who were minors, and their guardian, together with Joseph Smith, were made defendants.

The bill alleges, that the note sued upon, together with others which were paid, was one and the last of a number of notes they had executed to the intestate, for certain lands lying in Bond county, for which a bond for a deed was executed and delivered to them by the intestate. That they were put into possession of the lands, and made lasting and valuable improvements on some of the tracts, but have discovered that one or more tracts, which they supposed they had bought, were not included in the bond. One of those tracts is described as "the old field tract" lying south-east of Shoal creek, and being part of the west half of the north-west quarter of section twenty-three, in town five north, range four west, containing forty and nineteen-hundredths acres; and the other, the "Gillespie tract," being the east half of the north-west quarter of the north-east quarter of the same section, township and range, containing twenty acres; the undivided half of both which tracts, the complainants allege, was purchased by them of the intestate, and was to have been included in the title bond, but by mistake was left out, and these tracts subsequently sold by the intestate to Joseph Smith.

The bill also alleges, that some time anterior to the commencement of this suit on the note, the administrator had filed a petition in the circuit court, at the September term, 1855, praying the court for an order to authorize him to make a deed to complainants for the land described in the bond; that this petition contained the same errors and mistakes as are now complained of, with another error superadded in describing the lands as being in section "twenty-five." The complainants admit they were made defendants, and had due notice of the pending of the petition, but they did not appear to defend, supposing the lands were described as in the bond, and their being made defendants was a mere ceremony, and the proceedings consistent with their rights. That these errors and mistakes were carried into the decree rendered on this petition, and in the deed which the administrator tendered to them, and by them refused. No exhibit is made of these proceedings or of this deed.

The title bond is alleged to have been written by the intestate, and delivered to the complainants and accepted by them without any objection, on the 30th of March, 1850. In the following year, 1851, the intestate left the state, and in 1852 died, leaving these infant defendants his only heirs at law.

The prayer of the bill is, that the court would order and direct the defendants to convey to complainants all of the land agreed to be conveyed to them by the intestate, and to annul and hold for naught the order of the circuit court in behalf of the administrator, or to amend and correct the decree so as to comport with justice and good conscience, and perpetually enjoin the collection of the note sued on, until they are able to comply with the understanding of Samuel W. Hunter, the intestate.

The bond is made an exhibit, and describes the lands sold, and to be conveyed on payment of the purchase money. They are: "The undivided half of a certain lot, beginning at the south corner of the south-west quarter of section 14, town 5 north, of range 4 west of the third principal meridian; thence running north fifty poles; thence west to the middle of the channel of Shoal creek; thence down the channel of Shoal creek, to the section line; thence east to the beginning corner, containing thirty-eight acres, more or less. Also, the undivided half of so much of the west half of the north-west quarter of section 23, town 5 north, range 4 west of the third principal meridian, lying on the west side of Shoal creek. Also, twenty poles south from the creek on the east line of said half; thence west to said creek; thence up said creek to the beginning. Also, the undivided half of twelve acres, more or less, of the south-west quarter, town 4 west of the third principal meridian, commencing at the south-west corner of said section; thence north fifty; thence east to the middle of the channel of Shoal creek; thence down said creek to the section line; thence west to the beginning. Also, two acres and a half of the west half of the north-west quarter of section 23, in same township and range, commencing at a stake on the east line of said land at the south-east corner of the mile post; thence south twenty poles; thence west twenty poles; thence north twenty poles; thence east twenty poles, to the beginning." This last tract was in a separate bond to Finis Bilyeu, one of the complainants, made at the same time and on the same conditions, as the bond to complainants jointly, and for convenience, no question being made on it, both bonds are considered as one.

There is a slight apparent ambiguity in the description of the undivided half of twelve acres, which is explained by the plat sworn to by the witnesses, and is the tract on the west side of the creek, contained within the

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north and south lines of the tract of thirty-eight acres, if extended west to the section line. There is no dispute about this tract. The tract described as "also twenty poles south from the creek on the east line of said half; thence west to said creek; thence up said creek to the beginning," is understood to describe the mill yard, having the shape of a rectangular triangle, the south line being the perpendicular, the west line the base, and the creek the hypothenuse. About this tract there is no dispute.

The administrator demurred to the bill, which was afterwards withdrawn, and his answer filed, not admitting the mistake alleged, to which there was a replication. At a subsequent term, he also filed a plea of the statute of frauds and perjuries. Smith also answered, denying any knowledge when he purchased, of any sale of the tract south-east of Shoal creek, in section twenty-three. On the hearing, the bill was dismissed as to him.

Much testimony was introduced on behalf of complainants, for the purpose of showing by the declarations of the intestate, that an undivided half of other tracts besides these, namely, the tracts known as the "old field" tract, sold to Smith, and the "Gillespie" tract, were bargained for and sold, but, for some cause not fully explained, omitted from the title bond.

The lasting and valuable improvements were made by complainants on other tracts, about which there is no dispute.

The bill is, in effect, a bill to reform by parol, this title bond by incorporating into it the part lying south-east of the creek, called the "old field" tract, and the "Gillespie" tract, and when reformed, to decree a specific performance. The contract must be reformed before such a decree can pass.

This presents a question which has been much discussed in the courts of this country and of England, and on which there is great contrariety of opinion.

The question is, in a bill to reform a written instrument, in the absence of any allegation or proof of fraud, and on the ground of accident and mistake alone, is parol evidence admissible to prove an agreement to do something further than is contained in the writing, the statutes of frauds and perjuries being relied on in the defense, and which that statute requires to be proved by writing?

Whilst in England, the weight of adjudications seems to be opposed to the admission of parol evidence, in this country, it appears to be the other way. One of the leading cases in England, is that of Woollam v. Hearn, 7 Ves. 211. It is prominent among the Leading Cases of White & Tudor (pt. 1, vol. 2), with copious notes by Hare & Wallace, 510.

In this case the bill filed by Wm. Woollam against Hearn, stated that the rent of seventy-three pounds ten shillings was inserted in the written lease by mistake, or with some unfair view; the real agreement being that the plaintiff was to have the lease upon the same rent as the defendant paid to his lessor, and that he did not pay more than sixty pounds. The prayer was for a specific performance, and that the defendant may be decreed to execute a lease according to the agreement, at the rent of sixty pounds, or such other rent as the defendant paid his lessor. The defendant, in his answer, denied that seventy-three pounds ten shillings was inserted by mistake, or with any unfair view; or that the agreement was that the plaintiff should pay the same rent as the defendant paid, which he admitted was sixty-three pounds. The bill was proved by depositions.

Sir Wm. Grant, M. R., said: "By the rule of law, independent of the statute (of frauds and perjuries), parol evidence cannot be received to contradict a written agreement. To admit it, for the purpose of proving that the written instrument does not contain the real agreement, would be the same as receiving it for every purpose. It was for the purpose of shutting out that inquiry, that the rule of law was adopted. When equity is called upon to exercise its peculiar jurisdiction by decreeing a specific performance, the party to be charged is let in to show, that, under the circumstances, the plaintiff is not entitled to have the agreement specifically performed; and there are many cases in which parol evidence of such circumstances has been admitted, as in Buxton v. Lister, 3 Atk. 383. There on the face of the instrument, a specific sum was to be given for the timbers, but it was shown, by parol, that the defendants were induced to give that, upon the representation that it was valued by two timber merchants which was not true. If this had been a bill brought by this defendant for a specific performance, I should have been bound by the decisions to admit the parol evidence, and to refuse a specific performance. But this evidence is offered, not for the purpose of resisting, but of obtaining a decree, first to falsify the written agreement, and then to substitute in its place a parol agreement to be executed by the court. There is no case in which the court has gone the length now desired. The evidence offered is to vary an agreement in a material part, and having varied it, to procure it to be executed in another form. There is nothing to show that ought to be done; and my opinion being that it ought not, I must dismiss the bill."

In the case of Rogers v. Earl, 1 Dickson, 294, which was a bill to rectify a mistake of the solicitor in drawing a marriage settlement; in Thomas v. Davis, Id. 301, to rectify a mistake in a conveyance by the omission of one of the parcels of land intended to be conveyed; in Sims v. Urry, 1 Ch. Cas. 225, to prove a mistake in the penal sum of a bond, by writing it forty instead of four hundred pounds,—verbal evidence was admitted.

In Hardwood v. Wallace, cited in Targus v.

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Puget, 2 Ves. Sr. 195, where it was proposed to prove a mistake in drawing a settlement; and in Attorney General v. Sitwell, 1 Young & C. 559, etc., where it was proposed to show, by parol, that in a contract with the crown for the sale of a certain manor, with the appurtenances, the advowson was omitted by mistake,—such evidence was rejected, or deemed inadmissible. In this case Baron Alderson said: "I cannot help feeling that in the case of an executory agreement, first to reform and then to decree an execution of it, would be, virtually, to repeal the statute of frauds."

In cases within the statute of frauds, verbal evidence was held inadmissible, as in Dwight v. Pomeroy, 17 Mass. 303, where the plaintiff, being creditor of an insolvent debtor who had executed a deed of assignment in trust, for the benefit of his creditors, filed his bill against the trustees to reform an alleged mistake in the trusts expressed in the deed. And in Elder v. Elder, 10 Me. 80, where the written agreement was for the conveyance of a lot of land in Windham, formerly owned by J. E., and the plaintiff proposed to prove by parol that it was intended to include the adjoining land in Westbrook, under the same ownership, but that this was omitted by mistake. In Osborn v. Phelps, 19 Conn. 63, an agreement for the sale of land was drawn in two separate instruments, one to be signed by the vendor, and the other by the purchaser, and neither of the instruments contained any reference to the other, but each was signed by the wrong party by mistake. This the plaintiff sought to prove by parol evidence, but the court held it inadmissible.

In other American cases, such evidence has been held admissible. In Gillespie v. Moon, 2 Johns. Ch. 585, which was a bill for relief and for the reconveyance of a tract of land, which had been included by mistake or fraud in a deed of conveyance, verbal evidence of the mistake, on a review of all the cases, was admitted, and a reconveyance decreed. In Tilton v. Tilton, 9 N. H. 385, where tenants in common agreed to make partition pursuant to a verbal award, and executed deeds accordingly; but, in the deed to the plaintiff, a parcel assigned to him was omitted by mistake; in a bill for relief, verbal evidence was held admissible, and relief thereupon decreed. So in Langdon v. Keith, 9 Vern. 299, where upon the transfer of a part of several promissory notes, secured by mortgage, an assignment of the mortgagee's entire interest in the mortgage was made, by mistake, instead of a part, relief was decreed upon verbal proof. In De Riemer v. Cantillon, 4 Johns. Ch. 85, where a portion of the land purchased at sheriff's sale was by mistake omitted in his deed to the purchaser, upon parol evidence of the fact the judgment debtors were decreed to convey to the purchaser the omitted parcel. Several other cases are referred to in this note.

It does not appear that the statute of frauds and perjuries was pleaded in any of these cases, though referred to in the argument, and in the opinion of the court.

In Woollam v. Hearn, and in many of the cases referred to in Hare & Williams' notes to that case, a distinction is made between seeking and resisting specific performance, as to the admission of evidence. It is said, though a defendant resisting a specific performance, may go into parol evidence to show that by fraud the written agreement does not express the real terms, a plaintiff cannot do so for the purpose of reforming the agreement and obtaining a specific performance of it as reformed.

This doctrine is critically examined in Gillespie v. Moon, 2 Johns. Ch. 585, before cited. In that case the bill was filed to rectify a mistake in the conveyance which, by an error in the description of the land, conveyed the whole lot, or two hundred and fifty acres, instead of two hundred acres, parcel of the same.

The mistake is positively denied in the answer, and the point was, is parol proof of this mistake admissible, in opposition to the plain language of the deed, and especially in opposition to the defendant's answer?

It will be seen the statute of frauds and perjuries was not set up in the case.

After entering minutely into the parol proof of the fact of the mistake, Chancellor Kent says: "The rule in courts of law is, that the written instrument does, in contemplation of law, contain the true agreement of the parties, and that the writing furnishes better evidence of the sense of the parties, than any that can be supplied by parol. But equity has a broader jurisdiction, and will open the written contract to let in an equity arising from facts perfectly distinct from the sense and construction of the instrument itself. I have looked into most, if not all the cases on this branch of equity jurisdiction, and it appears to me to be established on great and essential grounds of justice, that relief can be had against any deed or contract in writing, founded in mistake or fraud. The mistake may be shown by parol proof, and the relief granted to the injured party, whether he sets up the mistake affirmatively by bill, or as a defense."

After reviewing many of the decisions on this question, the chancellor decides that parol proof was admissible, and that it established the mistake as charged in the bill.

It will be observed, the contract in this case was an executed contract, a deed of conveyance having been made; there was no prayer for a specific performance of a contract, but to correct a mistake in the deed. The chancellor remarks: "Whether such proof be admissible on the part of a plaintiff, who seeks a specific performance of an agreement in writing, and at the same time seeks to vary it by parol proof, has been made a question. Lord Hardwicke, in

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Jacques v. Statham, 3 Atk. 388, seemed to think it might be done, but such proof was rejected in Woollam v. Hearn, 7 Ves. 211 (which we have cited at length); and in Higginson v. Clowes, 15 Ves. 516; and when Lord Redesdale said, in Clinan v. Cooke, 1 Schoales & L. 39, that he could find no decision in which a plaintiff had been permitted to show an omission in a written agreement, by mistake or fraud, he must be understood to refer to the cases of bills for a specific performance of an agreement, which was the case then before him."

This case would seem to decide nothing more than this: that in a bill to correct a mistake in an executed contract, parol proof of the mistake is admissible, and that such proof is as available for one party, or for one purpose, as for another,—as available for the plaintiff in setting up a claim, as for the defendant in resisting it. It is nowhere said, that a bill to reform an executory contract, and then decree a specific performance when reformed, against a denial, in the answer, of any mistake, and the plea of the statute of frauds and perjuries, can be sustained by parol evidence.

This decision, so far as it goes, has been followed by the courts of many other states. The cases are referred to by Hare & Wallace, on pages 539, 540, but in none of them was the denial in the answer accompanied by a plea of the statute of frauds and perjuries. Nor do these cases go farther than to assert the general principle, that independent of this statute, where it is not set up as a defense, parol evidence will be received to correct an alleged mistake in a written executed contract, when asserted by a plaintiff, and is as available for him, as for defendant.

The cases go to the extent of declaring, that parol evidence shall be admissible to correct a writing as well for a plaintiff as against him, thus establishing mutuality and equality in the operation of the doctrine.

In 1 Story, Eq. Jur. § 161, in commenting on the distinction set up, the learned author says, in a note, that it is of a very artificial character, and difficult to be reconciled with the general principles of courts of equity. He says: "The ground is very clear, that a court of equity ought not to enforce a contract, when there is a mistake, against the defendant insisting upon and establishing the mistake; for it would be inequitable and unconscientious. And if the mistake is vital to the contract, there is a like clear ground, why equity should interfere at the instance of the party as plaintiff, and cancel it; and if the mistake is partial only, why, at his instance, it should reform it. In these cases, the remedial practice is equal; and the parol evidence to establish it, is equally open to both parties to use as proof. Why should not the party aggrieved by a mistake in an agreement, have relief in all cases when he is plaintiff, as well as when he is defendant? If the doctrine be founded upon the impropriety of admitting parol evidence to contradict a written agreement, that rule is not more broken in upon by the admission of it for the plaintiff than it is by the admission of it for the defendant. If the doctrine had been confined to cases arising under the statute of frauds, it would, if not more intelligible, at least have been less inconvenient in practice."

In a subsequent case,—Keisselbrack v. Livingston, 4 Johns. Ch. 145,—which was a bill for the specific performance of an agreement in writing to execute a lease for lives "containing the usual clauses, restrictions and reservations contained in the leases given by defendant," the bill stated that a lease was offered, containing a provision that upon every sale of the demised premises, one-fifth of the purchase or consideration money should be taken by the defendant to his own use, which complainant refused to receive, alleging, that at the time of the execution of the writing, it was agreed no such quarter or fifth sales should be demanded or paid.

The defendant did not, in direct and clear terms, deny any such agreement, but denied any other or different contract than the one set forth made in writing, and as to the validity of the supposed verbal agreement, he pleaded the statute of frauds.

The point in the case was, whether this verbal agreement could be established by parol. The learned chancellor says, it did not appear to him, that the statute of frauds had any bearing on the case. "The agreement for the three life lease is in writing, and it has been partly performed, by possession taken and transferred, and rent paid. The right of the plaintiff rests upon the contract in writing, and the only inquiry is, whether there is not a mistake in the generality of the expression, that the lease was to contain the 'usual clause,' etc., and whether the parties did not intend an exception in respect to the quarter sales. There is no doubt of their declared intention to make such an exception at the time the agreement was drawn; and I am inclined to think that the writing is, and ought to be, susceptible of amendment and correction in that particular."

The proof was admitted, and the mistake corrected, partly upon the ground, that the writing itself let in parol proof, to show which were "the usual clauses," etc., and such proof being let in by the contract itself, it might, on the principle of the agreement itself, be applied to correct any mistake manifestly shown to exist, in the general and unqualified terms of that part of the written agreement which depended for its explanation upon external proof.

This court has held, as a general proposition, that the terms of a written agreement cannot be changed by parol. Baker v. Whiteside, Breese, 132; Penny v. Graves, 12 Ill. 298. And so it is held by all courts. At the same time, we have said, that whatever covenants an absolute deed may contain, parol

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evidence may be admitted to show that it was intended as a mortgage, or mere security for the payment of the debt, and the grantor can have relief in equity, and this, where mistake is not alleged. Purviance v. Holt, 3 Gilman, 405; Ferguson v. Sutphen, Id. 547. And it is also held, in Harlow v. Boswell, 15 Ill. 57, where parties commit their contracts to writing, this forms the only evidence of its terms.

In Scott v. Bennet, 3 Gilman, 254, this court said, it is a familiar principle that you may give evidence to explain, but not to vary, add to, or alter a written contract. Courts cannot make a new contract for the parties. But if there is doubt and uncertainty, not about what the substance of the contract is, but as to its particular application, it may be explained, and properly directed.

As a general principle, where a contract is reduced to writing, the writing affords the only evidence of the terms and conditions of the contract; all antecedent and contemporaneous verbal agreements are merged in the written contract.

There is an apparent contradiction in these several opinions, but we think a few familiar considerations will serve to reconcile them, or show that it is not real. The subjects peculiarly proper for the jurisdiction of courts of equity, are well understood to be, fraud, trusts, accident and mistake, and these courts are vested with the power to afford relief in all cases, wherein, by reason of the universality and rigor of the rules of the common law, a remedy cannot otherwise be had. The power to correct a mistake in a writing, is as much within the scope of this jurisdiction as any other mistake. The whole realm of mistake is laid open to the court, and its powers are limitless to correct, on a proper case made. That it should be dormant, when invoked to correct a mistake in a written contract, would be strange indeed. It is no answer to say, that within the rigid rule of law, the power may be exercised, but not outside of it, as that would destroy the rule. In our judgment, it has no such effect. The jurisdiction of a court of chancery to correct mistakes, is no less important to the due administration of justice, and the safety of the citizen, than the rule of the common law, that parol evidence cannot be received to add to, or vary a written contract, and in a court of equity, it must be determined, on the circumstances of each case, which shall prevail, the exercise of an unquestioned power of the court, or the rule of the common law.

The doctrine is undisputed and incontestable, that a deed, absolute on its face, may be shown, by parol, to have been intended by the parties to it, as conditional, merely, and a court of equity, on proper proof, will so hold. This contract is explained by parol evidence, and if it is made to speak a language its words do not import, who will deny that it is within the competency of that court to ascertain the real contract of the parties, and then enforce it, according to the intention of the parties? If a court of equity has not the power to correct mistakes in a deed, or other writing, on convincing proof of the existence of the alleged mistake, great injustice would be perpetrated with impunity. A man sells a vacant lot adjoining the lot on which he has a costly residence, but by the mistake of the scrivener, the deed describes the lot of his residence. An ejectment is brought—the purchaser claiming under his deed—and if no power exists in a court of equity to correct the mistake, he must surrender that which he never sold, and the purchaser recover a property he never bought. A court of chancery should not hesitate to receive parol evidence of this mistake, and on sufficient proof, correct it, else the most flagrant injustice would be perpetrated, and an undoubted power of that court be rendered ineffectual and worthless. There can be no danger in exercising this power, since the court has before it all the facts, and if they are not convincing, the stern rule of law will prevail.

The court has, in many cases, acknowledged and exercised this power, and we do not know that it has been questioned by the bar here or elsewhere.

The doctrine is fully recognized in the case of Broadwell v. Broadwell, 1 Gilman, 599, that a court of chancery will always correct any mistakes of fact which have occurred in drawing up a paper, when a proper case is presented and clearly proved, and then carry into effect the instrument when thus corrected. And herein is found the safeguard for those so litigating, a proper case must be presented and clearly proved. If it be clearly proved, who shall say that a court of equity transcends its powers, or violates the rule of law, in declaring the contract to be as the parties have made it? We cannot think the statute of frauds and perjuries has any application to such cases.

Here the bill is filed to reform this contract, by inserting in it several tracts of land, alleged to have been omitted from it by mistake, and parol evidence is relied on for such purpose; and when reformed, then the prayer is, to decree a specific performance of the contract. This proof makes the contract different from what its words import, and adds to it, and varies it very materially. It, in fact, makes a new and different contract; yet if the mistake is clearly established, which should give way, that rigid rule of the common law, or that power residing in a court of equity, to correct mistakes? The strongest and most convincing evidence will be required, before the common law rule is postponed, and the power of the court exercised. Now, what is the testimony in this case?

It consists, in great part, of loose conversations held by one Gillespie and others, with the intestate, in which he said, there was a mistake in the bond; that the tract lying south-east of Shoal creek, being part of the

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west half of the north-west [quarter] of [section] twenty-three was not in the bond, or not in right, and the Bilyeus had found it out. This witness states nothing in positive terms, but "thinks" the facts were so and so, as he details them. He "thinks" all the lands claimed by complainants were included in the bond, except the Gillespie tract, and thinks that intestate told him some of the numbers were wrong, and some of the land was not named in the bond. He spoke of the west half of the north-west [quarter of section] twenty-three lying south-east of Shoal creek, as not included in the bond, and that he would not rectify the mistake because they could not agree upon a division of the lands according to his understanding of the contract. This witness says that he can neither read nor write, and details only such parts of the conversation, as he "thinks" was had with the intestate. He does not say in positive terms, that the intestate admitted to him he had sold this tract to complainants, or that it was left out of the bond by mistake. No testimony could be more unsatisfactory than his, taking the whole of it together. Fenton says he "thinks" Hunter told him he drew the bond himself and that there was a mistake in it, but does not recollect what the mistake was. He says it was his understanding a bond was given by Hunter to complainants, and notes given for the payment of the money—does not say he ever saw the bond or notes—says the complainants never took possession of the Gillespie tract—on the tract south-east of the creek; they cut some timber off, put a blacksmith shop upon, and pastured the field on it while they and Hunter were in partnership; there was some money paid on the general contract, but don't know how much.

Paine states that Hunter told him complainants were to have half of this tract, when he, Hunter, sold or left, according to the contract as made with complainants, in the sale of the mill, which was in 1850. He had this conversation in the winter after the sale of the mill property; that complainants have cut and hauled saw logs, and Hunter and complainants built a blacksmith shop on this land; and "thinks" complainants repaired the fences some, but is not certain, and they used it as a pasture in connection with Hunter. Hunter also said he had sold the Gillespie tract to them, and that David Hunter was to make a deed to it. Don't know that complainants ever exercised any acts of ownership over this tract. Hunter said there was a mistake in the bond, and if his health would permit, he was coming to town to get it fixed; "thinks" the mistake applied to the tract south-east of Shoal creek, on which there was an old field. Does not know of complainants exercising any acts of ownership over this "old field tract," since they and Hunter dissolved partnership; don't know the numbers of the land.

The testimony of Clouse, and of L. G. Bilyeu, does not differ, substantially, from that of other witnesses.

Smith says, Hunter told him, that all the lands the complainants were to get, were included in the bonds; that half of the timber on the tract lying on the south-east side of Shoal creek, on which there was an old field, was included in the contract with complainants, and that they had got their share off, and that he had not sold the land to them. Wesley Bilyeu had stated to witness that he had an interest in this tract, and Hunter then told him as above stated. Hunter had possession of this tract when witness bought it, and had corn standing in the field on it. George Smith stated that Hunter told him that complainants had no right to the tract lying south-east of Shoal creek, but as soon as he could buy a piece from John Clouse, he would make it right, but they were to have it when he sold or left; understood this same tract was included in the original contract.

This is the substance of the evidence to prove the mistake in the bond, and part performance, which, it is very clear, is wholly insufficient for either purpose. It would be relaxing too much those salutary rules of evidence, which require a contract to be clearly proved, before a specific performance of it will be decreed. It is discretionary with the court, in all such cases, to decree or not a specific performance of a contract, and that discretion will not be exercised except in a very clear case.

This contract was made in March, 1850, and the intestate remained in the state until 1851, during a part of which time he was in partnership with complainants, in using the mill property. They paid their notes as they became due, and not a word of complaint is heard of any mistake. They were impleaded, by the administrator of the intestate, in a petition in chancery, for the purpose of obtaining an order of court, authorizing him to make a deed to them in performance of the covenant; in which suit, it was fully competent for the complainants to have litigated all these matters, but which they neglected to do. Though these proceedings are not pleaded, or set up in bar by the defendants, they might have been, successfully, and the case thus disposed of, rendering unnecessary the examination we have been compelled to give it on the issues made.

We are satisfied nothing has been shown to establish a mistake, its nature, or extent, so clearly, as to leave no doubt on the mind of the actual existence of the alleged mistake. The decree, as to the old field tract, being a part of the west half of the north-west quarter of section twenty-three, lying north-east of Shoal creek, and as to the Gillespie tract, is reversed, and the decree so modified as to exempt those tracts from its operation. The injunction will be dissolved, and the administrator, the appellant here, will be allowed to proceed with his action at law.

Decree modified.

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SWIMM v. BUSH.

(23 Mich. 99.)

Supreme Court of Michigan. April Term, 1871.

Appeal from circuit court, Shiawassee county; in chancery.

The facts appear in the opinion.

Gould & Lyon, for complainant. L. Walker and A. Russell, for defendant.

CAMPBELL, C. J. The bill is filed to enforce the specific performance of a written contract for the sale of a farm in the city of Owosso. The defense rests on the ground that the contract was obtained fraudulently and is unconscionable.

The facts, as we deduce them from the testimony, were in substance these: Bush is a clergyman, residing in Eastern Pennsylvania. He had owned property for many years, and it was in the hands of a tenant. Not far from the end of May, 1868, four persons had written to Bush to negotiate for the purchase of the farm, but nothing had been done to close with them. Early in June, Swimm ascertained that various persons were desirous of buying it, and immediately left home and went down to see Bush, and obtained the contract sued upon, June 8th. He then returned home and got upon the land, although the tenant also remained there and objected. The contract was in consideration of three thousand dollars, viz.: four hundred dollars paid down, and one hundred dollars to be paid on the exchange of deed, and securities for the balance, which was to be in thirty days. Nothing was said in it about possession. A few days after the contract was made, Bush received letters satisfying him that the property was worth more than he had sold it for, and he wrote two consecutive letters to Swimm desiring to be released, to which Swimm paid no attention beyond hastening to take possession. In July, Bush visited Owosso, and this suit was commenced on the 13th, not very far from the time of his arrival. We leave out of consideration many minor facts which do not affect the rights of the parties.

The defense rests upon the claim that Swimm, being in possession of better knowledge of the value and surroundings of the property than Bush, took means to secure the confidence of the latter, and by his misrepresentations and urgency induced him to make the sale at an under value, and thereby defrauded him.

The facts are within a narrow compass, and we are not compelled to pass upon any very complicated questions, either of law or fact. It is not claimed that a sale will be disregarded merely because of an undervaluation. And it is not claimed that the ordinary banter and abating of prices between buyer and seller, when acting on an equal footing, can usually have much weight in such a controversy. The decision must rest upon the presence or absence of such a state of facts as, under all the circumstances, renders the bargain unconscionable. We think such facts existed here.

There is a good deal of difference of opinion among the witnesses as to the value of the property. We have no doubt it was worth at least a thousand dollars more than Swimm paid for it, and we think it clear he thought so. His hasty and clandestine journey to anticipate the other purchasers, and his haste to seize a foothold on the land, go to corroborate strongly the other proofs of value. It is evident he expected to make a very advantageous bargain. It is also evident that Bush had no adequate knowledge of the present value of the farm, or of its prospective value. A visit to Owosso, or ever a full knowledge of the value of the land three years before, would give no means of testing its present value, and it is quite clear he did not know it. Swimm had, then, all the advantage of superior knowledge, and knew that he had it. His statements and his conduct must all be viewed from this standpoint. And a willful misstatement of facts or opinions of value, made under such circumstances, and made with a design to deceive, and actually deceiving Bush to his prejudice, would be fraud in law. Pickard v. McCormick, 11 Mich. 68.

We think the course taken by Swimm was such that it was eminently calculated to deceive Bush, and that the latter cannot be regarded as at fault in believing him. He obtained from a reputable member of the bar, who wrote it in good faith, a letter of introduction, stating that the writer, at the request of Bush's sister, had been looking for a purchaser of the farm, and that Swimm would, as he thought, buy it and pay its value, and he recommended him as a man of wealth and reliability. Swimm also took a letter from Mr. Bloss, a brother-in-law of Bush.

Upon presenting these letters of introduction, Swimm inquired the price of the land, and was answered, four thousand dollars. He said if that was the price there was no use talking; that he hoped to buy it for twenty-six or twenty-eight hundred dollars. Bush then showed him the four letters of inquiry, and asked him about the writers. One of them he said he did not know; which appears to be true. One he gave Bush to understand was not responsible. The other two letters, he said, were written in his own behalf. The statements concerning these three were not correct. Bush went on to question him about the farm and about Owosso. He thereupon gave Bush to understand that Owosso was not flourishing, but was being injuriously affected by Corunna; that property was declining, and that the farm itself was in a very bad condition, as he described it; which was not a very great exaggeration. He, when asked concerning the value of the land, said it was not worth four thousand nor three thousand dollars, and that he had not expected to

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pay more than twenty-eight hundred dollars, but that he would give three thousand, as his wife was born on it and had an affection for it, and an offer of three thousand had been made for it by one of the letters written by a Mr. Martin, the person he said he did not know. Bush desired to take the matter of sale into consideration, and said he would talk it over with his wife (who was then in New Jersey) on her return. Swimm urged him to go at once with him and he would bear the expense. They went at once and saw Mrs. Bush, and the bargain was concluded the same day.

In all of this transaction it is very plain, from a review of the evidence, that Bush was induced by the letters he brought to regard Swimm as a reliable and veracious man, who was acquainted with the facts necessary to form a judgment upon, and would not deceive him. It is just as clear that Swimm knew this, and gave him the answers and made the representations in order to induce him to believe he was getting the outside value of the land, and that it would not be safe to lose a good offer. The representations were of the greatest materiality, and referred to the matters on which any sensible man would found his conclusions. The sale was the result of nothing but the urgency and deceit of Swimm, and such statements coming from a man of undoubted character (as Swimm was naturally assumed to be under the circumstances), might have deceived a man of more experience than Bush. This reason he gave for being willing to pay a larger price than his real estimate of the value, was one which appealed very naturally to the better feelings, and would have considerable weight in confirming the veracity of the purchaser. This reason was without any foundation, as Mrs. Swimm was not born there.

Except as to the condition of the land—which was mainly important on the supposition that the dead state of Owosso rendered the land valueless except for farming—the whole tenor of the representations was contrary to fact.

Owosso was improving rapidly, and not stagnant or retrograding. The land was in demand and was worth more than four thousand dollars, and the purchaser knew this, and went down to Pennsylvania on purpose to prevent other offers from reaching Bush, and used such arguments and made such statements as he found were best adapted to force him into hasty action, for fear of the danger of delay. He induced Bush to abstain from that deliberation which would have inevitably defeated the scheme. And where a party is induced to abstain from informing himself, even material concealment is often sufficient to create fraud, without active misrepresentation.

It does not avail in such a case that sharp business men might not have been so readily deceived. Possibly they might not. But the law does not seek to encourage the practice of cunning arts upon those who are not well qualified to resist them. The character and business capacity of the person operated on form a very important element in fraud. If the effect is produced, and is intended to be produced, that is enough. There can be no splitting of hairs to sustain unconscionable action. Every one is expected to use reasonable diligence in resisting deceit, but each case must depend on its own facts, and this case shows no fault in Bush. He was obliged to depend on information, and he sought it from what he had reason to believe was a reliable source. No man of sense would have done as he did without being deceived.

We do not feel called upon to lay down any rule as to how far smartness may go without crossing the legal boundaries of fraud. Neither are we disposed to consider the somewhat unprofitable subject of the impeachment of witnesses. The circumstances which are most important are not left at all in doubt, and there can be no reason for refusing relief in this cause to the defendant, except upon the theory that he was in fault in allowing himself to be overreached in the bargain. We do not think he contributed enough to his own loss to be subject to this criticism.

The decree below must be reversed, and the bill dismissed, with costs of both courts. If, after the taxation of costs, any balance of the four hundred dollars advanced by Swimm remains in excess of the taxation, defendant must pay over such balance within thirty days after demand, or may deposit it with the clerk of this court for the benefit of complainant.

The other justices concurred.

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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-

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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.

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MITCHELL et al. v. McDOUGALL.

(62 Ill. 498.)

Supreme Court of Illinois. Jan. Term, 1872.

Appeal from circuit court, McLean county; Thomas F. Tipton, Judge.

Bill in equity to rescind a conveyance of lands on the ground of misrepresentation and fraud.

R. E. Williams, for appellants. Benjamin & Weldon, for appellee.

BREESE, J. In Lockridge v. Foster, 4 Scam. 569, which was a bill in chancery praying, in the alternative, for the rescission of an executed contract for the sale of land, on the ground of fraudulent representations by the vendor, this court said, on the principles of equity and justice, a contract, to be obligatory, must be justly and fairly made. The contracting parties are bound to deal honestly, and act in good faith with each other. There should be a reciprocity of candor and fairness. Both should have equal knowledge concerning the subject-matter of the contract; especially ought all the facts and circumstances which are likely to influence their action to be made known. If they have not mutually this knowledge, nor the same means of obtaining it, it is then a duty incumbent on the one having the superior information to disclose it to the other. In making the disclosure, he is bound to act in good faith and with a strict regard to truth. If he makes false representations respecting material facts, or intentionally conceals or suppresses them, he acts fraudulently, and renders himself responsible for the consequences which may result. Fraud may consist as well in a suppressio veri as in a suggestio falsi, for, in either case, it may operate to the injury of the innocent party. A false representation by the vendor, which influences the conduct of the other party, and induces him to make the purchase, will vitiate and avoid the contract. And in making the representation, it is immaterial whether he knows it to be false or not, for the consequences are the same to the vendee. If he relies on the truth of the declaration, he is equally imposed on and injured, and ought to have redress from the one who has been the cause of the injury. So a suppression or concealment by the vendor of facts, which, if known to the vendee, would have the effect to prevent him from making the purchase, will, in equity, equally vitiate the contract. A court of equity will not enforce and carry into effect contracts thus unfairly and fraudulently made; and when the injured party invokes its aid in proper time, and the circumstances of the case will permit it to be done, the contract will be rescinded and the parties restored to their original rights.

The court refers to 1 Story, Eq. Jur. §§ 191–197, 204–207, and 2 Kent, Comm. 482, 490.

Sections 191–197, inclusive, treat of false suggestions, and fully support the doctrine of the case cited, on that point. Sections 204 to 207, inclusive, treat of the doctrine of suppressio veri, a doctrine which, though true in morals, is not the doctrine recognized by courts of equity, except under certain circumstances.

The extreme doctrine of some courts is, that undue concealment of a fact resting in the knowledge of one contracting party, which, if known to the other, would have prevented the contract, will vitiate the contract.

The true definition is found in section 207, supra, where it is said undue concealment which amounts to a fraud in the sense of a court of equity, and for which it will grant relief, is the non-disclosure of those facts and circumstances which one party is under some legal or equitable obligation to communicate to the other, and which the latter has a right, not merely in foro conscientiæ, but juris et de jure, to know.

Under such circumstances, the concealment of an important fact would be improper and unjust; it would be an undue concealment on account of the fiduciary relation existing; but where two parties, in the absence of any such relation, are treating for an estate, and the purchaser knows, from surface indications, or otherwise, by actual boring, there is a valuable mine upon the land, the purchaser is not bound to disclose that fact to the owner, for the means of information on the subject were as accessible to the owner of the land as to the purchaser.

The rule stated by Chancellor Kent, at page 482, referred to in the opinion in 4 Scam., supra, is that each party is bound to communicate to the other his knowledge of the material facts, provided he knows the other to be ignorant of them, and they be not open and naked, or equally within the reach of his observation.

This, we admit, is a rule of moral obligation, but not enforced in the courts. It is by them qualified, as we have stated above, that the party in possession of the facts must be under some special obligation, by confidence reposed, or otherwise, to communicate them truly and fairly, and this is the doctrine of this court in the cases of Fish v. Cleland, 33 Ill. 243, and Cleland v. Fish, 43 Ill. 282, referred to by appellee's counsel.

It is qualified by Beach v. Sheldon, 14 Barb. 72; Laidlaw v. Organ, 2 Whart. 178; Knitzing v. McElrath, 5 Pa. St. 467.

In Fox v. Mackeath, 2 Brown, Ch. 400, Thurlow, Lord Chancellor, in delivering the opinion in the case where undue concealment of an important fact was charged, said: "The doubt I have is, whether this case affords facts from which principles arise to set aside this transaction, which will not, by necessary application, draw other cases into hazard. And, without insisting upon technical morality, I don't agree with those who say, that where an advantage has been taken in a contract, which a man of delicacy would not have taken, it must be set aside. Sup-

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pose, for instance, that A, knowing there to be a mine in the estate of B, of which he knew B was ignorant, should enter into a contract to purchase the estate of B for the price of the estate without considering the mine, could the court set it aside? Why not, since B was not apprized of the mine and A was? Because B, as the buyer, was not obliged, from the nature of the contract, to make the discovery. It is, therefore, essentially necessary, in order to set aside the transaction, not only that a great advantage should be taken, but it must arise from some obligation in the party to make the discovery." Not, as Justice Story says (1 Story, Eq. Jur. § 148), from an obligation in point of morals only, but of legal duty. In such a case he says, a court of equity will not correct the contract merely because a man of nice morals and honor would not have entered into it. Lord Eldon, in Turner v. Harvey, Jac. 178, approved the doctrine of Lord Thurlow and the illustration of the mine, and so does Justice Story in 1 Eq. Jur. § 207.

But we are dealing in this case with the doctrine of suggestio falsi and not of suppressio veri, as the charge in the bill is, false representations made by appellee of the value of the land and lots in Missouri.

There is much testimony in the record, from which we derive the knowledge that appellee represented to appellant, who had never been in Missouri (appellee having resided there before coming to Bloomington), that the land was good land, and was the land occupied by one Judge Smith, before the Rebellion, and improved by him. This land was the south part of section eighteen and the north part of section twenty-four, in all one hundred and sixty acres, and was worth, probably, fifteen dollars per acre. The land conveyed was in section fifteen, stony, poorly timbered, and comparatively worthless. The house in Montevallo, instead of being a desirable residence, and worth one thousand dollars, as represented by appellee, proved to be a mere shell, one story high, occupied by hogs and goats, bringing not eight dollars a month rent "right along," as represented, but unfit for human abode, and worth, with the "lot and a half," not over two hundred and fifty dollars, and, as we should judge, not at all saleable. So soon as appellant, by personal inspection on a visit to the locality, discovered the facts, he came to the conclusion appellee had imposed upon him, and at once, on his return to Bloomington, demanded a rescission of the contract and a reconveyance of the Bloomington property, and tendering deeds for the Missouri property, together with appellee's note for three hundred dollars, part of the purchase money. This being refused by appellee, this bill was filed by appellants, and pending the bill the house was consumed by fire, on which, however, appellee had effected an insurance of three thousand dollars.

The court dismissed the bill and complainants appealed.

There is no question of law made except the one we have discussed, and there is some conflict in the testimony, but a careful examination of it, as we find it in the record, satisfies us appellant has not received from appellee what he contracted for, and which contract he made wholly on the representations of appellee, which have proved to be untrue.

It is said by appellee, there was a mistake in conveying the land as in section fifteen—that he supposed the "Smith farm" was on that section, but is willing and offers to convey the land in fact occupied by Smith in sections eighteen and twenty-four, and he insists, that a mistake being made is no ground for the rescission of the contract, as the court can and will correct the mistake. But this consideration should not prevail in this case, because appellee represented the land he was selling to be worth twenty dollars per acre, which he had purchased but a short time previously for four dollars per acre, and he asserted to appellant that such land was selling for twenty dollars an acre in that neighborhood. This he based upon a letter said to have been received by him from one Selsor, a land agent in that county. Selsor in his deposition says, the lands he referred to in that letter were among the best improved farms in that portion of Cedar and Vernon counties; he says he had no idea of fixing the price of raw lands by these figures, and did not suppose any one would be so foolish as to attempt it.

That letter, which appellee says was burnt up in the building when it was destroyed, was to this effect: "We have sold within the last two weeks ten thousand dollars worth of land, from fifteen to twenty-five dollars an acre." This was so construed by appellee to appellant as to induce the latter to believe they were lands in the neighborhood of those he was about to purchase.

The town property was of small value. Now, under such circumstances, it would not be just to allow appellee to correct the mistake in the land and claim the contract as made, but it would be just, as a mistake was made by appellee in the deed, to permit the injured party to avail of it, and, through that, repudiate the entire contract. In a case where false representations have been made, it is the province of a court of equity, if applied to for that purpose, to rescind the contract, putting the parties in statu quo.

It is claimed by appellee that the Bloomington property was taken at a very high valuation, and that he ought to be permitted to show that appellant has received from him its full value.

This we do not consider as the question before us. The question is, did appellant get what he bargained for? That he did not we think the evidence satisfactorily shows.

Appellant's right to the insurance money will hardly be questioned, as the building upon the lot when sold, is now represented by that money, and after deducting the premium paid by appellee and the cost of the addition

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to the building which he erected, and was covered by the insurance, we are of opinion the company should pay the balance to appellant.

On the point that Mrs. Mitchell, appellant's wife, was improperly rejected as a witness, we think the court ruled correctly; the case was in no correct legal sense her own case.

The views here expressed reverse the decree of the circuit court dismissing the bill. The cause is remanded for further proceedings consistent with this opinion.

Decree reversed.

SCOTT, J., did not hear the argument in this case, and gave no opinion.

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ALLORE v. JEWELL.

(94 U. S. 506.)

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

Appeal from the circuit court of the United States for the Eastern district of Michigan.

The facts are stated in the opinion of the court.

Alfred Russell, for appellant. A. B. Maynard, contra.

Mr. Justice FIELD delivered the opinion of the court.

This is a suit brought by the heir at law of Marie Genevieve Thibault, late of Detroit, Mich., to cancel a conveyance of land alleged to have been obtained from her a few weeks before her death, when, from her condition, she was incapable of understanding the nature and effect of the transaction.

The deceased died at Detroit on the 4th of February, 1864, intestate, leaving the complainant her sole surviving heir at law. For many years previous to her death, and until the execution of the conveyance to the defendant, she was seised in fee of the land in controversy, situated in that city, which she occupied as a homestead. In November, 1863, the defendant obtained from her a conveyance of this property. A copy of the conveyance is set forth in the bill. It contains covenants of seisin and warranty by the grantor, and immediately following them an agreement by the defendant to pay her $250 upon the delivery of the instrument; an annuity of $500; all her physician's bills during her life; the taxes on the property for that year, and all subsequent taxes during her life; also, that she should have the use and occupation of the house until the spring of 1864, or that he would pay the rent of such other house as she might occupy until then. The property was then worth, according to the testimony in the case, between $6,000 and $8,000. The deceased was at that time between sixty and seventy years of age, and was confined to her house by sickness, from which she never recovered. She lived alone, in a state of great degradation, and was without regular attendance in her sickness. There were no persons present with her at the execution of the conveyance, except the defendant, his agent, and his attorney. The $250 stipulated were paid, but no other payment was ever made to her; she died a few weeks afterwards.

As grounds for cancelling this conveyance, the complainant alleges that the deceased, during the last few years of her life, was afflicted with lunacy or chronic insanity, and was so infirm as to be incapable of transacting any business of importance; that her last sickness aggravated her insanity, greatly weakened her mental faculties, and still more disqualified her for business; that the defendant and his agent knew of her infirmity, and that there was no reasonable prospect of her recovery from her sickness, or of her long surviving, when the conveyance was taken; that she did not understand the nature of the instrument; and that it was obtained for an insignificant consideration, and in a clandestine manner, without her having any independent advice.

These allegations the defendant controverts, and avers that the conveyance was taken upon a proposition of the deceased; that at the date of its execution she was in the full possession of her mental faculties, appreciated the value of the property, and was capable of contracting with reference to it, and of selling or otherwise dealing with it; that since her death he has occupied the premises, and made permanent improvements to the value of $7,000; and that the complainant never gave him notice of any claim to the property until the commencement of this suit.

The court below dismissed the bill, whereupon the complainant appealed here. The question presented for determination is, whether the deceased, at the time she executed the conveyance in question, possessed sufficient intelligence to understand fully the nature and effect of the transaction; and, if so, whether the conveyance was executed under such circumstances as that it ought to be upheld, or as would justify the interference of equity for its cancellation.

Numerous witnesses were examined in the case, and a large amount of testimony was taken. This testimony has been carefully analyzed by the defendant's counsel; and it must be admitted that the facts detailed by any one witness with reference to the condition of the deceased previous to her last illness, considered separately and apart from the statements of the others, do not show incapacity to transact business on her part, nor establish insanity, either continued or temporary. And yet, when all the facts stated by the different witnesses are taken together, one is led irresistibly by their combined effect to the conclusion, that, if the deceased was not afflicted with insanity for some years before her death, her mind wandered so near the line which divides sanity from insanity as to render any important business transaction with her of doubtful propriety, and to justify a careful scrutiny into its fairness.

Thus, some of the witnesses speak of the deceased as having low and filthy habits; of her being so imperfectly clad as at times to expose immodestly portions of her person; of her eating with her fingers, and having vermin on her body. Some of them testify to her believing in dreams, and her imagining she could see ghosts and spirits around her room, and her claiming to talk with them; to her being incoherent in her conversation, passing suddenly and without cause from one subject to another; to her using vulgar and profane language; to her making immodest gestures; to her talking strangely, and making singular motions and gestures in her neighbors' houses and in the streets. Other

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witnesses testify to further peculiarities of life, manner, and conduct; but none of the peculiarities mentioned, considered singly, show a want of capacity to transact business. Instances will readily occur to every one where some of them have been exhibited by persons possessing good judgment in the management and disposition of property. But when all the peculiarities mentioned, of life, conduct, and language, are found in the same person, they create a strong impression that his mind is not entirely sound; and all transactions relating to his property will be narrowly scanned by a court of equity, whenever brought under its cognizance.

The condition of the deceased was not improved during her last sickness. The testimony of her attending physician leads to the conclusion that her mental infirmities were aggravated by it. He states that he had studied her disease, and for many years had considered her partially insane, and that in his opinion she was not competent in November, 1863, during her last sickness, to understand a document like the instrument executed. The physician also testifies that during this month he informed one Dolsen, who had inquired of the condition and health of the deceased, and had stated that efforts had been made to purchase her property, that in his opinion she could not survive her sickness, and that she was not in a condition to make any sale of the property "in a right way."

This Dolsen had at one time owned and managed a tannery adjoining the home of the deceased, which he sold to the defendant. After the sale, he carried on the business as the defendant's agent. Through him the transaction for the purchase of the property was conducted. The deceased understood English imperfectly, and Dolsen undertook to explain to her, in French, the contents of the paper she executed. Some attempt is made to show that he acted as her agent; but this is evidently an afterthought. He was in the employment of the defendant, had charge of his business, and had often talked with him about securing the property; and in his interest he acted throughout. If the deceased was not in a condition to dispose of the property, she was not in a condition to appoint an agent for that purpose.

The defendant himself states that he had seen the deceased for years, and knew that she was eccentric, queer, and penurious. It is hardly credible that, during those years, carrying on business within a few yards of her house, he had not heard that her mind was unsettled; or, at least, had not inferred that such was the fact, from what he saw of her conduct. Be that as it may, Dolsen's knowledge was his knowledge; and, when he covenanted to pay the annuity, some inquiry must have been had as to the probable duration of the payments. Such covenants are not often made without inquiries of that nature; and to Dolsen he must have looked for information, for he states that he conversed with no one else about the purchase. With him and with his attorney he went to the house of the deceased, and there witnessed the miserable condition in which she lived, and he states that he wondered how anybody could live in such a place, and that he told Dolsen to get her a bed and some clothing. Dolsen had previously informed him that she would not sell the property; yet he took a conveyance from her at a consideration which, under the circumstances, with a certainty almost of her speedy decease, was an insignificant one compared with the value of the property.

In view of the circumstances stated, we are not satisfied that the deceased was, at the time she executed the conveyance, capable of comprehending fully the nature and effect of the transaction. She was in a state of physical prostration; and from that cause, and her previous infirmities, aggravated by her sickness, her intellect was greatly enfeebled; and, if not disqualified, she was unfitted to attend to business of such importance as the disposition of her entire property, and the securing of an annuity for life. Certain it is, that, in negotiating for the disposition of the property, she stood, in her sickness and infirmities, on no terms of equality with the defendant, who, with his attorney and agent, met her alone in her hovel to obtain the conveyance.

It is not necessary, in order to secure the aid of equity, to prove that the deceased was at the time insane, or in such a state of mental imbecility as to render her entirely incapable of executing a valid deed. It is sufficient to show that, from her sickness and infirmities, she was at the time in a condition of great mental weakness, and that there was gross inadequacy of consideration for the conveyance. From these circumstances, imposition or undue influence will be inferred. In the case of Harding v. Wheaton, 2 Mason, 378, Fed. Cas. No. 6,051, a conveyance executed by one to his son-in-law, for a nominal consideration, and upon a verbal arrangement that it should be considered as a trust for the maintenance of the grantor, and after his death for the benefit of his heirs, was, after his death, set aside, except as security for actual advances and charges, upon application of his heirs, on the ground that it was obtained from him when his mind was enfeebled by age and other causes. "Extreme weakness," said Mr. Justice Story, in deciding the case, "will raise an almost necessary presumption of imposition, even when it stops short of legal incapacity; and though a contract, in the ordinary course of things, reasonably made with such a person, might be admitted to stand, yet if it should appear to be of such a nature as that such a person could not be capable of measuring its extent or importance, its reasonableness or its value, fully and fairly, it cannot be that the law is so much at variance with common sense as to uphold it." The case subsequently came before this court; and, in de-

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ciding it, Mr. Chief Justice Marshall, speaking of this, and, it would seem. of other deeds executed by the deceased, said: "If these deeds were obtained by the exercise of undue influence over a man whose mind had ceased to be the safe guide of his actions, it is against conscience for him who has obtained them to derive any advantage from them. It is the peculiar province of a court of conscience to set them aside. That a court of equity will interpose in such a case is among its best-settled principles." Harding v. Handy, 11 Wheat. 125.

The same doctrine is announced in adjudged cases, almost without number; and it may be stated as settled law, that whenever there is great weakness of mind in a person executing a conveyance of land, arising from age, sickness, or any other cause, though not amounting to absolute disqualification, and the consideration given for the property is grossly inadequate, a court of equity will, upon proper and seasonable application of the injured party, or his representatives or heirs, interfere and set the conveyance aside. And the present case comes directly within this principle.

In the recent case of Kempson v. Ashbee, 10 Ch. Cas. 15, decided in the court of appeal in chancery in England, two bonds executed by a young woman, living at the time with her mother and step-father,—one, at the age of twenty-one, as surety for her step-father's debt, and the other, at the age of twenty-nine, to secure the amount of a judgment recovered on the first bond,—were set aside as against her, on the ground that she had acted in the transaction without independent advice; one of the justices observing that the court had endeavored to prevent persons subject to influence from being induced to enter into transactions without advice of that kind. The principle upon which the court acts in suh cases, of protecting the weak and dependent, may always be invoked on behalf of persons in the situation of the deceased spinster in this case, of doubtful sanity, living entirely by herself, without friends to take care of her, and confined to her house by sickness. As well on this ground as on the ground of weakness of mind and gross inadequacy of consideration, we think the case a proper one for the interference of equity, and that a cancellation of the deed should be decreed.

The objection of the lapse of time—six years—before bringing the suit cannot avail the defendant. If during this time, from the death of witnesses or other causes, a full presentation of the facts of the case had become impossible, there might be force in the objection. But as there has been no change in this respect to the injury of the defendant, it does not lie in his mouth, after having, in the manner stated, obtained the property of the deceased, to complain that her heir did not sooner bring suit against him to compel its surrender. There is no statutory bar in the case. The improvements made have not cost more than the amount which a reasonable rent of the property would have produced, and the complainant, as we understand, does not object to allow the defendant credit for them. And as to the small amount paid on the execution of the conveyance, it is sufficient to observe, that the complainant received from the administrator of the deceased's estate only $113.42; and there is no evidence that he ever knew that this sum constituted any portion of the money obtained from the defendant. A decree must, therefore, be entered for a cancellation of the deed of the deceased and a surrender of the property to the complainant, but without any accounting for back rents, the improvements being taken as an equivalent for them.

Decree reversed, and cause remanded with directions to enter a decree as thus stated.

Mr. Chief Justice WAITE and Mr. Justice STRONG, concur.

Mr. Justice BRADLEY (dissenting). I cannot concur in the judgment given in this case. Were there no other reason for my dissent, it would be enough that the complainant has been guilty of inexcusable laches. He knew every thing of which he now complains, in February, 1864, when the grantor of the defendant died, and when his rights as her heir vested; and yet he waited until six years and nine months thereafter before he brought this suit, and before he made any complaint of the sale she had made. Meanwhile, he accepted the money the defendant had paid on account of the purchase, and he stood silently by, asserting no claim, while the defendant was making valuable improvements upon the lot, at a cost of $6,000 or $7,000, a sum about equal to the value of the property at the time of the purchase. To permit him now to assert that the sale was invalid, because the vendor was of weak mind, is to allow him to reap a profit from his own unconscionable silence and delay. I cannot think a court of equity should lend itself to such a wrong.

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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-

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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

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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.

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COWEE v. CORNELL.

(75 N. Y. 91.)

Court of Appeals of New York. Nov. 12, 1878.

Appeal from order of the general term of the supreme court in the Third judicial department, reversing a judgment entered upon the report of a referee.

Plaintiff made a claim against the estate of Latham Cornell, of whose will defendants were the executors, for interest upon a promissory note executed by the deceased. This claim was rejected, and was referred by stipulation.

The facts, as stated by the referee, are in substance as follows:

Latham Cornell, the deceased, was the grandfather of Latham C. Strong. He was possessed of large property, consisting of real estate and of personal property invested in stocks, bonds and other securities. He died in 1876 at the age of ninety-five. For four years prior to his death he was partially blind. From July, 1871, until the time of his death, his grandson at his request attended to his affairs, writing his letters, looking after his banking business and his rents, making out his bills, cutting off his coupons, reading to him, and on occasions going away from home to transact other business. In July, 1871, Cornell gave to Strong a deed of two adjoining houses in the city of Troy, valued at about $32,000, in one of which houses the grandfather lived until the time of his death. The grandson moved into the adjoining house in the spring of 1872, and resided there until after his grandfather's death. During the time that the two thus lived in adjoining residences, they were in daily conference upon business matters of the old gentleman, in the house occupied by the grandson. The grandson with his family consisting of five persons, during all this time lived at the sole expense of the grandfather, and claims to have received, in addition to the note in suit, as gifts from his grandfather, $30,000 in government bonds and the assignment of a mortgage for about $1,700. At what particular time it is claimed these gifts were made is not in evidence. Mr. Cornell made his will in 1871, providing a legacy of $15,000 for Mr. Strong. In the fall of 1872, Mr. Strong expressed a desire to go into business for himself and to be independent of his grandfather, and actually was in negotiation with different persons in Troy and New York with a view of forming business associations. Mr. Cornell became uneasy at the prospect of losing the services of his grandson and caused him to be written for to come home. Mr. Strong came back to Troy, and his grandfather said to him then, as he had previously said, that he wanted him to give up his ideas of leaving and to devote his whole time to the business of his grandfather. Mr. Cornell further said that he had no one else to look after his business, and frequently said that there was money enough for all of them. Mr. Strong immediately abandoned his business projects and devoted his whole time and attention to his grandfather's business, until the death of the latter. After this Mr. Cornell sent for his legal advisers and proposed to alter his will so as to make provision to compensate his grandson for having devoted himself to his business. What provision was intended is not disclosed by the evidence. The lawyers advised that his will be left unaltered, and that he take some other way of compensating his grandson. Mr. Cornell gave to Mr. Strong the note in question. It is as follows:

"$20,000. Troy, April 1, 1873. Five years after date I promise to pay Latham L. C. Strong, or order, $20,000, for value received, with interest yearly. L. Cornell."

The note was on a printed form, the name of the payee being printed "Latham Cornell." The note was filled up in the handwriting of the maker, but in striking out with his pen the name of the payee he left the word "Latham" and afterwards interlined the full name, "L. C. Strong." Annexed to the note was a stub with some printed forms, on which Mr. Cornell wrote: "Troy, April 1st, 1873, L. C. Strong, $20,000 at five years, to make the amount the same as Chas. W. Cornell." The stub was on the note when it was delivered to the payee, but was torn off by him before it was transferred to the plaintiff; and there is no evidence that the plaintiff ever knew of the existence of the stub. The stub and note were taken from a blank book which belonged to decedent. No payment of interest was made upon the note during the lifetime of the maker. The referee found that the note was given for a valuable consideration. Mr. Strong sold the note to the plaintiff for $19,000, taking his note, payable in one year after date. What that date was has not been disclosed. Mr. Strong testified at the trial that he still held the note. Mr. Strong was one of the executors.

Further facts are stated in the opinion.

Irving Browne, for appellant. John Thompson, for respondents.

HAND, J. The counsel for respondents suggested at the close of his argument before us that there was no evidence of a delivery of the note to Strong, the payee, and the finding of delivery by the referee was entirely unsupported. He does not however make this a point in his printed brief, and did not present it strenuously or with any emphasis in his oral remarks.

It is true that the evidence in this respect was not very satisfactory. Ordinarily the possession and production of the note by the payee will raise a presumption of delivery to him. But this presumption must be very much weakened when the possession is shown not to precede the possession of all the maker's papers and effects by the payee

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as executor, when the note appears to have been all in the handwriting of the maker and to have been taken with a stub attached, also in his handwriting, from a bank book belonging to him, and when installments of interest falling due in the maker's life-time were not paid and although years elapsed after they so became due before his death there is no proof of any demand of them by the payee or recognition of liability by the deceased. I am not prepared to say however that these circumstances absolutely destroy the presumption from possession and production of the instrument. While some evidence on the part of the plaintiff, showing that the note had been delivered to Strong in his grandfather's life-time, or at least negativing the idea that Strong found it in the bank-book or among the papers of the deceased when he took possession of them as executor, could probably have been easily produced if consistent with the fact, yet we cannot hold its absence conclusive against the plaintiff upon this point, upon the record as it stands. No motion for judgment or to dismiss was made on this ground by the respondents although the trial was in other respects treated by the counsel on both sides as one before a referee appointed in the ordinary way to hear and determine and direct judgment as in an action, and we cannot say but that if the plaintiff had been notified of such an objection, the evidence would have been supplied. The finding of the delivery by the referee was not even excepted to, although there were exceptions to the finding of consideration. Under these circumstances we must, I think, assume an acquiescence in the truth of the finding by the respondents for reasons known to them, and which if disclosed would probably be entirely satisfactory.

The majority of the general term put their reversal of the judgment upon the ground that it conclusively appeared from the stub attached that the note was intended as a gift and was without consideration. In this I am unable to concur.

The referee's finding that the note was delivered not as a gift but for a valuable consideration has some evidence to support it, in the proof of the services rendered by Strong to the deceased, and his abandonment of a profession at the request of the deceased, in the intention expressed by the latter to make some compensation for those services, and the conversation had with his counsel not very long before the date of this note, in which he was dissuaded from making this compensation by will and advised to do it while alive, to which he assented. What appears upon the stub is not in my opinion conclusive against this result.

There is perhaps difficulty in giving any entirely satisfactory construction to this memorandum made by the deceased; but the interpretation of the general term seems to my mind inconsistent with the known facts of the case. Strong certainly had had and the deceased knew that he had had property of the value of $32,000 given him before the date of this note, and perhaps $30,000 more in bonds. The $20,000 note could not have been therefore as the general term supposes, a gift to make him equal in gifts with his cousin Charles, to whom only $20,000 had been given in all.

But not only do the circumstances show that the memorandum could not mean that this gift of the $20,000 to Strong would make him equal in gifts to Charles, but the memorandum itself does not say so. Its language is "to make the amount the same as Chas. W. Cornell." While, as has already been said, there is probably insuperable difficulty in discovering precisely all that the deceased meant by this expression, its intrinsic sense is merely that the amount of this note, $20,000, is so fixed to make it the same as an amount possessed in some way by Charles, and this is consistent with both amounts being gifts, or the one being fixed upon in the testator's mind as a fair compensation for Strong's services and at the same time equal to an amount he had given or intended to give to Charles. On the whole I think this memorandum was a piece of evidence to be submitted with the other evidence to be considered by the referee on the question of fact. His decision upon all this evidence cannot be disturbed by this court.

The same may be said of the proof of large gifts to Strong either all before, or some before and some after the date of the note.

The reversal by the general term is not stated to be upon the facts, and on the argument it was conceded by the counsel for the respondents to be upon the law merely. It may be that a finding upon all the evidence that the note was without consideration and a gift would not be disturbed, and would be held by us as not unauthorized by the evidence. On the other hand, we cannot accede to the proposition that a finding to the contrary, such as has been made by the referee here, must by reason of the contents of this stub or other testimony be reversed as erroneous in law.

It follows that except as bearing upon undue influence, and the relations of parties hereafter considered, the inadequacy of the services or the extravagance of the compensation are not material. That was a matter purely of agreement between Strong and the deceased, and with which the court will not interfere under ordinary circumstances. Earl v. Peck, 64 N. Y. 597; Worth v. Case, 42 N. Y. 362; Johnson v. Titus, 2 Hill, 606. Although the consideration of a promissory note is always open to investigation between the original parties (and we agree with the court below that the plaintiff here has no better position than Strong himself), yet as pointed out by the chief judge in Earl v. Peck, supra, mere inadequacy in value of the

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thing bought or paid for is never intended by the legal expression, "want or failure of consideration." This only covers either total worthlessness to all parties, or subsequent destruction, partial or complete.

Assuming then, as I think we must, that there was no error as matter of law in the finding of the referee that this note was given for a valuable consideration, and that the adequacy of that consideration is something with which we have no concern if the parties dealt on equal terms, the only point remaining to consider is the relations existing between the deceased and Strong at the date of the note.

It is insisted strenuously by the learned counsel for the respondents that these were such as to call for the application of the doctrine of constructive fraud, and threw upon the plaintiff the burden of proving not only that the deceased fully understood the act, but that he was not induced to it by any undue influence of Strong, and that the latter took no unfair advantage of his superior influence or knowledge.

The court below were hardly correct in the suggestion that the plaintiff conceded this burden to be upon himself, and for that reason, instead of resting upon the statement of consideration in the note, gave evidence in opening his case of an actual consideration; for this may have been done to show in the first instance that the note was not a gift and hence void under the law applicable to gifts. Indeed it appears from the findings and refusals to find, and the opinion of the referee, that such was not the theory upon which the action was tried or decided.

We return then to the question whether this case was one of constructive fraud. It may be stated as universally true that fraud vitiates all contracts, but as a general thing it is not presumed but must be proved by the party seeking to relieve himself from an obligation on that ground. Whenever, however, the relations between the contracting parties appear to be of such a character as to render it certain that they do not deal on terms of equality, but that either on the one side from superior knowledge of the matter derived from a fiduciary relation, or from overmastering influence, or on the other from weakness, dependence or trust justifiably reposed, unfair advantage in a transaction is rendered probable, there the burden is shifted, the transaction is presumed void, and it is incumbent upon the stronger party to show affirmatively that no deception was practiced, no undue influence was used, and that all was fair, open, voluntary and well understood. This doctrine is well settled. Hunt, J., Nesbit v. Lockman, 34 N. Y. 167; Story, Eq. Jur. § 311; Sears v. Shafer, 6 N. Y. 268; Huguenin v. Basely, 13 Ves. 105, 14 Ves. 273, and 15 Ves. 180; Wright v. Proud, 13 Ves. 138; Harris v. Tremenheere, 15 Ves. 40; Edwards v. Myrick, 2 Hare, 60; Hunter v. Atkins, 3 Mylne & K. 113. And this is I think the extent to which the well-considered cases go, and is the scope of "constructive fraud."

The principle referred to, it must be remembered, is distinct from that absolutely forbidding a purchase by a trustee or agent for his own benefit of the subject of a trust, and charging it when so purchased with the trust. That amounts to an incapacity in the fiduciary to purchase of himself. He cannot act for himself at all, however fairly or innocently, in any dealing as to which he has duties as trustee or agent. The reason of this rule is subjective. It removes from the trustee, with the power, all temptation to commit any breach of trust for his own benefit. But the principle with which we are now concerned does not absolutely forbid the dealing, but it presumes it unfair and fraudulent unless the contrary is affirmatively shown.

This doctrine, as has been said, is well settled, but there is often great difficulty in applying it to particular cases.

The law presumes in the case of guardian and ward, trustee and cestui que trust, attorney and client, and perhaps physician and patient, from the relation of the parties itself, that their situation is unequal and of the character I have defined; and that relation appearing itself throws the burden upon the trustee, guardian or attorney of showing the fairness of his dealings.

But while the doctrine is without doubt to be extended to many other relations of trust, confidence or inequality, the trust and confidence, or the superiority on one side and weakness on the other, must be proved in each of these cases; the law does not presume them from the fact for instance that one party is a grandfather and old, and the other a grandson and young, or that one is an employer and the other an employé. The question as to parties so situated is a question of fact dependent upon the circumstances in each case. There is no presumption of inequality either way from these relations merely.

In the present case it cannot be said that the fact that the deceased employed Strong as his clerk to read and answer his letters and cut off his coupons, and make out his bills, or as his bailiff to collect his rents, or that at this time he was old and of defective vision, or that Strong lived near him and was his grandson, taken separately or together raise a conclusive presumption of law that their situation was unequal, and that dealings between them as to compensation for these services were between a stronger and a weaker party, a fiduciary in hac re and the party reposing confidence. These relations as a matter of fact may have led to or been consistent with controlling influence on the part of the grandson, or childish weakness and confidence on the part of the grandfather, but this was to be shown, and is not necessarily derivable or presumable

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from the relations themselves, as in the case of trustee, attorney or guardian.

From these relations and the large gifts shown from the deceased to Strong, and from the extravagant amount of the compensation in the note, it is very possible the referee might have found as a fact the existence of weakness on the one side, or undue strength on the other, which rendered applicable the doctrine of constructive fraud, and threw upon the plaintiff the burden of disproving such fraud. These circumstances may have well been of a character, if not sufficient to shift the presumption, at least to authorize a setting aside of a contract without any decisive proof of fraud, but upon the slightest proof that advantage was taken of the relation, or of the use of "any arts or stratagems or any undue means or the least speck of imposition." Whelan v. Whelan, 3 Cow. 538, Lord Eldon, L. C.; Harris v. Tremenheere, 15 Ves. 40, Lord Brougham; Hunter v. Atkins, 3 Mylne & K. 135.

But the referee not only has not found as fact any inequality in the situation of the deceased and Strong, but refused to find as a matter of law its existence, and there is really no evidence whatever of any arts or stratagems or "speck of imposition" on the part of Strong as to this note.

We are not permitted to supply these findings even if we thought them proper for the referee to make, nor can we sustain a reversal of the original judgment upon facts not found and not necessarily inferable from uncontradicted evidence in the case, the general term not having in any way interfered with the findings of the referee.

On the whole therefore we reach the conclusion that there was no good reason for disturbing the judgment of the referee. This large claim upon the estate of the deceased is not so clearly justified and explained in the evidence as we could have wished, and the circumstances are such as to compel this court to look upon the case, if not with suspicion, certainly with anxiety, yet after careful examination we can find no material error in the original decision.

The order granting a new trial must be reversed and judgment for plaintiff affirmed, with costs.

All concur, except MILLER and EARL, JJ., absent.

Judgment accordingly.

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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-

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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.

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SOLINGER v. EARLE.

(82 N. Y. 393.)

Court of Appeals of New York. Nov. 9, 1880.

Appeal from judgment entered upon an order reversing a judgment for plaintiff upon an order overruling a demurrer to the complaint. The judgment of the general term sustained the demurrer and dismissed the complaint.

The facts appear in the opinion.

Abram Kling, for appellant. William M. Ivens, for respondents.

ANDREWS, J. The complaint alleges in substance that the plaintiff, to induce the defendants to unite with the other creditors of Newman & Bernhard in a composition of the debts of that firm, made a secret bargain with them to give them his negotiable note for a portion of their debt, beyond the amount to be paid by the composition agreement. He gave his note pursuant to the bargain, and thereupon the defendants signed the composition. The defendants transferred the note before due to a bona fide holder, and the plaintiff having been compelled to pay it, brings this action to recover the money paid. The complaint also alleges that the plaintiff was the brother-in-law of Newman, and entertained for him a natural love and affection, and was solicitous to aid him in effecting the compromise, and that the defendants knowing the facts, and taking an unfair advantage of their position, extorted the giving of the note as a condition of their becoming parties to the composition.

We think this action cannot be maintained. The agreement between the plaintiff and the defendants to secure to the latter payment of a part of their debt in excess of the ratable proportion payable under the composition was a fraud upon the other creditors. The fact that the agreement to pay such excess was not made by the debtor, but by a third person, does not divest the transaction of its fraudulent character.

A composition agreement is an agreement as well between the creditors themselves as between the creditors and their debtor. Each creditor agrees to receive the sum fixed by the agreement in full of his debt. The signing of the agreement by one creditor is often an inducement to the others to unite in it. If the composition provides for a pro rata payment to all the creditors, a secret agreement, by which a friend of the debtor undertakes to pay to one of the creditors more than his pro rata share, to induce him to unite in the composition, is as much a fraud upon the other creditors as if the agreement was directly between the debtor and such creditor. It violates the principle of equity, and the mutual confidence as between creditors, upon which the agreement is based, and diminishes the motive of the creditor who is a party to the secret agreement, to act in view of the common interest in making the composition. Fair dealing and common honesty condemn such a transaction. If the defendants here were plaintiffs seeking to enforce the note, it is clear that they could not recover. Cockshott v. Bennett, 2 Term R. 763; Leicester v. Rose, 4 East, 372. The illegality of the consideration upon well-settled principles would be a good defense. The plaintiff, although he was cognizant of the fraud, and an active participator in it, would nevertheless be allowed to allege the fraud to defeat the action, not, it is true, out of any tenderness for him, but because courts do not sit to give relief by way of enforcing illegal contracts, on the application of a party to the illegality. But if he had voluntarily paid the note, he could not, according to the general principle applicable to executed contracts void for illegality, have maintained an action to recover back the money paid. The same rule which would protect him in an action to enforce the note, protects the defendants in resisting an action to recover back the money paid upon it. Nellis v. Clark, 4 Hill, 429.

It is claimed that the general rule that a party to an illegal contract cannot recover back money paid upon it does not apply to the case of money paid by a debtor, or in his behalf, in pursuance of a secret agreement, exacted by a creditor in fraud of the composition, and the cases of Smith v. Bromley, 2 Doug. 696, note; Smith v. Cuff, 6 Maule & S. 160; and Atkinson v. Denby, 7 Hurl. & N. 934,—are relied upon to sustain this claim. In Smith v. Bromley the defendant, being the chief creditor of a bankrupt, took out a commission against him, but afterward finding no dividend likely to be made, refused to sign the certificate unless he was paid part of his debt, and the plaintiff, who was the bankrupt's sister, having paid the sum exacted, brought her action to recover back the money paid, and the action was sustained. Lord Mansfield in his judgment referred to the statute 5 Geo. II. c. 30, § 11, which avoids all contracts, made to induce a creditor to sign the certificate of the bankrupt, and said: "The present is a case of a transgression of a law made to prevent oppression, either on the bankrupt or his family, and the plaintiff is in the case of a person oppressed, from whom money has been extorted and advantage taken of her situation and concern for her brother." And again: "If any near relation is induced to pay the money for the bankrupt, it is taking an unfair advantage and torturing the compassion of his family." In Howson v. Hancock, 8 Term R. 575, Lord Kenyon said that Smith v. Bromley was decided on the ground that the money had been paid by a species of duress and oppression, and the parties were not in pari delicto, and this remark is fully sustained by reference to Lord Mansfield's judgment. Smith v. Cuff was an action brought to recover money paid by the plaintiff to take up his note given to

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the defendant, for the balance of a debt owing by the plaintiff, which was exacted by the latter as a condition of his signing with the other creditors a composition. The defendant negotiated the note and the plaintiff was compelled to pay it. The plaintiff recovered. Lord Ellenborough said: "This is not a case of par delictum; it is oppression on the one side and submission on the other; it never can be predicated as par delictum where one holds the rod and the other bows to it." Atkinson v. Denby was the case of money paid directly by the debtor to the creditor. The action was sustained on the authority of Smith v. Bromley and Smith v. Cuff.

It is somewhat difficult to understand how a debtor who simply pays his debt in full can be considered the victim of oppression or extortion because such payment is exacted by the creditor as a condition of his signing a compromise, or to see how both the debtor and creditor are not in pari delicto. See remark of Parke, B., in Higgins v. Pitt, 4 Exch. 312. But the cases referred to go no further than to hold that the debtor himself, or a near relative who out of compassion for him pays money upon the exaction of the creditor, as a condition of his signing a composition, may be regarded as having paid under duress and as not equally criminal with the creditor.

These decisions cannot be upheld on the ground simply that such payment is against public policy. Doubtless the rule declared in these cases tends to discourage fraudulent transactions of this kind, but this is no legal ground for allowing one wrongdoer to recover back money paid to another in pursuance of an agreement, illegal as against public policy. It was conceded by Lord Mansfield in Smith v. Bromley, that when both parties are equally criminal against the general laws of public policy, the rule is "potior est conditio defendentis," and Lord Kenyon in Howson v. Hancock, said that there is no case where money has been actually paid by one of two parties to the other upon an illegal contract, both being particeps criminis, an action has been maintained to recover it back.

It is laid down in Cro. Jac. 187, that "a man shall not avoid his deed by duress of a stranger, for it hath been held that none shall avoid his own bond for the imprisonment or danger of any one than himself only." And in Robinson v. Gould, 11 Cush. 57, the rule was applied where a surety sought to plead his own coercion as growing out of the fact that his principal was suffering illegal imprisonment as a defense to an action brought upon the obligation of the surety given to secure his principal's release. But the rule in Cro. Jac. has been modified so as to allow a father to plead the duress of a child, or a husband the duress of his wife, or a child the duress of the parent. Wayne v. Sands, 1 Freem. 351; Baylie v. Clare, 2 Brownl. & G. 276; 1 Rolle, Abr. 687; Jacob, Law Dict. "Duress."

We see no ground upon which it can be held that the plaintiff in this case was not in par delictum in the transaction with the defendants. So far as the complaint shows he was a volunteer in entering into the fraudulent agreement. It is not even alleged that he acted at the request of the debtor. And in respect to the claim of duress, upon which Smith v. Bromley was decided, we are of opinion that the doctrine of that and the subsequent cases referred to can only be asserted in behalf of the debtor himself, or of a wife or husband, or near relative of the blood of the debtor, who intervenes in his behalf, and that a person in the situation of the plaintiff, remotely related by marriage, with a debtor who pays money to a creditor to induce him to sign a composition, cannot be deemed to have paid under duress by reason simply of that relationship, or of the interest which he might naturally take in his relative's affairs.

The plaintiff cannot complain because the defendants negotiated the note, so as to shut out the defense, which he would have had to it in the hands of the defendants. The negotiation of the note was contemplated when it was given, as the words of negotiability show. It is possible that the plaintiff while the note was held by the defendants, might have maintained an action to restrain the transfer, and to compel its cancellation. Jackman v. Mitchell, 13 Ves. 581. But it is unnecessary to determine that question in this case. The plaintiff having paid the note, although under the coercion resulting from the transfer, the law leaves him where the transaction has left him.

The judgment should be affirmed.

All concur.

Judgment affirmed.

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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

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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.

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BLANCHARD v. DETROIT, L. & L. M. R. CO.

(31 Mich. 43.)

Supreme Court of Michigan. Jan. Term, 1875.

Appeal from circuit court, Ionia county; in chancery.

Clute & Smith, for complainant.

Bell & Hutchinson and G. V. N. Lothrop, for defendant.

GRAVES, C. J. The court below having dismissed the complainant's bill after hearing on pleadings and proofs, he has appealed to this court.

He sets up a conveyance made by himself and wife to the Ionia & Lansing Railroad Company in June, 1870, of certain ground on his farm, for a track and depot, the subsequent consolidation of that company with the Detroit, Howell & Lansing Railroad Company, and the assumption by the resulting organization of the name ascribed to defendants in the title of the cause.

The consideration clause of this deed stated that the conveyance was made "in consideration of five hundred dollars and the covenant to build a depot hereinafter mentioned," and following the description and preceding the habendum was the following clause: "But this conveyance is made upon the express condition that said railroad company shall build, erect and maintain a depot or station house on the land herein described, suitable for the convenience of the public, and that at least one train each way shall stop at such depot or station each day when trains run on said road, and that freight and passengers shall be regularly taken at such depot." Apart from these passages the deed was in common form, and silent in regard to a depot. Together with other matters not necessary to be mentioned, the bill alleged acceptance of the deed, and that the company built the road over the land granted, and that for some time past the consolidated organization has used and occupied the road for running trains; that complainant, in granting to the company, was largely influenced by his expected accommodations, in having a depot at his place, and the rise in value which it would cause to his surrounding property; that by accepting the grant the company became bound to perform as specified in the second of the foregoing clauses, but have totally refused to comply with, or abide by it, and that complainant is entitled to insist on specific performance, or if that be found improper, then to such compensation as will indemnify him.

The answer asserts, and this is admitted, that the deed was wholly prepared by complainant's legal adviser, and that complainant refused to convey on any other terms. The answer then avers that the clause concerning a depot, and now assumed by complainant to operate as a covenant, is not one, nor entitled to operate as one, but is simply and purely a condition subsequent, and that the company, having become satisfied that compliance with it would be detrimental to the public interest and their own, decided not to observe it, and had therefore refused to abide by it.

The answer also claims the benefit of a demurrer for want of equity.

A peculiar feature of this clause is, that it is the grantee, and not the grantor, as is almost invariably the case, who maintains that the important clause in the grant which the grantor relies upon as a covenant, is a condition, and one, too, which the grantee has distinctly violated. This is the more noticeable since one of the settled rules for deciding in doubtful cases that the writing is a covenant, and not a condition, is based on the idea that a condition, as tending to destroy the estate, would be less favorable to the grantee. 4 Kent, Comm. 129, 132.

The position of these parties confounds the reason of this rule, and would dispense with the rule itself if the case were a doubtful one. Catlin v. Springfield Fire Ins. Co., 1 Sumn. 434, 440, Fed. Cas. No. 2,522.

The real questions necessary to be decided will hardly admit general reasoning or nice deductions. Aside from reasons very manifest, they depend upon authority, and can only be lawfully determined in accordance with principles which have been fully recognized and adjudged. And the circumstance, that one of the parties is a natural and the other an artificial person, gives no significance whatever to the legal merits, nor does it in any manner bear upon the proper exposition and application of the controlling principles.

The complainant and the other party to the grant, being both competent, and able to act independently and look after their respective interests, voluntarily bargained with each other, and complainant, being assisted by counsel, caused a provision couched in terms of his own choice to be incorporated in the grant, and the grantee deliberately accepted the grant so drawn, and the defendant, as successor of the grantees, expressly and finally refuses to execute the provision in question.

After insisting that this provision was binding on them in no other sense or extent than as a condition subsequent, and as a necessary consequence that it affords no basis whatever for any relief exclusively dependent upon promissory undertaking, the defendant further insists that if the controverted clause, or rather the clause of which the nature is controverted, were to be regarded as promissory, still its positive enforcement must be declined in equity, first, on the ground of public policy, and second, on the ground that its requirements are on the one hand positively unsuitable to be enforced by chancery, and on the other hand that in many indispensable particulars the subject matter is left

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too much at large, too vague, and too much in want of detail, to admit of execution by the court.

The first question for consideration appears naturally to be, whether the particular clause in the deed is a covenant or mere condition subsequent, having no promissory force; and this is purely a question of authority. The language of the clause itself is plain and unambiguous, and the grant must have effect according to the legal interpretation and meaning of its terms, and not according to any erroneous impression either party may have formed respecting its operation. Furbush v. Goodwin, 5 Fost. (N. H.) 425.

Much stress was placed by complainant's counsel upon the phrase in the consideration clause, which speaks of an after-mentioned covenant to build a depot. Now this expression must be taken to refer to the subsequent clause about whose operation the parties differ, or it must otherwise be taken as a mere purposeless expression.

The reasonable opinion would seem to be, that this statement in the consideration clause was actually intended to refer to the later provision respecting the depot, and to expressly mark that the right it evidenced was part of the consideration.

It is hardly admissible to suppose that the grantor carefully introduced this phrase, and then omitted to insert anything to satisfy what he considered the phrase called for.

But, conceding the expression was meant to apply to the subsequent passage, it is another and very different question, whether it is entitled to control the proper meaning and nature of that passage. It may be fully admitted that if the terms of the main clause were not clear and strong to fix its legal character, or if the other portions of the instrument were such as to cause the mind to hesitate about its legal significance, the words of the consideration clause might be resorted to, to help to a conclusion in harmony with the literal import of these words. But this is not the case. Apart from the expression in the consideration clause, the subsequent provision, as well as the residue of the instrument, is too perfectly worded and too precise, to admit of any doubt whatever.

Independently of such first expression, there is no ambiguity, and no obscurity.

Now, in alluding as they did, when writing down the statement of consideration, to the positive provision as a covenant, we may suppose that at the most the parties manifested their opinion of the legal nature of the stipulation. But as this clause was precisely in the form desired, their opinion of the character the law impressed upon it, or their idea of the name belonging to it, whether indicated by giving it a specific designation, or in some other way, cannot alter its necessary legal nature. The books are full of illustrations of this point. When an instrument or provision is clearly and distinctly so drawn and consummated that the law at once attaches, and determines that it possesses a specific legal nature, and exclusively belongs to a given class of transactions, the parties cannot, by arbitrarily assigning a name to it wholly foreign to its true character, succeed in transforming it, and so cause it to stand and operate in a manner wholly alien to it. To conclude otherwise would be to reject the legal criteria of certainty in written transactions. Radcliff v. Rhan, 5 Denio, 234; Scudder v. Bradbury, 106 Mass. 422; Pearce v. Grove, 3 Atk. 522; Rice v. Ruddiman, 10 Mich. 125; Railroad Co. v. Trimble, 10 Wall. 367; 1 Cow. & H. Notes, 211 et. seq. Even when the legislature holds a mistaken opinion concerning the law, it does not change it. Postmaster General v. Early, 12 Wheat. 136; Talbot v. Seeman, 1 Cranch, 1; Mersey Docks v. Cameron, 11 H. L. 443, per Lord Chelmsford, page 518; Murray's Lessee v. Hoboken Land & Improvement Co., 18 How. 272, 285. A plain condition cannot be converted into a perpetual covenant by calling it one. This sentence, then, cannot be allowed to alter the intrinsic nature of the main provision. In noticing the position that the consideration clause in the deed ought to help to an opinion that the second clause constituted a covenant, and not a mere condition subsequent, we have assumed that the terms of this second clause are so clear and explicit that there is no room for any real question touching its intrinsic legal nature and true denomination. A few words may be now proper to sustain the validity of this assumption. We have seen the language of the provision; and its position in the instrument, as well as its authorship, has been explained.

How do the authorities apply to it? An estate upon condition is one which has a qualification annexed, by which, on the happening of a particular event, it may be created, enlarged or destroyed. If set forth, the condition is express; and if it allows the estate to vest, and then to be defeated in consequence of non-observance of the requirement, it is a condition subsequent. 2 Bl. Comm. c. 10; 4 Kent, Comm. "Of Estates on Condition"; Co. Litt. 201a, 215a, 215b, 233b, 234b, 251b; Bac. Abr. tit. "Conditions"; Com. Dig. tit. "Conditions"; Shep. Touch. c. 6, "Of Conditions."

The author of the Touchstone says: "Conditions annexed to estates are sometimes so placed and confounded amongst covenants,—sometimes so ambiguously drawn,—and at all times have in the drawing so much affinity with limitations, that it is hard to discern and distinguish them. Know, therefore, that for the most part conditions have conditional words in their frontispiece, and do begin therewith; and that amongst these words there are three words that are most proper, which, in and of their own nature and efficacy, without any addition of other words of re-entry in the conclusion of the condition, do make the estate conditional, as: proviso, ita quod, and sub condi-

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tione. And, therefore, if A grants lands to B, to have and to hold to him and his heirs, provided that,—or so as,—or under this condition,—that B do pay to A ten pounds at Easter next; this is a good condition, and the estate is conditional without any more words." Page 121. See, in addition to the books last cited, Washb. Real Prop., and Hil. Real Prop. The question whether there is a limitation or a condition, or whether there is a condition precedent or subsequent, or whether what is to be expounded is a condition or covenant, or something capable of operating both ways, frequently becomes very perplexing in consequence of the uncertain, ambiguous, or conflicting terms and circumstances involved; and the books contain a great many cases of the kind, and not a few of which are marked by refinements and distinctions which the sense of the present day would hardly tolerate.

Where, however, the terms are distinctly and plainly terms of condition, where the whole provision precisely satisfies the requirements of the definition, and where the transaction has nothing in its nature to create any incongruity, there is no room for refinement, and no ground for refusing to assign to the subject its predetermined legal character. In such a case the law attaches to the act and ascribes to it a definite significance, and the parties cannot be heard to say, where there is no imposition, no fraud, no mistake, that, although they deliberately made a condition, and nothing but a condition, they yet meant that it should be exactly as a covenant.

Among the numerous cases serving to illustrate the subject, which have been examined, the following may be referred to: Michigan State Bank v. Hastings, 1 Doug. (Mich.) 225, 229, 230, 249–256; Merritt v. Harris, 102 Mass. 326; Tilden v. Tilden, 13 Gray, 103; Gray v. Blanchard, 8 Pick. 284; Attorney General v. Merrimack Manuf'g Co., 14 Gray, 586; Allen v. Howe, 105 Mass. 241; Jackson v. Florence, 16 Johns. 47; Jackson v. Allen, 3 Cow. 220; Livingston v. Stickles, 8 Paige, 398; Stuyvesant v. Mayor, 11 Paige, 414; Palmer v. Ft. Plain & C. Plank-Road Co., 11 N. Y. 376; Hefner v. Yount, 8 Blackf. 455; Cross v. Carson, Id. 138; Sperry's Lessee v. Pond, 5 Ohio, 387; Wheeler v. Walker, 2 Conn. 196; Willard v. Henry, 2 N. H. 120; Doe v. Asby, 10 Adol. & E. 71; Churchward v. Queen, L. R. 1 Q. B. 173, per Shee, J., 211; Mead v. Ballard, 7 Wall. 290.

The cases are of course numerous where, on controversy about the meaning or operation, the writing has been held either to create a limitation or a covenant, or to work both as a condition and covenant. But on examination it will appear that in all the cases in which it has been deliberately determined that the writing, though possessing many or all of the characteristics of a condition, was still susceptible of operating as a covenant, there were grounds for claiming that promissory words existed, or at least words which, in the light of pertinent facts, were fairly capable of a promissory sense. Among the cases of this class, are the following: Spaulding v. Hallenbeck, 35 N. Y. 204; Stuyvesant v. Mayor, ubi supra; Doe v. Watt, 8 Barn. & C. 308.

And it is believed that no considered case can be shown, that assumes to decide that a writing which, like that before the court, precisely answers, in verbiage, position, and relative facts, to all the requirements of an express condition subsequent, and stands without any thing except the hasty opinion of the grantor to gainsay its apparent legal nature, is either a covenant, or susceptible of being proceeded on as a covenant, in opposition to a claim by the grantee that it is a bare condition, and which by his non-observance has entitled the grantor to forfeiture.

The result, upon the whole, is, that the provision relied on by complainant as a covenant to be specifically enforced against the defendants, must be considered an express condition subsequent, and not a covenant, and not specifically enforceable against defendants as one.

Having reached this conclusion, this opinion might here end. But, as the case was fully argued in another aspect, it is deemed admissible to go further.

Supposing it to be admitted that the provision in the grant is susceptible of being understood in a promissory sense, and is capable of being considered as in the nature of an agreement by the defendants with the complainant, is it capable of specific enforcement by the court? Setting aside the objection founded on public policy, which is not examined, are the requirements in the writing of such a nature, and so fully and clearly marked out, defined, identified, or indicated, as to make specific execution by the court practicable? We had occasion in the recent case of Buck v. Smith, 29 Mich. 166, to submit some observations respecting the power and duty of the court to execute agreements for the performance of an indefinite number and variety of future acts within the scope of a business not distinctly and exactly mapped out and particularized, and what was there stated has some application here.

The jurisdiction of equity in specific performance proceeds on the supposition that the parties have not only agreed, as between themselves, upon very material matter, but that the matters so agreed on are of such a nature, and the subjects of enforcement so delineated or indicated, either directly or by reference to something else, or so raised to view by legitimate implication, that the court can and may collect, and in their proper relations, all the essential elements, and proceed intelligently and practically in carrying into execution the very things agreed on and standing to be performed.

If, however, it appears, either that the things to be performed are in their nature incapable of execution by the court, or that needful specifications are omitted, or that

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material matters are left by the parties so obscure or undefined, or so in want of details, or that the subjects of the agreement are so conflicting or incongruous, that the court cannot say whether or not the minds of the parties met upon all the essential particulars, or if they did, then can not say exactly upon what substantial terms they agreed, or trace out any practical line where their minds met, the case is not one for specific performance.

As the court does not make contracts for parties, so it never undertakes to supply material ingredients which they omit to mention, and which cannot be legitimately considered as having been within their mutual contemplation. And where the party to perform is left by the agreement with an absolute discretion respecting material and substantial details, and these are therefore indeterminate and unincorporated until by his election they are developed, identified, and fixed as constituents of the transaction, the court cannot substitute its own discretion, and so by its own act perfect and round out the contract. If the court were to do this, it would be to assume a right not belonging to it, but one which the parties reserved to themselves.

Now what is it that the complainant in this cause asks the court to execute?

It is—First, that defendants shall make and maintain on the premises a depot or station-house, suitable for the convenience of the public.

Second, that during all future time, when trains run on the road, at least one train each way shall every day stop thereat; and

Third, that in all future time freight and passengers shall be regularly received and discharged at such depot.

It is extremely plain that the requirements for stopping trains and receiving and discharging freight and passengers were leading objects, and that the building a station-house was of secondary consideration. The putting up of such a building could be of little consequence if no trains stopped there. The other requirements should therefore be regarded as the chief subjects of complainant's equity.

Supposing all other objections removed, is it practicable for the court to execute them? May it take upon itself for all the future to supervise the daily running and stopping of trains, both of passengers and freight, and the regularity of action in regard to the reception and discharge of passengers and freight?

If the writing embodies any promissory agreement at all, it is that when and so long as trains run on the road, one train each way shall every day stop at this place, and also that passengers and freight shall be there regularly received and discharged.

Waiving all considerations of possible future action by government under the postal, war, police, or other power, inconsistent with any particular decree which might now be made, can the court see that in all coming time these requirements are carried out? Can it know or keep informed whether trains are running, and what accommodations are suitable to the public interest? Can it see whether the proper stoppages are made each day? Can it take notice, or legitimately and truly ascertain from day to day, what amounts to regularity in the receipt and discharge of passengers and freight? Can it have the means of deciding at all times whether the due regularity is observed? Can it superintend and supervise the business, and cause the requirements in question to be carried out? If it can, and if it may do this in regard to one station on the road, it may with equal propriety, upon a like showing, do the same in regard to all stations on the road, and not only so, but in regard to all stations on all the present and future roads in the state.

That any such jurisdiction is impracticable, appears plain, and the fault lies in the circumstance that the objects of the parties, as they were written down by them, are by their very nature insusceptible of execution by the court.

In this connection we may refer to a few cases. Raynor v. Stone, 2 Eden, 128, was a case for specific performance of several stipulations by the defendant in a lease. Among others, were agreements to mend hedges and fences, and keep the mansion house and other buildings in repair. The defendant having demurred, Lord Northington allowed the demurrer, and in the course of his opinion observed, that the remark of counsel, that he had no officer to see to performance, was very strong. "How," he remarked, "can a master judge of repairs in husbandry? What is a proper ditch or fence in one place, may not be so in another. How can a specific performance of things of this kind be decreed? The nature of the thing shows the absurdity of drawing these questions from the proper trial and jurisdiction."

In Gervais v. Edwards, 2 Dru. & War. 80, specific performance of an agreement between the parties for straightening a crooked river which divided their lands was sought, and the contract contained stipulations for mutual compensation for the soil which might be shifted from one to the other, and in regard to the contingent damages which might afterwards happen. The complainant waived all right on his part to future and contingent damages. The chancellor, Sir Edward Sugden, refused to decree performance, however, and some of his observations are so explicit and appropriate, that a somewhat extended quotation will not be deemed objectionable. He said: "As far as the merits of the case go, I would decree the specific execution of this contract; but I do not see how it is possible. If I execute it at all, I must execute it in toto; and how can I execute it prospectively? The court acts only on the principle of executing it in specie, and in the very terms in which it has been made; therefore,

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when you come to the specific execution of a contract containing many particulars, you may see that it is possible to execute it effectively. The court cannot say that when an event arises hereafter, it will then execute it. In the case of a decree for the execution of a contract for the sale of timber, it is no objection that it is to be cut at intervals; that is certain, and there mere delay will not prevent the court from executing it; there the agreement is executed in specie; the court decrees to one the very timber contracted for, to the other the very price. If I am called on now to execute this agreement, I can only specifically execute a portion; whereas I am bound to execute it all." He afterwards added, "No precedent has been cited; but, indeed, none is necessary. It is a question of principle; and I am clearly of opinion that if I gave a decree now, it would not be a specific execution of the contract, but only a declaration that there ought to be a specific execution of it hereafter. I must therefore leave the plaintiff to his remedy at law."

Blackett v. Bates, 1 Ch. App. 117, was where an award required that the defendant should execute to the plaintiff a lease of the right of such part of a railway made by the plaintiff as was on the defendant's land, the lease to be in the words set out in the award; and that the defendant should be entitled to run carriages on the whole line, on certain terms, and might require the plaintiff to supply engine power, while the latter should have an engine on the road; and that the plaintiff, during the whole time, should keep the entire railway in good repair. Differences having arisen about carrying out the award, a bill was filed for specific performance, which was demurred to generally, for want of equity. In support of the demurrer it was pertinently observed by counsel that "whether if the court had legislative power it would be desirable to make parties perform in specie all manner of contracts, was not then the question. That the court only decreed specific performance when it could dispose of the matter by an order capable of being enforced at once, and did not decree a party to perform a continuous duty extending over a number of years, but left the party to his remedy at law." Lord Cranworth acceded to this view, and observed, "that the court had no means of enforcing the performance of daily duties during the term of the lease; that it could do nothing more than punish the party by imprisonment or fine, in case of failure to perform them, and might be called on for a number of years to issue repeated attachments for default." He cited Gervais v. Edwards with approbation.

In Marble Co. v. Ripley, 10 Wall. 339, the court acted on the same principle. The contract concerned the use and mode of enjoyment of a quarry, and contained particular stipulations as to the future rights and privileges of the parties. Among other things, the court remarked, that "if performance be decreed, the case must remain in court forever, and the court to the end of time may be called upon to determine, not only whether the prescribed quantity of marble has been delivered, but whether every block was from the right place, whether it was sound, or whether it was of suitable size or shape or proportion. It is manifest that the court cannot superintend the execution of such a decree. It is quite impracticable, and it is certain that equity will not interfere to enforce part of a contract, unless that part is clearly severable from the remainder." Port Clinton R. Co. v. Cleveland & T. R. Co., 13 Ohio St. 544, is cited with approval. Among other authorities which tend to illustrate the subject, see Baldwin v. Society for Diffusion of Useful Knowledge, 9 Sim. 393; Hamblin v. Dineford, 2 Edw. Ch. 529; De Rivafinoli v. Corsetti, 4 Paige, 264; Sanquirico v. Benedetti, 1 Barb. 315; Dodd v. Seymour, 21 Conn. 476; Waters v. Taylor, 15 Ves. 10–25.

Without going further into this view of the case, it is only needful to say, that it seems obvious that the very nature of the provision sought to be enforced is such as to render the remedy impracticable.

But if this objection were not insuperable, there would be still another in the want of details and lack of particularity and specification.

The specific location is not given for the building, nor is there anything certain as to the plan, size, shape, materials or arrangement of the building. All this appears to have been left, by the assent of the parties, substantially to the judgment and discretion of the grantees.

The only specification, the only limit upon such judgment and discretion, the parties saw fit to make, was that it should be suitable for the convenience of the public. For many purposes this might be considered definite enough. It would be in a charter in which the end to be obtained would be presented as the object of the legislature, whilst everything in regard to details and means would be rightly and purposely left to the company. But for a building contract, or an agreement to be executed by the court, it is not so.

If the court were to attempt to decree, what direction could it give as per contract, in regard to the plan, size, shape, materials, arrangement and cost? If what would now satisfy the interest of the public were known, it might guide as to the present size and arrangement; but it could go no further. What is needful now may be otherwise in time, and future changes in the state of the country or in business may wholly disappoint all present calculations. The public interest may require many alterations. But the reference to the public convenience gives no clue whatever as to the materials, or in regard to other essential matters.

The other parts of the provision are also marked by similar difficulties; but it is need-

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less to dwell upon them. Among many others we cite the following authorities as going to explain this feature of the case: McClintock v. Laing, 22 Mich. 212; Tatham v. Platt, 15 Eng. Law & Eq. 190; Harnett v. Yielding, 2 Schoales & L. 549; Colson v. Thompson, 2 Wheat. 336; Boston & M. R. Co. v. Bartlett, 3 Cush. 224; German v. Machin, 6 Paige, 288; McMurtrie v. Bennette, Har. (Mich.) 124; Webb v. Direct London & P. R. Co., 1 De Gex, M. & G. 521, 9 Eng. Law & Eq. 249; Stuart v. London & N. W. Ry. Co., 1 De Gex, M. & G. 721, 11 Eng. Law & Eq. 112, and comments on these cases in Hawkes v. Eastern Counties Ry. Co., 1 De Gex, M. & G. 757, 15 Eng. Law & Eq. 358, and 5 H. L. 331; South Wales Ry. Co. v. Wythes, 1 Russ. & J. 186, 5 De Gex, M. & G. 880, and 31 Eng. Law & Eq. 226. Also 3 Pars. Cont. 354 et seq.; Fry, Spec. Perf. cc. 1, 3, 4.

On this phase of the case, then, the difficulties are insurmountable.

The alternative request for an allowance of damages, or something in the nature of compensation, by the court, must of course fail.

If the case stood upon any final ground which would permit such an appeal to the jurisdiction of chancery, it could not be justly sustained.

In the first place, the uncertainties and lack of details which mark the case, the want of land-marks, boundaries, and specifications, the absence of proper data, and the aptness of the subject for a jury, would induce the court to decline. Pratt v. Law, 9 Cranch, 456; Morss v. Elmendorf, 11 Paige, 277; Fry, Spec. Perf. "Compensation," §§ 813, 814; 3 Pars. Cont. 402, 403, and notes.

But again, if the writing is treated as a promissory undertaking which is binding on the defendant, what it stipulates for is chiefly and mainly a series of daily acts to extend through all the future, and a full and complete award, which, according to the settled course of the court and the principles on which alone it intervenes, is the only admissible one, would be utterly impossible upon any data now afforded, or which can now be afforded.

So many changes of a nature to affect the question are not only possible but probable, that any attempt by the court to adjudge specific compensation in money, in lieu of performance for all future time of the requirements in the writing, would be wild and absurd. A partial award, one for present damages, would not only be futile, but would be an unwarranted departure from principle. The ground of equitable interference, or at least one ground, is, to do at once and in one case final and complete justice. The court always seeks to avoid piece-work determinations.

In the introduction to Adams, Eq. it is said: "The equity for performance with compensation may be enforced by either the vendor or purchaser, but is of course more readily granted to the latter; in either case the defect must be one admitting of compensation, and not a mere matter of arbitrary damages, and the compensation given must be really compensation for a present loss, and not indemnity against a future risk." Page 68. See, also, the body of the work, page 109, margin, and cases cited.

For the reasons given the decree below must be affirmed, with costs.

The other justices concurred.

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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

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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.

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DANFORTH et al. v. PHILADELPHIA & CAPE MAY S. L. RY. CO.

(30 N. J. Eq. 12.)

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

Bill for specific performance. Heard on bill and answer.

J. W. Griggs, for complainants. W. A. House, for defendants.

RUNYON, Ch. The bill is filed to obtain a decree for specific performance, by the defendants, of a contract entered into between the complainants, partners in business, and them, on the 19th of December, 1877, by which the former agreed to construct, equip and finish, for the latter, a single-track, narrow-gauge railroad, and telegraph line in connection therewith, from the terminus of the Camden, Gloucester & Mount Ephraim Railway to high-water mark in the city of Cape May, with stations, engine and freight houses, machine and repair-shops, turn-tables, water-stations, &c., &c., and all necessary terminal facilities, for $2,000,000, payable in the capital stock and first mortgage bonds of the company.

By the contract, the complainants were to complete the work within five months after the bonds were negotiated and sold at a price not less than ninety cents on a dollar of the par value thereof; and it was stipulated that they should not be sold at less than that price without the consent of both parties.

The bill states that the complainants entered on the work, and proceeded with it from the date of the contract to the 20th of February following; that there was, at the latter date, due to them, under the contract, the sum of $40,000, or thereabouts; that they were then entitled to have an estimate made, but the defendants refused to make it, or to pay them, or to carry out the contract, which the complainants allege would be of great value to them if performed; and, further, that the defendants cannot respond in damages for their refusal to carry out the agreement; and that the complainants could profitably dispose of the bonds and stock stipulated for as payment. The bill prays that the defendants may be decreed to specifically perform the contract generally, and, also, that they may be required to make the estimate before mentioned, and deliver bonds and stock to the complainants for the amount which may be found due them thereon.

The defendants' answer admits the contract and declares their willingness to perform it, but alleges their inability to do so by reason of the provisions of an act of the legislature of this state (a supplement to the general railroad law), approved on the 19th of February, 1878. By one of those provisions the provision of the original act requiring that the articles of association should not be filed until at least $2,000 of stock for every mile of the proposed railroad should have been subscribed and ten per cent. paid thereon, was altered so as to require that the entire amount of $2,000 per mile shall be paid to the treasurer of this state, to be repaid by him to the directors or treasurer of the company in the manner specified in the supplement, as the work of constructing the railroad shall progress. By the other, the provision of the original act which authorized the mortgaging of the road, &c., of the company, to secure the payment of their bonds to an amount not exceeding the amount of the paid-up capital stock, was altered by adding a provision that if any person or persons shall issue such bonds to any greater amount than the amount which at the time of such issue shall have been actually paid up on the capital stock of the company, he, she or they shall be guilty of a misdemeanor, and, on conviction, be punished by fine of not more than $5,000 or imprisonment at hard labor for not more than three years, or both, at the discretion of the court. These provisions of the supplement were therein expressly made applicable to corporations already organized under the original act. The defendants state that they have expended all the money received by them on account of their capital stock in the work on the road, and that they are not able to comply with the provisions of the supplement, and that, by the terms of the supplement, their charter is forfeited, by reason of their failure to comply with the provisions of that act.

There are several considerations which forbid the granting of the relief prayed for in this suit. If this court would undertake the performance of such a contract as that stated in the bill, a contract for building and equipping a long line of railroad, building station, freight and engine houses, &c., &c. (and the current and great weight of authority is decidedly against it,—Story, Eq. Jur. § 726; Ross v. Union Pac. R. Co., 1 Woolw. 26, Fed. Cas. No. 12,080; Fallon v. Railroad Co., 1 Dill. 121, Fed. Cas. No. 4,629; South Wales R. Co. v. Wythes, 5 De Gex, M. & G. 880), the disability of the defendants would be a sufficient reason for refusing. Courts of equity will never undertake to enforce specific performance of an agreement where the decree would be a vain or imperfect act. Tobey v. County of Bristol, 2 Story, 800, Fed. Cas. No. 14,065. And the incapacity of the defendant to carry the contract into execution affords a ground of defence in a suit for specific performance. Fry, Spec. Perf. § 658.

In this case the defendants are willing to perform their part of the contract if they can lawfully do so. They have never refused to issue their bonds and stock to the complainants in accordance with the terms of the contract, except because of the provisions of the supplement above referred to, under which they apprehend they may have lost their corporate existence, and by which, if their corporate existence be not lost, their directors and officers who should act in the matter

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would be liable to severe and ignominious punishment for so doing. P. L. 1878, p. 23. They have not complied with the provisions of the supplement in reference to the amount to be paid in on their capital stock, and have not been able and are not able to do so. Only ten per cent. of the amount of their capital stock has been paid in. Their corporate powers are, according to the supplement, extinct, and the corporation is dissolved. P. L. 1878, p. 22. The complainants, however, insist that the supplement is an unconstitutional law; that it destroys their contract, which existed when it was passed, and which was founded on the faith of the original act; that it deprives them of their vested rights thereunder, and that it should be declared to be unconstitutional, and its provisions, so far as they are subject to that objection, disregarded. But it is in nowise necessary to consider that question; for, if there were no other valid objection, this court would not, under the circumstances of the case, declare that the apprehensions, or doubts at least, of the defendants, as to the validity of the supplement, are wholly groundless, and direct them to proceed, notwithstanding the penalties above mentioned, to issue bonds according to the contract and in violation of the prohibition of the supplement; to subject themselves to indictment for misdemeanor and the consequences of conviction. It is enough that the legislature has forbidden them to issue the bonds to induce this court to refuse to order them to issue them. But, further, there is at least doubt whether the company still has a corporate existence.

Though the court might, if the case were free from these difficulties, direct the defendants to make the estimate of work already done prayed for in the bill (Waring v. Railway Co., 7 Hare, 482), yet, for the considerations already presented, that relief must also be denied.

The bill will be dismissed.

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BECK v. ALLISON.

(56 N. Y. 366.)

Court of Appeals of New York. April 21, 1874.

Action for specific performance of covenants to repair contained in a lease executed by defendant to Luke Poole & Co., of premises 44 Vesey street, New York, which lease was held by plaintiff as assignee. The facts are stated in the opinion.

Andrew Boardman, for appellant. Wm. W. MacFarland, for respondents.

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

The question is thus presented whether equity will enforce the specific performance of an agreement for making repairs of this character. The learned chief justice who gave the opinion of the general term, after an elaborate and learned examination of the English authorities, arrived at the conclusion that equity would specifically enforce the agreements for making repairs. In this he differs from Judge Story, who after an examination and citation of some of the leading cases relied upon by the learned judge, adopts precisely an opposite conclusion. 1 Story, Eq. Jur. 726, §§ 726, 727. The accuracy of the conclusion of Judge Story is strongly corroborated by the fact that in this state, and so far as I am aware, in this country, no court of equity has ever attempted the exercise of any such power. The same conclusion is substantially adopted by a learned English author of a work upon this particular branch of equity jurisprudence, who refers to most of the cases relied upon by the learned judge. Fry, Spec. Perf. 19, § 48. I shall refer to only a few of the cases cited by the judge, although I have examined nearly all. City of London v. Nash, 1 Ves. 11, more fully reported, 3 Atk. 512, decided by Lord Hardwicke, is much relied upon in the opinion. In this case the chancellor stated that equity would enforce the performance of a building contract, for the reason that it was an entire thing, but not a contract for repairs. While I am unable to see if the former is thus enforced, why the latter should not be, for the reason that the former would be attended by about the same difficulties as the latter, and a legal remedy would be equally applicable to both, yet the case is authority against the conclusion of the general term in the present case, as this is an agreement for making repairs. It may be further remarked, that a specific performance of the contract to rebuild was not decreed, the chancellor being of opinion that that would be inequitable under the circumstances, and the party injured by the breach of the contract was left to his legal remedy for the recovery of damages. The judgment given is no authority for enforcing the specific performance of contracts to build. In the subsequent case of Lucas v. Commerford, 3 Brown, 166, it was expressly held by Chancellor Thurlow, that there could not be a decree to rebuild, as the court could no more undertake the conduct of a rebuilding than of a repair. I think the soundness of the reason given a full answer to the criticism of this chancellor contained in the opinion with a view to impair the authority of the judgment given in this case. In Rayner v. Stone, 2 Eden, 128, a demurrer to a bill for the specific performance of covenants contained in a lease to repair hedges and the mansion house, was sustained by Lord Worthington. Among the reasons assigned for the judgment was that the court had no officer to see to the performance, which the chancellor said was to him very strong. He asks, how can a master judge of repairs in husbandry, etc.? He adds that it is said that this is an equitable right, and that it was insisted that he should put the plaintiff in a better state than what he could be at law, but the court had no jurisdiction to strip the defendant of the right to try the supposed breach of covenant at law. Besides, how can a specific performance of things of this kind be decreed? The nature of the thing shows the absurdity of drawing these questions from their proper trial and jurisdiction. These reasons apply with all their force, to an attempt to enforce the specific performance of the contract in question. The court must first adjudge what repairs are to be made and the time within which they are to be done. When this is accomplished more serious difficulties remain. The idea that a court can appoint a receiver to take possession of the property and cause the work to be done, with money furnished by the defendant, would be, in the language of Lord Worthington, absurd. The mode, if undertaken, must be for the court first specifically to determine what shall be done, and when and how, and then to enforce performance by attachment, as for contempt in case of alleged disobedience. Then will arise not

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only the question, whether there has been substantial performance, and if found not, whether the defendant had any such excuse therefor as will exonerate him from the contempt charged, and in case of performance, but not in as beneficial a manner as adjudged, the compensation that should be made for the deficiency. It is obvious that the execution of contracts of this description under the supervision and control of the court would be found very difficult if not impracticable, while the remedy at law would in nearly if not in all cases afford full redress for the injury. It is for these reasons that such powers have never been exercised in this country. It was for these reasons that the court in South Wales R. Co. v. Wythes, 5 De Gex, M. & G. 880, refused to decree the specific performance of a contract to construct a branch railway. The case enforcing the specific performance of an agreement made by a railway company with a land-owner, to construct an arch under their road for his use, does not militate against this doctrine. Damages in an action at law would not, in such a case, afford adequate redress. The same may be said of the case enforcing a contract for the construction of a wharf, etc. The want of an adequate remedy at law has always been regarded as a proper ground for sustaining a bill in equity. See Wilson v. Furness R. Co., 9 Eq. Cas. 28. What was said by Lord Hardwicke in Rook v. Worth, 1 Ves. Sr. 460, was intended to apply to the particular facts of that case, which related to questions as to the rights of tenant in tail and the reversioner, which could not well be protected in a legal action.

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

But under the Code a plaintiff may unite in the same complaint several causes of action, both legal and equitable, arising out of the same transaction. Code, § 167, subd. 1. In the present case the rights of the plaintiff under the agreement were stated in the complaint, and the failure of the defendant to perform the same was also set out. The parties proceeded to trial upon the claim made by the plaintiffs for a specific performance of the contract. The trial judge found that the facts were not such as to authorize the granting of this relief, but as some evidence showing the value of the plaintiffs' interest in case of a prompt repair of the premises had been given, the judge proceeded to give judgment, that the lease should be canceled, and the plaintiffs should recover of the defendant the value of his interest in the premises, upon the basis of the repairs to the building having been completed in a reasonable time after the fire. To this the defendant's counsel excepted. When the judge found that the plaintiffs were not under the facts of the case entitled to the equitable relief demanded (specific performance), the case as an action in equity was terminated. It then appeared that the plaintiffs never had any equitable cause of action against the defendant, adjudging a cancellation of the lease was wholly immaterial. This was the necessary result of a recovery by the plaintiffs of their damages for the unexpired term, consequent upon the refusal of the defendant to perform his agreement to make the repairs. The plaintiffs could not recover these and retain any rights under the lease. Such a judgment in favor of the plaintiffs would bar an action brought by the defendant against them for rent. Under a system vesting equity and legal jurisdiction in different tribunals, the former after determining that the complainant had no equitable cause of action, did not retain jurisdiction for the purpose of giving such relief as he would be entitled to at law. Kempshall v. Stone, 5 Johns. Ch. 193, and cases cited. It was only where the plaintiff was entitled to equitable relief upon the case made by him, but which could not be awarded, for the reason that it was not in the power of the defendant to perform the judgment granting it, or that such relief would be harsh and inequitable under all the circumstances of the case, that the court, as a substitute therefor, awarded an equivalent in damages, thus ending the controversy, instead of sending the parties to a court of law for that purpose. That was not this case. There was no incapacity of the defendant to specifically perform the contracts if the plaintiffs were entitled to such relief. The court should have held that they were not so entitled upon the case made by them. This as before remarked terminated the case as a suit in equity; and under a system vesting equitable and legal jurisdiction in different tribunals, the complaint should have been dismissed. But jurisdiction of both classes of action is now vested in the same tribunal, the mode of trial only being different. If the complaint contains an equitable and also a legal cause of action, if the plaintiff upon the trial of the former fails in establishing a case entitling him to relief, he has still a right to a trial of the legal cause of action set out. The defendant is not therefore entitled to a dismissal of the complaint until the latter has been tried. In the present case, the complaint stated the agreement of the defendant to make the repairs, and the neglect of the defendant to perform it; it failed to state some other facts essential to the right of the plaintiffs to recover the damages thereby sustained. The complaint might therefore have been properly regarded as setting out an equitable cause of action only, and upon the failure of the plaintiffs in establishing such a cause, properly dismissed. But it was in the power of the court, upon terms deem-

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ed just, to allow an amendment of the pleadings, so that a legal remedy might be had in the action, as from the lapse of time the statute of limitations may bar another action. I think an opportunity should be given to the plaintiffs to obtain a legal remedy in this by the proper amendment, and securing to the defendant his right of trial by jury.

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

All concur.

Judgment reversed.

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LEAR v. CHOUTEAU et al.

(23 Ill. 39.)

Supreme Court of Illinois. Nov. Term, 1859.

Error to circuit court, St. Clair county; W. H. Underwood, Judge.

This was a bill in chancery, by Pierre Chouteau, Jr., James Harrison and Felix Valle, against Ferdinand Lear, to compel a conveyance to the complainants of certain coal and coal lands, and privileges connected therewith, purchased by the defendant, as was alleged, in trust for the complainants.

The attorney for the complainants testified that he took down the notes from which the exhibit was drawn from the directions of Charles P. Chouteau and the defendant, when together in his office; that he read the same to the defendant, and said he believed it embodied the whole agreement, and all that was necessary; that the defendant replied, he believed it did; that the defendant was slightly deaf; that when the agreement was drawn, the "defendant expressly desired that some time should be limited in it, in which he should be required to commence operations, and they fixed upon a month, that is to say, this is what I understood Lear's wish at the time."

The agreement or exhibit contained the following clause: That it "should not take effect until after one month's notice given to said Lear, by Chouteau, Harrison and Valle, to that effect, unless the parties should mutually consent to a shorter time for the commencement of operations." Lear never signed this agreement. The opinion states the other material facts.

Kœrner & Niles, John M. Krum, and E. W. Decker, for plaintiff in error. George Trumbull, for defendants in error.

CATON, C. J. (after stating the facts). There is no pretense for a resulting trust in this case. The interests in the lands in controversy were purchased by Lear not for cash down, but on time, to be paid for as the coal should be taken out, and Lear gave his personal obligations for the payment of the purchase money, and took whatever title was taken to himself. The agreement under which these purchases were made could not create a resulting trust, which can alone arise from the fact, that a purchase is made in the name of one, while the purchase money belongs to another. Here no part of the purchase money has been paid, and hence it is impossible that a resulting trust could arise.

The subject matter of this controversy is coal in lands, with the right to take and remove it therefrom. This is an interest in lands, and by the statute of frauds all contracts concerning it are required to be in writing, in order to be binding on the parties, yet the well settled rules of both law and equity require that those who would avoid the obligations of such parol contracts by reason of the statute, must set up the statute by way of defense, or rely upon it by pleading in some way, and if they will not do this, they thereby impliedly waive the objection, that the contract was not in writing. Here the defendant has not relied upon the statute in his answer, and it is now too late for him to say that it was not in writing. We must now consider this case as if no such statute existed.

We shall assume, for the purposes of this decision, that the testimony of Mr. Hill shows that Lear assented to the paper exhibit A, as containing the terms of the agreement between the parties under which these lands were purchased, and for which he agreed to assign the contracts to the complainants, while we confess that we are by no means satisfied that such admission was understandingly made, or that Mr. Lear fully understood the effect of the paper. But we shall place our decision upon the terms and provisions of the paper as exhibited. It shows such an agreement as no court of chancery ever ought to enforce specifically, even though the defendant agreed to all its terms. It is not every contract, although fairly and even understandingly made, which a court of chancery will decree to be specifically performed. Shall we compel Lear to assign these purchases for the consideration of the covenants and obligations which the complainants propose to assume by the execution of this paper? It is a paper by which Lear agrees to superintend the opening and working these mines and to devote all his time thereto, for which services the complainants are to pay him seventy dollars per month till the mines are open, and after that, two mills per bushel for the coal which shall be taken out and marketed. Even if the contract stopped here, we cannot say that it should be specifically performed. This contract makes no provision for the payment of the purchase money. By the original contracts to be assigned by Lear to the complainants, Lear had bound himself in personal covenants to pay fifteen dollars per acre for all the coal in all these lands, and this paper leaves him still obliged to pay this rent or purchase money. Was such the intention of the parties? Did Lear intend to bind himself still to pay this money? Probably not, although such is the effect of the papers which we are called upon to compel him to execute. But the last clause in this exhibit "A," leaves it without the least particle of value to Lear, and places him entirely at the mercy of the complainants. It is this: "This agreement is not to take effect until after one month's notice given to said Lear by Chouteau, Harrison & Valle to that effect, unless the parties hereto shall mutually consent to a shorter time for the beginning of operations." Here then the contract which constitutes the sole consideration for these assignments is to remain a dead letter, till the complainants choose to impart to it vitality by giving the notice specified. Till then, it is not to take effect; it is to have no existence; it is as if

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it had never been written, except that Lear is forever bound to hold himself in readiness on one month's notice to enter into the service of the complainants on the terms specified. Of what worth is such a paper to Lear—what consideration is it for the assignment of these purchases, which had cost him, no doubt, considerable labor and scientific skill as a collier, as the case shows, and also for which he had executed his obligations amounting in the aggregate to a very large sum? Nothing; absolutely nothing, and even worse than nothing, for by it his hands would be tied up so that he could not engage in other enterprises of a permanent character, but must ever stand with his hands folded, awaiting the pleasure of these gentlemen. In such a contract as this there is neither reciprocity, fairness nor good conscience, and if the defendant was simple enough to consent to such an agreement, a court of equity will not compel him to execute it specifically, but leave the parties to their remedies at law, which has no conscience and knows no mercy. In order to induce a court of equity to enforce specifically a contract, it must be founded on a good consideration, it must be reasonable, fair and just. If its terms are such as our sense of justice revolts at, this court will not enforce it, though admitted to be binding at law. Such is the character of this agreement—there is not one reciprocal feature in it. Lear is required to perform every thing on his part, and binds himself to the performance of future acts unconditionally, while the complainants are absolutely bound to nothing. Some men delight in holding all the strings in their own hands—holding others entirely at their mercy, that they may make a merit of justice and call it generosity, or crush down their victim with a heavy hand and plead the letter of the bond for a justification. Such traits of character and such transactions are as abhorrent to equity as they are detestable to the common appreciation of mankind, and will look in vain for favor at the hands of this court. We will not say that these complainants are fully obnoxious to this censure, but this transaction looks very like it if they fully comprehend the scope of the agreement which they propose to give the defendant, and the position in which they are seeking to place him.

The decree is reversed and the bill dismissed.

Decree reversed.

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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-

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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,

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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.

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MARGRAF v. MUIR.

(57 N. Y. 155.)

Commission of Appeals of New York. Jan. Term, 1874.

Appeal from order of the general term of the supreme court in the Second judicial department, reversing a judgment in favor of plaintiff, entered upon the report of a referee and granting a new trial.

This action was against the vendor for specific performance of a contract to convey a lot of land, situate in Westchester county, and for damages for breach of the contract in case it could not be specifically performed.

The defendant is the widow of Alexander Muir, who died intestate in 1858, seized of a lot of land in Westchester county. He left six children, three of whom were yet minors, when the contract in question was made. The defendant, with her children, resided in Brooklyn, and the plaintiff resided in Westchester county, near the lot in question. She did not know what the lot was worth, but he knew it was worth $2,000 in consequence of its recent rise in value. This knowledge he concealed from the defendant and contracted with her to purchase it for $800. She contracted in her own name, expecting that those of her children who were of age would unite with her in the conveyance, and that she could get from the court the right to convey on behalf of her minor children. Before the making of the contract, the lot had been sold for taxes, and a lease thereof given in pursuance of such sale. At the time of making the contract, the plaintiff knew that the lot belonged to defendant's children, and that proceedings would have to be taken in some court to give her the right to convey; and he also knew that the land had been sold for taxes, and this latter fact she did not know. The referee found that the lot was worth $2,000, and ordered judgment for the plaintiff for $1,200, the difference between the contract price and the value of the lot. Further facts appear in the opinion.

John Flanders, for appellant. Samuel J. Glassey, for respondent.

EARL, C. This was an unconscionable contract and could not be specifically enforced on the ground of the inadequacy of the consideration. The plaintiff lived near the lot and knew its value. The defendant lived at a distance and did not know its value. While the plaintiff did not make any misrepresentations, he concealed his knowledge of the recent rise in value of the lot and took advantage of her ignorance, and thus got from her a contract to convey to him the lot for but a little more than one-third of its value. Such a contract, it is believed, has never yet been enforced in a court of equity in this country. When a contract for the sale of lands is fair and just and free from legal objection, it is a matter of course for courts of equity to specifically enforce it. But they will not decree specific performance in cases of fraud or mistake, or of hard and unconscionable bargains, or when the decree would produce injustice, or when such a decree would be inequitable under all the circumstances. 2 Story, Eq. Jur. § 769; Will. Eq. Jur. 262; Osgood v. Franklin, 2 Johns. Ch. 1, 14 Johns. 527; Seymour v. Delancy, 6 Johns. Ch. 222, 3 Cow. 531.

Formerly, in case courts of equity refused specific performance on the ground of mere inadequacy of consideration, the party claiming performance still had his remedy by a new action in the courts of law for damages for the breach of contract, and in such courts mere inadequacy of consideration, not so great as to be evidence of fraud, was never a defense. Hence if this action had been brought before the Code in the court of chancery, the equity of the bill being denied, jurisdiction of the action would not have been retained to award such damages for a breach of the contract as could be recovered in a court of law. But the plaintiff would have been obliged to commence a new action at law to recover his damages. This practice has however been changed by the Code; and now, equitable and legal jurisdiction being united in the same court, a party can unite in the same complaint both legal and equitable causes of action arising out of the same transaction. Code, § 167. I suppose it is perfectly competent for a party to set forth in his complaint a cause of action for specific performance of a contract to convey land, and also a cause of action for damages for breach of the contract, in case for any reason it cannot be performed. If upon the trial, it turns out that for any reason the equitable relief cannot be granted, the plaintiff can yet recover his damages if he is entitled to any. Barlow v. Scott, 24 N. Y. 40; Bradley v. Aldrich, 40 N. Y. 504; Pumpelly v. Phelps, Id. 59.

In this case the referee denied the equitable relief, but awarded damages for the breach of the contract, and in this he did not err, provided he adopted the proper rule of damage. The referee allowed the plaintiff as damages the difference between the contract-price and the value of the land, thus placing him in the position he would have been if the contract had been performed. In this I think he erred. The general rule in this state, in the case of executory contracts for the sale of land, is that in the case of breach by the vendor, the vendee can recover only nominal damages, unless he has paid part of the purchase-money, in which case he can also recover such purchase-money and interest. Mack v. Patchin, 42 N. Y. 167; Bush v. Cole, 28 N. Y. 261; Pumpelly v. Phelps, supra. See, also, Lock v. Furze, L. R. 1 C. P. 441; Engle v. Fitch, L. R. 3 Q. B. 314. But to this rule there are some exceptions based upon the wrongful conduct of the vendor, as if he is guilty of fraud or can

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convey, but will not either from perverseness or to secure a better bargain, or if he has covenanted to convey when he knew he had no authority to contract to convey; or where it is in his power to remedy a defect in his title and he refuses or neglects to do so, or when he refuses to incur such reasonable expenses as would enable him to fulfill his contract. In all such cases, the vendor is liable to the vendee for the loss of the bargain, under rules analogous to those applied in the sale of personal property. Here no fraud was perpetrated on the vendee. He knew that the vendor did not have title to the lands, and that she could not convey to him without authority from some court; and he knowing that the land was worth $2,000, may be presumed to have known that no authority could be obtained to convey the land for $800, without in some way practicing an imposition upon the court. This latter knowledge she did not have. Believing, as she did, that $800 was a fair price for the land, she had no reason to doubt that she could obtain authority to convey. Further than this, he knew that the land had been sold for taxes and a lease given. This she did not know. Under these circumstances, she could not get authority from the court to make a conveyance upon behalf of her minor children, and it appears that she could not procure the tax title. Hence, there is no ground for imputing to her any blame for not making such a conveyance as her contract called for. These facts do not call for the application of an exceptional rule of damages in this case.

The case of Pumpelly v. Phelps, supra, is the widest departure from the general rule of damages in such case that is to be found in the books. In that case it was held, that where the vendor, in an executory contract for the conveyance of land, knew at the time he made the contract that he had no title, although he acted in good faith, believing that he could procure and give the purchaser a good title, he was yet liable for the difference between the contract-price and the value of the land. But there are two features which distinguish this case from that. In that case, the vendee did not know that the vendor had no title. Here, he did know it, and he knew also that she could get no title without imposing upon some court. Here also, even if she could have procured the authority of some court to convey, she still would have been unable to give such a title as her contract called for, on account of the outstanding tax title which was unknown to her when she contracted and which she could not procure.

The plaintiff agreed, subsequently, to the making of the contract, if defendant would abate $100 from the contract-price, that he would, at his expense, conduct the proceedings to procure from the court authority to convey, she co-operating with him and would take a conveyance subject to the tax title. This did not alter the position of the parties so as to affect this case. She was in no sense culpable in not co-operating with him in imposing upon some court, and to shield her from the damages claimed in this case, she was not obliged to allow him any thing on account of the tax title. I am therefore of opinion that the referee erred in the rule of damages applied. The recovery should have been confined to the purchase-money paid ($25) and the interest thereon.

The general term did not therefore err in reversing the judgment, and its order should be affirmed and judgment absolute ordered against the plaintiff, with costs.

All concur.

Order affirmed and judgment accordingly.

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BIRD v. HALL et al.

(30 Mich. 374.)

Supreme Court of Michigan. Oct. Term, 1874.

Appeal from circuit court, Marquette county; in chancery.

Parks & Hayden and Mitchel & Pratt, for complainant. Ball & Black and C. B. Grant, for defendants.

COOLEY, J. A short statement of this case, as it is set forth in the bill, is, that Bird contracted to purchase a lot of land of Hall, and has partly paid for it; that he then contracted to sell the same land to McFee, who also paid for it in part and was put in possession, the balance of the purchase price not being yet due; that Hall then, in disregard of complainant's rights, has given McFee a conveyance; that McFee is irresponsible, and complainant by this conveyance is deprived of his security for the balance which is to become due to him hereafter from McFee; and the bill prays that McFee be decreed to convey to complainant in specific performance of the contract of Hall, in whose shoes as his assignee he now stands.

It seems clear that a conveyance as prayed by the bill would be strictly equitable, as it would place the parties where they have agreed to place themselves by their contracts. Complainant was entitled to a conveyance from Hall on payment of the balance due him, which he has offered to make, and he was then entitled to hold the title until he is paid in full by McFee. This is conceded by defendants, but they insist that complainant has at law an ample remedy against Hall, if he suffers a loss in consequence of Hall's conveyance to McFee, and that as it is not alleged that Hall is irresponsible, there is no sufficient ground for equitable interference.

What complainant loses by this conveyance is his security for the ultimate payment by McFee. Whether a loss of the security would result in loss of the debt cannot yet be determined, and any present right of action at law against Hall would give him nominal damages only. A right of action against him at a future day, after the personal remedy against McFee had proved ineffectual, might or might not find him in condition to respond, even if it be conceded that at present he is entirely responsible. Complainant cannot justly be compelled to run this risk. These parties cannot be allowed to deprive him of his security and turn him over to the contingencies of successive suits at law after his demand has matured. He has a right to be protected against the suits and the contingencies by having ample and effectual security in his own hands, and the remedy in equity was alone adequate to the case.

The decree must be reversed with costs, and the cause remanded, with directions to the court below to overrule the demurrer and allow the defendant McFee to answer.

The other justices concurred.

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MERCHANTS' BANK v. THOMSON.

(55 N. Y. 7.)

Court of Appeals of New York. Nov. 11, 1873.

Appeal from order of general term of the supreme court in the Fourth judicial department, affirming conditionally an order of special term directing Theodore F. Tuttle, a purchaser at a foreclosure sale, to complete his purchase.

This action was to foreclose a mortgage executed by the defendant, William P. Thomson, to Guevera M. Waite, conditioned for the payment of $1,070 in one year from date. Helen A. Thomson, the wife of the mortgagor, was made a nominal party defendant. There were, however, no averments in the complaint relating to her. She did not join in the mortgage, which was upon the undivided one-fourth part of certain real estate situate in the city of Watertown. Personal service was had upon all the defendants, and no defence was interposed by any of them. The whole amount of the mortgage was due. The usual decree of foreclosure was entered May 10, 1872. A. W. Wheelock, sheriff of Jefferson county, was directed by the decree to conduct the sale, which took place June 6, 1872.

The premises were struck off to Theodore F. Tuttle, for $3,350, he being the highest bidder. The purchaser requested a delay for a short time; this was granted, and at the suggestion of the sheriff that a specified time should be stated by the terms of sale, it was agreed to be completed on the tenth of June. After the sale Tuttle requested to be released, upon the ground that his bid was too high, but this plaintiff refused and Tuttle was repeatedly urged to complete the sale. On the twenty-fifth of June, the sheriff formally tendered to him a deed of the premises and demanded payment. On the 5th of July, 1872, an order was made by Mr. Justice Mullin, requiring Tuttle to show cause at an adjourned special term, on the tenth of the same month, why he, Tuttle, should not pay the amount of his bid, and receive from the sheriff a deed. On that day a hearing was had at said special term; Tuttle appeared and opposed on the ground of defect of title, because of the inchoate dower right of Helen A. Thomson. An order of reference was granted to a referee to inquire as to the facts and circumstances occurring at the sale, etc., and report the same, with his opinion. Pursuant to this order, the testimony of Tuttle and others was taken by said referee, who reported the same, with his opinion that Tuttle should be required to receive the sheriff's deed and pay the amount of his bid. Pending the taking of the testimony before the referee, Helen A. Thomson, for the purpose of relinquishing her contingent dower right, executed a quit-claim deed of the premises to J. F. Moffatt, who, with his wife, also executed a quit-claim deed to Tuttle. Upon motion to confirm the report, the special term ordered that Tuttle complete his purchase by receiving the sheriff's deed of the premises and the quit-claim deeds, and paying the purchase-price, with interest from day of sale.

Upon appeal to the general term it was ordered that such order be reversed, unless plaintiff should, within thirty days, deliver to Tuttle a valid release of the dower right of the mortgagor's wife, together with the sheriff's deed; if such release and deed were so delivered, then order affirmed.

L. J. Dorwin, for appellant. Samuel Hand, for respondent.

FOLGER, J. When Thomson executed the mortgage which was foreclosed, he was married. The mortgage was not given for the purchase-money, nor did his wife join in executing it. Hence it did not affect her inchoate right of dower in the premises. Though she was made a party to the action of foreclosure, she was not barred of that right by the judgment therein. There is no allegation in the complaint that the mortgage was prior, or superior, or hostile, to her right or interest. There is the general clause in the judgment that the defendants be foreclosed of all right in the premises. But her inchoate right of dower was not in issue, and there could be no valid adjudication adverse to it. Moreover a foreclosure action is not the proper mode to litigate rights claimed in priority or hostility to the mortgage. A judgment passing upon them is erroneous. A person claiming dower by title paramount to the mortgage cannot be brought into court in such a suit to contest the validity of her dower. Lewis v. Smith, 9 N. Y. 502. The position is the same as if she had not been made a party to the foreclosure action.

The title made by the referee's sale in the action was subject then to this inchoate right of dower. And that was the sole objection to the title, made by the purchaser. It is ordinarily a good objection. Where there is an outstanding inchoate right of dower in the premises, unknown to the purchaser at the time of the sale, the court will not compel him to take a deed and complete his purchase. Fitts v. Hoitt, 17 N. H. 530; Mills v. Van Voorhies, 20 N. Y. 412. And see Simar v. Canaday, 53 N. Y. 298. And this is so in judicial sales when the sale is not made at the risk of the purchaser. McGown v. Wilkins, 1 Paige, 120; Spring v. Sandford, 7 Paige, 550. The attempt to obviate this objection by the execution and tender of the quit-claim deed from the wife to Moffatt, and of that from him to the purchaser, though it showed the willingness of the vendor to meet the requirements of the referee and of the court at special term, was futile. Moffatt was a stranger to the title. A quit-claim or release, by a married woman to a stranger to the title, is ineffectual to divest her of an inchoate right of dower. Malloney v. Horan, 49 N. Y. 111; Marvin v. Smith, 46 N. Y. 571. But a release from the wife, executed directly to the purchaser, in connection with the sheriff's deed to him, will free the premises and give him a good

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title thereto. The order of the general term directs this. There is no suggestion but that this direction has been or will be followed, and we must treat the case as if it had been done.

Then the only ground upon which the purchaser now stands, in declining to complete his contract, is that so much time has elapsed since the sale, that he may not be compelled to take the premises, although the title be free from objection. Doubtless the later tendency of courts of equitable jurisdiction is to hold that time is material, and is in many cases of the essence of the contract. Inexcusable laches and delay will debar a party from the relief which, they being absent, he might have by a judgment for specific performance. This question has been much considered of late in this court. Delavan v. Duncan, 49 N. Y. 485; Finch v. Parker, Id. 1; Hubbell v. Von Schœning, Id. 326; Peters v. Delaplaine, Id. 362. It seems that whether specific performance shall be adjudged depends much upon the circumstances of each case, of which the lapse of time unexcused is one. It is not yet the rule however that the time fixed in a contract for the performance of it, is necessarily of its essence. The mere efflux of time will not of itself always lead to a denial of relief. When the lapse of time is occasioned or accompanied by a refusal or a failure to claim or act under the contract, and is so great or of such characteristics as to amount to a waiver or abandonment of the contract, the party who comes not into court until after such delay will have forfeited all claim to equity. Can this be said of the vendor in this case? The sale was made on the 6th day of June, 1872. By the conditions of sale the time for the completion was, at the request of the purchaser for delay, stated to be on the 10th day of that month. It is evident however that this day was not deemed essential. The sheriff wished a memorandum of the sale, that there might be no misunderstanding of the terms, and the 10th day of the month was named in it but not as peremptory. A few days after the day of sale the purchaser made known a desire to be relieved from his bid, but put his wish upon the ground of his bid being too large. He was not relieved nor was he in anywise led to suppose that he would be. On the contrary, frequent claims were made upon him to complete his contract. On the 25th day of that month a formal tender was made to him of a deed by the sheriff, and a demand for performance. On the 5th day of July, 1872, on his refusal to perform, these proceedings were commenced to compel performance by him and they have been pending ever since. Certainly there is no delay here which from its length or other characteristic indicates an intention in the vendor to waive or abandon the contract. Rather the vendor showed himself in the oft-quoted language of Lord Alvanley (Milward v. Earl of Thanet, 5 Ves. 720, note), "desirous, prompt and eager." The vendor to be sure was not "ready," which is a part of the phrase in that case. But it is noteworthy, that it was not until after compulsory proceedings were begun against the purchaser, that he raised the objection to the title that it was incumbered with an inchoate right of dower. Before that his refusal was put only upon the excess of his bid over the real value of the lands; a claim which is not shown to be well founded. It thus appears that up to the commencement of proceedings to compel performance and for a time after that all delay arose from either the indecision of the purchaser in determining whether he would or would not take the land or from an untenable objection taken by him. In such case and whenever the delay is attributable to the party resisting performance, he will not be allowed it as a defense. Monro v. Taylor, 3 Macn. & G. 713–723; Morse v. Merest, 6 Madd. 26; Spurrier v. Hancock, 4 Ves. 667. Nor does it appear from the papers that the lapse of time which has occurred since the commencement of the proceeding is to be laid at the door of the vendor alone. The order of reference to take proofs seems to have been granted on the request of the purchaser, and to enable him to establish his objections. If there has been delay in executing that order before the referee (and there seems to have been a greater lapse of time there than elsewhere), the purchaser is not more exempt from blame therefor than the vendor. And besides that, had the true and at that time the only reliable objection of the purchaser, that made to the title, been put forth in the first instance as the ground for a refusal to perform, the vendor is not to be defeated if within a reasonable time thereafter he takes proceedings to test the validity of the objection. Southworth v. Bishop, etc., 8 Hare, 212; Paton v. Rogers, 6 Madd. 256. Still less can a vendor be said to be dilatory who by the prompt initiation of compulsory proceedings forestalls and provokes an objection to his title, which when made he at once sets about to obviate and does obviate to the satisfaction of each tribunal in turn before which the matter comes. If a party comes recenti facto, for a specific performance, the suit is treated with indulgence and generally with favor by the court. Marquis, etc., v. Boore, 5 Ves. 719, and cases cited in note. See, also, 2 Sugd. Vend. 30 et seq.; 1 Story, Eq. Jur. § 777. We do not think that the vendor is to be barred of its relief by reason of the mere efflux of time since the sale.

It is stated in the text-books and in the cases, that if by reason of delay arising from an imperfection of title, the circumstances of the transaction and of the parties have materially changed, so that equal justice may not be done to both by adjudging specific performance, judgment therefor will not be given. See Taylor v. Longworth, 14 Pet. 172, per Story, J. And it is intimated in one of the points of the appellant that by reason of the defect of title he has been unable to secure a loan upon the premises with which to pay the purchase-money; that the

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property has greatly depreciated in value; that at the time of the sale he could have resold without loss, and that now the property is unsalable. There are no facts presented in this case which sustain the intimations of the appellant's point and afford a basis upon which he may rest the application of this rule in his behalf. Nor is any authority cited that without such facts shown there will be a presumption that the circumstances have materially changed in the time elapsed, so that it will be of evil to the defendant to now hold him to his contract. It is said by Bronson, J., in Jackson v. Edwards, 22 Wend. 498–510, to the effect that it needs not proof of a change of circumstances, to show that delay in perfecting the title must be injurious to the purchaser, but that the bare fact of delay, inasmuch as that it of necessity prevents a purchaser from dealing with the property as his own, excuses him from accepting the title when at last it is perfected. It is to be observed however that there was in that case proof put in of a serious change in the circumstances subsequent to the sale. The remark of the learned judge was obiter. Sentor Verplanck, the only other member of the court who delivered an opinion, concurred in the result arrived at by Bronson, J., as to the effect in that case of the material change of circumstances which had taken place. But he puts his conclusion upon the facts as shown by the proofs, and holds that from these the court below was warranted in concluding that the delay had injuriously affected the purchasers. I am unable to find that the dictum of Bronson, J., has ever been cited with approval; though in McKay v. Carrington, 1 McLean, 50–60, Fed Cas. No. 8,841, it is said that it may be presumed that the embarrassment of the title, and the failure to obtain possession of the land for a number of years, essentially injured the interests of the purchaser by preventing a sale by him. If the dictum in Jackson v. Edwards is to be adopted as a rule, it will be applicable to every case, where there has been any lapse of time occasioned by a remediable defect of title, and the purchaser resists performance. And this would be to set aside a current of authority, that where the vendor comes in a reasonable time to enforce the contract, prepared to obviate the objections made to his title, he shall have relief. 1 Story, Eq. Jur. § 777.

It is well recognized as one of the grounds on which a court of equity adjudges a specific performance, that by lapse of time it has become impossible to strictly perform the contract, and so the party has lost his remedy at law. But if the very lapse which gives occasion for the court to interfere may be used to prevent its action, without any proof that the lapse has been of detriment, this ground of interference is effectually done away with. Time, though not ordinarily of the essence of the contract, may become so if, by its effluxion, a change of value, or other material change of circumstances, has been produced. Certainly it should be made to appear that such effect has in fact followed. If the court, without facts shown, might speculate as to the effect of delay upon the interests of parties, it is quite as reasonable, at many periods of our history, to surmise that in the lapse of time circumstances have changed to the benefit of the purchaser, as otherwise. Some of the cases above cited (from 49 N. Y.) show this. The true rule must be that if the delay of itself is unreasonable and unexcused, it is enough to relieve the unwilling party from the contract; and that delay, though not in itself unreasonable, if it has made way for an intermediate and material change of circumstances, detrimental to the interests of defendant if obliged to perform, will have the same effect; but that in the latter case it must so appear to the court from the facts shown in the case.

These views would lead to a simple affirmance of the order of the general term, but for another consideration. The order of the special term directed that the purchaser pay his bid, with interest from the day of the sale. It gave no direction as to rents and profits, in the meantime, of the lands sold. It does not appear either who had in the meantime the possession of the lands, though it may be inferred that the purchaser had not. The order of the general term affirmed that of the special term, on condition that the plaintiff should, within thirty days thereafter, deliver to the purchaser the sheriff's deed of the premises, and a release by the wife of the mortgagor of her inchoate right of dower. We have assumed that this deed and this release have been ready for the purchaser, and would have been delivered to him within the specified time, had he been ready to receive them and pay the purchase-money. But is not according to the rules governing such cases to compel the purchaser, who is out of possession, and is not under an especial contract, so stringent in its terms as of itself to lead to that result, to pay interest on the purchase-money, when the vendor has not been ready to make a good title. In such case the purchaser is bound to pay interest, and to take the rents and profits of the lands in lieu thereof, only from the time when a good title is first shown. Forteblow v. Shirley, cited in Binks v. Lord Rokeby, 2 Swanst. 222; Paton v. Rogers, 6 Madd. 256; Jones v. Mudd, 4 Russ. 118. Indeed, it is at the option of the purchaser whether to take the rents and profits and pay interest, or to relinquish the rents and profits and to be exempt from the payment of interest. Dias v. Glover, 1 Hoff. 71. And see Worrall v. Munn, 53 N. Y. 185.

The order of the special term and that of the general term are erroneous, then, so far as they direct the payment of interest by the purchaser from the date of the sale up

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to the time of the readiness to deliver the deed and release, provided for by the order of the general term. And though the order of the general term should be affirmed in its general scope, it should be modified in this particular to agree with the facts. As the exact state of the facts does not yet appear, the terms of the judgment of this court will have to be settled on the presentation of them by the parties.

Neither party should have costs against the other in this court.

All concur.

Ordered accordingly.

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HUBBELL v. VON SCHOENING et al.

(49 N. Y. 326.)

Court of Appeals of New York. May 3, 1872.

Action to compel the specific performance of a contract for the sale of three lots on One Hundred and Twenty-First street in the city of New York. There was a judgment for defendant, from which plaintiff appealed.

The following are the principal facts in the case: Defendants, husband and wife, contracted to convey to plaintiff premises in New York belonging to the wife, the purchase-money to be paid and deed delivered January 24, 1868. On the 23d, plaintiff applied to defendants' attorney, at whose office the contract was to be performed, for an extension of time to enable him to complete searches. The attorney promised to send him word when the defendants arrived next day, so that he could see them about it. Not receiving any word, plaintiff waited until four p. m. the next day, and then went to the office, where he found the husband, who informed him the wife had been there at noon, and had gone home, and would have nothing more to do with it; he was also informed he could not see her that night. The next morning plaintiff sought the defendants at their house, with the money to make the tender, but was told they were not at home. He thereupon tendered the money to the attorney at his office. This was Saturday. On Monday, plaintiff again sought the defendants, but was unable to find the wife. Thereupon he brought suit for specific performance.

Samuel Hand, for appellant. A. Lansing and George W. Van Slyck, for respondents.

ALLEN, J. There were no laches on the part of the plaintiff, nor any delay in the assertion of his rights. He has shown himself, in the language of the cases, "ready, desirous, prompt, and eager" to carry out the contract and have a performance of it. The brief delay of a few hours in making a formal tender of the purchase-money and demanding a conveyance of the property, was explained and excused. He had not, for some reason, completed his searches, and satisfied himself as to the title, and the day before that appointed for the performance of the contract he applied to the attorney of the defendants, at whose office the parties were to meet, for an extension of the time to enable him to complete his searches, and the attorney promised him that he would send him word as soon as the defendants came to his office, if they arrived the next day, so that he might see them about it.

Not receiving any message from the attorney the next day, he had reason to believe, either that the parties had not arrived or that they had assented to his request. He might reasonably and properly rely upon this promise of the attorney, and it should not be imputed to him as laches or as evidence of an indifference to, or an unwillingness to perform the contract, that he did so. The plaintiff had all of the 24th of January within which to perform the contract, as no hour was named for that purpose. He did not wait for the promised notice from the defendants' attorney, but during the business hours, and late in the afternoon of that day, went to the office and there found Mr. Von Schoening, one of the contracting parties, and was told by him that he would have nothing more to do with him, that he did not pay the money that same day, he did not fulfill his agreement and he would have nothing more to do with it. The feme defendant had been there in the earlier part of the day but had left, and the plaintiff was told he could not see her that night. The next morning the plaintiff sought the defendants early at their own house at Harlem, with the money to make the tender of the purchase-money and was told they were not at home. He then tendered the money to the attorney at his office, and this being Saturday, on the Monday following he again sought the defendants to tender the money to them personally, but was unable to find Mrs. Von Schoening, who was the owner of the property. She evidently kept out of the way, and the complaint was verified on the same day. In Duffy v. O'Donovan, 46 N. Y. 223, we held the plaintiff entitled to a specific performance against the vendor and the person to whom he had conveyed the premises with notice of the contract, although the money was not paid or tendered at the hour, the purchaser acting in good faith and intending to perform, and supposing, from the acts and declarations of the agent and attorney of the seller, that the money would be received at a later hour in the day.

Time, in the performance of an agreement either for the sale or purchase of real property, is always material, and a court of equity will not, any more than a court of law, excuse laches and gross negligence in the assertion of a right to a specific performance. But time is not of the essence of the contract, unless made so by the terms of the contract; and therefore, although there may not, when time has not been made essential, be performance at the day, if the delay is excused and the situation of the parties or of the property is not changed so that injury will result, and the party is reasonably vigilant, the court will relieve him from the consequences of the delay and grant a specific performance. Radcliffe v. Warrington, 12 Ves. 326; More v. Smedburgh, 8 Paige, 600; Edgerton v. Peckham, 11 Paige, 352. Each case must be judged by its own circumstances.

A party may not trifle with his contracts and still ask the aid of a court of equity. Neither will the law be administered in a spirit of technicality, and so as to defeat the ends of justice. In this instance there is no vexation, no room for suspicion of any trick

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on the part of the plaintiff; at most, it was a mistake in depending upon the promise of the defendants' attorney to advise him when the defendants arrived, if they should arrive on the day fixed for the performance of the contract.

It was assumed by the learned judge on the trial that one of the parties could, by notice to the other, make time of the essence of a contract, when by its terms it was not made so. This may be questionable, but need not be considered. The party in such case, if the operation and effect of the contract are to be essentially changed so as to vary his rights or duties at the volition of the other, should have reasonable notice in advance of the time when he will be called upon to act. Here no such notice was given, but, on the contrary, the plaintiff was put at ease by the promise of the attorney of the defendants. Doubtless a party may be held to a strict performance as to time and put in default for non-performance—that is, a default in law; and whether equity would relieve would depend on circumstances. But to do this the party seeking to put the other in default must not only be ready and willing to perform, but he must tender performance at the time and demand performance from the other. Von Schoening testified that a deed had been prepared and was ready, but the plaintiff was not notified of the fact, and it was not shown or offered to him. The defendants took especial pains to prove by the feme defendant, the owner of the premises, that she had never authorized any one to complete the contract or to receive the money for her, and she was not at the place of performance when the plaintiff called. The plaintiff was not in default, and was not put in default by any acts or offers of the defendants. The judge before whom the cause was tried has not found that the defendants put the plaintiff in default by an offer and a demand of performance, and the evidence would not have justified such a finding. But he has found that the plaintiff had failed to perform, and therefore was not entitled to relief merely by reason of a casual and justifiable delay of a few hours in making a formal tender of performance. In this we think there was error.

The judgment should be reversed and a new trial granted.

All concur.

Judgment reversed.

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LAMB v. HINMAN et al.

(8 N. W. 709, 46 Mich. 112.)

Supreme Court of Michigan. April 27, 1881.

Appeal from Berrien.

Edward Bacon, for complainant. Henry F. Severens, for defendants.

COOLEY, J. Specific performance is prayed in this case of an oral contract alleged to have been made by complainant with Hugh Lamb, his father, now deceased. The defendants are the administrator and heirs at law of Hugh Lamb. The case made by the bill is that on or about October 12, 1872, Hugh Lamb owned a certain 80-acre lot of land in the township of Warsaw, of the value of about $2,400, upon which he lived alone; that he was then 72 years of age, and very infirm; that among his infirmities was an ungovernable temper which rendered it difficult for others to live with him; that he had been letting his land on shares and had not succeeded well in so doing; that he had no team, little live stock and few farming utensils; that complainant was then a married man, living with his wife and two children about a mile from his father; that his father went to see him, and after talking over his affairs and circumstances, entered into a verbal agreement with him in substance and effect, as follows:

On the part of complainant it was agreed that as soon as suitable preparations could be made, complainant with his wife and family should remove to his father's dwelling-house on the land aforesaid, and live with him during the remainder of his life, and should give him suitable care and attention, and should farm the land, rendering to his father annually two-fifths of all the wheat and one-half of all the corn raised on the land, all to be delivered on the land, the wheat in the half bushel and the corn in the shock or row; that complainant should furnish the seed, farming utensils and team for use on the farm, and supply his father with suitable board, lodging, washing and mending, and on the part of said Hugh Lamb it was agreed that he should pay annually to complainant $75, and let complainant have the south 40 acres of the land and give him a good and sufficient deed thereof; that this agreement was fully performed on his part to the satisfaction of his father; that complainant took possession of the south 40 as his own in July, 1873, and has since cultivated and improved the same; that his father often promised to give complainant a deed of said south 40, but neglected to do so, and died without having given a deed, in September, 1878, and that since his death the heirs at law and the administrator appointed to settle his estate refuse to recognize and perform the agreement; wherefore complainant prays the aid of the court.

The defendant answered, denying that Hugh Lamb ever made such an agreement, and the case was brought to a hearing on pleadings and proofs. We are convinced by the proofs that a contract substantially as set up in the bill was made by the parties, and that complainant has strong equities in his favor which should be recognized if no inflexible rules of law forbid. The evidence that proves the contract discloses little discrepancies in the understanding of particulars, but not such as to make us doubt the parties having agreed upon the terms of an arrangement as complainant now describes them.

If there is any doubt as to the precise terms of the contract, it concerns the time when the deed was to be given. The complainant seems to have expected his father would give him a deed without any great delay; but the agreement fixed no time; and as the retention of the title constituted the father's security for the performance by complainant, it was not unnatural that he should delay putting the security out of his hands. If the contract had been in writing, Hugh Lamb would have had the legal right to decline to part with the title so long as he lived; and it is no reason for declining specific performance of the oral contract that complainant had expected his father would so far confide in him as to make the deed in person instead of leaving it to be made by his heirs. We think, therefore, that so far as proof of the contract is concerned, the case is sufficiently made out to answer the requirements of cases relied upon by defendants. Case v. Pelers, 20 Mich. 298; Wright v. Wright, 31 Mich. 380.

But it is said there has been no such part performance as can take the case out of the statute of frauds. The most important act of part performance was the taking possession of the land, occupying and cultivating it during the father's life. But this it is said was not in fact the complainant's possession, but the possession of the father; so that on this branch of the case there is substantial failure to make out any recognizable equity. The reason why taking possession under an oral contract is recognized as a ground for specific performance when payment of the purchase price is not, is that in one case there is no standard for the estimate of damages when the contract is repudiated, and in the other there is a standard that is definite and certain. A purchaser who takes possession of land under an oral purchase is likely in so doing to change very considerably—perhaps wholly—the general course of his life as previously planned by him; and if he is evicted on a repudiation of the contract, any estimate of his loss by others must in many cases be mere guess-work. The rule, therefore, rests upon the element of uncertainty, and not upon any technical ground of exclusiveness in the possession. And upon this point no case on its equities could be plainer than this. Complainant abandoned one home and made a new one in reliance upon the oral contract; occupied the land bargained for and cultivated it for six years in confidence that the contract would be performed; and it is not too much to say that the whole course of his sub-

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sequent life was probably changed in consequence. To deny relief under such circumstances for no other reason than that he did not occupy exclusively, would be to make the whole case turn upon a point in itself unimportant as affecting the real equities. The case is within Kinyon v. Young, 44 Mich. 339, 6 N. W. 835.

The decree of the court of chancery was in favor of complainant, and it must be affirmed with costs.

The other justices concurred.

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STEWARD v. WINTERS et al.

(4 Sandf. Ch. 588.)

Court of Chancery of New York. May, 1847.

Motion to dissolve an injunction, restraining the defendants from carrying on the auction business, or selling goods at public auction, in the store number eighteen William street, in the city of New York; and from conducting therein any business other than the regular dry goods jobbing business.

On the 2d day of February, 1847, the complainant, being the owner of that store, leased to the defendant, Winters, the first floor and cellar, for two years from the first day of May then next, at the yearly rent of fifteen hundred dollars, payable quarterly. The lease, executed by both parties, contained the following stipulation next following the demising clause, viz.: "The store to be occupied for the regular dry goods jobbing business, and for no other kind of business; and the store is not to be relet, without the written consent of the party of the first part; there is to be no marking or lettering on the granite, and no alteration in the shelving, or in the store otherwise, unless by the consent of the party of the first part."

On the first of May, 1847, Winters entered into possession of the premises, and immediately, in connection with the defendant Sayres, under the firm of Sayres & Winters, commenced selling goods there at auction, and continued to sell at auction daily, till the service of the injunction, suspending over the door the customary auctioneer's flag. Advertisements of their sales were published daily in the morning papers, in the columns of auctions, with the heading: "J. B. Sayres, Auctioneer. By Sayres & Winters, Store No. 18 William Street. This day, at 10 o'clock, at the auction rooms. Dry goods," &c. &c.

On the sixth of May, the complainant notified Winters in writing, that he was violating the stipulation in the lease by selling at auction, and that the complainant would insist on its being enforced; but Winters continued the auction sales as before.

The complainant owned several stores adjoining to and in the immediate neighborhood of the premises let to Winters, most of which were let to tenants carrying on the regular dry goods jobbing business; Winters' doings annoyed those tenants, and they complained of it to the complainant. The occupants of the lofts over Winters, who were also tenants of the complainant were annoyed by the auction sales; and those sales were thereby, as he insisted, injuriously affecting his interests in respect to his stores as tenements, to prevent which was one reason for his inserting the restriction. The bill stated that the auction business is not the regular dry goods jobbing business, and the conducting of the former in the demised premises, was a violation of the stipulation in the lease. The defendants, in support of the motion insisted in affidavits, that the business conducted by them was within the terms contained in the lease; and they showed that the complainant owned a store opposite the demised premises in the same street, which he had leased for an auction store; and that several other auction stores were close by.

J. Slosson, for complainant. E. Sandford, for defendants.

SANDFORD, V. C. I have no doubt that the business of selling goods at auction, is prohibited by the terms of the covenant in the lease, and that the lessee when he executed the lease, knew perfectly well that the lessor intended to exclude the auction business. The philological authority cited by the defendants, does not bear them out. Dr. Webster defines a "jobber" to be, "a merchant who purchases goods from importers and sells to retailers." An auctioneer does not purchase at all. He sells the goods of others for a commission.

Without wasting time upon the well established distinction between a dry goods jobber and an auctioneer, which is too clearly marked to be confounded or obliterated by affidavits, I will proceed to the only question in the cause, that of jurisdiction.

It is said, that the remedy at law for damages is adequate, and that so far from there being an irreparable injury by the continuance of the breach of this covenant, it is shown that there can be no injury at all.

I apprehend that we are not to regard this subject in the manner indicated by the latter proposition. The owner of land, selling or leasing it, may insist upon just such covenants as he pleases, touching the use and mode of enjoyment of the land; and he is not to be defeated when the covenant is broken, by the opinion of any number of persons, that the breach occasions him no substantial injury. He has a right to define the injury for himself, and the party contracting with him must abide by the definition.

In the case of the bakery (Macher v. Foundling Hospital) in 1 Ves. & B. 188, hereafter cited, I have no doubt a great many witnesses might have been found, who would have testified, that the bakery was not an annoyance to them, or to any but over sensitive persons. And in Hills v. Miller, 3 Paige, 254, the injury to the complainant, if tested by the opinions of witnesses, would scarcely have resulted in even nominal damages, in an action at law.

It is not necessary that the act complained of, should amount to a nuisance in law, either public or private. Nor is the court to enter into a comparison, and permit a tenant to carry on some trades as less offensive than others, where the covenant prohibits the former. Per Lord Eldon, in Macher v. Foundling Hospital, 1 Ves. & B. 188.

So far as the injury is concerned, it is therefore unnecessary for the complainant to establish that it will be irreparable; or on a

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continuing covenant, that it will be substantially injurious.

The question remains, is there an adequate remedy at law?

In the first place, it is manifest that at law a new cause of action will arise every day that the defendants sell at auction. If the lessor avail himself of his full rights at law, he will sue daily for damages. This would lead to a multiplicity of suits, harassing to both parties, and highly obnoxious to the censure of a court of equity.

Then if the suits were brought, how is it possible to estimate the actual damages? A jury might enter into a wide field of conjecture, without any certainty of coming out of it at the point of justice to the parties. The jurors might infer that the continuance of an auction business in the demised premises, would for years diminish the rent of the adjoining property, and render the premises less desirable to good tenants. But any estimate of damages on that basis, however well founded, would be wholly conjectural. A different jury might imagine that the conducting of an auction business, would enhance the value of the adjoining premises, and refuse to give any damages. And witnesses could undoubtedly be produced, whose opinions would sanction a finding in either of these modes.

I think that in a case where the parties by an express stipulation, have themselves determined that a particular trade or business conducted by the one, will be injurious or offensive to the other, and there is a continuing breach of the stipulation by the one, which this court can perceive may be highly detrimental to the other, although on the facts presented, it is not clear that there is a serious injury, and it is manifest that the extent of the injury is difficult to be ascertained or measured in damages; it is the duty of the court by injunction, to restrain further infractions of the covenant, thereby preventing a multiplicity of petty suits at law, and at the same time protecting the rights of the complainant.

The principles to be extracted from the following authorities, in my judgment, sanction this jurisdiction. I refer to Hills v. Miller, 3 Paige, 254; Barrow v. Richard, 8 Paige, 351; Rankin v. Huskisson, 4 Sim. 13; Barret v. Blagrave, 5 Ves. 555 (same case, 6 Ves. 104, where the jurisdiction was virtually conceded on the motion to dissolve the injunction); Lord Grey de Wilton v. Saxon, 6 Ves. 106; Macher v. Foundling Hospital, before cited; 2 Story, Eq. Jur. § 928.

As I remarked at the outset, the legal right is entirely free from doubt, so that the objection frequently made, previous to a trial of the right at law, does not exist. Therefore, the argument of Sir James Wigram, V. C., in Rigby v. Great Western R. Co., is exceedingly applicable; and in this respect, his argument is not impaired by the judgment of the Chancellor of England in the same case, on dissolving the injunction. 4 Railway & Can. Cas. 175, 1 Coop. t. Cott. 3.

The motion to dissolve the injunction must be denied, with costs.

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MANHATTAN MANUFACTURING & FERTILIZING CO. v. NEW JERSEY STOCK-YARD & MARKET CO. et al.

(23 N. J. Eq. 161.)

Court of Chancery of New Jersey. May Term, 1872.

Bill for an injunction. Heard on a rule to show cause why an injunction should not issue.

Mr. McCarter, for complainant. I. W. Scudder and Mr. Winfield, for defendants.

ZABRISKIE, Ch. The complainant is a corporation of the state of New York, doing business at Communipaw. The defendant, the stock yard company, a corporation of this state, owns a large and extensive abattoir or slaughter-house at Communipaw. It has not, for some years, slaughtered animals there, but let to butchers the privilege of slaughtering their animals in the abattoir. Previous to August, 1870, the blood and other remains of animals thus slaughtered there by the butchers, not being removed or properly cared for, had created a stench which became a nuisance to the adjoining country, and the company was restrained by an injunction from permitting the business to be carried on there, unless on condition of having the blood and offal perfectly cared for. The butchers paid for the privilege of slaughtering there, and left the blood and offal on the premises, to be cared for by the stock yard company. These difficulties became a serious embarrassment in the enterprise. The complainant undertook to manage this, and to remove and manufacture the blood and other abandoned refuse left on the premises by the butchers, so as to prevent any public or private nuisance that might else arise from them.

To effect the objects of this arrangement, the stock yard company, on the 5th of August, 1870, made a lease to the complainant of certain premises adjoining the abattoir, for the specified business of manufacturing and preparing fertilizers and manures, and the materials for that purpose. The term was for twenty years from April 20th, 1867, with privilege of renewal, and the rent to be paid was fifteen per cent. of the net profits of the business. The lease contained this provision: "The parties of the second part shall also have the refusal and exclusive right of saving and taking all the blood of animals slaughtered in the abattoir and sheep-house of the parties of the first part, and of saving and taking the animal matter and ammonia from the rendering tanks of the parties of the first part, and of using the same in their business;" and also this agreement on part of the complainant: "Said parties of the second part hereby bind themselves to save all that is possible of the blood from the animals slaughtered, and the animal matter and ammonia from the tanks, to prevent any effluvia or stenches from escaping, and to prevent any and all nuisance from being created in any manner whatsoever, either in saving the blood, animal matter, or ammonia, or in converting the same into articles of commerce."

The lease was executed by the president of the stock yard company, in the name of the company, by affixing its common seal and his signature. The execution was duly proved, and the lease recorded in Hudson county clerk's office, August 20th, 1870.

The complainant, on faith of the lease, erected on the demised premises expensive buildings and machinery for the purpose of the manufacture. These were completed by January 9th, 1871. In the meantime arrangements had been made by the complainant with the stock company and its employes for coagulating the blood on the premises, and for preventing nuisances arising from slaughtering in the abattoir. Part of this coagulated blood had, with complainant's acquiescence, been delivered to John J. Craven, one of the defendants, for making experiments or manufacturing it.

In April, 1871, the stock yard company leased its abattoir to Henry R. Payson and David H. Sherman, two of the defendants, who have since carried on the business under the name of D. H. Sherman & Co. The defendant, Isaac Freese, who was in the employ of the stock yard company as superintendent, and continued in the employ of D. H. Sherman & Co. in the like capacity, entered into partnership with the defendant Craven, who was also in the employ of the stock yard company at the making of its lease to the complainant, and with the defendant Sherman, under the name of "The Bergen Manufacturing Company," for the purpose of manufacturing albumen and fertilizers.

After January 9th, 1871, the complainant demanded all the blood of the animals slaughtered at the abattoir, but Craven made an arrangement with certain butchers who slaughtered there, for saving and taking the blood of the animals slaughtered by them, and this was permitted by Sherman & Co., and Freese, their superintendent; and a large part of the blood is thus taken and delivered to Sherman, Freese and Craven, and is lost to the complainant.

By the record of the lease to the complainant, Sherman, Craven and Freese had constructive notice of its contents, and also it is clear that they, as well as Payson, had actual notice. They do not deny this, but take the ground that the blood, like all other parts of the animal slaughtered, belongs to the butcher, and that they or the stock yard company can no more control or deliver it than they could control the flesh or hides. That the butchers having discovered that the blood has a merchantable value, have a right to dispose of it for their own benefit; and that

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when they had determined to sell it, and not to abandon it, Craven was under no obligation not to buy it, and his firm might receive it through him without breach of faith.

This defence, at first sight, is seemingly good; but it wholly rests upon the correctness of the premises, to wit, that the stock yard company had not the right or power to control the disposition of the blood. It is not claimed that it had, before the complainant's lease, granted to any one the privilege of slaughtering there. If it had, for a term unexpired, it would have lost the control. Before that, they had permitted butchers to slaughter there without any provision about disposing of the blood or offal. It may, by custom, have been the effect of such contract, that the butcher might leave the blood and offal to be removed by the company. If left, the company was liable for any nuisance occasioned by it. It cannot be doubted that the company could have required, as a condition, that the butcher should remove the blood and offal. It had the right to prevent any one from using the abattoir who would not comply. Before the lease to the complainant, this condition would have been deemed a burden on the butchers, and might have injured the business of the company. It was in difficulty by reason of the nuisance caused by leaving these matters, and the injunction growing out of it. It was relieved by this lease. The consideration was the exclusive right to take the blood and offal which was secured by covenant to the complainant. After that, the company had the same right to demand of every one using the abattoir that he should leave these matters for the complainant, as it had to require him to remove them. This could have been annexed as a condition to every permission to use the abattoir, as well as the condition to pay for the use. And this, by its covenant, the company was bound to do. D. H. Sherman & Co., as the lessees, are bound by the same covenant. And Freese, Craven and Sherman having notive of this obligation before they commenced their business, are bound to refrain from interfering with these rights of the complainant, and from taking the blood and other matters which it is entitled to take. Tulk v. Moxhay, 2 Phila. 774; De Mattos v. Gibson, 4 De Gex & J. 276.

The facts that Freese and Craven transferred to the complainant their claim to a patent for making albumen from blood, and took part in the arrangements for the lease by the company in whose employ they were, and that Craven interfered by these negotiations with the butchers after he was repulsed in his attempt to get into the employ of the complainant, do not give greater validity to the complainant's right; they may show bad faith and vindictiveness, and that they are not entitled to any favorable consideration beyond their legal rights.

The injunction applied for is not a mandatory injunction; it is not to require the delivery of the blood, but to restrain Craven from taking it, and the other defendants from suffering or permitting any other person than the complainant to take it.

For this injury there is a remedy at law, but it is not an adequate remedy. The value of the blood is no measure of the injury, and it is hardly possible to compute the damages which the injury may occasion. And redress at law could only be obtained by a continued series of suits through the twenty or forty years of the complainant's term. It is a case peculiarly proper for the preventive remedy by injunction. Shreve v. Black, 4 N. J. Eq. 177.

The defendants, in their answers, deny that the seal of the stock yard company was affixed to the lease by authority of the directors. The bill alleges that the stock yard company made and executed the lease under its corporate seal, and sets out a lease with the seal affixed, and signed by the president. The answer of the company is not verified by any one who has knowledge of the facts. The present secretary swears that he believes the facts to be true. Any deed of a corporation, under its corporate seal and signed by the proper officer, is presumed to have been executed by authority of the corporation, until the contrary is clearly shown. Leggett v. New Jersey Manuf'g & Banking Co., 1 N. J. Eq. 541. There is no proof here to overcome this presumption.

The injunction must issue as prayed for.

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TRUSTEES OF COLUMBIA COLLEGE v. LYNCH.

(70 N. Y. 440.)

Court of Appeals of New York. Sept. 1877.

Action to restrain the carrying on of business on premises situate on the north-east corner of Fiftieth street and Sixth avenue in the city of New York, upon the ground that the premises were subject to a covenant reserving the property exclusively for dwelling-houses.

The westerly portion of the block in question, prior to 1860, belonged to Joseph D. Beers, from whom defendant Lynch acquired title, and the portion adjoining on the east belonged to the plaintiffs.

In July, 1859, an agreement was executed whereby Beers, in consideration of similar reciprocal covenants therein contained on the part of the plaintiffs, did for himself, his heirs and assigns, in respect to the lands which he then owned, covenant with the plaintiffs, their successors and assigns, that his lands above mentioned should be subject to the following covenants: That Beers, his heirs or assigns, his or their tenants, and others occupying his said lands, should not permit, grant, erect, establish or carry on in any manner on any part of said lands any stable, school-house, engine-house or manufactory or business whatsoever; or erect or build, or commence to erect or build, any building or edifice, with intent to use the same, or any part thereof, for any of the purposes aforesaid.

The agreement was recorded, and defendant Lynch took her lot expressly subject to the conditions and restrictions of the agreement of Beers and the plaintiffs.

The trial court found that the opposite side of Sixth avenue, between Fiftieth and Fifty-First streets, was entirely occupied by the Broadway railroad stables; there was a grocery store on the south-east corner and a liquor store on the south-west corner of Sixth avenue and Fiftieth street; and Sixth avenue, in that vicinity, was occupied as a business street. There was judgment for defendant, from which plaintiffs appealed.

S. P. Nash, for appellants. Samuel Hand, for respondents.

ALLEN, J. It was competent for the plaintiffs and Mr. Beers, from the latter of whom the defendants derive title, while they were the owners of adjoining tracts or parcels of land in the city of New York, by mutual covenants to regulate the use and enjoyment of their respective properties, with a view to the permanent benefit and the advancement in value of each. The mutual and reciprocal covenants of the contracting parties constituted a good consideration for the covenants and agreements of both. All that is required, when the undertaking of one of two contracting parties gives the consideration for the undertaking of the other, is that there should be mutuality; covenants or undertakings by each, that each should come under some obligation, or release some right to the other; but a perfect reciprocity in the undertakings, or equality in the obligations assumed or rights released, is not involved in or essential to the sufficiency of the considerations. Equality is not of the essence of mutuality. It suffices that some promise or covenant has been made, or some right given up; and the adequacy of the same, as a consideration to support the undertaking of the other party, in the absence of fraud, is for the parties to determine. A covenant is well supported in law and in equity by any consideration, however slight. In this case it is not material to inquire whether the covenant of the plaintiffs is, as viewed from our standpoint, the perfect equivalent of that of Mr. Beers. It was accepted by the latter as a sufficient consideration for the covenant made by him, and there is no evidence before us to impeach the agreement as one not fairly and honestly made.

The agreement itself is not void, as in restraint of trade or as imposing undue restrictions upon the use of property. Covenants, conditions and reservations, imposing like restrictions upon urban property, for the benefit of adjacent lands, having respect to light, air, ornamentation, or the exclusion of occupations which would render the entire property unsuitable for the purposes to which it could be most advantageously devoted, have been sustained, and have never been regarded as impolitic. They have been enforced at law and in equity without question. The restrictions are deemed wise by the owners, who alone are interested, and they rest upon and withdraw from general and unrestricted use but a small portion of territory within the corporate limits of any city or municipality, and neither public or private interest can suffer. It is not alleged in the answer, nor was it proved upon the hearing, that there has been any change in the character of the locality, the surroundings of the premises, or the occupation of contiguous property, or the business of the vicinage, which has rendered it inexpedient to observe the covenant, or made a disregard of it indispensable to the practical and profitable use and occupation of the premises, so that it might be inequitable to compel a specific performance of the agreement. If such a defense could avail, it has not been interposed, so that the facts found by the learned trial judge, in respect of the character of the buildings, and the business carried on at this time in the Sixth avenue, are immaterial and cannot affect the result.

The purpose and intent of the parties to the agreement is apparent from its terms preceded by the recital. The agreement recites the ownership by the respective parties of adjacent premises particularly described, and these constitute the subject-matter of

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the mutual covenants. There was no privity of estate or community of interest between the parties, but each could, by grant, create an easement in his own lands for the benefit of the lands owned by the other, and the purpose of the agreement was to create mutual easements, negative in their character, for the benefit of the lands of each. It was the design to impose mutual and corresponding restrictions upon the premises belonging to each, and thus to secure a uniformity in the structure and position of buildings upon the entire premises, and to reserve the lots for, and confine their use to, first-class dwellings, to the exclusion of trades and all business, and all structures which would derogate from their value for private residences. The purpose clearly disclosed was, by the restrictions mutually imposed by the owners respectively upon the use of their several properties, to make the lots more available and desirable as sites for residences, and the agreement professes to, and does in terms, impose, for the common benefit, the restrictions in perpetuity, and to bind the heirs and assigns of the respective covenantors. This should be construed as a grant by each to the other in fee of a negative easement in the lands owned by the covenantors. An easement in favor of and for the benefit of lands owned by third persons, can be created by grant, and a covenant by the owner, upon a good consideration, to use, or to refrain from using, his premises in a particular manner, for the benefit of premises owned by the covenantor, is, in effect, the grant of an easement, and the right to the enjoyment of it will pass as appurtenant to the premises in respect of which it was created. Reciprocal easements of this character may be created upon the division and conveyances in severalty to different grantees of an entire tract, and they may be created by a reservation in a conveyance, by a condition annexed to a grant, or by a covenant, and even a parol agreement of the grantees. Curtiss v. Ayrault, 47 N. Y. 73; Tallmadge v. East River Bank, 26 N. Y. 105; Gibert v. Peteler, 38 Barb. 488, affirmed, 38 N. Y. 165. The right sought to be enforced here is an easement, or, as it is sometimes called, an amenity, and consists in restraining the owner from doing that with, and upon, his property which, but for the grant or covenant, he might lawfully have done, and hence is called a negative easement, as distinguished from that class of easements which compels the owner to suffer something to be done upon his property by another. Washb. Easem. 5. Easements of all kinds may be created and exist in favor of any third person, irrespective of any privity of estate or community of interest between the parties; and, in this respect, there is no distinction between negative easements and those rights that are more generally known as easements, as a way, etc.

A covenant by the owner with A. B., his heirs and assigns, that it should be lawful for them at all times afterward to have and to use a way by and through a close, etc., was held to be an actual grant of a way and not a covenant only for the enjoyment of such right. Holms v. Seller, 3 Lev. 305; Gibert v. Peteler, supra; Washb. Easem. 22, 28, and cases cited in note 1. A negative easement, by which the owner of lands is restricted in their use, can only be created by covenant in favor of other lands not owned by the grantor and covenantor. The covenant made by Beers was valid and binding upon him, and had he retained the ownership of the premises, it would have been specially enforced by a court of equity. Upon a disturbance of the easement by him, it was capable of being enforced by the appropriate remedies at law or in equity at the suit of the owner of the dominant tenement, at the time of the violation of the covenant. The plaintiffs appear to retain the ownership of the premises to which the easement is appurtenant, and therefore this action is properly brought by them. Equity has jurisdiction to compel the observance of covenants made for the mutual benefit and protection of all the owners of lands, by those owning different parcels of the lands, and to secure to those entitled the enjoyment of easements or servitudes annexed by grant, covenant, or otherwise to private estates. 2 Story, Eq. Jur. 926a, 927; Barrow v. Richard, 8 Paige, 351.

It is strenuously urged, in behalf of the defendants and respondents, that there was no privity of estate between the mutual covenantors and covenantees, in respect of the premises owned by them respectively, and which were the subjects of the covenants and agreements, and that the covenants did not therefore run with the lands, binding the grantees, and subjecting them to a personal liability thereon. This may be conceded for all the purposes of this action. It is of no importance whether an action at law could be maintained against the grantees of Beers, as upon a covenant running with the land and binding them. Whether it was a covenant running with the land or a collateral covenant, or a covenant in gross, or whether an action at law could be sustained upon it, is not material as affecting the jurisdiction of a court of equity, or the right of the owners of the dominant tenement to relief upon a disturbance of the easements.

The covenantor Beers bound himself, and in equity charged the premises with the observance of the covenant, and thus impressed this easement upon the lands then owned by him in favor of the lands then and now owned by the plaintiffs. A right in respect of the defendant's lands, and affecting the use in behalf of the plaintiffs

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and their lands existed, which while Beers continued the owner, equity would have enforced, and this right was a right in perpetuity, going with and attaching to the lands in the hands of all subsequent grantees taking title with notice of its existence. An owner may subject his lands to any servitude, and transmit them to others charged with the same; and one taking title to lands, with notice of any equity attached thereto, or any outstanding right or claim affecting the title or the use and enjoyment of the lands, takes subject to such equities and such right or claim, and stands in the place of his grantor, bound to do or forbear to do whatever he would have been bound to do or forbear to do. Lord Cottenham uses this language: "If an equity is attached to property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased." Tulk v. Moxhay, 2 Phila. 774. In the case cited a covenant between grantor and grantee in respect to the use of the granted premises was enforced against subsequent grantees thereof, with notice. The rule is of universal application, as stated by Lord Cottenham. Tallmadge v. East River Bank, supra; Story, Eq. Jur. §§ 395, 397. Here each successive grantee from Beers, the covenantor, down to and including the defendant Lynch, the present owner, not only had notice of the covenant and all equities growing out of the same, but took their title in terms subject to it, and impliedly agreeing to observe it. It would be unreasonable and unconscientious to hold the grantees absolved from the covenant in equity for the technical reason assigned that it did not run with the land, so as to give an action at law. A distinguished judge answered a like objection in a similar case by saying in substance, that if an action at law could not be maintained, that was an additional reason for entertaining jurisdiction in equity and preventing injustice. The action can be maintained for the establishment and enforcement of a negative easement created by the deed of the original proprietor, affecting the use of the premises now owned and occupied by the defendants, of which they had notice, and subject to which they took title. There is no equity or reason for making a servitude of the character of that claimed by the plaintiffs in the lands of the defendant, an exception to the general rule which charges lands in the hands of a purchaser with notice of all existing equities, easements and servitudes. The rule and its application does not depend upon the character or classification of the equities claimed, but upon the position and equitable obligation of the purchaser. The language of courts and of judges has been very uniform and very decided upon this subject, and all agree that whoever purchases lands upon which the owner has imposed an easement of any kind, or created a charge which would be enforced in equity against him, takes the title subject to all easements, equities and charges however created, of which he has notice. Parker v. Nightingale, 6 Allen, 341; Catt v. Tourle, L. R. 4 Ch. App. 654; Carter v. Williams, 18 Wkly. Rep. 593, before Vice Chancellor James; Wolfe v. Frost, 4 Sandf. Ch. 72; Tulk v. Moxhay, supra; Whiting v. Union R. Co., 11 Gray, 359; Gibert v. Peteler, supra; Barrow v. Richard, supra; Greene v. Creighton, 7 R. I. 1; Bronner v. Jones, 23 Barb. 153. The grantees from Beers became entitled to the benefits of the corresponding covenants on the part of the plaintiffs, and of the easement in their lands, and in the purchase had recompense for any diminution in the value of their own lands by reason of the restrictions upon their use. Should it appear that the plaintiffs had parted with their title, it might be questionable whether they could maintain the action. The right exists for the benefit of the owners of the lands for the time being, and it may be waived or released by them, and it would seem they would be the proper parties to bring the action. At most, the plaintiffs would be but the dry trustees of the covenant for the benefit of their grantees, and in equity and in all cases under the present system of practice, the real party in interest should bring the action. But the plaintiffs' right of action, if a cause of action exists, does not appear to have been questioned, so that no question as to parties is in the case. The cases in which it has been held that an action at law will not lie, upon a covenant restricting the use of the lands against the grantees of the covenantor, when there was no privity of estate between the covenantor and covenantee, do not aid us in determining whether there may not be relief in equity for a violation of the equitable right resting upon and growing out of the covenant treated as in substance a grant, and the consideration upon which it was made.

The author of the American note to Spencer's case, 1 Smith, Lead. Cas. (6th Am. Ed.) 167, recognizes the distinction between the binding obligation at law of covenants not running with the lands and the equitable rights recognized and enforced in equity in such cases. He says, speaking of such a covenant: "But although the covenant, when regarded as a contract, is binding only between the original parties, yet, in order to give effect to their intention, it may be construed by equity as creating an incorporeal hereditament (in the form of an easement) out of the unconveyed estate, and rendering it appurtenant to the estate conveyed; and when this is the case, subsequent assignees will have the right and be subject to the obligations which the title or liability to such an easement creates."

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In Hills v. Miller, 3 Paige, 254, and Trustees of Watertown v. Cowen, 4 Paige, 510, and Barrow v. Richard, 8 Paige, 351, there could have been no recovery at law, or actions on the covenants; but upon the deeds and instruments in writing, under seal, it was held that easements had been granted out of the property sought to be charged, which had come by assignment to the hands of the defendants, which were intended by the parties to be appurtenant to lands owned by the plaintiffs; and the observance of the easements was enforced.

Barrow v. Richard, although differing in circumstances from the present case, was decided upon the ground that is controlling here, that the parties intended to create mutual easements for the benefit of the owners of the whole tract, and that the want of a remedy at law would sustain, rather than defeat, the jurisdiction of equity, and that the covenant should consequently be enforced by injunction against those who held the land to which it related. The lands of the defendants are equitably chargeable with the easement created by Beers, and the objection that the easement is not obligatory upon the defendants as a contract, cannot avail as a defense to a suit in equity to restrain the defendants by injunction from its violation and a destruction of the easement.

There is no waiver of the covenant and consequent surrender of the easement, alleged in the answer, proved upon the trial, or found by the judge. The building was of the class of buildings permitted by the easement and suitable for occupation as a private residence. It was not specially adapted to any other use, and the plaintiffs were not bound to foresee, before its completion, that it could or would be applied to any purpose prohibited by the covenant. So far as appears, their objection was reasonable. The plaintiffs did not stand by and keep silence when it was their duty to speak, and the defendants have a building which they may use for purposes contemplated by the parties. It was assumed by the judge at the trial, and does not appear to have been questioned that the businesses carried on by the defendants Yates and Blaisdells were violations of the covenants and forbidden by it. If they were not, that was a proper question to be litigated upon the trial, and may be tried upon the new trial which must be had. There is nothing in the record from which we can determine, that if permitted, such businesses will not defeat the object and purpose of the agreement of the parties, and deprive the plaintiffs of the substantial benefit of the covenant. If the occupation and use of the premises by the defendants in the manner reported by the judge is in contravention of the spirit, as well as the letter of the covenant, the question of damages is wholly immaterial. Upon that question men might differ, and it might be thought that the damages, if any, were so trifling as to be inappreciable, but the parties had the right to determine for themselves in what way and for what purposes their lands should be occupied irrespective of pecuniary gain or loss, or the effect on the market value of the lots. Doubtless another trial will, upon other facts, present other questions, and there may be objections to a recovery not disclosed by the record, but upon the record before us the judgment must be reversed and a new trial granted.

All concur, except RAPALLO and MILLER, JJ., absent.

Judgment reversed.

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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

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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.

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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; Ingraham 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-

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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 possesses. 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.

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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

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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

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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

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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-

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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-

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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

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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.

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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.

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ROBINSON et al. v. BAUGH.

(31 Mich. 290.)

Supreme Court of Michigan. Jan. Term, 1875.

Appeal from superior court of Detroit; in chancery.

Walker & Kent, for complainants. Gartner & Burton and Alfred Russell, for defendant.

GRAVES, C. J. The complainants, nineteen in number, being separate owners and occupants of valuable residences in a small specified district in Detroit, substantially used for dwellings, have united in a complaint against the defendant, in which they maintain that he uses certain premises he occupies, not far off on Woodbridge street, in such manner as to be a nuisance, and specially and greatly injurious to them in property, comfort and health.

His business is that of forging, which he conducts in low, wood buildings, and on a large scale. He employs steam and consumes a large amount of bituminous coal. He works four steam hammers, one of which weighs thirty--five hundred pounds. The smoke and soot from his works are often borne by the wind in large amounts to the premises of complainants, and sometimes enter their dwellings by the chimneys and the slight cracks by the doors and windows, in such measure as to be extremely offensive and harmful, and the noise from his steam hammers is frequently so great at complainants' places as to be disagreeable and personally hurtful, whilst the jar produced by the largest greatly annoys complainants and their families, and seriously disturbs the sick, and in some cases causes substantial damage to dwellings.

The complainants pray that defendant may be enjoined from carrying on his works in a way thus wrongful and injurious.

Upon answer and proofs, the court below made a decree in accordance with the prayer of the bill, and the defendant appealed.

He objects first, that the case is not rightly constituted, on the ground that complainants are separate owners with distinct property interests, and the attorney general is not a party.

Upon the circumstances of this case, we think the objection not maintainable. The rights asserted by complainants, and for which they ask protection, are alike, and the grievance stated in the bill and charged against defendant has one source, and operates in the same general manner against the agreeing and equivalent rights of all the complainants. If his works as conducted are a nuisance to complainants, they are a nuisance to all in the same way. The case presents no diversity to cause embarrassment in dealing with it, and we should only sacrifice substance to useless form by giving any sanction to the point, if there was no authority to favor its rejection. But without going far, we are able to cite such authority. Scofield v. Lansing, 17 Mich. 437; Middleton v. Flat River Booming Co., 27 Mich. 533; Peck v. Elder, 3 Sandf. 126, and opinion of the chancellor in a note; Reid v. Gifford, Hopk. Ch. 416.

It is next objected, that the bill should have been sworn to. It was framed as a mere pleading, and was not constructed upon the theory that it might be requisite to use it as a sworn statement on which to base an application for preliminary relief.

The only relief contemplated was such as would be grantable on final hearing, and the case exhibited is within the ordinary jurisdiction, and stands on no peculiar ground which might call for a verification of the bill. The point is not warranted by reason, or the course of the court. Moore v. Cheeseman, 23 Mich. 332; Atwater v. Kinman, Har. (Mich.) 243.

A further objection is, that a trial at law was needful before seeking the aid of equity.

This position is not maintainable. The legislature have expressly declared that equity shall have jurisdiction "in all matters concerning nuisances where there is not a plain, adequate and complete remedy at law, and may grant injunctions to stay or prevent nuisances." Comp. Laws 1871, § 6377. And this language implies that the jurisdiction may not be merely assistant, but is independent and ample in those cases where a remedy at law would not be plain, adequate and complete. That the law could afford no such remedy here, is manifest. Even before this declaratory provision, the chancellor asserted the jurisdiction fully. White v. Forbes, Walk. Ch. 112. See, also, Soltau v. De Held, 9 Eng. Law & Eq. 104.

When the cause is thus within the jurisdiction, the authority of the court is plenary, and is not dependent upon steps at common law. If, on a view of the circumstances, the court feels that there ought to be a finding, it may in its discretion require one, but is not bound to do so.

The defendant further urges that some of complainants have establishments not far away, which are liable to objections similar to those made against his, and that therefore he ought not to be enjoined at their instance.

Assuming the fact to be as supposed, it affords no valid answer for him. That complainants are distinct wrong-doers in the same way, neither lessens his wrong or disables them from making legal complaint of it. Their wrongdoing must be tried by itself. It cannot be investigated and decided in the proceedings against him.

The point is also taken, that complainants so far acquiesced in defendant's operations, that the court ought not to listen to their application to enjoin him.

His operations which are objected to, were commenced only about two years before the suit, and the large hammer was not purchased until a year later.

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And it appears from the case that complaint was made to the common council, on the part of some of complainants, and, as I infer, some months before the suit, of the injurious character of defendant's business, and that he was informed of it, and moreover, that one of complainants, Mr. Robinson, complained in person, a considerable time before the bill was filed.

Indeed, the evidence is clear, that defendant knew at an early day, that his operations were regarded by complainants, or some of them, as wrong and hurtful, and that they were not assenting.

The facts, as to time and circumstance, are strong to show that there was no acquiescence, either in the sense of conferring a right on him to continue, or in the sense of depriving complainants of the right to seek and obtain equitable interference.

Looking into the record, we notice that as a further ground of defense, the answer specifies several establishments in the vicinity which are claimed to be as detrimental in their operations as that of defendant. But this, if true, cannot aid him. If others in the same neighborhood are maintaining nuisances, and even nuisances of similar character, it is no reason for refusing to stop one maintained by him, or, what is the same thing, for allowing him to continue his nuisance because other independent parties are doing wrong in the same way.

When nuisances, or establishments alleged to be nuisances, exist in separate hands, they must be proceeded against separately, and it is a matter of no legal moment which is taken first, and which last; nor is it of any legal consequence that prosecution is carried on only against one at the same time. Meigs v. Lister, 23 N. J. Eq. 199; St. Helen's Smelting Co. v. Tipping, 11 H. L. Cas. 642; Thorpe v. Brumfitt, 8 Ch. App. 650, 6 Eng. R. 554.

Coming to the main controversy, and considering the locality, character and value of defendant's works, and the way they are used, and considering the locality, value and character of complainants' dwellings, and the effect produced by defendant's operations, does the proof clearly establish the charge made by complainants? We think it does.

The general principle is that every person must so use his own as not to cause injury to his neighbors, and this principle is intelligible enough. But there is often considerable difficulty in its application; and where the question relates to the uses to which near proprietors choose to put their separate and respective holdings, and especially in places where the population is dense, and pursuits and tastes are various, or in manufacturing and mining districts, the difficulty sometimes becomes serious.

In such instances, the question can be satisfactorily solved in no other way than by taking a fair practical view.

The subject cannot be safely dealt with by resorting to subtle refinements and nice theories. Extreme claims must give way, and men must yield somewhat in a spirit of accommodation and concession, and measurably recognize and respect the actual exigencies of time, place and circumstances. One living in the country must accept country life, and one living in a city must accept city life. Those activities which are right in themselves and belong to the neighborhood and are reasonable in their mode, may not be quite agreeable to the fastidiousness of some, or the special or peculiar susceptibilities of others, but those thus affected must bear their little discomforts if they choose to stay where they are so caused, and a resident of a trading or manufacturing neighborhood must submit to such ordinary personal annoyances as are fairly incidental to such legitimate trading and manufacturing as is there carried on in a reasonable way; and of course the existence of these slight personal annoyances can afford no ground for saying that the concerns causing them are not suitably situated, and are therefore nuisances.

But the requirement to bear thus much, may not be extended to extraordinary personal hurts or discomforts caused by means which, beyond "fair controversy, ought to be regarded as exceptive and unreasonable," and it cannot "apply to circumstances the immediate result of which is sensible injury to the value of the property." It is not appropriate to say that the injurious work is fitly and rightly located, and that the business is lawful in itself, when the ground of complaint is, that it causes a real and serious direct injury to the property of another. However lawful the business may be in itself, and however suitable in the abstract the location may be, they cannot avail to authorize the conductor of the business to continue it in a way which directly, palpably and substantially damages the property of others; unless, indeed, the operator is able to plant himself on some peculiar ground of grant, covenant, license or privilege, which ought to avail against complainants, or on some prescriptive right, and which in this country can rarely happen. There is nothing of the kind here.

In the present case, the proof is clear that the defendant's works are so situated and conducted as to cause wrong and injury in regard to both person and property, and to an extent which justifies the complainants in objecting as they do. The grievances shown, are not such in their cause, nature and objective effects, as to warrant the court in saying they must be borne in deference to practical exigencies.

The case of Gilbert v. Showerman, 23 Mich. 448, is, however, cited as authority against the decree made by the court below. But the governing facts there were entirely different. The complainant's residence was situated in the very heart of a quarter substantially, and, indeed, almost wholly abandoned as a spot for living, and devoted to diverse trades and noisy occupations. He resided in

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the upper story of his building, and had been accustomed to rent the lower floor as a store or warehouse, thus himself recognizing that the locality was so completely a business one that he might naturally and properly derive profit from the use of his own rooms under him as a noisy business establishment. The mill of which he complained was in an adjoining building, and the evidence conduced to prove that it was well constructed, and that the machinery was run with care, and was really less noisy than some other near occupations. The mode of working was in itself unexceptionable, and the substantial matter of complaint, as shown by the evidence, was the personal discomforts experienced by complainant and his family, in the chambers where they resided adjacent to the mill.

As he chose to stay in a building partly given up to business, and in the midst of a trading and manufacturing district, he was not entitled to enjoin the legitimate occupations, reasonably and fairly conducted about him, because their natural incidents were annoying and unpleasant to him and his family.

Here the circumstances are wholly different. The defendant's works have been going but a short time, are not very expensive, and not of a permanent character. They are placed on leased ground, under a short term, and are practicably removable without very great inconvenience or cost. Other sites reasonably eligible in respect to the profitable prosecution of the business may be had, and where surrounding proprietors would not be wronged.

On the other hand, the complainants' dwellings are in a part of the city appropriated almost wholly to residences, and the place is among the most suitable and desirable for the purpose. The buildings are generally costly and substantial, and some of them have grounds expensively improved. The total value is very large, and in comparison with it the value of defendant's establishment proper is a mere trifle. The case of Gilbert v. Showerman cannot apply.

On the whole, as already stated, we think the complainants have clearly made out their rights to the relief prayed, and that the decree below must be affirmed, with costs.

COOLEY and CAMPBELL, JJ., concurred.

CHRISTIANCY, J., did not sit in this case.

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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

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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. 220*a*. 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.

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WILSON v. CITY OF MINERAL POINT et al.

(39 Wis. 160.)

Supreme Court of Wisconsin. Aug. Term, 1875.

Bill for an injunction. A demurrer to the bill was overruled, and the defendants appealed.

M. M. Cothren, for appellants. Wilson & Jones, for respondent.

LYON, J. It is sufficiently averred in the complaint that the defendant Weidenfeller, acting under the authority and orders of the regularly constituted authorities of the defendant city, is about to destroy fences, fruit and ornamental trees and shrubbery standing and growing upon premises owned by the plaintiff and occupied by him as his residence and homestead; that the pretense for so doing is that such fences, trees and shrubbery are within the limits of public streets; but that such pretense is unfounded in fact, and the defendants have no lawful authority to do the threatened acts.

On the facts averred it is clear that the plaintiff is entitled to an injunction as prayed in the complaint. It is quite true that the courts will not interfere by injunction to restrain the committing of a mere trespass, for which, if committed, the recovery of damages in an action at law would be an adequate remedy. It is also true that the courts will interfere by injunction and prevent a threatened injury, which, if inflicted, will be irreparable.

An injury is irreparable when it is of such a nature that the injured party cannot be adequately compensated therefor in damages, or when the damages which may result therefrom cannot be measured by any certain pecuniary standard. High, Inj. § 460, and cases cited. It is said by Judge Story that: "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 interfere 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 future." 2 Story, Eq. Jur. § 928.

That the threatened injuries which this action was brought to prevent, would, if inflicted, be irreparable, in the legal acceptation of that term, and would greatly impair the just enjoyment of the plaintiff's property, is perfectly well settled. No one will seriously contend that a money compensation is an adequate remedy for the loss of the trees and shrubbery which the complaint avers the defendants threaten to destroy; and it would be a denial of justice were the courts to refuse the plaintiff the protection he asks, and thus permit his home to be permanently despoiled. See High, Inj. § 467, and cases cited.

We think the complaint states a cause of action against both defendants, and that there is no misjoinder of causes of action, and no defect of parties. We do not decide whether or not the complaint states facts sufficient to entitle the plaintiff to recover damages, but only, that if the averments therein contained are true, he is entitled to the injunction prayed.

Order affirmed.

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