Grant). The execution of the mortgage to Leo & Cameron with the knowledge of plaintiff, was strong evidence of abandonment.

Blevins, for the respondent, referred to *Norway* v. *Moore* (5 Grant, 611), as to the effect of a statement in the bill being contradicted by evidence. *Carolan* v. *Brabazon* (3 J. & Lat. 444) shews that to prove a defence on the ground of abandonment, the fact of abandonment must be proved as clearly as the original agreement. He cited *Clark* v. *Hart*, 5 Jur. N.S. 447; Fry on Spec. Per. 306; Sug. V. & P. Ss. 211-212.

Sir J. B. ROBINSON, Bart.—I think there is nothing in this case which stands in the way of a determination by this court of the question whether it is or is not consistent with equity that the plaintiff should have a decree for specific performance. As to the reference to the master which the decree contemplates, that would not be upon any point material to our forming a judgment upon the main question. The necessity for such reference is dependent on the decree for specific performance being upheld.

Then as to the ground of objection to the appeal, that it was discretionary with the court to decree performance or not, and that there can be no appeal from the exercise of mere discretion. That is true in a limited sense, but not universally, or there could scarcely be an appeal in any suit of this description; whereas we have had many, and shall not improbably have to dispose of more. It is no doubt within the authority of an appellate jurisdiction to determine in this case, as in others, whether the judgment of the Court of Equity in a matter which may be admitted to be in some measure discretionary has been given in accordance with the general principles which in such cases govern courts of equity. It need hardly be said that a judgment decreeing specific performance may in many more instances be found the subject of an appeal than a judgment refusing it. This is an order of the former kind.

This case should not, in my opinion, be looked upon as if the transaction were enirely one of business—in which the motive of each party is, for all that appears, to get an equivalent for what he gives. This is a bill filed by a son against his father, to compel him to carry into effect an agreement, positive enough no doubt on the part of the father, but in which the son has lost all remedy at law by most unreasonable negligence and delay.

It does not appear that the defendant exacted any undertaking from the son to pay the sum of money mentioned in the defendant's bond as the consideration for the land which he was to convey, nor any undertaking to pay the taxes.

All that we see, or hear of, is a bond from the defendant to the plaintiff, that he will make him a deed of the land in question, 50 acres in the township of Albion, provided the plaintiff should pay him £50 in six years from the 1st September, 1850, that is to say, £10 on 1st September, 1852, and the remaining £40 in four equal annual payments on 1st September in each of the four years following; so that the whole price should be paid by 1st September, 1856; and the plaintiff was in the mean time to pay all taxes on the 50 acres. No interest was to be paid, according to the terms recited in the defendant's bond to convey. The agreement therefore properly speaking was all on one side, and that is a material feature in the case.

At the time that the defendant thus bound himself to convey to his son these 50 acres for £50, to be paid in six years, the land it appears by the evidence was well worth £150, and is now worth from £300 to £400.

It is quite plain that there must have been some particular purpose to be answered to the father by selling to his son 50 acres of the same lot on which he lived for a third of its value. I have no doubt that the object was that which is indicated in the evidence, and is in some measure admitted by the plaintiff, namely, to keep the son from wandering about, laboring for strangers, or wasting his time perhaps more unprofitably.

Or it may have been that the motive also entered into his father's mind of making in this manner a provision for this son, in proportion perhaps to what he might be able to give to his other children, for the land given to him upon these easy terms would be in a great measure a gift.

These considerations apply strongly against treating this as an agreement to be enforced against the defendant by any active interference of a court of equity, where the son is chargeable with great laches in omitting to do what he was bound to do in order to bring himself within the terms of his father's bond.

On considering the whole evidence, I find it not easy to satisfy myself what labor the son had done for the father after the execution of the bond, which the father afterwards agreed to allow for as part payment of the £50. It is very imperfectly proved, and the evidence that is given is contradicted.

The cases which are referred to in Mr. Fry's work on Specific Performance, chapter 24, are very strong to shew that the court should not lend its aid to the plaintiff to enforce special performance against the father, after a delay of so many years, where the plaintiff has not in the mean time been in possession and has made no improvements, and has neglected so long to enforce the agreement after he had, as he admits, full notice that his father, in consequence of his negligent conduct, intended not to consider the agreement still in force which had been so long disregarded, that is, I mean, the specific agreement to convey the land, though he had offered no alternative.

I think the decree should be reversed and the bill dismissed with costs, though, if my brothers concur, I should have no objection to follow the course taken in *Spurrier* v. *Hancock*, 4 Ves. jr. 694, by adding, "unless within one month the plaintiff should deliver up the agreement;" and in that case without costs.

DRAPER, C. J.—I can see nothing in this case to take it out of the general rule, that the specific performance of an agreement for the sale of lands should be decreed. I think, for the reasons assigned by the learned Vice Chancellor, the decree should be affirmed and the appeal dismissed with costs.

ESTEN, V. C.—I think the decree pronounced by me in favour of the plaintiff should be affirmed. The estate was sold at an undervalue by a father to a son, who had acted towards him in a praiseworthy manner, but for a substantial consideration, and this circumstance can therefore form no bar to a specific performance. The bond is proved and constitutes a valid contract within the Statute of Frauds. The only defence then which can be raised to the suit is abandonment or laches on the part of the plaintiff. The defendant was anxious to keep his son in the neighbourhood, and see him married and settled. I am satisfied that he never intended to rescind the contract. The plaintiff paid a substantial part of the consideration, and at the end of the year asked for possession; when the defendant said that if he would marry and settle he would admit him into possession. The plaintiff was not prepared at that time to marry, and time passed, the plaintiff and defendant having dealings with each other. The defendant never notified the plaintiff that if the contract were not performed he would rescind it. He brought the land into cultivation, intending probably the plaintiff to have the benefit of it when he should settle. During this time the plaintiff left the bond in the hands of George Evans, with instructions to press it, but he did not, and Mrs. Matthews took it away. On the plaintiff's return from the Grand River he pressed his claim, and the defendant, not insisting that the contract was at an end, made a very advantageous offer of compromise to the plaintiff. Upon the whole, considering the circumstances of the case and the relation existing between the parties, I think no abandonment and no sufficient laches exist in the present case to debar the plaintiff from the relief he seeks. I do not attach any weight to the declaration of the plaintiff as mentioned in the evidence of Hessy, although I think he was speaking the truth to the best of his recollection. Mrs. Hessy exhibited a good deal of feeling in delivering her testimony. She was only ten years old at the time of the transactien which she relates. The defendant should have acquiesced in the demand of the plaintiff, and accepted the money which he tendered to him.

I think the appeal should be dismissed, and with costs.

HAGARTY and MORRISON, J. J., concurring in the views expressed by the president, the appeal was allowed and the bill in the court below ordered to be dismissed.