

a demurrer was a commendable time-saving and cost-saving proceeding; but it was also put to highly technical time-losing and cost-increasing uses, and thus came into such bad repute that even the name seems to have become unbearable and was obliterated; and yet its better part still remains under a new name and ought always to remain, by whatever name it may be called, though "demurrer" still holds the mind whatever the tongue may say. And that this case ought to have been heard upon demurrer, speedily and inexpensively, instead of being, in the first instance, brought down to trial involving much delay, much greater cost, and an unfortunate conflict of testimony between equally highly reputable fellow-citizens, I consider obvious; so obvious that I would not have mentioned it except that it may be necessary to do so in dealing with the question of costs.

At the close of a hard-fought trial upon a question of fact involving such a conflict of testimony as I have mentioned, it turns out that there is a vital preliminary question to be considered; a question which might, and ought early in the action, to have been raised and determined under that practice which is now the equivalent of a general demurrer. If the demurrer were held to be good the action was ended; otherwise the parties would be obliged to go to trial; so that, plainly, it was not the better course to bring all questions down to a trial, where, after all, the demurrer must be considered, and, if given effect, to render all the proceedings upon the other question worse than useless.

The question raised upon the demurrer is whether, admitting all that the plaintiff alleges as to the extent of the agreement entered into respecting the sale and purchase of the land in question, there is an enforceable contract for the purchase of it.

There is no dispute as to the facts on this branch of the case; the whole agreement, it is said on both sides, is contained in the writing in question, and so no question under the statute of frauds can be raised; there is nothing that is not in writing; and the single question is whether that writing contains all the essentials of an enforceable agreement for the sale of land.

This question is further simplified, too, by the fact that the only point in it is whether the want of any definite agreement as to the terms of payment of that part of the price of the land to be secured by a mortgage upon it renders the agreement unenforceable because incomplete.