

The plaintiff does not accuse the defendant personally of any fraud. I find that Mr. Smart was not his agent at all. Both the Messrs. Dingwall have been acquitted of all charges of fraud by the statements of plaintiff's counsel in open Court. I do not, as I understand the evidence, perceive any ground upon which I can or should set aside the document sought to be impeached, and I think it should be permitted to stand as a good document.

The defendant claims specific performance of the agreement. He does not plead this in the form of a counterclaim, but, no matter how it is stated, when it is in reality a counterclaim, it must, I think, be so considered, and looking at it in this way, it is in effect another action, in which the defendant is the plaintiff and the plaintiff the defendant.

The sole argument against specific performance was that there is a want of mutuality, and a setting up of the provisions of the Statute of Frauds.

The memorandum is signed by Mrs. Jarvis, the party to be charged, but not by Gardner, who uses for the specific performance. He is, I think, to be considered to be in the same position as of he had under the former practice filed his bill for specific performance.

The position of the parties in such a case is stated in the fourth edition of Fry on Specific Performance, at p. 209, where it is said that the plaintiff by instituting proceedings has waived the original want of mutuality and rendered the remedy mutual. The authorities referred to in Fry seem to make the matter plain. In *Flight v. Bolland*, 4 Russ. at 301, which was the case of an infant, the Master of the Rolls said: "The plaintiff's counsel principally rely upon a supposed analogy afforded by cases under the Statute of Frauds, where the plaintiff may obtain a decree for specific performance of a contract signed by the defendant, although not signed by the plaintiff. It must be admitted that such now is the settled rule of the Court, though seriously questioned by Lord Redesdale upon the ground of want of mutuality. But these cases are supported first because the Statute of Frauds only requires the agreement to be signed by the party to be charged; and next it is said that the plaintiff by the act of filing the bill has made the remedy mutual." And then the learned Judge adds: "Neither of these reasons applies to the case of an infant."

See also *Martin v. Mitchell*, 2 J. & W. at p. 427; also *Western v. Russell*, 3 V. & B. at p. 192. See also *Ottway v. Braithwaite*, Finch 405, where a contract contained in a deed poll was enforced, notwithstanding that an objection