

SPECIFIC PERFORMANCE.

ion of the Court to which application is made, or of any Court of Appeal, some substantial wrong or miscarriage has been thereby occasioned in the trial of the action; and if it appears to such Court that such wrong or miscarriage affects part only of the matter in controversy, the Court may give final judgment as to the part thereof and direct a new trial as to the other part only." Rev. Stat. cap. 50, sec. 289.

Examples, under our Act, of refusal by the Court to order new trials notwithstanding improper reception or rejection of evidence will be found in *Smith v. Murphy*, 35 U. C. R.; 569, *McDermott v. Ireson*, 38 U. C. R., 1; *Davis v. The Canada Farmers' Ins. Co.*, 39 U. C. R. 452. The most recent case touching on the subject is that of *Reg. v. Wilkin-son*, a note of which will be found *post*, *infra*, page 81.

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The remedial jurisdiction of the Court of Chancery in the specific enforcement of contracts is of such importance that we are surprised no recent treatise has been written upon the subject. Nearly twenty years have elapsed since the present Mr. Justice Fry modestly gave to the professional world his valuable work on "Specific Performance" which practically superseded all earlier books on that branch of law. Since then the statutory powers of the Court as to awarding damages and compensation and in many other respects have been largely extended, but authorship has not kept pace with the progress of the law in Parliament and in Court.

In no other region of jurisprudence do we find so many instances of that judge-made law which has gone far to nullify

the Statute of Frauds. Equity Judges have been astute from the first so to deal with that famous Act as that it should not be a cover for fraud. The Chief Justice of England is credited with the opinion that the Statute of Frauds has had its day; that it is no longer a useful enactment, that it has now-a-days a great tendency to promote false swearing, and so to defeat the ends of justice. Into this matter, we do not propose to enter, but it may be well to indicate that the force of the Statute has been evaded in equity from the outset, and that successive judges have only developed the ancient doctrines of the Court to suit the exigencies of modern times. The first instance in which any equitable exception to the Statute appears is a case in the time of Lord Nottingham (5 Vin. Abr. 523, 524). There was a verbal contract for the conveyance of land and for a defeasance to be executed by the grantee; but he, having obtained the conveyance, refused to execute the defeasance and relied on the Statute; but his plea was over-ruled and he was decreed to execute according to his agreement. So in *Walker v. Walker*, 2 Atk. 99, Lord Hardwicke said: "Suppose a person who advances money should, after he has received the absolute conveyance, refuse to execute the defeasance, would not the Court relieve against such fraud?" In accord with these early cases, compare *Lincoln v. Wright*, 4 De G. & J. 16, where it is laid down that the Statute formed no defence to the performance sought, because insisting on a conveyance as absolute when it was agreed it should be defeasible was a fraud and should not be allowed to cover fraud. The same matter is put in a different way in *Jervis v. Bertridge*, L. R. 8 Ch. 357, where Lord Selborne says: "The conveyance executed was only a piece of machinery obtained as sub-"