

U. S. Rep.]

WOLFORD V. HERRINGTON—CHANCERY SPRING CIRCUITS.

the party made the promise he did not mean to comply with it in good faith, but circumstances evinced the contrary. The fact was that he had procured a settlement to be drawn by a conveyancer, which his wife refused to sign, because it contained a remainder to the "issue of the bodies of her three half sisters," one of whom was unmarried, which she thought an indelicate expression; and on his death bed he expressed great uneasiness at not having made a will, and soon after the declaration lost his reason. In noticing the case in *Oliver v. Oliver*, *supra*, Mr. Justice Rogers said: "It has never been doubted that he entered into the contract in good faith." In the case before us, from Herrington's evasion of his promise at and after the bidding, and his final refusal, there was reason to infer that when he made the agreement he did not mean to perform it, and that the whole arrangement was sought by him for the very purpose of deceiving and defrauding the Wolfords, and becoming the owner of their property at a price below its true value. When, however, it is a part of the agreement that the trust shall be declared in writing, or it is shown that the trust was not inserted in the deed under a stipulation to that effect in consequence of the verbal promise to perform it, such fraudulent intent at the time of the agreement need not be shown in order to establish the trust. The fraud consists in the fraudulent use of the instrument, as was decided in *Oliver v. Oliver*. It is true that it has been since held in *Jackman v. Ringland*, 4 W. & S. 149, that where there is nothing more in the transaction than is implied from the violation of a parol agreement, equity will not decree the purchaser a trustee; which was affirmed in *Barnet v. Dougherty*, 8 Casey, 371, *Kellman v. Smith*, 9, Ibid, 158, in the latter of which Mr. Justice Strong said: "The fraud which will convert the purchaser at a sheriff's sale into a trustee, *ex maleficio* of the debtor, must have been fraud at the time of the sale." But in none of these cases did the element exist of a promise at the time to execute a declaration of trust in writing, upon the faith of which the purchase was made. In *Jackman v. Ringland* the opinion was by Mr. Justice Rogers, who does even refer to his own opinion in *Oliver v. Oliver*, and evidently did not suppose that there was any conflict. In *Kellman v. Smith*, Mr. Justice Strong cites *Robertson v. Robertson*, 9 Watts, 32, in the opinion in which, by Mr. Justice Rogers, *Thomson's Lessee v. White* is cited with approbation as a case of fraud. He would undoubtedly have noticed it if he had supposed the

opinion he was then pronouncing overruled it. *Thomson's Lessee v. White*, and *Oliver v. Oliver*, have never been shaken or overruled. These decision are founded upon sound reason. Where it appears that the understanding at the time of the verbal promise was by a writing to comply with the provisions of the statute of frauds, it is something more than a mere verbal promise. The opposite party relies upon the special stipulation to reduce it to writing and thus make him secure. A chancellor would decree its specific performance. If in confidence that such writing will be executed the legal title is acquired, it is a fraud in the purchaser to refuse to do what was promised, and claim to hold discharged of it, which will constitute him a trustee *ex maleficio*. We are of opinion that the case below should have been submitted to the jury. Some difficulty may arise perhaps upon another trial, growing out of the fact that John Wolford, the defendant below, was the defendant in the execution. It may be well for the counsel to consider the propriety of applying to the court to permit Mrs. Wolford also to be made a defendant.

Judgment reversed, and *venire facias de novo* awarded.

AGNEW and WILLIAMS, JJ., dissent.

CHANCERY SPRING CIRCUITS, 1874.

THE HON. THE CHANCELLOR.

TORONTO . . . Tuesday March 24th.

THE HON. THE CHANCELLOR.

EASTERN CIRCUIT.

LINDSAY	Tuesday	April 7th.
PETERBORO'	Friday	" 10th.
BELLEVILLE	Thursday	" 16th.
BROCKVILLE	"	" 23rd.
CORNWALL	Tuesday	" 28th.
COBBOURG	"	May 6th.
KINGSTON	"	" 12th.
OTTAWA	"	" 19th.

THE HON. VICE-CHANCELLOR STRONG.

WESTERN CIRCUIT.

LONDON	Wednesday	March 18th.
WOODSTOCK	"	" 25th.
STRATFORD	"	April 1st.
GODEKICH	"	" 8th.
WALKERTON	"	" 15th.
SANDWICH	"	" 22nd.
SARNIA	"	" 29th.
CHATHAM	Tuesday	May 5th.

THE HON. VICE-CHANCELLOR BLAKE.

HOME CIRCUIT.

GUELPH	Tuesday	April 7th.
SIMCOE	"	" 14th.
WHITBY	"	" 21st.
BRANTFORD	"	" 28th.
BARRIE	Monday	May 11th.
OWEN SOUND	Tuesday	" 19th.
ST. CATHARINES	"	" 26th.
HAMILTON	Thursday	" 28th.