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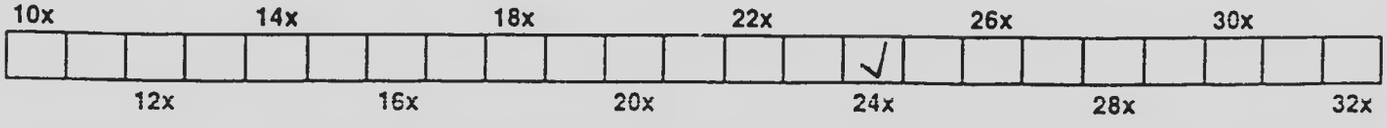

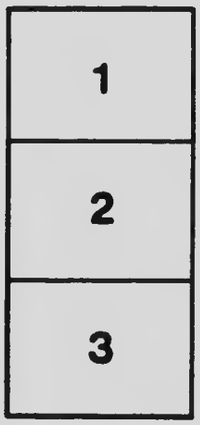

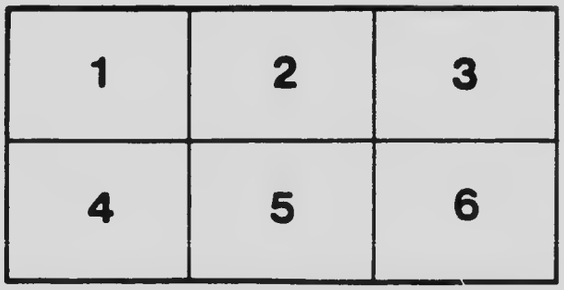

A TREATISE

ON THE

SPECIFIC PERFORMANCE OF CONTRACTS

BY

THE RIGHT HON. SIR EDWARD FRY, G.C.B.

SOMETIME ONE OF THE LORDS JUSTICES OF APPEAL

FIFTH EDITION

BY

WILLIAM DONALDSON RAWLINS

INCLUDING

NOTES ON THE CANADIAN LAW

BY

HON. MR. JUSTICE RUSSELL

OF THE SUPREME COURT OF NOVA SCOTIA

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PREFACE

TO THE FIFTH EDITION

I HAVE again been entrusted by the Author with the responsibility of editing a new edition of this treatise.

It might not unnaturally be supposed that the last word had, before now, been said on the principles applicable to the specific performance of contracts in English law: but, as a matter of fact, in the course of the period—nearly eight years—which has elapsed since the publication of the Fourth Edition, more than a hundred and twenty cases have been reported, and are cited in the present volume, which include not merely illustrations of those principles, but also some interesting developments of them. Such, for instance, are *Halkett* v. *Earl of Dudley*, discussing the ground and limits of a purchaser's right of repudiation; *Measures Brothers* v. *Measures*, on interdependent contracts; and *Re Stuckley*, pointing out the very wide applicability of the doctrine of vendor's lien.

Something, too, has for the first time been said in this Edition on a question at present undecided, namely, the power of the Crown to sue, and its liability to be sued, for specific performance.

But, for the most part, my task has consisted in the re-statement, with sundry additions and modifications, of matters already familiar, in the form and manner of their presentment, to the English-speaking legal world.

W. D. R.

LINCOLN'S INN,
December, 1910.

PREFACE

TO THE FOURTH EDITION

For this Edition the Editor alone is responsible, and he is not unconscious of the responsibility.

During the period—more than a decade—which has elapsed since the publication of the third Edition, the stream of decisions upon questions falling within the purview of this treatise has been copious and constant, and the flow shows no sign of slackening.

In particular, the topic of Wilful Default, under the common condition of sale relating to delayed completion, has been the subject of much judicial discussion; there have been numerous decisions on questions of Doubtful Title; and the potentialities and limits of the Court's jurisdiction on a vendor and purchaser summons have been amply illustrated by reported cases.

Also, it has been thought advisable to take notice, in the chapter on Damages, of the rule in *Flureau* v. *Thornhill* and modern applications of that rule; and the scope of the first chapter of Part IV.—now intituled "Of the Proceedings up to and including Judgment"—has been in some measure extended, in the direction indicated by the altered title of the chapter.

The combined effect of the foregoing causes has been to add not inconsiderably to the text and notes, the number of newly-cited cases being upwards of three hundred.

Further, the legislation of the last ten years—notably the Voluntary Conveyances Act, 1893, and the Married Women's Property Act of the same year, and in some degree the Trustee Act, 1893, the Merchant Shipping Act, 1894, and the Land Transfer Act, 1897—has necessitated modifications of the text.

The Editor has, however, been solicitous to interfere as little as possible with the Author's language, and to preserve

the general structure and arrangement of the work with which practitioners have been for many years familiar.

It ought, perhaps, to be mentioned that in this Edition the Index has been thoroughly overhauled and to a large extent recast; also that the Table of Contents has been shortened by omitting the detailed analysis of topics which is in substance embodied in the Index.

W. D. R.

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PREFACE

TO THE THIRD EDITION

THE Second Edition of this book was by myself and Mr. William Donaldson Rawlins, of Lincoln's Inn, Barrister-at-law M.A. and late Fellow of Trinity College, Cambridge. The extent and importance of his assistance may be learned from the Preface to the Second Edition. In the present Edition I have been assisted by my son

All the important decisions which have been pronounced on the subjects discussed since the Second Edition have, it is hoped, been referred to.

In some matters relative to the former practice of the Court of Chancery I have thought it reasonable, having regard to the lapse of time since the Judicature Acts came into operation, to be more brief than in the Second Edition. Thus the old practice in regard to references of title and the question as to parol variation being set up by the plaintiff are more briefly treated than before

In respect to the following matters, some considerable changes or additions have been introduced: the origin and early history of the jurisdiction in specific performance, the case of *Bolton Partners* v. *Lambert* (treated of in an additional note), the contracts of married women, especially under the Act of 1882.

[*A passage which followed here has been incorporated with the text of the fourth edition, and is accordingly omitted.* — *W. D. R.*]

I was never more conscious than now of the defects of this book; and I believe that I could now write a better treatise on the subject. But for such a labour I have neither time nor inclination.

E. F.

January, 1892.

PREFACE

TO THE SECOND EDITION.

More than twenty years have passed away since I first wrote and published the following treatise: and in that space of time great changes have been effected in the law—and a great volume of decisions bearing on the subject of this essay has been pronounced.

I must expect a severer criticism for this second edition than that with which the first edition was received: but I am sure that the kindness which I have always received from the members of my profession will not fail me now.

There is one notion often expressed with regard to works written or revised by authors on the Bench which seems to me in part at least erroneous—the notion, I mean, that they possess a quasi-judicial authority. It is hardly enough remembered how different are the circumstances under which a book is written and a judgment pronounced, or how much the weight and value of the latter are due to the discussions at the bar which precede the judgment.

I have revised or re-written or written the following parts of the present volume, viz.:—

Part I.—The whole.
" II.—The whole, except part of Chapter II.
" III.—The whole, except Chapter XXV.
" V.—Chapter V.
" VI.—The whole, except Chapter IX.

The XIth Chapter of Part III. (that on the Statute of Frauds) was originally revised for me by another hand and may retain some traces of a difference of style: and in other parts I received some assistance from my former pupil and friend, the late Mr. H. W. May. By far the greater part of

this work of revision and re-writing was done by me before leaving the bar. These parts of the work have been subsequently revised and brought down to date by the labours of Mr. Rawlins.

The revision of the other parts of the volume, namely:—

Part II.—Part of Chapter II.
„ III.—Chapter XXV.
„ IV.—The whole.
„ V.—The whole, except Chapter V.
„ VI.—Chapter IX.

has been undertaken by Mr. Rawlins alone. He has consulted me on various points which have arisen, especially on the general arrangement of some of the chapters; but the whole merit of this work is his.

To him also is due the entirely new Index, which will, I hope and believe, be found a valuable part of the book.

My thanks are due to Professor Holland, of Oxford, for kind assistance, the nature of which will be learned from the additional note at the end of the volume.

E. F.

Lincoln's Inn,
May, 1881.

PREFACE

TO THE FIRST EDITION.

THE following pages contain an attempt to inquire into the principles which govern Courts of Equity in the Specific Performance of Contracts. I offer this little book to the members of my profession, with somewhat of hope, because I know the indulgence with which they are wont to accept the results of honest labour spent on professional subjects: but with much more of diffidence, because I am not ignorant of the difficulties of the subject on which I have written, or the shortcomings of my own performance.

The scope and object of my essay will be sufficiently learned from the Table of Contents. It will at once be seen that they are essentially different from those of the admirable works of Lord St. Leonards and Mr. Dart on the Law of Vendors and Purchasers. Those treatises discuss the contract of sale of real estate and all the relations thence arising, so that the doctrine of specific performance is treated of only as one mode in which that contract is enforced: whilst the present work is designed to elucidate the principles of specific performance in general, and the contract of sale only so far as it requires attention as one of the contracts which the Court enforces. If the object of those learned treatises had not been thus distinct from that of the following pages, I should never have thought of committing them to press.

The connection of the different branches of Law is, like the connection of the sciences, so close as often to embarrass the writer who attempts to treat of one subject by itself. I have found this difficulty continually recurring, as I have been engaged in composing this book, because it is by no means easy to decide how much of the Law on many questions ought to find place in a treatise on the principles and practice of the Courts

in specific performance, and how much ought to be referred to a discussion of the particular species of contract to which the point may relate. I have endeavoured on each occasion to solve this question with a view to the practical utility of the following pages, and to what I suppose a lawyer would reasonably expect to find in a treatise bearing the title of this volume.

Several important decisions on the subject of specific performance have appeared during the progress of these pages through the press, which I have found it impracticable to embody in the text: some of these cases have been referred to in the notes, and others only in the Table of Addenda, to which the reader is referred.

My friend Mr. J. P. Green, of the Middle Temple, has obligingly read the proof-sheets of this book: I gratefully acknowledge his kindness in so doing.

E. F

5, New Square, Lincoln's Inn,
24th May, 1858.

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NOTE.

The following editions are (except where it is otherwise stated) referred to:—

Daniell's Chancery Practice, 7th edition.

Dart's Vendors and Purchasers, 7th edition.

Fonblanque's Treatise of Equity, 5th edition.

Holland's Jurisprudence, 11th edition.

Maddock's Chancery Practice, 2nd edition.

Maine's Ancient Law, 10th edition.

Seton's Decrees [cited as "Seton"], 6th edition.

Stephen's Pleading, 4th edition.

Story's Conflict of Laws, 2nd edition.

Story's Equity Jurisprudence, 10th edition.

Sugden's Vendors and Purchasers [cited as "St. Leon. V. and P."], 14th edition.

Mitford's Treatise of Pleadings is cited thus:—"Redesdale, Plead."

The volumes of the Law Journal Reports cited are those of the New Series.

The Rules of the Supreme Court are cited thus:—R. S. C. Ord. I. r. 1.

Statutes cited in the text or notes will be found in the Index, under their several titles, and also under the general heading "STATUTES CITED."

THE

SPECIFIC PERFORMANCE OF CONTRACTS.

PART I.

THE JURISDICTION.

CHAPTER I.

THE ORIGIN AND GENERAL CHARACTER OF THE JURISDICTION.

What a contract is.

§ 1. "A CONTRACT," says the author of *The Mirror*, "is a speech betwixt parties that a thing which is not done be done."[1] "A contract," says Fulbecke,[2] "is nothing but the consent of two persons for a thing to be done or given by the one to the other, and it is on both sides obligatorions." "The substance of all contracts," says West,[3] "consisteth in consent as their matter, and in the cause or businesse as their forme." "A contract," says Sir William Blackstone, is "an agreement upon sufficient consideration to do or not to do a particular thing."[4] "In order to constitute

[1] Ch. ii. s. 27.

[2] The Second Part of the Parallele or Conference of the Civil Law, the Canon Law, and the Common Law, 1602, pp. 28, 29.

[3] West, Symboleography, Part i. The introduction to this part contains a discussion on the nature and classification of contracts, which probably represents the current views of the Elizabethan lawyers.

[4] 2 Bla. Com. 442. For other definitions, see Holland's Elements of Jurisprudence (11th edit.), 254, 255; Pollock on Contracts, ch. i.; Anson on Contracts.

an agreement or contract," said Kindersley V.C., "two things are requisite,—1stly, the will, and 2ndly, some act, whether in word or deed, whereby that will is communicated to the other party. No man has entered into an agreement or contract to do, or not to do, some particular thing unless he has willed that the thing should be done or forborne, and also has communicated that will to the other party by some act engaging to carry it into effect; when both parties will the same thing, and each communicates his will to the other, with a mutual engagement to carry it into effect, then (and not till then) an agreement or contract between the two is constituted."[1]

Definitions of contract not here discussed.

§ 2. This treatise being devoted to a discussion not of contracts in general but of one particular method of giving relief in respect of them, it is not proposed here to enter into the numerous points which arise upon the above definitions. Many of the points which would require attention in such a discussion will be found treated of under the head of the defences which may be raised to an action for specific performance. That mode of treatment, if less logical, is, it is conceived, more practically useful for the purposes of this treatise than entering upon a general discussion of the nature of contracts.

What specific performance is.

§ 3. The specific performance of a contract is its actual execution according to its stipulations and terms: and is contrasted with damages or compensation for the non-execution of the contract. Such actual execution is enforced under the equitable jurisdiction vested in the Courts of this country by directing the party in default to do the very thing which he contracted to do, and, in the event of his disobedience, by treating such disobedience as a contempt of Court and visiting it

[1] *Haynes* v. *Haynes*, 1 Dr. & Sm. at p. 433. The case of *Bolton Partners* v. *Lambert*, 41 Ch. D. 295, appears to cast some doubt on the necessity of will or consent to the existence of a contract. See, on that case, Additional Note A at the end of this treatise.

with all the consequences of such contempt, including imprisonment;[1] and in some cases by doing in one way the thing which the defaulter was directed to do in another way, as, *e.g.*, by vesting by an order of the Court an estate which ought to have been vested by conveyance of the party.[2] To say, as is above said, that the Courts enforce actual execution according to the stipulations and terms of the contract is not quite exact; for the Court rarely, if ever, interferes until the time for performance has passed and default been made: consequently the performance enforced by the Court is almost always behind time as compared with due performance voluntarily yielded.

The obligation arising from a contract.

§ 4. From every contract there immediately and directly results an obligation on each of the contracting parties towards the other of them to perform such of the terms of the contract as he has undertaken to perform.[3] And if the person on whom this obligation rests fail to discharge it, there results in morality to the other party a right at his election either to insist on the actual performance of the contract or to obtain satisfaction for the non-performance of it.[4]

Many systems of jurisprudence do not enforce specific performance.

§ 5. When we consider how large a part in the affairs of modern society is played by contracts and the resulting rights and obligations, and how plainly the right to insist on the actual execution of contracts flows from their very nature, it is at first sight a remarkable circumstance that many systems of jurisprudence seem to

[1] Seton, 2285, 2287.

See *infra*, § 1183.

[2] "I think I may safely say, as a general rule, that where in a written contract it appears that both parties have agreed that something shall be done which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect. What is the part of each must depend on circumstances." *Per* Lord Blackburn in *Mackay* v. *Dick*, 6 App. Cas. at p. 263.

[3] Austin's Jurisprudence, Student's edit., 1904, p. 178; 3rd edit. 65; Holland's Jurisprudence, 11th edit., ch. xiii.

make no direct provision for it. In Scotland, indeed, the breach of a contract for the sale of a specific subject, such as landed estate, gives the party aggrieved the legal right to sue for implement.[1] But it seems probable that no such elaborate attempt to enforce the actual performance of contracts as that made by the Courts of Equity in this country exists in any other system of jurisprudence.[2]

Roman Law gave damages only.

§ 6. It is certain that the Roman Law gave a title to damages as the sole right resulting from default in performance, and did not enforce specific performance directly or in any other manner than by giving such right to damages. It held to the maxim "*Nemo potest præcise cogi ad factum.*"[3]

So, too, the Common Law.

§ 7. In like manner the Common Law of England made no attempt actually to enforce the performance of contracts, but gave to the injured party only the right to satisfaction for non-performance.

Suggested reason of this.

§ 8. Perhaps it is to the recent growth in most societies of contract as compared with status, custom, and imperative law that the want in question is to be referred. Sir Henry S. Maine has shown[4] how slow was the introduction into jurisprudence of any provision

[1] *Stewart* v. *Kennedy*, 15 App. Cas. 75—102.

[2] See further, Additional Note B at the end of this treatise; and, as to specific performance in Roman-Dutch Law, see Van Leeuwen's Commentaries on Roman-Dutch Law, translated by Chief Justice Kotzé, Vol. 2 (1886), pp. 27, 33, 118—119, 141—142, and 210.

[3] See Pothier, Tr. des Oblig. part 1. ch. ii. art. 2, § 2.

[4] Ancient Law, ch. ix. The history of contracts in early law remains, I believe, yet to be written. I may offer the following references to anyone who may be desirous to look into the subject. As to English law, the latest discussion is in Maitland and Baildon's Court Baron (Selden Society, Vol. 4), p. 113. As to Egyptian contracts, 1 Wilkinson's Ancient Egyptians, 242 *et seq.*, ed. 1878; and an Egyptian marriage contract in 10 Records of the Past, 77. As to Assyrian and Babylonian contracts,—1 Records of the Past, 137 *et seq.*, 9 Records, &c., 91 *et seq.*, and the Egibi tablets (relating to a banking firm for 164 years, ending B.C. 159), 11 Records, &c., 85 *et seq.* As to Græco-Egyptian contracts, a contract note dated B.C. 230, in Mahaffy's Flinders Petrie Papyri, No. 16.

for enforcing contracts, and how that introduction was due to the increase of commercial activity. The same spirit of commerce which led to the enforcement of contracts, also brought in the notion that money is an equivalent of everything—is an universal common measure: and this, coupled with the simplicity of early contracts and the difficulty attendant on the specific performance of complicated ones, probably led to the arrested growth of the remedies for their breach and the confining of such remedies for the most part to the payment of money or the delivery of a chattel.

§ **9**. Again, in countries where the same instrument is at once contract and conveyance, it is obvious that no separate jurisprudence in specific performance is ever likely to arise.

§ **10**. There were, it appears, ancient systems of law which refused all assistance to the enforcement of contracts on the ground that they ought only to be entered into with those whose honour could be trusted: such was, it is said, the principle adopted by Charondas and the ancient Indians.[1] The principle of Charondas.

§ **11**. Though the Courts of Common Law never enforced the specific performance of contracts, there were certain cases in which they made near approaches to it, and these it will be well briefly to consider. They were cases— Cases in which Common Law approached specific performance.

(i.) Where a public duty arose from a private contract:

(ii.) Where the contract was for the delivery of a chattel:

(iii.) Where the contract was for the payment of a sum of money:

(iv.) Arising on covenants real.

§ **12**. (i.) The object of the prerogative writ of mandamus is the enforcing of public duties. Before i. The prerogative writ of mandamus.

[1] Holland, Jurisp. (11th edit.), 256.

the Judicature Acts[1] if A. had by the deed of settlement of a company entered into a contract with that company, or with trustees for it, or with his fellow shareholders, that a company should be formed and conducted in a specified manner, including, for instance, provisions for the registration of transfers of shares, and if this deed of settlement had been confirmed by royal charter, and the company had made default in registering a transfer, whereby A. was injured, in such a case the prerogative writ of mandamus would have lain in the Court of Queen's Bench, and the public duty of the company which resulted from the contract contained in the deed of settlement would have been enforced at the suit of A.[2] Here the contract would not have been specifically enforced: but a public duty flowing in part from the contract would have been performed.

The statutory writ of mandamus.

§ 13. In addition to the old prerogative writ of mandamus there was a statutory writ under the 68th section of the Common Law Procedure Act, 1854 (now repealed by statute 46 & 47 Vict. c. 49, s. 3), which provided for the issue of "a writ of mandamus compelling the defendant to fulfil any duty in the fulfilment of which the plaintiff is personally interested." It was naturally suggested that this power authorized the Courts of Common Law to grant specific performance of contracts by means of the statutory writ; but by the cases of *Benson* v. *Paull*[3] and of *Norris* v. *The Irish Land Co.*,[4] it was determined that the Courts of Common Law could not by means of the writ of mandamus enforce the actual execution of contracts which resulted in private rights only and not in duties in which the public were interested.

ii. Delivery of chattels.

§ 14. (ii.) Before the passing of the Common Law

[1] See now Jud. Act, 1873, s. 25 (8); *Re Paris Skating Rink Co.*, 6 Ch. D. 731.

[2] *Norris* v. *Irish Land Co.*, 8 El. & Bl. 512.

[3] 6 El. & Bl. 273.

[4] 8 El. & Bl. 512. See, too, *Barker* v. *London County Council*, 63 L. T. 767, at p. 771.

Procedure Act, 1854, it was matter of question whether in detinue the delivery of the specific chattel could be obtained if the defendant chose to pay the damages assessed instead of delivering up the chattel; but all such doubts were removed by the 78th section of that Act, which has in its turn been subsequently repealed. But Ord. XLVIII. r. 1, of the Rules of the Supreme Court, which has taken the place of the repealed statute, enables the plaintiff to obtain execution for the delivery of the property, without giving the defendant the option of retaining such chattel upon paying the value assessed.

Return of chattel not specific performance.

§ **15.** If a contract were entered into between A. and B. for the delivery by B. of a certain chattel on payment of a certain sum by A., and A. made the payment, but B. refused to deliver the chattel, an action for its detension would lie in a Court of Common Law at the suit of A., and at his election execution might issue for the return of the chattel. This looks very like a specific performance of the contract, but was not such in fact. The complaint of A., in the case supposed, was not that the contract had been broken, but that the chattel had been detained. He did not aver that the contract ought to be performed and that the chattel ought to be made his; but he alleged that the contract had been performed, and that therefore the chattel was his, and the defendant's detention wrongful. In short, the contract came into controversy, if at all, only as the title of the plaintiff.

iii. Contract for payment of a sum of money.

§ **16.** (iii.) Lord Mansfield C.J., has remarked that "pecuniary damages upon a contract for payment of money are, from the nature of the thing, a specific performance."[1] But the remark seems hardly strictly accurate. No doubt the sum agreed to be paid will be the measure of damages, and the amount paid will be the same whether the contract be performed or broken.

[1] In *Johnson* v. *Bland*, 2 Burr. at p. 1086.

But in the former case the money is paid in performance of the contract: in the latter case it is paid as satisfaction for its non-performance. It is evident that the consequences of the two payments would therefore be different.

(iv.) Writ of covenant.

§ 17. (iv.) According to the old Common Law, a covenant by A. to convey lands to B. (which was called a covenant real) could be enforced by a special writ of covenant, which was in the nature of a specific performance of that covenant. The writ was to the sheriff to command A. that he keep his covenant with B.; and the relief for non-performance was not in damages but by means of a *præcipe quod reddat* of the land in question. This writ of covenant was the commencement of proceedings in fines before their abolition.[1]

Former jurisdiction of the Ecclesiastical Courts.

§ 18. In one case the Ecclesiastical Courts exercised a jurisdiction in the nature of specific performance. When man and woman had entered into a marriage contract *per verba de præsenti*, one refusing might be sentenced by the Ecclesiastical Court to celebrate the marriage *in facie ecclesiæ* accordingly, and for refusal to obey might be excommunicated and imprisoned on a writ *de excommunicato capiendo* until he or she submitted to obey the ordinary: and a like jurisdiction was exercised in the case of contracts *per verba de futuro*, though the process for contumacy was in certain cases different.[2] But by the statute 26 Geo. II. c. 33, s. 13, and afterwards by statute 4 Geo. IV. c. 76, s. 27, this jurisdiction of the Ecclesiastical Courts was abolished.

Origin of the equitable jurisdiction in

§ 19. From what has been already said, it appears that the origin of this branch of equitable jurisdiction

[1] Fitzh. Natura Brevium, "Covenant to levy a Fine:" 3 Bla. Com. 156.

[2] 2 Burn's Eccl. Law (1st edit.), Marriage, ii. 5. In the *Maid of Honour*, Massinger makes his heroine sue to the King for the specific performance of a written contract to marry her.

is not to be sought in the Roman Law. Perhaps it is rather to be found in the Ecclesiastical Law. Specific performance.

§ 20. When St. Paul, in writing his first letter to the Christians at Corinth, insisted that they should settle their own disputes by reference to a domestic forum and abstain from going to law before the heathen, he was helping to lay the foundations of a great system of jurisprudence. If we follow the authorized version and Dean Stanley, St. Paul thought that the least esteemed members of the Church were fit for such business. But when we think of some episcopal chancellors whom we have known, we feel great relief in the revised version; for this makes the setting of the least valued members of the Church to this business an additional matter of reproach in St. Paul's mouth. However this may be, we here, for the first time, it is believed, catch a glimpse of the internal jurisdiction of the Church which was destined to grow into the great system ruled over by the Corpus juris canonici. The origin of the Ecclesiastical Law.

§ 21. In the second Book of the Apostolical Constitutions[1] (whatever its date and authorship) we get another glimpse of the Church Courts as then existing. From this we can to some extent figure to ourselves the manner of conducting the business, which was half hortatory and half judicial; we can gather some light on the penalties by which the judgments were enforced; but we find little or nothing definite with regard to the subjects of jurisdiction.

§ 22. In Pliny's celebrated letter to Trajan, we have perhaps the first trace of the subject-matters of which the Church Courts took cognizance. The Christians, according to the report of those who had abjured their faith, bound themselves by an oath not to commit theft, robbery, or adultery; not to break their word ("*ne fidem fallerent*"), and not to deny the existence of a deposit when called upon by the depositor.[2] These The subject of its jurisdiction.

[1] § 47.

[2] Plin. Epist. lib. x. ep. 97.

words "*ne fidem fallerent*" cover a wide area of moral obligation, and the jurisdiction of the Court of the Christians if it undertook to enforce it would be ample. In these few words we may perhaps find the germ of many things with which we are more or less familiar: of the troth which man and woman pledge to one another in the marriage service; of the form of declaration *Do fidem* still used in the University of Oxford; of shaking hands over a bargain; of the oath on the faith of a Christian—so much discussed on the admission of Jews to Parliament; of the affidavit; of "*ma foi*" as a common exclamation of our French neighbours; and of the whole jurisdiction asserted by the Ecclesiastical Courts based on *fidei laesio*. This applied to contracts is, perhaps, the origin of the jurisdiction in specific performance.

Fidei laesio.

§ **23**. If every breach of faith was cognizable in the Church, it would follow that to pledge the faith was to create an obligation cognizable in the spiritual Courts and enforceable by penitence or excommunication; and accordingly we find in the middle ages that the pledge of faith (*fidei interpositio—fides facta*) was a common sanction to engagements of various descriptions.[1] It was used in the contract of marriage, where it still survives: it was used in private bargains such as partnerships:[2] in the matter of essoins,[3] in certain proceedings in the Exchequer,[4] and in obligations of a more public or political character.[5]

[1] In the Cartulary of Rievaulx (Vol. 83 of the Surtees Society's publications) there is an attestation by Henry, Archbishop of York, of a confirmation by Robert de Ros of a grant to the Abbey. The Archbishop declares that Robert "primum haec omnia sacramento firmavit, deinde *Christianitatem* in manu mea qua se obsidem dedit, et me plegium constituit de his omnibus." In this passage the word "*Christianitatem*" appears to mean the same thing as "*fidem*."

[2] Decret. iv. cap. 2.

[3] Bracton Com. lib. v. Tract. ii. cap. 2. Pleas in Manorial Courts (Selden Soc.), p. 6.

[4] Dialogus de Scaccario, ii. 19 *et seq.*

[5] See *e.g.*, Eadmer His. p. 7, Rolls Series. See, too, Fioretti di San

§ 24. In England, with the single exception of the proceedings in the Exchequer above referred to, it seems probable that no lay Court took any cognizance of a *fidei laesio*, whilst the Canon Law seems to have claimed a general jurisdiction in all cases of the breach of an oath or of the plighted faith,—a jurisdiction probably enforceable by admonition and penance, and in default of obedience by excommunication. Accordingly we find the clergy of Normandy, in articles passed by them in 1190 and assented to by Richard, asserting a general jurisdiction in breaches of faith and violations of oaths: "generaliter omnes de fidei laesione, vel juramenti transgressione quaestiones in ecclesiastico foro tractabuntur;"[1] and in like manner in England we find that the Courts Christian asserted a general jurisdiction in all such cases. If it had been allowed it is evident that they would have acquired a firm hold on almost all the ordinary affairs of life, whenever in fact there was a contract or dealing in which the faith could be pledged or an oath taken.

§ 25. In Bracton's time[2] the Ecclesiastical Courts appear to have claimed jurisdiction in matters of contract in three cases: (1) when one of the parties was a clerk; (2) when an oath had been taken; and (3) when there was the *fidei interpositio*. But in all these cases the lay Courts prohibited if the subject-matter of the contract was of secular and lay cognizance. Glanville puts the relation of the ecclesiastical and lay Courts in this matter of the plighted faith very clearly:[3] "Die autem statutâ, debitore apparente in curiâ, creditor ipse si non habeat inde vadium nec

Ecclesiastical jurisdiction in contracts.

Francesco, cap. 21, where the saint puts the Wolf of Agobio to pledge his faith to his treaty! and Pollock on Contracts in Early English Law, Harvard Law Review, March, 1893.

[1] 2 Ralph de Diceto, p. 80, Rolls Series; 2 Matt. Paris, p. 368, Rolls Series.

[2] Com. lib. v. cap. 9.

[3] Book x. cap. 12.

plegios nec aliam diracionationem nisi solam fidem, nulla est haec probatio in curiâ Domini Regis. Verumtamen de fidei lesione vel transgressione inde agi poterit in curiâ Christianitatis. Sed judex ipse ecclesiasticus, licet super crimine tali possit cognoscere et convicto poenitentiam vel satisfactionem injungere: placita tamen de debitis laicorum vel de tenementis in curiâ Christianitatis per assisam regni, ratione fidei interpositae, tractare vel terminare non potest."

§ 26. To the like effect too is the 16th chapter of the Constitutions of Clarendon: "Placita de debitis quae fide interposita debentur vel absque interpositione fidei sint in justitiâ regis." To the like effect are records of John's reign,[1] and Edw. III.[2]

Struggle with Common Law.

§ 27. The struggle was long continued: "The Spiritual Courts," says Blackstone,[3] "continued to grasp at the same authority as before in suits *pro laesione fidei*, so late as the fifteenth century." The two versions of the great statute Circumspecte agatis, the one saving to the Courts Christian jurisdiction in such actions, and the other denying it to them, are evidence of the zeal with which the contest was carried on: for the true text must almost certainly have been tampered with and falsified by the one party or the other, in order to support its contention.

Bracton's note-book.

§ 28. In Bracton's note-book, so admirably edited by Prof. Maitland, two cases illustrative of the claim of jurisdiction on the ground of *fidei laesio* are particularly instructive.

The first (No. 50) occurred in the year 1219. A prohibition had issued to restrain Alice Hathemus from drawing Roger the son of Ade into the Court Christian in regard to a lay fee. Alice replied that the matter between her and Roger in the Court Christian was "*de fide sua lesa et non de laico feodo*"; that after her

[1] Abbrev. Placit. Vol. 21, p. 31. Edw. III.
[2] Lib. Assis. fol. 61, pl. 70, 22 [3] iv. 53.

husband's death she had pledged part of her dower to Roger for a term of ten years, and that he had pledged his faith (*affidavit*) to return the land to her at the end of the ten years: that the term had passed but he had not returned the land, and therefore she sued him "*de lesione fidei.*" But Alice was restrained, and the marginal note runs, "*Nota quod prohibicio locum tenet de fidei lesione propter laicum feodum.*"

The second case (No. 1893) occurred in the year 1227. It was an assize to determine whether William the son of Godwin unjustly disseized Richard the son of Maria de Brom of a tenement in Acle.

The jurors found that Alured Rowe demised the land to Richard the son of Maria for a term: meanwhile William the son of Godwin met with Alured and they arranged that Alured should demise the land to William (*in feodum*) for a certain sum of money, and the day was fixed for the payment of the money and the execution of the charter, and they pledged their faith to this contract ("*et ad convencionem istam tenendam hinc inde fuit affidatum*"). When the day came William broke his bargain, and thereupon Alured demised the land to Richard. Subsequently, William impleaded Alured in Court Christian for breach of faith (*de fidei lesione*). Ultimately, Alured was compelled to execute the deed and to demise the land to William ("*ita quod oportuit eundem Aluredum de necessitate facere ei cartam suam et terram illam ei concedere*"). Thereupon came William and disseized Richard of the land. Richard (as was just) was held entitled to recover seizin of the land and William was in mercy.

This entry is of the last importance for the present enquiry. It appears to be a clear case of a judgment for specific performance by the Ecclesiastical Court.

Specific performance by a Court Christian.

§ 29. At later dates a few traces of a jurisdiction of the Ecclesiastical Courts in respect of contracts may

be found.[1] Chaucer in the Friar's Tale mentions contracts as a subject-matter of the jurisdiction of the archdeacon,

> "That boldely did execucioun
> In punischying of fornicacioun,
> Of wicchecraft, and eek of bauderye,
> Of diffamacioun and avoutrye,
> Of chirche-reeves and of testamentes,
> Of contracts, and of lak of sacramentes."

On such a point the authority of Chaucer appears entitled to much weight. He is said to have been bred to the law: and certain parts of his Tales exhibit an acquaintance even with the forms of law; as, for instance, the Doctor's Tale, where the "pitous bill" presented to Appius by Claudius,[2] forcibly recalls the form of a bill of complaint in the Court of Chancery.

§ 30. Again, in the Registrum Brevium (1634), p. 66*a*, is found a form of writ *de excommunicato deliberando*, where the excommunication appears to have been pronounced "*ratione contractus in civitate nostra habiti*."

§ 31. Reference may also be made to the fourth volume of the Selden Society's publications, intituled "The Court Baron," which contains (at p. 115) an account of entries in the rolls of the Bishop of Ely's Manorial Court at Littleport, about five miles north of Ely, in the reign of Edward II. It is curious to find from these entries that the fen-men of that early date were attempting, by means of distress, to enforce specific performance of their contracts. In one case the defendant had contracted to make the plaintiff a thousand of sedge; in another, to make a new "rother"

[1] From an Inquisition taken by the King's command in the year 1311, and some nearly contemporaneous legal proceedings, it appears that the Bishop of Bath and Wells had or claimed in Wells, as lord of the town, a certain Court of his men and tenants to be held twice a year on reasonable summons. There he asserted a right to cognisance of pleas of contract and covenant arising within the town. See Year Books of Edward III., year 16 (1st Part), Rolls Series, edited by L. O. Pike, Introduction, pp. lxvii., lxxix., xciii.

[2] v. 178 *et seq.*

(*i.e.*, according to Halliwell, a rudder); and in both cases an order was made to distrain the defendant to make the thing he had contracted for. It is strange that this out-of-the-way Court in the fens should have been in advance, in the development of jurisprudence, of the King's Courts and of the Chancery; and yet such seems to have been the position of things in the reign of our second Edward. The explanation may perhaps be found in the fact that the Lord of the Manor was a high ecclesiastic; that cases of difficulty or importance arising in the Court at Littleport might be reserved for the Bishop's Court or Council (Consilium) at Ely; that an aggrieved litigant might complain to the Bishop, and obtain a writ to the steward commanding him to do right ("The Court Baron," p. 111); and that in these ways the doctrine of specific performance may have leaked through from the Canon into the Manorial Law.

§ 32. There is therefore clear evidence of the activity of the Courts Christian in matters of contract. But there is another point to be noted: they proceeded by admonishing the delinquent party to do the very thing undertaken,—the man who had married a woman and refused her the rights of matrimony, to take her home, —the man who refused to execute the deed according to his promise, to execute the deed. A principle of the Canon Law was expressed in the heading of a chapter, "*Judex debet studiose agere ut promissa adimpleantur*," and in the sentence therein contained, "*Studiose agendum est ut ea quæ promittuntur opere compleantur*."[1]

§ 33. These materials make it probable that from early times the Courts Christian enforced the specific execution of contracts in which there was an oath or *fidei interpositio*: that this jurisdiction was narrowed and perhaps almost extinguished by the pressure of the writ of prohibition from the King's Court: and that the ecclesiastical Chancellors found in the Chancery a

Origin of the jurisdiction in Chancery.

[1] Decr. Greg. IX. lib. i. tit. 36, cap. 3.

means of reviving a like jurisdiction, the writ of *subpœna* taking the place of excommunication.[1]

§ 34. For in the records of the Court of Chancery there are early traces of the jurisdiction. A case in the reign of Richard II. has been thought to be one of specific performance: cases more distinctly in point occur in the reigns of Henry VI. and Edward IV.

§ 35. In the reigns of Edward VI., Elizabeth, and James I. several cases occur, and the advantages of the jurisdiction in Chancery were perhaps becoming more known. Brooke, in his Abridgment,[2] had pointedly shown the superiority of the proceedings by *subpœna* over an action on the case. "Note," he says, "that by this he will get nothing but damages, but by *subpœna* the Chancellor can compel him to convey the estate or imprison him *ut dicitur*."

§ 36. The jurisdiction was thus established, though not without much jealousy on the part of the Common Law Courts, and a strenuous effort to set forward the action on the case as an adequate remedy in the case of contracts.[3] In an Additional Note (C), at the end of this volume, will be found a reference to several cases, illustrative of the earlier history of this jurisdiction of the Court of Chancery.

§ 37. The circumstances which seem beyond all others to have conduced to the great development of the doctrine of specific performance in England are the great complication of the titles to English land, and the fact that in regard to land, contract has never been itself the conveyance. In a jurisprudence where contract and transfer are effected by the same instrument, a jurisdiction in specific performance could hardly arise: but

[1] See further on the subject of Specific Performance and *Laesio fidei* an article by the present author in the Law Quarterly Review (No. 19), Vol. 5, p. 235.

[2] Action sur le case, pl. 72.

[3] See *per* Fairfax J., Y. B. 21 Edw. IV. 23, pl. 6, and *per* Pinnel C.J., Y. B. 21 Hen. VII. 41, pl. 66.

where contract is separated from conveyance by all the formalities and delay of an examination into title, and the preparation of a formal deed, it would be a necessity to anything like a civilized system of law.

The jurisdiction in specific performance distinguished

§ 38. Before proceeding further it will be well to distinguish the jurisdiction usually described as that in specific performance from some kindred ones formerly exercised by the Court of Chancery. By specific performance is usually understood that peculiar and, as it is called, extraordinary jurisdiction, which the Court exercised in respect of executory contracts. Some [illegible] of equitable relief approximate to specific performance from which they are nevertheless distinguished. Specific performance may be usefully distinguished from

(a) Specific relief on an executed contract.

(b) The performance of trusts.

(c) The delivery of a chattel in specie.

(d) An equitable charge arising from failure to complete a contract for a legal charge.

(e) Constructive trusts.

from that under executed contracts;

§ 39. (a.) An executory contract is one which is not intended between the parties to be the final instrument regulating their relations, an executed contract is one which is intended to be thus final.[1] The difference may be illustrated by the contrast between an agreement (say on the dissolution of a partnership) to execute a deed containing certain covenants, and the deed itself containing these covenants. The agreement is an executory contract; the deed is an executed contract. An action founded on the agreement would be strictly an action for specific performance: an action founded on the deed would not be so described, and it could

[1] *Per* Lord Selborne in *Wolverhampton and Walsall Railway Co.* v. *London and North Western Railway Co.*, L. R. 16 Eq. 439; *Tailby* v. *Official Receiver*, 13 App. Cas. 523, particularly 547. See also I Powell, Contr. 225.

have been entertained by the Court of Chancery only on the ground that an injunction or an account was prayed for, or that some independent jurisdiction of the Court was invoked. It could not have been supported on the ground of the peculiar jurisdiction in specific performance.

from performance of trusts;

§ 40. (b.) Actions for specific performance of executory contracts differ from actions for the performance of trusts. For contracts are for the most part contained in legal instruments which give rise to legal rights: and specific performance is therefore only an alternative remedy in lieu of damages. On the contrary, trusts are constituted by instruments which are of equitable force (at least so far as the trust is concerned), in respect of which therefore, before the Judicature Acts, a suit in Equity was the only mode of relief.

from delivery of chattel in specie;

§ 41. (c.) The delivery of a chattel in specie may be a mode of specific performance when the right to the chattel flows from a contract. But the Court of Chancery had (as we shall see[1]) an independent jurisdiction to decree the delivery up of unique articles, whether the right to them resulted from contract or not.

from an equitable charge;

§ 42. (d.) A contract for a legal or equitable charge, when the consideration has passed, itself creates an equitable charge independently of the doctrine of specific performance, but may in addition create a right to have a legal charge: though if the contract rested entirely *in fieri* no performance could be had.[2]

from cases of constructive trust;

§ 43. (e.) Again, from actions for specific performance we must distinguish those cases in which, by reason of fraud or the breach of some fiduciary relationship, a constructive trust arises. Cases sometimes of a mixed nature have arisen: as, for instance, when by a contract to give up part of an estate if purchased, A. persuaded B. not to compete with him as a purchaser. On A.'s refusal to abide by his contract, B.

[1] *Infra*, § 79.

[2] See *infra*, § 51.

might have sued him, alleging at once the contract and the breach of A.'s duty as agent.[1]

We shall hereafter see[2] that the peculiar doctrines of the Court as to the specific performance of executory contracts do not necessarily apply to the other forms in which the Court grants specific relief. from specif relief.

§ 44. There is an observation often made with regard to the jurisdiction in specific performance which remains to be noticed. It is said to be in the discretion of the Court. The meaning of this proposition is not that the Court may arbitrarily or capriciously perform one contract and refuse to perform another, but that the Court has regard to the conduct of the plaintiff and to circumstances outside the contract itself, and that the mere fact of the existence of a valid contract is not conclusive in the plaintiff's favour.[3] "If the defendant," said Plumer V.C., "can show any circumstances *dehors*, independent of the writing, making it inequitable to interpose for the purpose of a specific performance, a Court of Equity, having satisfactory information upon that subject, will not interpose."[4] The jurisdiction discretionary.

§ 45. And the contract itself may give rise to the discretion. A property was sold as "leasehold business premises," and the purchaser was by condition precluded from objecting to anything in the lease: the lease, when produced, showed fetters on the use of the property, which falsified the description of the property as business premises: the Court declined in its discretion to enforce performance.[5]

§ 46. But of the circumstances calling for the exercise of this discretion, the Court judges by settled and fixed

[1] See *Chattock* v. *Muller*, 8 Ch. D. 177, 184.

[2] *Infra*, § 811 *et seq.*

[3] *Lamare* v. *Dixon*, L. R. 6 H. L. 414; *Loch* v. *Schroder*, L. R. 9 Ch. at p. 467, n.; *Re Terry and White's Contract*, 32 Ch. D. at p. 27.

[4] In *Clowes* v. *Higginson*, 1 V. & B. 527.

[5] *Re Davis and Carey*, 40 Ch. D. 601.

rules[1]; hence the discretion is said to be not arbitrary or capricious, but judicial[2]; hence, also, if the contract has been entered into by a competent party, and is unobjectionable in its nature and circumstances, specific performance is as much a matter of course, and therefore of right, as are damages.[3] The mere hardships of the results will not affect the discretion of the Court.[4]

[1] As to the rules of Courts of Equity, see the observations of Jessel M.R. in *Re Hallett's Estate, Knatchbull* v. *Hallett*, 13 Ch. D. at p. 710; and, as to the weight attaching in those Courts to precedents, see *per* Rigby L.J. in *Re Scott and Alvarez' Contract*, [1895] 2 Ch. at p. 615.

[2] *Goring* v. *Nash*, 3 Atk. 186; *White* v. *Damon*, 7 Ves. 30, 35; *Buckle* v. *Mitchell*, 18 Ves. 100, 111; *Revell* v. *Hussey*, 2 Ball & B. 288.

[3] *Hall* v. *Warren*, 9 Ves. 605, 608. See, however, *Re Scott and Alvarez' Contract*, [1895] 2 Ch. 603.

[4] *Haywood* v. *Cope*, 25 Beav. 140, where Lord Romilly M.R. fully discusses the nature of the discretion in specific performance.

CANADIAN NOTES.

Character of the Jurisdiction.

The headnote in *Ledyard* v. *McLean*, 10 Grant's Ch. 139, which is very lengthy and elaborate, lays it down that "the Court in adapting itself to the exigencies of mankind as they arise from time to time will deal with new subjects as they present themselves, so as best to effectuate the intentions of the parties, and will not allow rules and principles applicable to a different state of circumstances to interfere with the exercise of its jurisdiction whenever in the opinion of the Court it can be usefully exercised. And where money has been expended on the faith of an agreement, although otherwise the Court might not have enforced the contract, it will not entertain objections to the form of the contract when it can execute it, and in doing so, will construe the agreement liberally. In this case the owner of land made a demise of fifty acres for fourteen years at a nominal rent for the purpose of boring for oil and contemporaneously executed an agreement by which the owner agreed to convey at any time a roadway from any wells the lessee might dig or bore to a certain road and also sufficient land for the working of such well or wells, the lessee agreeing to pay one hundred dollars for the first well he might work for oil, and the sum of fifty dollars per acre for the land necessary for working said oil on said roadway, and the sum of fifty dollars for any oil well he shall work after the first one, and the sum of twenty-five dollars per acre for any land necessary for said well or wells and the roadway.

"The lessee, having divided a portion of the fifty acres into acre lots having a frontage of from 80 to 100 feet, sold his interest in one such acre to a third party who went into possession and opened a well, erected an oil refinery and constructed the necessary tanks and works for separating the oil from the water with which it was

mixed when taken from the earth and declared his option of purchasing within the time specified.

"The owner of the field having sold and conveyed his interest in the whole fifty acres, his vendee objected to convey the acre, except upon terms not warranted by the agreement and subsequently refused to convey more than in his opinion was absolutely necessary for working the well in its then state, the produce of which had become greatly diminished, and filed a bill asking to have the agreement construed and an injunction against the occupant continuing the refinery on the premises.

"The evidence in the cause shewed that by constructing tanks one above another, a great saving of space would be gained, but that the expense greatly exceeded the value of the crude oil, and that the refinery occupied a space equal to about one twenty fourth of the whole acre. The Court was of opinion that under the agreement the purchaser was not entitled to space for a refinery on the premises, but, it appearing that the sinking of another well, within the limits of such acre would tend to injure the well already sunk, and that an acre was not too large a piece for the purposes contemplated, refused the injunction asked for, and the purchaser, by his answer, having asked cross relief, by way of specific performance of the agreement, a decree was made accordingly; the deed to be prepared under such decree to provide for payment of the sums stipulated for in the event of the opening of any future well upon such acre. But in such a case, the parties so claiming specific performance would be liable to pay for any other well or wells opened and worked upon the whole fifty acres by other persons, the assignee in this respect standing in no better position than his assignor, the original lessee, and the contract not containing any stipulation or agreement for the laying off of the fifty acres into sub-divisions, and the Master having required a list of all persons who had opened and worked wells upon the property with a view of making them parties in his office and taking an account of what they owed respectively in order that they might be bound thereby, and that the defendant might thus acquire a lien on their portions of the land for the sums so to be paid by the defendant, it was held, on

motion by way of appeal from this direction of the Master, that such other purchasers were not proper parties, nor could the defendant thus acquire any lien upon their property, or, in the absence of a request, any claim against the parties for repayment of the amount advanced on their account, there being no legal liability on his part to make such payment; and it was questioned, even if he thus could acquire such lien or claim, whether they would in that case have been proper parties.

Remedy is Discretionary.

In *Harris* v. *Robinson*, 21 S.C.R. 390, Strong J. referred to the principle that the exercise of jurisdiction to grant specific performance was discretionary, citing the case of *Lamare* v. *Dixon*, L.R. 6, H.L. 423. "The exercise," he said, "of jurisdiction is a matter of judicial discretion, one which is to be said to be exercised as far as possible upon fixed rules and principles, but which is, nevertheless, more elastic than is generally permitted in the administration of judicial remedies. In particular it is a remedy in the application of which much regard is shewn to the conduct of the parties seeking relief." In the same case, he said, "The rule which governs the Court in giving relief by way of specific performance of agreements, even in cases in which time is not made the essence of the contract is, that a plaintiff seeking such relief must shew that he has been always ready and eager to carry out the contract on his part," and, speaking with reference to the facts in the case, he said that "to grant specific performance in the case would be to set at defiance the wholesome rule before adverted to which requires promptitude and diligence on the part of one who seeks at the hands of the Court this extraordinary relief."

The same subject is referred to by Armour J., in *Coventry* v. *MacLean*, 22 O.R. at p. 9, in the same terms used by Strong J., and citing the same case of *Lamare* v. *Dixon*.

CHAPTER II.

THE EXTENT OF THE JURISDICTION.

Not all kinds of contracts performed.

§ 47. It has already been in substance observed that if a contract be made and one party to it make default in performance, there appears to result to the other party a right at his election either to insist on the actual performance of the contract, or to obtain satisfaction for the non-performance of it.[1] It may be suggested that from this it follows that a perfect system of jurisprudence ought to enforce the actual performance of contracts of every kind and class, except only when there are circumstances which render such enforcement unnecessary or inexpedient, and that it ought to be assumed that every contract is specifically enforceable until the contrary be shown. But so broad a proposition has never, it is believed, been asserted by any of the Judges of the Court of Chancery, or their successors in the High Court of Justice, though, if prophecy were the function of a law writer, it might be suggested that they will more and more approximate to such a rule.

Judges have sometimes dwelt upon those negative circumstances which render specific performance unnecessary or inexpedient: sometimes on those affirmative circumstances which render such performance necessary and expedient.

The extent and limits of the jurisdiction.

§ 48. The following propositions may help to explain the extent to which the jurisdiction has hitherto gone,

[1] See *supra*, § 4.

assuming in each proposition (unless otherwise stated or implied) the existence of a contract binding in Equity.

The Court will interfere in specific performance—

(i.) Where there is no Common Law remedy.

(ii.) Where the Common Law remedy exists, but is not adequate.

On the contrary, the Court will not interfere in specific performance—

(iii.) Where the Common Law remedy exists and is adequate.

(iv.) Where the contract is such as the Court cannot perform.

(v.) Where the performance of the contract would prove useless.

(vi.) Where the Court would be unable to enforce its own judgment.

(vii.) Where the enforced performance of the contract would be worse than its non-performance.

(viii.) Where the contract is voluntary.

(ix.) Where the plaintiff has elected to proceed in some other manner than for specific performance.

(x.) Where the jurisdiction has been taken away by statute.

After the foregoing propositions have been discussed it will be shewn—

(xi.) That the jurisdiction is against the defendant personally.

(xii.) That there are certain cases of quasi-contract in which the Court has jurisdiction.

Lastly will be considered—

(xiii.) The jurisdiction in relation to the Crown.

i. *Where there is no Common Law remedy.*

Ground of interference of Equity.

§ 49. In many cases though a contract was in conscience obligatory upon both the parties to it, yet the

Common Law, from the strictness of its forms, afforded no remedy to the party injured by the other's non-performance. The defect of justice which hence arose was avoided by the jurisdiction of Equity, which in such cases has compelled the specific execution of the contract, if in other respects fit for the intervention of the Court.

Contracts differently regarded at Common Law and in Equity.

§ 50. In Equity, differing in this respect from the Common Law, a distinction was made between those terms which are of the essence of the contract and those terms which are not thus essential, and a breach of which it is inequitable for either party to set up against the other as a reason for refusing to execute the contract between them. In these cases the doctrine of Common Law was forfeiture; the doctrine of Equity is compensation. "Lord Thurlow," to quote the language of his successor Lord Eldon, "used to refer this doctrine of specific performance to this:—that it is scarcely possible that there may not be some small mistake or inaccuracy; as, that a leasehold interest represented to be for twenty-one years, may be for twenty years and nine months; some of those little circumstances that would defeat an action at Law, and yet lie so clearly in compensation that they ought not to prevent the execution of the contract."[1] On this ground the jurisdiction rests in all cases where specific performance is decreed with compensation by the plaintiff.

Common Law remedy lost by default of plaintiff.

§ 51. The fact that the Common Law remedy has been lost by the default of the very party seeking the specific performance of a contract will not exclude the jurisdiction, if it be notwithstanding conscientious that the contract should be performed, as in cases where the plaintiff has performed his part substantially, but not with such exactitude as to be able to plead such performance as the Common Law Courts required.[2]

Common Law unavailable

§ 52. But besides these cases, there are many others

[1] In *Mortlock* v. *Buller*, 10 Ves. 315-16. See also *Stewart* v. *Alliston*, 1 Mer. 26, 32.

[2] *Davis* v. *Hone*, 2 Sch. & Let. 341, 347.

from something in the contract

in which the Court interferes, because there is no Common Law remedy by reason of something in the subject-matter of the contract,[1] or the parties to it, or the form in which it is concluded.

Or from the nature of the contract

§ 53. Thus the Court will give relief in respect of a contract to assign a chose in action,[2] or of a contract concerning the hope of succession of an heir,[3] although no damages could have been recovered at Common Law for contracts dealing with those subject-matters, and it will in a proper case specifically enforce a right of pre-emption, and restrain by injunction the violation of such a right, and will specifically enforce a compromise.[4] In one case Plumer M.R. intimated the opinion that where a promissory note had been handed over for valuable consideration unindorsed, a Court of Equity would at the suit of the holder compel the transferor, or his personal representative, to indorse it in order to substantiate the right of the transferee.[5] A contract between joint tenants of a copyhold estate to divide it between them has been specifically enforced.[6]

Contracts to execute mortgage and to lend money

§ 54. Again, the Court will specifically enforce a contract to execute a mortgage, and that even with an immediate power of sale where the money has been actually advanced either before or at the time of the contract.[7] It is, however, settled that the Court will

[1] See *per* James L.J. in *Beasley* v. *Atkinson*, 13 Ch. D. at p. 300 (windows).

[2] See *infra*, § 59, and *Cogent* v. *Gibson*, 33 Beav. 557.

Jones v. *Roe*, 3 T. R. 88, compared with *Beckley* v. *Newland*, 2 P. Wms. 182, and cases *infra*, § 1530 *et seq.* See also 1 Fonbl. Eq. 216.

[3] *Hemfray* v. *Fothergill*, L. R. 1 Eq. 567, 573; *Birmingham Canal Co.* v. *Cartwright*, 11 Ch. D. 421. Cf. *Lord Cavington* v. *Wycombe Railway Co.*, L. R. 3 Ch. 377; *Lord Beauchamp* v. *Great Western Railway Co.*, L. R. 3 Ch. 745; *London & South Western Railway Co.* v. *Gomm*, 20 Ch. D. 562; *Turner* v. *Green*, [1895] 2 Ch. 20.

Watkins v. *Meade*, 2 J. & W. at p. 213. Distinguish *Edge* v. *Bamford*, 31 Beav. 247.

[4] *Bolton* v. *Ward*, 1 Ha. 530. See, too, Seton, 1265 (contract for exchange).

[5] *Ashton* v. *Corrigan*, L. R. 13 Eq. 76; *Hermann* v. *Hodges*, L. R. 16 Eq. 18. Cf. *Taylor* v. *Eckersley*, 2 Ch. D. 302.

not so enforce a mere agreement to lend, advance or pay money[1] (though the loan be one to be secured by mortgage), while it rests entirely unperformed either by the intended lender[2] or by the intended borrower. And this rule applies to a contract to lend to a company money, payable by instalments, upon the security of debentures of the company.[3] "The Statute of Frauds does not apply to such a case. Therefore if the Court has jurisdiction in such a case, any conversation may be made the subject of a suit for specific performance: thus if two friends are walking together and one says 'Will you lend me £100 at £5 per cent. for a year on good security?' and the other says 'I will,' that conversation might be made the subject of a suit for specific performance in this Court if on the next day one friend should say 'I do not want the money,' or the other should say 'I will not lend it.' Nothing would be more difficult and more dangerous than the task which this Court would have to perform if it were to investigate cases of that description."[4]

Advance on security of lessee's leasehold

§ 55. In one case there was a contract by B. to advance to C. £3,000 on the security of some leasehold houses for five years. B. advanced £600 on deposit of the lease of one of the houses. The contract was (in the opinion of the Court) that B. should not be entitled to call for the lessor's title. Nevertheless he

[1] *Lucas* v. *Bonany y Gwerty*, L. R. 5 P. C. 346. Cf. *Brough* v. *Oddy*, 1 E. & M. 55.

[2] *Rogers* v. *Challis*, 27 Beav. 175.

Sichel v. *Mosenthal*, 30 Beav. 371. See also *Firth* v. *Slingsby*, 58 L. T. 481.

[3] *South African Territories, Ltd.* v. *Wallington*, [1898] A. C. 309, affirming S. C. [1897] 1 Q. B. 692. See, too, *per* Chitty J. in *Western Wagon and Property Co.* v. *West*, [1892] 1 Ch. 271, at p. 273; 61 L. J. Ch. 211; 66 L. T. 102. Distinguish *Gorringe* v. *Land Improvement Society*, [1899] 1 I. R. 112, 152, where the transaction was held to be, in substance, the purchase of a rent-charge, and *Starkey* v. *Barton*, [1909] 1 Ch. 281, 291; 78 L. J. Ch. 129, where the contract was in substance and in fact a contract for sale and purchase of land, part of the purchase-money being left on mortgage.

[4] *Per* Lord Romilly M.R. in *Rogers* v. *Challis*, 27 Beav. at p. 178.

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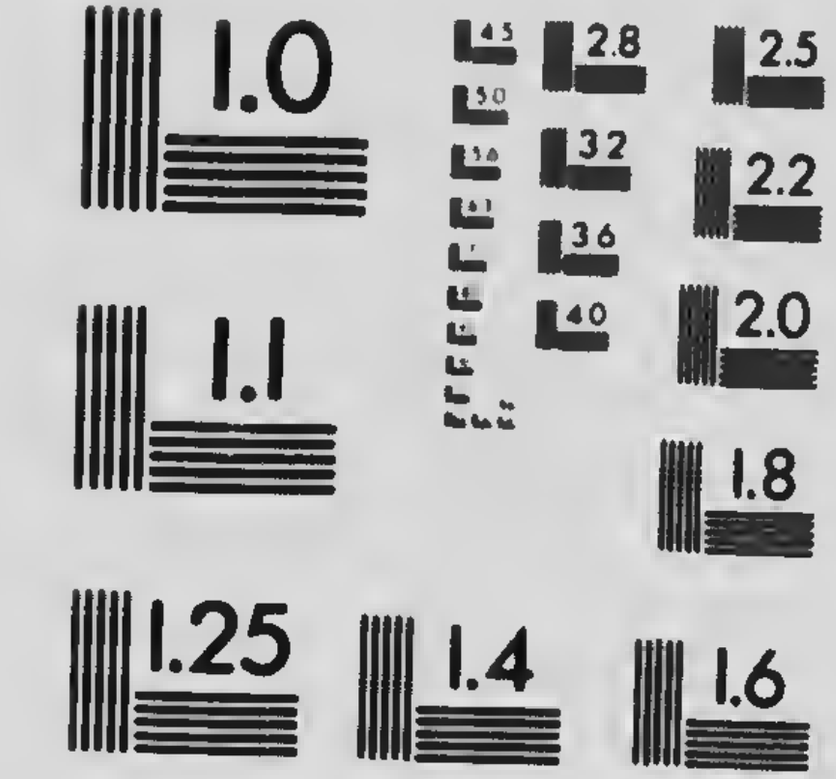

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did call for it, and on its being refused filed a bill for specific performance of the contract or for the sale of the property to repay him the £600 and interest. The Court considered that the plaintiff was in the wrong, but, the defendant submitting to perform the contract without showing the lessor's title, and the plaintiff electing to have a decree, made him pay the costs of the suit, as the price of its interference.[1]

Deposit of title deeds.

§ 56. In another case S. who had become liable for a debt of W., and with whom W. had deposited title deeds as an indemnity, was held entitled to have a written memorandum of the terms of the deposit signed by W.[2]

Remedy in damages prevented by death.

§ 57. Again, though no action would lie at Common Law in respect of a contract to convey by a particular day, which was rendered impossible by the death of the contractor before that day, yet specific performance would be decreed by the Court of Chancery against the heir.[3]

By marriage.

§ 58. The Court of Chancery also interfered specifically to execute a contract evidenced by a bond given to a wife by her husband, or to a husband by his wife,[4] before marriage, though the bond was suspended at Common Law by the intermarriage.

Remedy in damages unavailable from form of contract.

§ 59. The same principle equally applies to give the Court jurisdiction where, though the contract is in its nature such that a breach of it can be satisfied by damages, yet from some particular circumstances this remedy is not open to the aggrieved party: therefore where a contract for the purchase of timber-trees was comprised in a memorandum which appeared not to be the final contract, but was to be made

[1] *Buss* v. *Chirley*, Taml. 80.

[2] *Sporle* v. *Whayman*, 20 Beav. 607.

[3] See arguments of counsel in *Milnes* v. *Gery*, 14 Ves. 403, and 1 Mad. Ch. 362.

[4] *Cannel* v. *Buckle*, 2 P. Wms. 242; *Acton* v. *Acton*, Prec. Ch. 237. See too, *Gage* v. *Acton*, 1 Salk. 325.

complete by subsequent articles, so that it was doubtful whether the contract, as it then stood, would not have been considered at Law as incomplete, and so the plaintiff have been debarred of any remedy there, Lord Hardwicke held that the contract was one which the Court of Chancery could specifically perform.[1] In another case a contract to purchase a debt was enforced against the purchaser, on the ground that the debt had not been so assigned to him as to enable him successfully to sue at Law;[2] and in the case of a contract for the purchase of Government stock, the fact that the plaintiff was not the original holder of the scrip, but merely the bearer, which rendered it doubtful whether he could maintain an action at Law upon the contract, was one ground on which the Court of Chancery was held to have jurisdiction.[3]

Former practice of the Court of Chancery.

§ 60. It is said that before the time of Lord Somers the practice of the Court of Chancery was to send the parties to Law, and to entertain the suit only in case of the plaintiffs there recovering damages,[4] a practice which, of course, involved the proposition that specific performance could not be granted except in cases where damages could be recovered at Law. That limitation of the jurisdiction has, however, been long overruled —notably in the case of *Dr. Bettesworth* v. *The Dean and Chapter of St. Paul's*,[5] decided by Lord King in 1726, with the assistance of Raymond C.J. and Price J. A lease had been granted by the defendants previously to the disabling statute of 13 Eliz., with a covenant to renew for ninety-nine years, and the plaintiff sought a renewal for the term allowed by the statute, which the Lord Chancellor refused, on the ground that no action

[1] *Buxton* v. *Lister*, 3 Atk. 383; but see *infra*, §§ 334, 506.

[2] *Wright* v. *Bell*, 5 Pri. 325. Cf. *Adderley* v. *Dixon*, 1 S. & S. 607

[3] *Doloret* v. *Rothschild*, 1 S.&S 590.

[4] *Per* Clarke M.R. in *Dodsley* v. *Kinnersley*, Ambl. at p. 406.

[5] Sel. Cas. in Ch. 66; S. C. 3 Brown, P. C. 389.

could have been maintained on the covenant after the passing of the statute. "I take this to be a certain clear rule of Equity," said Raymond C.J.,[1] "that a specific performance shall never be compelled for the not doing of which the Law would not give damages. The covenant to oblige them to make a lease for ninety-nine years is gone, and damages cannot be recovered for part of a covenant, and I, therefore, am of opinion Equity cannot interfere." This decision, which was opposed by the opinion of Jekyll M.R., was reversed in the House of Lords; and it is abundantly evident, from the cases already cited, that the jurisdiction at present exercised is not restrained within these limits, and that there are many cases in which specific performance is granted where no action for damages could be maintained.[2]

ii. *Where there is no adequate Common Law remedy.*

iii. *Where there is an adequate Common Law remedy.*

These propositions converse.

§ 61. The propositions that the Court will interfere in specific performance where the Common Law remedy exists but is not adequate, and that the Court will not interfere where the Common Law remedy exists and is adequate, being in the nature of converse propositions will be conveniently considered together.

Common Law remedy inadequate.

§ 62. The only remedy at Common Law for the non-performance of a contract was in damages, that is to say, in the payment of a sum of money by the party who had broken the contract to the party injured by that breach. If money were in all cases a perfect measure of the injury done by this breach, it is evident that an exact equivalent for the wrong might be made,

[1] Sel. Cas. in Ch. at p. 69.

[2] *Per* Lord Redesdale in *Lennon* v. *Napper*, 2 Sch. & Lef. 682; *Cannel* v. *Buckle*, 2 P. Wms. 242. The passage in *Williams* v. *Steward*, 3 Mer. 491, to which Mr. Justice Story (Eq. Jur. § 741) has referred as a dictum of Grant M.R., is the language of counsel *arguendo*.

and that the justice done would be complete. But money is an exact equivalent only when by money the loss sustained by the breach of contract can be fully made good. Now in a vast variety of cases this is not so; for though one sovereign or one shilling is to all intents and purposes as good as any other sovereign or shilling, yet one landed estate, though of precisely the same market value as another, may be vastly different in every other circumstance that makes it an object of desire: so that it evidently follows that there would be a failure of justice, unless some other jurisdiction supplemented that of Common Law, by compelling the defaulting party to do that which in conscience he is bound to do, namely, actually and specifically to perform his contract. The Common Law treats as universal a proposition which is for the most part, but not universally, true, namely, that money is a measure of every loss.[1] The defect of justice which arose from this universality of the Common Law principle was met and remedied in certain cases by the jurisdiction of Courts of Equity to compel specific performance.

Common Law remedy partial.

§ 63. The mere existence of a Common Law remedy, and even the existence of a perfect Common Law relation, will not necessarily exclude specific performance. Thus, in one case it was held that, although an agreement might possibly amount at law to a present demise or assignment, yet, if the document showed the intention that a further instrument should executed, be specific performance might be decreed.[2]

Common Law remedy less beneficial.

§ 64. Even when money is alone in question, the Common Law remedy is in some instances less beneficial than that afforded by Courts of Equity, and where this is so, a ground is laid for specific performance, if otherwise a proper remedy. So where A. gave a note to B., and C. agreed with B. for the relinquishment of

[1] See Aris. Eth. Nic. lib. ix. c. 1.

[2] *Fraser* v. *Hepburn*, 2 Y. & C. C. C. 159.

his (B.'s) claim against A. on the payment of certain sums, for which the notes were, in the contemplation of Equity, to stand only as a security, it was held that the Court of Chancery would specifically perform the contract, though the relations between the parties might have been worked out by actions at Law.[1]

Doctrine of Leach V.C.

§ 65. Sir John Leach M.R. (then V.C.) seems to have considered that the fact that the remedy in damages given at Common Law depended for its beneficial effect upon the personal responsibility of the defendant, gave the other party to the contract a right to sue in Equity for its actual performance.[2] It is evident that this principle applies to all damages, and, if it were admitted, would give the Court jurisdiction by way of specific performance in all cases of contract, whether for the sale of chattels or of any other nature, which certainly is not the law of the Court.

In another case the same learned Judge appears to have held that the circumstance that damages at Law would not accurately represent the value of the contract to either party was a ground for granting specific performance. The contract in that case was for the sale of debts proved under two commissions of bankruptcy; and Leach V.C. granted specific performance, considering that to compel the plaintiff to accept damages would be to compel him to sell those dividends which were of unascertained value at a conjectural price.[3] The learned Judge just named seems to have shown a tendency to extend the jurisdiction in specific performance somewhat more liberally than most other Judges:[4] and the mere want of exactitude in the measure of damages at

[1] *Beech* v. *Ford*, 7 H. 208 (affirmed by Lord Cottenham). Cf. *Cogent* v. *Gibson*, 33 Beav. 557 (purchase-money of patent).

[2] *Dolorel* v. *Rothschild*, 1 S. & S. 590.

[3] *Adderley* v. *Dixon*, 1 S. & S. 607. See *per* Lord Hatherley (then Wood V.C.), in *Pollard* v. *Clayton*, 1 K. & J. 462.

[4] See *Withy* v. *Cottle*, 1 S. & S. 594; *Kenney* v. *Wexham*, 6 Mad. 355; cf. *Bradley* v. *Collins*, Yon. 347, 350.

Common Law has not always been held a sufficient ground for the equitable jurisdiction.

Cases where Common Law remedy is adequate.

§ 66. The ground of this jurisdiction having been the inadequacy of the remedy at Common Law, it followed that where that remedy was adequate, Chancery did not interfere to compel specific performance. It is on this ground that the Court has generally refused specific performance in respect of Government stock or chattels, as will be hereafter seen, and refuses it in all cases where the contract is satisfied by a mere payment of money.[1]

Instances.

§ 67. The principle has been recognized in several other cases. It was one of the grounds on which Knight Bruce and Lord Cranworth L.JJ. acted in dismissing the bill in *Lord James Stuart* v. *London and North-Western Railway Co.*[2] so far as regarded specific performance, and only putting the defendants on terms to make certain admissions in any action at Law to be brought by the plaintiff against them,—their Lordships considering that, the railway having been abandoned and complete relief being in their opinion obtainable at Law, the case was not one for specific performance. It was also one of the reasons alleged by Lord Cranworth L.J. for dismissing the bill in *Webb* v. *Direct London and Portsmouth Railway Co.*,[3] he considering that under the circumstances the vendor could obtain complete relief at Law. The authority of these decisions was subsequently questioned by Lord St. Leonards,[4] but only as to the applicability of the principle to the circumstances, and not as to the validity of the principle itself.

[1] See *Brough* v. *Oddy*, 1 R. & M. 55; *Larios* v. *Bonany y Gurety*, L. R. 5 P. C. 346; *Ryan* v. *Mutual Tontine, &c., Association*, [1893] 1 Ch. at pp. 125, 128; and cf. the cases on contracts with a penalty, *infra*, § 140.

[2] 1 De G. M. & G. 721.

[3] 1 De G. M. & G. 521.

[4] *Hawkes* v. *Eastern Counties Railway Co.*, 1 De G. M. & G. 737; S. C. 5 H. L. C. 331.

Contract for yearly tenancy.

§ 68. In one case specific performance was sought of a contract for a tenancy from year to year, the contract specifying that the tenant was in all respects to abide by the terms entered into by a previous tenant, and that the tenant should pay for a contract to be drawn up; it was contended that the Court would therefore interfere for the purpose of settling the proper terms of the contract. But the Court thought the remedy at Law was adequate, and that the full terms of the contract might be shown there, and therefore refused to decree performance.[1]

Specific performance may, however, be granted in a proper case, even where the contract is for a yearly tenancy.[2]

Contract to make railway.

§ 69. On this ground also, as well as that of the incapacity of the Court to execute the works, the Court of Chancery refused specifically to perform a contract to make a branch railway, although the contract for the execution of it had been entered into during the pendency of the Bill before Parliament, and when several of the directors had thoughts of withdrawing the Bill, and would have in fact done so (as the bill of complaint alleged), but for the contract in question.[3]

Contract to pay money.

§ 70. And where a bill sought the specific performance of a contract which would have been effected by a mere account of profits and a payment of the amount found due, and there was no obstacle to the

[1] *Clayton* v. *Illingworth*, 10 Ha. 451. Cf. *Fraser* v. *Hepburn*, 2 Y. & C. C. C. 159.

[2] *Lever* v. *Koffler*, [1901] 1 Ch. 543. See, too, *Manchester Brewery Co.* v. *Coombs*, [1901] 2 Ch. at p. 616; and *Zimbler* v. *Abrahams* (agreement to grant a lease for life), [1903] 1 K. B. 577; 72 L. J. K. B. 103. Distinguish *Glasse* v. *Woolgar*, 41 Sol. Jo. 573 (contract to let for a single day).

[3] *South Wales Railway Co.* v. *Wythes*, 1 K. & J. 186; S. C. 5 De G. M. & G. 880. See, too, *Greenhill* v. *Isle of Wight* (*Newport Junction*) *Railway Co.*, 19 W. R. 345; and cf. *Dominion Coal Co.* v. *Dominion Iron and Steel Co.*, [1909] A. C. 293, 299; 78 L. J. P. C. 115.

recovery of the amount at Law, the Court dismissed the suit.[1]

Alternative remedy.

§ 71. In analogy with this principle, in a case in which the plaintiffs sought the specific performance of a contract to grant a way-leave for a railway for a term of sixty years, and between the filing of the bill and the hearing the plaintiffs had obtained statutory powers to take the land in fee, Stuart V.C. considered this to be a circumstance strongly influencing the discretion of the Court against specific performance.[2]

Contra, enforced by vendor.

§ 72. It may appear at first sight that, inasmuch as money in exchange for the estate is what the vendor of land is entitled to, he has a complete remedy in an action for damages, and therefore cannot sustain an action for the specific performance of the contract. But on further consideration it will be apparent that damages will not place the vendor in the same situation as if the contract had been performed; for then he would have got rid of the land and of all the burdens and liabilities attaching to it, and would have the purchase-money in his pocket; whereas, after an action for damages, he still has the land and, in addition, damages,—representing, in the opinion of a jury, the difference between the stipulated price and the price which it would probably fetch, if re-sold, together with incidental expenses and any special damage which he may have suffered.[3] The doctrine of Equity with respect to the conversion of the land into money, and of the money into land upon the execution of the contract,[4] and the lien which the vendor has on the

[1] *Ord* v. *Johnston*, 1 Jur. N. S. 1063; 4 W. R. 37 (Stuart V.C.). See also *Sturge* v. *Midland Railway Co.*, 6 W. R. 233; 4 Jur. N. S. 273. Cf. *Bagnell* v. *Edwards*, I. R. 10 Eq. 215.

[2] *Meynell* v. *Surtees*, 3 Sm. & Gif. 101. See also *per* Lord Cranworth in *Morgan* v. *Milman*, 3 De G. M. & G. 35.

[3] *Eastern Counties Railway Co.* v. *Hawkes*, 5 H. L. C. 331, 359, 376; *Lewis* v. *Lord Lechmere*, 10 Mod. 503.

[4] Ibid.

estate for the purchase-money, and his right to enforce this by the aid of the Court, are additional reasons for extending the remedy to both parties. Accordingly, it is well established that the remedy is mutual, and that the vendor may bring his action in all cases where the purchaser could sue for specific performance of the contract, and this independently of any question on the Statute of Frauds.[1]

Government stock.

§ 73. On the principle that damages are a sufficient satisfaction, it is now perfectly settled that specific performance will not be enforced of a contract for the transfer of stock in the public funds.

Cuddee v. *Rutter.*

§ 74. It appears that in one instance Lord Hardwicke did grant specific performance of such a contract:[2] but in the earlier case of *Cuddee* (or *Cud*) v. *Rutter*[3] Lord Macclesfield, overruling a decision at the Rolls, refused to perform a contract to transfer South Sea Stock, though by the decree he undertook to arrange the settlement between the parties. His Lordship assigned three reasons for this decision: first, the nature of the subject-matter of the contract; secondly, the circumstance that the defendant was not possessed of the stock at the time of the contract; and thirdly, that the liability to sudden rise and fall in stock made the day a most material part of the contract, and therefore rendered it an improper one for the Court to carry into execution. This principle was acted on by Gilbert C.B.[4] and stated to be the settled doctrine of the Court by Lord Eldon.[5]

[1] *Clifford* v. *Turrell*, 1 Y. & C. C. C. 138, 150; affirmed 9 Jur. 633; *Walker* v. *Eastern Counties Railway Co.*, 6 Ha. 591; *Kenney* v. *Wexham*, 6 Mad. 355. See further, on this subject, a paper on "A Vendor's Right to Specific Performance," by Professor W. D. Lewis, in the American Law Register, Vol. 11, N. S. 65 (February, 1902).

[2] See *Nathrown* v. *Thornton*, 10 Ves. 161.

[3] 5 Vin. Abr. 538, pl. 21; S. C. 1 P. Wms. 570; 2 W. & T., L. C. in Eq. (7th edit.), 416.

[4] *Cappur* v. *Harris*, Bunb. 135.

[5] In *Nathrown* v. *Thornton*, 10 Ves. 161.

Other instances

§ 75. In a case before Leach V.C., a bill for the specific performance of a contract to sell Neapolitan Stock was supported; but this was partly on the ground of its praying the delivery of the certificates which would constitute the plaintiff the proprietor of a certain quantity of the stock, and partly because, the plaintiff not being the original scrip-holder, but merely the bearer, it was doubtful whether he would be able to maintain his action at Law.[1] In another case the same Judge overruled a demurrer to a bill by the vendor of a life-annuity payable out of dividends of stock, on the ground that the purchaser could clearly maintain such a bill, and that the remedy must be mutual.[2] But it seems that the Court would not enforce specific performance of a contract to sell a life-interest in the public funds.[3]

Shares in companies

§ 76. With regard to shares in companies the same principle does not apply. "In my opinion," said Shadwell V.C.,[4] "there is not any sort of analogy between a quantity of £3 per cents. or any other stock of that description (which is always to be had by any person who chooses to apply for it in the market), and a certain number of railway shares of a particular description, which railway shares are limited in number, and which, as has been observed, are not always to be had in the market;[5] and accordingly specific performance was enforced of a contract to sell a certain number of railway shares, the shares not being particularized. In a subsequent case Lord Chelmsford stated that there was no doubt that a contract for the sale of railway

[1] *Doloret* v. *Rothschild*, 1 S. & S. 590.

[2] *Withy* v. *Cottle*, 1 S. & S. 174.

[3] *Brealey* v. *Collins*, You. 317, 330.

[4] *Duncuft* v. *Albrecht*, 12 Sim. 189, 199. See *Jackson* v. *Cooker*, 4 Beav. 59.

[5] In the case, however, of shares which are dealt with largely in the market, and which any one can go and buy there, there would seem to be no reason why they should not be treated as being in the same position as Government Stock (as to which *see supra*, § 73): *Re Schweinfurth*, *Stern* v. *Schwabacher*, 98 L. T. 127, at p. 128.

shares is capable of being enforced;[1] and in a subsequent chapter[2] many recent cases will be referred to which have arisen in respect of contracts for the sale of shares. It may have been on this principle that Lord King disallowed a demurrer to a bill for the transfer of York Building Stock;[3] but a different view seems to have been previously entertained by Lord Macclesfield, inasmuch as he dismissed a bill for the transfer of £1,000 of the same stock.[4]

Actions on contracts to take shares.

§ 77. A vendor of shares may maintain an action against the purchaser to compel him to complete the purchase by the execution and registration of a proper transfer,[5] and to indemnify the vendor against future calls.[6]

In like manner the company may sue a person who has contracted with the company to take shares from it.[7] Many difficult questions have arisen as to the nature and effect of contracts to take shares, which will be considered separately in a later chapter.[8]

Chattels.

§ 78. Apart from statute,[9] the Court for the most part refuses to interfere in respect of chattels, both because damages are a sufficient remedy, and because the price of such articles, especially of merchandise, varies so as often to render the specific execution of contracts for their sale and delivery an act of injustice, entailing perhaps ruin on one side, when upon an action

[1] *Cloale* v. *Kenward*, 3 De G. & J. 27.

[2] Part VI. chap. i.

[3] *Colt* v. *Netterville*, 2 Sim. 304.

[4] *Dorison* v. *Westbrook*, 5 Vin. Abr. 540, pl. 22.

[5] *Shaw* v. *Fisher*, 2 De G. & Sm. 11; 5 De G. M. & G. 596. Cf. *Ward and Henry's Case* (where the purchaser had filed his bill for specific performance), L. R. 2 Eq. 226; 2 Ch. 431.

[6] *Wynne* v. *Price*, 3 De G. & Sm. 310; *Walker* v. *Bartlett*, 18 C. B. 845.

[7] *New Brunswick, &c. Co.* v. *Muggeridge*, 1 Dow. 616. See also *Sheffield Gas Consumers' Co.* v. *Harrison*, 17 Beav. 294; *Oriental Inland Steam Co.* v. *Briggs*, 2 J. & H. 625; 4 De G. F. & J. 191; *Odessa Tramways Co.* v. *Mendel*, 8 Ch. D. 235.

[8] Part VI. chap. i.

[9] See § 82, *ad fin.*

that party might not have paid perhaps above a shilling damages.[1] As, however, these principles do not apply to all cases of chattels, exceptions arise which we shall now consider.

Unique affections.

§ 79. When the chattel in question is unique, when there is, over and above the market value, that which has been called the *pretium affectionis*, the Court, whether the plaintiff's right has arisen from contract or not, has interfered and not left him to his Common Law remedy. The leading case in this branch of the law is *Pusey* v. *Pusey*,[2] in which the heir of the family of Pusey recovered possession by a bill in Equity of the celebrated Pusey horn: the grounds of the decision are insufficiently reported, but the case "turned," to quote Lord Eldon's language in respect of it,[3] "upon the *pretium affectionis*, independent of the circumstance as to tenure, which could not be estimated in damages." This has been followed by other similar cases, one having relation to an ancient silver altarpiece, remarkable for a Greek inscription and dedication to Hercules,[4] another to a tobacco-box of a remarkable and peculiar kind,[5] another to masonic dresses and ornaments,[6] and another to a very finely engraved cherry-stone.[7]

[1] *Per* Lord Hardwicke in *Barton* v. *Lester*, 3 Atk. 384. In *Norton* v. *Seale*, Finch. 149, Lord Nottingham specifically performed a charter-party by directing the payments to be made in pursuance of it; but see *infra*, § 855. See also *Claringbould* v. *Curtis*, 24 L. J. Ch. 541, and Lord Westbury in *Holroyd* v. *Marshall*, 10 H. L. C. 209. Where the delivery of chattels is only part of a contract otherwise enforceable, the contract may be performed. *Marsh* v. *Millington*, 3 Jur. N. S. 979 (Wood V.C.).

[2] 1 Vern. 273.

[3] In *Nathrown* v. *Thornton*, 10 Ves. 163.

[4] *Duke of Somerset* v. *Cookson*, 3 P. Wms. 390.

[5] *Fells* v. *Read*, 3 Ves. 70.

[6] *Lloyd* v. *Loaring*, 6 Ves. 773. See also *Saville* v. *Tancred*, 1 Ves. Sen. 101; S. C. 3 Sw. 141, n.; *Lady Arundell* v. *Phipps*, 10 Ves. 139; *Lowther* v. *Lord Lowther*, 13 Ves. 95. A ship is probably within this principle. See *Lynn* v. *Chalers*, 2 Ke. 521, and *Claringbould* v. *Curtis*, 24 L. J. Ch. 541; *De Mattos* v. *Gibson*, 4 De G. & J. 276; *Hart* v. *Herwig*, L. R. 8 Ch. 860, 866; *Batthyany* v. *Bouch*, 60 L. J. Q. B. 421; 44 L. T. 177. See, too, Part VI. chaps iv., *infra*.

[7] *Per* Lord Hardwicke in *Pearne* v. *Lisle*, Ambl. 77, in which case a

Tort, trust, and contract.

§ 80. These particular cases were suits grounded on tort or trust: but the same principle applies to cases of contract relating to chattels.

Illustrations of the principle.

§ 81. Accordingly in *Falcke* v. *Gray*[1] Kindersley V.C. sustained a bill by a purchaser for the specific performance of a contract to sell to him for £40 two china jars; and in *Thorn* v. *The Commissioners of Works*,[2] Lord Romilly M.R. made a decree for the specific performance of a contract for the sale to the plaintiff of the arch stone, the spandril stone, and the Bramley Fall stone contained in old Westminster Bridge, which had been pulled down. In this case, though elaborately argued, no objection seems to have been taken to the jurisdiction.

Dictum of Lord Westbury.

§ 82. A dictum of Lord Westbury in the House of Lords put the jurisdiction of Courts of Equity, as regards chattels, as if extending to every case where the contract relates to specific property. "A contract for the sale of goods," said his Lordship,[3] "as, for example, of 500 chests of tea, is not a contract which would be specifically performed, because it does not relate to any chests of tea in particular: but a contract to sell 500 chests of the particular kind of tea which is now in my warehouse in Gloucester is a contract relating to specific property, and which would be specifically performed. The buyer may maintain a suit in Equity for the delivery of a specific chattel when it is the subject of a contract, and for an injunction (if necessary) to restrain the seller from delivering it to any other person." It may be doubted whether this dictum did not express a more complete system of jurisprudence than that which this country possessed at the time when it was uttered, and whether the records

specific delivery of negroes was prayed, "but that is not necessary," said his Lordship, "others are as good."

[1] 4 Drew. 651.

[2] 32 Beav. 490.

[3] In *Holroyd* v. *Marshall*, 10 H. L. C. 209, 210. Cf. *per* Lord Watson in *Tailby* v. *Official Receiver*, 13 App. Cas. 535.

of the Court of Chancery contained many bills for the specific performance of contracts relating to specific chattels of a mercantile value like tea.[1] But by section 52 of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), it has been enacted that, in any action for breach of contract to deliver specific or ascertained goods, the Court may, if it thinks fit, on the application of the plaintiff, by its judgment or decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages. The judgment or decree may be unconditional, or upon such terms and conditions as to damages, payment of the price, and otherwise as to the Court may seem just, and the application by the plaintiff may be made at any time before judgment or decree.

Vendor plaintiff.

§ 83. It does not appear to follow from the authorities which have been referred to, or from principle, that the vendor of a chattel can maintain an action for specific performance in all cases where a purchaser of the same chattel could do so. It will have been noticed that the statutory remedy mentioned in the last preceding paragraph is in terms given only to the party who is, under the contract sued upon, to be the recipient of goods.

Price agreed on.

§ 84. It also appears that if the chattel be of a peculiar value, but by contract between the parties a price has been put upon the chattel, that circumstance has been treated as precluding the jurisdiction; for it is an admission that by a money payment full relief can be had.[2]

Chattels not unique but of

§ 85. Hitherto unique chattels have been spoken of: but it appears that such jurisdiction as the Court

[1] Consider *Heathcote* v. *North Staffordshire Railway Co.*, 2 Mac. & G. 112; *per* Lord Cranworth in *Hoare* v. *Dresser*, 7 H. L. C. at pp. 317—8; *Fothergill* v. *Rowland*, L. R. 17 Eq. 132; *Tailby* v. *Official Receiver*, 13 App. Cas. 523.

[2] *Dawling* v. *Betjemann*, 2 J. & H. 544.

peculiar importance.

exercises in the case of unique chattels it may also exercise in the case of chattels which, though not unique, possess a special and peculiar value to the plaintiff. Thus in *North* v. *The Great Northern Railway Co.*[1] the Court upheld its jurisdiction to interfere to prevent the sale of certain waggons belonging to the plaintiff, which had been used by the plaintiff in his business of a colliery owner, and which the defendants asserted that they had a right to detain and sell. "Where specific things," said Stuart V.C.,[2] "necessary for conducting a particular business are in the possession of persons who claim a lien upon them, and threaten an immediate sale, this Court has undoubted jurisdiction to interfere by injunction and prevent irreparable injury to the debtor, by giving him an opportunity of redeeming assets."

Where a particular article is essential or only convenient

§ 86. So, too, there is the high authority of Lord Hardwicke for suggesting that specific performance might be maintained by a shipbuilder if he were to contract with a landowner for the supply of timber from an adjoining estate, the shipbuilder being under contract to complete a ship by a given time, for which the supply of such timber by the defendant was essential. But this seems open to doubt; and certainly the doctrine will not be extended to mere cases of convenience, as the supply of coal from an adjoining colliery, when plenty of other coal can be procured in the neighbourhood.[3]

In a recent case,[4] in which a coal company had contracted with a steel company for the supply by the former to the latter of all the coal that the steel company might require for use in its works, the Privy

[1] 2 Giff. 61.

[2] p. 69.

[3] *Per* Lord Hardwicke in *Buxton* v. *Lister*, 3 Atk. 383, compared with *Pollard* v. *Clayton*, 1 K. & J. 462; and cf. *Fothergill* v. *Rowland*, L. R. 17 Eq. 132.

[4] *Dominion Coal Co.* v. *Dominion Iron and Steel Co.*, [1909] A. C. 293, 311; 78 L. J. P. C. 115.

Council held that the contract was not one of which specific performance would be decreed by a Court of Equity, but that, the coal company having wrongfully repudiated the contract, the steel company was entitled to treat the contract as at an end, and to recover damages for the loss of it, in addition to damages in respect of breaches of it committed before repudiation.

Chattels connected with enjoyment of estate.

§ 87. Cases might probably arise in which the Court would interfere in respect of chattels connected with the enjoyment of an estate, where but for such connection it would not exercise jurisdiction. In one case Lord Eldon made an order specifically to restore to a tenant the stock on a farm, which had been seized by the landlord under a distress and bill of sale; his Lordship holding that, under the circumstances of that case, there was an entire contract by which the landlord agreed to let the tenant have both the estate and the chattels, the enjoyment of the chattels being requisite for the enjoyment of the estate.[1]

Contracts to build.

§ 88. This appears to have been one ground on which the Court of Chancery anciently enforced contracts to build in certain cases; as where the father entered into articles with a builder, and died before the execution of the contract, the heir was allowed to sue the personal representative of his father and the builder, the contract savouring of the reality.[2] So, in another case, a contract to build was specifically enforced against a tenant who, having undertaken to rebuild the farm-house, had done so on his own soil instead of his landlord's.[3] And we shall hereafter[4] see that contracts by railway companies for the execution of works on the land of the plaintiff stand on a different footing from ordinary building contracts.

[1] *Nathrown* v. *Thornton*, 10 Ves. 159.

[2] *Holt* v. *Holt*, 2 Vern. 322; *per* Lord Hardwicke in *Rook* v. *Warth*. 1 Ves. Sen. 461.

[3] *Pembroke* v. *Thorpe*, 3 Sw. 437, n.

[4] *Infra*, § 103.

Contracts to be performed by instalments.

§ 89. Lord Hardwicke seems to have entertained the view that where the contract was for the delivery of chattels by instalments and for payment in a like method, the Court would entertain jurisdiction.

In a case cited by his Lordship, articles for the sale of eight hundred tons of iron, to be paid for by instalments, at periods running through some years, were specifically enforced.[1] The case appears to have been, as already stated, approved by his Lordship, but was doubted by Lord Hatherley (when V.C.), who remarked on the absence of any case for the sale of mere goods being supported on the ground of their being to be delivered by instalments.[2] Mr. Austin, too, has expressed his inability to understand on what principle the case proceeded,[3] and a like inability is here confessed.

Undivided moiety of mineral property.

§ 90. It may here be noticed that the Court has, and in a proper case will exercise, jurisdiction to grant specific performance of a contract relating to an undivided moiety of mineral property. Whether such a contract is a convenient or an inconvenient one is for the parties to consider when they enter into it.[4]

iv. *Where the contract is such as the Court cannot perform.*

Incapacity of Court to execute contract.

§ 91. Where the contract is from its nature such that the Court cannot enforce its performance,[5] it is necessarily no subject of its jurisdiction in that respect.[6] On this principle the Court will not prohibit the making of a secret medicine; for if it be secret, then the Court cannot tell whether it has been

[1] *Taylor* v. *Neville*, cited 3 Atk. 384. Distinguish *Nives* v. *Nives*, 15 Ch. D. 619.

[2] *Pollard* v. *Clayton*, 1 K. & J. 462.

[3] Lectures on Jurisprudence (3rd edit.), 808.

[4] *Hexter* v. *Pearce*, [1900] 1 Ch. 341, 346. Cf. *Barrow* v. *Seammell*, 19 Ch. D. 175.

[5] As to uncertainty in contracts, see Part III. chap. iv., *infra*.

[6] Consider *Hope* v. *Gibbs*, 26 W. R. 72; *De Mattos* v. *Gibson*, 4 De G. & J. 276, 299.

infringed or no;[1] nor, for the same reason, will it direct the specific performance of covenants in a farming lease, for "how," said Lord Northington, "can a Master judge of repairs in husbandry?"[2] Nor will it enforce against a life assurance society a contract to reduce a premium if satisfied with the removal of the cause for charging an extra premium, for it is the society and not the Court which is to be satisfied;[3] nor will it order the performance of continuous acts.[4] And the fact that the parties cannot be put in the condition for which they stipulated when the contract was entered into obviously disables the Court from adjudging specific performance.[5]

Breaches frequent.

§ 92. So, too, the Court will not interfere to enforce a contract by means of injunction, where the acts complained of as breaches are frequent, and the Court could not ascertain whether there has in each case been a breach without an action: as in the case of a covenant not to sell water from a certain well to the plaintiff's injury.[6]

Goodwill of a business.

§ 93. The incapacity of the Court to execute the contract limits its jurisdiction in cases relating to the sale of the goodwill of a business. For where the contract has respect to a goodwill alone, unconnected with business premises, the Court refuses specific performance by reason of the uncertainty of the subject-matter, and the consequent incapacity of the Court to give specific directions as to what is to be done to

[1] *Newberry* v. *James*, 2 Mer. 446; *Williams* v. *Williams*, 3 Mer. 157; and see the other cases cited in the note to § 1544.

[2] *Rayner* v. *Stone*, 2 Eden. 128; *Phipps* v. *Jackson*, 56 L. J. Ch. 550; 35 W. R. 378. Cf. *Bernard* v. *Meara*, 12 Ir. Ch. R. 389, 396.

[3] *Manby* v. *Gresham Life Assurance Society*, 29 Beav. 439.

[4] *Blackett* v. *Bates*, L. R. 1 Ch. 117; *Powell Duffryn Steam Coal Co.* v. *Taff Vale Railway Co.*, L. R. 9 Ch. 33; *Dominion Coal Co.*, v. *Dominion Iron and Steel Co.*, [1909] A. C. 293; 78 L. J. P. C. 115.

[5] *Re Mercantile and Exchange Bank*, L. R. 12 Eq. 268, 276.

[6] *Collins* v. *Plumb*, 18 Ves. 454. See also *City of London* v. *Nash*, 3 Atk. 512, 515.

transfer it.[1] But where the goodwill is entirely or mainly annexed to the premises, and the contract is for the sale of the premises and goodwill, the contract may be enforced.[2] For in that case the goodwill is merely the advantage attached to the possession of the house or other place of business,[3]—"the probability," to use the words of Lord Eldon,[4] "that the old customers will resort to the old place,"—together with the right which arises to the purchaser to restrain the vendor from setting up anew, or continuing, the identical business he has contracted to sell, but without any right, independently of stipulation, to prevent the vendor's setting up a similar business.[5] In the case of contracts for the sale of the business of an attorney, the legality of stipulations comprised in them, for the purpose of giving to the party to carry on the business the advantage of the name or of the recommendation of the party not engaged in it, has been questioned by the highest authorities, including Lord Eldon, Grant M.R., and Knight Bruce L.J.[6] But it seems to be now established, not only that such transactions are legally valid,[7] but that they may be specifically enforced, by injunction or otherwise, by the Court.[8]

[1] *Baxter* v. *Conolly*, 1 J. & W. 576; *Bozon* v. *Farlow*, 1 Mer. 459; *Coslake* v. *Till*, 1 Russ. 376.

[2] *Darby* v. *Whitaker*, 4 Drew. 134, 139, 140.

[3] *Chissum* v. *Dewes*, 5 Russ. 29; *Mummery* v. *Paul*, 1 C. B. 316, 326; and see further as to the nature of a goodwill, *Potter* v. *Commissioners of Revenue*, 10 Ex. 147; *Allison* v. *Monkwearmouth*, 4 El. & Bl. 13; and Lindley, Partn. (6th edit.), 441.

[4] In *Cruttwell* v. *Lye*, 17 Ves. 346.

[5] *Cruttwell* v. *Lye*, 17 Ves. 335; *Shackle* v. *Baker*, 14 Ves. 468. Cf. *Leggott* v. *Barrett*, 15 Ch. D. 306; *Vernon* v. *Hallam*, 34 Ch. D. 748.

Per Lord Eldon in *Candler* v. *Carden*, Jac. 231; *Bozon* v. *Farlow*, 1 Mer. 459; *Thornbury* v. *Bevill*, 1 Y. & C. C. C. 584. See, too, *Gilfillan* v. *Henderson*, 2 Cl. & Fin. 1.

[7] *Bunn* v. *Guy*, 4 East, 190.

[8] *Whittaker* v. *Howe*, 3 Beav. 383; *Aubin* v. *Holt*, 2 K. & J. 66. As to a medical practice, see *May* v. *Thomson*, 20 Ch. D. 705.

v. *Where the performance of the contract would be useless.*

Revocable contracts.

§ 94. The Court will not enforce a contract which is in its nature revocable by the defendant; for its interference in such a case would be idle, inasmuch as what it had done might be instantly undone by one of the parties.

Thus where the Registrar of a Consistory Court agreed to grant a deputation of his office, it was held that such a deputation was in its nature revocable, and therefore could not be enforced by the Court.[1]

Contract to enter into partnership at will.

§ 95. It is on the same principal that the Court generally refuses to interfere in cases of contracts to enter into partnership which do not specify the duration of the partnership—that relation, unless otherwise provided, being dissoluble at the will of either party.[2] There is indeed some authority to the contrary of this proposition, consisting of a dictum of Lord Hardwicke's[3] in general terms, and two or three cases[4] in which specific performance of contracts for partnership seems to have been enforced, but with regard to which it does not appear whether the partnerships thus constituted were for a term or not; and it is indeed said that Lord Eldon was not quite satisfied with his decision in the case quoted as establishing the principle.[5]

Contract to become member of company.

§ 96. The doctrine, however, appears to be generally accepted as that of the Court. Thus in a case before Lord Romilly M.R. the principle was acted on:

[1] *Wheeler* v. *Trotter*, 3 Sw. 174, n. See also *Sturge* v. *Midland Railway Co.*, 6 W. R. 233 (Stuart V.C.).

[2] *Hercy* v. *Birch*, 9 Ves. 357. See further, *infra*, §§ 843, 1540 *et seq.*, and cf. *Firth* v. *Ridley*, 33 Beav. 516, 521.

[3] In *Buxton* v. *Lister*, 3 Atk. 385.

[4] *Anon.*, 2 Ves. Sen. 629; *Anon.*, 1 Mad. Ch. 411, n.; *Hibbert* v. *Hibbert*, Coll., Partn. 133.

[5] 1 Mad. Ch. 111, n.

the defendant entered into a contract with the plaintiff company to take a certain number of shares and to execute the deed of settlement when required; and of this contract the Court refused specific performance, because the defendant might, by the rules of the company, have ceased again to be a partner within fourteen days after becoming such.[1]

Contract to execute revocable instrument.

§ 97. It is on the same reasoning that the Court declines to perform a contract to execute an instrument, if such covenants must be introduced into the instrument that the party resisting the performance may immediately take advantage of them to deprive the other of all benefit under the instrument; as, for instance, a contract for a lease which is to contain a proviso for re-entry on breach of a covenant, which the plaintiff has already broken.[2]

vi. *Where the Court would be unable to enforce its judgment.*

Contracts to build and execute works.

§ 98. In some old cases, the Court of Chancery entertained suits in respect of building contracts: and what has been considered one of the earliest traces of the jurisdiction in specific performance is a dictum of Genney J. in the 8 Edward IV. that a promise to build a house would be specifically enforced.[3] Lord Hardwicke also maintained this view of the jurisdiction of the Court.[4] But it is now clearly settled that, subject to certain exceptions, the Court will not

[1] *Sheffield Gas Consumers' Co.* v. *Harrison*, 17 Beav. 294; cf. *Black* v. *Mallalue*, 27 Beav. 398, 405. Distinguish *Odessa Tramways Co.* v. *Mendel*, 8 Ch. D. 235; and cf. *New Brunswick and Canada Railway Co., Limited* v. *Muggeridge*, 30 L. J. Ch. at p. 247. See also, as to contracts to form a company, *Stocker* v. *Wedderburn*, 3 K. & J. 393.

[2] *Per* Grant M.R. in *Jones* v. *Jones*, 12 Ves. 188.

[3] See Additional Note C at the end of this volume.

[4] *Buxton* v. *Lister*, 3 Atk. 385; *City of London* v. *Nash*, 3 Atk. 512: S. C. 1 Ves. Sen. 12. See also *Allen* v. *Harding*, 2 Eq. C. Abr. 17.

specifically enforce contracts to build or repair,[1] both because specific performance is "decreed only where the party wants the thing in specie, and cannot have it any other way,"[2] and because such contracts are for the most part so uncertain that the Court would be unable to enforce its own judgment.[3]

Cases where performance refused

§ 99. For the first of the reasons stated, Grant M.R. refused specific performance of a covenant to make good a gravel-pit:[4] on the ground of both of these reasons, specific performance was refused in a case of a contract for the construction of a branch railway, which was entered into during the pendency of the Bill before Parliament, and when several of the directors had thoughts of withdrawing the Bill, and, as the plaintiffs alleged, would have done so, but for the contract in question:[5] and in other cases, specific performance has been refused of contracts for the working of quarries,[6] and coal mines,[7] or involving the performance of continuous acts or duties.[8] Indeed, it is a recognized rule that the Court will not decree specific performance of a contract, the execution of which would require watching over and supervision by the Court.[9]

Other instances.

§ 100. In the case of *Bruce* v. *Wharton*[10] decided by

[1] *Paxton* v. *Newton*, 2 Sm. & G.f. 137; *Kay* v. *Johnson*, 2 H. & M. 118; *Wheatley* v. *Westminster Brymbo Coal Co.*, L. R. 9 Eq. 538.

[2] *Per* Lord Kenyon M.R. in *Crampton* v. *Agnesly*, 2 Bro. C. C. 343; S. C. 2 Dick. 692. Accordingly *Lucas* v. *Commerford*, 3 Bro. C. C. 166.

Mosely v. *Virgin*, 3 Ves. 184; cf. *Greenhill* v. *Isle of Wight* (*Newport Junction*) *Railway Co.*, 19 W. R. 345; *Bernard* v. *Moara*, 12 Ir. Ch. R. 389, 397.

[3] *Flint* v. *Brandom*, 8 Ves. 159.

[4] *South Wales Railway Co.* v. *Wythes*, 1 K. & J. 186; S. C. 5 De G. M. & G. 880; *Greenhill* v. *Isle of Wight* (*Newport Junction*) *Railway Co.*, 19 W. R. 345.

[6] *Booth* v. *Pollard*, 1 Y. & C. Ex. 61.

[7] *Pollard* v. *Clayton*, 1 K. & J. 462.

[8] *Blackett* v. *Bates*, L. R. 1 Ch. 117; *Powell Duffryn Steam Coal Co.* v. *Taff Vale Railway Co.*, L. R. 9 Ch. 331. See *supra*, § 91.

[9] See *Ryan* v. *Mutual Tontine, &c. Association*, [1893] 1 Ch. at p. 125; and cf. *Keith, Prowse & Co.* v. *National Telephone Co.*, [1894] 2 Ch. at p. 153.

[10] 25 Beav. 348. Note that this

Lord Romilly M.R. in March, 1858, the contract was that A. should grant a lease to B. as soon as B. should have built a house of the value of £1,400 according to a plan to be submitted to and approved by A. and B. agreed to build and take the lease: no plan had been approved: a bill filed by A. against B. was dismissed with costs. In like manner a contract by a landlord to execute repairs upon a farm was not enforced.[1]

Lord Cairns' Act

§ 101. But, since Lord Cairns' Act (21 & 22 Vict. c. 27), it has been held that where the contract is for the building of a house and also for the grant and acceptance of a lease, the Court can grant specific performance of the contract to accept the lease and give damages for the non-building of the house.[2]

Exceptions (a) Where the work is defined and essential to the plaintiff.

§ 102. There are, as already hinted, exceptional cases of building contracts in respect of which the Court will interfere. Lord Rosslyn, in a judgment which appears never to have been overruled, maintained that where a contract for building is in its nature defined, the Court might without much difficulty entertain a suit for its performance.[3] Mr. Justice Story argues in support of this view,[4] and in *Cubitt* v. *Smith*[5] Stuart V.C. acted upon it. It may also be added that in Scotland many contracts to build are specifically performed, in respect of which the Court would decline jurisdiction in England, the Scotch Courts appointing some properly qualified person, under whose superintendence the work is directed to be executed.[6]

(b) Where the defendants

§ 103. But whether the Court will, or will not,

case was decided before the passing of Lord Cairns' Act. Consider *Asylum for Female Orphans* v. *Waterlow*, 16 W. R. 1102.

[1] *Norris* v. *Jackson*, 1 J. & H. 319.

Soames v. *Edge*, Johns. 669; *Mayor, &c. of London* v. *Southgate*, 38 L. J. Ch. 141; 17 W. R. 197.

Mosely v. *Virgin*, 3 Ves. 184.

[2] Eq. Juris. § 728.

[3] 10 Jur. N. S. 1123; 11 L. T. 398; *Hepburn* v. *Leather*, 50 L. T. 660.

[4] *Clark* v. *Glasgow Assurance Co.*, 1 M'Qu. 668.

interfere to enforce all such contracts when definite, it appears to be settled that it will assume jurisdiction where we have the following three circumstances:— first, that the work to be done is defined; secondly, that the plaintiff has a material interest in its execution, which cannot adequately be compensated for by damages;[1] and thirdly, that the defendants have by the contract obtained from the plaintiff possession of the land on which the work is to be done. Thus the Court has in numerous cases[2] enforced on railway companies contracts to make and maintain works for the convenience of the lands of the plaintiff. It has done this in cases in which the terms of the contract have been general and difficult to execute. And, in *Wolverhampton Corporation* v. *Emmons*,[3] a purchaser of land from an urban sanitary authority was ordered to perform specifically a contract to erect houses on the purchased land in accordance with plans submitted to and approved by the plaintiffs' public works committee.

have also obtained possession under the contract

§ 104. In another case a contract by a railway company to construct and maintain, upon land belonging to and to be provided by a landowner, a siding of specified length alongside the line, was held capable of specific performance; and the company were not allowed to resist performance on the ground that the plaintiff had,

Contract to make siding or accommodation works.

See *Molyneux* v. *Richard*, [1906] 1 Ch. 34, 43; 75 L. J. Ch. 39.

Storer v. *Great Western Railway Co.*, 2 Y. & C. C. C. 48; *Saunderson* v. *Cockermouth and Workington Railway Co.*, 11 Beav. 497; *Lord Dredge* v. *London, Chatham and Dover Railway Co.*, 1 De G. J. & S. 201; 3 Ib. 21; L. R. 2 H. L. 43; *Sir E. B. Lytton* v. *Great Northern Railway Co.*, 2 K. & J. 394; *Wilson* v. *Furness Railway Co.*, L. R. 9 Eq. 28; *Hood* v. *North Eastern Railway Co.*, L. R. 5 Ch. 525; cf. *Wilson* v. *Northampton and Banbury Junction Railway Co.*, L. R. 9 Ch. 279; and *Egan* v. *Mutual Tontine, &c. Association*, [1893] 1 Ch. at p. 128. See also *McManus* v. *Cooke*, 35 Ch. D. 680; *Hepburn* v. *Leather*, *ubi sup.*

[1] [1891] 1 K. B. 515, C. A.; followed in *Molyneux* v. *Richard*, [1906] 1 Ch. 34; 75 L. J. Ch. 39. Distinguish *Rashbrooke* v. *O'Sullivan*, [1908] 1 I. R. 292.

before filing his bill, entered into a negotiation (which failed) for a money compensation.[1] And where the undertaking of a railway company, which had covenanted with a landowner to make and maintain certain accommodation works, was transferred by Act of Parliament to another railway company "subject to the contracts, obligations, and liabilities" of the former company, the landowner was held entitled to enforce specific performance of the covenants against the transferee company.[2]

Contract to erect market-house

§ 105. There is also a reported case in which the plaintiff had sold lands to the defendants, a municipal corporation, who by the deed of sale covenanted forthwith to make a road and erect a market-house on the land. They entered and made the road, but neglected to build the market-house. Wigram V.C. observed that the defendants having had the benefit of the contract in specie, the Court would go any length that it could to compel them to perform their contract in specie.[3]

Amount of damages unascertainable by plaintiff.

§ 106. In this case, as in the railway cases previously quoted, the plaintiff, having parted with the land, had no opportunity of doing the work which the defendants had contracted to do, and so ascertaining the amount of damages sustained by their non-performance;[4] but though part performance has to this extent been held important, it must be borne in mind that it will in no case enable the Court to intervene where it has no jurisdiction in the original subject-matter of the contract.[5]

[1] *Greene* v. *West Cheshire Railway Co.*, L. R. 13 Eq. 44; *Todd* v. *Midland G. W. Railway of Ireland*, 9 L. R. (Ireland) 85; cf. *infra*, § 847.

[2] *Fortescue* v. *Lostwithiel, &c. Railway Co.* (which see for the form of judgment), [1894] 3 Ch. 621, 640.

[3] *Price* v. *Corporation of Penzance*, 11 Ha. 548. See also *Peabody* v. *Thorpe*, 3 Sw. 137, n.; *Oxford Provand*, L. R. 2 P. C. 135.

[4] *Per* Lord Hatherley (then Wood V.C.) in *South Wales Railway Co.* v. *Wythes*, 1 K. & J. 200.

[5] *Kirk* v. *Bromley Union*, 2 De G. 640, 648; *Crampton* v. *Varna Railway Co.*, L. R. 7 Ch. 562.

§ 107. Where the act alleged as part-performance is one proper to be brought before a jury and can be answered in damages, non performance of the rest of the contract does not constitute that fraud which is the origin of the Court's jurisdiction in cases of part-performance in this respect, as well as when treated as an exception from the Statute of Frauds.[1]

Act of part performance answerable in damages

§ 108. In one case Lord Eldon, though expressing difficulty in decreeing repairs to be done affirmatively, yet by means of an injunction in fact granted performance of a covenant to keep a canal and its stopgates in repair for the benefit of the lessee of a mill interested in them.[2]

A covenant to keep canal in repair

§ 109. Where default has been made in the execution of works contracted to be done, the French law authorizes the injured party to execute the works at the expense of the defaulter.[3] It seems worthy of consideration whether a like remedy might not be usefully introduced into our own law.

French law as to execution of works

vii. *Where the enforced performance of the contract would be worse than its non-performance.*

§ 110. The relation established by the contract of hiring and service[4] is of so personal and confidential a character that it is evident that such contracts cannot be specifically enforced by the Court against an unwilling party with any hope of ultimate and real success; and accordingly the Court now refuses to entertain jurisdiction in regard to them.[5]

Hiring and service.

[1] *South Wales Railway Co.* v. *Wythes*, 1 K. & J. 186; and see *infra*, § 585.

Lane v. *Newdigate*, 10 Ves. 192. Lord Cottenham, §§ 1143, 1144.

[2] See *per* Jessel M.R. in *Rigby* v. *Connol*, 14 Ch. D. at p. 487.

See *Gillis* v. *McGhee*, 13 Ir. Ch. R. 48, 57; *White* v. *Bolgy*, 26 W. R. 153; *Kirchner & Co.* v. *Gruban*, [1909] 1 Ch. 413. In *Rigby* v. *Connol*, 14 Ch. D. at p. 487, the opinion appears to have been intimated by Jessel M.R. that the fact of there

Such contracts formerly enforced.

§ 111. In former times this seems to have been otherwise. In a case decided by Lord Cowper and the House of Lords, there was a contract by which a skilled person had bound himself to serve during his life as manager and overseer to a company engaged in the manufacture of brass, and the company had agreed to pay him a certain salary and 3*s.* 6*d.* for every hundred-weight of brass wire made by him or any other person for them during his life; on a bill by the manager, Lord Cowper decreed the payments according to the articles for past services, and specific performance of them for the future, by the plaintiff again repairing to the works and acting according to the articles, if the defendants should require the same. The appeal from this decree to the House of Lords was by the plaintiff on a point of the construction of the contract as to the 3*s.* 6*d.* per cwt., which resulted in a modification of the decree according to his contention.[1] And in another case Lord Hardwicke specifically enforced against the plaintiffs as part of the things to be done by them under the contract, a stipulation by the East India Company to employ a man as a packer.[2]

So as now.

§ 112. But the difficulty of enforcing such contracts in specie is now admitted by the Court. It is not for the interests of society that persons who are not desirous of maintaining continuous personal relations with one another should be compelled so to do.[3] In a case where the plaintiffs had contracted for a specified

being no *property*, the right to which is taken away from the person complaining, lies at the root of the Court's non-interference in respect of contracts strictly personal in their nature. See also *De Francesco* v. *Barnum*, 45 Ch. D. 430.

[1] *Ball* v. *Coggs*, 1 Bro. P. C. 140. This case involves the validity of contracts of service for life; as to which see also *Wallis* v. *Day*, 2 M. & W. 273.

[2] *East India Co.* v. *Vincent*, 2 Atk. 83.

[3] *De Francesco* v. *Barnum*, 45 Ch. D. 430; *Whitwood Chemical Co.* v. *Hardman*, [1891] 2 Ch. 416; *per* Cotton L.J. in *Bainbridge* v. *Smith*, 41 Ch. D. 474.

sum to work the line of a railway company and to keep the engines and rolling stock in repair, the Court, considering this to be a contract for services, refused to enforce it.[1] "We are asked," said Knight Bruce L.J.,[2] "to compel one person to employ against his will another as his confidential servant, for duties with respect to the due performance of which the utmost confidence is required. Let him be one of the best and most competent persons that ever lived, still, if the two do not agree, and good people do not always agree, enormous mischief may be done."

§ 113. The proposal to apply the principles of specific performance to contracts of service which would have affected the Ryots of Bengal led to a vigorous protest from Lord Lawrence, whose observations on the point may be read with profit.[3]

§ 114. In one case a grant having relation to an office of a personal and confidential character, was held to be incapable of being specifically enforced;[4] in another instance, where an indenture was held to constitute the relation of master and servant, and not of partner, Lord Truro dissolved an injunction which had been previously granted, restraining the defendant from excluding the plaintiff from the management of the business:[5] and in another case, where a contract by the plaintiff to employ the defendant as manager of a business formed part of a contract by which the defendant agreed to grant to the plaintiff a lease of a wharf, specific performance was refused on the ground Instances.

[1] *Johnson* v. *Shrewsbury and Birmingham Railway Co.*, 3 De G. M. & G. 914. See, too, *Horne* v. *London and North Western Railway Co.*, 10 W. R. 170.

[2] p. 926.

[3] Life of Lord Lawrence by Smith, 552.

[4] *Pickering* v. *Bishop of Ely*, 2 Y. & C. C. C. 249.

[5] *Stocker* v. *Brocklebank*, 3 Mac. & G. 250; *Frith* v. *Frith*, [1906] A. C. 254, 261; cf. *Webb* v. *England*, 7 Jur. N. S. 153; 9 W. R. 183; 30 L. J. Ch. 222.

of want of mutuality.[1] On the other hand, where a railway company had contracted with a landowner not only to make and maintain accommodation works, but also to do certain acts in the nature of personal services, it was held that, the stipulation as to those acts being part of a larger contract which was specifically enforceable, the Court could and would decree performance of the stipulation, although it might not be possible to enforce performance otherwise than by means of a sequestration.[2]

Contracts of agency.

§ 115. In like manner the Court cannot enforce contracts of agency: as has been illustrated in the cases of contracts to employ a shipping-broker[3] and auctioneer.[4] Nor can the Court specifically enforce a contract of apprenticeship against an infant, though he may have validly bound himself by it.[5]

viii. *Where the contract is voluntary.*

Where no consideration.

§ 116. The Court will never lend its assistance to enforce the specific execution of contracts which are voluntary, or where no consideration emanates from the party seeking performance,[6] even though they may have the legal consideration of a seal: and this principle applies, whether the contract insisted on be

[1] *Ogden* v. *Fossick*, 4 De G. F. & J. 421; cf. *Stocker* v. *Wedderburn*, 8 K. & J. 393; *Firth* v. *Ridley*, 33 Beav. 516; *Frith* v. *Frith*, [1906] A. C. 254, 261.

[2] *Fortescue* v. *Lostwithiel, &c. Railway Co.*, [1894] 3 Ch. at pp. 639, 640.

[3] *Brett* v. *East India and London Shipping Co., Limited*, 2 H. & M. 404.

[4] *Chinnock* v. *Sainsbury*, 30 L. J. Ch. 409; *Bertram* v. *Hale*, 27 Sol. Jour. 39.

[5] 1 Eq. C. Abr. 6; *De Francesco* v. *Barnum*, 43 Ch. D. 165; S. C. on trial, 45 Ch. D. 430.

[6] *Wycherley* v. *Wycherley*, 2 Ed. 175; *Groves* v. *Groves*, 3 Y. & J. 163; *Poughton* v. *Lees*, 1 Jur. N. S. 862 (Stuart V.C.); *Ord* v. *Johnston*, id. 1063; 4 W. R. 37 (Stuart V.C.); *Walrond* v. *Walrond*, Johns. 18; *Kennedy* v. *May*, 11 W. R. 358. See, too, *per* Lord Eldon in *Penn* v. *Lord Baltimore*, 1 Ves. Sen. at p. 450, and distinguish *Cheale* v. *Kenward*, 27 L. J. Ch. 784, and *Stephens* v. *Green*, [1895] 2 Ch. 148, 162.

in the form of an executory agreement, a covenant, or a settlement.[1] The peculiar doctrines of the Court as to the consideration which permeates[2] contracts in relation to marriage settlements must be borne in mind in relation to the foregoing statement.

§ 117. In the case of contracts for the purposes of pleasure, scientific pursuits, charity, or philanthropy, it has been said[3] that "no Court of Justice can interfere, so long as there is no property the right to which is taken away from the person complaining." Where no right to property affected.

ix. *Where the plaintiff has elected to proceed in some other manner than for specific performance.*

§ 118. Where a plaintiff proceeded at Common Law and recovered damages for breach of the contract, he could not afterwards sue in Equity for its specific performance.[4] But of course it was not every proceeding at Common Law under a contract which barred its specific performance in Equity.[5] This result was effected only where the legal and equitable relief were in respect of the same thing. Where plaintiff proceeded at Law.

§ 119. In *Swinfen* v. *Swinfen*[6] Knight Bruce L.J. seemed to think that the fact of applying to the Court of Common Pleas for an attachment to enforce a contract to compromise would stand in the way of the applicant afterwards suing in Chancery for performance of the same contract. Opinion of Knight Bruce L.J.

[1] *Jeffreys* v. *Jeffreys*, Cr. & Ph. 138; *Hervey* v. *Audland*, 11 Sim. 531. See the older cases discussed in 1 Mad. Ch. 413; and cf. *Re King*, 14 Ch. D. at p. 186. Consider, too, *Andrews* v. *Salt*, L. R. 8 Ch. 622, 636; *Joyce* v. *Hutton*, 12 Ir. Ch. R. 71; and *Chetwynd* v. *Morgan*, 31 Ch. D. 596.

[2] Cf. *infra*, § 202; and *Re D'Angibau*, 15 Ch. D. 228, 242. Consider *Lee* v. *Lee*, 4 Ch. D. 175.

[3] *Per* Jessel M.R. in *Rigby* v. *Connol*, 14 Ch. D. at p. 487: *Baird* v. *Wells*, 44 Ch. D. 661.

[4] *Sainter* v. *Ferguson*, 1 Mac. & G. 286; cf. *Fox* v. *Scard*, 33 Beav. 327.

[5] *North* v. *Great Northern Railway Co.*, 2 Giff. 61.

[6] 2 De G. & J. 381, 391.

Opinion of Lord Cranworth.

And in *Blackett* v. *Bates*[1] Lord Cranworth intimated the opinion that a party to an award could not, after unsuccessfully taking proceedings to set it aside, insist on having it specifically performed. But in a case already referred to, a negotiation for the payment of a money compensation which went off was held not to be an election which precluded the relief in specific performance.[2]

Proceedings under Lands Clauses Act.

§ 120. In a case where a railway company was entitled to enforce a contract as to the sale of lands entered into by the defendant with the promoters of the company, the company first took proceedings under the Lands Clauses Consolidation Act for a compulsory purchase, then took compulsory possession of the land by virtue of a bond, and lastly filed their bill for specific performance of the contract. It was held that they had taken the benefit of sections of the Lands Clauses Consolidation Act to which they were not entitled if a binding contract subsisted, and their bill was dismissed.[3]

The present practice.

§ 121. It is conceived that the principle embodied in the case last cited will continue to be observed by the Supreme Court.[4] But so far as the form of the proceedings is concerned, the right of claiming alternative[5] relief, and the wide powers of amendment[6] exercisable under the new practice, will in all proper cases enable a plaintiff to obtain relief by way of specific performance, provided that the facts proved and the rest of his claim as presented or insisted on at the trial are not inconsistent with such relief.[7]

[1] L. R. 1 Ch. at p. 126.

[2] *Greene* v. *West Cheshire Railway Co.*, L. R. 13 Eq. 44.

[3] *Bedford and Cambridge Railway Co.* v. *Stanley*, 2 J. & H. 746.

[4] See *Thompson* v. *Ringer*, 29 W. R. 520, *infra*, § 1139.

[5] R. S. C. Ord. XX. r. 6.

[6] R. S. C. Ord. XXVIII.

[7] Cf. *Cargill* v. *Bower*, 10 Ch. D. 502, 508; *Newby* v. *Sharpe*, 8 Ch. D. 39; *Laird* v. *Briggs*, 19 Ch. D. 22.

x. *Where the jurisdiction has been taken away by statute.*

Fines and Recoveries Act.

§ 122. By sect. 47 of the Fines and Recoveries Abolition Act (3 & 4 Will. IV. c. 74), any jurisdiction which the Courts of Equity might otherwise have had to treat a disentailing assurance under the statute as a contract of which specific performance might be granted, is taken away.[1] But this does not affect the jurisdiction which the Courts possessed of enforcing against the actual contracting tenant in tail a contract to execute a disentailing assurance.[2]

xi. *The jurisdiction is against the defendant personally.*

Equity acts against the person.

§ 123. The jurisdiction in specific performance is against the person of the defendant[3] on the equity arising from the contract. This principle is fertile in results.

Where defendant not subject to the jurisdiction.

§ 124. One result is that where the defendant is a person over whom the tribunals of this country have no jurisdiction, there can be no relief. Hence no specific performance can be awarded against a foreign government of a contract entered into by such government with a private person.[4]

Where Court had originally no jurisdiction.

§ 125. Another result of this principle is that it constitutes no objection to specific performance, that the subject-matter with which the contract deals was not originally within the jurisdiction of the Court, as the contract itself may give the Court jurisdiction in specific performance, as well as in damages. The

[1] *Banks* v. *Small*, 36 Ch. D. 716.

[2] *Att.-Gen.* v. *Day*, 1 Ves. Sen. 218, 223; *Lewis* v. *Duncombe*, 20 Beav. 398; *Petre* v. *Duncombe*, 7 Ha. 24; *Dering* v. *Kynaston*, L. R. 6 Eq. 210; *Hall Dare* v. *Hall Dare*, 31 Ch. D. 251.

[3] It is perhaps needless to observe that the principle stated in the text does not exempt bodies corporate from liability to be sued for specific performance.

[4] *Smith* v. *Wegelin*, L. R. 8 Eq. 198.

original jurisdiction in respect of the boundaries of our plantations in North America resided in the King in Council; but a contract respecting them having been entered into between adjoining proprietors was held by Lord Hardwicke to give the Court jurisdiction;[1] and on the same principle, although the Court has no jurisdiction in matrimonial causes, yet, where there has been a contract or covenant, it may interfere to enforce the execution of a proper separation deed, or to restrain the breach of a covenant contained in it.[2]

Foreign contracts.

§ 126. This introduces to our consideration the subject of foreign contracts.

The general principle which regulates the place for the enforcement of contracts is, it is conceived, expressed in the maxim "*actio sequitur forum rei*."[3] It follows from this that a contract made abroad may be enforced against a defendant within the jurisdiction of this country, and as the remedies for breach of a contract are clearly governed by the *lex fori*, or law of the place where the action is brought,[4] it follows that it is no objection to the specific performance in England of a foreign contract that the foreign law might have given no such remedy.

Accordingly a marriage contract made in France was specifically executed here, the parties to it having come to this country as refugees.[5]

Contracts relating to immoveable property.

§ 127. This jurisdiction is not confined to cases of contracts relative to personal property, but extends to those relative to real or immoveable property, where the defendant is within the jurisdiction of the Court. The maxim is "*Æquitas agit in personam*," and any

[1] *Penn* v. *Lord Baltimore*, 1 Ves. Sen. 444. Consider *Norris* v. *Chambres*, 3 De G. F. & J. 583 (affirming S. C. 29 Beav. 246).

[2] *Wilson* v. *Wilson*, 1 H. L. C. 538; S. C. 14 Sim. 405; 5 H. L. C. 40. See, too, *Cahill* v. *Cahill*, 8 App. Cas. 420.

[3] *Davis* v. *Park*, L. R. 8 Ch. 862.

[4] Story's Conflict of Laws, § 556.

[5] *Foubert* v. *Twist*, 1 Bro. P. C. 129.

operation of the judgment on the immoveable estate abroad is not direct but indirect, and only through the medium of the person affected by the judgment. Thus where Sir Philip Carteret, the owner of the island of Sark, had mortgaged it, and a bill was brought against him by the mortgagee for foreclosure, a plea put in by the defendant that the island was not within the jurisdiction of the Court of Chancery was overruled.[1]

There must be privity of contract.

§ 128. But the Court has been careful to confine its jurisdiction to relief arising strictly from privity of contract: it has nothing to do with rights arising from privity of estate in any other country.[2] So in *Norris* v. *Chambres*[3] the Court declined to enforce a lien on foreign real estate, though the parties were residing here, and the defendant had taken the estate with notice of the contract from which the lien was sought to be raised.

Mr. Justice Story on the English doctrine.

§ 129. It has been said by Mr. Justice Story[4] that "the doctrine of the English Courts of Chancery on this head of jurisdiction seems carried to an extent which may perhaps in some cases not find a perfect warrant in the general principles of international public law." And Lord Romilly M.R. in the case last cited, adopting this remark, expressed his disposition not to go a step further than the cases warranted and demanded.[5]

The case of *Hart* v. *Herwig*.

§ 130. It remains to notice a case in which the Court

[1] *Toller* v. *Carteret*, 2 Vern. 494. See, too, *Comes Arglasse* v. *Maschamp*, 1 Vern. 75; *Jackson* v. *Petrie*, 10 Ves. 164; *Lord Portarlington* v. *Soulby*, 3 My. & K. 104, 108; Story Eq. Jur. § 743.

[2] *Vincent* v. *Godson*, 4 De G. M. & G. 546; see, too, the argument in *Innes* v. *Mitchell*, 4 Drew. 57, and the cases collected in the note, p. 99.

[3] 29 Beav. 246; 3 De G. F. & J. 583.

[4] Conflict of Laws, § 244.

[5] See, further, as to land in the Colonies, *Re Holmes*, 2 J. & H. 527; *Sichel* v. *Raphael*, 3 N. R. 662; *Reiner* v. *Marquis of Salisbury*, 7 Ch. D. 378; and cf. *per* Jessel M.R. in *Norton* v. *Florence Land and Public Works Co.*, 7 Ch. D. at p. 335.

of Chancery granted relief with a view to specific performance against a defendant not within the jurisdiction.[1] In that case Hart, a domiciled Englishman, agreed at Hamburg with Herwig, domiciled at Hamburg, for the purchase of a ship to arrive from San Francisco, for a certain sum liable in the event of certain damage to an abatement. The ship arrived in this country. The plaintiff claimed the abatement, the amount of which he alleged could be ascertained by a survey, which Herwig and the master refused and declined to complete except on payment of the full price. The bill was against Herwig and the master, and prayed specific performance and an injunction against removing the ship. This injunction was granted by Malins V.C., and upheld by James and Mellish L.JJ. Their Lordships drew a distinction between an action for damages and the suit. If it had been the former it was said that the action must have been in the forum of the defendant. "But where," said James L.J.,[2] "the contract as in this case though made abroad is to deliver a thing in specie to a person in this country, and the thing itself is brought here, then the Court here, in the exercise of its discretion, will see that the thing to be delivered in this country does not leave this country, so as to defeat the right of the plaintiff to have it so delivered." The law thus laid down seems to create an exception to the general principle of international law, which requires the plaintiff to seek the defendant and to sue in his forum. The decision is remarkable, but it has the authority of three unanimous judges.

Service out of the jurisdiction.

§ 131. It should be added that service of a writ or notice of a writ of summons may be allowed out of the jurisdiction when any contract affecting land or hereditaments within the jurisdiction is sought to be enforced

[1] *Hart* v. *Herwig*, L. R. 8 Ch. 860. Distinguish *Rowney* v. *Alder*, before Pollock B. as Vacation Judge, 24 Sol. Jo. 807.

[2] At p. 864.

in the action, or when the action is founded on any breach or alleged breach within the jurisdiction of any contract, wherever made, which, according to the terms thereof, ought to be performed within the jurisdiction, unless the defendant be domiciled or ordinarily resident in Scotland or Ireland.[1]

xii. *Quasi-contracts in respect of which the Court has jurisdiction.*

Quasi-contracts under Lands Clauses Act.

§ 132. There is a class of quasi-contracts in respect of which the Court entertains jurisdiction, viz. where the relationship of vendor and purchaser is constituted by the exercise of those compulsory powers of railway and other companies which are conferred by the Lands Clauses Consolidation Act, 1845, and similar statutes.[2] They are here called quasi-contracts, because when the proceedings are strictly under the statute there is an absence on the part of the man whose land is taken on that volition, which seems an essential element in all true contracts.

Effect of notice to treat.

§ 133. It was at one time supposed that the mere notice to treat constituted the relation of vendor and purchaser to such an extent that a suit in Equity could thereupon be maintained. But it is now well ascertained that such is not the case, and that though the notice constitutes the relation for certain purposes, such as that the particular lands to be taken are fixed, and that, if the landowner accepts the notice, the company cannot get rid of the obligation to take nor the landowner of the obligation to give up these lands, yet there is no contract between the parties and no ground

[1] R. S. C. Ord. XI. r. 1.

[2] The principles enunciated in this and the following paragraphs under this heading (xii.) are applicable to cases of notice to treat served by a local authority upon a landowner under the compulsory powers of Michael Angelo Taylor's Act. See *Wild* v. *Woolwich Borough Council*, [1909] 2 Ch. 287; [1910] 1 Ch. 35, 38.

for equitable intervention.[1] It is, however, not competent for the landowner to accept the notice as to some of the lands specified in it and treat them as bound by it, and to repudiate the notice as to other lands and treat them as not bound by it. He must either treat the notice as an offer to purchase the lands comprised in it as a whole, or he must repudiate it, and if he does repudiate it, it is open to the givers of the notice to accept his repudiation, and to withdraw and put an end to the notice. And, in the event of such a withdrawal, the landowner will not be entitled to any compensation by way of damages.[2]

Procedure after the notice.

§ 134. After this notice is given, the Act points out the method in which the purchase-money is to be ascertained. If the amount claimed do not exceed 50*l.* it is to be settled by two justices: if it exceed 50*l.* it is to be settled by arbitration if the landowner so require, but otherwise by a jury, to be summoned at the instance of the company.[3]

Refusal to proceed after the notice.

§ 135. If after notice given the landowner refuse to convey, the company can proceed against him under their statutory powers, but have no ground for equitable relief: and conversely if after notice the company refuse to proceed, the landowner cannot, it is conceived, generally sue in Equity; but he may apply for a mandamus to compel the company to proceed under the statute to ascertain the compensation money payable.[4]

[1] *Haynes* v. *Haynes*, 1 Dr. & Sm. 426, where all the earlier cases are considered and classified; *per* Sterling L.J. in *Mercer* v. *Liverpool, St. Helen's and South Lancashire Railway*, [1903] 1 K. B. at p. 661. "The mere service of a notice to treat does not constitute a contract between the corporation and the party served. It is a step which cannot be retracted, but the completion must be enforced, if necessary, by mandamus, and not by action for specific performance." *Per* Fletcher Moulton L.J. in *R. Thames Tunnel (Rotherhithe and Ratcliff Act, 1909*, [1908] 1 Ch. at p. 501. See, however, *Marson* v. *London, Chatham and Dover Railway Co.*, L. R. 6 Eq. 101; 7 Eq. 346.

[2] *Wild* v. *Woolwich Borough Council*, [1909] 2 Ch. at pp. 294, 296; [1910] 1 Ch. at pp. 38, 40, 42.

[3] Lands Clauses Consolidation Act, 1845, sects. 22 and 23.

[4] *Adams* v. *London and Blackwall Railway Co.*, 2 Mac. & G. 118.

§ 136. There is one case,[1] however, in which jurisdiction was entertained by the Court of Chancery to enforce on the railway company proceedings under the Lands Clauses Consolidation Act. The question was how far a piece of land came within the definition of curtilage, so that if the company took any part they could be compelled to take the whole under sect. 92 of the Lands Clauses Consolidation Act. The company gave a notice to take the part: the plaintiff gave a counter-notice to take the whole; the company took possession of part, and the plaintiff thereupon filed his bill and obtained at the hearing a declaration that the company were liable to take the whole and a reference for title; when the case came on for further consideration[2] the plaintiff's counsel admitted that there was no precedent pointing out what course was to be pursued; but they asked and obtained a direction that the defendant company should proceed under the Lands Clauses Consolidation Act to ascertain the amount payable for the value of the land, and directions for the payment of this amount and execution of the conveyance. The question of jurisdiction to make such a decree as was made does not seem to have been raised at the hearing.

The company forced to proceed.

§ 137. After the ascertainment of the amount of purchase-money, the equitable jurisdiction of the Court of Chancery was clear. There then exists what has been called a parliamentary contract, and the performance of that so-called contract could not be enforced at Common Law, for the Courts of Common Law having no machinery for investigating the title or settling the conveyance could not do complete justice between the parties; but a suit might have been maintained in

Parliamentary contract.

Lord v. *Isle of Wight Ferry Co.*, 7 L. T. N. S. 416; 1 N. R. 13; cf. *Leominster Canal Navigation Co.* v. *Shrewsbury and Hereford Railway Co.* 3 K. & J. 654; and consider *Baker* v. *Metropolitan Railway Co.*, 31 Beav. 504, 511.

[1] *Marson* v. *London, Chatham and Dover Railway Co.*, L. R. 6 Eq. 101.

[2] L. R. 7 Eq. 546.

Equity by either party to carry into execution this quasi-contract.[1] For this purpose it seems to have been considered immaterial whether the compensation money had been ascertained in strict pursuance of the Act or otherwise. In *Mason* v. *Stokes Bay Pier & Railway Co.*[2] and *Harding* v. *The Metropolitan Railway Co.*[3] the compensation money was ascertained by statutory arbitrations; in *Nash* v. *The Worcester Improvement Commissioners*[4] by the verdict of a jury; in *Inge* v. *Birmingham, Wolverhampton & Stour Valley Railway Co.*[5] the compensation was settled by correspondence; in *The Regent's Canal Co.* v. *Ware*[6] by arbitrators appointed under a written agreement; and in *Watts* v. *Watts*[7] by two surveyors named by parol; and in all these cases, as well where the Act was as where it was not strictly pursued, the Court of Chancery entertained jurisdiction. In the latter class of cases the relation constituted approached to, if it did not assume, the character of true contract.

Application to quasi-contracts of rules relating to contracts.

§ 138. When the quasi-contract has been established by notice and the ascertainment of the price, all the ordinary rules which prevail between vendor and purchaser apply unless excluded by statutory enactment. On this principle a railway company has been held liable to pay interest on the purchase-money in a case in which an ordinary purchaser would have been so liable,[8] and a district council has been held bound, as in the case of an ordinary purchase, to take a

[1] *Regent's Canal Co.* v. *Ware*, 23 Beav. 575; *Mason* v. *Stokes Bay Pier and Railway Co.*, 32 L. J. Ch. 110; 11 W. R. 80; *Harding* v. *Metropolitan Railway Co.*, L. R. 7 Ch. 154; *Watts* v. *Watts*, L. R. 17 Eq. 217; *Re Pigott and Great Western Railway Co.*, 18 Ch. D. 146.

[2] 11 W. R. 80; 32 L. J. Ch. 110. L. R. 7 Ch. 154.

[3] 4 Jur. N. S. 973.

[4] 1 Sm. & G. 317; S. C. 3 De G. M. & G. 658. See, too, *Re v. Stafford and Uttoxeter Railway Co.*, 23 W. R. 863.

[5] 23 Beav. 575.

[6] L. R. 17 Eq. 217.

[7] *Re Pigott and Great Western Railway Co.*, 18 Ch. D. 146.

conveyance of lands acquired under compulsory powers.[1]

It is probably hardly needful to observe that, if, after statutory notice, a contract should be entered into between the company and the landowner, such a contract may be the subject matter of an action for specific performance, just in the same way as any other contract.[2] It is none the less a contract because the relations between the parties began under the statutory powers of the company.

Where notice to be followed by contract

xiii. *The jurisdiction in relation to the Crown.*

Specific performance cannot be had at the instance of the Crown

§ 139. Can the Crown be sued for specific performance? is a question on which no express authority is, it is believed, to be found either in the statute book or in the reports. It is conceived that, in a proper case, a petition of right would lie against the Crown for the specific enforcement of a contract,[1] for the purpose and to the extent at any rate of seeking and obtaining a declaratory judgment that the plaintiff is entitled to specific performance; although there might, perhaps, be some difficulty about enforcing such performance, in the unthinkable event of the Crown refusing to comply with the judgment.

If, however, the Crown's advisers were to take up and insist upon the position that the Crown is not liable to be sued, and will not allow itself to be sued, in

[1] *In re Cary-Elwes' Contract*, [1906] 2 Ch. 143, 150.

Per Kindersley V.C. in *Hughes v. Hughes*, 1 De. & Sm. 137. See *Wells v. Chelmsford Local Board of Health* (15 Ch. D. 108), where the defendants ingeniously, but unsuccessfully, tried to give the go-by to the contract by proceedings under ss. 76, 77 of the Lands Clauses Act, 1845.

Consider *Nurse v. Lord Seymour*, 13 Beav. 251, in which case a demurrer to a bill filed by the plaintiff against the Commissioners of Woods and Forests for specific performance of a contract for a lease was allowed; but the Attorney-General (Sir John Romilly) *arguendo* said (at p. 264), "The proper mode of enforcing the plaintiff's alleged equity is by petition of right."

any way for specific performance, it would seem to follow that to an action by the Crown for the specific performance of a contract there would be a good defence on the ground of want of mutuality.[1]

[1] Statutory provisions with respect to actions by the War Office are to be found in the Defence Act, 1842 (5 & 6 Vict. c. 94), s. 31, the Ordnance Board Transfer Act, 1858 (18 & 19 Vict. c. 117), ss. 1, 4, 5, and the War Department Stores Act, 1867 (30 & 31 Vict. c. 128), s. 20; and with respect to actions by and against the Admiralty in the Admiralty Land and Works Act, 1864 (27 & 28 Vict. c. 57), s. 11, and the Admiralty Power, &c., Act, 1865 (28 & 29 Vict. c. 124), ss. 1–3. See, too, *Blundell* v. *The King* (a petition of right for compensation for the injurious affection of lands adjoining lands compulsorily taken under the Defence Acts), [1905] 1 K. B. 516; *Re Postmaster-General and Colgan's Contract*, [1906] 1 I. R. 287, 477, in which case H.M.'s Postmaster-General does not appear to have objected to being made respondent to a vendor and purchaser summons; *Att.-Gen.* v. *Trustees of the British Museum*, [1903] 2 Ch. at p. 603; and Robertson's Civil Proceedings by and against the Crown, pp. 2, 3, 39, 331–2, 375, 395–7, 595.

CANADIAN NOTES

Adequate Remedy at Law

In *Mara* v. *Fitzgerald*, 19 Grant's Ch. 52, it was held that the Court would not entertain a bill for the specific performance of a contract for a lease of real estate for a year, and where a tenant in possession contracted to assign his possession and with it his right to a renewal of his term for the year the Court refused to specifically perform the agreement, the remedy at law being sufficient.

It was contended in this case that it appeared from one of the paragraphs of the bill that there was no remedy at law, but Spragge V.-C. said that, granting that, it formed no foundation for the jurisdiction.

In *Ashton* v. *Pryne*, 19 Grant's Ch. 56, the plaintiffs contracted with the defendant that he should clear for them in a husbandman-like manner certain swamp lands that they owned, and that he should take the timber as compensation. The defendant cut down and removed the timber accordingly, but he did not clear up the land, and the plaintiffs thereupon filed a bill for specific performance. A demurrer thereto was allowed, on the ground that the remedy at law was adequate.

In *DeGear* v. *Smith*, 11 Grant Ch. 570, it was held that a bill could not be sustained for the specific performance of an agreement for the delivery of notes which were to be given for the price of land purchased by the defendant from the plaintiff, on two grounds; first, that the agreement was of a nature that the Court could not execute, and secondly, that the Court could give no other remedy than that which could be given by a Court at law. All that the Court could give would be a money compensation for the non-fulfilment of the contract; in other words, damages could be recovered as at law against the goods and land of the defendant.

Title at Law Disputable.

In *Graham* v. *Graham*, 6 Grant's Ch. 372, joint tenants in tail executed articles of agreement for a division of the property, and each went into possession and for thirty-six years continued to enjoy the portion allotted to him, when a bill was filed to enforce the agreement. It was held that the defendant could not set up as a defence to such bill that the plaintiff had by possession acquired a perfect title at law. "It may be true that the plaintiff had acquired a perfect title at law by means of possession and the time that had elapsed. This, however, is a title that may be disputed and that must be established by litigation and the defendant, having agreed to execute a conveyance, cannot, I think, refuse to perform the agreement on any such plea."

Property Smaller than Paid for.
Legal Remedy Adequate.

In *McCall* v. *Faithorne*, 10 Grant's Ch. 324, a parcel of land, having been surveyed and laid off in building lots, was afterwards offered for sale by public auction, when McCall became the purchaser of two of the lots. The plan by which the property was sold contained a memorandum on the margin that it was drawn upon a scale of four chains to the inch. In reality, the plan had been made on a scale of three chains to the inch which was not discovered until after the conveyance had been executed and the purchase money paid. The purchaser thereupon filed a bill praying repayment of a proportionate amount of the purchase money, or a conveyance of a sufficient quantity of the adjoining land to make up the deficiency. Spragge V.-C. held that the plaintiff could not maintain his bill. If the contract had not been executed, if the conveyance had not been made, or the purchase money not fully paid, he apprehended that the plaintiff would be entitled to relief, but here the contract was fully executed and the plaintiff's remedy he thought was at law. The case of *Nerlham* v. *May*, 13 Price 749, is cited, in which Chief Baron Alexander said, "The cases of compensation in equity have grown out of the jurisdiction of Courts of Equity as exercised in re-

spect of contracts for the purchase of real property when it is often ancillary as incidentally necessary to effectuate decrees of specific performance. This, however, (which was a claim for compensation on the ground of untrue representation as to the annual rental of the estate sold) appears to me to be no more than a common case of fraud by means of misrepresentation, raising a dry question of damages in effect a mere money demand."

Where the Contract is Voluntary.

A person being about to effect the purchase of land, stipulated verbally with another who had been accustomed to use a road over the property that, in the event of the purchase being completed, he would be allowed to continue the use thereof, but afterwards refused to carry out such agreement. It was held that this promise was merely voluntary and as such insufficient to found a bill for specific performance.

In this case there was no proof whatever of the agreement upon which the suit was founded, viz., that the plaintiff intended to purchase the property and forbore at the request of Mrs. Hatch, and that she, in consideration of such forbearance, agreed to grant the right of way in question. The most that was proved was that just before the sale she promised to allow the plaintiff, if she purchased and her son remained on the place, to use the right of way as before, and that she admitted that before the sale she had agreed to make good his deed. It was not shewn that defendant intended to purchase or that Mrs. Hatch knew it, or that he forbore to purchase in consequence of her promise. *Barr* v. *Hatch*, 9 Grant's Ch. 312.

Performance Requiring Supervision, etc.

In *Kingston* v. *Kingston Electric Ry. Co.*, 25 O.A.R. 462, it was held that the Court would not order specific performance of an agreement by the Electric Railway Company to run its cars on certain streets at certain hours, with certain officers, as the Court could not oversee the carrying out of the judgment if granted. Nor

would the Court grant an injunction to restrain the company from carrying out such an agreement to the extent to which they were willing to carry it out unless and until they carried it out *in toto*, as this would also involve the same minute supervision; nor would the Court direct in an action the issue of a writ of mandamus where the duty to be fulfilled arose out of an agreement of this kind, the performance of which *in specie* was not deemed enforceable by the Court.

In *Dixon* v. *Corcet*, 17 Grant's Ch. 321, the owner of the land granted to a railway company the privilege of crossing his property, in consideration of which the company agreed, amongst other things, to pay him four hundred dollars a year, to carry flour for him on certain favourable terms, and, "to bottom out his present mill race from its present unfinished point." It was held that this was a contract such as the Equity Court could not decree a specific performance of, nor damages for breach of it, but plaintiff must be left to his remedy at law.

"I take it," said Spragge Ch., "to be still the rule of the Court (1870) that it will not entertain a bill for the specific performance of a contract to execute works, that is, as a general rule, for there have, of course, been exceptions to it."

In *Colton* v. *Routledge*, 19 Grant's Ch. 121, the headnote reads: "Equity now-a-days does not as a general rule enforce specifically a contract between a land holder and a builder for the erection of a house or the like, but specific performance of agreements to execute work is enforced in cases where the plaintiff shews what the Court considers to be a sufficient ground of equity to entitle him to that relief." A bill alleged that the plaintiff contracted with the defendants to lease to them certain lands and to erect thereon for their use a stone building of a specified size, according to plans and specification furnished by the defendant, that accordingly the plaintiff had expended four thousand dollars on the building, under the superintendence of the defendants and according to plans furnished by them, that he had done everything for which the defendants had given directions and that the defendants had accepted the building and taken possession of part of it, but it ap-

peared that the machinery was not completed in all respects. It was held that the allegations of the bill, if proved, would entitle the plaintiff to relief.

It is pointed out in the judgment of Mowatt V.-C. that in this case the plaintiff was not seeking to compel the defendants to build; "all that the plaintiff wants is the specific performance of the defendant's contract to take a lease; the building was to be erected by the plaintiff himself." A vigorous dissenting opinion of Strong V.-C. is founded upon the vagueness of the contract and the difficulty which the Master of the Rolls found insuperable in the case of *Bruce* v. *Wehnert*, 25 Beavan 348. "If the Court takes upon itself to settle a plan how is it to provide from time to time for the works being carried on in accordance with the plan. All experience points out that disputes will arise upon this head, and I cannot see how they can be satisfactorily settled. It is no answer to say that the Court may nominate an expert to superintend the work. This is a question of jurisdiction and if the Court possesses the jurisdiction now it must be one which it could have exercised at a time anterior to the modern change in its practice which enables it to have recourse to the assistance of experts."

In consideration of a bonus granted by the corporation of the city of St. Thomas to the Credit Valley Ry. Company the latter agreed to bring their railway from Ingersoll to some point on the line of the Canada Southern Railway not more than half a mile east of the passenger station of said railway at St. Thomas, and, secondly, to run all their passenger trains to and from a small station on Church Street. The defendants performed the first part of their agreement and also the second, so long as the Canada Southern Ry. Co. permitted the use of their line from the point of junction to the small station on Church Street, but, on the refusal of the other company to continue the same, the defendants discontinued the performance of this part of their agreement. It was held, that this was not a case in which the defendants should be directed to perform their contract as to the Church Street station, but that the plaintiffs were entitled to a reference for damages.

"The language of the contract," said the Chief Justice, "must of course govern, but we cannot avoid looking at the existing facts and circumstances at the time the contract was made. The defendants brought their road from Ingersoll to the point indicated on the Canada Southern Railway. There the defendants' line stopped. It was of course perfectly well known to all the contracting parties that the defendants running trains anywhere beyond that point must be over the Canada Southern Railway." A decree such as the plaintiffs desired would have compelled the Company to build a new railroad from their point of intersection with the Canada Southern to some point on Church Street, and while the cases shewed that companies could be compelled specifically to perform contracts to erect stations, sidings, and so on, and to stop their trains at named points, they had the power in such cases to do so, and it was always on their own land or on land available for the purpose. "I have seen no case in which a company has been ordered specifically to perform a contract which would involve the building of another line of railway." *Corporation of St. Thomas* v. *Credit Valley Railway Co.*, 12 O.A.R. 273.

In *Bell* v. *Northwood*, 3 Man. 514, it was held that as the stock bargained for could not be transferred without the sanction of the directors, the Court would not direct a transfer which it had no power to execute.

Specific Performance Decreed Notwithstanding Difficulty.

In *Hincks* v. *McKay*, 14 Grant's Ch. 232, the vendor agreed that the purchaser should have sufficient water to drive a saw-mill and other machinery. In a suit by the vendor against the purchaser the Court decreed a specific performance of the contract, treating the water and the use of the dams and booms as sold with the land. The Court conceded that the contract was a difficult one to execute, yet both parties wanted it executed specifically, the defendant's only objection being that he was entitled to compensation for the breach of contract by the plaintiff which was not made out.

Sale of Goodwill.

In *Mossop* v. *Mason*, 18 Grant 153, it was held that the sale of the goodwill of the business of an innkeeper implied an obligation enforceable in equity that the vendor would not thereafter resume, or carry on the business in the same place. The process for enforcing would, of course, be an injunction.

Contract for Chattels.

Saw-logs cannot *prima facie* be intended to be of peculiar value without any evidence that they are so, but they are more likely to be of peculiar value than most other descriptions of chattels and specific relief may be given with respect to them in more instances than almost any other sort of chattel property. *Per* Esten V.-C.: "The reason that the doctrine of specific performance does not in general apply to chattels is, not because they are chattels, but because for the most part it cannot be predicated of them that they possess any peculiar value. In most instances pecuniary damages furnish an adequate compensation for the breach of the agreement because other articles of precisely the same description can be had without difficulty or delay. The moment, however, the contrary appears, as in the case of *the Pusey Horn* and other cases of that class the jurisdiction of the Court is called into action and the specific delivery of the article in question is compelled." *Flint* v. *Corby*, 4 Grant's Ch. 45.

In *Stevenson* v. *Clarke*, 4 Grant's Ch. 540, also, it was held that the Court would decree the specific performance of the contract for the manufacture and sale of saw-logs where they were capable of being identified and possessed a peculiar value for the purchaser.

See also to the same effect *Fuller* v. *Richmond*, 4 Grant's Ch. 657, and *Farwell* v. *Wolbridge*, 6 Grant's Ch. 634.

Contract to Hand over Orders taken by Agent.

In *Beatley* v. *Beatley*, 12 Man. 336, the plaintiff had been carrying on business under the name of the Berlin Photograph Company of making enlarged portraits in

crayon from photographs, and defendant had agreed to become his agent on the terms specified, agreeing to keep three agents, of whom he himself might be one, to canvas for orders. He obtained a number of orders with photographs from which the crayons were to be made. The question arose on a suit for specific performance of the agreement to hand over the orders. While it was held that specific performance would not be granted of a covenant to act as agent of another, Bain J. said: "If the case were merely that the plaintiff was asking to have specific performance decreed of the defendant's contract to hand over the orders, I am of opinion that he would be entitled to the assistance of the Court. The plaintiff wants the photographs and orders so that he can fulfil the contract he has made through the defendant with the persons from whom the orders were taken, and it is manifest that compensation in damages would not afford him any adequate remedy for the defendant's breach of contract. The plaintiff cannot conduct his business and fulfil the contract unless he gets the specific orders the defendant has, and so these orders are of special and peculiar value to him, for which no damages he could recover would be a compensation."

Election of Different Remedy.

Where the vendor brought ejectment and turned the heirs of the purchaser out of possession he was held in *Hawn* v. *Cushion*, 20 Grant's Ch. 518, to have disabled himself from coming to the Court for specific performance and could only do so in order to bind their interests in such manner as to render the property saleable. Under such circumstances, the plaintiff having placed himself in a false position by reason of the proceedings at law, the Court deprived him of his costs up to decree, but gave him his costs subsequent thereto.

A lease was made of certain premises, with a right of purchase at a price fixed upon between the parties, being such a sum as the rent reserved would form the interest of. The lessee did not pay either principal or interest and abandoned the possession of the property and left the premises for the United States. The lessor, being

unable to ascertain the lessee's place of residence, so as to put an end to the contract, obtained possession by a writ of *habere facias* issued in an action of ejectment brought upon a vacant possession. After a third instalment of interest fell due, the lessee caused a tender to be made of the amount due which was refused, and about a year afterwards filed a bill to enforce specific performance of the contract. Two questions arose, one, whether the plaintiff as a purchaser, apart from the peculiar nature of the instrument, had disentitled himself to specific performance, the other, whether the form of the instrument or the remedy that the defendant had pursued should make any difference.

Spragge V.-C. said he did not think that the defendant had elected to avail himself of his character of lessor only; he had pursued the remedy appropriate to that character but with the intent of putting an end to the whole contract. The plaintiff himself had disabled the defendant from pursuing the ordinary remedy of a vendor. He was absent from the province and his place of residence was unknown to the defendant; it was fair to presume that if the plaintiff had not placed himself beyond the reach of those remedies, they would have been used against him. The decision of the Court, therefore, was, that the course pursued by the defendant was not necessarily referable to an election to rest upon his character of lessor only and that notwithstanding that course it was open to him, as a vendor resisting specific performance, to avail himself of the laches of the purchaser as a ground of defence and that the laches of the plaintiff in this case had been such as to disentitle him to relief. *Young* v. *Bown*, 6 Grant's Ch. 402.

The Jurisdiction in Relation to the Crown.

In *Simpson* v. *Grout*, 5 Grant's Ch. 267, it was held that the Court could not enforce against the Crown specific performance of an order in council. *Per* Blake Ch.: "I am of opinion that there was no means of enforcing performance of that order in council, an order in council that the lands in question in the cause should

be granted to certain persons in trust for the town of London in connection with the Presbyterian Synod of Canada), either at common law or under the Statute. I had occasion to consider that question carefully in *Westover* v. *Doe Henderson*, and having stated the grounds of my opinion at length in that case, it is unnecessary to repeat them here . . . It is clear, I think, that this Court has no common law jurisdiction to decree specific performance of this order in council against the Crown, but if that were doubtful, it has been settled, I think, by the express declaration of the legislature."

CHAPTER III.

CONTRACTS WITH A PENAL OR OTHER LIKE SUM.

§ 140. From the principles stated in the last chapter, it appears that where a contract is substantially performed by the payment of a sum of money, the Common Law remedy being adequate, Equity will not interfere. Hence, in cases where there is added to the contract a clause for the payment of a sum of money in the event of non-performance, the question arises whether the contract will be satisfied by its payment, or whether it will not. In the former case, Equity will not interfere; in the latter it may.

Equity in the particular.

§ 141. The question always is, What is the contract? Is it that one certain act shall be done, with a sum annexed, whether by way of penalty or damages, to secure the performance of this very act? or is it that one of two things shall be done at the election of the party who has to perform the contract, namely, the performance of the act or the payment of the sum of money? If the former, the fact of the penal or other like sum being annexed will not prevent the Court's enforcing performance of the very act, and thus carrying into execution the intention of the parties:[1] if the latter, the contract is satisfied by the payment of a sum of money, and there is no ground for proceeding against the party having the election to compel the performance of the other alternative.

The question stated.

[1] *Howard* v. *Hopkins*, 2 Atk. 371; *French* v. *Mead*, 2 Dr. & War. 269; *Roper* v. *Bartholomew*, 21 Pri. 797.

Contracts of the kind discussed

§ 142. From what has been said it will be gathered that contracts of the kind now under discussion are divisible into three classes:

(i.) Where the sum mentioned is strictly a penalty — a sum named by way of securing the performance of the contract, as the penalty in a bond.

(ii.) Where the sum named is to be paid as liquidated damages for a breach of the contract:

(iii.) Where the sum named is an amount the payment of which may be substituted for the performance of the act at the election of the person by whom the money is to be paid or the act done.

Where the stipulated payment comes under either of the two first-mentioned heads, the Court will enforce the contract, if in other respects it can and ought to be enforced, just in the same way as a contract not to do a particular act, with a penalty added to secure it performance or a sum named as liquidated damages, may be specifically enforced by means of an injunction against breaking it. On the other hand, where the contract comes under the third head, it is satisfied by the payment of the money, and there is no ground for the Court to compel the specific performance of the other alternative of the contract.[1] It will be convenient to consider the three classes of cases separately.

1. Contract with a penalty strictly so called.

§ 143. (i.) A penalty (strictly so called) attached to the breach of the contract will not prevent it from being specifically enforced.

"The general rule of Equity," said Lord St. Leonards,[2] "is that if a thing be agreed upon to be

[1] "There are," said Lord Bramwell, in *Legh* v. *Lillie*, 6 H. & N. 165, 171; 30 L. J. Ex. 25, 28, "three classes of covenants; first, covenants not to do particular acts, with a penalty for doing them, which are within the 8 & 9 Will. III. c. 11: secondly, covenants not to do an act, with liquidated damages to be paid if the act is done, which are not within the statute: and thirdly, covenants that acts shall not be done unless subject to a certain payment."

[2] In *French* v. *Macale*, 2 Dr. & Wa. 274-5.

done, though there is a penalty annexed to secure its performance, yet the very thing itself must be done. If a man, for instance, agree to settle an estate and execute his bond for 600*l.* as a security for the performance of his contract, he will not be allowed to pay the forfeit of his bond and avoid his agreement, but he will be compelled to settle the estate in specific performance of his agreement.[1] So if a man covenant to abstain from doing a certain act, and agree that if he do it he will pay a sum of money: it would seem that he would be compelled to abstain from doing that act, and, just as in the converse case, he cannot elect to break his engagement by paying for his violation of the contract."

Instances.

§ 144. Thus, where two persons entered into articles for the sale of an estate, with a proviso that, if either side should break the contract, he should pay 100*l.* to the other, and the defendant, by his answer, insisted that it was the intention of both parties that, upon either paying 100*l.*, the contract should be absolutely void, Lord Hardwicke nevertheless decreed specific performance of the contract to sell.[2] In another case, the condition recited a contract for a settlement comprising a sum of money and also real estate: the penalty was double this sum of money, but had no relation to the real estate: the Court granted specific performance of the contract embodied in the condition.[3] And where a father, in consideration of his daughters' giving up a part of their interest in the property, agreed to make up their incomes arising out of it to 200*l.* a year, and entered into a bond for the payment of such sum as might be needful for that purpose, and the bond recited the contract, the Court took this as evidence of the contract, and accordingly granted relief on the foot

[1] The case referred to seems to be *Chilliner* v. *Chilliner*, 2 Ves. Sen. 529.

[2] *Howard* v. *Hopkins*, 2 Atk. 371.

[3] *Peddle* v. *Bagherst*, 1 Sw. 309.

of it beyond the bond;[1] and in a case which went to the House of Lords, a contract (contained in the condition of a bond) to give certain property by will or otherwise, was held not to be satisfied by the penalty, but was specifically performed.[2]

Contract not to carry on business.

§ 145. So, again, a contract not to carry on a particular kind of business within certain limits expressed in the condition to a bond can be enforced by injunction.[3]

ii. Distinction between penalty and liquidated damages.

§ 146. (ii.) The difference between penalty and liquidated damages is, as regards the Common Law remedy, most material. For according to Common Law, if the sum named is not a penalty, but the agreed amount of liquidated damages, the contract is satisfied either by its performance or the payment of the money.[4] But as regards the equitable remedy the distinction is unimportant: for the fact that the sum named is the amount agreed to be paid as liquidated damages is, equally with a penalty strictly so called, ineffectual to prevent the Court from enforcing the contract in specie.[5]

Condition

§ 147. The simplest illustration of this is the ordinary

[1] *Jendwine* v. *Agate*, 3 Sim. 141.

[2] *Logan* v. *Wienholt*, 7 Bli. N. S. 4; 1 Cl. & Fin. 641. See also *Butler* v. *Powis*, 2 Coll. 156; *National Provincial Bank of England* v. *Marshall*, 40 Ch. D. 112.

[3] *Clarkson* v. *Edge*, 33 Beav. 227; *Gravely* v. *Barnard*, L. R. 18 Eq. 518; cf. *William Robinson & Co., Ltd.* v. *Heuer*, [1898] 2 Ch. at p. 458.

[4] *Anon.*, Hard. 320; *Lowe* v. *Peers*, 1 Burr. 2225; *Hurst* v. *Hurst*, 4 Ex. 571; *Legh* v. *Lillie*, 6 H. & N. 165; *Mercer* v. *Irving*, El. Bl. & E. 563; *Atkyns* v. *Kinnear*, 4 Ex. 776. As to the distinction between penalty and liquidated damages, see also *Lord Elphinstone* v. *Monkland Iron and Coal Co.*, 11 App. Cas. 332, 346—348; *Clydebank Engineering and Shipbuilding Co.* v. *Don José Ramos Yzquierdo y Castaneda*, [1905] A. C. 6, 15; 74 L. J. P. C. 1; *Public Works Commissioner* v. *Hills*, [1906] A. C. 368, 375; 75 L. J. P. C. 69; *Wallis* v. *Smith*, 21 Ch. D. 243, 249, 258; *Pye* v. *British Automobile Commercial Syndicate*, [1906] 1 K. B. 425; *Diestal* v. *Stevenson*, [1906] 2 K. B. 345, 350; 75 L. J. K. B. 797; and *General Billposting Co.* v. *Atkinson*, [1908] 1 Ch. at p. 544.

[5] *City of London* v. *Pugh*, 4 Bro. P. C. 395; *Webb* v. *Clark*, 1 Fonbl. Eq. 154; *French* v. *Macale*, 2 Dr. & War. 296; *Coles* v. *Sims*, 5 De G. M. & G. 1; *Carden* v. *Butler*, Hayes & J. 142; *Bird* v. *Lake*, 1 H. & M. 111; cf. *Bray* v. *Fogarty*, 1 Ir. Eq. 544.

case of a stipulation on the sale of real estate that if the purchaser fail to comply with the condition he shall forfeit the deposit, and the vendor shall be at liberty to resell and recover as and for liquidated damages the deficiency on such resale and the expenses.[1] Such a condition has never been held to give the purchaser the option of refusing to perform his contract if he choose to pay the penalty, nor to stand in the way of specific performance of the contract.

for recovery of deficiency on resale.

§ 148. In *French* v. *Macale*[2] Lord St. Leonards fully discussed the law as to compelling the performance of contracts of the kind under discussion. In that case there was a covenant in a farming lease "not to burn or bate the demised premises or any part thereof under the penalty of 10*l.* per acre to be recovered as the reserved yearly rent for every acre so burned." His Lordship appears to have considered this increased rent as in the nature of liquidated damages and not a penalty, but nevertheless he granted an injunction against the burning, saying after a careful review of the authorities that in every case of this nature the question is one of construction, and that the Court will always interfere unless there is evidence of an intention that the act is to be permitted to be done on payment of the increased rent.

French v. *Macale.*

§ 149. In one case a deed was executed dissolving a partnership between H. and L., and containing a recital that it had been agreed that the deed should contain a covenant by L. not to carry on the trade within one mile from the old place of business "without paying to H., as or by way of stated or liquidated damages," a sum named. In a subsequent part of the deed there was an absolute covenant not to carry on the trade

Bird v. *Lake.*

[1] "A purchaser," said Lord Eldon in *Crutchley* v. *Jerningham* (2 Mer. 502), "has no right to say that he will put an end to the agreement, forfeiting his deposit." Cf. *Long* v. *Bowring*, 33 Beav. 585; and § 1174, *infra*.

[2] 2 Dr. & War. 269.

within that limit, followed by a proviso that if L. should act contrary to or in infringement of that agreement he would immediately thereupon pay to H. the sum of 1,500*l.* by way of liquidated damages. Notwithstanding the recital and the form used, it was held that L. was not entitled to break the covenant on paying the 1,500*l.*, and an injunction was granted.[1]

Coles v. Sims.

§ 150. The same view was put forward, though perhaps in slightly different language, by the Lords Justices in *Coles* v. *Sims*.[2] That was a case in which there were mutual covenants between a vendor of part of his land and the purchaser of that part as to building on the sold and unsold parts, with a stipulation for payment of liquidated damages in case of breach of covenant. On an application for an interim injunction (which was granted), Knight Bruce L.J. said:[3] "If I were now deciding the cause, I should probably come to the conclusion that in a case where a covenant is protected (if I may use the expression) by a provision for liquidated damages, it must be in the judicial discretion of the Court, according to the contents of the whole instrument and the nature and circumstances of the particular instance, whether to hold itself bound or not bound upon the ground of it to refuse an injunction if otherwise proper to be granted: and that in the present case, the circumstances are such as to render it right for the Court to grant an injunction." Turner L.J. added: "The question in such cases, as I conceive, is whether the clause is inserted by way of penalty or whether it amounts to a stipulation for liberty to do a certain act on payment of a certain sum."

Where contract and obligation to pay are distinct.

§ 151. Where the contract to do or not to do the act is distinct from the obligation to pay a sum of money, it seems that either the contract or the obligation may be sued on.

[1] *Bird* v. *Lake*, 1 H. & M. 111. [2] 5 De G. M. & G. 1.
[3] 5 De G. M. & G. 9.

"Where a person," said Lord Romilly M.R. in *Fox* v. *Scard*,[1] "enters into an agreement not to do a particular act and gives his bond to another to secure it, the latter has a right at Law and in Equity, and can obtain relief in either, but not in both, Courts."

Where election not imported.

§ 152. It is clear that the fact that the contract may be comprised in a bond does not of itself import any election to pay the money and refuse to do the act.[2]

iii. Alternative contracts.

§ 153. (iii.) In the third class of contracts, which may be distinguished as alternative contracts, the intention is that a thing shall be done or a sum of money paid at the election of the person bound to do or pay.

In these cases the contract is as fully performed by the payment of the money as by the doing of the act, and therefore where the money is paid or tendered there is no ground for interference by way of specific performance or injunction.

Intention primarily governs the construction.

§ 154. The question to which of the three foregoing classes of contracts any particular one belongs is of course a question of construction. In considering it "the Courts must, in all cases, look for their guide to the primary intention of the parties, as it may be gathered from the instrument upon the effect of which they are to decide, and for that purpose to ascertain the precise nature and object of the obligation."[3] Consequently each case depends on its own circumstances, but it may be noticed that "a Court of Equity is in general anxious to treat the penalty as being merely a mode of securing the due performance of the act contracted to be done, and not as a sum of money really

[1] 33 Beav. at p. 328.

[2] *Hobson* v. *Trevor*, 2 P. Wms. 191; *Chilliner* v. *Chilliner*, 2 Ves. Sen. 528; *Clarkson* v. *Edge*, 33 Beav. 227. "The form of marriage articles by bond does not import election": *Roper* v. *Bartholomew*, 12 Priv. 797.

[3] *Roper* v. *Bartholomew*, 12 Pri. 821.

intended to be paid;"[1] and that, "on the other hand, it is certainly open to parties who are entering into contracts to stipulate that on failure to perform what has been agreed to be done, a fixed sum shall be paid by way of compensation."[2]

Alternative form not conclusive.

§ 155. On this question it is by no means conclusive that the contract may be alternative in its form, for nevertheless the Court may clearly see that it is essentially a contract to do one of the alternatives: so that where there was a contract to renew a certain lease, with an addition of three years to the original term, or to answer the want thereof in damages, the Court decreed specific performance of the lease, the second alternative only expressing what the law would imply.[3]

The amount of the penalty.

§ 156. The largeness or smallness of the sum named is no reason for considering it a mere penalty, unless that be the apparent intention.[4] but where the amount of the penalty is small, as compared with the value of the subject of the contract, it has been considered a reason for treating the sum reserved as a mere penalty, and not in the nature of an alternative contract.[5]

Hobson v. *Trevor.*

§ 157. In a case where a man, being very uncertain what estate he should derive from his father entered into a bond in 5,000*l.*, on the marriage of his daughter, to settle one-third of such property, and the contract so to settle was recited in the condition of the bond, it was specifically performed in full, and not up to 5,000*l.* only.[6] "Such agreement," said Lord

[1] *Per* Lord Cranworth in *Ranger* v. *Great Western Railway Co.*, 5 H. L. C. 94; *Astley* v. *Weldon*, 2 Bos. & P. 346.

[2] *Ranger* v. *Great Western Railway Co.*, 5 H. L. C. 94.

[3] *Finch* v. *Earl of Salisbury*, Finch, 212.

[4] *Roy* v. *Duke of Beaufort*, 2 Atk. 190; *Astley* v. *Weldon*, 2 Bos. & P. 346; *French* v. *Macale*, 2 Dr. & War. 269. But see *Burne* v. *Madden*, Ll. & G. *t.* Plunk. 493.

[5] *Chillingr* v. *Chillingr*, 2 Ves. Sen. 528.

[6] *Hobson* v. *Trevor*, 2 P. Wms. 191.

Macclesfield,[1] "was not to be the weaker but the stronger for the penalty."

The benefit of the penalty and the contract resulting to different persons.

§ **158**. The fact that the benefit of the contract would result to one person or flow in one channel, and the benefit of the sum, if paid, in another, is a strong circumstance against considering the contract alternative in its nature: thus where, on a marriage, the husband's father gave a bond for the payment of 600*l.* to the wife's father, his executors or administrators, in the penalty of 1,200*l.* if he did not convey certain lands for the benefit of the husband and wife and their issue, Lord Hardwicke held that the obligor was not at liberty to pay the 600*l.*, or settle the lands, at his election, but compelled the specific performance of the contract to settle,—partly on the ground that the 600*l.* would not have gone to the benefit of the husband and wife and their issue, but of the wife's father and his representatives, and partly that the lands to be settled were worth much more than 600*l.*[2]

Single sum and continuing act.

§ **159**. Where the sum reserved is single, and the act stipulated for or against is in its nature continuing or recurring, as, for instance, particular modes of cultivating a farm, the sum will be considered as a security and not an alternative.[3]

Sums variable.

§ **160**. On the other hand, where the sum or sums made payable vary in frequency of payment or amount according to the thing to be done or abstained from, the Courts have, in many cases, found that the payment is an alternative.

Woodward v. *Gyles*.

§ **161**. In *Woodward* v. *Gyles*,[4] a covenant by the defendant not to plough meadow land, and if he did, to pay so much an acre, was held not to be a fit case for an injunction restraining the ploughing: but the exact

[1] 2 P. Wms. at p. 192 (6th ed.).

[2] *Chilling* v. *Chillingr*. 2 Ves. Sen. 528; *Roper* v. *Bartholomew*, 12 Pri. 797.

[3] *French* v. *Macale*, 2 Dr. & War. 269; and see *Roper* v. *Bartholomew*, 12 Pri. 797.

[4] 2 Vern. 119.

form of the covenant does not appear. "If," said Lord St. Leonards,[1] "as in *Woodward* v. *Gyles*,[2] and *Rolfe* v. *Peterson*,[3] there is evidence of intention that the party is to be at liberty to do the act if he choose to pay the increased rent, of course the Court cannot interfere, because this Court never interferes against the express contract of the parties."

Rolfe v. Peterson.

§ 162. In *Rolfe* v. *Peterson*[4] the question was whether the payment was a penalty and so came within the doctrine of equitable relief against penalties: but of it Lord Loughborough said, in *Hardy* v. *Martin*,[5] "That was a case of a demise of land to a lessee to do with the land *as he thought proper:* but if he used it one way he was to pay one rent and if another way another rent." Similarly, a covenant in a farm lease not to do certain things "under an increased rent of," &c., was held to give the tenant the right to do the act on paying the increased rent,[6] and a contract to renew perpetually "under a penalty of 70*l.*" was held alternative.[7]

Where a forfeiture in addition.

§ 163. But where, in addition to the increased rent, there is a stipulation that the act provided against shall be a forfeiture of the covenanter's interest, the sum is held to be a security only and not an alternative: and consequently the Court would restrain the doing of the act:[8] and, of course, the usual form of lease giving the lessor the right to re-enter and avoid the lease on breach of covenant offers no impediment to the enforcement of the covenants specifically.[9]

Where the contract is

§ 164. Where the contract would be unreasonable

[1] *French* v. *Macale*, 2 Dr. & War. 281.

[2] 2 Vern. 119.

[3] 2 Bro. P. C. 436.

[4] *Ibid.*

[5] 1 Cox, 26.

[6] *Legh* v. *Lillie*, 6 H. & N. 165; 9 W. R. 55; 30 L. J. Ex. 25; and see *Hurst* v. *Hurst*, 4 Ex. 571; *Gerrard* v. *O'Reilly*, 3 Dr. & War. 414.

[7] *Magrane* v. *Archbold*, 1 Dow, 107.

[8] *Barret* v. *Blagrave*, 5 Ves. 555, as explained by Lord St. Leonards in *French* v. *Macale*, 2 Dr. & War. 278–9.

[9] *Dyke* v. *Taylor*, 3 De G. F. & J. 467.

unless it gives an option to the person stipulating to pay the sum, this will be a strong circumstance for treating the contract as alternative. So where a lady, administratrix of her husband, covenanted, under a penalty of 70*l.*, to renew a sub-lease as often as she obtained a renewal of the head-lease, and it appeared that the fines on the head-lease were raised on renewal, according to the then value of the property, so as to render her covenant unreasonable except upon the construction of its giving her an option, the House of Lords treated the contract as alternative.[1]

reasonable only as an alternative one.

[1] *Magrane* v. *Archbold*, 1 Dow, 107.

CANADIAN NOTES.

Penalty or Alternative Mode of Performing.

Upon a contract for sale of an estate subject to a mortgage, it was stipulated that the vendor should execute a bond to save harmless and indemnify the purchaser against the encumbrance, and a sum of £500 by way of liquidated damages for non-performance by either was to be paid to the other. The Court held that this did not enable either party to repudiate the contract upon paying to the other £500, and in a suit by the vendor a reference as to title was directed, but without the usual declarations that the plaintiff was entitled to specific performance, reserving a right on the hearing on further directions to refuse specific performance in the event of the vendor's failing to effect, or endeavouring to effect an arrangement with the mortgagee, which the vendor alleged he could make. It was also held that the fact of the vendor being a partner in a mercantile firm who since the execution of the contract had made a composition with their creditors was not such an objection as could prevail against the claim to specific performance. *Fiske* v. *Wride*, 7 Grant's Ch. 598.

PART II.

PARTIES TO THE ACTION.

CHAPTER I.

THE GENERAL RULE.

Division of the subject.

§ 165. In considering the subject of this chapter it will be convenient to treat separately (I.) of the rules formerly applicable to suits for specific performance in the Court of Chancery, and (II.) of the rules now applicable to like actions in the High Court. It is not yet possible entirely to neglect the former practice, as it will no doubt be appealed to from time to time as assisting the Court under the existing practice.

I. *As to the former practice of the Court of Chancery.*

The general rule stated.

§ 166. The general rule with regard to suits to enforce contracts was that the parties to the contract, or their representatives, were the necessary and sufficient parties to the suit—that all the parties to the contract should be parties to the suit and no one else.[1] The contract is what constitutes the rights and regulates the liabilities of the parties: in a stranger

[1] *Mole* v. *Smith*, Jac. 490; *Tasker* v. *Small*, 3 My. & Cr. 63, 69; *Wood* v. *White*, 4 My. & Cr. 460, 483; *Humphreys* v. *Hollis*, Jac. 73; *Patterson* v. *Long*, 5 Beav. 186; *Peacock* v. *Penson*, 11 Beav. 355; *Bishop of Winchester* v. *Mid-Hants Railway Co.*, L. R. 5 Eq. 17, 21; *Lumley* v. *Timms*, 21 W. R. 319; S. C. ib. 494; *Halifax Joint Stock Banking Co.* v. *Sowerby Bridge Town Hall Co.*, 25 Sol. Jo. 450; W. N. 1881, 65.

there is no liability; and against him, therefore, there was no more right to enforce specific performance in Equity than to recover damages at Law.[1]

Stranger a necessary party to conveyance

§ 167. It made no difference, that the stranger to the contract might be a necessary party to the conveyance, as a judgment creditor, or a legal or equitable mortgagee, or a person interested in the equity of redemption.[2] In *Tasker* v. *Small*[3] the bill was filed by the purchaser of an equity of redemption against the vendors, and Phillips, the first mortgagee, was made a defendant on the ground that he refused to convey without having competent authority for so doing. Lord Cottenham, however, held that the bill could not be maintained against him.

Tasker v. *Small*

Long v. *Bowring*

§ 168. Where the owner of land contracted to grant a lease to A. and then mortgaged the land to B. with notice of the contract, and B. did not dispute A.'s right to the lease, it was held that B. was not a proper party to a suit by A. for specific performance.[4]

Other instances.

§ 169. And so where a steward was made a party as being receiver of the rents, and having the title deeds in his possession, the bill was dismissed as against him.[5] And in a suit to enforce a contract made by a mortgagee under a power of sale, the mortgagor was not a necessary party;[6] unless the purchaser

[1] *Hare* v. *London & North Western Railway*, 1 J. & H. 252.

[2] *Tasker* v. *Small*, *ubi sup.*, overruling S. C. 6 Sim. 625, 636; cf. *Soden* v. *Kemp*, 6 Ha. 155 (a mixed case of specific performance and foreclosure). See also *Petre* v. *Duncombe*, 7 Ha. 24 (a purchaser's bill), and *Lord Leigh* v. *Lord Ashburton*, 11 Beav. 470 (a vendor's bill), from which it appears that judgment creditors, though not necessary, might be proper parties. See also *Greycoat Hosp.* v. *Westminster Imp. Comms.*, 1 De G. & J. 531; *Holl* v. *Lucer*, 3 Y. & C. Ex. 191. As to whether there was any difference in that respect between suits to rescind and suits to enforce contracts, see *Aberaman Ironworks* v. *Wickens*, L. R. 4 Ch. 101, 111, and *Fewings* v. *Bulman*, L. R. 9 Eq. 165.

6 Sim. 625; 3 My. & Cr. 63.

[4] *Long* v. *Bowring*, 33 Beav. 585, 589.

[5] *Macnamara* v. *Williams*, 6 Ves. 143; and see *Muston* v. *Bradshaw*, 15 Sim. 192; 10 Jur. 402.

[6] *Corder* v. *Morgan*, 18 Ves. 344; *Ford* v. *Heely* (Smart V. C.), 3 Jur. N. S. 1116; *Clay* v. *Sharp*, 18 Ves. 346, n.

had notice that the mortgagor disputed the validity of the sale.

Same property sold twice over

§ 170. In a case before Shadwell V.C., where the vendor sold the same property twice over and the bill was brought by the first purchaser against the vendor and the second purchaser, it was dismissed (without costs) as against the latter, though specific performance was decreed as against the original contractor:[1] this was affirmed by Lord Lyndhurst after two arguments: and Turner L.J. laid down the same doctrine.[2]

Purchasers of different lots held under same lease.

§ 171. Again, where two houses held under one lease were sold in separate lots at the same auction, and it was stipulated that each purchaser should be a party to the other's assignment, it was held that the purchaser of Lot 2 was not a necessary party to a suit to enforce the contract with the purchaser of Lot 1.[3]

And a bill by a purchaser for specific performance could not be sustained against parties to a previous contract to sell the same land which the bill impeached.[4]

Effect of direction that V. should convey.

§ 172. In connection with the question under consideration it may be noticed that a direction in an order that A. should convey included in effect mortgagees and all other necessary conveying parties, and the omission of the words commonly inserted, that A. "and all other necessary parties if any" should convey, was immaterial.[5]

Where the suit had several objects.

§ 173. Where the suit sought other relief than that in specific performance, though all arising from a contract, the Court might require the presence of other parties. So where a plaintiff sought to restrain the occupation of his purchaser and his purchaser's lessees

[1] *Ames*, 6 Mad. 10. See *Jenkins* v. *Jones*, 2 Giff. 99; *Dance* v. *Goldingham*, L. R. 8 Ch. 902. But see *Clay* v. *Sharp*, 18 Ves. 346, n.

[2] *Catts* v. *Phelps*, 1 Coll. 242, 254. See, too, *Acton* v. *Woford*, 1 Russ. 372.

Chadwick v. *Maden*, 9 Ha. 188.

[3] *Paterson* v. *Long*, 5 Beav. 186.

[4] *De Hoghton* v. *Money*, L. R. 1 Eq. 154, affirmed L. R. 2 Ch. 164.

[5] *Manton* v. *Kierwood*, L. R. 3 Ch. 611.

by asserting his right as unpaid vendor, the lessees were held proper parties.[1]

Tenant of vendor.

§ 174. On the other hand, the general principle under discussion was strongly illustrated by the case of *Robertson* v. *The Great Western Railway Company*.[2] The plaintiff had agreed to sell to the defendants a piece of land, and to buy up the right then vested in his tenant: the defendants having entered before payment of the purchase-money, they were served with notices not to trespass on the land both by the plaintiff and his tenant. The plaintiff then brought his bill for a specific performance and to restrain the trespass, to which the defendants demurred, on the ground that the tenant was not a party. Shadwell V.C. allowed the demurrer; but the demurrer was overruled by Lord Cottenham on the grounds that the object of the suit was a specific performance, and that the company might be restrained from entering without payment of the purchase-money, whether that entry did or did not affect the tenant.

Persons having adverse rights.

§ 175. In the Court of Chancery persons having adverse or inconsistent rights in the subject-matter of the suit could not be joined as plaintiffs;[3] nor could a person who had no interest be joined as plaintiff with one who had.[4] The importance of the doctrine of misjoinder was, however, diminished by the 49th section of the Chancery Procedure Act, 1852.[5] In some cases, persons claiming adversely might be made defendants.[6]

[1] *Bishop of Winchester* v. *Mid-Hants Railway Co.*, L. R. 5 Eq. 17. See *Sedgwick* v. *Watford, &c. Railway Co.*, 36 L. J. Ch. 379; *Cousins* v. *Bognor Railway Co.*, L. R. 1 Ch. 594.

[2] 1 Rail. C. 459; S. C. 10 Sim. 314.

[3] *Pulham* v. *McCarthy*, 1 H. L. C. 703; *Padwick* v. *Platt*, 11 Beav. 503.

[4] S. C., and *per* Lord Lyndhurst in *King of Spain* v. *Machado*, 4 Russ. 240. See also *Pearce* v. *Watkins*, 16 Jur. 832.

[5] 15 & 16 Vict. c. 86; and see now *infra*, § 192.

[6] See *infra*, § 192.

§ 176. To the general rule above stated[1] it will be found that many exceptions arose: some of these will be noticed in the subsequent chapters of this Part. But there are other exceptions, or apparent exceptions, to the strict rule, which may well be stated here. Exceptions to the general rule.

§ 177. One case where the parties to the original contract were not those to the suit was, where there had been a novation or new contract substituted for the original one by the intervention of a new person; in which case the party in whose place the new person was introduced, being no longer a party to the contract, ceased to be a proper party to the suit, and it had to be carried on between the parties to the new contract. Thus, where A. agrees to sell to B., and, before completion, B. contracts to sell to C., and A. accepts C. as the purchaser, this may amount to a new contract; and even where it did not strictly do so, B. might be an unnecessary party to the suit.[2] Novation.

§ 178. One of the most remarkable instances of novation occurs in sales on, and is the result of the custom of, the Stock Exchange. The vendor's broker sells shares to a jobber, the jobber sells to another broker, or to several brokers of several purchasers, and at last the name of the ultimate purchaser of the shares is handed in by his broker on the "name day" and comes finally to the vendor's broker; the transfer is made by the original vendor to the ultimate purchaser, and all intermediate sales, although they may be numerous, are eliminated, and by novation the only contract left standing is between the first vendor and the last purchaser.[3] Sales on the Stock Exchange.

§ 179. There are certain cases in which A. contracts Stranger.

[1] *Supra*, § 166.

[2] *Holden* v. *Haya*, 1 Mer. 47; *Hall* v. *Lacy*, 3 Y. & C. Ex. 191; *Shaw* v. *Fisher*, 5 De G. M. & G. 596. And see *Stanley* v. *Chester and Birkenhead Railway Co.*, 9 Sim. 264; 3 My. & Cr. 773. See also *infra*, § 1040 *et seq.* as to Novation.

[3] *Coles* v. *Bristowe*, L. R. 4 Ch. 3; *Hawkins* v. *Maltby*, L. R. 4 Ch. 200. And see *infra*, Part VI. chap. i.

with B. for the benefit of C., and C. can sue on the contract. These will be considered in the next chapter.

Interest under prior contract.

§ 180. Another exception arose from the existence of an interest in the estate bought or the money paid derived from a contract anterior to the contract for sale. In these cases the person thus interested in the fruit of the contract appears to have been a proper party to the suit.

Instances.

§ 181. Therefore when A. had contracted to purchase an estate from B., having previously agreed with C. to sell the estate to him, and a contract to that effect was afterwards entered into between A. and C., A. and C. subsequently brought a bill for performance against B., and it was held by Knight Bruce (then) V.C. that they were both proper parties.[1] The Vice-Chancellor considered that *Tasker* v. *Small*[2] had little or no application to the case before him,[3] and appears to have rested his decision on the ground that both the plaintiffs had, at the institution of the suit, an interest in the subject-matter of it.[4] And from another case it may be gathered that if A. contracted to purchase from B., and A. then contracted with C. that B. should convey to C., and B. had notice thereof, A. could not enforce the contract against B. without joining C. as a party.[5] In like manner a person who by virtue of an antecedent contract with the vendor claimed an interest in the purchase-money was a proper party to a suit for specific performance.[6]

Remainderman.

§ 182. In cases of contracts under powers, the question sometimes arose, whether a contract entered into by the donee of the power could be enforced by or against the remainderman, the cases in which he could sue or be sued being, of course, co-extensive.[7]

[1] *Nelthorpe* v. *Holgate*, 1 Coll. 203.

[2] 3 My. & Cr. 63, *supra*, § 167.

[3] 1 Coll. at p. 211.

[4] *Anon.* v. *Walford*, 4 Russ. 372.

[5] *West Midland Railway Co.* v. *Nixon*, 1 H. & M. 176.

[6] See *infra*, § 462.

The rule by which this question was decided was that the contract was binding in those cases, and those cases only, in which it might have been enforced against the donee of the power himself, independently of any conduct on his part.[1] The grounds on which part-performance by a tenant for life will not bind the remainderman, will be considered when we come to treat of the principles of that subject.[2] It has already been noticed[3] that the jurisdiction of Courts of Equity has, by statute, been excluded in regard to the enforcement of the contracts of a tenant in tail against those in remainder.[4]

Objection precluded by pleading.

§ 183. In one case vendors, plaintiffs to a bill for specific performance against a purchaser from them, made a sub-purchaser a defendant: and the sub-purchaser then filed his bill against his vendor and the original vendors for specific performance: to this the original vendors objected that they were not proper parties: but it was held that they had precluded themselves from the objection by the course they had pursued.[5]

Some suing or sued on behalf of all.

§ 184. Where the circumstances of the case were fitting, some might sue for specific performance on behalf of all:[6] thus the directors of an unincorporated joint-stock company were allowed to sue on a contract to make a lease to them in trust for the company, without joining all the shareholders.[7] But in the converse case, there was great difficulty in applying to specific performance the principle that some might be sued on behalf of all; from the nature of such suits, however, this application of the principle was not often

[1] *Morgan* v. *Milman*, 10 Ha. 279; S. C. 3 De G. M. & G. 24; *Lowe* v. *Swift*, 2 Ball. & B. 529; and see *Affleck* v. *Affleck*, 3 Sm. & G. 391.

[2] See *infra*, § 589.

[3] *Supra*, Part I. chap. ii. § 122.

[4] 3 & 4 Will. IV. c. 74, s. 47.

[5] *Fenwick* v. *Bulman*, L. R. 9 Eq. 165.

[6] *Finn* v. *Craig*, 3 Y. & C. Ex. 216.

[7] *Taylor* v. *Salmon*, 1 My. & Cr. 134.

required for the ends of justice. In one case, a joint-stock company established by an Act of Parliament, which vested in them all property then belonging to them and authorised them to bring actions in the name of their treasurer, purchased an estate, with notice of a prior contract by the owner to grant a lease of part: on a bill by this proposed lessee against the directors and treasurer, but not the other proprietors, asking for a specific performance of the contract, Grant M.R. said, that though he could bind the interests of parties not before the Court, he could not compel them to do an act, and that the execution of the lease by a few on behalf of all would hardly be sufficient, supposing it proper. He, however, gave the plaintiffs all the relief he could, by enjoining the treasurer from disturbing their possession, though he could not compel specific performance of the contract.[1]

Avoiding multiplicity of suits.

§ 185. There are a few cases in which the strict rule, that none but the parties to a contract are proper parties to a suit for its specific performance, appears to have been relaxed in order to avoid multiplicity of suits.

Lowther v. *Viscountess of Andover.*

§ 186. To this principle we may probably refer the case of *Lowther* v. *Viscountess of Andover*,[2] where a father entered into a covenant with the trustees of his daughter's marriage settlement to endeavour to purchase certain remainders in estates of which he was tenant for life, and, when purchased, to convey them to the uses of the settlement. The covenantor died, having previously entered into a contract for the purchase of the remainders: on a bill filed by the trustees of the settlement against the vendors, and it would seem also the personal representative of the deceased

[1] *Mare* v. *Malthy*, 2 Sw. 277. And see *Adair* v. *New River Co.*, 11 Ves. 429; *Att.-Gen.* v. *Mayor and Corporation of Poole*, 4 My. & Cr. 17; *Parr* v. *Clegg*, 29 Beav. 589; *Cullen* v. *Duke of Queensbury*, 1 Bro. C. C. 101; 1 Bro. P. C. 396.

[2] 1 Bro. C. C. 384. As to creditors of a deceased vendor suing, see *Johnson* v. *Legard*, T. & R. 281.

covenantor, specific performance was granted. In another case, where the Duke of Chandos had granted to A. a lease of a lodge, and also the deputation of a keepership in Enfield Chase, and A. assigned, but for part of the term only, to B., B. was allowed to maintain a bill against the Duke and A. for the rectification of a mistake in the original grant by the Duke, and for a new and sufficient grant by him.[1]

Where one lot sold was involved with an adjoining lot.

§ 187. The same principle is illustrated by another case, in which a bill was filed by a purchaser against trustees for sale, to enforce the specific performance of a contract for the sale of lot A.: it was resisted on the ground that by an arrangement, to which the plaintiff was a party, part of that lot as originally described was taken from it and given to the adjoining lot B. The bill was amended to put in issue this averment, which came out in the answer, but without adding as defendant the purchaser of lot B.; and the Court held that he ought to have been made a defendant, for otherwise the vendors would be exposed to another suit from the purchaser of lot B.[2]

Adverse claimants.

§ 188. And where there were claims made by persons, strangers to the contract, adversely to both the parties to it, they might under some circumstances be made defendants to a suit for the performance of it. Thus, where an assignee under an insolvency sold a reversionary interest in stock of the insolvent, and the purchaser was served with notice not to pay the purchase-money to the assignee by a person claiming under a previous assignment by the insolvent subsequent to his insolvency, a bill was brought against the assignee and the adverse claimant, and prayed an inquiry into the rights of the latter: he was, in the event, decreed to pay costs.[3]

[1] *Jolabart* v. *Duke of Chandos*, 1 Eden, 372.

[2] *Mason* v. *Franklin*, 1 Y. & C. C. C. 239.

[3] *Collett* v. *Hoare*, 1 Coll. 227, before Lord Cottenham, and cf. *Debtors* v. *Noranni*, 3 Sw. 144 (annuitants); *Wilson* v. *Thomson*, 23 W. R. 741.

Voluntary settlement.

§ 189. And so, in the case of purchases from a voluntary settlor, where the contract was sought to be enforced by a purchaser, it seems to have been proper to make defendants, not only the vendor, but the trustees of the settlement and the persons beneficially interested under it:[1]—the question whether the purchaser was entitled to have the contract performed depending on whether the previous settlement was or was not void against him, and that being a question which could not be tried in the absence of those who were interested under the settlement alleged to be voluntary. "I see no reason," said Turner L.J.,[2] "why it shall not be tried in a suit for specific performance, rather than be made the subject of a distinct and separate suit, the more so as it is a question which affects the validity no less than the performance of the contract."

Multifariousness.

§ 190. Where the several purchasers of several lots had been joined as defendants in one suit, a demurrer for multifariousness was repeatedly allowed.[3] "Suppose," said Lord Kenyon M.R.,[4] "an estate is sold in lots to different persons, a plaintiff could not include them all in one bill for a specific performance, for each party's case would be distinct and would depend upon its own peculiar circumstances: and there must have been a distinct bill upon each contract."

And a bill by several purchasers against one vendor would have been equally multifarious.[5]

Several contracts in one suit.

§ 191. But in one case in which there had been several sales of a like kind, and several purchasers joined

[1] *Holford* v. *Holford*, 1 Ch. Ca. 217; *Buckle* v. *Mitchell*, 18 Ves. 100; *Willats* v. *Busby*, 5 Beav. 193; *Lister* v. *Turner*, 5 Ha. 281; *Daking* v. *Whimper*, 26 Beav. 568.

[2] In *Townend* v. *Toker*, L. R. 1 Ch. 457.

[3] *Rayner* v. *Julian*, 2 Dick. 677; *Att.-Gen.* v. *Mayor, &c. of Poole*, 4 My. & Cr. 117; *Brookes* v. *Lord Whitworth*, 1 Mad. 86; *Turner* v. *Robinson*, 1 S. & S. 313; *Inman* v. *Wearing*, 3 De G. & Sm. 729.

[4] In *Rayner* v. *Julian*, 2 Dick. 677.

[5] See *Hudson* v. *Maddison*, 12 Sim. 416.

as plaintiffs, and the difficulty in completing the sale arose from the same cause in each case, and the persons interested in the estate made no objection for multifariousness, the Court decreed specific performance of the different contracts in one suit.[1]

And where the purchaser had entered into two separate but simultaneous contracts (for the purchase of freeholds and leaseholds) with the same vendor, and the investigations of the two titles had gone on concurrently, Kindersley V.C. considered that the vendor was right in making both contracts the subjects of one suit for specific performance.[2]

II. *As regards the practice of the High Court.*

The general rule.

§ 192. No doubt the general rule still is and will continue to be that the parties to the contract are the necessary and sufficient parties to the action: for that is a rule of convenience and good sense.

Provisions of the Rules of Court as to parties.

But the fact that persons may be joined as plaintiffs whose claims are alternative, or some of whom are found to have no interest in the litigation, or that a defendant is not interested in all the relief claimed, now furnishes no defence:[3] and the plaintiff may unite in the same action, and in the same statement of claim, several causes of action, subject to a power in the Court or Judge to direct separate trials of any of such causes of action.[4] Further, the Court or a Judge may at any stage of the proceedings order the name of any party, plaintiff or defendant, who ought to have been joined, or whose presence before the Court may be necessary,

[1] *Hargreaves* v. *Wright*, 10 Ha. Appx. 56. In this case the bill was originally filed by two of the purchasers *on behalf* of themselves and the other purchasers, and the Court (Turner V.C.) refused to entertain the suit in that form, but gave liberty to amend by adding other purchasers as co-plaintiffs. Consider *Turner* v. *May*, 32 L. T. 56.

[2] *Rogon* v. *Paul*, 28 L. J. Ch. at p. 556.

[3] R. S. C. Ord. XVI. rr. 1, 4. Cf. *Cox* v. *Barker*, 3 Ch. D. 379.

[4] R. S. C. Ord. XVIII. r. 1. See *Flower* v. *Buller*, 15 Ch. D. 665.

in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the action, to be added.[1]

Counter-claim.

§ 193. The existing procedure by way of counter-claim affords in some cases a mode in which, in a proper case, a person who was not a party to the original action may be brought in to the proceedings.

Thus, where second mortgagees brought an action against first mortgagee, who had contracted to sell the mortgaged property under his power of sale, claiming to have the sale completed and the sale moneys applied in satisfaction of the mortgages, and the defendant delivered a counter-claim, to which he made the purchaser a co-defendant with the original plaintiffs, alleging that the concurrence of the latter in the sale was a term of the contract, and claiming specific performance; Hall V.C. held that the purchaser was properly made a party to the counter-claim.[2]

Ecclesiastical Commissioners v. *Pinney.*

§ 194. In *Ecclesiastical Commissioners* v. *Pinney*,[3] where a contract for sale of glebe lands had been entered into by a vicar with the approval of the Ecclesiastical Commissioners, who were made parties to the contract, it was held by the Court of Appeal that the Commissioners, in virtue of their statutory duty to see to the purchase-money being obtained and secured, had a right to sue, if not for specific performance, at least for enforcement of a vendor's lien for unpaid purchase-money.

Registered land.

§ 195. In actions for the specific performance of contracts relating to land or a charge registered under the Land Transfer Act, 1875, the Court has a special statutory power of bringing into the action any persons who have registered estates or rights in such land or charge.[4]

[1] R. S. C. Ord. XVI. r. 11. See *Long* v. *Crossley*, 13 Ch. D. 388.

[2] *Peir* v. *Snowden*, 4 Ch. D. 478.

[3] [1899] 1 Ch. 99. And see S. C. [1899] 2 Ch. 729, 735; [1900] 2 Ch. 736.

[4] 38 & 39 Vict. c. 87, s. 93, *infra*, §§ 237, 1112. As to the costs of parties so appearing, see sect. 94 of the same Act.

CHAPTER II.

STRANGERS TO THE CONTRACT.

§ 196. CAN a stranger to the contract sue, or be sued, for its performance? Division of the subject.

It will be convenient to consider the two branches of this question separately.

I. *As to a stranger suing.*

§ 197. It is a general principle both at Common Law and in Equity, that a stranger to the contract cannot sue on it; and this is not varied by the mere fact that the stranger takes a benefit under it.[1] Generally a stranger cannot sue.

§ 198. Thus in a case, where protracted litigation had been undertaken by A. for the recovery of an estate, and in the course of these proceedings A. became greatly indebted to his solicitor, and, by a contract between A. and his brother B., A. agreed to relinquish his interest in the estate to B., in consideration of B.'s undertaking to pay the costs already incurred with interest, it was held[2] that the solicitor, being no party to the contract, Instance

[1] *Crow* v. *Rogers*, 1 Str. 592; *Ex parte Peck*, 6 Ves. 602, 604; *Ex parte Williams*, Buck, 13; *Berkeley* v. *Hardy*, 5 B. & C. 355; *Lord Southampton* v. *Brown*, 6 B. & C. 718; *per* Lord Langdale M.R. in *Colyear* v. *Countess of Mulgrave*, 2 Ke. 98; *per* Cotton L.J. in *Re D'Angibau*, 15 Ch. D. at p. 242; *Hill* v. *Gomme*, 5 My. & Cr. 250, 256; *Chesterfield, &c. Colliery Co.* v. *Hawkins*, 3 H. & C. 677. The dicta of Eyre C.J. in *Fellmakers' Co.* v. *Davis*, 1 B. & P. 102, and of Buller J. in his N. P. p. 134, do not appear to be law. The Scottish law differs from ours in this particular, recognising the *jus quæsitum tertio*. Stair, Inst. B. i. t. 10, s. 5.

[2] *Moss* v. *Bainbrigge*, 18 Beav. 478, 482; S. C. on appeal, 6 De G. M. & G. 292.

and having given no consideration for it, could derive no benefit under it capable of being enforced by him.

Apparent exceptions from the rule.

§ **199**. There are, however, several apparent exceptions from this principle.

i. Cestui que trust of contractor.

§ **200**. Thus (i.) there may be cases in which, where A. has as a trustee for B. contracted with C., B. may be entitled to sue both C. and A. for performance of the contract. The case of *Touche* v. *Metropolitan Railway Warehousing Co.*[1] is a case of this sort. So, too, in *Murray* v. *Flavell*,[2] a widow who was the *cestui que trust* of a trust created by partnership articles was allowed to sue upon them.

ii. Agency.

§ **201**. (ii.) There are cases of agency which may wear the aspect of exceptions from the rule. In *Hook* v. *Kinnear*[3] the two defendants were tenants in common of certain lands and the defendant Kinnear having been tenant of the defendant Philips' moiety, and in arrear to him for the rent, agreed with Philips to execute to the plaintiff such lease of the entire premises as Philips and the plaintiff should agree upon, and that all the rent should be paid to Philips till the arrears due to him were satisfied: the plaintiff was no party to the contract: Philips entered into another contract with the plaintiff for a lease of the premises to the plaintiff at 30*l*. per annum, and executed a lease of his moiety at 15*l*. per annum: the defendant declined to do the same in respect of his moiety: and it was objected that the plaintiff as a stranger could not sue: but Lord Hardwicke overruled the objection, on the ground that Philips might be taken as the agent of the plaintiff in the contract with Kinnear, and compared it to the case of stewards entering into contracts, and their masters enforcing them.

[1] L. R. 6 Ch. 671. Cf. *Re Empress Engineering Co.*, 16 Ch. D. 125; *Gandy* v. *Gandy*, 30 Ch. D. 57; *Clarke* v. *Birley*, 41 Ch. D. 422; *Bagot Pneumatic Tyre Co.* v. *Clipper Pneumatic Tyre Co.*, [1901] 1 Ch. 196; [1902] 1 Ch. 146; *Kelly* v. *Larkin*, [1910] 2 I. R. 550.

[2] 25 Ch. D. 89.

[3] 3 Sw. 417, n.

§ 202. (iii.) There are cases of persons claiming benefits under deeds who are not parties to the deeds, of persons suing for the execution of the trusts of marriage settlements who are not parties to such settlements,[1] and of proceedings by children under contracts antecedent to the marriages of which they are the issue. But these either refer to executed and not to executory contracts, or attract the jurisdiction of the Court on grounds other than that of the specific performance of contracts resting in *fieri*.

iii. Executed contracts.

§ 203. (iv.) There is a class of cases where the nearness of relationship of one party to the contract with the party to be benefited by it was formerly supposed to give to the latter the benefit of the consideration and a right to sue on the contract. The *Physician's case*[2] was the leading authority on this point: there A. made a promise to his physician, that, if he would effect a certain cure, he would pay a sum of money to the physician's daughter; and it was held that she might sue. In another case, in *assumpsit* the plaintiffs who were husband and wife, declared that the wife's father, being seised of lands which had subsequently descended to the defendant, was about to fell 1,000*l.* worth of timber to raise a portion for his said daughter; and the defendant promised the father that, if he would forbear to fell the timber, he would pay the daughter 1,000*l.* A verdict was found for the plaintiffs; but it was moved, in arrest of judgment, that the father alone could have brought the action, but not the husband and wife: but after two arguments, the objection was overruled on the ground of the nearness of relationship.[4] But these cases were in the year 1861 considered and deliberately disapproved

iv. Near relationship.

[1] 8 & 9 Vict. c. 106, s. 5.

[2] Cf. *Re D'Angibau*, 15 Ch. D. 228, 242, and *supra*, § 116.

Cited 1 Ventr. 6.

[4] *Dutton* v. *Pool*, 1 Ventr. 318, 332; 2 Lev. 210, affirmed in Cam. Scac. T. Raym. 302; *per* Lord Mansfield C.J. in *Martyn* v. *Hind*, Cowp. 443.

by the Court of Queen's Bench, and can no longer be considered law.[1]

v. Change in condition of life.

§ 204. (v.) It seems that an exception from the general principle, that a stranger even though taking a benefit under a contract cannot sue on it, may arise in cases where the contract is of such a nature and has been so far acted upon as to change the condition in life of the stranger, and to raise in him reasonable expectations grounded on the contract. Such a case might be presented by a contract between A., a rich man, and B., a poor one, that A. should take B.'s child, bring him up as a gentleman, and leave him certain property, and a part-performance of this on A.'s part. But here, any right which the child of B. might have to insist on the contract is derived, not from the contract alone, but from the conduct of A. in pursuance of it, and the wrong which the child would sustain, if the contract were carried out in part and not in whole. For no such Equity would exist where the contract remained entirely in abeyance.[2]

II. *As to a stranger being sued.*

Generally stranger cannot be sued.

§ 205. Generally a stranger to the contract is not a proper defendant to an action for enforcing it.[3] But this general rule is subject to exceptions.

Exception if he gets possession of subject-matter with notice.

§ 206. If a stranger to the contract gets possession of the subject-matter of the contract with notice of it, he is or may be liable to be made a party to an action

[1] *Tweedle* v. *Atkinson*, 1 Best & Sm. 393.

[2] *Hill* v. *Gomme*, 1 Beav. 540; 5 My. & C. 250; *Lyons* v. *Blenkin*, Jac. 245.

[3] See *supra*, §§ 165, 192, and *per* Stuart V.C. in *Bishop of Winchester* v. *Mod-Ilanto Building Co.*, L. R. 5 Eq. at p. 21, and *West Midland Railway Co.* v. *Nixon*, 1 H. & M. 176. The case may be different where the action is for rescission. See *Abraman Ironworks* v. *Wickens*, L. R. 4 Ch. 101, 111, explained by Cozens-Hardy J. in *Fleming* v. *Lee*, [1901] 2 Ch. 594, 597 (counter-claim for money had and received, on total failure of consideration); reversed on the facts, [1902] 2 Ch. 353, on appeal, [1901] W. N. 44; 73 L. J. Ch. 826, *sub nom. Mackusick* v. *Fleming*.

for specific performance of the contract upon the equitable ground of his conscience being affected by the notice.

Instance.

§ 207. Thus where S. contracted with P. for the sale to him of an estate and afterwards conveyed it to C., who, at the time of the conveyance, had notice of P.'s contract; on a bill filed by P. against S. and C. for the enforcement of the contract between S. and P. Wigram V.C. decreed specific performance of the contract, ordered all necessary parties to convey the estate to P., and gave the plaintiff costs against both S. and C.[1]

§ 208. Again, a stranger to the contract may mix himself up with it by setting up a claim to some benefit resulting from it, as to render him liable to be made a party to proceedings for the enforcement of the contract; as, for instance, by claiming to be interested in the purchase-money under an arrangement antecedent to the contract.[2]

Where part of the relief might affect person in possession.

§ 209. In some cases where a portion of the relief claimed might affect the person in actual possession of the property, that person may properly be made a party to an action for the specific performance of the contract; as for instance, where the purchasers, a railway company, being in possession of the land contracted to be purchased leased it to another railway company, who opened and worked a railway over it, and the unpaid vendors filed their bill against both companies for performance of the contract, declaration of the vendors' lien, and the appointment of a receiver.[3]

[1] *Potter* v. *Sanders*, 6 Ha. 1; cf. *Daniels* v. *Davison*, 17 Ves. 433; *Holmes* v. *Powell*, 8 De G. M. & G. 572; and distinguish *Leaty* v. *Hillas*, 2 De G. & J. 110; *Peacock* v. *Bulman*, L. R. 9 Eq. 165.

[2] *West Midland Railway Co.* v. *Nixon*, 1 H. & M. 176. Consider *Muston* v. *Bradshaw*, 15 Sim. 192, where the interest claimed was created subsequently to the contract, and cf. *Aberaman Ironworks* v. *Wickens*, L. R. 4 Ch. 101; *Wilson* v. *Thomson*, 23 W. R. 744.

Bishop of Winchester v. *Mid-Hants Railway Co.*, L. R. 5 Eq. 17. Cf. *Churchill* v. *Salisbury and Dorset Railway Co.*, 23 W. R. 534, 893.

"Ordinarily," said Stuart V.C.,[1] "a person not being a party to the contract ought not to be brought before the Court. But it is otherwise where possession is sought by the bill, and the person in possession will be affected by the decree. Therefore the South-Western Company [the lessees] have been properly brought here."

Exception under statutory provisions.

§ 210. Lastly, there are provisions in the Land Transfer Act, 1875,[2] by virtue of which strangers to the contract may, in certain cases, be brought into the position of defendants to an action for enforcing its specific performance.

[1] L. R. 5 Eq. at p. 21.

[2] See §§ 195, 897, 1142.

CHAPTER III.

DEATH OF A PARTY TO THE CONTRACT.

Death of a party.

§ 211. The general rule, that parties to the contract must alone be parties to the action, is further modified by certain circumstances, one of which namely, the death of a party to the contract, will now be considered. By this circumstance, with an exception to be mentioned hereafter,[1] the obligation to perform, and the right to call for the performance[2] of, the contract devolve on the representatives of the party dying.

Death of vendor.

§ 212. If the vendor of real estate die before completion, the contract may be enforced either by the purchaser[3] or by the personal representatives[4] or representative of the vendor;[5] but in both cases the

[1] See *infra*, § 221.

[2] See, for instance, *Ingle* v. *Vaughan Jenkins*, [1900] 2 Ch. 368, where the executor of a person who had contracted with a tenant for life for a lease obtained a judgment for specific performance against the remainderman.

Hinton v. *Hinton*, 2 Ves. Sen. 631; *Barker* v. *Hill*, 2 Rep. in Ch. 218.

[4] Note that under the Land Transfer Act, 1897, the real estate of a testator, who appoints executors, generally vests (not only in those who prove, but) in all of them *Re Pawley and London and Provincial Bank*, [1900] 1 Ch. 58; cf. however, *per* North J. in *John* v. *John*, [1898] 2 Ch. at p. 576). But where one body of executors is appointed for a testator's English property, and another for his colonial property, the English real estate vests in the former body exclusively (*Re Cohen's Executors and London County Council*, [1902] 1 Ch. 187; 71 L. J. Ch. 161). An equitable estate in copyholds devolves, upon the death of the owner, on his personal representative (*Re Somerville and Turner's Contract*, [1903] 2 Ch. 583).

[5] *Boden* v. *Countess of Pembroke*, 2 Vern. 212.

heir[1] or devisee[2] must be a party, as having an interest in disputing the contract: and it makes no difference that the legal estate is outstanding in a trustee.[3] As a purchaser has no right to insist on having the will proved against the heir, he is not a necessary party where there are devisees of the estate in question.[4]

The foregoing rules as to parties to an action remain, it is conceived, unaltered by the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), ss. 1—3.

Trustee Act, 1893, ss. 26, 31.

§ **218.** Formerly, where the vendor's heir was an infant, a difficulty arose, owing to the inability of the infant to convey;[5] but this difficulty has been overcome by legislation. First, by virtue of the 26th section of the Trustee Act, 1893, where a trustee entitled to or possessed of any land is an infant, the High Court may make an order vesting the land in any person entitled to require a conveyance of the land in any such manner and for any such estate as the Court shall direct;[6] and under the 31st section of the same Act, the Court may, where a judgment is given for the specific performance of a contract concerning any land, declare that any of the parties to the action are trustees of the land or any part of it, and therefore may make a vesting order relating to the rights of those persons, as if they had been trustees. It was held under the corresponding (but now repealed) sections of

[1] *Roberts* v. *Marchant*, 1 Ha. 547; S. C. 1 Ph. 370; *Lacon* v. *Mertins*, 3 Atk. 1; *Haddel* v. *Pugh*, 33 Beav. 489 (costs); cf. *Longinotto* v. *Morss*, 26 L. T. 828 (lease).

[2] *Galton* v. *Emuss*, 1 Coll. 243; *Hale* v. *Bushill*, 35 Beav. 343; *Parser* v. *Darby*, 4 K. & J. 41 (costs). See, too, *London and South Western Railway Co.* v. *Bridger*, 12 W. R. 948. As to the *cestuis que trust* of real estate devised in trust, see R. S. C. Ord. XVI. r. 8.

[3] *Roberts* v. *Marchant*, 1 Ha. 547; 1 Ph. 370. Distinguish *Fowler* v. *Lightburne*, 11 Ir. Ch. R. 495, 500.

[4] *Harris* v. *Ingledew*, 3 P. Wms. 91; *Colton* v. *Wilson*, id. 190; *Wakeman* v. *Countess of Rutland*, 3 Ves. 233; *Morrison* v. *Arnold*, 19 Ves. 670; *Boales* v. *Lord Rokeby*, 2 Mad. 227.

[5] *Bullock* v. *Bullock*, 1 J. & W. 603.

[6] Cf. *Re Howard*, 5 De G. & Sm. 435. As to the costs of the infant heir, see *Barker* v. *Venables*, 15 W. R. 803.

the Trustee Act, 1850, that where the contract was merely executory, the Court could not, on petition only, declare the heir of the vendor a trustee for the purchaser,[1] but that it could do so where, during the vendor's life, the contract had been executed by payment of the purchase-money and the execution of a formal covenant to surrender.[2] Secondly, it has been enacted, by the 4th section of the Conveyancing and Law of Property Act, 1881, that where at the death of any person dying after the commencement of that Act there is subsisting a contract, enforceable against his heir or devisee, for the sale of the fee simple or other freehold interest, descendible to his heirs general, in any land, his personal representatives[3] shall, by virtue of that Act, have power to convey the land, for all the estate and interest vested in him at his death, in any manner proper for giving effect to the contract; and the section goes on to provide that a conveyance made under it shall not affect the beneficial rights of any person claiming under any testamentary disposition or as heir or next of kin of a testator or intestate. Where there is no dispute or doubt about the validity of the contract, and the vendor's heir or devisee is an infant, this section appears to afford a convenient means of conveying the legal estate to the purchaser without resort to the Court.

Conveyancing Act, 1881, s. 4.

§ **214.** Where the vendor leaves a widow, who, but for the contract, would be entitled to dower[4] or

Widow

[1] *Re Carpenter*, Kay, 118; *Re Colling*, 32 Ch. D. 333 (more fully reported 54 L. T. 809), disapproving of *Re Lowry*, L. R. 15 Eq. 78.

[2] *Re Cuming*, L. R. 5 Ch. 72. See too, *Re Beaufort's Will*, [1898] W. N. 148.

As to the powers of personal representatives under the Land Transfer Act, 1897, see sect. 2 of that Act.

[4] See, under the Dower Act, 1833 (3 & 4 Will. IV. c. 105), which regulates the dower-rights of widows married since the 1st of January, 1834. The 5th section of the Act enacts that all contracts to which a deceased husband's land is subject shall be valid and effectual as against the right of his widow to dower.

freehench, the contract may be enforced against her, and she must be a party.[1]

Contract enforced by creditors.

§ 215. Where a binding contract has been made by a vendor who subsequently dies, it would seem that, if the executors decline to enforce the performance, or to compel the purchaser to do so, an action may be brought for the purpose of executing the contract by the creditors of the deceased vendor against the executors and heir of the vendor and the purchaser.[2]

Executors suing before probate.

§ 216. In a case[3] where executors of a vendor of leaseholds to a railway company filed their bill for specific performance, alleging (truly) that they had not proved the will, but before the hearing of an interlocutory motion to restrain the company from continuing in possession, the probate had been obtained, it was held that the defendants could not resist the motion on the ground of the bill's being demurrable.

Death of purchaser.

§ 217. If the purchaser of realty die before completion, the contract may be enforced either by the vendor against the personal representative and the heir or devisee of the purchaser, or by the heir or devisee, joining the personal representative as a co-plaintiff or making him a defendant, against the vendor: the personal representative being a party as having an interest in disputing the contract, and being the hand to pay the purchase-money;[4] and the heir or devisee being a

[1] *Hinton* v. *Hinton*, 2 Ves. Sen. 631, 638; *Brown* v. *Raindle*, 3 Ves. 256.

[2] See *Johnson* v. *Legard*, T. & R. 281; 1 Mad. Ch. 369.

Newton v. *Metropolitan Railway Co.*, 1 Dr. & Sm. 583.

[3] *Buckmaster* v. *Harrop*, 7 Ves. 341; S. C. 13 Ves. 456, where the residuary legatees were made parties; and see *Holt* v. *Holt*, 2 Vern. 322; *Binfield* v. *Scrivens*, 22 W. R. 202 (decree against executor with costs). Note, too, that if (as is conceived to be the case) the equitable estate, having passed by the contract to the purchaser, vests in his personal representative (Land Transfer Act, 1897, s. 1), that is an additional reason for making the latter a party; and further, such personal representative may, it is suggested, be entitled to maintain an action against the vendor for enforcement of the contract, making the purchaser's heir or devisee a party.

party as being the person entitled (subject to the provisions of the Land Transfer Act, 1897, ss. 1—3) to have the estate conveyed to him, and to insist on a proper inquiry into the title.[1]

Heir or devisee of purchaser.

§ 218. The heir or devisee of the purchaser has no right to insist on the completion of a purchase, except where the contract is such as might have been enforced against his ancestor or testator; for otherwise he might be able to take the purchase-money from the personal estate, in order to purchase for himself that which his ancestor or testator was not bound to purchase, and perhaps never would have purchased.[2]

Vendor ordered to revive.

§ 219. In a case where, after a suit had been instituted by a vendor against a purchaser, and a reference of title and report in favour of it had been made, the purchaser died, the Court, on the application of his real and personal representatives, ordered the plaintiff to revive, or, in default thereof, that his bill should stand dismissed.[3]

Death of proposed lessee.

§ 220. Where a person who has agreed to take a lease dies, the executors admitting assets may be compelled to take a lease, the covenants being so qualified as that the executors shall be no further liable thereon than they would have been on the covenants which ought to have been entered into by their testator.[4]

Discharge of the contract by death.

§ 221. The maxim *Actio personalis moritur cum persona* has no reference to legal proceedings arising from contract. But an exception to the devolution of the

[1] *Townsend* v. *Chapernowne*, 9 Pri. 130.

[2] *Broome* v. *Monck*, 10 Ves. 597; *Beckmasbee* v. *Harrop*, 13 Ves. 471, 472; *Savage* v. *Carroll*, 1 Ball & B. 265, 281; *Garnett* v. *Acton*, 28 Beav. 333; *Collier* v. *Jenkins*, You. 295. Consider *Ingle* v. *Richards* (No. 1), 28 Beav. 361, 364; and cf. *Cooper* v. *Jarman*, L. R. 3 Eq. at p. 101, and *Re Day, Sprake* v. *Day*, [1898] 9 Ch. 510.

[3] *Norton* v. *White*, 2 De G. M. & G. 678.

[4] *Phillips* v. *Everard*, 5 Sim. 102; *Stephens* v. *Hotham*, 1 K. & J. 571. See also *Page* v. *Broom*, 3 Beav. 36. Distinguish *Blosse* v. *Prende gast* (13 Ir. Ch. R. 373), where the lease had been executed by the lessor, but not by the lessee, before the latter's death.

Where personal qualities are required.

liability to perform contracts by the death of one of the parties, arises in all cases in which the personal skill or taste of one of the contracting parties is required; for in such cases the death of that party discharges the contract, and exempts his personal representatives from liability for the breach of contract occasioned by non performance after his decease,[1] —an exception obviously grounded on the same principle as the non-assignability of such contracts, hereafter considered.[2] On this principle it has been decided that, if an author contract to complete a work, and die before doing so, his executors will be discharged from the contract;[3] or, if a master contract to teach an apprentice, and die before the expiration of the term, his representatives will be equally excused.[4] And in one case a contract to build a lighthouse was from the skill and science involved in its performance, held to be a personal contract.[5] This principle would, of course, apply as much in actions for specific performance as in actions for damages.

[1] *Farrow* v. Wenslevdale (then Parke), 3 Bing. N. C. 744; *Hall* v. *Wright*, E. B. & E. 746; *Kickman*, 1 M. & W. 543.

[2] *Post*, 259.

Marshall v. *Broadhurst*, 1 Tyrw. 349; S. C. 1 Cromp. & Jer. 405.

[4] *Baxter* v. *Burfield*, 2 Str. 1266.

[5] *Per* Patteson J. in *Wentworth* v. *Cock*, 10 A. & E. 45.

CHAPTER IV.

ASSIGNMENT OF THE CONTRACT OR OF THE PROPERTY.

I. *Assignment of the contract.*

Assignment of the contract.

§ 222. As a general rule, the benefit of a contract may be assigned in Equity, and the assign can enforce specific performance of it, making his assignor a party.[1] Thus, for example, where there was a contract for a lease, which contained nothing to show that it was made with the assignor (who had become insolvent) from any personal motive, and the assign was solvent, the contract was enforced in favour of the assign.[2] Similarly, where there is nothing personal in the contract or the motives to it, a person who has appeared as agent may afterwards disclose himself as a principal, and enforce the contract in his own name.[3] And where A. contracted for an estate from B., A. having previously agreed with C. to sell the estate to him, and B. resisted performance on this amongst other grounds; the price being adequate, and B. not suggesting that he had ever refused, or was unwilling, or would have objected to treat with C., or might have obtained

[1] Of course if a new contract has been come to between the assignee and the person who originally contracted with the assignor, the assignor is not a necessary party to a suit brought on the new contract.

Crosbie v. *Tooke*, 1 My. & K. 431. *Morgan* v. *Rhodes*, id. 135. *Ex parte Dowell* v. *Dew*, 1 Y. & C. C. C. 345, where Knight Bruce V.C. refused to grant specific performance of a contract for a lease to an assignee, except upon the terms of the assignor's entering into the covenants of the lease. This decision was affirmed by Lord Lyndhurst: 12 L. J. Ch. 178. *See infra*, § 227.

Lewis v. *Lord Guyder*, 1 R. & My. 5

better terms from him, had he known the real circumstances of the case, specific performance was granted at the suit of A. and C.[1]

Assignment by way of mortgage.

§ 223. An assign of a contract by way of mortgage may enforce his security by means of specific performance. Thus, in a case decided by Lord Hatherley (then Wood V.C.), where A. had agreed to sell certain property to B., and then had mortgaged his interest under this contract to C., and C. had assigned his mortgage to D., it was held that D. (sub-mortgagee) might maintain a bill against the purchaser B. for the performance of the original contract between him and A.[2]

Exceptions

§ 224. The assignability of contracts in Equity is however subject to some exceptions and limitations, which for the most part fall under one or other of the following classes, viz.: (i.) where the contract is personal; (ii.) where the contract contains a provision against assignment; and (iii.) where the assignment is illegal or contrary to public policy.

i. Where the contract is personal.

§ 225. (i.) It is an obvious principle, that where the learning, skill, solvency, or any personal quality of one of the parties to the contract is a material ingredient in it, then the contract can be performed by him alone. It may be a matter of indifference to A. whether B. or C. be the purchaser of the stock or paid-up shares he is selling; but it is a matter of great moment whether a distinguished artist, or his nominee, is to paint a picture for which A. may have agreed to pay a certain sum. Accordingly, in the case of contracts of the latter kind, it is not competent to a person, who has appeared as agent for a principal on whose personal qualities reliance has been placed, to show himself to be the principal and to sue in his own name:[3] in

[1] *Nelthorpe* v. *Holgate*, 1 Coll. 203.

[2] *Browne* v. *London Necropolis Co.*, 6 W. R. 188. In this case, however, specific performance was, on another ground, refused.

[3] *Per* Alderson B. in *Rayner* v. *Grote*, 15 M. & W. 365. See *supra*, § 221.

respect of such contracts bankruptcy confers no claim on the trustee;[1] and the benefit of such contracts is incapable of being assigned.[2] Further, it has been laid down that whenever, by reason of change of business or change of parties, the result of an assignment would be to impose upon one of the contracting parties a greater liability than he ever intended to assume, the contract cannot be assigned.[3]

In tenures.

§ 226. Where a contract established a personal relation between an author and his publisher, it was held that it was incapable of assignment.[4] So where a coachbuilder contracted with A. to supply him with a chariot for five years, and within that period the coachbuilder assigned the contract to a third person, it was held that A. had a right to have the benefit of the judgment and taste of the coachbuilder to the end of the term, and consequently that an action brought by the coachbuilder and his assign against A. could not be maintained.[5] So also where a lessee in insolvent circumstances suffered another person to become the apparent owner of the farm, but with a secret trust for himself, and the landlord, supposing the trustee to be the rightful owner, and trusting to his solvency, entered into a contract with him to grant him a new lease, in a suit by the original lessee against the landlord,

Per Lord Abinger C.B. in *Gib* v. *Carruthers*, 8 M. & W. 313. Cf. *Drake* v. *Mayor of Exeter*, 1 Eq. Ca. Abr. 33 and the notes to Hargrave's edition of Freeman, ib. n. p. 153a; also *Vandemanker* v. *Desbrough*, 2 Vern. 96; *Megas* v. *Little*, id. 194.

Distinguish *Jalabert* v. *Duke of Grenadas*, 1 Eden. 372 (keepership of wrass).

Tidhurst v. *Associated Portland Cement Manufacturers*, [1901] 2 K. B. at p. 816; 70 L. J. K. B. 1046; reversed, but only upon an inference of fact, [1902] 2 K. B. 660, 675; 71 L. J. K. B. 949, 959. Consider S. C. in D. P. [1903] A. C. 414, 420, 423; and distinguish *Kemp* v. *Baerselman*, [1906] 2 K. B. 601; 75 L. J. K. B. 873.

[1] *Stevens* v. *Benning*, 1 K. & J. 168; affirmed 28 L. J. Ch. 158. This principle applies where the publisher is a limited company. *Griffiths* v. *Tower Publishing Co.* 45 W. R. 73.

[2] *Robson* v. *Drummond*, 2 B. & Ad. 303.

specific performance of this contract was refused, the Court considering that the landlord had entered into it expecting to have the covenants of a man of substance, which he could not do, as there would be no equity to compel the trustee to enter into the covenants.[1] And so again, if a landlord trusts to the skill of a person who is in fact a secret trustee, he will not be obliged to execute the contract for the *cestui que trust*.[2]

Contracts for leases

§ 227. How far, in the case of an ordinary contract for a lease, the intended lessor relies on the solvency of the intended lessee as a personal qualification, is a point on which somewhat different views have been taken.[3] But it appears to be now clear from the judgments of Lord Lyndhurst and Lord Chelmsford that such contracts are assignable and may be enforced by the assign.[4]

Where there is a set-off

§ 228 Again it is presumed to be clear that if A. owed B. 1,000*l.* and B. then agreed to buy from A. an estate for 2,000*l.*, no assign of A. could sue B. for performance except upon the terms of giving B. the benefit of the set-off of 1,000*l.*[5]

Where some previous personal relation.

§ 229 Again where, though the relation established by the contract may have in it nothing personal, some previous personal relation of favour, or otherwise, between the contracting parties has been a material motive to the contract, it can be enforced by that person only, and not by a concealed *cestui que trust* or principal or assign. This is illustrated by the case of

[1] *O'Herlihy* v. *Hedges*, 1 Sch. & Lef. 123.

[2] S. C.; *per* Grant M.R. in *Featherstonhaugh* v. *Fenwick*, 17 Ves. 313.

[3] *Crabtree* v. *Tinke*, *Morgan* v. *Rhodes*, *Dowell* v. *Dew*, *supra*, § 222; *Buckland* v. *Papillon*, L. R. 1 Eq. 477; 2 Ch. 67. See also *Stocker* v. *Dean*, 16 Beav. 161, where, from the personal nature of acts to be done, right of pre-emption was held to be limited to the life of the person who had to do them.

[4] 12 L. J. Ch. 164; L. R. 2 Ch. 71.

[5] *Coulton* v. *Jones*, 2 H. & N. 564. Cf. *Re Taylor*, *Ex parte Norris*, [1900] 1 K. B. 562.

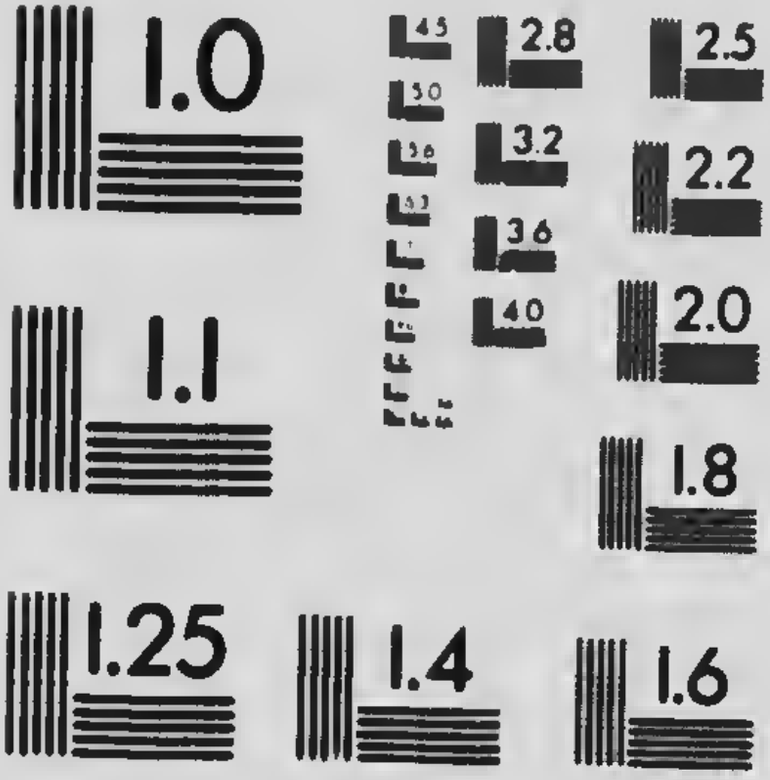
Phillips v. *Duke of Buckingham*:[1] a negotiation had been entered into between the plaintiff and the Duke for the purchase of an estate by the plaintiff, which had gone off: the plaintiff then got the secretary of Lord Chancellor Nottingham to enter into a negotiation on his behalf, but pretending it to be for the Lord Chancellor, or his son the Solicitor-General: the Duke had several cases depending in Chancery, and, wishing to oblige the Lord Chancellor, entered into articles; but on discovering who was the real purchaser, refused to complete: according to the report in Vernon, the plaintiff's bill was dismissed, and the case is considered an authority for the principle established by such dismissal; for, though it appears that specific performance was ultimately granted, it seems to have been only on payment by the plaintiff of the full value of the estate, being a sum greater than that originally agreed on.[2] Lord Thurlow showed an inclination to disregard these personal motives, considering it to be immaterial in a contract for an annuity, that the defendant was in fact a trustee for the son of the plaintiff, with whom he had refused to deal.[3] But Lord Eldon expressed dissatisfaction with that decision;[4] and the law seems now to be that where one person is deceived as to the real party with whom he is contracting, and that deception either induces the contract or renders its terms more beneficial to the deceiving party or more onerous to the deceived, or where it occasions any other loss or inconvenience to the deceived party, there the contract cannot be enforced against him; but that where none of these

[1] 1 Vern. 227. See also *Harding* v. *Cox*, 1 Vern. 227, n.

[2] See Raithby's note (quoting the Reg. Lib.) at p. 229 of vol. i. of his edition of Vernon. And see the case in Vernon, 1 St. Leon. Vend. p. 319, n., 10th ed. See also *Scott* v. *Langstaffe*, cited Lofft, 797.

[3] *Lord Lake* v. *Child*, 1 Bro. C. C. 92. See also *Jordan* v. *Savekins*, 1 Ves. Jun. 102.

[4] *Bennett* v. *Sadler*, 11 Ves. 528.



circumstances can be shown to follow from the deception, the contract may be enforced.[1]

Pothier on error in regard to the person contracted with.

§ 230. "Does error in regard to the person with whom I contract," asks Pothier,[2] "destroy the consent and annul the contract? I think that this question ought to be decided by a distinction. Whenever the consideration of the person with whom I am willing to contract enters as an element into the contract which I am willing to make, error with regard to the person destroys my consent, and consequently annuls the contract. . . . On the contrary, where the consideration of the person with whom I thought I was contracting does not enter at all into the contract, and I should have been equally willing to make the contract with any person whomsoever as with him with whom I thought I was contracting, the contract ought to stand."[3]

The principle illustrated.

§ 231. The same principle of course applies to assignments. So where a contract for a lease was entered into by a lady with her son-in-law for his personal accommodation in the mansion house and demesne lands, in the nature of a family transaction, the Court refused specific performance at the suit of his assignees in bankruptcy.[4]

ii. Where there is a proviso against assignment.

§ 232. (ii.) Where the contract stipulates that the instrument to be executed in performance of it shall contain a proviso against assignment, this operates to

[1] *Fellowes* v. *Gwydyr*, 1 Sim. 63; 1 R. & My. 83.

[2] Traité des Obligations, § 19. See *Smith* v. *Wheatcroft*, L. R. 9 Ch. D. 223; *Gordon* v. *Street*, [1899] 2 Q. B. 641, 647.

[3] For an illustration of this, see *Nash* v. *Dix*, [1898] W. N. 32; 78 L. T. at p. 449. Distinguish *Archer* v. *Stone*, 78 L. T. 34.

[4] *Flood* v. *Finlay*, 2 Ball. & B. 9. But in *Mardell* v. *Curtis*, [1899] W. N. 93 (approved in *Zimbler* v. *Abrahams*, C. A., [1903] 1 K. B. 577, 583; 72 L. J. K. B. 103), where an informal memorandum, argued (on the authority of *Duxbury* v. *Sandiford*, 78 L. T. 230, afterwards reversed in C. A., 80 L. T. 552) to be a mere personal arrangement, was held by the Court to be an arrangement for a lease for lives, specific performance was granted at the suit of the tenant.

prevent not only an assignment of the interest when perfected, but also of the contract to grant it.[1] But the benefit of the proviso may of course be waived for the purposes of specific performance; as where the assign of the intended lessee was recognised by the intended lessor as tenant.[2]

iii. Illegality of assignment.

§ **233**. (iii.) The statute 32 Henry VIII. c. 9, which is intituled the Bill of bracery and buying of titles, prohibits any person from selling or buying any pretended rights or titles to any lands, except the vendor has been in possession of the same, or of the reversion, or in receipt of the rents thereof, for a year before the sale; but it provides that it shall be lawful for the person in possession to buy in any pretended title. In *Sharp* v. *Carter*,[3] and *Hitchens* v. *Lunlor*,[4] pleas founded on this statute were allowed. In a case[5] before the Court of Common Pleas, A. the owner of a term died in 1828, and B. his brother, who had previously been in possession of part of the premises, then took possession of the whole, and continued so until 1829, when he died, leaving all his interest in the property to C., who thereupon entered and remained in undisputed possession until 1841, when D., a brother of A., the original termor, took out administration to him, and sold his interest in the property, as such administrator, for 10*l.*: the transaction was held to be void both by the Common Law and under the statute. Wherever a contract gives rise to a pretended right or title to any lands and to nothing more, the assignment of such a contract would be within the statute.

[1] *Weatherall* v. *Geering*, 12 Ves. 504; cf. *Jalabert* v. *Duke of Chandos*, 1 Eden, 372.

[2] *Dowell* v. *Dew*, 1 Y. & C.C.C. 345; 13 T. J. Ch. 158.

[3] 3 P. Wms. 375.

[4] G. Coop. 34. See also *Wall* v. *Stubbs*, 1 Mad. 80; S. C. 2 V. & B. 354.

[5] *Doe* d. *Williams* v. *Evans*, 1 C. B. 717. See also *per* Montague C.J. in *Partridge* v. *Strange*, Plowd. 88.

Transfer of expectancy.

§ **234**. But a transfer of an expectancy is not within the mischief of the statute; for the sale of an expectancy is not an allegation of any present right or title, but of the possibility of one thereafter to exist.[1]

Maintenance.

§ **235**. The principle on which the statute of Henry VIII. is founded, and which gives rise to the doctrines of champerty and maintenance, namely, that persons ought not to be allowed to come in for the mere purpose of litigating rights which others are not disposed to enforce, applies to render void some cases of assignment which are not strictly within the above statute. Thus, whilst it is clearly lawful to assign a right at the time undisputed, and if, from circumstances afterwards discovered, a necessity arises for litigation against third parties, the assign may maintain his action;[2] yet it is as clearly against public policy to allow of the assignment of a mere naked right to bring an action for a matter in dispute.[3] On this ground the Irish Court of Chancery refused its assistance to enforce the performance of a contract by a person out of possession, to grant a present lease to a person who was at the time apprised that he could not obtain possession except by a suit.[4] "I do not hesitate to say," said Turner L.J.,[5] "that, in my opinion, the right to complain of a fraud is not a marketable commodity, and that if it appears that an agreement for purchase has been entered into for the purpose of acquiring such a right, the purchaser cannot call upon this Court to enforce specific performance of the agreement. Such a

[1] *Cook* v. *Field*, 15 Q. B. 460.

[2] *Wilson* v. *Short*, 6 Ha. 366.

[3] *Prosser* v. *Edmonds*, 1 Y. & C. Ex. 481. With the distinction between this and the preceding case, compare the distinction between furnishing evidence for the recovery of property without a view to litigation, and furnishing evidence to maintain litigation, *Sprye* v. *Porter*, 7 El. & Bl. 58. As to a trustee in bankruptcy, see *Seear* v. *Lawson*, 15 Ch. D. 429; *Gay* v. *Churchill*, 40 Ch. D. 481.

[4] *Bayly* v. *Tyrrell*, 2 Ball & B. 358. In this case the lease to the plaintiff had been actually executed.

[5] In *De Hoghton* v. *Money*, L. R. 2 Ch. at. p. 169, affirming S. C. L. R. 1 Eq. 154.

transaction, if not in strictness amounting to maintenance, savours of it too much for this Court to give its aid to enforce the agreement."

Public trust.

§ 236. Upon principles of public policy contracts by which railway or public companies seek to devolve business, or delegate powers, with which they are entrusted, on persons to whom the legislature has not entrusted them, and on whom it has not attached the same responsibilities that it has on the companies, are incapable of being enforced by a Court of Equity.[1]

Offer not assignable.

§ 237. It must be added that, even where a concluded contract would be assignable, the benefit of an offer cannot, it seems, be transferred, by the person to whom it is made, to a third person. "In case of an offer by A. to sell to B., an acceptance of the offer by C. can establish no contract with A., there being no privity."[2]

The rights of the assign of the contract.

§ 238. The assign of a contract may, as has been shown, sue on it;[3] but he cannot by notice to the other party to the contract deprive him of the right to complete it with the original contractor, or make him responsible for any loss which may result to the assign from the completion of the contract with the assignor.[4]

Amalgamation of companies.

§ 239. One particular species of assignment of a contract arises in the cases in which a railway or other public company has entered into a contract, and subsequently becomes amalgamated with some other

[1] *Johnson* v. *Shrewsbury and Birmingham Railway Co.*, 3 De G. M. & G. 914; *Beman* v. *Rufford*, 1 Sim. N. S. 550; S. C. 7 Rail. C. 48; *Great Northern Railway Co.* v. *Eastern Counties Railway Co.*, 9 Ha. 306; *Winch* v. *Birkenhead Lancashire and Cheshire Junction Railway Co.*, 5 De G. & Sm. 562; *London, Brighton and South Coast Railway Co.* v. *London and South Western Railway Co.*, 4 De G. & J. 362.

[2] *Meynell* v. *Surtees*, 3 Sm. & Gif. 101, 117; *Boulton* v. *Jones*, 2 H. & N. 564.

[3] Cf. *Birmingham Canal Co.* v. *Cartwright*, 11 Ch. D. 421 (covenant to give right of pre-emption).

[4] *McCreight* v. *Foster*, L. R. 5 Ch. 604; affirmed *s. n. Shaw* v. *Foster*, L. R. 5 H. L. 321; *Crabtree* v. *Poole*, L. R. 12 Eq. 13.

company: for by this process the liability under the contracts of the existing companies is transferred to the new body which arises out of their fusion.[1]

Bankruptcy.

§ 240. In the event of a contracting party becoming bankrupt, if the property of the bankrupt include an unprofitable contract, the trustee has by statute the right of disclaiming the property, subject to certain provisions as to the time of disclaimer and the right of proof of the other contracting party.[2] But if, after contracting to sell leasehold property, the vendor becomes bankrupt, his trustee in bankruptcy cannot disclaim the property without disclaiming the lease.[3]

II. *Assignment of the Property.*

Assignment of the property.

§ 241. Where a contract has been entered into for the sale or demise or other dealing with property, and that property is afterwards transferred to a third person, such third person is liable to perform the contract at the suit of the purchaser or intended lessee in any of the following events, viz :—

(1.) When the transferee takes as a volunteer.

(2.) When the transferee takes with notice of the prior contract.

(3.) When the transferee has acquired only an equitable title, and has no better equity than the purchaser or intended lessee.[4]

[1] *Stanley* v. *Chester and Birkenhead Railway Co.*, 9 Sim. 264; S. C. 3 My. & Cr. 773; *Earl of Lindsey* v. *Great Northern Railway Co.*, 10 Ha. 664 (where the cases of amalgamation establishing this principle are discussed); *Clay* v. *Rufford*, 5 De G. & Sm. 768; *Beman* v. *Rufford*, 1 Sim. N. S. 550; *Balfour* v. *Ernest*, 5 C. B. N. S. 601; *Solvency Mutual Guarantee Co.* v. *York*, 3 H. & N. 588. Cf. *Ernest* v. *Nicholls*, 6 H. L. C. 401; and as to railway companies, see 26 & 27 Vict. c. 92, s. 13.

[2] Bankruptcy Act, 1883, s. 55; Bankruptcy Act, 1890, s. 13.

[3] *Pearce* v. *Bastable's Trustee in Bankruptcy*, [1901] 2 Ch. 122.

[4] *Flinn* v. *Fountain*, 37 W. R. 445.

"If," said Lord Rosslyn,[1] "he" (the transferee) "is purchaser with notice, he is liable to the same equity, stands in his place, and is bound to do that which the person he represents would be bound to do by the decree." This principle has been acted on in numerous cases.[2] It has been applied, in a case of a transferee taking as a volunteer, to a contract for sale of shares.[3]

Unregistered contracts in register counties.

§ 242. In particular the principle applies to unregistered contracts relating to land in register counties. Such contracts may be enforced against subsequent purchasers who may have obtained conveyances which they have registered, if they have notice of such prior contracts.[4]

Owner of prior title affected by notice.

§ 243. Where a person having a prior title gets in the subsequent estate which is affected by the contract, and has notice, he cannot protect himself from the performance of the contract by his elder title: thus, where an equitable mortgagor entered into a contract for a lease, and then the mortgagee, whose mortgage was prior to the contract, bought the estate with notice, he was held bound to specifically perform the contract:[5]

[1] In *Taylor* v. *Stibbert*, 2 Ves. Jun. 437.

[2] *Jackson's case*, 5 Vin. Abr. 513, pl. 3; *Howard* v. *Hopkins*, 2 Atk. 371; *Ford* v. *Compton*, 2 Bro. C. C. 32, and Belt's n. 2; *Jolabert* v. *Duke of Chandos*, 1 Eden, 372; *Brooke* v. *Hewitt*, 3 Ves. 253; *Knollys* v. *Alcock*, 5 Ves. 648; *Mews* v. *Maltby*, 2 Sw. 277; *Spence* v. *Hogg* (before Shadwell V.C. and Lord Cottenham), 1 Coll. 225; *Dowell* v. *Dew*, 1 Y. & C. C. C. 345; affirmed 12 L. J. Ch. 158; *Crofton* v. *Ormsby*, 2 Sch. & Lef. 583; *Potter* v. *Sanders*, 6 Ha. 1; *Hersey* v. *Giblett*, 18 Beav. 174; *Shaw* v. *Thackeray*, 1 Sm. & G. 537; *Goodwin* v. *Fielding*, 4 De G. M. & G. 90; *Waldron* v. *Jacob*, I. R. 5 Eq. 131; *Reilly* v. *Garnett*, I. R. 7 Eq. 1; and *supra*, § 206. See, too, *Dyas* v. *Cruise*, 2 Jon. & L. 460 (where a contract for a lease was enforced against a provisional assignee in insolvency); and as to the last mentioned case, cf. *supra*, § 240.

[3] *Graham* v. *O'Connor*, 73 L. T. at p. 713.

[4] *Per* James L.J. in *Greaves* v. *Tofield*, 14 Ch. D. at p. 572.

[5] *Smith* v. *Phillips*, 1 Ke. 691; *Mumford* v. *Stohwasser*, L. R. 18 Eq. 556. Cf. *Union Bank* v. *Kent*, 39 Ch. D. 238, 246. As to *Mumford* v. *Stohwasser*, see *Hunt* v. *Luck*, [1901] 1 Ch. 45; [1902] 1 Ch. 428.

and again where A., having only the equity of redemption, agreed to sell to B., and subsequently both A. and his mortgagee conveyed to C., who had notice of A.'s contract with B., it was held that B. might enforce specific performance against C.[1]

Mortlock v. Buller.

§ **244.** This principle of notice, under somewhat peculiar circumstances, was applied by Lord Eldon in the case of *Mortlock* v. *Buller*:[2] there the plaintiff alleged that a contract had been entered into by trustees of a marriage settlement, who had a power to sell with the consent of the husband and wife: after the bill was filed, the wife died, and the husband's estate for life and remainder in fee were brought together, and the legal power of sale in the trustees was extinguished. But Lord Eldon said that if the purchaser had entered into the contract with the approbation of the husband and wife, as was required by the settlement, the contract bound the estate, and should be made good by those who took interests, if it could not out of the power.

Contracts to devise lands.

§ **245.** Contracts to devise lands have been enforced against persons claiming them under the party contracting to make the will.[3]

In *Synge* v. *Synge*,[4] Kay L.J., delivering the judgment of the Court of Appeal, said:—"A definite proposal, in

[1] *Lightfoot* v. *Heron*, 3 Y. & C. Ex. 586.

[2] 10 Ves. 292, 315.

[3] *Goglaer* v. *Paddiston*, 2 Ventr. 353; S. C. as *Goilmere* v. *Battison*, 1 Vern. 48. And see further, as to contracts to make wills containing particular dispositions, *Lord Walpole* v. *Lord Orford*, 3 Ves. 402; *Jones* v. *Martin*, 5 Ves. 266, n.; *Fortescue* v. *Hennah*, 19 Ves. 67; *Needham* v. *Kirkman*, 3 B. & Al. 531; *Needham* v. *Smith*, 4 Russ. 318; *Logan* v. *Wienholt*, 1 Cl. & Fin. 611; *Jones* v. *How*, 7 Ha. 267; S. C. 9 C. B. 1; *Barkworth* v. *Young*, 4 Drew. 1; *Eyre* v. *Monro*, 26 L. J. Ch. 757; 5 W. R. 870; *Alderson* v. *Maddison*, 5 Ex. D. 293; reversed 7 Q. B. D. 174; 8 App. Cas. 467; *Re Parkin*, [1892] 3 Ch. 510, 517, where Stirling J. expressed the opinion that specific performance ought not to be decreed in a case of a contract to leave property by will on the part of one who was merely donee of a testamentary power of appointment; and *Macphail* v. *Townsend*, 25 T. L. R. 810.

[4] [1894] 1 Q. B. at pp. 170, 171.

writing so as to satisfy the Statute of Frauds, to leave property by will, made to induce a marriage, and accepted, and the marriage made on the faith of it, will be enforced in Equity. Then, what is the remedy where the proposal relates to a defined piece of real property? We have no doubt of the power of the Court to decree a conveyance of that property, after the death of the person making the proposal, against all who claim under him as volunteers."

CANADIAN NOTES

Parties to Suit

In a suit by the personal representatives of a vendor for the specific performance of a contract of sale, an infant heir was joined as a co-plaintiff. The Court refused to make a decree although the bill had been taken *pro confesso* against the defendant the purchaser, and ordered the case to stand over with a view to the plaintiffs amending their bill by making the infant a party defendant in order that the contract might be established against him.

Per STRONG V. C.: "It is in the discretion of the Court to direct a conveyance by the infant in a suit for specific performance, or to put the purchaser to a petition if directed in the suit, and, in the case of an unwilling purchaser especially, it would appear to be proper in the suit. It ought not to be upon less evidence of the infant being a trustee to convey than is required where proceedings are taken under the Act. I might direct an enquiry as to the infant being a trustee, leaving the suit constituted as it is, but I think it would be an anomalous proceeding; it would be requiring plaintiff's case to be proved against one of the plaintiffs, and that plaintiff would necessarily be required to be represented by a different solicitor from his co-plaintiffs by reason of diversity of interest between him and the substantial plaintiff, the personal representative, or rather [illegible] an infant, by his next friend."

The suggested anomaly was avoided by amending the bill and making the infant a defendant as above stated. *Hamilton* v. *Walker*, 12 Grant's Ch. 172.

In *Crooks* v. *Glen*, 8 Grant's Ch. 239, it was laid down that the general rule is that only the parties to the contract should be parties to a suit for specific performance. The vendor, after contracting with the vendee had granted a lease with a right to purchase. It did not

appear whether the option had been exercised or the time for exercising it had arrived. The lease had been assigned and the defendant, the vendee, objected that the assignee should be a party to this suit, but the Court overruled the objection.

In *Jessop* v. *McLean*, 15 Grant's Ch. 489, it was held that a husband and wife might jointly maint. in one bill for specific performance of a contract made by them for a sale of land of the wife, but the wife must sue by her next friend.

It was held in *O'Neal* v. *McMahon*, 2 Grant's Ch. 145, that in proceedings against the heir at law of a purchaser, in order to obtain a specific performance or a rescission of the contract, the personal representative of the deceased is a necessary party to the suit, and without one the suit is defective, though an executor *de son tort* is a defendant, and though no administration has been taken out before filing the bill.

In *Ideleman* v. *Stout*, 13 Grant's Ch. 692, a question was made whether, where it was clear that a purchaser of real estate had paid all his purchase money, it was necessary in a suit for specific performance against the heirs at law of the vendor to make the personal representatives parties to the bill therefor, and the headnote states that in such a case it would seem sufficient to add the personal representatives as parties in the Master's office.

In *Burns* v. *The Canada Co.*, 7 Grant 587, the eldest son and heir at law of a person who had in his lifetime agreed for the purchase of land from the Canada Company, left this country without in any manner attempting to complete the purchase. The other children of the purchaser paid the balance of purchase money due on the land and sold it in portions to three several purchasers. In a suit brought in the name of the several purchasers against their vendors and the Canada Company, it appeared that the heir at law had not been heard of for upwards of twenty-five years. The Court, under the circumstances, ordered the conveyance of the several portions to the purchasers without requiring any administration of the estate of the heir at law, the Canada Company not objecting thereto.

A vendor devised his estate to trustees and, on a division of the estate among the *cestuis que trustent* the trustees conveyed to one of them the sold property. These facts appeared on a bill by the purchaser against the grantee for specific performance. The defendants set up by answer that the executors and trustees were necessary parties, but the Chancellor at the hearing overruled the objection and the Court of Appeal sustained the decree. Draper C.J. and Gwynne and Galt JJ. dissenting. *Butler v. Church*, 18 Grant's Ch. 190.

According to *Wathen v. Smith*, 5 Grant's Ch. 203, the Court will entertain a bill for the purpose of compelling the sheriff to convey property sold under an execution but to such a bill the execution debtor whose property has been sold must be made a party. The opinion is expressed as an *obiter dictum*, the bill having been dismissed for want of a memorandum in writing to satisfy the Statute of Frauds.

Sub purchasers.

In *Vernon v. Lowe*, 1 Man. 304, the parties to whom Legge the purchaser had agreed to sell the property in question, which the defendant had agreed to purchase from the plaintiff, were made defendants in the action, and they allowed the bill to be taken against them *pro confesso*. It was said that the English cases cited as to making the sub-purchasers parties, besides being all cases of purchasers of only part of the property, seem scarcely applicable in this country and to a case like the present, the agreements with the sub-purchasers being registered. Where a vendor is entitled to a decree for specific performance and to rescission on default in payment of the purchase money, he would also be entitled to have the registration of these avoided.

Vendor without Formal Assignment.

In *Ritchie v. Dunn*, 25 Grant's Ch. 322, the plaintiff purchased from one Corrigan a mill privilege with a right to overflow land belonging to the defendant, and abstained at the instance of the defendant from obtaining from Corrigan an assignment of a bond securing the

right so to flood defendant's land. In a proceeding afterwards taken by plaintiff to compel defendant specifically to perform the contract contained in the bond, it was held that the want of a formal assignment of the bond could not be raised as an objection to the plaintiff's right to relief.

Purchaser with Notice.

In the case of *Draper* v. *Holborne*, 21 U.C.C.P. 122, an important *obiter dictum* occurs. A parol agreement had been made for a lease for ten years on terms of the plaintiff clearing or paying rental either in clearing or in money. After the plaintiff had entered into possession and cleared a number of acres, the defendant sold the lot to a purchaser who ejected the plaintiff.

It was held that the plaintiff had no remedy under the agreement, not being in writing, but Gwynne J. said that the purchaser, having had actual notice of the fact that the plaintiff was in possession of the property, was bound to enquire into and inform himself thoroughly of the plaintiff's claim and right to such possession, under penalty, in default of so doing, of being made subject in a Court of Equity to the same relief which the plaintiff could substantiate against the party from whom he purchased, "and, as it seems to me, the plaintiff's claim for relief, if any he has, would be for specific performance of the agreement for the lease which Deverill, (the purchaser), having had notice of plaintiff's possession, would be as liable to grant as the defendant would have been, had the fee still remained in him."

Hagarty C.J. also said, "that the plaintiff's only remedy would be to compel specific performance and, if so, the claim should be against Deverill, (the purchaser), instead of the defendant, the original owner.

In the *Corporation of Wallace* v. *The Great Western Ry. Co.*, 3 O.A.R. 11, in consideration of a bonus granted by the plaintiff, the Wellington, Gray & Bruce Ry. Company covenanted to erect and maintain a permanent freight and passenger station at Gowanstown. Shortly afterwards the road was leased with notice of this agreement to the defendants, who discontinued Gowanstown as a regular station, merely stopping there when there

were any passengers to be let down or taken up. It was held, affirming the decree of Spragge C. that the mere erection of station buildings was not a fulfilment of the covenant, and that the municipality was entitled to have it specifically performed.

In *Osborne* v. *Osborne*, 5 Grant's Ch. 619, the locatee of lands of the Crown, executed a bond in favour of one of his sons for the conveyance of fifty acres of his land for the purpose of procuring his marriage with a particular person, which, however, never took place, and the son afterwards married another woman, having in the meantime been allowed to retain possession of the bond. The father subsequently conveyed to another son for value, but who had notice of the existence of the bond, and he applied for and obtained the Crown patent for the land, and on his refusing to recognize the right of his brother under the bond, a bill was filed to compel the specific performance of the agreement contained therein. It was held that as against a purchaser for value the bond was voluntary and could not be enforced.

Estoppel against Owner Standing by.

Where the owner of an estate stands by, and allows a third person to appear as the owner and enter into a contract as such, the owner will be decreed to specifically perform such contract. Where the owner of an estate was present and permitted a third person to agree for the sale of his land and the purchaser was let into possession who made improvements and, being afterwards ejected by the owner of the property, filed a bill for payment of the value of those improvements, the Court allowed a demurrer for want of equity. *Davis* v. *Snyder*, 1 Grant's Ch. 134.

CHAPTER V.

LIABILITY OF SOME COMPANIES FOR THE CONTRACTS OF THEIR PROMOTERS.

The doctrine introduced

§ 246. ANOTHER very important exception to the general rule, as to parties to the contract alone being parties to the action, is furnished by the rule that in certain cases a public company may after incorporation be sued for the specific performance of contracts entered into by the promoters before incorporation.

In some cases by statute.

§ 247. In the case of companies incorporated by certificate under the provisions of the Railways Construction Facilities Act, 1864, contracts relative to the purchase or taking of lands for the railway entered into by the promoters before the incorporation of the company by the certificate are (by sect. 30 of the Act) made as binding on the company as if they had been entered into by the company. In the case of companies incorporated by special Acts of Parliament the doctrine rests upon decision, and was introduced and acted upon by Lord Cottenham, on the ground that the company stands in the place of the promoters, or, to use the language of Lord Jeffrey in the Court of Session, that the fact of "a party having passed from the chrysalis to the butterfly state"[1] creates no difficulty in the enforcement of such a contract. This doctrine thus established has, as before stated, been subsequently made binding by statute upon a particular class of railway companies.

In others by decision.

[1] *Caledonian and Dumbartonshire Junct'n Railway Co. v. The Magistrates of Helensburgh*, 2 M'Q. 394.

Edwards v. Grand Junction Railway Co.

§ **248**. The principle was first introduced in the case of *Edwards* v. *The Grand Junction Railway Co.*[1] There Moss, who was the agent of the promoters of a railway, entered into a contract with the trustees of a public highway, whilst the railway Bill was before Parliament, by which Moss agreed that he would enter into a contract to the effect of certain clauses which the trustees had been desirous to have inserted into the Bill, and would get the same confirmed under the seal of the company intended to be incorporated,—the contract being expressed to be made on the understanding that the trustees should offer no opposition to the Bill, and that the contract should be void on Moss's delivering to the trustees the engagement of the intended company to the same effect. The Bill passed: the company proposed to make a road across the railway of a narrower width than that stipulated for by the clauses before mentioned: on a bill filed by the trustees against the company for a performance of the contract and an injunction, the company was held to be bound by the contract entered into by the promoters before incorporation. "The question," said Lord Cottenham, in delivering judgment,[2] "is not whether there be any binding contract at Law, but whether this Court will permit the company to use their powers under the Act in direct opposition to the arrangement made with the trustees prior to the Act, upon the faith of which they were permitted to obtain such powers. If the company and the projectors cannot be identified, still it is clear that the company have succeeded to, and are now in possession of, all that the projectors had before: they are entitled to all their rights, and subject to all their liabilities. If any one had individually projected such a scheme, and, in prosecution of it, had entered into arrangements, and then had sold and assigned all his

[1] My. & Cr. 650; S. C. 1 Rail. Cas. 173; before Shadwell V.C., 7 Sim. 337.

[2] 1 My. & Cr. 672.

interest in it to another, there would be no legal obligation between those who had dealt with the original projector and such purchaser; but in this Court it would be otherwise. So here, as the company stand in the place of the projectors, they cannot repudiate arrangements into which such projectors had entered: they cannot exercise the powers given by Parliament to such projectors in their corporate capacity, and at the same time refuse to comply with those terms upon the faith of which all opposition to their obtaining such powers was withheld." The same principle was subsequently acted on by his Lordship in the cases of *Stanley* v. *The Chester and Birkenhead Railway Co.*[1] and *Lord Petre* v. *The Eastern Counties Railway Co.*[2]

Conditions under which the doctrine is applicable.

§ 249. The conditions under which the doctrine in question is applicable, if they have not been narrowed by subsequent cases, have at least been more clearly defined than they were in the cases already referred to. These conditions seem to be, (i.) that the company must have taken the benefit of the contract; and (ii.) that the contract must be for something warranted by the terms of the incorporation.

i. The company must have taken the benefit of the contract.

§ 250. (i.) The company itself, after incorporation, must either have taken the benefit of the contract, or have otherwise recognized it as a contract binding on them. It is not enough that the opposition to the intended Bill was withdrawn, as that is a consideration moving, not to the company, but to the promoters. Therefore, where a company was incorporated in consequence of the withdrawal of the plaintiff's opposition, but after that event they had not entered upon any of the land, or in anywise adopted the contract, except

[1] 3 My. & Cr. 773; S. C. 1 Rail. C. 58; before Shadwell V.C., 9 Sim. 264.

[2] 1 Rail. C. 462. See also *per* Lord Cottenham in *Greenhalgh* v. *Manchester and Birmingham Railway Co.*, 3 My. & Cr. 791, and in *Doo* v. *The London and Croydon Railway Co.*, 1 Rail. C. 257; and see *Vauxhall Bridge Co.* v. *Earl Spencer*, Jac. 64.

by fruitless negotiations, Lord Romilly M.R. refused specific performance of the contract, and declined to order the defendants to admit the validity of the contract in an action at Law;[1] and his Lordship acted on the same principle in the case, which shortly afterwards came before him, of *Preston* v. *The Liverpool Manchester and Newcastle, &c. Railway Co.*[2] In *The Earl of Lindsey* v. *The Great Northern Railway Co.*[3] Lord Hatherley (then V.C.) explained the principle of these cases in a way strongly supporting the first condition above stated. He considered that the cases did not proceed on the principle of contract through the agency of the promoters, but on the principle that the Court will not allow a body to exercise powers acquired by means of a previous contract and arrangement, without carrying that contract and arrangement into full effect. To this extent, the Court acts negatively; but having once acquired jurisdiction, then its action is positive as well as negative, and therefore it will not merely restrain the doing of acts contrary to the contract, but will enforce every portion of it. Lord Campbell also, in his judgment in *The Eastern Counties Railway Co.* v. *Hawkes*,[4] supported the same view of Lord Cottenham's doctrine. But it must be added that Lord St. Leonards, from the observations he made in the last-mentioned case on *Gooday* v. *The Colchester Railway Co.*,[5] appeared inclined to uphold that doctrine in its utmost generality, and to hold that the conduct of the directors, after the Act, in relation to the execution of their powers, cannot absolve them from liability in respect of the benefit which they secured by the withdrawal of the opposition to the Bill. Again, in *Williams* v. *The St. George's Harbour Co.*,[6] the company after incorporation had by

Williams v. St. George's Harbour Co.

[1] *Gooday* v. *Colchester, &c. Railway Co.*, 17 Beav. 132; *Williams* v. *St. George's Harbour Co.*, 3 Jur. N. S. 1014 (Lord Romilly M.R.), 2 De G. & J. 547.

[2] 17 Beav. 115.

[3] 10 Ha. 664.

[4] 5 H. L. C. 356.

[5] Ibid. 368.

[6] 2 De G. & J. 547.

an agreement been made parties to an action by the plaintiff against the promoters on a contract entered into by the promoters before incorporation, and had consented to a judgment in that action. That judgment, by consent, was held to be a sufficient recognition of the contract of the promoters as a contract binding on the company to give the Court of Chancery jurisdiction.

Contract *intra vires* and beneficial.

§ 251. Where the contract is within the powers of the future company, and is beneficial for the company, and the company sues upon it, the other contracting party cannot, on the ground of want of mutuality, raise any objection to the company's enforcing the contract.[1]

ii. The contract must have been warranted by the terms of incorporation.

§ 252. (ii.) The second condition, viz. that the contract must be for something warranted by the terms of the incorporation, and which the company is therefore competent to perform under the powers of its Act, is established and illustrated by the case of *The Caledonian and Dumbartonshire Junction Railway Co.* v. *The Magistrates of Helensburgh*,[2] which came before the House of Lords from the Court of Session in Scotland. The magistrates of Helensburgh had agreed with the promoters of the railway to afford the projected company certain facilities for the construction of the railway through the town, and to petition Parliament in favour of the Bill; and the promoters on their part agreed that the company should pay for the making of a quay and harbour, which the magistrates were to apply to Parliament for powers to make. Lord Cranworth, after animadverting on the general principle introduced by Lord Cottenham, decided the case on the ground that, in the instances before that Judge, the acts to be done were within the powers of the company when incorporated, whereas here the object of

[1] *Bedford and Cambridge Railway Co.* v. *Stanley*, 2 J. & H. 746.
[2] 2 McQ. 391.

the arrangement was to apply the funds raised under legislative authority for the purpose of the railway to an object foreign from that of the railway, namely, the construction of a pier and harbour.

Contract *ultra vires.*

§ 253. Again, in *Preston* v. *The Liverpool, Manchester, and Newcastle-upon-Tyne Junction Railway Co.*,[1] Lord Cranworth held that a contract to pay 5,000*l.* to a person for not opposing a Bill in Parliament would be *ultra vires* of a railway company when incorporated, and therefore that it could not be enforced against the company by reason of its having been entered into by the promoters.

A very similar decision was pronounced by Kindersley V.C. in *The Earl of Shrewsbury* v. *The North Staffordshire Railway Co.*[2] There the promoters had agreed to pay to the plaintiff 2,000*l.* for his support in obtaining their Act, and the directors of the company after incorporation had ratified the bargain. It was held to be *ultra vires* of the company and not binding, though entered into by the promoters before the passing of the Act.

Doubts on the general principle.

§ 254. Not only have these conditions been imposed on the doctrine as laid down by Lord Cottenham, but grave doubts have been thrown on the very principles of his decisions by Lords Cranworth and Brougham and by Kinnersley V.C. Thus, in the case already referred to of *The Caledonian and Dumbartonshire Junction Railway Co.* v. *The Magistrates of Helensburgh*,[3] Lord Cranworth, in a written judgment which had before its delivery received the concurrence of Lord Brougham, though deciding the case upon the point before mentioned, fully considered the general principle in question, and disapproved of it. His Lordship

[1] 5 H. L. C. 605, 621. See also *Leominster Canal Co.* v. *Shrewsbury and Hereford Railway Co.*, 3 K. & J. 654.

[2] L. R. 1 Eq. 593.

[3] 2 M'Q. 391. See also *Williams* v. *St. George's Harbour Co.*, 3 Jur. N. S. 1014 (Lord Romilly M.R.), 2 De G. & J. 547.

observed that the doctrine in question could be supported only on the assumption that the company when incorporated is in substance, though not in form, a body succeeding to the rights and coming into the place of the projectors; and then proceeded to show that, in his judgment, it is such a body neither in form nor in substance. The body incorporated, he argued, is not confined to the projectors, and may even include none of them: the Act of Parliament when passed becomes the charter of the company, prescribing its duties and declaring its rights: and all persons becoming shareholders have a right to consider that they are entitled to all the benefits held out by the Act, and liable to no obligation beyond those which are there indicated; that to permit other terms to be imposed on the shareholders behind the terms of incorporation, would lead to injury to the shareholders, and often to a fraud, or at least a surprise on the legislature; and that, to render special terms as to particular cases or persons binding on the company, they ought to be the subject of special clauses in the Act, whereby the whole truth could be disclosed, and neither the legislature nor any person taking shares could complain. Again, in the case of *Preston* v. *The Liverpool, Manchester, and Newcastle-upon-Tyne Junction Railway Co.*,[1] Lords Cranworth and Brougham expressed similar views of the doctrine, although the ground on which they dismissed the plaintiff's appeal was that the contract was in itself conditional on the construction of the railway. And Kindersley V.C. in a case already referred to[2] expressed himself adversely to Lord Cottenham's view.

[1] 5 H. L. C. 605; affirming the decision of Lord Romilly M.R., 17 Beav. 115. See the same case before Lord Cranworth as V.C., 1 Sim. N. S. 586, as to which see the case before the House of Lords.

[2] *Earl of Shrewsbury* v. *North Staffordshire Railway Co.*, L. R. 1 Eq. 593.

State of the authorities.

§ 255. In this state of the authorities, it is difficult to speak with certainty as to how far the doctrine in question is to be considered as law. On the one hand, it was repeatedly acted on by Lord Cottenham, and appears to have been adopted by Lords Campbell and St. Leonards; on the other hand, the principles upon which it rests have been criticised by Lord Hatherley (when V.C.), and have been distinctly disapproved of by Lords Brougham and Cranworth and Kindersley V.C., upon reasonings, to say the least, of the greatest weight and cogency. In the judgment of Kindersley V.C. in the case last referred to[1] will be found a very careful statement of the reasoning for and against this doctrine of Lord Cottenham. It is difficult to refuse assent to the learned Judge's conclusion that "it would be most consonant with legal principle, most just, and most for the public benefit, to hold that contracts of the promoters with landowners are not binding on the company, unless sanctioned by the Act constituting the company."[2]

[1] L. R. 1 Eq. pp. 615–6.

CHAPTER VI.

AGENCY.

Contracts by agents

§ 256. The cases which arise where the contract is made by an agent require consideration, as sometimes affording an apparent exception to the rule that only parties to the contract can be parties to the action.

Agents appearing to contract as such.

§ 257. Where agents contract ostensibly as such, and in the names of their principals, little difficulty can occur. The principals here are the proper parties to sue and be sued, and it is, in the absence of special circumstances, improper to make such an agent a party to the action.[1] In one case, where an agent having no interest whatever was made a co-plaintiff, the bill was held to be demurrable.[2] But this result would not now follow.[3]

Agents appearing on contract as principals.

§ 258. Where, on the other hand, agents appear on the face of the contract as principals, the case is different. The principle by which these cases are regulated is laid down with great clearness by Lord Wensleydale in *Higgins* v. *Senior*.[4] "There is no doubt," said his Lordship, "that where such an agreement is made, it is competent to show that one or both of the contracting parties were agents for other

[1] *Johnson* v. *Ogilby*, 3 P. Wms. 277; *Smith* v. *Clarke*, 12 Ves. 477, 484; *Lesset* v. *Reave*, 2 Atk. 394; *Ex parte Hartop*, 12 Ves. 349, 352; *Clark* v. *Lord Rivers*, L. R. 5 Eq. 91.

King of Spain v. *De Machado*, 1 Russ. 225, 241. Cf. *Glasbrook* v. *Richardson*, 23 W. R. 51 (agent sole plaintiff).

[2] R. S. C. Ord. XVI. r. 1.

[3] 8 M. & W. 811. Cf. *per* Knight Bruce V.C. in *Nelthorpe* v. *Holgate*, 1 Coll. at p. 220. See, too, *Fraser* v. *Hollens*, L. R. 7 Q. B. at pp. 623, 624; affirmed, L. R. 7 H. L. 757.

persons, and acted as such agents in making the contract, so as to give the benefit of the contract on the one hand to,[1] and charge with liability on the other,[2] the unnamed principals, — and this, whether the agreement be or be not required to be in writing by the Statute of Frauds; and this evidence in no way contradicts the written agreement. It does not deny that it is binding on those whom, on the face of it, it purports to bind; but shows that it also binds another, by reason that the act of the agent, in signing the agreement in pursuance of his authority, is in law the act of the principal. But, on the other hand, to allow evidence to be given that the party who appears on the face of the instrument to be personally a contracting party, is not such, would be to allow parol evidence to contradict the written agreement, which cannot be done." The Statute of Frauds, as we shall subsequently see,[3] does not require that the authority of the agent should be in writing where the contract is required to be so.

Primâ facie liability and being sued

§ 259. The proposition at which we have thus arrived, that a person appearing as principal may yet have contracted as agent for another, who may, when disclosed, sue or be sued as principal, is to be qualified by all those considerations as to the reliance of one party on the personal qualities of the other, which have been referred to in considering how far the benefit of a contract is assignable in Equity.[4] Thus it appears clear that if A. contract with B. for the performance of anything in which B. may be reasonably taken to have relied on A.'s personal character or qualities, A. cannot declare himself the agent of C. so as to place him in the same position as regards B. that A. held.

[1] See *Garrett* v. *Handley*, 4 B. & C. 664; *Bateman* v. *Phillips*, 15 East, 272.

See *Paterson* v. *Gandasequi*, 15 East, 62.

[2] Part III. chap. xi. § 526.

[3] See *supra*, § 225.

and again, if A. were to contract with B. for the purchase from him of an estate which was the property of B., B. could not afterwards declare himself the agent of C., for C., not having the estate, could not perform the contract. And it may, it is conceived, be laid down that in no case can a contracting party declare himself the agent of an unnamed principal, except where the contract, if really made by the contracting party, might have been assigned by him to the party suing as principal.

Agent not necessary party.

§ 260. In these cases the agent is not a necessary party to the action,[1] unless the agency be not proved, or there be special circumstances which may render it proper to make him a defendant: as where the agent claimed to have entered into the contract for his own benefit.[2]

Question who the party is principal or agent.

§ 261. The question may sometimes arise whether a party has, on the construction of the contract, entered into it as principal or as agent. The Commissioners of Woods and Forests were by statute authorised to enter into contracts, but the estate remained in the Crown: on a contract entered into by them under this authority, it was held on demurrer that they could not be sued for specific performance, but that the contract must be enforced in the ordinary way in the case of estates vested in the Crown.[3]

Both principal and agent sued.

§ 262. In some cases both agent and principal may be sued. Thus in *Waller* v. *Hendon*[4] there was a contract with the plaintiff for the purchase and renewal of a lease in the name of Hendon or such person as he should nominate or appoint. He nominated Cox,

[1] *Kingsley* v. *Young*, Dan. Ch. Pr. (7th ed.) 175.

[2] *Taylor* v. *Salmon*, 4 My. & Cr. 134; referred to in *Luddy's Trustee* v. *Peard*, 33 Ch. D. at p. 517. See also *Lees* v. *Nuttall*, 1 R. & My. 53; *Selthorpe* v. *Holgate*, 1 Coll. 203; *supra*, § 181; and cf. *Marshall* v. *Sladden*, 7 Ha. 128, and *Wise* v. *Wardle*, L. R. 19 Eq. 171.

[3] *Nurse* v. *Lord* [illegible], 14 Beav. 254.

[4] 5 Vin. Ab. 524, pl. 15.

declaring he bought for him as his agent. It was ordered by Lord Macclesfield, affirming a decision at the Rolls, in a suit (in which both Hendon and Cox were defendants) for payment of the residue of the purchase-money, that they should both pay it, and that if Hendon paid it he might prosecute the decree against Cox.

Directors.

§ **263**. Directors of a public company are agents of the company, and their personal liability upon contracts entered into by them is governed by the ordinary law of principal and agent. "Wherever an agent is liable," said Lord Cairns (then L.J.) in *Ferguson* v. *Wilson*,[1] "those directors would be liable; where the liability would attach to the principal and the principal only, the liability is the liability of the company." Accordingly it was held in the last-mentioned case, that the directors of a railway company were not liable to indemnify or pay damages to the plaintiff in respect of a resolution of the Board under which the plaintiff alleged that he was entitled to have shares in the company allotted to him; the resolution being, if anything, a contract between the plaintiff and the company. On the other hand, where directors of a company signed a contract (for a lease), on the face of which the Court considered the presumption to arise that they were, as between them and the plaintiff (the lessor), principals, they were held personally liable to perform the contract, notwithstanding that the plaintiff had in correspondence treated the company as liable to execute the contract.[2]

Agent suing.

§ **264**. In the case of a contract by an agent as a principal, the agent might at Common Law sue in his own name, without in any way joining the real principal: in Chancery, however, a suit could not be

[1] L. R. 2 Ch. 77. Cf. *Wilson* v. *Lord Bury*, 5 Q. B. D. at pp. 528, 527.

[2] *Kay* v. *Johnson*, 2 H. & M. 118.

maintained by the agent, unless his real principal were in some shape a party to the suit.[1]

Agent sued.

§ 265. The principle already stated[2] that a person appearing on a contract as principal, though really an agent, is yet liable on the contract as principal, applies in cases of specific performance in Equity[3] as well as in actions for damages,[4] and accordingly such an agent may be sued without the principal. In *Chadwick* v. *Maden*,[5] where the contract was in the name of the agent, who contended that, being merely such, the bill should be dismissed as against him, Turner V.C. said that "the signature of the agreement was sufficient to subject him to the liability of performing it." In that case, after a lot had been knocked down to him, A. declared himself an agent for C., who was present, and asked to have the contract drawn up in C.'s name, which was refused, and then signed it himself; it was there held that A. was personally liable on the contract. It would, however, appear on principle, that if, at the time the contract was signed, both A. and B. understood that A. was acting merely as agent for C., and B. were afterwards to sue A. for specific performance as principal, A. might allege the understanding between himself and B. at the time, and give parol evidence of it, and that, if the allegation were proved, it might furnish a valid defence. And in many cases it is obvious that an action for specific performance against an agent alone would fail, from the incapacity of the agent to perform it.[6]

Cases where agent a

§ 266. There are, however, special circumstances which sometimes occur, and make it proper that an agent

[1] *Per* Lord Lyndhurst in *Small* v. *Attwood*, You. 157. See S. C. 6 Cl. & Fin. 232.

[2] *Supra*, § 258.

[3] *Corlass* v. *Sparling*, I. R. 8 Eq. 335; 21 W. R. 876; *Saxon* v. *Blake*, 29 Beav. 128.

[4] *Jones* v. *Littledale*, 6 A. & E. 486; *Magee* v. *Atkinson*, 2 M. & W. 440. Cf. *Long* v. *Millar*, 4 C. P. D. 150.

[5] 9 Ha. 191.

[6] See *infra*, § 388.

proper party.

should be a party to an action for specific performance. In almost all these cases the agent is an agent and something more.

i. Agent claiming interest.

(i.) The claim by the agent to an interest in the property in question is one of these cases, and there the agent may be a party.[1]

ii. By reason of form of contract.

(ii.) The contract, as we have already seen, may be so framed as to give a right of action against both principal and agent.[2]

iii. Stakeholders.

(iii.) The agent of the vendor often becomes by the contract a stakeholder of the deposit paid by the purchaser, and in that character he may be a proper party to an action.

Cases where stakeholders made parties.

§ **267**. Thus where a stakeholder threatens to pay over the deposit to the vendor, he may properly be made a party to an action by the purchaser.[3] Where the stakeholder had paid over the deposit to the vendor, and difficulties had arisen in completing the contract because the deposit was not forthcoming, the purchaser made the stakeholder a party to a bill filed for specific performance, and was held entitled to a declaration that the stakeholder was (jointly with the vendor) liable to make good the deposit, which was required to discharge a mortgage on the property.[4] So, again, the auctioneer has repeatedly been made a defendant to bills by the vendor or those claiming under him, and has been ordered to pay the deposit (less his charge[5]) into Court.[6] And on account of the auctioneer's right to bring an action for the deposit,[7] and of his liability in respect of

[1] *Taylor* v. *Salmon*, 4 My. & Cr. 134; *Heard* v. *Pilley*, L. R. 4 Ch. 548. Distinguish *Glashrook* v. *Richardson*, 23 W. R. 51.

[2] *Waller* v. *Hendon*, *supra*, § 262.

[3] *Cutts* v. *Thodey*, 13 Sim. 206; 1 Coll. 223, n.; *Fenton* v. *Hughes*, 7 Ves. 287.

[4] *Wiggins* v. *Lord*, 4 Beav. 30.

[5] As to this see St. Leon. Vend. 51-52, and *Blenkhorn* v. *Penrose*, 29 W. R. at p. 239.

[6] *Annesley* v. *Muggridge*, 1 Mad. 593; *Yates* v. *Farebrother*, 4 Mad. 239. Cf. *Blenkhorn* v. *Penrose*, 29 W. R. at p. 239.

[7] In *Hodgens* v. *Keon*, [1894] 2 I. R. 657, the auctioneer had, without authority from the vendor, taken the purchaser's I.O.U. for the deposit:

it, it has been said that he can be made a co-plaintiff with the vendor,[1] or he may interplead.[2]

The proper practice in such cases.

§ 268. Still, although it is the law that a stakeholder or auctioneer holding a deposit may be made a defendant, the proper practice is not to make him a defendant when the deposit which he holds is small, unless being applied to to pay it into Court, he refuses to do so. Where the deposit is large, the depositee may properly be made a defendant if he has not paid it into Court before action.[3]

Auctioneers, &c. who may or may not be stakeholders.

§ 269. The auctioneer being agent for both vendor and purchaser, and receiving the deposit as a stakeholder, is liable to an action for it if the sale goes off,[4] although he be also solicitor for the vendor;[5] and where the contract provided "that a deposit of 350*l.* should be paid in part of the purchase-money to" the vendor's solicitors, it was held that they were stakeholders.[6] But the vendor's agents,[7] including solicitors to whom the deposit is paid, "as agents for the vendor," are not stakeholders.[8] Accordingly, where there is a condition for payment of the deposit to the vendor's solicitor "as agent for and on account of the vendor," the payment of the money to the solicitor is equivalent to payment to the vendor, and, if the contract goes off owing to the vendor's default, the deposit cannot be recovered from the solicitor, whether he has paid it over to his principal or not.[9]

it was held that the auctioneer could maintain an action against the purchaser for the amount.

[1] Dan. Ch. Pr. (5th ed.) 175; but see the 7th ed. 174, note.

[2] *Hoggart* v. *Cutts*, Cr. & P. 197. *Earl of Egmont* v. *Smith*, 6 Ch. D. 469, 474-5.

[3] *Grey* v. *Gutteridge*, 1 Man. & Ry. 644; *Harington* v. *Hoggart*, 1 B. & Ad. 577.

[4] *Edwards* v. *Hodding*, 5 Taun. 815.

[5] *Wiggins* v. *Lord*, 4 Beav. 30.

[6] *Duke of Norfolk* v. *Worthy*, 1 Camp. 337; *Hurley* v. *Baker*, 16 M. & W. 26.

[7] *Edgell* v. *Day*, L. R. 1 C. P. 80.

[8] *Ellis* v. *Goulton*, [1893] 1 Q. B. 350, 353.

CANADIAN NOTES.

Want of Authority in Agent.

In the *Elk Lumber Co. v. Crows Nest Pass Coal Co.*, 13 S.C.R. 169, the plaintiffs as assignees claimed specific performance of an alleged agreement for the sale of lands based upon the following letter:—

"Fernie, B.C., June 5th, 1910.

"D. V. Mont, Esq.,
"Fernie, B.C.

"*Re sale to you of mill site.*

"*Dear Sir,*—

"The Crows Nest Pass Coal Company hereby agree to sell to you a piece of land, at or near Hosmer Station, on the Crow's Nest Pass Line, to contain at least one hundred acres of land at the price of five dollars per acre, payable as follows,—when title issued to purchaser, title to be given as soon as the company is in a position to do so. Purchaser to have possession at once. The land to be as near as possible as shewn on the annexed sketch plan.

"Yours truly,
"W. Fernie, *Land Commissioner.*"

The lands claimed were not those shewn on the sketch plan, but other lands alleged to have been substituted therefor by verbal agreement with another employee of the defendant company at the time of survey.

It was held, affirming the judgment appealed from, 12 B.C. 423, but on different grounds, that specific performance could not be decreed in the absence of any proof of authority of the agent to sell the land of the defendant company, and that the mere fact of their investing their employee with the title of Land Commissioner, did not estop the defendants from denying the power to sell the lands.

Principal Estopped from Denying Agent's Authority.

Parties having lots of land for sale, employed an agent to sell them and supplied him with blank forms of

agreement signed and sealed by them, requiring for their completion only the name of the purchaser, the property sold and the amount of the purchase money. The agent was verbally instructed to reserve all pine timber fit for saw-logs. The agent sold one of the lots without any reservation of timber, and the vendors subsequently refused to adopt such sale without such reservation being made and commenced felling the timber upon the land. It was held in a suit for specific performance by the purchaser that the agreement as entered into by the agent constituted the true agreement between the parties and that the vendors were left to enforce any claim they might have against their agent for having acted in breach of their instructions. The defendants were ordered to pay the value of the timber cut and removed by them and to pay the costs of the suit.

The vendors had put it in the power of the agent, by means of the documents delivered to him to deceive either themselves or the purchasers by exceeding any verbal instructions which he might have received from them fettering his discretion. "One would think that in all common fairness, any loss arising from this cause should fall upon the party who had enabled his agent to occasion it and not upon the innocent purchaser, dealing in good faith upon the terms of the contract he had obtained from the agent. Authority is to be found, however, for saying that the purchaser runs the risk of this excess of powers by the agent, and the case of *Taylor* v. *The Great Indian Peninsular Ry. Co.* is to this effect. If an agent has nothing to shew but his mere verbal instructions, the party dealing with him, if he does not choose to enquire of the principal, places his confidence in the agent and must take the consequence. If the agent has written powers they of course will govern. But when the agent is entrusted with his principal's name, as in this case, a layman, at least, may very reasonably suppose that everything has been entrusted to his discretion, or that the principal is willing and prepared to abide by his agent's acts." *Jury* v. *Barrowes*, 9 Grant's Ch. 367.

PART III.

DEFENCES TO THE ACTION.

CHAPTER I.

INCAPACITY TO CONTRACT.

Nature of the defence.

§ 270. The incapacity to contract of either of the parties to a contract furnishes ground on which that party may resist specific performance;[1] and on the principle of mutuality hereafter to be considered it may also furnish a defence to the other party, though himself perfectly competent. The incapacity to contract, and the incapacity to execute a contract, are of course different questions: the one must be judged of at the time of the contract, the other when its performance is sought.

When incapacity to be judged of.

§ 271. The question as to the capacity of persons to contract, as raised in actions for specific performance, being for the most part identical with the question as discussed at Common Law, and having no peculiar relation to the jurisdiction in specific performance, it is proposed only to refer to a few points of practical importance which may arise in actions of this nature.

Infants.

§ 272. An infant has no general power to contract: and generally can neither sue nor be sued on a contract[2] into which he has purported to enter. In

[1] Note that a person's capacity to make a contract with regard to an immovable (*e.g.* land in the Transvaal) is governed by the *lex situs*. *Bank of Africa* v. *Cohen*, [1909] 2 Ch. 129, 141, 143.

[2] See further, § 461, *infra*.

respect of apprenticeship, an infant may bind himself by an indenture for this purpose, but nevertheless no relief can be had against the infant by way of damages[1] or specific performance[2] on his contract to serve. "You cannot get specific performance against an infant."[3]

Married women.

§ **273.** Married women have certain special powers of contracting, and a partial incapacity to contract. This subject will be found discussed in a subsequent chapter.[4]

Lunatics.

§ **274.** A contract entered into by a lunatic during a lucid interval is as binding as if made by a person of perfectly sound mind.[5] And, further, "a contract made by a person of unsound mind is not voidable at that person's option, if the other party to the contract believed, at the time he made the contract, that the person with whom he was dealing was of sound mind. In order to avoid a fair contract on the ground of insanity, the mental incapacity of the one must be known to the other of the contracting parties. A defendant, who seeks to avoid a contract on the ground of his insanity, must plead and prove, not merely his incapacity, but also the plaintiff's knowledge of that fact, and unless he proves these two things he cannot succeed."[6] Under the practice of the Court of Chancery, where a person who had entered into a contract was subsequently found lunatic from a date prior to the contract, it was competent for the other party to sue

[1] *Gylbert* v. *Fletcher*, Cro. Car. 179.

[2] 1 Eq. C. Abr. 6; *De Francesco* v. *Barnum*, 43 Ch. D. 165; S. C. on trial, 45 Ch. D. 430.

[3] *Per* Lindley L.J. in *Lumley* v. *Ravenscroft*, [1895] 1 Q. B. at p. 634.

[4] See Part VI. chap. v.

[5] *Hall* v. *Warren*, 9 Ves. 605. As to the evidence required to prove a lucid interval, see *Att.-Gen.* v. *Parnther*, 3 Bro. C.C. 441; *Ex parte Holyland*, 11 Ves. 10. See also Ray's Medical Jurisprudence and Insanity, ch. 11; Bucknill and Tuke's Psychological Medicine (3rd ed.), p. 27, where many authorities are cited.

[6] *Per* Lopes L.J. in *Imperial Loan Co.* v. *Stone*, [1892] 1 Q. B. at p. 602.

for specific performance, and obtain a decision of the questions whether the defendant was a lunatic at the time of the contract, and, if so, whether he had lucid intervals, and whether the contract was executed during a lucid interval:[1] or he might ask, in the alternative, to have the contract either performed or discharged; and in the latter case the Court would allow him, if vendor, to retain out of the deposit his costs, charges, and expenses.[2] In judging of insanity, Courts of Equity are governed by the same principles as purely Common Law Courts.[3]

Subsequent lunacy of a party

§ 275. The subsequent lunacy of a party to a contract in nowise affects the rights of the other parties;[4] and the difficulties which formerly stood in the way of their remedies are now dealt with by the Lunacy Act, 1890, sect. 133 and following sections. Where, for instance, a contract for sale of leasehold property had been entered into by a lunatic before his incapacity, and had been so acted upon as to entitle the purchasers to a judgment for specific performance, an order was made under sect. 135 of the last-mentioned Act, vesting the property in the purchasers, after payment by them of the purchase-money to the lunatic's curator.[5]

Persons standing in confidential relations.

§ 276. In addition to the legal incapacities to contract, Courts of Equity consider trustees, guardians, agents, and other persons standing in a confidential relation to others to be incapable (either absolutely or except under certain restrictions) of contracting for the purchase of the property entrusted to them in behalf of the persons to whom they stand thus confidentially related, and, under many circumstances, of

[1] *Hall* v. *Warren*, 9 Ves. 605.

[2] *Frost* v. *Beaven*, 17 Jur. 369. As to setting aside a contract for the lunacy of a party, see *Neill* v. *Morley*, 9 Ves. 478, 482.

[3] Per Lord Hardwicke in *Beaumont* v. *Vade*, 2 Atk. 327; *Osmond* v. *Fitzroy*, 3 P. Wms. 129. See *infra*, § 309.

[4] *Owen* v. *Davies*, 1 Ves. Sen. 82.

[5] *Re Pagani*, [1892] 1 Ch. 236, 238.

contracting with such persons;[1] and this incapacity may, of course, be urged in an action for specific performance. But inasmuch as it depends on the general doctrines of the Court with regard to each of these particular relations,—and questions of this sort are more often agitated in actions to set aside the impugned transaction, than in proceedings for specific performance,—it does not appear necessary to do more here than allude to the subject generally.

[1] See *Flanagan* v. *Great Western Railway Co.*, L. R. 7 Eq. 116.

CANADIAN NOTES.

Infants' Contracts.

In a suit for specific performance, where there were infant defendants, the Court held that the plaintiff's laches precluded him from obtaining relief, but directed an enquiry as to whether it would be beneficial to the infants to affirm or annul the contract. If found beneficial to affirm it, the plaintiff might excuse his laches, but *semble*, all the parties interested must consent to the enquiry. Esten V. C. held that the plaintiff, because of his laches, was not entitled to specific performance so far as he was concerned, and unless it was for the benefit of the infants, his bill should be dismissed; but the plaintiff might, on the enquiry, if it should appear beneficial to the infants to disannul the contract, allege anything in excuse of his delay. *Chevalier* v. *Strong*, 8 Grant's Ch. 320.

See also *McDougall* v. *Barron*, 9 Grant's Ch. 450, in which on a bill filed to enforce an agreement, an enquiry was directed as to whether it would be more to the advantage of the infants interested in the estate to adopt the agreement, or that a sale of the estate should be made under the decree of the Court.

The father of an infant died, having made a will purporting to devise all his real estate to his wife. The will not having been executed in proper form the infant became entitled to the land as heir-at law. Shortly before he became of age he agreed with another for the sale to him of the real estate for valuable consideration. A conveyance was prepared by the infant and executed by his mother, the infant being a witness to the conveyance. The grantee afterwards sold his interest and later the infant brought an action of ejectment against the purchasers, having become of age in the meantime. It was shewn on the bill to restrain this action of ejectment

that the heir at law had at various times acquiesced in the sale after he became of age. It was held that his conduct with reference to the sale was fraudulent and was to be considered as an assertion that his mother was entitled as devisee in fee, and such conduct, together with his subsequent acquiescence after attaining majority, estopped him from denying the validity of the sale. He was, therefore, enjoined from proceeding with the action of ejectment and ordered to execute a conveyance to the plaintiff to whom the land had been conveyed. *Lowry v Rose*, 10 Grant's Ch. 346.

CHAPTER II.

NON-CONCLUSION OF THE CONTRACT.

There must be a concluded contract.

§ 277. No proceedings in specific performance can, of course, be had unless a contract has actually been concluded, *i. e.*, unless two persons have agreed on the same terms, and mutually signified to one another their assent to them. If what passed between them was but treaty or negotiation, or an expectation of contract, or an arrangement between them of an honorary nature, no specific performance can be had.

Onus of proof on plaintiff.

§ 278. The burden of proving this concluded contract is, of course, on the plaintiff: and where the law requires some peculiar mode of evidencing the contract, as, *e. g.*, a writing, or a signature, or a seal, the question of the existence of a contract in fact and of the existence of the required evidence should ever be kept distinct in thought.[1] There may be a contract in fact, though the required evidence of it may be wanting; or there may be a writing, or signature, or seal, and yet no contract in fact. Parol evidence is admissible to show that, although there is what purports to be a signed agreement the parties in truth never came to an agreement at all. The admission of evidence to show that does not contravene the rule of law that evidence is not admissible to vary the terms of an agreement in writing.[2]

Mutual misunderstanding.

§ 279. Where there is nothing to throw light upon the existence or non-existence of a contract but some

[1] *Rossiter* v. *Miller*, 3 App. Cas. 1124, 1151; *Chalk* v. *Marchioness of Ely*, 4 De G. & S. 638.

[2] *Pym* v. *Campbell*, 6 E. & B. 370, 373; *Pattle* v. *Hornibrook*, [1897] 1 Ch. at pp. 30, 31.

instrument or instruments, the question is really one of construction of the documents in question.

Where there is a formal document.

§ 280. Where the contract is embodied in a formal document simultaneously entered into by both parties, and purporting to be a contract, little difficulty can occur as to whether the contract was concluded. But where this is not the case questions have arisen.

Is the instrument a contract?

§ 281. One question has been whether the instrument in question was the embodiment of a contract or of some other transaction.

Judge's order.

(i.) is a Judge's order made by consent, and directing certain things to be done by the parties to it, a contract to do the things? It was said not to be by Lord Hatherley (when a Vice-Chancellor), who, both on that ground and on the nature of the Judge's order, refused specific performance.[1] The opposite view has been taken in some cases at Common Law, and it has been said that a contract is not the less a contract, and subject to the incidents of a contract, because there is superadded the command of a judge.[2]

Instructions for settlement.

(ii.) Are instructions for a settlement a contract for a settlement, or only instructions for a contract? This was a question on which the House of Lords was in one case much divided.[3]

Articles of association.

(iii.) Are articles of association a contract between the company and a third person named in them? This is a question which, under special circumstances, has been answered in the affirmative.[4]

[1] *Thames Ironwork Co.* v. *Patent Derrick Co.*, 1 J. & H. 93.

[2] *Wentworth* v. *Bullen*, 9 B. & C. 840; *Lievesley* v. *Gilmore*, L. R. 1 C. P. 570; *Conolan* v. *Leyland*, 27 Ch. D. 632. See also *Tatham* v. *Platt*, 9 Ha. 660.

[3] *Caton* v. *Caton*, L. R. 2 H. L. 127.

[4] *Touche* v. *Metropolitan Railway Warehousing Co.*, L. R. 6 Ch. 671; questioned, however, by Bowen L.J. in *Gandy* v. *Gandy*, 30 Ch. D. at p. 65. It is conceived that, generally, the question propounded in the text is to be answered in the negative. See *Re Olympia*, [1898] 2 Ch. at p. 168, and the cases there referred to.

(iv.) Is the recital in a deed evidence of a contract? —is a question which also has been answered in the affirmative.[1] Recital.

§ **282.** A much more common question is whether negotiations have passed from that state and resulted in actual contract. If it were only doubtful whether the contract was concluded or negotiations still remained open, the Court of Chancery used to refuse specific performance, and leave the parties to their Common Law rights if any.[2] Negotiation is not contract.

§ **283.** A binding contract, enforceable in Equity, may be constituted by the proposal of one party and the acceptance of the other.[3] But as the proposal has no validity without the acceptance,[4] a memorandum of offer differs essentially from a memorandum of agreement. "In the case of an offer, no doubt, the party signing it may at any time before acceptance retract; but if it be an agreement, though signed by one party alone, he cannot retract at his pleasure, but all he can do is to call upon the other party to sign or rescind the agreement. A memorandum of agreement supposes that the two parties have verbally made an actual contract with each other; and when the terms of such contract are reduced into writing and signed, that is sufficient to bind the party signing; but if the memorandum is of an offer only, that assumes that there has been no actual contract between the parties."[5] Proposal and acceptance.

[1] *Wilson* v. *Keating*, 27 Beav. 121, affirmed 4 De G. & J. 588.

[2] *Haddleston* v. *Briscoe*, 11 Ves. 583, 591; *Stratford* v. *Bowcorth*, 2 V. & B. 341; *Skelton* v. *Cole*, 1 De G. & J. 587.

[3] The acceptance must be by the other party. An offer by A. to B. and acceptance by C. constitutes no contract. *Meynell* v. *Surtees*, 3 Sm. & Gif. 101, 117.

[4] See *South Hetton Coal Co.* v. *Haswell, &c. Co.*, [1898] 1 Ch. 465, 468, where a liquidator vendor having undertaken to accept "the highest net money tender I receive for some mines, and the plaintiff having thereupon sent in a tender which in the view of the Court of Appeal did not answer the description of what the vendor had bound himself to accept, it was held that there was no contract.

[5] *Per* Kindersley V.C. in *Warner* v. *Willington*, 3 Drew. 531. See also *Meynell* v. *Surtees* (on appeal).

Essentials of the acceptance.

§ **284**. In order that an acceptance may be operative, it must be plain, unequivocal, unconditional, and without variance of any sort between it and the proposal, and it must be communicated to the other party, and that without unreasonable delay.[1]

Kennedy v. *Lee*.

§ **285**. The proposition that the acceptance must be plain, unequivocal, unconditional, and without variance, is supported and illustrated by a great variety of decisions.

In the case of *Kennedy* v. *Lee*,[2] the subject was much discussed: it was there unsuccessfully argued that the acceptance introduced a term respecting the goodwill of a business not included in the proposal.

Acceptance must be unequivocal.

§ **286**. The unequivocal character of the acceptance that is requisite is well illustrated by a case in which A. made an offer to B., by letter, to sell a lot of land: B. filed a bill against A., alleging a contract in writing for the sale of this estate, and the answer offered to sell the estate: the decree was in the alternative for a conveyance on the payment of the purchase-money into the bank, or in default for the dismissal of the bill: the money was paid. The question arose between the heirs and devisees of B. as to the time when the contract became binding: it was held that the bill did not amount to an acceptance so as to bind B.; for he as plaintiff might have dismissed his bill: the decree did not, for it left an election to the plaintiff: but the payment of the money into the bank did, for that was unequivocal.[3] In another case, where the plaintiff had made an offer to take a farm, and had referred to certain persons as to his capabilities and capital, and in

1 Jur. N. S. 737; 3 W. R. 535; *Horsfall* v. *Garnett*, 6 W. R. 387. See, as to *pollicitatio*, Pothier, Traité des Obligations, par. 1, chap. 1, s. 1, art. 1, § 2.

[1] *Oriental Inland Steam Navigation Co., Limited* v. *Briggs*, 4 De G. F. & J. 191.

[2] 3 Mer. 441. See, too, *Thornbury* v. *Bevill*, 1 Y. & C. C. C. 554; *Cayley* v. *Walpole*, 18 W. R. 782.

[3] *Gaskarth* v. *Lord Lowther*, 12 Ves. 107.

consequence of this offer the agents of the proposed lessor had, by his direction, prepared and sent to the proposed lessee a lease which they considered to be in pursuance of the proposal; Kindersley V.C. held this not to be an acceptance,[1] on the ground that the act was ambiguous and conditional:—ambiguous, because the lease might have been sent in order to save time, and without any intention of departing from the right of accepting or refusing the offer of the plaintiff, according to the result of his communication with the referees; and conditional, because the sending the draft lease, if an acceptance at all, was an acceptance upon condition that the defendant accepted the draft lease. The case of *Thomas* v. *Blackman*,[2] before Knight Bruce V.C., may also be referred to as illustrating this doctrine. Here there had been a long correspondence, and the Vice-Chancellor held that there never had been, in any part of it, a clear accession on both sides to one and the same set of terms; and accordingly he decreed the dismissal of the bill, unless the plaintiff accepted the terms of the defendant's original offer, which the plaintiff acceded to.

Acceptance must be unconditional.

§ **287.** In illustration of the unconditional nature of the acceptance required, the case of *Crossley* v. *Maycock*[3] may be referred to. There vendors wrote, in answer to an offer, "which offer we accept, and now hand you two copies of conditions of sale," and inclosed a form of contract containing sundry special stipulations; and it was held that the acceptance was conditional only. "If," said Jessel M.R.,[4] "there is a simple acceptance of an offer to purchase, accompanied by a statement that the acceptor desires that the arrangement should

[1] *Warner* v. *Willington*, 3 Drew. 523. Cf. *Horsfall* v. *Garnett*, 6 W. R. 387.

[2] 1 Coll. 301.

[3] L. R. 18 Eq. 180. See, too, *Lewis* v. *Brass*, 3 Q. B. D. 667; and *Jones* v. *Daniel*, [1894] 2 Ch. 332.

[4] L. R. 18 Eq. at p. 181.

be put into some more formal terms, the mere reference to such a proposal will not prevent the Court from enforcing the final agreement so arrived at. But if the agreement is made subject to certain conditions then specified or to be specified by the party making it, or by his solicitor, then, until those conditions are accepted, there is no final agreement such as the Court will enforce."

And without variance from the offer.

§ **288**. Where there is any variance between the terms of the proposal and those of the acceptance, no contract arises: as where A. offered to purchase a house on certain terms, possession to be given on or before the 25th of July, and B. agreed to the terms, and said he would give possession on the 1st of August.[1] And where A. made the promoters of a railway an offer of a way-leave for the purpose of their railway, which was one for mineral traffic only, and it was subsequently accepted, but for the purpose of constructing a public railway for general traffic, this was held to be such a variation in the subject-matter as prevented any contract from arising.[2]

Acceptance must not introduce any new term.

§ **289**. The introduction of a term in the acceptance which is not in the proposal, is a variance which prevents their constituting a contract. Therefore, where the defendant offered certain terms for a lease, and the plaintiff accepted the terms and offered an under-lease, there was held to be no contract.[3] So where a condition was introduced into the acceptance, it prevented its operating as a contract.[4] In another case, where the plaintiff proposed a contract to the defendant, stipulating amongst other things that a lease should contain all the covenants in the superior lease, and the

[1] *Routledge* v. *Grant*, 4 Bing. 653.

[2] *Meynell* v. *Surtees*, 3 Sm. & Gif. 101, affirmed by Lord Cranworth, 1 Jur. N. S. 737: 3 W. R. 535, sanctioning this argument.

[3] *Holland* v. *Eyre*, 2 S. & S. 194. See, too, *Lewis* v. *Pedrick*, 29 L. T. 178.

[4] *Hall* v. *Hall*, 12 Beav. 414: *Lucas* v. *Martin*, 37 Ch. D. 597.

defendant signed the contract tendered, but with the qualification that there was nothing unusual in such superior lease: a draft of the proposed lease was then submitted to the defendant, who made some alterations, and requested the plaintiff's solicitors to adopt them at once, or to refuse the lease: the solicitors sent back the draft, acceding to all the alterations except one as to assigning without licence: it was held that at this stage there was no contract, and that the proposed lessee could determine the treaty.[1] And where a proposal was made to take an allotment of railway shares, and a letter was returned, accepting the offer, but headed "not transferable," the new term introduced by these words prevented the proposal and acceptance from constituting a contract.[2]

Acceptance subject to title being approved by solicitors.

§ 290. In a case which went to the House of Lords,[3] the Court of Appeal held that the purchaser's acceptance of a proposal for sale "subject to the title being approved by our solicitors," did not constitute a contract by reason of the new term; for all that the simple acceptance could have given here would have been the right to a good title, and what he stipulated for was a title to be approved by particular persons of his own selection. But in the House of Lords, though the decision of the Court of Appeal was affirmed (on the ground that no concluded contract had been established), Lord Cairns dissented from that Court's view of the effect of the words in question, and said,[4] "I am disposed to look upon the words as meaning nothing more than a guard against its being supposed that the title was to be accepted without investigation, as meaning, in fact, the title must be investigated and approved of

[1] *Lucas* v. *James*, 7 Ha. 410. Cf. *Wright* v. *St. George*, 12 Ir. Ch. R. 226; and see *Pattle* v. *Hornibrook*, [1897] 1 Ch. at p. 31 (counter-offer declined—no contract).

[2] *Duke* v. *Andrews*, 2 Ex. 290.

[3] *Hussey* v. *Horne-Payne*, 8 Ch. D. 670; 4 App. Cas. 311; *Hudson* v. *Buck*, 7 Ch. D. 683.

[4] 4 App. Cas. at p. 322.

in the usual way, which would be by the solicitor of the purchaser." If the point be still open, it will be worthy of consideration whether the opinion of Lord Cairns can be maintained.

What is not a new term.

§ **291**. But where the proposal leaves a term to be decided by the acceptance, the decision of this will not of course amount to the introduction of a new term; as, *e.g.*, where the proposal has reference to such a day as shall be named by the party to whom it is made, and he in accepting names the day.[1] And a contract by proposal and acceptance may, like any other, leave the price or any other term to be ascertained in a way agreed on.[2]

Nugatory variation.

§ **292**. So again, it seems clear that a variation which is purely nugatory will not affect the contract;[3] nor will the introduction into the acceptance of what is not matter of contract; as, *e.g.*, the words "we hope to give you possession at half-quarter day," which were held to be a mere expression of hope, and so not to introduce a new term into the acceptance.[4]

Reference to mode of execution.

§ **293**. Nor will the Court consider a new term to be introduced by the circumstance that the acceptance proceeds to treat of the way in which the contract is to be carried into execution; as, for instance, by referring to a formal contract that was to be drawn.[5]

Indulgence.

§ **294**. Nor will a new term be held to be introduced

[1] *Boys* v. *Ayerst*, 6 Mad. 316.

[2] *Walker* v. *Eastern Counties Railway Co.*, 6 Ha. 594.

[3] *Lucas* v. *James*, 7 Ha. 410, 421. Cf. *infra*, § 636, and *per* Lord Colonsay in *Proprietors, &c. of English & Foreign Credit Co.* v. *Arduin*, L. R. 5 H. L. 64, 81, 82.

[4] *Clive* v. *Beaumont*, 1 De G. & Sm. 397. See also *Johnson* v. *King*, 2 Bing. 270; and *Simpson* v. *Hughes*, 66 L. J. Ch. 734, C. A.; 76 L. T. 237, affirming S. C. 45 W. R. 221, where it was held that some remarks in a letter of acceptance, as to the time from which the purchase was to date, and as to seeing to the fences, were not to be treated as part of the bargain.

[5] *Gibbins* v. *North Eastern Metropolitan Asylum District*, 11 Beav. 1; *Skinner* v. *M'Donall*, 2 De G. & Sm. 265; *Bonneuil* v. *Jenkins*, 8 Ch. D. 70; *Rossiter* v. *Miller*, 3 App. Cas. 1124; and see *infra*, § 508.

by the mere grant of some indulgence by the acceptor to the proposer: as where the proposal involved the payment on a particular day, and the acceptance added that if the payment was not so made, interest at 10 per cent. must also be paid.[1] It would seem that this could only apply where the time of payment would be of the essence of the contract, as in any other case it would seem that such a stipulation was not an indulgence. granted by acceptor.

§ 295. The acceptance must be communicated in some way by the accepting party to the other:[2] a mere mental acceptance will not do. "The plea is not good," said Brian C.J., "without showing that he certified the other of his pleasure, for it is common learning that the intent of a man is not triable, for even the Devil does not know the intent of a man."[3] Acceptance must be communicated to proposer;

§ 296. But upon this doctrine a remarkable exception has been engrafted by decision, viz., that where the communications are by post, the delivery of the acceptance to the post office makes a concluded and absolute contract, though it may never reach the hands of the other party. This conclusion has been based on various suggestions; as that the person making the offer has assented to treating the posting of the acceptance as a sufficient communication to him; that the post office is the agent of the proposer to receive the acceptance; that the balance of convenience is in favour of the doctrine; that the acceptor has done all that is requisite on his part, and is not answerable for the casualties of the post office; that the case is governed by analogy with the law as to notice of dishonour of a bill. Whether any of these suggested reasons are satisfactory is a question now open for discussion only in the House of or to post office.

[1] *Harris' case*, L. R. 7 Ch. 587.

[2] *Re Consort, &c. Mines, Ex parte Stark*, [1897] 1 Ch. at p. 591.

[3] Year Book, 17 Edw. IV. T. Pasch. 2, referred to by Lord Blackburn in *Brogden* v. *Metropolitan Railway Co.*, 2 App. Cas. 692, and by Lord Macnaghten in *Keighley, Maxsted & Co.* v. *Durant*, [1901] A. C. at p. 247.

Lords; for in the *Household Fire Insurance Co.* v. *Grant*,[1] the majority of the Court of Appeal upheld the conclusion above stated, Lord Bramwell dissenting in a vigorous judgment. The current of authorities before this decision cited in the note hereto was not uniform.[2] In *Heatho n* v. *Fraser*,[3] Lord Herschell said that he "should prefer to state the rule thus: Where the circumstances are such that it must have been within the contemplation of the parties that, according to the ordinary usages of mankind, the post might be used as a means of communicating the acceptance of an offer, the acceptance is complete as soon as it is posted."

Without unreasonable delay.

§ 297. The acceptance, moreover, must be without unreasonable delay. "When I offer anything to a person," said Lord Cranworth,[4] "what I mean is, I will do that if you choose to assent to it; meaning, although it is not so expressed, if you choose to assent to it within a reasonable time." This principle is illustrated by the case of *Williams* v. *Williams*,[5] of which the circumstances were, that in 1827 A. wrote to B. that he had credited B.'s account with 220*l.* in consideration of a contract by B. to convey certain houses. The abstract was delivered; but there was no acceptance in writing by B., who however five years afterwards filed his bill against A. for specific performance. It appeared that in 1827 A. had abandoned the treaty, and that in 1829 both parties considered it as broken off, but nevertheless that B. had in the meantime had

Illustrations.

[1] L. R. 4 Ex. Div. 216.

[2] *Adams* v. *Lindsell*, 1 B. & A. 681; *Stocken* v. *Collin*, 7 M. & W. 515; *Dunlop* v. *Higgins*, 1 H. L. C. 381; *Duncan* v. *Topham*, 8 C. B. 225; *Hebb's case*, L. R. 4 Eq. 9; *British, &c. Telegraph Co.* v. *Colson*, L. R. 6 Ex. 108; *Townsend's case*, L. R. 13 Eq. 148; *Wade's case*, L. R. 15 Eq. 18; *Byrne* v. *Van Tienhoven*, 5 C. P. D. 344.

[3] [1892] 2 Ch. at p. 33. In accordance with the rule as stated by Lord Herschell, an option to purchase may be validly exercised at the time when notice of its exercise is posted. *Bruner* v. *Moore*, [1904] 1 Ch. 305, 316; 73 L. J. Ch. 377.

[4] In *Meynell* v. *Surtees*, 1 Jur. N. S. 737; 3 W. R. 535.

[5] 17 Peav. 213

the benefit of the credit of 220*l*. The Court dismissed the bill, on the ground that an offer, to convert it into a contract, must be accepted and acted on within a reasonable space of time. In another case, A. applied to a company for shares on the 8th of June, and an allotment was made on the following 23rd of November, and it was held that the acceptance of the proposal to take shares came too late to bind the proposer.[1]

What determines the proposal.

§ 298. The proposal, before conversion into a contract by acceptance, may be determined in two ways, by the withdrawal of the person making the offer, or by the refusal of the person to whom it is made.

1. Withdrawal.

§ 299. First, it may be determined by the proposer by withdrawal before acceptance,[2] because the proposal by itself creates no mutuality and no obligation; so that where a person made an offer for a farm, which the owner intended to accept, but did not do so bindingly, and the proposer subsequently withdrew his offer, it was held that he could do so, and that there was no contract.[3] And so also where A. by writing applied to a company for shares "which he thereby accepted" and paid the deposit, but before allotment withdrew his application and unsuccessfully required the return of his deposit, and an allotment was made to him, he was held not to be a contributory.[4] And where a railway company gave notice to treat for part of a manufactory, which was met by a counter notice requiring them to take the whole, and the company then gave notice of their intention to apply to the

[1] *Re Imperial Victoria Hotel Co., Limited* v. *Montefiore*, L. R. 1 Ex. 109.

Thornbury v. *Bevill*, 1 Y. & C. C. C. 554. See also *Maguell* v. *Sutton*, 1 Jur. N. S. 737; 3 W. R. 535; *Hoggett* v. *Garnett*, 6 W. R. 387; and as to the right of a vendor at an auction to withdraw the property at any time before the hammer falls: *Warlow* v. *Harrison*, 28 L. J. Q. B. 18.

[2] *Warner* v. *Willington*, 3 Drew. 523. Cf. *Rumcaus* v. *Robins*, 4 De G. J. & S. 88.

[3] *Ex parte Grahame*, 30 L. J. Bank. 42.

Board of Trade for the appointment of a surveyor to determine the value of the premises required by the notice to treat, and of the further lands which the owner could lawfully require, and had required the company to take, it was held that the company might still withdraw their notice to treat.[1]

Notwithstanding time for acceptance prescribed.

§ 300. This right to retract is not affected by the fact that the offer itself specifies a time within which the acceptance is to be made; so that where A. offered to sell a house to B., and gave B. six weeks for a definite answer, A. was held entitled to withdraw his offer before the expiration of that period.[2]

Express notice of withdrawal not needful

§ 301. It is necessary to the effectual determination of a proposal by withdrawal before acceptance that some notice of withdrawal or retraction should be given to or reach the person to whom the proposal was made, and the mere posting of a letter is not sufficient.[3] For a person who has made an offer must be considered as continuously making it, until he has brought to the knowledge of the person to whom it was made that it is withdrawn.[4] But it is not needful that the notice should be formal or express.[5] "It may well be that the one man is bound in some way or other to let the other man know that his mind with regard to the offer has been changed;"[6] but as soon as the person to whom the offer was made in fact has this knowledge, as, for instance, by knowing that the proposer has sold the property to a third person, he will be taken to have sufficient notice of withdrawal, and

[1] *Grierson* v. *Cheshire Lines Committee*, L. R. 19 Eq. 83; cf. *supra*, § 133, and cases there cited.

[2] *Routledge* v. *Grant*, 4 Bing. 653; *Cooke* v. *Oxley*, 3 T. R. 653. Cf. *Dickenson* v. *Dodds*, 2 Ch. D. 463; *Bristol, &c. Bread Co.* v. *Maggs*, 44 Ch. D. 616.

Byrne v. *Van Tienhoven*, 5 C. P. D. 344; *Stevenson* v. *McLean*, 5 Q. B. D. 346.

[4] *Per* Lord Herschell in *Boat* v. *Fraser*, [1892] 2 Ch. at p. 34.

[5] *Dickenson* v. *Dodds*, 2 Ch. D. 463, 474.

[6] *Per* James L.J., 2 Ch. D. at 472. Cf. *Stevenson* v. *McLean*, 5 Q. B. D. 346; *Guillamore* v. *Peacocke*, 12 Ir. Ch. R. at p. 360.

he cannot afterwards by accepting the offer make a binding contract.[1]

Notice under right of pre-emption

§ 302. Where however the communication is not a mere offer to contract but a notice given in pursuance of a right of pre-emption, the notice may, according to the terms of the instrument giving this pre-emption, be incapable of being withdrawn.[2]

Unauthorized acceptance prevents withdrawal

§ 303. In *Bolton Partners* v. *Lambert*[3] the Court of Appeal held that an unauthorized acceptance by a stranger in the name of the person to whom a proposal was made prevented the person making the proposal from withdrawing it. The case appears to be a remarkable one; and it raises such important questions with regard to the true nature of a contract that some observations are made upon it in an Additional Note at the end of this volume, to which the reader is referred.

It has been held that the doctrine of the case above discussed does not apply where the ratification does not come till after the time fixed by the contract for performance has arrived.[4]

B. Refusal

§ 304. In the second place, the refusal of the person to whom the proposal is made puts an end to it; and it will not be revived by a subsequent tender of acceptance.[5]

Variations of the proposal

§ 305. As it is competent to the proposer to recall his proposal at any time before acceptance, so also he

[1] *Dickenson* v. *Dodds*, 2 Ch. D. 463, 474.

See *Honfray* v. *Fotheryill*, L. R. 1 Eq. 567.

41 Ch. D. 295; followed in *Re Portuguese Copper Mines, Limited, Ex parte Badman*, 45 Ch. D. 46; but distinguished in *Dibbins* v. *Dibbins*, [1896] 2 Ch. 348, 351, where there was an option which had to be finally exercised, if at all, within a limited time. See, too, *Athy Guardians* v. *Murphy*, [1896] 1 I. R. at pp. 74, 75.

[4] *Managers of Metropolitan Asylums* v. *Kingham*, 6 Times L. R. 217.

[5] *Hyde* v. *Wrench*, 3 Beav. 334. The decision in *Hodgson* v. *Hutchinson*, 3 Vin. Abr. 522, pl. 31, which inferred an acceptance from acts after an explicit refusal, probably cannot be maintained on this point.

may vary it by the introduction of any new term into it. And as the person to whom the proposal is made may of course offer to accept the terms proposed with any variation or addition, it follows that each party may continue to add fresh stipulations to the proposed contract, until the terms proposed by one side have been definitely accepted by the other.[1] Therefore where the owner of an estate made a proposal requiring amongst other things the payment of 1,000*l.* by way of deposit, and the purchaser objected to it, and before he accepted the terms, the owner required it to be paid and the contract to be signed before a given day, or the treaty to be at an end, and this was not complied with, but a subsequent offer was made to sign the contract and pay the deposit: the Court held that there was no contract.[2]

Written signed by one party sufficient.

§ 306. The Statute of Frauds requiring that the memorandum of agreement shall be signed by the party to be charged therewith and not requiring the signature of both parties, it follows that where there is a writing under the hand of the defendant expressing the contract, there is no need to prove an acceptance in writing by the plaintiff of the terms of that contract, and the institution of the action is a sufficient acceptance.[3] If that writing leaves any term open to the election of the other party, the acceptance must of course be in writing to satisfy the statute.[4]

Plaintiff's accept ance need not be in writing.

§ 307. But the cases have gone further, and it is now well settled that where the writing is a memorandum expressing not a contract but a mere proposal, yet there the acceptance of this proposal (though it seems essential to convert the proposal into a contract) need not be in writing.

[1] *Honeyman* v. *Marryat*, 21 Beav. 14, affirmed in D. P. C. H. L. 12 C. 112. Distinguish *Jolliffe* v. *Blandeny*, 18 W. R. 784.

S. C.

[2] *Bean* v. *Ayerst*, 6 Mod. 310.

[3] Ibid.

This was so decided by Kindersley V C., in a case where he observed on the want of previous authority distinctly to establish the point,[1] and his decision was subsequently followed by the Courts of Exchequer and Exchequer Chamber.[2] In the old case of *Chapman* v. *Upcot*,[3] where there was first an acceptance by the plaintiff by parol, and subsequently a subscription by the plaintiff, the parol acceptance appears to have been the ground of the decision that there was a binding contract. Where a written and signed memorandum contains two alternative proposals, parol acceptance of one of them may suffice to constitute a contract enforceable by the acceptor.[4]

Acceptance need not be in writing.

§ 308. When it has been once established that the acceptance need not be in writing, it of course follows that it may be by acts as well as words. Thus, for example, where an uncle of a young man sent proposals to the friends of a lady, to which no answer was returned, but the young man was admitted as a suitor, and the marriage ensued, it was held by Lord Nottingham to amount to a complete contract, which ought to be performed on all sides.[5] It is an every-day occurrence to infer assent from acts as well as from words.

Defendant's acceptance must be in writing.

§ 309. Of course no action can be brought against any one on a parol acceptance of a proposal relative to the sale of realty.

Time at which the contract is constituted.

§ 310. In contracts constituted by proposal and acceptance, it is obvious that the question may arise, at what time the treaty was converted into a contract.[7]

[1] *Warner* v. *Willington*, 3 Drew. 523.

[2] *Smith* v. *Neale*, 2 C. B. N. S. 67; *Bruce* v. *Pocksley*, L. R. 1 Ex. 342. See also *Mozley* v. *Tinkler*, 1 C. M. & R. 692; *Liverpool Borough Bank* v. *Eccles*, 1 H. & N. 139; and *Tilley* v. *Hounsell*, [1896] 2 Ch. at p. 749.

[3] 5 Vin. Abr. 527, pl. 17; cf. *Pulsart* v. *Scott*, 1 R. & My. 394.

[4] *Love* v. *Keller*, [1901] 1 Ch. 543.

[5] *Williams* v. *Williams*, L. R. 2 Ch. 294.

[6] *Parker* v. *Sowerby*, Finch, 156.

[7] Cf. on the point, *Dickenson* v. *Dodds*, 2 Ch. D. 463; *post*, § 391.

Posting letter.

In all cases in which the contract is perfected by the posting of a letter declaring the acceptance, the contract dates from the posting, and not from the receipt of the letter of acceptance.[1]

Where there is an agent for proposer.

§ **311**. In case of there being an agent for the proposer authorized in that behalf, the communication of the acceptance to him completes the contract, though the agent may fail to make known the acceptance to his principal.[2]

Representation and conduct.

§ **312**. One species of contract by proposal and acceptance is constituted by a promise or representation made by one person, and acts done by another person on the faith of such promise or representation. "A representation," said Lord Cottenham,[3] "made by one party for the purpose of influencing the conduct of the other party, and acted on by him, will in general be sufficient to entitle him to the assistance of this Court for the purpose of realizing such representation."

Representation of things past.

§ **313**. Representations are of two kinds: the one of things past or present, the other of things future: the one of things done or existing, the other of things to be done. With regard to the former class, whenever a representation as to something alleged as a then existing fact, which representation is not true, has been made by a person who knows it to be untrue, or does not know it to be true,[4] to another person in order to induce him to an act, and that act has been thereupon done by the second person to his prejudice, the person making the representation will not be allowed by the Court afterwards to turn round and deny the alleged fact.

[1] *Potter* v. *Sanders*, 6 Ha. 1; *Byrne* v. *Van Tienhoven*, 5 C. P. D. 344.

[2] *Wright* v. *Bigg*, 15 Beav. 592.

[3] In *Hammersley* v. *De Biel*, 12 Cl. & F. 62, n.; cf. *Aylieffe* v. *Tracey*, 2 P. Wms. 64, which shows that where the act was not done in reliance on the representation, no contract arises.

[4] *Per* Grant M.R. in *Arnslie* v. *Medlycott*, 9 Ves. 21.

"It shall be," said Lord Mansfield C.J.,[1] "as represented to be." Thus for example, where one person represented to another, on a treaty for marriage with his daughter, that a certain demand was not existing, he was afterwards restrained by the Court from proceeding to recover the demand:[2] and where a father represented to a future husband of his daughter that she was entitled after the death of her parents to 10,000*l.*, and she was in fact only entitled to about half that amount, the balance was recovered from the father's estate.[3] But in these cases, the Court acts merely on the principle of preventing fraud, and not at all on contract;[4] and they therefore do not properly come in for discussion here. Illustration.

§ **314**. But with regard to representations of something future, and within the power of the party making the statement, the case is different. On the one hand, the doctrine of estoppel by representation has no application to such cases;[5] and on the other hand such a representation, made for a particular purpose by one person, and followed by conduct in pursuance of it by the other, constitutes a true and proper contract. "There is no middle term," said Lord Cranworth,[6] "no *tertium quid* between a representation so made to be effective for such a purpose and a contract; they are identical." In one case an uncle represented that he Representation of things future.

[1] In *Montefiori* v. *Montefiori*, 1 Wm. Black. 364.

[2] *Neville* v. *Wilkinson*, 1 Bro. C. C. 543. See also *Gale* v. *Lindo*, 1 Vern. 475; *Scott* v. *Scott*, 1 Cox, 366; and at Law, *Montefiori* v. *Montefiori*, 1 Wm. Bl. 363; *Pickard* v. *Sears*, 6 A. & E. 469; *Gregg* v. *Wells*, 10 A. & E. 90; *Freeman* v. *Cooke*, 2 Ex. 654; *Howard* v. *Hudson*, 2 El. & Bl. 1; *Foster* v. *Mentor Life Assurance Co.*, 3 El. & Bl. 48.

Bold v. *Hutchinson*, 20 Beav. 250; affirmed 5 De G. M. & G. 558, on different grounds. See also *Jameson* v. *Stein*, 21 Beav. 5.

[4] *Per* Lord Cranworth L.J. in *Money* v. *Jordan*, 2 De G. M. & G. 332.

[5] *Maddison* v. *Alderson*, 8 App. Cas. 467, 492. See, too, *George Whitechurch, Limited* v. *Cavanagh*, [1902] A. C. 117, p. 130.

[6] In *Maunsell* v. *White*, 4 H. L. C. 1056.

would buy a warehouse for his nephew, and at the uncle's instance the nephew entered into a binding contract to purchase the warehouse: it was there held that the uncle's estate was bound to find the purchase-money.[1]

Representation must be clear and absolute.

§ 315. In order to enable the Court to give relief on the ground of contract to a person who has acted on the faith of another's statements, the representation or promise on which he relies must be clear and absolute. Therefore where a father, after declining to enter into a settlement, added that he should allow his daughter the interest of 2,000*l.*, and that if she married he *might* bind himself to do it, and pay the principal at his decease, it was held not to be an absolute contract:[2] and so where the father of an intended husband made only a promise to recognise his son in common with the rest of his family, but the promise was loose and vague, and defined no sum, Stuart V.C. dismissed a bill filed by the son, but under the circumstances directed the costs to be paid out of the father's estate.[3] But, on the other hand, where on the treaty for a marriage the father of the intended wife wrote to the intended husband, "At my decease she [the intended wife] shall be entitled to her share in whatever property I may die possessed of," Lord Romilly M.R. held that this amounted to a contract binding on the father and his estate, and was not too vague to be enforced.[4] "When," said his Lordship,[5] "a man makes a solemn engagement upon an important occasion, such as the marriage of his

[1] *Skidmore* v. *Bradford*, L. R. 8 Eq. 134; cf. *Ridley* v. *Ridley*, 34 Beav. 478.

[2] *Randall* v. *Morgan*, 12 Ves. 67. See the observations on this case of Lord St. Leonards in *Maunsell* v. *White*, 1 Jon. & L. 567.

[3] *Kay* v. *Crook*, 3 Sm. & G. 407.

[4] *Lacer* v. *Fiddler*, 32 Beav. 1. Distinguish *Re Fickus*, *Farina* v. *Fickus*, [1900] 1 Ch. 331, where the intended wife's father had written to the intended husband, "She will have *a share* of what I leave after the death of her mother." See, too, *Coverdale* v. *Eastwood*, L. R. 15 Eq. 121.

[5] 32 Beav. at p. 12.

daughter, he is bound by the promise he then makes. If he induce a person to act upon a particular promise with a particular view which affects the interests in life of his own children and of the persons who become united to them, this Court will not permit him afterwards to forego his own words, and say that he was not bound by what he then promised. It is upon these principles that the Court has acted in all such cases; it exercises its jurisdiction for the enforcement of the truth, and makes a man's acts square with his words, by compelling him to perform what he has undertaken."

Where the engagement is merely honorary.

§ 316. Where the representation is merely of what the person intends to do,[1] or the promise is one for the performance of which the person making it refuses to contract, and insists that the recipient shall rely on his honour, the engagement is of a merely honorary nature, and therefore not enforceable by the Court.[2] In one case the guardians of a young lady, who was a minor, objected to her marriage until a suitable settlement should be made on behalf of her intended husband; his uncle, from whom he had expectations, having been previously consulted on the matter, was informed of this resolution; in reply to which he wrote to his nephew, "My sentiments respecting you continue unalterable: however, I shall never settle any part of my property out of my power so long as I exist. My will has been made for some time, and I am confident that I shall never alter it to your disadvantage. I repeat that my Tipperary estate will come to you at my death, unless some unforeseen occurrence should take place." The letter further alleged that, as he had never settled anything on any of his nephews, his doing so in this case would cause jealousy in the family: this letter the

Maunsell v. White.

[1] *E.g.*, *Re Fickus, Farina* v. *Fickus*, [1900] 1 Ch. 331.

[2] Cf. *Lord Walpole* v. *Lord Orford*, 3 Ves. 402; *infra*, § 596.

writer desired might be communicated to the young lady's guardians. It was held that the intention of the uncle was not to settle his property, and that therefore the letter could not be treated as a contract.[1]

Money v. *Jordan.*

§ 317. The same principle governed the decision of the case of *Money* v. *Jordan*.[2] The facts were, shortly, that B. was under a bond for the payment of a sum of money to A.; that B. being about to marry, A. said she should never distress him about the bond, that she had given it up, and would never enforce it; but on being requested to give up the bond, she declined to do so, saying that she would be trusted, and that B. might rely on her word. B. married, and A. subsequently having put the bond in suit, B. sought the interference of the Court by injunction. The representations in question were held to be binding by Lord Romilly M.R. in the first instance, by Knight Bruce L.J. on appeal, and by Lord St. Leonards in the House of Lords, whilst the contrary was ultimately decided by a majority in the House, consisting of Lords Cranworth and Brougham. The question was in a considerable part one of evidence. But Lords Cranworth and St. Leonards differed as to the effect of a representation of intention, the latter holding such to be binding, and the former not.[3]

Other illustrations.

§ 318. On the same principle, where a settlement was not ready at the time of the marriage, and the lady married on the husband's engagement in honour that she should have the same advantage of the agreement

[1] *Maunsell* v. *White*, 1 Jon. & L. 539; affirmed 4 H. L. C. 1039.

[2] 15 Beav. 372; 2 De G. M. & G. 318; 5 H. L. C. 185, *sub nom. Jorden* v. *Money*. And see *Chadwick* v. *Manning*, [1896] A. C. at pp. 238, 239.

With regard to the force of an expression of intention, see, besides the cases above stated, *Norton* v. *Wood*, 1 R. & My. 178; *Cross* v. *Sprigg*, 1 Ha. 553; *Lawes* v. *Fiddes*, 32 Beav. 1; *Coverdale* v. *Eastwood*, L. R. 15 Eq. 121; *Loffus* v. *Maw*, 3 Giff. 592, overruled in *Maddison* v. *Alderson*, 8 App. Cas. 467; *George Whitechurch, Limited* v. *Cavanagh*, [1902] A. C. at p. 139 (promises *de futuro*); and *infra*, §§ 328, 329.

as if it were in writing and duly executed, the Court refused to interfere, as the engagement was merely honorary.[1] And again where letters were sent containing what only amounted to a general assurance that, if a tenant acted to the satisfaction of his landlord, he would deal honourably and handsomely with him in regard to renewing his lease, this assurance was discriminated from a matter of contract, and was not enforced by the Court.[2]

Morehouse v. Colvin.

§ 319. The circumstances of the case of *Morehouse* v. *Colvin*[3] were these. A testator, who had by his will bequeathed 12,500*l.* to his daughter, wrote a letter to an old friend of his in India, to whom the young lady was consigned, and therein stated that, in case of her marrying with his approbation, her husband should have 2,000*l.* on the marriage, and continued, "nor will that be all: she is and shall be noticed in my will; but to what further amount I cannot precisely say, owing to the present reduced and reducing state of interest, which puts it out of my power to determine at present what I may have to dispose of." The substance of these terms was communicated to the intended husband: the testator revoked his will, and made another, omitting the legacy, and giving his daughter a residuary and contingent interest: Lord Romilly M.R., and afterwards the Court of Appeal in Chancery, held that there was no contract which could be enforced.

Maddison v. Alderson.

§ 320. Again, in *Maddison* v. *Alderson*,[4] the appellant, a housekeeper, had been long in the service of a farmer, and proposed to leave him; he told her of expectations he had from an uncle, and that the uncle wished her to stay with him as long as he lived, and to make all right by leaving her the farm, which he (the farmer) promised to do if she lived with him;

[1] *Viscountess Montacute* v. *Maxwell*, 1 P. Wms. 618.

[2] *Price* v. *Assheton*, 1 Y. & C. Ex. 441.

[3] 15 Beav. 311.

[4] 8 App. Cas. 467.

the appellant remained with the farmer till his death. The House of Lords held the case was one of conduct induced by promises and not of definite contract; that there was no contract on her part to remain with her master, and that he was at liberty to have dismissed her at any time.

Subsequent settlement silent as to promise.

§ **321**. Where, subsequently to representations of the sort which we have been considering, a settlement has been executed making a provision but taking no notice of the subject of the representations, a presumption arises that the settlement contains the whole contract, and this, if not rebutted, is of course a bar to any relief on the representations.[1]

Where the promise did not induce the marriage.

§ **322**. The same result more clearly follows where not only is there a settlement which is silent as to the promise, but where it appears that the marriage was determined on long before the promise. There it is evident that the promise did not induce the marriage.[2]

Cases where representation binding.

§ **323**. We will now proceed to consider the cases in which a representation, followed by conduct of the party to whom it is made, has been held to be binding.

In cases of marriage contracts.

§ **324**. These cases have for the most part turned upon representations made in the course of marriage treaties, followed by marriage made on the faith of such representations,—a class of cases in which the Court is inclined to attach more than ordinary weight to the language of the one party, when it is calculated to convey a false impression to the other.[3]

Distinction between written and verbal proposal.

§ **325**. Where the proposal is in writing, the marriage and other acts are relied on only as evidence of acceptance; but where the proposal has been verbal, the acts must be relied on also as constituting a case of part-performance, for which purpose marriage alone is, from

[1] *Losley* v. *Heath*, 1 De G. F. & J. 489; *Sands* v. *Soden*, 31 L. J. Ch. 870; *Re Badcock*, 17 Ch. D. 361.

[2] *Goldicutt* v. *Townsend*, 28 Beav. 445.

[3] Per Lord St. Leonards in *Mettam* v. *White*, 1 Jon. & L. 563.

the words of the Statute of Frauds, not sufficient. The cases on part-performance in connection with such contracts,[1] and also of marriage in fraud of a parol contract,[2] are respectively considered elsewhere.

The principle long established

§ **326**. The principle of the cases now under discussion is established by several old decisions, to which it will be sufficient to refer[3] before considering the more recent cases.

Luders v. *Austey*

§ **327**. In *Luders* v. *Austey*,[4] a husband before marriage wrote a letter proposing a settlement of the lady's fortune, securing certain benefits to the children of the lady's first marriage: shortly afterwards the marriage took place, and Lord Loughborough held that the husband was bound by the letter, though bonds to execute a settlement had subsequently been entered into, also securing benefits, but different ones, to the same children. "There is no *locus pœnitentiæ*," said his Lordship, "in this case; and I should require a positive distinct dissent: and that could not be evidenced by anything but an actual settlement before marriage, varying from that."

Saunders v. *Cramer*

§ **328**. In *Saunders* v. *Cramer*,[5] a paper signed by a lady, expressing her intention of leaving her granddaughter a certain sum, to be secured by a bond, which offer was to be, and was in fact communicated to the intended husband of the young lady, and was followed by a marriage, was held a binding proposal. The mention of the bond went to show that it was intended to be binding on the party making it.

De Beil v. *Thomson*

§ **329**. In *De Beil* v. *Thomson*,[6] in written proposals made on the marriage treaty the father expressed that he "intended to leave his daughter a further sum of

[1] See *infra*, § 619.

[2] See *infra*, § 576.

[3] *Moore* v. *Hart*, 1 Vern. 110, 201; *Wankford* v. *Fotherley*, 2 Vern. 322; *Halfpenny* v. *Ballet*, 2 Vern. 373; *Cookes* v. *Mascall*, 2 Vern. 200.

[4] 4 Ves. 501; S. C. 5 Ves. 213; *Firet* v. *Firet*, 17 Ch. D. 385, n.

[5] 3 Dr. & War. 87.

[6] 3 Beav. 469.

10,000*l.* in his will, to be settled on her and her children, the disposition of which, supposing she had no children, to be prescribed by the will of her father." This was held to create an obligation. These proposals were made subject to revision; but it was held that that power was determined by their acceptance by the intended husband, and the marriage with the father's consent. This decision of Lord Langdale M.R. was affirmed by Lord Cottenham,[1] and afterwards by the House of Lords.[2]

Montgomery v. Reilly.

§ 330. In *Montgomery* v. *Reilly*,[3] the eldest son came into estates, subject to a jointure to his mother and portions to his brothers and sisters, and carried on a correspondence with a friend of the family with a view to the increase of these charges, and ordered the payment of the increased jointure and interest on the increased portions: on the faith of a representation made on the strength of these acts by the family friend, a daughter married: the interest on the increased portion was continued to be paid to the daughter, and the agent's accounts in which these payments were stated passed; and the eldest son took possession of some property under the arrangement with his brothers and sisters, to which he would not otherwise have been entitled. The House of Lords decided that there was a contract binding on the eldest brother and specifically enforced it.

Prole v. Soady.

§ 331. In *Prole* v. *Soady*,[4] the Court, notwithstanding a considerable conflict of evidence, came to the conclusion that, previously to and in contemplation of the marriage of the plaintiff's father and mother, the natural father of the lady had represented to the intended husband and to other persons that a certain

[1] 12 Cl. & Fin. 61, n.

[2] 12 Cl. & Fin. 46, *sub nom. Hammersley* v. *De Biel*. See, too, *Synge* v. *Synge*, [1894] 1 Q. B. at p. 469.

[3] 1 Bli. N. S. 364; S. C. 1 Dow, N. S. 62.

[4] 2 Giff. 1, compromised on appeal; *per* Malins V.C. in *Re Badcock*, 17 Ch. D. 365.

estate of his in Scotland and a sum of 105,000 sicca rupees were settled by him as a provision for his daughter and her children, and that the marriage was contracted in a confidence in that representation. It was part of the defendant's case that at the date of the marriage there was an existing testamentary settlement of the property in question in favour of the lady: but the Court held that such an instrument if it existed was made irrevocable by the representations of the father: and it gave the plaintiff relief on the ground of the representation made.

And in a later case the same Judge (Stuart V.C.) held that a gift made by a codicil in pursuance of a promise by an uncle to his niece, on the faith of which she altered her position in life and continued to act as his caretaker, became irrevocable by force of the promise and conduct.[1] But this case was overruled by *Maddison* v. *Alderson*.[2] *Loffus v. Maw.*

In *Coverdale* v. *Eastwood*[3] the contract was contained in letters, and the only serious question was one of construction. *Coverdale v. Eastwood.*

§ **332**. The representations need not be made by the persons most immediately interested in the marriage treaty. In one case a legatee on his marriage assigned part of his legacy to the trustees of his settlement, and covenanted to pay the amount by instalments. It was proved that the marriage was contracted, and the settlement made, on the faith of representations by the executor that the legacy was substantial and safe and would be paid though at a future time. The estate of the testator proving insufficient to pay the legacies, it was held that, by force of the representations, the estate of the executor was liable for the amount of the legacy.[4] Representations by stranger.

[1] *Loffus* v. *Maw*, 3 Giff. 592.

[2] 8 App. Cas. 467; *supra*, § 320.

[3] L. R. 15 Eq. 121.

[4] *Hutton* v. *Rossiter*, 7 De G. M. & G. 9.

Piggott v. Stratton.

§ **333**. The doctrine in question seems to have been carried to its fullest limits in the case of *Piggott* v. *Stratton*.[1] The defendant Stratton was lessee for a long term of plots A, B, and C. The lease contained a covenant that any new houses should be detached and separated from one another by an open space of not less than thirty feet. Plot C lay between B and the sea. The defendant Harbour, under whom the plaintiff claimed as assign, negotiated with Stratton for an under-lease of part of B, and Stratton in answer to a question stated that he could not build closer than thirty feet because the lease forbad him, and Harbour swore that thereupon he was induced to take the land, and further that in order to satisfy himself he asked for and was shown a draft of the lease. An under-lease was executed containing covenants referring to the original lease. The original lease was surrendered, and a new lease granted with different covenants, and Stratton the lessee proposed to build so as not to leave the thirty feet space. Lord Hatherley (then Wood V.C.) held that the covenants in the under-lease did not restrain this conduct, but that the representation did. He held it equivalent to a representation that the lease was an instrument by which the property was secured to the purchaser in a course of enjoyment, and that to permit him to alter that course would be to permit him to derogate from his own grant. Lord Campbell and Turner L.J. held that the defendant was bound both by his covenants in his under-lease and by his representation. Knight Bruce L.J. held that he was bound by his covenants, but declined to give any opinion on the other point. It will not escape notice that in this case the only representation made was one of an existing fact, viz., the existence of the lease, that there was no statement that the state of things should continue, or that the lease

[1] Johns. 341; S. C. 1 De G. F. & J. 33.

should not be surrendered or allowed to drop, and that to infer from the existence of a lease that it should never be surrendered, seems, in the absence of express contract, a somewhat strong inference. The case is, however, one of the highest authority.[1]

[1] See the references to this case made by Lord Macnaghten in *Spicer* v. *Martin*, 14 App. Cas. at pp. 22, 23; by Lindley L.J., S. C. in C. A., 31 Ch. D. at p. 12; and by Kay L.J. in *Lear* v. *Beauvais*, [1894] 3 Ch. at p. 110.

CHAPTER III.

INCOMPLETENESS OF THE CONTRACT.

Contract must be certain, fair, and just.

§ 334. "Nothing is more established in this Court," said Lord Hardwicke,[1] speaking of contracts which the Court will enforce, "than that every agreement of this kind ought to be certain, fair, and just in all its parts. If any of those ingredients are wanting in the case, this Court will not decree a specific performance." "I lay it down as a general proposition," said Lord Loughborough (afterwards Earl of Rosslyn),[2] "to which I know no limitation, that all agreements, in order to be executed in this Court, must be certain and defined: secondly, they must be equal and fair; for this Court, unless they are fair, will not execute them: and thirdly, they must be proved in such manner as the law requires."

Where part performance.

§ 335. In regard to objections founded on the want of any of these qualities in the contract, or on the incapacity of the Court to perform the contract, or its illegality, the Court is, from obvious motives of justice, somewhat unwilling to entertain the objection, when it is made after part-performance from which the defendant has derived benefits, and the plaintiff cannot be fully recompensed except by the performance of the contract *in specie*.[3] When a contract has been partly executed by possession having been taken under it, the Court, it has been said, "will strain its power to enforce a complete performance."[4]

[1] In *Buxton* v. *Lister*, 3 Atk. 386. See *infra*, § 596.

[2] In *Lord Walpole* v. *Lord Orford*, 3 Ves. 420. See, accordingly, *Underwood* v. *Hitchcox*, 1 Ves. Sen. 279; *Franks* v. *Martin*, 1 Eden, 299.

[3] See §§ 105, 480.

[4] *Parke* v. *Tassell*, 2 De G. & J. 559, 571.

Completeness, fairness, and certainty how to be explained.

§ **336**. The qualities of completeness, certainty, and fairness, which will be now considered, will in great part be best explained by showing cases in which they have been considered as being wanting. The qualities of completeness and certainty are not perhaps truly separable: but under the former those cases will be rather considered where there is the absolute want of some term in the contract; under the latter head of certainty, those where it is not the entire want of the term, but the want of sufficient exactitude in it, which has furnished a defence to a specific performance.[1]

Incompleteness may be in contract or evidence.

§ **337**. It is evident that incompleteness may be in the contract itself—in which case there is properly speaking no contract, or in the evidence—in which case there is no sufficient memorandum. But nevertheless it seems not inconvenient to consider these defects together.

Completeness to be ascertained at commencement of proceedings.

§ **338**. The time at which the completeness of the contract is to be ascertained was the filing of the bill, and is now the commencement of the action: so that it was not sufficient for the purpose of obtaining an immediate decree, to prove that the consent of a tenant for life, which was essential to the contract, was given before the hearing.[2] It is an obvious principle of justice, that the adoption of a contract by a third party shall not so relate back as to subject a party to legal proceedings in respect of its non-performance, the non-performance having at the time been justifiable.[3]

Exceptions.

1. When incompleteness arises

§ **339**. To this principle there are some exceptions, or apparent exceptions, which it is well briefly to notice. When the contract is incomplete through the default of the defendant, and the incompleteness is one which can

[1] See also the cases stated *infra*, Part III. chap. xi.

[2] *Adams* v. *Brooke*, 1 Y. & C. C. C. 627. See also *Shardlow* v. *Cotterell*, 20 Ch. D. 90; reversing S. C. 18 Ch. D. 280.

[3] *Right* v. *Cuthell*, 5 East, 491. *Doe* d. *Mann* v. *Walters*, 10 B. & C. 626; *Doe* d. *Lyster* v. *Goldwin*, 2 Q. B. 143.

be remedied, the Court will not refuse its aid: thus, where a contract had been entered into for granting an annuity for three lives to be named, and the consideration had been paid, but through the defendant's refusing to proceed the lives had not been named, the plaintiff was allowed to perfect his contract by nominating three lives who were in being at the time of the contract.[1] So where the defendant agreed to build a house on the plaintiff's land and the plaintiff agreed thereupon to grant a lease which the defendant agreed to accept; and the defendant pulled down the old house but neglected to build the new one: the Court held that the contract to accept a lease gave it jurisdiction, that damages could be awarded under Lord Cairns' Act for the non-performance of the contract to build, and that this condition being thus satisfied the plaintiff could have performance of the defendant's contract to accept a lease.[2] ii. From default of defendant.

§ 340. An action may be maintained on a contract where, though some term be not ascertained, the Court has the means of ascertaining it, on the principle of the maxim *id certum est quod certum reddi potest*.[3] Thus, in a contract for the sale of lands under the Lands Clauses Consolidation Act, in which the sum was not ascertained, the Court decreed the defendants to issue their warrant to the Sheriff to summon a jury to settle the compensation:[4] and the same principle is illustrated by the cases on the requisite completeness of the subject-matter and price.[5] ii. Or may be made good from the contract itself.

§ 341. The necessary completeness of the contract Completeness to

[1] *Pritchard* v. *Overy*, 1 J. & W. 396; *Lord Kensington* v. *Phillips*, 3 Dow. 61.

[2] *Soames* v. *Edge*, Johns. 669; *Middleton* v. *Greenwood*, 2 De G. J. & S. 142. Distinguish *Norris* v. *Jackson*, 1 J. & H. 319.

[3] *Pickles* v. *Sutcliffe* (incorporation of conditions of sale), [1902] W. N. 200.

[4] *Walker* v. *Eastern Counties Railway Co.*, 6 Ha. 594. See also *Owen* v. *Thomas*, 3 My. & K. 353; *Munro* v. *Taylor*, 8 Ha. 51.

[5] *Infra*, §§ 345, 353.

How considered.

may be considered in respect of (i.) the subject-matter, (ii.) the parties to the contract, (iii.) the price, and (iv.) the other terms.

i. As to subject-matter.

§ **342**. (i.) Every valid contract must contain a description of the subject-matter: but it is not necessary that it should be so described as to admit of no doubt what it is: for the identity of the actual thing and the thing described may be shown by extrinsic evidence. This flows from the very necessity of the case; for all actual things, except the contract itself, being outside of and beyond the contract, the connection between the words expressing the contract and things outside it must be established by something other than the contract itself, that is, by extrinsic evidence:[1] the same rule is admitted, and from the like necessity, with regard both to persons and things mentioned in wills;[2] and in the cases of contracts within both the fourth and the seventeenth sections of the Statute of Frauds, parol evidence as to identity is admissible.[3] Thus, for instance, the expression "Mr. Ogilvie's house" was held sufficient, and extrinsic evidence was admitted to show what house it referred to.[4] In another case a subject-matter described as "the mill property including cottages in Esher village" was held capable of identification by parol evidence.[5] The expressions "this place"[6] and "the lease"[7] have been held sufficient descriptions of the thing sold: and "your word" has

Illustrations.

[1] As to extrinsic evidence—note that although, where words in a written contract have a fixed meaning, parol evidence is not admissible to show that the parties meant something different from what they have said, still, where the words used are susceptible of more than one meaning, extrinsic evidence is admissible to show what the facts were which the parties had in their minds. *Bank of New Zealand* v. *Simpson*, [1900] A. C. 182, 189.

[2] See *per* Lord Cranworth (then Rolfe B.) in *Clayton* v. *Lord Nugent*, 13 M. & W. 207.

[3] *Sarl* v. *Bourdillon*, 1 C. B. N. S. 188.

[4] *Ogilvie* v. *Foljambe*, 3 Mer. 53.

[5] *McMurray* v. *Spicer*, L. R. 5 Eq. 527.

[6] *Waldron* v. *Jacob*, L. R. 5 Eq. 131.

[7] *Horsey* v. *Graham*, L. R. 5 C. P. 9.

been explained by parol evidence of a previous conversation.[1] So where a contract referred to another writing, parol evidence of the identity of a certain writing with that referred to was admitted;[2] and in other cases parol evidence was admitted to show the meaning of "50*l.* more of premium" and "the profit rent of the present tenant,"[3] and to identify "twenty-four acres of land, freehold, ... at Totmonslow in the parish of Draycott."[4] A general description of the subject-matter is sufficient, as *e.g.* "the Bank End estate," although the contract itself may provide for the parcels being subsequently defined.[5]

Pleading.

§ **343**. Where it is necessary to call in extrinsic evidence, the connection of the subject-matter of the contract, and the thing in respect of which specific performance is sought, must be pleaded and supported by sufficient evidence.[6]

What definiteness required.

§ **344**. It is, however, essential that the description of the subject-matter should be so definite, as that it may be known with certainty what the purchaser imagined himself to be contracting for,[7] and that the Court may be able to ascertain what it is.[8] And so in a case where there was a contract for the letting of "coals, etc.," the statement of the subject-matter was thought by Knight Bruce L.J. insufficient, and specific performance was refused on that amongst other grounds.[9]

[1] *Macdonald* v. *Longbottom*, 1 El. & El. 977; *Shardlow* v. *Cotterell*, 20 Ch. D. 90.

[2] *Climan* v. *Cooke*, 1 Sch. & Lef. 21, 23. See *infra*, § 539.

[3] *Skinner* v. *M'Donall*, 2 De G. & Sm. 265.

[4] *Plant* v. *Bourne* [1897] 2 Ch. 281. See, too, *North* v. *Percival*, [1898] 2 Ch. 128, where the subject-matter of sale was "thirty-six acres of land," defined by boundaries on three sides, but not on the fourth; and cf. *Markham and Darter's ca* , [1899] 1 Ch. at p. 129.

[5] *Haywood* v. *Cope*, 25 Beav. 140. Cf. *Gordon-Cumming* v. *Houldsworth*, [1910] A. C. 537.

[6] *Price* v. *Griffith*, 1 De G. M. & G. 80.

[7] *Stewart* v. *Alliston*, 1 Mer. 26, 33.

[8] *Kennedy* v. *Lee*, 3 Mer. 441, 451; *per* Lord Eldon in *Daniels* v. *Davison*, 16 Ves. 250.

[9] *Price* v. *Griffith*, 1 De G. M. &

Where subject-matter ascertainable though not ascertained.

§ **345**. With regard to the description of the subject-matter, the maxim *id certum est quod certum reddi potest* applies. Thus, where the memorandum of the contract contained no specific description of the property sold, but referred to the deeds as being in the possession of a person named, the Court thought that the property might easily be ascertained before the Master, and held the description of the subject-matter sufficient.[1] And again, a contract to sell an estate within certain ascertained boundaries, described as partly freehold, and partly leasehold, is not void for uncertainty, because it is a good contract to sell the vendor's interest in the property; but the purchaser is entitled to have it reduced to certainty by the boundary of the properties of different tenures being ascertained, or shown to be capable of being so.[2] In one case the contract described the property as half an acre of the land as agreed on. The land had previously been paced out in the purchaser's presence, and the description was held sufficient.[3]

Ascertained by election.

§ **346**. So the uncertainty of description of the subject-matter may be got over by the election of one party to the contract, where the effect of the contract is to give such a right of election. Thus, where a contract was made by the defendant to sell to the plaintiff for the purpose of a churchyard so much land as was necessary on the north side of the church, and the plaintiff obtained the sanction of the proper authorities to the consecration of three-quarters of an acre of land adjoining the north side of the existing inclosure of the church and applied to the defendant to convey, it was held that the plaintiff being the person to do the first act

G. 80. See also *Inge* v. *Birmingham, Wolverhampton, and Stour Valley Railway Co.*, 3 De G. M. & G. 658.

[1] *Owen* v. *Thomas*, 3 My. & K. 353. Cf. *Naylor* v. *Goodall*, 26 W. R. 162.

[2] *Manser* v. *Taylor*, 8 Ha. 51.

[3] *Wylson* v. *Dunn*, 34 Ch. D. 569.

under the contract had a right of election, and that if otherwise there was uncertainty of description he had sufficiently ascertained the land to be conveyed.[1] A similar decision was pronounced in a case where the difficulty arose on a contract to let a glebe "except thirty-seven acres," and it was held that the right of election was with the lessee as the person who had the first act to do.[2] With these cases may be compared the cases on executory contracts for the sale of goods not specified, where the appropriation by the party entitled to elect converts the executory contract into an actual sale and passes the property to the vendee.[3]

ii. As to the parties.

§ **347**. (ii.) The contracting parties must appear in the contract, or the memorandum of it,[4] in order to constitute a binding contract:[5] but they may so appear either by name or by description or reference sufficient to ascertain their identity.[6] Indeed it is "sufficient, so far as parties are concerned, that the written contract should show who the contracting parties are, although they or one of them may be agents or agent for others, and it makes no difference whether you can gather the fact of agency from the written document or not. Who the principals are may be proved by parol."[7] "There can be no doubt that if a written contract is made in this form: 'A. B. agrees to sell Blackacre to C. D. for 1,000*l*.,' then E. F., the principal of A. B., can sue G. H., the principal of C. D., on that contract."[8]

[1] *Rumble* v. *Heggate*, 18 W. R. 749.

[2] *Jenkins* v. *Green*, 27 Beav. 137.

See the cases collected in Benjamin on Sales (5th ed.), Book II. chap. 5.

[4] See *Pearce* v. *Gardner*, [1897] 1 Q. B. 688, where the name of a contracting party appeared only on an envelope, which was treated as part of the memorandum.

[5] *Champion* v. *Plummer*, 1 N. R. 253; *Warner* v. *Willington*, 3 Drew. 523; *Squire* v. *Whitton*, 1 H. L. C. 333; *Williams* v. *Lake*, 2 El. & El. 349. Cf. *Skelton* v. *Cole*, 1 De G. & J. 587, 596.

[6] *Potter* v. *Duffield*, L. R. 18 Eq. 4. See, too, *Re Holland*, *Gregg* v. *Holland*, [1902] 2 Ch. at pp. 374, 385 (reasonable intendment).

[7] *Per* Romer J. in *Filby* v. *Hounsell*, [1896] 2 Ch. at p. 740.

[8] *Per* Jessel M.R. in *Commins* v. *Scott*, L. R. 20 Eq. at pp. 15, 16.

Where, however, the defendants made a written offer to take a lease, beginning "Sir," but without address, and the plaintiff's agent wrote an acceptance, but there was no document signed by the defendants showing the intended lessor's name, it was held that there was no contract in writing sufficient to satisfy the Statute of Frauds.[1]

Description instead of name.

§ 348. The contracting parties may be indicated by description instead of by name, provided the description is sufficient to preclude any fair dispute as to the identity;[2] or, in other words, is certain within the legal maxim, *id certum est quod certum reddi potest*;[3] and provided this description is not by reference, but to the contract itself. "It is scarcely possible," said Lord Romilly M.R.,[4] "to look at an auction list without seeing property sold by a mortgagee, or by executors, or by trustees, without the name being disclosed and bought by somebody whose name is not given until the conveyance is prepared. It is the ordinary practice."

Lord Cairns' statement of the law.

§ 349. "Your Lordships," said Earl Cairns, addressing the House of Lords, "have frequently seen conditions of sale not merely by auction but by private contract, in which it is stated that the sale is made, sometimes by the *owners*, and sometimes by the *mortgagees*, and a form of contract is annexed in which an agent signs for the vendors, and no other specification upon the vendors' part is inserted, and I never heard up to this time that a contract under those circumstances was invalid. In point of fact, my Lords, the question is, is there that certainty which is described in the legal maxim *id certum est quod certum reddi potest?* If I enter into a contract on behalf of my *client*, on behalf of my *principal*, on behalf of my *friend*, on behalf of

[1] *Williams* v. *Jordan*, 6 Ch. D. 517. Distinguish *Carr* v. *Lynch*, [1900] 1 Ch. 613.

[2] *Rossiter* v. *Miller*, 3 Ch. D. 648; 3 App. Cas. 1124, 1140; *Carr* v. *Lynch*, *ubi supra*, at p. 615.

[3] *Hazel* v. *Lord Barrington*, L. R. 6 Eq. 218. See, too, *Bourdillon* v. *Collins*, 19 W. R. 556.

those whom it may concern, in all those cases there is no such statement, and I apprehend that in none of those cases would the note satisfy the requirements of the Statute of Frauds. But if I, being really an agent, enter into a contract to sell Blackacre, of which I am not proprietor, or to sell the house No. 1, Portland Place, on behalf of *the owner* of that house, there, I apprehend, is a statement of matter of fact, as to which there can be perfect certainty, and none of the dangers struck at by the Statute of Frauds can arise."[1]

Description held sufficient.

§ 350. In a case already referred to,[2] the sale was stated to be by direction of the executors of Admiral F., and, in another,[3] the vendor was stated to be a trustee selling under a trust for sale; and in each case the description was held sufficient. Again, where the contract stated the sale to be by direction of the proprietor, that was held to be a sufficient description.[4] And so, where a landlord signed and handed to his tenant a memorandum beginning, "Dear Sir,—In consideration of your having this day paid me the sum of 50*l.*, I hereby agree to grant you a further lease," it was held that the intended lessee (who was not named in the memorandum) was sufficiently defined as being the person who had paid the 50*l.*[5] In another case, where property was sold by ten persons incorporated, who worked the property in the name of a company, it was held that the description "the vendors" was enough, because it appeared from the conditions of sale and memorandum of the contract, that the vendors were in possession, that the abstract

[1] *Rossiter* v. *Miller*, 3 App. Cas. 1140. The italics are not in the report.

[2] *Hood* v. *Lord Barrington*, L. R. 6 Eq. 218. See, too, *Towle* v. *Topham*, 37 L. T. 508; *Webb* v. *Kirby*, 3 Sm. & G. at p. 337.

Catling v. *King*, 5 Ch. D. 660.

[4] *Sale* v. *Lambert*, L. R. 18 Eq. 1. See, too, *Rossiter* v. *Miller*, 5 Ch. D. 648; 3 App. Cas. 1124; *Beer* v. *London and Paris Hotel Co.*, L. R. 20 Eq. 412; and *Thomas* v. *Brown*, 1 Q. B. D. 714.

[5] *Carr* v. *Lynch*, [1900] 1 Ch. 613.

would be an abstract of the company's title, and that it was the interest of the company which was being sold.[1] In one case the signature of A. B. on the paper bearing the name of A. B.'s firm was held a sufficient description of that firm.[2]

Description held insufficient.

§ 351. But where the contract did not disclose the vendor's name, but stated the auctioneer's name, and the auctioneer signed the contract as confirming it "on behalf of the vendor," the memorandum was held insufficient, because the question who sold the estate (*i.e.*, the question of the contract) was left to be decided by parol evidence.[3]

§ 352. When the conditions described the person selling as "the vendor," and named A. B. as "the vendor's solicitor," and A. B. was the beneficial owner (and was so known to the purchaser at the time of the contract), the description was insufficient:[4] so was the description of the vendor as "landlord."[5]

iii. As to price.

§ 353. (iii.) In all sales it is evident that price is an essential ingredient, and that where this is neither ascertained nor rendered ascertainable, the contract is void for incompleteness, and incapable of enforcement.[6]

Cases where price not ascertained.

Accordingly where A. agreed to sell an estate to B. for 1,500*l.* less than any other purchaser would give, the contract was held void: for if the estate was not

[1] *Cumming* v. *Scott*, L. R. 20 Eq. 11.

[2] *Wylson* v. *Dunn*, 34 Ch. D. 569.

[3] *Potter* v. *Duffield*, L. R. 18 Eq. 4. Distinguish *Wallace* v. *Roe*, [1903] 1 I. R. 32, where the memorandum contained the vendor's name.

[4] *Jarrett* v. *Hunter*, 34 Ch. D. 182.

[5] *Coombs* v. *Wilkes*, [1891] 3 Ch. 77. Cf. *Pattle* v. *Anstruther*, 41 W. R. 625; 69 L. T. 175 ("proposing lender" not a sufficient description of an intending mortgagee).

[6] *Elmore* v. *Kingscote*, 5 B. & C. 583; *Goodman* v. *Griffiths*, 1 H. & N. 574: *per* Farwell L.J. in *Wild* v. *Woolwich Borough Council*, [1910] 1 Ch. at p. 341. Consider *Langstaff* v. *Nicholson*, 25 Beav. 160; *Re Khorassakhoma, &c. Syndicate*, [1897] 2 Ch. at pp. 464, 467; and *Douglas* v. *Baynes*, [1908] A. C. 477, 485; 78 L. J. P. C. 13.

to be sold to any other purchaser than B., it was impossible to know what such a purchaser would give for it.[1] So again where there was a contract to sell at a price to be fixed by two surveyors, and they made their valuation, but that did not sufficiently and finally ascertain the price, specific performance was refused:[2] and the like was the result of a similar case, where the valuation was such as the Court could not act on, by reason of circumstances of great impropriety on the part of one of the valuers, and the valuation being based on an erroneous view of the facts.[3]

Contract need not precisely determine the price.

§ 354. It is not, however, necessary that the contract should in the first instance determine the price.[4] It may either appoint a way in which it is to be determined, or it may stipulate for a fair price.

Where a mode of determining the price prescribed.

§ 355. Where the contract appoints a way of determining the price, the Courts have in some cases deemed that way essential: in other cases they have deemed it non-essential, and have treated the contract as essentially one to sell at a fair price. In all cases where the principal subject of the contract is to be valued in a specified manner, the manner has, it is believed, been held essential:[5] the manner has often been held non-essential where it is applied only to an incident to the main subject, as timber to land, fixtures to a house, or plant to a business.

Where mode of ascertainment essential.

§ 356. Where the contract specifies a way of ascertaining the price which is essential, the contract is conditional till the ascertainment, and is absolute only when the price has been determined in the manner agreed upon.[6] In case of default in this respect the

[1] *Bromley* v. *Jefferies*, 2 Vern. 115.

[2] *Hopcraft* v. *Hickman*, 2 S. & S. 430.

[3] *Chichester* v. *McIntre*, 4 Bli. N. S. 78.

[4] See *London Guarantee Co.* v. *Fearnley*, 5 App. Cas. at p. 920.

[5] *Milnes* v. *Gery*, 14 Ves. 400, 405.

[6] *Bridgend, &c. Co.* v. *Dunraven*, 31 Ch. D. 219.

contract remains imperfect, and incapable of being enforced: for the Court will never direct the payment of such a sum as A. may fix.[1]

Ascertainment by valuers to be named

§ 357. If the contract be between A. and B. to sell and buy at such a price as valuers to be named by them shall fix, it seems that either A. or B. may refuse to name a valuer, and the contract will remain incapable of completion without any liability on the part of the refusing party.[2] But if the contract between A. and B. be to sell and buy at such a price as C. shall fix, neither A. nor B. can rightfully prevent C.'s determination and the completion of the contract: and it is presumed that an action might be maintained for such prevention.[3] "Actus inceptus," says one of Lord Bacon's maxims,[4] "cujus perfectio pendet ex voluntate partium, revocari potest: si autem pendet ex voluntate tertiæ personæ vel ex contingenti, non potest." One of his illustrations is this: "If I contract with you for cloth at such a price as J. S. shall name, then if J. S. refuse to name, the contract is voyd, but the parties cannot discharge it, because they have put it in the power of the third person to perfect."[5]

Lord Bacon's maxim.

The doctrine of the Roman Law.

§ 358. The conclusion that a valid sale could be effected at such a price as a third person should fix was not arrived at in the Roman Law without great doubt, or finally settled until the time of Justinian. Ofilius and Proculus maintained the validity of such a sale: Labeo and Cassius denied it.[6] "Sed nostra decisio," says Justinian, after adverting to the doubts of the ancients, "ita hoc constituit, ut quoties sic composita sit venditio *quanti ille æstimaverit*, sub hac

[1] *Darley* v. *Whitaker*, 1 Drew. 131; *Tillett* v. *Charing Cross Bridge Co.*, 26 Beav. 419. Consider *Baker* v. *Metropolitan Railway Co.*, 31 Beav. 504.

[2] See, as to the French Law on this point, Troplong, De la Vente, § 157.

[3] *Smith* v. *Peters*, L. R. 20 Eq. 511, *infra*, § 361.

[4] No. 23.

[5] Maxims, ed. 1636, pp. 71, 73.

[6] Troplong, De la Vente, § 156.

condicione staret contractus ut, si quidem ipse qui nominatus est pretium definierit, omnimodo secundum ejus æstimationem et pretium persolvatur et res tradatur, ut venditio ad effectum perducatur, emptore quidem ex empto actione, venditore autem ex vendito agente. Sin autem ille qui nominatus est vel noluerit vel non potuerit pretium definire, tunc pro nihilo esse venditionem, quasi nullo pretio statuto."[1] The principle thus established by Justinian is embodied in the French Law,[2] and has found its way into our jurisprudence.

Valuers are not arbitrators.

§ 359. The persons nominated to value are sometimes though inaccurately spoken of as arbitrators. Arbitrators are appointed to settle a pre-existing dispute: valuers to ascertain the value of the subject-matter of the sale. Accordingly the arbitration provisions of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 124), were not applicable to valuers named in a contract,[3] and the provisions of the Arbitration Act, 1889 (52 & 53 Vict. c. 49), are, it is conceived, similarly inapplicable.

First class of cases.

Milnes v. Gery.

§ 360. Of the first class of cases, viz., those in which the contract provides the mode of ascertaining the price, and this provision is an essential term, *Milnes* v. *Gery*[4] may be considered as the leading case. There was there a contract that land should be sold at a price to be fixed by one valuer appointed on each side, or their umpire: the valuers could not agree; and Grant M.R. held the contract to be incomplete, and that the Court could not supply the defect by appointing other persons as valuers, which would be to execute a contract different from that of the parties; although, where it is merely a contract

[1] Inst. Lib. iii. tit. 23, § 1.

[2] Code Civil, art. 1592.

[3] See *Collins* v. *Collins*, 26 Beav. 306; *Re Dowdy*, 15 Q. B. D. 426; and *Re Cross-Wilson and Greene*, 18 Q. B. D. 7 (valuers' umpire). Sects. 3 to 17 inclusive of the Common Law Procedure Act, 1854, relating to arbitration, were repealed by the Arbitration Act, 1889.

[4] 14 Ves. 400.

to sell at a fair price, that is a matter which the Court can ascertain. "A man," said Leach V.C.,[1] "who agreed to sell at a price to be named by A., B., and C., could not be compelled by a Court of Equity to sell at any other price." This principle has governed the decision of several other cases of specific performance,[2] and may further be illustrated by the cases at Common Law.[3]

Difficulty overcome where obstacle to determination arises from defendant's default.

§ 361. The difficulty has in several cases prevailed, notwithstanding the fact that the obstacle to [illegible] arisen from the defendant's default. Thus, where [illegible] contract was to sell at a price to be fixed by arbitr[illegible] consequence of the defendant having refu[illegible] the arbitration-bond, it was uncertain wh[illegible] would be made, the Court refused to p[illegible] same result followed where the refus[illegible] valuers to proceed appeared to arise f[illegible] tion given to him by the defendant, of [illegible] not to complete.[5] But where a vendor had [illegible] sell a public-house for 10,750*l.*, and the furnit[illegible] fixtures in it at a fair valuation to be made by L., and after L. had commenced taking the inventory, the vendor refused to allow him to complete it, Jessel M.R., on an interlocutory application, made an order that L. be permitted to enter the premises for the purpose of completing the valuation.[6] In a case where the price was to be ascertained by one of two alternative modes, and no election had been made as to the mode of

[1] In *Morse* v. *Morse*, 6 Mad. 26.

[2] *Blundell* v. *Brettargh*, 17 Ves. 232; *Gourlay* v. *Duke of Somerset*, 19 Ves. 429; *Agar* v. *Macklew*, 2 S. & S. 418; *Darby* v. *Whitaker*, 1 Drew. 134.

[3] *E.g.*, *Thurnell* v. *Balbirnie*, 2 M. & W. 480; *Morgan* v. *Bevan*, 9 Bing. 672; *Milner* v. *Pell*, 5 Ex. 829.

[4] *Wilks* v. *Davis*, 3 Mer. 507; *Vickers* v. *Vickers*, L. R. 4 Eq. 529. Cf. *Morse* v. *Morse*, 6 Mad. 26.

Darby v. *Whitaker*, 1 Drew. 134; *Vickers* v. *Vickers*, L. R. 4 Eq. 529.

[5] *Smith* v. *Peters*, L. R. 20 Eq. 511.

ascertainment, the Court held that no contract had been constituted.[1]

Fitch v. Midland Railway Co.

§ 362. In a case between a landowner and a railway company, a contract had been entered into under which the company was to do certain works. By a subsequent contract an estimate of the cost of completing the works was to be made by the company's engineer and submitted to A., the landowner's agent, "for approval" in case of difference the amount was to be determined by B. the amount "when agreed or determined" was to be paid to the landowner by the company in discharge of their obligations as to the works. A. died before approving any estimate. B. was living: it was held that by A.'s death the contract became incapable of enforcement.[2]

Fitch v. Midland Railway Co.

§ 363. Again, where a railway company contracted for the purchase of land with a charitable corporation who had no power to sell except under the Lands Clauses Consolidation Act, and the price had not been ascertained by surveyor's certificate pursuant to the provisions of that Act, the Court held that no final contract had been arrived at.[3] It may here be noticed that, when once the price has been fixed pursuant to the Act, the purchasing corporation is compellable to complete the purchase.[4]

Wycombe Railway Co., Denton Hospital.

§ 364. The second class of cases embraces those contracts which are substantially for the sale of the property in question at a fair price, the mode of ascertainment, though indicated by the contract, being subsidiary and non-essential: and where consequently, if that mode of ascertainment has failed, the Court will have recourse to some other means of coming at the fair

Second class of cases. Contracts to sell at a fair price.

[1] *Morgan v. Milman*, 3 De G. M. & G. 24.

Fitch v. Midland Railway Co., L. R. 20 Eq. 100.

Wycombe Railway Co. v. Donnington Hospital, L. R. 1 Ch. 268.

[3] *Harding v. Metropolitan Railway Co.*, L. R. 7 Ch. 154; *supra*, § 137.

price and of thus carrying into effect the contract in its essential parts. As already remarked, these cases are principally of the valuation of incidental matters and not of the principal subject-matter of the contract.

The distinction between the two classes of cases illustrated.

§ **365.** Grant M.R. not only indicated in his judgment in *Milnes* v. *Gery*,[1] the distinction of the two classes of cases, but in two other cases before him acted upon it. In the earlier, in consequence of the lunacy of the vendor, the valuers could not be nominated; but the Master of the Rolls did not consider this an insurmountable difficulty, saying that, "if there was a valid and binding contract, the supervening incapacity of one party cannot deprive the other of the benefit;" and he accordingly directed an issue as to the lunacy, as a preliminary step in the cause.[2] In the other case, there was a contract to grant a lease, to contain such conditions as A. B. should think reasonable and proper: and his Honour referred it to the Master to settle the lease, and not to A. B., considering the agency of A. B. not to be of the essence of the contract, and that the Court having determined that the agreement as it stood was binding and conclusive, it would not require foreign aid. The objection that A. B.'s selling the lease might, it was said, have lain in the mouth of the defendant, but could not lie in the mouth of the plaintiff.[3]

§ **366.** Again, in a case before Stuart V.C. where there was a contract to sell land and bleachworks at a sum fixed, and the plant and machinery to be taken at a value to be ascertained by valuers to be appointed by the parties, it was held that this was a subsidiary stipulation only, and that it did not form an obstacle to specific performance, which was accordingly decreed with costs.[4] The same view was taken both by Stuart

[1] 14 Ves. 400.
[2] *Hall* v. *Warren*, 9 Ves. 605.
[3] *Gourley* v. *Duke of Somerset*, 19 Ves. 429.
[4] *Jackson* v. *Jackson*, 1 Sm. & G. 181; *Paris Chocolate Co.* v. *Crystal*

V.C. and on appeal by Lord Hatherley in a case where the main subject of the contract was the sale of an estate for 24,000*l.*, and a provision was inserted for the valuation of certain furniture and articles:[1] and in another case where a partnership contract contained a provision for a valuation at its expiration, which fell through from there being no provision as to an umpire, the Court ascertained the value.[2] The main object of the contract there was the partnership: the defendant had had the benefit of that contract, and could not be allowed to escape from the subsidiary contract as to sale on the ground of the difficulty as to the valuation.

Mogall v. Sowters.

§ **367**. In another case Stuart V.C. remarked that, where possession is referable to a contract to give a fair consideration, the amount of which has not been settled, the Court will, in favour of possession and expenditure referable to this contract, endeavour by every means within the legitimate bounds of its jurisdiction to ascertain the amount of the consideration.[3]

iv. As to other terms of the contract.

§ **368**. (iv.) It is of course essential to the completeness of the contract, and it should express not only the names of the parties, the subject-matter, and the price, but all the other material terms. What are, in each case, the material terms of contract, and how far it must descend into details to prevent its being void as incomplete and uncertain, are questions, which must of course be determined by a consideration of each contract separately. It may, however, be laid down that the Court will carry into effect a contract framed in general terms, where the law will supply

Paine v. Co., 3 Sm. & G. 119, 123. As to the way in which referees as to price ought to proceed, and on what grounds they may determine.

[2] *Ends* v. *Williams*, 1 De G. M. & G. 671.

[1] *Richardson* v. *Smith*, L. R. 5 Ch. 648.

[2] *Dickson* v. *Bradford*, L. R. 5 Ch. 539.

[3] *Mogall* v. *Sowters*, 3 Sm. & Gif. 101, 113; affirmed, 1 Jur. N. S. 737; 3 W. R. 535. See also *Chesbyn* v. *Dalby*, 2 Y. & C. Ex. 170.

the details;[1] but if any details are to be supplied in modes which cannot be adopted by the Court, there is then no concluded contract capable of being enforced.[2]

Instances of contracts held incomplete.

§ 369. Though it may be impossible to define what is the necessary completeness in the terms of a contract, it is easy to give instances in which contracts have been held insufficient in this respect. Such was the case where it was not stated from what time an increased rent was to commence;[3] where the contract did not state, either directly or by reference, the length of the term to be granted;[4] where a contract for a lease for lives neither named the lives nor decided by whom they were to be named;[5] where an auctioneer's receipt was set up as a contract, but it did not refer to the conditions of sale, or show the proportion which the deposit was to bear to the price;[6] where there was a term as to the expenses which was not settled by the contract;[7] where there was a contract for a partnership, which defined the term of

[1] In *Hampshire* v. *Wickens*, 7 Ch. D. 555), the power of the Court to enforce a contract to accept a lease "to contain all usual covenants and provisions" appears to have been admitted. Cf. *Haines* v. *Burnett*, 27 Beav. 500; *Kendall* v. *Hill*, 6 Jur. N. S. 968; *Pugatz* v. *Fortune*, 27 Beav. 393; *Blakeney* v. *Hardie*, I. R. 8 Eq. 381; and compare *Guillamore* v. *Pearoke*, 12 Ir. Ch. R. 354, 360. See, too, *Re Lander and Bagley's Contract*, [1892] 3 Ch. 41, where covenants (i) to reside on the premises and personally conduct the business, and (ii) not to assign without consent, were held not to be usual covenants in a lease of a public-house; *Midgley* v. *Smith*, [1895] W. N. 120, where covenants were held to be unusual and unreasonable; and *Lucas* v. *Hall*, [1899] W. N. 92, where the terms of "the usual public-house contract" were held to be ascertainable by evidence.

[2] See *South Wales Railway Co.* v. *Wythes*, 5 De G. M. & G. 880; *Ridgway* v. *Wharton*, 6 H. L. 238; *Rossmanos* v. *Robbins*, 3 De G. J. & S. 88; *infra*, § 380.

[3] *Lord Ormond* v. *Anderson*, 2 Ball & B. 363.

[4] *Clavan* v. *Cooke*, 1 Sch. & Lef. 22; *Gordon* v. *Trevelyan*, 1 Price 64; *Bagley* v. *Fitzmaurice*, 8 Ex. & Bl. 664.

Wheeler v. *D'Esterre*, 2 Dow. 359. But query whether the lessee cannot name the lives when the contract is silent. See also *Lord Kensington* v. *Phillips*, 3 Dow. 61.

[5] *Blaydes* v. *Bradbear*, 12 Ves. 466.

Stratford v. *Bosworth*, 2 V. & B. 341.

years, but was silent as to the amount of capital and the manner in which it was to be provided;[1] and where a document showed the amount of rent to be paid by a party to a mining enterprise, but was silent as to the other terms.[2]

Some matter left for future agreement.

§ 370. Contracts are often incomplete from their reserving some matter for future agreement: unless perhaps in cases where in the absence of such agreement the law determines the matter,[3] such contracts are necessarily incomplete until the further agreement has been come to.

Contract referring to third person's decision.

§ 371. Where the contract provides for the determination of any material thing by some third person, and this has not been done, the contract is in the same predicament as when the price has been neither expressed in the contract nor ascertained. Cases have occurred where buildings or works have been stipulated to be done in such manner as a third person may direct, and where such direction has either been refused or not given: and in these cases specific performance has been refused.[4]

Implied terms.

§ 372. Besides the express terms of the contract, there are others which, in the absence of any expression to the contrary, are implied by law.[5] With

[1] *Dawes* v. *Collins*, 6 Ha. 118.

Caddick v. *Skidmore*, 2 De G. & J. 52. Cf. *Isaacs* v. *Evans*, [1899] W. N. 261; 16 Times L. R. 113, 180.

Hall v. *Comber*, 2 C. B. N. S. 22; *May* v. *Thomson*, 20 Ch. D. 705; *Metropolit'n Board* v. *Cowabe*, 28 Sol. Jour. 378.

[2] *Tillett* v. *Charing Cross Bridge Co.*, 26 Beav. 419, *Earl of Dudley* v. *London, Chatham and Dover Railway Co.*, 3 De G. J. & S. 24; 8 C. B. Ab. 201; L. R. 2 H. L. 43.

[3] The elements of all contracts have by some jurists been placed in three classes: 1st, those things which are essential, without which the contract cannot exist; 2ndly, those which are of the nature but not of the essence of the contract being implied in it unless expressly excluded, but capable of being thus excluded without subverting the contract; and 3rdly, the things that are accidental. The terms in question correspond of course with the second of these classes. Pothier, Tr. des Oblig. Part 1. chap. 1, sect. 1, art. 1, § 3.

regard to such terms, therefore, whether they be necessary terms or not, the silence of the contract does not render it incomplete: thus a contract to sell property described merely as cottages and lands purchased by the vendor of persons named was construed as referring to and importing the sale of the whole of the vendor's interest.[1] A contract to sell a house simply implies that the interest sold is the fee simple;[2] and a contract to renew is presumed to be for the same term as the preceding lease.[3]

The Court, however, will not imply a term in a contract unless there arises from the language of the contract itself, and the circumstances under which it is entered into, such an inference that the parties must have intended the stipulation in question, that the Court is necessarily driven to the conclusion that it must be implied.[4]

Condition for good title implied.

§ **373.** In every contract for the sale of land, a condition is implied for a good title,[5] and for the delivery-up of the deeds: so that where this was prevented by the accidental destruction of the deeds subsequent to the contract, and the vendor could not furnish any evidence that they were duly executed and delivered, it was held that he could not enforce the sale.[6] The mere fact of the loss of the title deeds does not release a purchaser from performance of his contract. He can still be compelled to complete, if the vendor furnishes him within a reasonable and

[1] *Bower* v. *Cooper*, 2 Ha. 408.

[2] *Hughes* v. *Parker*, 8 M. & W. 244.

[3] *Price* v. *Assheton*, 1 Y. & C. Ex. 82.

[4] *Hamlyn & Co.* v. *Wood & Co.*, [1891] 2 Q. B. 488, 491.

[5] *Doe* d. *Gray* v. *Stanion*, 1 M. & W. 695, 701; *Worthington* v. *Warrington*, 5 C. B. 635. In *Ogilvie* v. *Foljambe* (3 Mer. 53, Grant M.R. appears to have thought the right to a good title was a collateral right given by the law. See *Ellis* v. *Rogers*, 29 Ch. D. 661, 670. The distinction is probably not of much practical importance, for the right, if collateral, is so closely connected with the contract that they always seem to go together.

[6] *Bryant* v. *Busk*, 4 Russ. 1.

proper time with satisfactory secondary evidence of the contents and due execution and delivery of the lost documents.[1]

The title to be shown, of course, varies according to the nature of the property to be sold:[2] in the case of the sale of a lease, it formerly included the title of the lessor, except in the case of a bishop's lease.[3] But by the Vendor and Purchaser Act, 1874,[4] it has been provided that under a contract to grant or assign a term of years whether derived or to be derived out of a freehold or leasehold estate the intended lessee or assign shall not be entitled to call for the title to the freehold; and by the same Act certain other provisions of a kind very common in contracts of sale are, in the absence of stipulation to the contrary, made implied terms in contracts for the sale of land. The statutory provisions with regard to title do not preclude the purchaser from showing *dimidio* that the title of the vendor is bad.[5]

Waiver of condition

§ **374.** Where a contract contains stipulations which are simply and solely for the benefit of the purchaser, and are severable, the purchaser may waive them, and obtain judgment for specific performance of the rest of the contract.[6] For instance, the terms conferring on the purchaser a right to a good title are conditions for

[1] *Re Halifax Commercial Bank — Wood*, C. A., 47 W. R. 194; 79 L. T. 536. In this case it was held that evidence not furnished until after the date for completion, and after the purchaser had reasonably issued a summons claiming a declaration that the vendor had not shown a good title, was too late.

Carlisle v. *Flight*, 6 Ha. 41; S. C. 2 Ph. 613.

Tibbs v. *Hooker*, 2 Mer. 424; *Seaber* v. *Drake*, 5 B. & Ad. 992; *Hall* v. *Betty*, 4 Man. & Gr. 410. As to a contract for the sale of a contract for a lease, see *Knatchbull* v. *Preston*, 25 L. J. Ex. 287; and see *infra*, § 1355.

[2] *Ewer* v. *Spencer*, 2 Mer. 439, n.

[3] 37 & 38 Vict. c. 78, s. 2. See, too, sect. 3 (4) of the Conveyancing Act of 1881, which provides that, under a contract to sell and assign a term of years derived out of a leasehold interest in land, the intended assign shall not have the right to call for the title to the leasehold reversion; and consider *Patman* v. *Harland*, 17 Ch. D. 353.

Jones v. *Wallis*, 43 Ch. D. 574.

Hinckley v. *Cottam*, [1892] 3 Ch. 359, 370.

the benefit of the purchaser, and may accordingly be waived by him, though the vendor may desire to insist on them as a ground for discharging himself from the contract.[1] But where an agreement for sale was expressed in a memorandum to be subject to the preparation by the vendor's solicitor and completion of a formal contract, that provision was held not to be such a stipulation as the vendor might waive, for the purpose of insisting on performance of the agreement without it.[2]

Contract for under-lease.

§ 375. On principle there seems much in favour of the view, that a contract for an under-lease implies that the sub-lessee is to be subject to all the covenants in the superior lease, and it is not unsupported by authority.[3] But it has been determined that this implication can only arise where the purchaser had a fair opportunity of ascertaining, and ought as a reasonable man to have ascertained,[4] for himself the provisions of the original lease:[5] and if the contract were silent, and unusual provisions were found in the head lease, the Court would probably not enforce specific performance on the ground of the implication referred to. Possession taken by the intended lessee is a strong circumstance to fix him with an acceptance of the terms of the head lease.[6] But it is not conclusive, and the circumstances under which the possession was taken may deprive it of this effect.[7]

[1] *Bennett* v. *Fowler*, 2 Beav. 302.

[2] *Lloyd* v. *Nowell*, [1895] 2 Ch. 744, 747.

[3] *Cosser* v. *Collings*, 3 My. & K. 283; *Smith* v. *Capron*, 7 Ha. 185; *Grosvenor* v. *Green*, 7 W. R. 110. Cf. *Collins* v. *Stubley*, ib. 710.

[4] *Molyneux* v. *Hawtrey*, [1903] 2 K. B. 487, 491, 72 L. J. K. B. 873.

[5] *Hyde* v. *Warden*, 3 Ex. D. 72. *Ecroyd* v. *Coulthard*, 20 Q. B. D. 523; *Re Bird and Smith's Contract*, [1896] 1 Ch. 637. Cf. *Hadlick* v. *Lipski's Contract*, [1901] 2 Ch. p. 669.

[6] *Flight* v. *Bastin*, 3 My. & K. 282. Cf. *Howe* v. *Gakstatter*, 8 Ch. J. 286 (constructive notice of restrictive covenants not enough to affect purchaser).

Cosser v. *Collings*, *Smith* v. *Capron*, *ubi supra*.

Hyde v. *Warden*, *ubi supra*.

Implication as to usual stipulations.

§ 376. The question whether or no there is an implication in executory contracts, in favour of the insertion in the executed contract of all such stipulations as are usually inserted in such contracts, appears one still open in our law.[1]

Implied terms rebutted by a condition or by notice.

§ 377. An implied term may of course be rebutted by the contract or conditions of sale; as where they limit the title to be deduced, or provide that the purchaser shall simply take the vendor's interest.[2] And further, although an express term of a contract is in nowise affected by notice,[3] yet notice, communicating knowledge, is sufficient to rebut the presumption of an implied term, for that is something not growing out of the contract itself, but given by law, and a matter therefore, not of contract, but of notice.[4] So that, for instance, where a purchaser has notice that the vendor is only a lessee, he cannot insist on the implication which might otherwise arise, that the contract is for the fee.[5]

Where material term can not be supplied, no performance.

§ 378. Again, a material term may well be supplied by construction or inference where the circumstances justify it: but if neither supplied by expression, construction, nor inference, the contract is incapable of performance. In a contract for the grant of a lease, the date of the commencement of the lease is a material term, and if it does not appear in the contract, by expression or reference, it is incomplete:[6] nor can it

[1] *Ricketts* v. , 1 De G. & S. n. 335, where the question was much discussed by Knight Bruce V.C. Cf. *Beaumont* v. *Hastie*, L. R. 8 Eq. 1. See, too, an article, under the heading "The Conveyancer," in 115 Law Times Journal p. 79.

Lyon v. *Reed*, 4 Mad. 364.

Bruell v. *Wheeler*, 7 M. & W. 464; *Hall* v. *Randall*, 19 L. T. N. S. 71.

[2] *Ogilvie* v. *Foljambe*, 3 Mer. 53, 61. *In re Gloag and Miller*, 23 Ch. D. 320; *Cato* v. *Thompson*, 9 Q. B. D. 616.

[3] *Cowley* v. *Watts*, 17 Jur. 172.

[4] *Blair* v. *Sutton*, 1 Mer. 237; *Nesham* v. *Selby*, L. R. 13 Eq. 191; 7 Ch. 406. See also *Hervey* v. *Gibbes*, 18 Beav. 171; *Wesley* v. *Walker*, 26 W. R. 568; *Cuthbertson* v. *Wells*, 36 L. T. 398; *Scatherd* v. *Harrison*, 11 W. R. 457; reversing S. C. 1 W. R. 704; *Dalling* v. *Evans*, W. R. 304; *White* v. *McMahon*, 18 L. R. Ireland 160

be inferred to begin at the date borne by the memorandum of agreement,[1] though it may, of course, be collected from the agreement read as a whole.[2]

Kusel v. Watson.

§ 379. Where A., being lessee of a house and shop for the unexpired residue (fifty-nine years) of a term of eighty years, agreed to sub-let the premises to B. (who did not know the nature of A.'s interest) at a fixed yearly rent, but the duration of the under-lease was not specified in the contract, and B. went into and remained in possession, and laid out money in improving the premises, and ultimately, when the head lease had still twenty years to run, brought his action for specific performance of the contract; it was held by Bacon V.C. that B. was entitled to an under-lease for the whole of the residue of the term, less one day; and the Court of Appeal affirmed the plaintiff's right to an under-lease of defined duration, though they varied the Vice-Chancellor's decision by directing A. to grant an under-lease for the residue of the term, less one day, if the plaintiff should so long live.[3]

[1] *Phelan v. Tedcastle* (15 L. R. (Ireland) 169), the date was ascertained by reference to circumstances. Cf. *Re Alexander's Timber Co.*, 70 L. J. Ch. 767.

[2] *Marshall v. Berridge*, 19 Ch. D. 233, overruling *Jaques v. Millar*, 6 Ch. D. 153; *Humphreys v. Cuyhaver*, 80 L. T. 10.

[3] *In re Lander and Bayley's Contract*, [1892] 3 Ch. at p. 48.

Kusel v. Watson, 11 Ch. D. 129. Cf. *Browne v. Warner*, 14 Ves. 156; *Re King's Leasehold Estates*, L. R. 16 Eq. 521; *Wood v. Beard*, 2 Ex. D. 30; *Zoubler v. Abrahams*, [1901] 1 K. B. 577, 72 L. J. K. B. 103.

CANADIAN NOTES

Incompleteness of the Contract

In *McIntyre v. Hood*, 9 S.C.R. 556, the defendant offered the plaintiff his property for $35,000, terms, one third cash, balance in one year at eight per cent. per annum. The offer was accepted by the plaintiff except that as to the cash payment he stipulated that it should be one third cash on completion of title, and requested that the papers and abstract should be submitted by the solicitor of the defendant as soon as possible that he might get a conveyance and give a mortgage. The Court of Queen's Bench of Manitoba held that there was a perfect contract and that the agreement should be specifically enforced, but the Supreme Court of Canada held, Ritchie C.J. and Fournier J. dissenting, that there was no binding unconditional acceptance of the offer and therefore no completed contract of sale between the parties. Ritchie C.J. held that, in the absence in the contract of any statement as to the title which was to be shewn by the vendor, the purchaser's right to a good title was implied by law and that before he was compelled to pay the purchase money he had a right to require that a good title should be shewn, or, at any rate, to use the plaintiff's expression, to have the papers and abstract submitted to enable him to have the title investigated and get a conveyance and give a mortgage. The acceptance, therefore, exactly met the terms of the offer and there was in his opinion a completed contract.

In *Arnold v. McLean*, 1 Grant's Ch. 337, a question arose as to whether a contract had been completed. The defendant wrote a letter to the plaintiff's agent containing the following passage with reference to the lands in question: "I am strongly advised to retain them, but, having other ground on which to build, and having some objects in view which I think may be accomplished with the proceeds, I feel inclined to sell at a thousand pounds.

That amount in hand would suit me much better than to have a small portion, say £250, on interest for so long a period. I dare say it would be quite the same thing for your friend to pay the whole at once. In order to raise a sum to pay for a property in Albion which Archie has been improving, I gave, in his behalf, a short time since, a mortgage to the University for £500 on Niagara Street lots, to be paid in five years. If your friend should decide on giving the whole I have no doubt the University would take a security on the Albion property, the title of which is secured by the advance, and release the lots on Niagara Street. The Albion property will more than pay off the mortgage within five years. Perhaps as matters stand your friend would take other securities to keep him harmless as to the £500 and so it might be unnecessary to trouble the University on the subject."

In the subsequent correspondence nothing was said as to this mortgage on either side and it was held by all the judges that the contract was complete. This decision was reversed on appeal and it was held that there was no complete contract. 6 Grant's Ch. 242.

In *Wallaston* v. *Lawson*, 19 S.C.R. 673, the defendant Lawson signed a document by which he agreed to sell certain property to the plaintiff for $12,500, and the plaintiff signed an agreement to purchase the same. The document signed by plaintiff stated that the property was to be purchased subject to the encumbrances thereon. With this exception the papers were in substance the same, and each contained at the end, this clause: "Terms, deed, and so on to be arranged by the first of May next." On the day that these papers were signed the defendant, on the request of plaintiff's solicitor to have the terms of sale put in writing, added to the one signed by him, the following: "Terms five hundred dollars cash this day, five hundred dollars on the delivery of the deed of the Parker property, eight hundred dollars with interest every three months until the six thousand five hundred dollars are paid, when the deed of the entire property will be executed."

The property mentioned in these documents was with other property of the defendant, mortgaged for $36,000. Plaintiff paid two sums of $500 each and de-

minded a deed of the Parker property which was to be used. In an action against defendant for specific performance of the above agreement defendant set up a verbal agreement that before a deed was given the other property of defendant was to be released from the mortgage. Per Ritchie C.J. "The agreement only provided for payment of $6,500 leaving the greater part of the purchase money unprovided for. If the plaintiff was to assume the mortgage it was necessary to provide for release of defendant's other property, and for matters in relation to the leasehold property." Per Strong J. "The agreement was for the sale of an equity of redemption only and, as questions would arise in future as to the release of defendant's other property from the mortgage and his indemnity from personal liability to the mortgagee, specific performance could not be decreed."

Strong J. in the course of his judgment points out the difference between what constitutes an objection to the title and what is said to be a matter of conveyancing, at p. 677, of the report.

In *Lubrecon v. Cohen*, 38 S.C.R. 588, the headnote reads that, "While A was absent abroad, B assumed without authority, to sell certain of his lands to C and received from C a deposit on account of the price. On receipt of a cablegram from B notifying him of what had been done, but without disclosing the name of the proposed purchaser, A replied by letter stating that he was willing to sell at the price named, that he would not complete the deal until he returned home, that the sale would be subject to an existing lease of the premises, and that he would not furnish evidence of title other than the deeds which were in his possession, and requesting B to communicate these terms to the proposed purchaser. On learning the conditions, C., in a letter by his solicitors, accepted the terms and offered to pay the balance of the price as soon as the title was evidenced to their satisfaction. In a suit for specific performance, it was held that the correspondence which had taken place constituted a contract sufficient to satisfy the requirements of the Statute of Frauds, that the words "so soon as title is evidenced to our satisfaction" in the solicitor's letter

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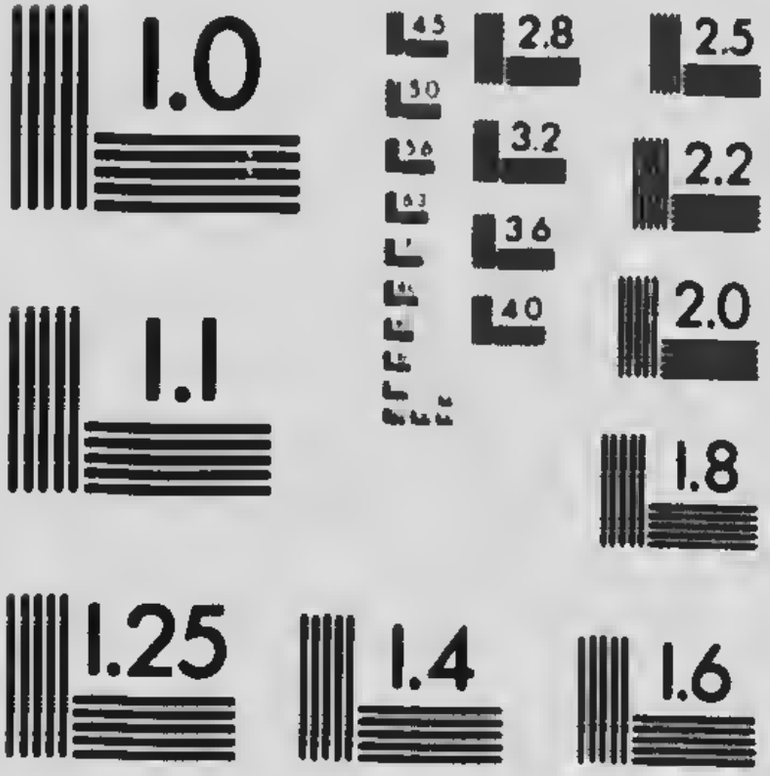

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accepting the condition, did not import the proposal of a new term, and that A was bound to specific performance.

McLennan J., referring to the terms in reference to title, said he was unable to assent to the view that those were a new stipulation or condition of the contract proposed on behalf of the plaintiff and which, as it was contended, had never been assented to by the defendant in writing. The defendant had stipulated that the sale should not be completed until the first of April after his return from England. "His title deeds were in Toronto and he is not to be called upon to produce any title papers other than those in his possession. He wants to have no trouble searching for or producing title papers not in his possession. That stipulation would clearly not oblige the purchaser to accept a bad or defective title, but, if accepted simpliciter, it might leave room for a contention that the purchaser had agreed to accept such title as might be shewn by the vendor's deeds and papers when produced, even if defective. To guard against any inference or contention of that kind, the solicitors say: 'The money is ready. Let Mr. Andrews send forward his deeds and the title papers in his possession, but if these deeds and title papers do not disclose a good title, we must still be satisfied that it is good.' I think the words which follow shew that is all that was meant. They ask for his deeds and a solicitor's abstract to enable them to examine into the title fully. In the case of *Hussey* v. *Horne-Payne*, 8 C.B. 670, a similar question arose, the words used in that case being 'subject to the title being approved by our solicitors.' The Court of Appeal held that this was a new term. That was, however, dissented from in the House of Lords. Cairns L.C. 4 App. Cas. at pp. 321-2, concurred in by Lords Selborne and Gordon, and although the judgment was affirmed on other grounds, must be deemed to be overruled. *Hack* v. *London Provident Association*, 23 Ch. D. 112, in the Court of Appeal."

CHAPTER IV.

UNCERTAINTY OF THE CONTRACT.

What amount of certainty required.

§ 380. It is obvious that an amount of certainty must be required in proceedings for the specific performance of a contract greater than that demanded in an action for damages. For to sustain the latter proceeding, the proposition required is the negative one, that the defendant has not performed the contract,—a conclusion which may be often arrived at without any exact consideration of the terms of the contract; whilst in proceedings for specific performance it must appear not only that the contract has not been performed, but what is the contract which is to be performed. It is perhaps impossible to lay down any general rule as to what is sufficient certainty in a contract; but it may be safely stated that the certainty required must be a reasonable one, having regard to the subject-matter of the contract,[1] and the circumstances under which and with regard to which it was entered into.[2] Thus in a case where there was a contract between two railway companies, that the one should have the right of running with their engines, carriages, and trucks, and carrying traffic upon the line of the other, Parker V.C. held that this was not too uncertain to be enforced.[3] "It means," he said, "a reasonable use,—a use consistent with the proper

[1] See Arist. Eth. Nic. lib. i. c. 3.

[2] *Marsh* v. *Milligan*, 3 Jur. N. S. 979 (Wood V.C.).

[3] *Great Northern Railway Co.* v. *Manchester, Sheffield, and Lincolnshire Railway Co.*, 5 De G. & Sm. 138.

enjoyment of the subject-matter, and with the rights of the granting party."[1] And we have already seen that where the terms of the contract are general, but the details are such as the law will supply, the contract will not be considered as objectionable for vagueness and uncertainty.[2] In one case a contract by a railway company with a landowner, to make such roads, ways, and slips for cattle as might be necessary, was held not incapable of being performed by the Court; but it is to be observed that in this case the company had entered and made the railway.[3] In another case, where a rector had agreed to grant a lease of his glebe, "except thirty-seven acres thereof" (which were not specified), Lord Romilly M.R. held that the contract was not void for uncertainty, inasmuch as the lessor had a right to select the thirty-seven acres at any time before the execution of the lease. His Lordship held, however, that this right must be so exercised as not to interfere with the lessee's beneficial enjoyment of the lands included in the lease.[4]

Original uncertainty removed.

§ 381. Where the terms of the contract have been originally uncertain, but the contract has been acted on and a user and course of dealing have existed between the parties which gives certainty to what was originally uncertain, the Court has in some cases had regard to this as removing the original difficulty.[5] Part performance will induce the Court to struggle against the objection of uncertainty.[6]

[1] 5 De G. & Sm. at p. 149.

[2] *Per* Turner L.J. in *South Wales Railway Co.* v. *Wythes*, 5 De G. M. & G. 888; *supra*, § 368.

[3] *Saunderson* v. *Cockermouth and Workington Railway Co.*, 11 Beav. 497, affirmed by Lord Cottenham, and applied in *South Eastern Railway Co.* v. *Associated Portland Cement Manufacturers*, [1910] 1 Ch. 12, 19. See *Parker* v. *Taswell*, 4 Jur. N. S. 183 (Stuart V.C.); S. C. 2 D. G. & J. 559, and *supra*, § 335.

[4] *Jenkins* v. *Green* (No. 1), 27 Beav. 137; and see *supra*, § 346.

[5] *Oxford* v. *Provand*, L. R. 2 P. C. 135. See also *Laird* v. *Birkenhead Railway Co.*, Johns. 500.

[6] *Hart* v. *Hart*, 18 Ch. D. 670, 685. See, too, *Hawksley* v. *Outram*, [1892] 3 Ch. at pp. 374, 376, 381.

Indefinite words.

§ **382**. The mere fact of indefinite words, such as "*et cætera*," being used in a contract does not necessarily make it too uncertain for performance. Such words may be understood with sufficient certainty by reference to the words to which they are added and the surrounding facts of the case.[1] Again where, by the contract for a lease, the tenant was to do certain specified works, and "other works" upon the property at a total estimated cost of about 150*l.*, and the specified works were such as would evidently cost nearly that sum, the Court considered the "other works" to be of such a trifling description that their being left undefined was not a ground for refusing specific performance.[2]

Instances of uncertain contracts.

§ **383**. On the ground of uncertainty, the Court has refused specifically to perform marriage-articles prepared by a Jewish rabbi in an obscure form, said to prevail amongst German Jews;[3] also a contract for the sale of land, where there was a doubt as to the identification of a plan to be incorporated into the contract.[4] In another case the Court refused to interfere in respect of an engagement by the defendant, Mr. Kean, to perform at a theatre.[5] "Independently of the difficulty of compelling a man to act," said Shadwell V.C., "there is no time stated, and it is not stated in what character he shall act; and the thing is altogether so loose that it is perfectly impossible for the Court to determine upon what scheme of things Mr. Kean shall perform his agreement."[6] So, where a vendor had agreed to sell an estate with a reservation of "the necessary land for making a railway through the estate to Prince Town,"

[1] *Cooper* v. *Hood*, 26 Beav. 293; *Powell* v. *Lowgrove*, 8 De G. M. & G. 357; *Parker* v. *Taswell*, 2 De G. & J. 559.

[2] *Baumann* v. *James*, L. R. 3 Ch. 508.

[3] *Franks* v. *Martin*, 1 Eden, 309.

[4] *Hodges* v. *Horsfall*, 1 Russ. & M. 116. Distinguish *Naylor* v. *Goodall*, 26 W. R. 162.

[5] *Kemble* v. *Kean*, 6 Sim. 333. Cf. *Ghillis* v. *McGhee*, 13 Ir. Ch. R. 48.

[6] 6 Sim. at p. 337.

Jessel M.R. held that the contract could not be enforced by the purchaser.[1] And a similar result was arrived at where, in a case of sale and purchase of land in the Transvaal, the price to be paid for the land was uncertain, not only in value, but in nature and character.[2]

Other instances.

§ **384**. So again, where the contract is discrepant with itself, or there are two different contracts relating to the same subject-matter, the Court will generally refuse specific performance.[3] In a case,[4] where an offer was made to take a house for a specific term and at a certain rent, if put into thorough repair, and stating also that the drawing-rooms would be required to be handsomely decorated according to the present style, and making some further requirements as to painting, and the offer was accepted, the Court of Appeal in Chancery, reversing the decision of Romilly M.R., dismissed the bill on the ground of the uncertainty imported into the contract by the expressions in the offer as to repairs. Where a contract was for the purchase of "the land required" for the construction of a railway at so much per acre, and the contract contained provisions agreed on between the land agents of the company and the vendor as to roads, culverts, etc., etc., Lord Romilly M.R. (following the decision of Turner V.C. in *Webb* v. *Direct London and Portsmouth Railway Company*,[5] then unreversed,) held that a surveyor going upon the ground, and having the contract in his hand, could accurately ascertain the land to be taken, and that the terms of the contract were therefore sufficiently

[1] *Pearce* v. *Watts*, L. R. 20 Eq. 192; observed upon in *Savill Brothers* v. *Bethell*, [1902] 2 Ch. at pp. 530, 541. Distinguish *South Eastern Railway Co.* v. *Associated Portland Cement Manufacturers*, [1910] 1 Ch. 12, 20.

[2] *Douglas* v. *Baynes*, [1908] A.C. 477, 485; 78 L. J. P. C. 13.

[3] *Callaghan* v. *Callaghan*, 8 Cl. & Fin. 374.

[4] *Taylor* v. *Portington*, 7 De G. M. & G. 328; cf. *Norris* v. *Jackson*, 1 J. & H. 319; *Samuda* v. *Lawford*, 4 Giff. 42; *Gardner* v. *Fooks*, 15 W. R. 388; *Dear* v. *Verity*, 17 W. R. 567.

[5] 9 Ha. 129; 1 De G. M. & G. 521.

explicit; but this decision was overruled on appeal, and Knight Bruce L.J. held the language "too vague, too uncertain, too obscure to enable this Court to act with safety or propriety."[1] A contract to take the mines under lands of A. at B., B. being neither a township nor a parish, has also been held uncertain.[2]

§ **385**. In another case, where there was a contract in general terms for the construction of a railway according to the terms of a specification to be prepared by the engineer of the company for the time being, it was held too vague, obscure, and uncertain to be enforced.[3] The like was held in the case of a contract to give the plaintiffs accommodation for the sale of their articles in the refreshment-rooms of the defendants, and to furnish them with the necessary appliances.[4] The like was again held where one partner proposed to sell to the other his share in the business, and that a large portion of his capital should remain in the business, but the writing did not state how much, for how long, or at what interest, and this proposal was accepted.[5] And again, where on the sale of a piece of land there were stipulations that, in the event of there being any coals or ironstone under the land, a royalty of so much per ton should be paid thereon by the purchaser to the vendor, and also that any mines required to be left by a certain railway company were to be paid for, as if the same had been gotten, out of the money to be received from the railway company; it was held, with regard to the latter stipulation, that it was incapable of being worked out, inasmuch as if the company bought the mines, the contingency whether there was any coal or ironstone under the land would remain undecided; and

Other instances.

[1] *Lord James Stuart* v. *London and North Western Railway Co.*, 15 Beav. 513; S. C. 1 De G. M. & G. 721. Cf. *Bellamy* v. *Knight*, 10 W. R. 289.

[2] *Lancaster* v. *De Trafford*, 31 L. J. Ch. 551.

[3] *South Wales Railway Co.* v. *Wythes*, 5 De G. M. & G. 880.

[4] *Paris Chocolate Co.* v. *Crystal Palace Co.*, 3 Sm. & Giff. 119.

[5] *Cooper* v. *Hood*, 26 Beav. 293.

as to the former stipulation, that the parties seemed to have intended to work it out by a reservation of mines to the vendor, and a lease of them by the vendor to the purchaser, but that there was nothing to guide the Court as to the stipulations to be included in such a lease, except the rates of royalty; and the Court accordingly declined to enforce the contract for sale.[1]

A contract to make ample provision for a person by will is too vague to be enforced.[2]

Less certainty required where there is fraud.

§ **386**. The same certainty will not be required in cases where there is any element of fraud, as in simple cases of specific performance of a contract. Thus where A. agreed with B. in effect that if B. would not try to buy a certain estate, A. would try to buy, and in case of success would cede a portion of the estate to B. at a certain price: and B. acted on his bargain and allowed A. to purchase: and A. having purchased refused to perform his part and set up the uncertainty of the part to be ceded: the Court held that the defence could not avail, and directed an inquiry to ascertain the portion to be given up and the price. It seems that if this could not have been ascertained, B. might have claimed the whole estate.[3]

[1] *Williamson* v. *Wootton*, 3 Drew. 210. See further, as to uncertainty, *Harnett* v. *Yielding*, 2 Sch. & Lef. 549; *Tatham* v. *Platt*, 9 Ha. 660; *Taylor* v. *Gilbertson*, 2 Drew. 391; *Holmes* v. *Eastern Counties Railway Co.*, 3 K. & J. 675; *Sturge* v. *Midland Railway Co.*, 6 W. R. 233; *Jeffery* v. *Stephens*, 8 W. R. 127; *Firth* v. *Ridley*, 33 Beav. 516; *supra*, § 93.

[2] *Macphail* v. *Torrance*, 25 T. L. R. 810, 811.

[3] *Chattock* v. *Muller*, 8 Ch. D. 117.

CANADIAN NOTES.

Uncertainty of the Contract.

In *Foster* v. *Russell*, 12 O.R. 136, specific performance of an agreement was refused because of the terms being too vague and uncertain. The plaintiff, a bookkeeper and accountant, entered into an agreement with a firm in the form of a letter addressed to himself, in the following terms: "In consideration of you advancing us the sum of three thousand dollars, we agree to give you collateral security and to pay you interest at the rate of eight per cent. per annum." No kind of security was specified in the agreement and it was held that parol evidence could not be given to supply the defect. The case of *DeGear* v. *Smith*, 11 Grant's Ch. 570, was followed as an authority that there could be no specific performance of such an agreement.

In *Leadgard* v. *MacLean*, 10 Grant's Ch. 139, the objection was taken that the contract was of too uncertain a character to be specifically enforced. The owner of the land had made a devise of fifty acres for fourteen years at a nominal rent for the purpose of boring for oil, and contemporaneously executed an agreement by which the owner agreed to convey at any time a roadway from any wells the lessee might dig or bore to a certain road, and also sufficient land for the working of such well or wells, the lessee agreeing to pay one hundred dollars for the first well he might work for oil, and the sum of fifty dollars per acre for the land necessary for working such oil well or said roadway, and the sum of fifty dollars for any oil well he should work after the first one, and the sum of twenty-five dollars per acre for any land necessary for working said well or wells and the roadway.

The Court held that the objection was not sustainable. The case of *Hook* v. *McQueen*, 2 Grant, 503, was cited, where the contract was for the sale of lot 16, and

as much of lot 17 as should require to be flooded for the purposes of working a mill on lot 16. Esten V.C. had held that this was not too uncertain to be executed, thinking that a jury or the Master would be competent to determine the quantity of land on lot 17 which it would be necessary to flood for the purpose of working any saw mill that would be reasonably erected on lot 16. In contracts respecting oil springs, it was scarcely possible from their novelty to define beforehand what quantity of land would be necessary for working them, and the Court adapting itself to the exigencies of mankind as they arose from time to time should so deal with new subjects as they presented themselves as best to effectuate the intention of the parties, and not allow rules and principles applicable to a different state of circumstances to interfere with the exercise of its jurisdiction whenever, in its judgment, it could be usefully exercised.

In *Carroll* v. *Cosemore*, 20 Grant's Ch. 16, it was held that *prima facie* the term "railway station" in a contract, means the station house. It having been ascertained that a railway company intended to have a station on the defendant's land, he contracted to sell to the plaintiff a quarter of an acre next to the railway station as soon as laid out. The company having afterwards located the station grounds but not the position thereon of the intended station house, it was held that the plaintiff's parcel could not be ascertained until the locality of the station house was determined, and that, until then, a bill to enforce specific performance was premature.

In *Burnham* v. *Ramsay*, 32 U.C.Q.B. 491, a bond was given for the conveyance of a water privilege on lot 17 and to convey also so much land as might be required for the purpose of making a race-way, or for erecting buildings on the said lot, at the rate of ten pounds per acre. It was questioned by Wilson J. whether a bill would lie for the specific performance of such a contract. "Whether the obligee could have filed a bill for specific performance of a contract to convey so much land as he might require for the purpose of making a race way or for erecting buildings on the lot, I am by no means certain. It was conceded on the argument that he

could. See *Stewart* v. *The London, etc., R.R. Co.*, 15 Beavan 513, *South Wales R.R. Co.* v. *Hughes*, 5 D.M. & G. 881, and other cases mentioned in Fry on Specific Performance. We say nothing on that point."

In *McLaughlin* v. *Whitesole*, 7 Grant's Ch. 573, it was held that specific performance will not be decreed where the terms of the contract signed by the parties are uncertain, nor will it be decreed where it is plain from the evidence that there was a misunderstanding. Where, therefore, the terms of the agreement contained in a letter written by the intending purchaser were "We will give you for your mill privilege in Laxton, with all the improvements including the saw logs and your claim on the land you applied for, viz., the north half of six in the eleventh and the north half of seven in ditto, lots numbers six and seven in the tenth concession, four thousand dollars, etc.," and in reality the premises mentioned comprised two mill privileges, but the vendor insisted that only one was embraced in this agreement, and filed a bill to enforce the specific performance of the cont act according to this construction, whilst the defendant by his answer insisted that both were included in his offer to purchase, the Court dismissed the bill. *Per* Blake Ch.: "There has been a plain misunderstanding. The plaintiff intended to sell one thing, the defendant to purchase another and an entirely different thing, and that would be in itself a sufficient defence to the suit, for, to decree specific performance under such circumstances would be obviously unjust; but the case fails on the ground of uncertainty also. I cannot tell what the expression "Your mill privilege in Laxton" means, and the meaning of the contract being uncertain, it cannot be specifically performed.

In the following case the apparent uncertainty of the contract was obviated by the construction put upon its terms by the Court.

In the *Grand Trunk Ry. Co.* v. *Canadian Pacific Ry. Co.*, 39 S.C.R. 220, by agreement through correspondence, the former was to tender for a triangular piece of land, offered for sale by the Ontario Government, containing nineteen acres, and convey half to the C.P.R. company which would not tender. The division was to

be made according to a plan of the block of land with a line drawn through the centre from east to west, the C.P.R. company to have the northern half. The G.T.R. company acquired the land, but the government reserved from the grant two acres in the northern half. In an action by the C.P.R. company for specific performance of the agreement, it was held, affirming the judgment of the Court of Appeal, that the C.P.R. company was entitled to one half of the land actually acquired by the G.T.R. company and not only to the balance of the northern half as marked on the plan, McLennan and Duff JJ. dissented. Per McLennan J. dissenting, concurred in by Duff J.: "The contract, unfortunately, makes no provision for the case which has occurred of the appellants failing to obtain all the land bargained for. There was no tenancy in common created in the whole parcel. The price to be paid was one half the price to be paid for the whole. If the respondents are to receive so much of the north half as was actually acquired, how is the price which they should pay to be ascertained? There is no evidence how the price to be paid for the whole was estimated, whether at so much per acre, or how otherwise. I see no way in which the price to be paid by the respondents for the only part of the land to which they can have any claim under the contract can be ascertained. This difficulty is overcome in the judgment appealed from by holding that the respondents are entitled to one-half of the land actually obtained by the appellants, and that the price to be paid is one half of the purchase money of the whole with interest, and by referring it to the Master to make a proper division. In my humble opinion, that is not warranted by the only agreement made between the parties." Per Davies J. "I think it must be taken to have been the common intention of the parties and that it sufficiently appears in the correspondence, that whatever land was in fact acquired was to be divided equally between the companies, each paying half the purchase money." This was the judgment of the majority.

It was held that a reference to the Master, in case the parties could not agree upon a line of division, was unnecessary.

In *Bell* v. *Northwood*, 3 Man. 511, specific performance was sought of the following agreement:

"I hereby agree to sell you 1850 shares in the D'Appelle Valley F. Co.'s stock, for the sum of $15,000, you to pay $10,000 to the Bank of Commerce, payment of the $15,000 to be made as follows: $5,000 by endorsed notes at four months, $5,000 by note at one year's date; $5,000 by note at two years' date at seven per cent., the last mentioned note to be secured by a portion of the stock."

It was held that this was too indefinite to be enforced, not shewing what particular shares were to be sold, and being uncertain as to the endorsement of the notes, and not providing what portion of the shares was to form security for the notes.

In *Tarte* v. *Calloway*, 2 Man. 289, it was pointed out that the certainty required in proceedings for specific performance of a contract was greater than in an action for damages. Specific performance being an appeal to the discretion of a Court, uncertainty itself was a good answer to the prayer for relief.

In the following case the Court inferred from the whole evidence a mutual intention sufficiently clear to be enforceable.

In *McLeod* v. *Orton*, 17 Grant's Ch. 84, the plaintiff, having occasion to raise $3,100 to pay the Church Society for a lot which he had leased and improved and which was worth $4,200 cash, procured the defendant to raise the money and to pay it to the Society, whereupon the Church Society conveyed the land to the plaintiff, and the plaintiff conveyed it to the defendant. The defendant in a few days afterward sold the lot for $4,200 cash to a person with whom the plaintiff had been previously negotiating. The defendant admitted that after the sale he intended to give the plaintiff the difference less his own expenses and $200 for his trouble. There was great inequality between the parties and some evidence of confidence between them and the negotiations between the two were private. The Court inferred from the whole evidence that the intention had been expressed during the negotiations between the plaintiff and defendant and that the plaintiff had conveyed on the strength

of it and held that it constituted an agreement which the Court would enforce.

One Kinnear, in 1835, purchased from the defendant part of lot number one, being a portion of a block of land owned by the latter, and two years afterwards agreed for the purchase of fifty feet additional land, and then erected his fences enclosing on the north 27 feet, on the west 6 feet, and on the south a quantity of land which could not now be defined, additional to the original purchase. Of the land so enclosed, Kinnear, and those claiming under him, remained in undisputed possession for about ten years, with the knowledge of the defendant who acted as agent for some years in respect of this property and was constantly in the habit of visiting it whilst the fences were in the course of erection. The plaintiff, having purchased this property from Kinnear, afterwards purchased from defendant the remainder of a lot situated on the south thereof, whereupon he removed the southern fence that had been erected by Kinnear, in order to put all the land into one parcel. On a plan of the property made by the defendant a lane had been laid out on the south of the original purchase, seventeen feet wide, and on the west another lane six feet whereof were comprised within the limits of lot number one. Kinnear's fences enclosed the six feet on the west and were supposed to have embraced the 17 feet lane on the south, which together with the 27 feet to the north, made in all fifty feet. The vendor subsequently sought to recover possession of the strips of land to the north and west, whereupon the plaintiff filed a bill to restrain the action at law and for a conveyance of the land. No place could be assigned to the fifty feet unless the twenty-seven feet and six feet formed part of it, and it having been established that the purchase money for the fifty feet had been paid, the Court made the decree as prayed with costs. *Howcutt* v. *Rees*, 3 Grant's Ch. 527.

Covenant to Build House.

In *Robertson* v. *Patterson*, 10 Ont. Rep. 267, there was an agreement for the sale of land from Robertson to Patterson, with the terms: "Price, one thousand

dollars, two hundred dollars cash and balance in five yearly payments, interest at the rate of seven per cent. and covenant of Patterson to build a house worth not less than four thousand dollars, to be commenced in year from date and finally completed in two years." The two hundred dollars was paid down and Robertson's solicitor prepared and tendered the deed, in which was inserted a covenant to build and a mortgage to Patterson for execution. Patterson refused to execute them and an action was brought for specific performance, which was resisted in the ground that the covenant to build was too vague and would not be enforced by the Court, but the contention was not sustained. Proudfoot J. referred to Waterman on specific performance, citing the case of *Wells* v. *Maxwell*, 32 Beavan 408, as marking the distinction between a contract to build a house and a contract of sale with a stipulation to erect a building or do certain work. "If the present case were a simple agreement to build a house of certain value, that authority would shew that it might be enforced, but that is not precisely the case here. The plaintiff seeks performance of the defendant's agreement to give a covenant to build of a certain value within a specified time, and to this I think him clearly entitled. The size, the plan, and the material are probably in the discretion of the defendant. The case of *Wood* v. *Silcock*, 50 L.T.N.S. 251, which was much relied on by the defendant appears to me to decide nothing contrary to what I propose to do. Bacon V.-C. held that the agreement to build houses was not a concluded one, but merely preliminary to something to be agreed upon at a future time, the plaintiff stating when examined, that he had plans when the agreement was prepared, but the defendant objected to them, and it was then agreed that plans which should make clear the agreement should afterwards be prepared; and there was no agreement, as here, to build of a certain value."

Here Recital of Wish no Part of Contract.

The owner of land promised the father of the plaintiff that if he would marry his daughter, he would give him fifty acres of land and after the marriage he did execute a bond for a conveyance thereof, reciting the

payment of three hundred dollars as the consideration therefor. The bond also contained a recital that the obligor, the father, desired that the land should go to the male issue of his daughter and her husband. The obligee having died, a suit to compel the specific performance of the agreement was filed by his infant heiress to which the obligor pleaded want of consideration and also denial of having executed the bond. At the hearing, Blake V.-C. refused to allow a supplemental answer to be filed setting up a defence as to the estate agreed to be conveyed, and, being of opinion that there was adequate consideration, made a decree for specific performance of the agreement with costs, which, on rehearing, was affirmed with costs. He held as to the recital that the obligor desired the property to go to the male issue of the marriage, that, taking the whole instrument together, the agreement was for the conveyance in fee simple and that the wish expressed by the obligor as to its ultimate destination did not qualify or modify the agreement. *Boyd* v. *Shouldice*, 22 Grant's Ch. 1.

Falsa Demonstratio.

In *Foster* v. *Anderson*, 16 O.L.R. 565, among the words of description of the parcel of land agreed to be sold, the contract contained the words, "being the premises known as number twenty-two Ann Street." The correct number was twenty-four. There was no number twenty-two, and the defendant owned no other property in Ann Street. It was held that, there being a description which identified the parcel without the aid of the street number, the words quoted might be rejected as surplusage, and there remained sufficient, with parol evidence, to satisfy the Statute of Frauds. Osler J.A. dubitante.

CHAPTER V.

WANT OF FAIRNESS IN THE CONTRACT.

Nature of the fairness required.

§ **387**. THERE are many instances in which, though there is nothing that actually amounts to fraud, there is nevertheless a want of that equality[1] and fairness in the contract which, as we have seen, are essential in order that the Court may exercise its extraordinary jurisdiction in specific performance. In cases of fraud[2] the Court will not only not perform a contract, but will rescind it; but there are many cases in which the Court in the exercise of the jurisdiction in specific performance will stand still, and interfere neither for the one purpose nor for the other.[3]

Unfairness in the terms or in extrinsic matters.

§ **388**. The unfairness in question may be either in the terms of the contract itself, or it may be in matters extrinsic and the circumstances under which it was made: with regard to the latter, parol evidence is of course admissible.[4]

When ascertained.

§ **389**. The fairness of the contract, like all its other qualities, must be judged of at the time it is entered into, or at least when the contract becomes absolute, and not by subsequent events:[5] for the fact that events,

[1] As to the equality which natural justice requires to find place in contracts see Grotius, De Jure Belli ac Pacis, lib. ii. cap. 12, sect. 8 *et seq.*

[2] The jurisdiction to rescind is, of course, not *confined* to cases of actual fraud. See *per* James L.J. in *Torrance* v. *Bolton*, L. R. 8 Ch. at p. 124.

[3] *Per* Lord Eldon in *Willan* v. *Willan*, 16 Ves. 83. See *Savage* v. *Taylor*, Forr. 234; *Twining* v. *Morrice*, 2 Bro. C. C. 326; *Savage* v. *Brocksopp*, 18 Ves. 335; *Davis* v. *Symonds*, 1 Cox, at p. 406; *Redshaw* v. *Governor and Co. of the Bedford Level*, 1 Eden, 346.

[4] *Davis* v. *Symonds*, 1 Cox, 402.

[5] So as to hardship: see *infra*, § 418.

uncertain at the time of the contract, may afterwards happen in a manner contrary to the expectation of one or both of the parties, is no reason for holding the contract to have been unfair. "The period," said the Irish Lord Chancellor Manners, "at which the Court is to examine the agreement between the parties is the time when they contracted."[1]

Where there is a condition to be performed.

§ **390**. In the case, however, of contracts to sell at a price to be fixed or any other condition to be performed before they become absolute, it may be urged that the time when the contract becomes absolute, and not the date of its signature, is the time to judge of its fairness. Unfairness in the valuation is certainly an objection.

Compromises and family settlements.

§ **391**. The principle of judging of the fairness of a contract at its date applies to compromises and settlements of family and other questions. "Where parties, whose rights are questionable, have equal knowledge of facts, and equal means of ascertaining what their rights really are, and they fairly endeavour to settle their respective rights amongst themselves, every Court must feel disposed to support the conclusions or agreements to which they may fairly come at the time,[2] and that notwithstanding the subsequent discovery of some common error"[3] or a subsequent judicial decision showing the rights of the parties to have been different from what they supposed, or that one party had nothing to give up.[4] And the uncertainty which may render a compromise fair, and therefore binding, may be either in some future and uncertain event, or the future ascertainment of some event past and therefore in itself certain, as, for instance, whether a son was

[1] In *Revell* v. *Hussey*, 2 Ball & B. 288. See *infra*, § 418.

[2] Cf. *per* Turner L.J. in *Williams* v. *Williams*, L. R. 2 Ch. at p. 504; *Bucknell* v. *Bucknell*, 7 Ir. Ch. R. 130.

[3] *Per* Lord Langdale M.R. in *Pickering* v. *Pickering*, 2 Beav. 31; *Frank* v. *Frank*, 1 Cas. in Ch. 84.

[4] *Lawton* v. *Campion*, 18 Beav. 87.

legitimate or not,[1] or whether an uncle had made a particular will or not.[2]

Contracts involving contingencies.

§ **392.** The principle just stated is perhaps most frequently illustrated by cases of family arrangement or of compromise; but it is applicable to contracts of whatsoever nature. The case of *Parker* v. *Palmer*,[3] which came before the Court in the fourteenth year of Charles II., illustrates this. Parker, as it appears, had, during the Commonwealth, sold a lease which he had from a dean and chapter for three lives, to Palmer, the price agreed on being 4,320*l.* Subsequently the purchaser agreed with the vendor that, if he would abate him 420*l.*, he would reconvey the lease whenever the King and dean and chapter were restored: the abatement was made: the King and Church were restored: and thereupon the vendor sued for a reconveyance, which was accordingly decreed by the then Master of the Rolls, and affirmed by Lord Clarendon and Sir Orlando Bridgeman. Again, where a man agreed to sell for 20*l.* an allotment thereafter to be made to him under an inclosure, and it turned out to be worth 200*l.*, he was nevertheless compelled to perform his contract:[4] and so in a case before Leach V.C., where he maintained a contract entered into without any fraud or concealment, by which one partner agreed with the retiring partner to give him 2,000*l.* for the concern, though they knew the partnership to be insolvent, his Honour said, "Suppose the case of a trade attended with great risk, one partner despairing, the other confident and willing to buy the share of his partner, and give him 2,000*l.* for it; on what possible ground could this contract be invalidated?"[5] The cases in which the thing sold is described in general terms,—as, for example,

Parker v. *Palmer*.

Other instances.

[1] *Stapilton* v. *Stapilton*, 1 Atk. 2.

[2] *Heap* v. *Tonge*, 9 Ha. 90.

[3] 1 Cas. in Ch. 42.

[4] *Anon.* before Jekyll M.R. cited in *Coath* v. *Jackson*, 6 Ves. 24.

[5] *Ex parte Peake*, 1 Mad. at p. 355.

a manor,—and the extent and value of it are at the time uncertain,[1] and also the cases in which the vendor only sells such interest in the property as he has, where that which is sold turns out differently from the purchaser's expectations, are analogous to those before stated.[2]

The contingency must be really such to both parties.

§ **393**. But in order to bring a contract within this principle, the uncertainty as to the subject-matter of the contract must at the time of the contract have been a real one to both parties, either from the nature of things or from the state of knowledge of both parties. A contract entered into by one party who knows that the subject-matter of the contract does not exist with another who does not know, will not, it seems, be executed by the Court, though its terms may be such as to put the ignorant party on his guard, and to throw the uncertainty on him. In one case, the particulars described the subject of the sale as the interest, if any, of Francis Norton in certain stock and also in a lease, and stated that there was a lien of 100*l.* on the lease, and the conditions provided that even if it should appear that Francis Norton had no interest in the premises, the purchaser should have no remedy against the vendor to compel him to refund; in consequence of the state of certain partnership accounts which was known to the vendor, but which the purchaser had no means of ascertaining, the interest sold was of no value whatsoever, and was in fact only exposed to sale for the purpose of enabling certain proceedings to be taken against the separate estate of Francis Norton: the vendor made no representations as to the value, but received from the purchaser 150*l.* as the purchase-money: Lord Hatherley (then Wood V.C.) set aside the sale at the suit of the purchaser, with costs against the vendor, on the ground that the purchaser was

[1] *Baxendale* v. *Seale*, 19 Beav. 601.

[2] See *infra*, § 1323.

buying what might be worth nothing, while the vendor was selling what was worth nothing.[1]

The contingency must have been understood as within the contract.

§ 394. Further, the principle in question will not apply where, though the terms of the contract may express an uncertainty, that uncertainty was not understood by the parties to comprise the event which actually happens. Thus where A. contracted with B. for the sale of a manor, and stipulated that he should not be obliged to define its boundary, and, the manor turning out to comprise a valuable property not before known to either party to be part of it, the purchaser, who had previously sought to repudiate the contract, filed his bill for performance, Lord Romilly M.R., on consideration of the evidence, came to the conclusion that neither party intended to sell or buy a mere doubtful matter, and that both parties at the time of the contract believed that it included something different from what would then be conveyed to the plaintiff, if the conveyance were to be executed as he claimed it, and accordingly dismissed the bill, but without costs.[2]

Davis v. Shepherd.

§ 395. In another case there was a farm which appears to have contained 181 acres, and had coal under it, which was known or believed to be traversed by a fault: the owners agreed to demise to A. the minerals under a portion of the farm which lay to the eastward of an upthrow fault to the east: the quantity was described as supposed to be 98 acres or thereabouts. There were to be a rent certain and royalties on the coal raised. It turned out that the fault left 173 instead of 98 acres to the east of it. The Court of Appeal in Chancery thought it clear that of such a contract specific performance could not have been granted at the suit of the lessee.[3]

[1] *Smith* v. *Harrison*, 26 L. J. Ch. 601. 112; 5 W. R. 408.

[2] *Baxendale* v. *Seale*, 19 Beav. 410.

[3] *Davis* v. *Shepherd*. L. R. 1 Ch.

Contracts to sell at a price to be fixed.

§ **396**. In contracts to sell at a price to be fixed by a third person, the Court would no doubt consider the unfairness of the valuer's conduct as a bar to the right to specific performance. So in one case, where the Court came to the conclusion that it was doubtful whether the valuation had been made with a due attention to accuracy, Lord Eldon refused specific performance of the contract to sell.[1]

Amount of rent to be fixed.

§ **397**. In another case, where the amount of rent to be paid was referred to arbitrators and an umpire, one of the arbitrators so far misconducted himself as to rest his decision, not on his own judgment, but on the will of one of the parties interested, and the umpire proceeded on the footing of an outlay of money by the tenant for which the contract contained no stipulation, the House of Lords reversed a decree for specific performance pronounced by the Irish Court of Chancery.[2]

Eads v. *Williams.*

§ **398**. In another case, where the referees consulted the umpire and made their award as to the value of coal upon his estimate, though one at least of the referees thought it wrong, this circumstance was held fatal to the valuation and the suit.[3] Other objections were discussed, and it was held that the objections (i.) that the valuers did not examine witnesses, and (ii.) that one of the valuers did not go down the mine, but acted on the report of his grandson, were not sustainable; but another objection, that the valuers did not sign their award together, was held entitled to much weight though not determined to be valid. This case is a very instructive one as to the duty of referees or valuers.

Fairness of surrounding circumstances.

§ **399**. In judging of the fairness of a contract, the Court will look not merely at the terms of the contract itself, but at all the surrounding circumstances,

[1] *Emery* v. *Wase*, 8 Ves. 505. Distinguish *Collier* v. *Mason*, 25 Beav. 200.

[2] *Chichester* v. *McIntire*, 4 Bli. N. S. 78.

[3] *Eads* v. *Williams*, 4 De G. M. & G. 674.

—such as intimidation and duress of the defendant,[1] the mental incapacity of the parties, though falling short of insanity,[2] their age or poverty, the manner in which the contract was executed, the circumstances that the parties were acting without a solicitor, that the property was reversionary, or that the price was not the full value.[3]

Court slow to act where circumstances suspicious.

§ 400. Therefore, whenever there are evidences of distress in the party against whom performance is sought,[4] or he is an illiterate person, or whenever there are any circumstances of surprise, or want of advice,[5] or anything which seems to import that there was not a full, entire, and intelligent consent to the contract,[6] the Court is extremely cautious in carrying it into effect. Still, it is not the doctrine of the Court that a man cannot contract without his solicitor at his elbow,[7] or that a man in insolvent circumstances, or in prison, is disabled from selling his estate: and if a contract made under such circumstances will bear the careful examination of the Court and the full light of day, it will be specifically enforced.[8]

Intentional unfairness not necessary to be proved.

§ 401. It is enough, generally speaking, to induce the Court to refuse performance, that there are any circumstances about the making of the contract which render it not fair and honest to call for its execution;

[1] *Dewar* v. *Elliott*, 2 L. J. Ch. (O. S.) 178.

[2] *Clarkson* v. *Hanway*, 2 P. Wms. 203; *Gartside* v. *Isherwood*, 1 Bro. C. C. 558; *Bridgman* v. *Green*, Wilm. Not. 58, 61. See *supra*, § 274.

[3] *Bell* v. *Howard*, 9 Mod. 302; *Martin* v. *Mitchell*, 2 J. & W. 413, 423; *Stanley* v. *Robinson*, 1 R. & M. 527.

[4] *Kerneys* v. *Hansard*, Coop. 125; *Johnson* v. *Nott*, 1 Vern. 271.

[5] *Stanley* v. *Robinson*, 1 R. & M. 527; *Helsham* v. *Langley*, 1 Y. & C. C. C. 175.

[6] The nature of the proper consent to a contract seems not incorrectly expressed in the following extract: "Consensus debet esse (1) verus seu internus et mutuus; (2) aliquo signo externo expressus; (3) liber et plene deliberatus; (4) serius, cum animo se obligandi." Mariani Examen, § 278.

[7] *Lightfoot* v. *Heron*, 3 Y. & C. Ex. 586; *Haberdashers' Co.* v. *Isaac*, 3 Jur. N. S. 611 (Wood V.C.).

[8] *Brinkley* v. *Hann*, Dru. 175.

it is not needful that there was any intentional unfairness or dishonesty at the time.[1] A leading case on this subject is *Twining* v. *Morrice*,[2] where the bill was by a purchaser against a vendor: at the sale, which was by auction, the solicitor, who was known to be the agent of the vendor, had made some biddings for the plaintiff, which from his known relationship to the vendor were thought to be the biddings of a puffer, and so damped the sale: the act was done in inadvertence by the solicitor; but as it was done at the plaintiff's instance, specific performance was refused by Lord Kenyon M.R.

Twining v. Morrice

Misstatements.

§ **402.** Unfairness arising from misstatements is considered under the head of Misrepresentation:[3] and cases relating to the silence or suppression of a fact by one party are considered in the chapter on Fraud.[4] But it seems possible that there may be cases where silence is not fraudulent, but yet creates such a case of hardship as prevents the interference of the Court in specific performance. On this ground was put a case where a lessee obtained the renewal of a lease on the surrender of an old one, knowing and suppressing the fact, which was unknown to the lessor, that the person on whose life the old lease depended was *in extremis*, and the Court declined to aid the lessee.[5] And in a case before Lord Cranworth, where the same solicitor acted for both parties, but did not disclose to both parties the whole nature of the dealing, or place his principals at arm's length in the transaction, the Court refused to enforce specific performance at the suit of the purchaser.[6]

Silence or *suppression*.

Intoxication.

§ **403.** On the ground of want of fairness, the Court will not assist one party to a contract specifically

[1] *Mortlock* v. *Buller*, 10 Ves. 292, 305.

[2] 2 Bro. C. C. 326.

[3] *Infra*, § 650.

[4] Part III. ch. xiv. § 701.

[5] *Ellard* v. *Lord Llandaff*, 1 Ball & B. 241.

[6] *Hesse* v. *Briant*, 6 De G. M. & G. 623.

to enforce it against the other, who at the time of entering into it was in a state of intoxication, and that even in the absence of any unfair advantage taken of his situation which would induce the Court to rescind the contract.[1] But the mere fact that some glasses of liquor had been drunk before the signing of the contract will not avoid it, if there be nothing to show that the defendant acted without a full understanding of what he was doing.[2] In one case Stuart V.C. refused to allow a third party, who, having got a subsequent transfer of the property, was the substantial defendant, to avail himself of this defence.[3]

Contract injurious to third persons.

§ 404. One kind of that unfairness which stays the interference of the Court arises where the enforcement of the contract would be injurious to third persons. Therefore where an estate was settled in strict settlement, giving to the settlor a life estate and an ultimate remainder, and the tenant for life entered into a contract for the sale of the fee, the Court refused to allow the purchaser to take the interest of the tenant for life with compensation, on the ground that a father and a stranger would be likely to use an estate without impeachment of waste in a different way, and that therefore the sale might prejudice the interests of the persons in remainder.[4]

Secret guarantee.

§ 405. Again, where bankers, after a customer had commenced liquidation proceedings, secretly took a guarantee from his brother that the bank's loss should not exceed 2,000*l.*, and thereupon forbore to take proceedings against the customer or to prove against his

[1] *Cooke* v. *Clayworth*, 18 Ves. 12; *Nagle* v. *Baylor*, 3 Dr. & War. 60. Distinguish *Shaw* v. *Thackray*, 1 Sm. & G. at p. 539. In *Butler* v. *Mulvihill*, 1 Bli. 137, a contract obtained by fraud from an intoxicated party was set aside. The contract of a drunken man is not void, but voidable. *Matthews* v. *Baxter*, L. R. 8 Ex. 132.

[2] *Lightfoot* v. *Heron*, 3 Y. & C. Ex. 586.

[3] *Shaw* v. *Thackray*, 1 Sm. & G. 537.

[4] *Thomas* v. *Dering*, 1 Ke. 729.

estate, the Court, on the ground that this arrangement tended to give the bankers an undue advantage over the other creditors, dismissed a bill filed by the bankers to enforce specific performance of the guarantee.[1]

Sale by a voluntary settlor.

§ **406**. Formerly the Act 27 Eliz. c. 4, in effect enabled a voluntary settlor of land to defeat the settlement by means of a subsequent conveyance to a purchaser for value. If, however, a voluntary settlor entered into a contract to sell the estate and brought an action to carry the contract into execution, the Court would not assist him thus to override the settlement and prejudice the interests of the persons claiming under it;[2] unless the purchaser was willing to complete on having a good title shown.[3] Now, by virtue of the provisions of the Voluntary Conveyances Act, 1893 (56 & 57 Vict. c. 21), a voluntary conveyance of land, if in fact made *bonâ fide* and without any fraudulent intent, is not liable to be defeated under any of the provisions of the above Act of Elizabeth.

Contracts necessitating a breach of trust.

§ **407**. The Court will not generally exercise its extraordinary power in compelling a specific performance, where to do so would necessitate a breach of trust or of a prior contract with a third person,[4] or would compel a person to do what he is not lawfully

[1] *McKewan* v. *Sanderson*, L. R. 20 Eq. 65. Cf. *De Cordova* v. *De Cordova*, 1 App. C. 692.

[2] *Johnson* v. *Legard*, T. & R. 281; *Smith* v. *Garland*, 2 Mer. 123; *Clarke* v. *Willott*, L. R. 7 Ex. 313. *Re Briggs and Spicer*, [1891] 2 Ch. 127, was overruled by the decision of the C. A. in *Re Carter and Kenderaine's Contract*, [1897] 1 Ch. 776.

[3] *Peter* v. *Nicolls*, L. R. 11 Eq. 391. But the difficulty of being quite sure that the settlement had not been made good by some *ex post facto* matter was calculated to deter purchasers from being willing to complete. It was held in a comparatively recent case that the mere fact that one link in the title was a voluntary conveyance to a person under whom the vendor claimed by purchase for value was not enough to justify the purchaser in repudiating the contract. *Noyes* v. *Paterson*, [1894] 3 Ch. 267.

[4] *Willmott* v. *Barber*, 15 Ch. D. 96, 107. Cf. *Mulholland* v. *Mayor of Belfast*, 9 Ir. Ch. R. 201, 215, and *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.*, [1900] 2 Ch. at p. 367; [1901] 2 Ch. at p. 50.

competent to do, even though at the time of contract the act might have been lawful,'—partly, as it seems, on the ground of the unfairness and illegal taint of such a contract in itself, and partly of the hardship to which it would expose the person forced to execute it. The plaintiff "must also," said Lord Redesdale, "show that, in seeking the performance, he does not call upon the other party to do an act which he is not lawfully competent to do; for, if he does, a consequence is produced that quite passes by the object of the Court in exercising the jurisdiction, which is to do more complete justice."[2]

Instances

§ **408**. Therefore, where trustees entered into a binding contract for a sale under a power, but one so disadvantageous as to be a breach of trust, the Court would not specifically perform the contract;[3] and so, again, where trustees for sale for the benefit of creditors made a sale by auction, under circumstances of improvidence and likely to prejudice the owner of the estate, for the sake of immediately realizing money to pay his creditors, the Court pursued the same course.[4] And where, on the sale of trust property, it was agreed that the purchaser should out of the purchase-money retain a private debt due to him from the trustee, a demurrer to a bill by the trustee was allowed.[5] Again, where trustees entered into a contract for a lease which

[1] *Mayor of New Windsor* v. *Stovell*, 27 Ch. D. 665.

[2] *Harnett* v. *Yielding*, 2 Sch. & Let. 553. See *Byrne* v. *Acton*, 1 Bro. P. C. 486; *Tolson* v. *Sheard*, 5 Ch. D. 19; *Oceanic Steam Navigation Co.* v. *Sutherbury*, 16 Ch. D. 236; *Mansfield* v. *Childerhouse*, 1 Ch. D. 82; and *Delves* v. *Gray* (repurchase by one of two trustees for sale), [1902] 2 Ch. 606, 611; 51 W. R. 56; 87 L. T. 125; and cf. *British South African Co.* v. *De Beers Consolidated Mines* (contract to issue debentures), [1910] 1 Ch. 354, 371; [1910] 2 Ch. 502; 103 L. T. 1.

[3] *Mortlock* v. *Buller*, 10 Ves. 292. Accordingly, *Bridger* v. *Rice*, 1 J. & W. 74; *Wood* v. *Richardson*, 4 Beav. 174; *Maw* v. *Topham*, 19 Beav. 576. See also *Hill* v. *Buckley*, 17 Ves. 394; *Neale* v. *Mackenzie*, 1 Ke. 474; *Rede* v. *Oakes*, 1 De G. J. & S. 505; *Dunn* v. *Flood*, 25 Ch. D. 629, affirmed 28 Ch. D. 586.

[4] *Ord* v. *Noel*, 5 Mad. 438.

[5] *Thompson* v. *Blackstone*, 6 Beav. 470.

was in excess of their power;[1] and, again, where they entered into a covenant for renewal which was *ultra vires*; the Court on this ground, in both cases, refused specific performance.[2]

Where condition for compensation.

§ **409**. Where trustees for sale misrepresented the value of the property, when they had the means in their power of stating it correctly, and the conditions of sale stipulated for compensation on either side; one of the grounds on which the House of Lords reversed a decree for compensation was, that the Court would not give effect to a condition which would injure the *cestuis que trust*, by reason of the neglect of the trustees in making the misdescription which was the ground for compensation.[3]

Sneesby v. *Thorn.*

§ **410**. In another case, the Court refused performance of a contract for the sale of leaseholds by one of two executors, on the ground that, under the circumstances of the case, it would be an injury to the *cestuis que trust*, and expose the executor to extraordinary risk from them, and that either of these grounds was sufficient to stay the interference of the Court.[4]

The objection precluded by the conditions of sale.

§ **411**. But where trustees, who had without authority granted leases, put up the property for sale under conditions which expressly provided that no objection should be made in respect of such leases, and that the purchaser should take subject to such interests as the tenants might be entitled to thereunder, the Court held the

[1] *Harnett* v. *Yielding*, 2 Sch. & Let. 549. Accordingly *Byrne* v. *Acton*, 1 Bro. P. C. 186.

[2] *Bellringer* v. *Blagrave*, 1 De G. & S. 63.

[3] *White* v. *Cuddon*, 8 Cl. & Fin. 766, reversing S. C. *s. n. Cudden* v. *Cartwright*, 4 Y. & C. Ex. 25. See *infra*, § 1294.

[4] *Sneesby* v. *Thorn*, 1 Jur. N. S. 536, before Lord Hatherley (then Wood V.C.), affirmed 7 De G. M. & G. 399. See also *Magrane* v. *Archbold*, 1 Dow, 107; *Trappes* v. *Cobb*, 16 W. R. 117; *Naylor* v. *Goodall*, 26 W. R. 162. But in *Barrett* v. *Ring*, 2 Sm. & Gif. 14, Stuart V.C. compelled trustees of a road to complete a contract for sale which had been made in forgetfulness of a statutory right of pre-emption, and might expose them to an action for damages.

purchaser precluded from objecting on the ground of breach of trust.[1]

It is conceived, however, that trustees generally cannot by contract prevent the operation of the Court's usual unwillingness to enforce any transaction resulting in injury to third persons.

Statutory provision as to depreciatory conditions.

§ 412. The law with regard to depreciatory conditions of sale used by trustees[2] has been modified by legislation. By the 14th section of the Trustee Act, 1893, it is provided as follows :—

"(1) No sale made by a trustee shall be impeached by any beneficiary upon the ground that any of the conditions subject to which the sale was made may have been unnecessarily depreciatory, unless it also appears that the consideration for the sale was thereby rendered inadequate.

"(2) No sale made by a trustee shall, after the execution of the conveyance, be impeached as against the purchaser upon the ground that any of the conditions subject to which the sale was made may have been unnecessarily depreciatory, unless it appears that the purchaser was acting in collusion with the trustee at the time when the contract for sale was made.

"(3) No purchaser, upon any sale made by a trustee, shall be at liberty to make any objection against the title upon the ground aforesaid."

Unbusinesslike contract.

§ 413. Even where there is nothing amounting to a distinct breach of trust the Court will be delicate of interfering against trustees ; so that where, in a contract for sale by them, there is any want of a business-like character. the Court will not, it seems, interfere, unless

[1] *Micholls* v. *Corbett*, 34 Beav. 376; 3 De G. J. & S. 18.

[2] See *Dunn* v. *Flood*, in C. A. 28 Ch. D. 586.

the price be shown to be equal, or more than equal, to the value of the property.[1]

Cases of breach of duty.

§ **414.** The doctrine does not apply only to persons standing in the position of formal trustees, but, it seems, to all cases of trust and confidence. So that, if a contract were the result of a gross breach of duty by an agent towards his principal, the Court would not, it seems, enforce the consequences of that act.[2] And so, railway directors having duties towards the shareholders, the Court will not enforce any contract amounting to a breach of duty to the prejudice of all or any of the shareholders at the instance of a plaintiff cognizant of the circumstances.[3]

Rescinding contract on this ground.

§ **415.** The Court has on this ground not only refused specific performance, but in a case where the purchaser must have known that assignees in bankruptcy were dealing without sufficient knowledge, and that the creditors who were to ratify it were equally ignorant, the Court, on the ground of the breach of trust of the assignees (as well as other grounds), set aside the contract.[4]

Injury to public.

§ **416.** In one case Lord Romilly M.R. took into consideration the injury likely to arise to the public from the specific performance of a contract relating to the level of a railway, and on the ground of that injury refused to compel the company to lower the level of their line. But that decision was reversed on appeal.[5]

[1] *Goodwin* v. *Fielding*, 4 De G. M. & G. 90.

[2] *Mortlock* v. *Buller*, 10 Ves. 292, 313.

[3] *Shrewsbury and Birmingham Railway Co.* v. *London and North Western Railway Co.*, 4 De G. M. & G. 115, affirmed, and this principle approved, 6 H. L. C. 113.

[4] *Turner* v. *Harvey*, Jac. 169. Cf. *Rowland* v. *Chapman*, [1901] W. N. 153; 17 Times L. R. 669 (receipt by purchaser's agent of secret commission from vendor).

[5] *Raphael* v. *Thames Valley Railway Co.*, L. R. 2 Eq. 37; 2 Ch. 147. Consider *Worthing Corporation* v. *Heather* (objection on grounds of public policy and illegality overruled and damages given, though specific performance unenforceable). [1906] 2 Ch. 532, 535, 536.

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Unfairness, etc.

Where a woman, under the impression that she had a life interest in two acres of land, when in reality she was entitled to the fee thereof, and also an annual allowance of ten pounds, partly in cash and partly in produce charged upon other lands, agreed to sell her interest in such two acres to the owner of the other land in consideration of his paying her the ten pounds all in cash, the Court, under the circumstances, refused to enforce the specific performance of the agreement. *Earley* v. *McGill*, 11 Grant's Ch. 75.

In[illegible]cation.

To a bill for specific performance of an agreement to purchase lands the defendant set up that he had been led into drink by the fraudulent contrivances of the vendor, and, while in an insensible state of intoxication, had been induced to sign the agreement in which the price stipulated to be paid for the property was most exorbitant. At the hearing it was clearly shewn that the purchaser had be[illegible] at the time of executing the contract intoxicated [illegible] that the price was exorbitant, but the Court exonerated the vendor from any fraudulent conduct and, therefore, refused to give the defendant his costs on the dismissal of the bill. The case does not decide whether the contract was void or voidable. *Schofield* v. *Tummonds*, 6 Grant's Ch. 568.

Trustee's Contract Detrimental to Cestui Que Trust.

A property was advertised, the advertisement describing it as having been rented for £72 and having 40 acres, a dense forest of pine, whereas in reality it rented for £60

only, and the pinery had no existence at all. The purchaser, having discovered the error, filed a bill for specific performance, with an abatement of the price. The defendant offered to perform the contract without compensation, but this the purchaser declined to accept. The defendant was a Building Society and there was a mortgagor interested in the sale who was described by Spragge V.-C. as being the *cestui que trust* of the Building Society and his interests would be seriously prejudiced should the contract be enforced with an abatement of price. The principle of *Mortlock* v. *Buller*, and *Lancsburg* v. *Jones*, was applied that the Court would not enforce, as against a person selling in a fiduciary character, a contract which any parties interested in the trust was entitled to complain of. *Osborne* v. *Farmers, etc., Building Society*, 5 Grant's Ch. 326.

CHAPTER VI.

HARDSHIP OF THE CONTRACT.

Hardship a bar to the Court's interference.

§ **417**. It is a well-established doctrine that the Court will not enforce the specific performance of a contract, the result of which would be to impose great hardship on either of the parties to it;[1] and this although the party seeking specific performance may be free from the least impropriety of conduct.[2]

When ascertained.

§ **418**. The question of the hardship of a contract is generally to be judged of at the time at which it is entered into: if it be then fair and just and not productive of hardship, it will be immaterial that it may, by the force of subsequent circumstances or change of events, have become less beneficial to one party,[3] except where these subsequent events have been in some way due to the party who seeks the performance of the contract. For whatever contingencies may attach to a contract, or be involved in the performance of either part, have been taken upon themselves by the parties to it. It has been determined that the reasonableness of a contract is to be judged of at the time it is entered into, and not by the light of subsequent events,[4] and we have already seen that the same principle applies in considering the fairness of a contract.[5]

[1] *Per* Lord Brougham in *Gould* v. *Kemp*, 2 My. & K. 308; and see *Re Highett and Bird's Contract*, in C. A. [1903] 1 Ch. at pp. 293, 294.

[2] *Per* Kindersley V.C. in *Falcke* v. *Gray*, 4 Drew. 660.

[3] *Lawder* v. *Blachford*, Beat. 522; *Webb* v. *Direct London and Portsmouth Railway Co.*, 9 Ha. 129; S.C. on appeal, 1 De G. M. & G. 521.

[4] *Jones* v. *Lees*, 26 L. J. Ex. 9.

[5] See *supra*, § 389.

Instances of subsequent circumstances disregarded.

§ 419. On this ground it has been decided in several cases in Ireland, that where a lessee of renewable leaseholds covenants with his sub-lessee for renewal without fine on every renewal to himself, and subsequently a renewal is made to him, but on terms far less beneficial than had been the custom at the time he entered into the covenant, and on the expectation of the continuance of which he had so covenanted, he will nevertheless be obliged to renew to his sub-lessee, and that without any contribution toward the increased fine which he has paid.[1] So where railway companies contract unconditionally for the purchase of land, and by their laches their powers expire before the completion of the purchase, that circumstance furnishes them with no ground of defence.[2]

Submission and awards.

§ 420. This is further well illustrated by the cases on awards: for where the contract contained in the submission is unfair, or conducing to hardship, the Court will not interfere;[3] whereas hardship or unreasonableness in the award itself will not be a bar to its enforcement by the Court: for the submission and not the award is the contract, and unreasonableness in the award is therefore a matter subsequent, and arising from the decision of a Judge whom the parties themselves have chosen, and the risks attending whose judgment they have taken on themselves.[4]

Instances of subsequent events regarded.

§ 421. It cannot, however, be denied that there are cases in which the Court has refused its interference by reason of events subsequent to the contract. Thus

[1] *Evans* v. *Walshe*, 2 Sch. & Lef. 419; *Revell* v. *Hussey*, 2 Ball & B. 280; *Lawder* v. *Blachford*, Beat. 522.

[2] *Hawkes* v. *Eastern Counties Railway Co.*, 1 De G. M. & G. 737, 755; S. C. 5 H. L. C. 331, 353. In *Scottish North Eastern Railway Co.* v. *Stewart* (3 Macq. 382, particularly 401), may be found expressions which appear contrary to the statement in the text. But the real point decided in the case was that, on the true construction of the contract, it was conditional on the making of the line.

[3] *Nickels* v. *Hancock*, 7 De G. M. & G. 300. See *infra*, § 1592.

[4] *Wood* v. *Griffith*, 1 Sw. 43; *Weekes* v. *Gallard*, 18 W. R. 331.

in *The City of London* v. *Nash*,[1] where a party had covenanted to re-build several houses, and, instead, had built but two new houses, and only repaired the others, but in so doing had laid out at least 2,200*l*., and put them in very good condition; Lord Hardwicke, holding that the covenant was one which in its nature the Court could enforce, yet considered that specific performance would entail so great a loss and hardship on the defendant, and be so useless to the plaintiff, that the Court would not enforce it, whether the defendant had mistaken the sense of the covenant to re-build, or perhaps had even knowingly evaded it. And so again, where a mortgagor had entered into a contract to grant a lease, expecting to obtain the mortgagee's consent, but failed in this, and was in circumstances which rendered him practically unable to redeem: in a suit instituted by the intended lessee, the Court refused specific performance, but granted the alternative prayer of the bill for rescission.[2]

Subsequent events dependent on plaintiff.

§ **422**. Notwithstanding these cases the general rule seems to be, that events subsequent to the contract, and not so involved in it as to render it unequal at the time it is entered into, cannot be brought forward to show the hardship of enforcing it. But where the subsequent events alleged for this purpose are acts of the plaintiff himself, or events in some sense within his power, the Court may have regard to them in exercising its discretionary jurisdiction in specific performance. There are cases in which the Court has considered that, by means of these events, such a change has taken place in the relative position of the plaintiff and defendant, as to render it inequitable specifically to enforce the contract against the latter.

Duke of Bedford v. *Trustees of British Museum*.

§ **423**. The leading case on this head is *The Duke of Bedford* v. *The Trustees of the British Museum*,[3]

[1] 3 Atk. 512; S. C. 1 Ves. Sen. 12. Lef. 160.

[2] *Costigan* v. *Hastler*, 2 Sch. & Lef. 160.

[3] My. & K. 552.

before Plumer M.R. and Lord Eldon. Lord William Russell and Lady Rachel his wife, being in the occupation of Southampton House (afterwards called Bedford House) as their residence, in 1675 conveyed to Mr. Montagu adjoining land, for the purpose of his erecting on it a mansion, with suitable appendages of gardens and offices; and Mr. Montagu entered into covenants with Lady Rachel Russell not to use the land in a particular manner, with a view to the more ample enjoyment of the adjoining lands. Lady Rachel Russell, or those claiming under her, subsequently covered these lands, or a considerable part of them, with houses, and Southampton House was pulled down to make way for streets and buildings. On a motion by the Duke of Bedford, who claimed under Lady Rachel Russell, for an injunction to restrain the defendants, who claimed under Mr. Montagu, from using the land in a way at variance with the covenants of the deed of 1675, Plumer M.R. and Lord Eldon held that the Duke or his predecessors having altered the state of the property in the way mentioned, it would be inequitable, unreasonable, and unjust, thus to enforce the covenants specifically, and the plaintiff was left to his remedy at Law.[1] And so, long acquiescence in a variation from the mode of renewal pointed out by a covenant for that purpose has been held a reason for not specifically enforcing the covenant in its original terms.[2]

Plaintiff's subsequent conduct a trap.

§ **424.** Where the conduct of the plaintiff subsequent to the contract has led the defendant into a trap, though the plaintiff's conduct may have been unintentionally injurious, the Court will refuse specific performance. Thus, in one case, the contract for sale

[1] See *per* Knight Bruce L.J. in *Shrewsbury and Birmingham Railway Co.* v. *Stour Valley Railway Co.*, 2 De G. M. & G. 882.

[2] *Davis* v. *Hone*, 2 Sch. & Let. 341; *Sayers* v. *Collyer*, 28 Ch. D. 103.

of leaseholds liable to a covenant to insure stipulated that the contract should be completed on the 20th July: the insurance expired on the 24th June: one of the vendors renewed for a month only, to the 24th July: the contract in fact was not completed before the 26th August, when the parties met for that purpose, and it was discovered that the insurance had expired and the leaseholds had become liable to forfeiture; and the purchaser refused to complete. Kindersley V.C. held that the property was at the risk of the purchaser: but as the vendors' conduct had operated as a trap to the purchaser, he refused specific performance.[1]

Distinction between patent and latent hardship

§ **425**. It would seem that, in considering the hardship which may flow from the execution of a contract, the Court will consider whether it is a result obviously flowing from the terms of the contract, so that it must have been present at the time of the contract to the minds of the contracting parties, or whether it arises from something collateral, and so far concealed and latent, as that it might not have been thus present to their minds.[2] It is obvious that a far higher degree of hardship must be present in the former, than in the latter class of cases, for it to operate on the discretion of the Court.

Hardship induced by the party himself.

§ **426**. The cases which have been already quoted as showing that the hardship must be judged of at the time of the contract also illustrate another obvious principle, namely, that where the hardship has been brought upon the defendant by himself, it shall not be allowed to furnish any defence against the specific performance of the contract,[3] at least whenever the thing he was contracted to do is "reasonably possible."[4]

[1] *Dowson* v. *Solomon*, 1 Dr. & Sm. 1.

[2] See *e.g.* cases stated § 429.

[3] See *per* Lord Hardwicke in *Pembroke* v. *Thorpe*, 3 Sw. 437 n.

[4] *Per* Knight Bruce V.C. in *Storer* v. *Great Western Railway Co.*, 2 Y. & C. C. C. 52.

Failure of party's scheme.

§ 427. It will not constitute a case of hardship that the ultimate object which a party had in view in entering into a contract may have become impossible: the mere failure of the purchaser's speculation will not discharge him from his obligations to the vendor. Thus, where one person contracted with another for the purchase of a piece of land on which he intended to erect a mill, for which the consent of a corporation was requisite, the refusal to give this consent furnished no defence to the purchaser, although he had, in consequence of the object he had in view, given a very high price for the ground.[1] And so also the fact that a mine which the defendant had contracted to take for £1,400 turned out literally worth nothing was held to be no defence to a suit for specific performance of the contract.[2]

Hardship on members of a corporation.

§ 428. In cases against companies, the Court will not consider the hardship which may result to the individual members from enforcing a contract made by the whole body; for "the Court cannot recognize any party interested in the corporation but must look to the rights and liabilities of the corporation itself;"[3] and though, as we have seen,[4] the decision of the case in which this language was used by Lord Cottenham has been disapproved of in the House of Lords, this principle seems to be untouched, and to rest on solid reasoning.

Forfeiture a circumstance of hardship.

§ 429. If the execution of the contract would render the defendant liable to a forfeiture, the Court will

[1] *Adams* v. *Weare*, 1 Bro. C. C. 567; *Morley* v. *Chevering*, 29 Beav. 83; *per* Turner V.C. in *Webb* v. *Direct London and Portsmouth Railway Co.*, 9 Ha. at p. 140; *per* Lord Romilly M.R. in *Lord James Stuart* v. *London and North Western Railway Co.*, 15 Beav. at p. 523 (as to these last two cases see *infra*, § 986). Distinguish *Bray* v. *Briggs*, 20 W. R. 962.

[2] *Haywood* v. *Cope*, 25 Beav. 140.

[3] *Per* Lord Cottenham in *Edwards* v. *Grand Junction Railway Co.*, 1 My. & Cr. at p. 674; *Hawkes* v. *Eastern Counties Railway Co.*, 1 De G. M. & G. 737, 754; cf. *supra*, § 414.

[4] See *supra*, § 254.

regard this as a circumstance of hardship: so where a man was entitled to a small estate under his father's will, on condition that, if he sold it within twenty-five years, half the purchase-money should go to a brother; the owner agreed to sell it, but Lord Hardwicke held that the hardship was sufficient to determine the Court not to interfere.[1] So where a lessee sold certain lots of building ground, and agreed to make a road, which it was found he could not do without incurring the risk of forfeiting a piece of leasehold land through which it was to pass, or of being sued by the lessor, the Court, granting the purchaser specific performance of the contract for sale, refused to enforce the stipulation, but gave him compensation for the non-performance of it.[2]

Exceptions.

§ 430. But the Court will give no effect to this defence unless it clearly appears that the forfeiture will follow on the judgment for specific performance. The mere apprehension of such a result is not enough. Nor will the Court give much, if any, consideration to this defence where the forfeiture is the result of other acts of the defendant himself. So where a lessee of a theatre, having by his lease power to lease forty-one boxes agreed to let a box to the plaintiff, and in defence alleged that he had already let forty-one boxes, so that to perform his contract with the plaintiff would work a forfeiture, his defence failed.[3]

Where vendor would be left subject to a liability.

§ 431. To this head of hardship we may perhaps best refer the cases which establish that, where the vendor is liable to certain covenants, and has not expressly stipulated that the purchaser shall indemnify him against them, yet the purchaser, so soon as he has notice of them, whether by the particulars of sale[4] or subsequently to the contract,[5] is bound to elect either

[1] *Faine* v. *Brown*, cited 2 Ves. Sen. 307.

[2] *Peacock* v. *Penson*, 11 Beav. 355.

[3] *Helling* v. *Lumley*, 3 De G. & J. 493.

[4] *Mosbay* v. *Inderwick*, 1 De G. & Sm. 708.

[5] *Lukey* v. *Higgs*, 24 L. J. Ch. 495 (Kindersley V.C.).

to rescind the contract or to execute an indemnity to the vendor: for otherwise the vendor would lose his land but retain his liability in respect of it. In the earlier of the cases cited, it was only decided that the purchaser as plaintiff could not enforce specific performance without entering into such indemnity; but in the latter, that the vendor as plaintiff might put the purchaser to his election.

Other liabilities.

§ 432. In a case where trustees had joined their *cestuis que trust* in a contract for sale, and had personally agreed to exonerate the estate from the incumbrances, and it did not appear whether the purchase-money would be sufficient to discharge them, or what would be the extent of the deficiency, the Court refused specific performance on the ground of hardship, although the plaintiff had had possession of the estate, and could not be deprived of the benefit of his contract without great inconvenience.[1] In another case a mortgagee with power of sale had obtained a foreclosure decree, and, intending to sell as absolute owner, entered into a contract for sale to the plaintiff. In the contract there was copied, by inadvertence, from conditions of sale of other parts of the estate drawn up some time before, a clause stating the vendor to be a mortgagee with power of sale: the vendor offered to convey as owner under the foreclosure decree; the purchaser insisted on a title under the power of sale: but the Court held, that to impose on the vendor the risk of opening the foreclosure decree by such a sale, was a hardship which it would not put on him, and accordingly dismissed the bill unless the plaintiff would accept the conveyance which the defendant was ready to execute.[2]

Liability disregarded.

§ 433. But where a tenant for life had agreed to grant a mining lease, and to a bill by the intended lessee he objected that he was only tenant for life, and

[1] *Wedgwood* v. *Adams*, 6 Beav. 600.

[2] *Watson* v. *Marston*, 4 De G. M. & G. 230.

that he could not grant the lease in question under his power and that he should be accountable for waste. Lord Nottingham appears to have considered this to be no defence, and he decreed the defendant to execute the contract as far as he was capable of doing.[1]

Minor instances of hardship

§ 434. In one case Lord Hardwicke, on the ground of hardship, refused specific performance of a covenant to leave buildings in repair contained in an ecclesiastical lease, the fact of the description of the buildings being continued from lease to lease without variation showing that the buildings in question might not have been in being at the time of the making of the lease.[2]

In another case, property described as "eligible freehold property for investment" having been sold by auction, the purchaser discovered before completion that it was being used by the vendors' tenant as a disorderly house. Vendors and purchaser were alike ignorant of this fact at the time of the contract. The Court of Appeal declined to enforce specific performance at the suit of the vendors, Lindley M.R. putting his judgment on the ground that the Court will not compel a man to buy a property which, if he takes no steps to prevent it, will expose him, as owner, to criminal proceedings by reason of its state at the time of the sale.[3]

And where a lessee of mines covenanted that if *at any time* before the expiration of the lease, the lessor should give notice of his desire to take the machinery and stock about the mines, the lessee would at the expiration of the lease deliver the articles specified in the notice to the lessor, on his paying the value, to be ascertained by valuation, the Court held the covenant

[1] *Clinton* v. *Gower*, Finch, 161; but see the cases stated *supra*, § 404 *et seq.*

[2] *Dean of Ely* v. *Stewart*, 2 Atk. 44.

[3] *Hope* v. *Walter*, [1900] 1 Ch. 257, 261 (reversing S. C. [1899] 1 Ch. 879). Note, however, that both Courts dismissed a counterclaim by the purchaser for rescission and return of deposit.

thus framed to be so injurious and oppressive to the lessee that it refused specific performance, and would not interfere to prevent a breach by injunction.[1]

Again, where A., in consideration of B.'s not joining in barring an entail, agreed to convey to him, his heirs or assigns, the fee of such parts of the estates, which were situate in three counties, as he or they should choose, to the yearly value of 200*l.*; the inconvenience and hardship to which such an option might expose the party who had granted it was one ground on which specific performance was refused by the House of Lords.[2] In another case the Court refused to enforce a contract for service by which a young man placed himself almost entirely in the power of certain great traders, by whom he was employed as traveller and clerk.[3]

Impossibility of enjoying the thing purchased.

§ **435.** Where a contract, if enforced, would make a man buy what he could not enjoy, the Court will, on the ground of hardship, refuse to interfere, as in the case of a contract to sell a piece of land to which no way could be shown, the contract itself being silent as to any right of way.[4]

In contracts between companies.

§ **436.** The principle applies equally to contracts between companies as to those between private individuals; and therefore where the result of such a contract was to divert from its legitimate channel a considerable portion of the profits of one part of the line of one company for the benefit of the other, without securing any corresponding portion of profits of the other line, the Court refused to interfere, by way of specific performance, irrespectively of the

[1] *Talbot* v. *Ford*, 13 Sim. 173.

[2] *Hamilton* v. *Grant*, 3 Dow. 33, 47.

[3] *Kimberley* v. *Jennings*, 6 Sim. 340: this case was decided, but on another point, by *Lee* v. *Wagner*, 1 De G. M. & G. 604.

[4] *Denne* v. *Light*, 26 L. J. Ch. 459: 8 De G. M. & G. 774. Consider *Tomlinson* v. *Manchester and Birmingham Railway Co.*, 2 Rail. C. 104, 123.

consideration whether such contracts were legally binding or not.[1]

§ **437**. The inadequacy of the consideration on the one side or the other is a form of hardship frequently alleged. This will be considered separately in the next chapter. Inadequacy of consideration.

[1] *Shrewsbury and Birmingham Railway Co.* v. *London and North Western Railway Co.*, 4 De G. M. & G. 115; S. C. 6 H. L. C. 113.

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Hardships of the Contract.

The distinction between the rescission of a contract for fraud and the refusal to decree specific performance, because of imposition, or the hardship of the case, is well illustrated by the Ontario case of *Gough* v. *Beach*, 6 O.R. 699. In that case, the plaintiff, an old women of the age of eighty-six, sued for rescission of a contract for the sale of land, and the defendant, by way of cross-relief, asked for specific performance. The evidence shewed that, at the time of the contract, there was inequality between the parties in that the plaintiff was not so well able to protect her own interest as was the defendant to protect his, that she had capriciously, and improvidently rejected the advice of her solicitor, who tried to persuade her to accept an offer more advantageous, that she was illiterate and her capacity, weak at best, was affected by her extreme age, by her distress for want of money, and by drink, that the price offered by the defendant was clearly inadequate, that, though it did not appear that the defendant was guilty of fraud, yet that probably the plaintiff did not clearly comprehend the terms of the bargain.

It was held that, under these circumstances, though no sufficient reason existed for interfering with the decision of the Judge below, in dismissing the plaintiff's bill, yet specific performance of the agreement should not have been decreed. In other words, although the circumstances did not warrant the rescission of the contract, yet the Court, in its discretion, should refuse to decree the specific performance of the agreement because of the inequality in the situation of the parties, the inadequacy of the price, the absence of the free and deliberate choice on the part of the vendor, and the hardship involved in the enforcement of the contract. *Per* Boyd Ch.: "As p intedly put in one of the cases, where

incapacity and i[illegible]pacy go hand in hand, the Court may refuse to e[illegible]rce the contract although the purchaser was guilty of no further fault than making a hard and unconscientious bargain."

The owner of land agreed to convey to a railway company a portion thereof, the consideration of which was paid, on which to erect an embankment, on condition that the company would make a culvert through such embankment. The building of the railway passed from such company into the hands of others who built the embankment but without making a culvert therein, they having no knowledge of the stipulation in respect thereof, and the owner having omitted to give them any notice in regard to it during the progress of the work. Upon a bill filed by him for the specific performance of the covenant to construct the culvert, it was held that, under such circumstances, it would be a hardship upon the company to decree specific performance, there having been no wilful default on their part. The cost of constructing a new culvert would be very great and it was considered that the parties ought now to be placed in the same position as if the agreement had not been entered into, in order that the company might proceed under the provisions of the Railway Clauses Consolidation Act, the Court retaining the bill until such proceedings were taken, giving to each party liberty to apply, but refusing to either party the costs of the litigation. *Hill* v. *Buffalo & Lake Huron Ry. Co.*, 10 Grant's Ch. 506.

In *Blackwood* v. *Paul*, 4 Grant's Ch. 550, a party agreed to purchase for £200 a small piece of land worth intrinsically not more than £7 10s., for the purpose of using it as a mill-pond and in order to protect himself against suits at the instance of the owner, but, owing to a dispute as to the metes and bounds of the land, no deed was ever executed until after the purchaser's mill was destroyed by fire, when the vendor tendered the deed, but the vendee, not requiring any use of the land, declined to complete the agreement. The Court below granted the decree without costs, for specific performance of the contract, the Vice-Chancellor dissenting, but on appeal, Robinson, C.J., delivering the judgment of the Court, said he thought the Court ought properly have

said that the contract had a hard appearance, and that if plaintiff were determined to insist upon the agreement he might take such damages as a jury would give him at law. "It is true that the mere circumstance of inadequacy of price in a purchase will not, as a matter of course, induce the Court to refuse specific performance; they do not set themselves scrupulously to consider whether the party applied against had what others would take to be a full consideration for an engagement which he deliberately entered into; but full effect, I think, may be allowed to all the cases which have affirmed that principle, and yet there would be found a weight of authorities against enforcing specific performance of this agreement which it would be difficult to overcome, and which I think I should not have been inclined to resist."

Whether right or wrong in his opinion, the learned Chief Justice pointed out that what had occurred since the parties made their written agreement had placed the plaintiff's claim to sue for specific performance on much less favourable ground than at the date of the contract. In the result the decision of the Chancery Court was reversed, and the plaintiff's bill dismissed with costs, the Vice-Chancellor dissenting.

See also case on award, p. 771.

CHAPTER VII.

INADEQUACY OF THE CONSIDERATION.

How it may appear in the contract.

§ **438**. We now proceed to inquire how far the inadequacy of the consideration for a contract may furnish a defence against its specific performance. The inadequacy may, it is evident, in contracts for sale be either on the side of the vendor or of the purchaser; either in the purchase-money or in the thing sold; or again, in other cases, it may consist in the inequality of the contingencies to which the contract has reference.[1]

Difference between cases of vendor and purchaser.

§ **439**. It has been justly remarked[2] that there is a great difference between the defence grounded on the inadequacy of purchase-money set up by the vendor, and on the excess of it set up by the purchaser; for whilst the Court can ascertain the former by a reference to the general market value of such property, it has no satisfactory means of determining what represents the money value to a particular individual of a particular estate.

Inadequacy with other circumstances.

§ **440**. There is no doubt that inadequacy of consideration when combined with any case of fraud, misrepresentation, studied suppression of the true value of the property,[3] or with any circumstances of oppression, or even of ignorance,[4] is a most material ingredient in the case, as affecting the discretion of the Court in

[1] *Hamilton* v. *Grant*, 3 Dow. 33.

[2] Dart, V. & P. (6th ed.) 1210.

[3] *Deane* v. *Rastron*, 1 Ans. 64.

[4] *Young* v. *Clarke*, Prec. Ch. 538; see also *per* Kindersley V.C. in *Falcke* v. *Gray*, 4 Drew. 660; *Lewis* v. *Lord Lechmere*, 10 Mod. 503.

granting specific performance; and further, it may materially concur in constituting a case for setting aside a transaction. Thus, in *Cockell* v. *Taylor*,[1] Lord Romilly M.R. set aside an alleged sale of land to the plaintiff, where the consideration was about ten times the value of the land,—the purchase having been made the condition of a loan which the plaintiff was very anxious to negotiate in order to prosecute his claim in Chancery to some valuable property, and he being in humble circumstances and illiterate. "Coupled with such circumstances," said his Lordship, "the evidence of over-price is of great weight, and if the case had stood here I should have been of opinion that this transaction was one which could not stand."[2] Inadequacy of consideration may also concur with other circumstances to show that the transaction was in the nature not of a contract for sale but of a gift, in respect of which therefore the Court would not interfere, as it does not decree the specific performance of incomplete gifts.[3]

Cockell v. *Taylor*.

Inadequacy by itself.

§ **441**. The question, however, which has been principally discussed is the effect on contracts of inadequacy of the consideration taken by itself and abstracted from all other circumstances.

As a ground for setting aside contracts.

§ **442**. With regard to it as a ground for the setting aside of transactions, the doctrine of the Court is that inadequacy of consideration, if only amounting to hardship or even great hardship, is no ground for relieving a man "from a contract which he has wittingly and willingly entered into;"[4] but that it may be so enormously great as to be a conclusive evidence of fraud, and that it is then a ground for setting aside the transaction affected by it.[5]

[1] 15 Beav. 103.

[2] 15 Beav. at p. 115.

[3] *Callaghan* v. *Callaghan*, 8 Cl. & Fin. 374.

[4] *Griffith* v. *Spratley*, 1 Cox, 383, 388-9; 2 Bro. C. C. 179; *Fox* v. *Mackreth*, 2 Dick. 683. See, too, *Harrison* v. *Guest*, 6 De G. M. & G. 424; affirmed in D. P. 8 H. L. C. 481.

[5] *Stilwell* v. *Wilkins*, Jac. 280.

As a defence to specific performance.

§ 443. Regarded as a ground of defence to a specific performance, the doctrine of the older cases was that inadequacy of consideration was a sufficient ground, it being regarded, even where not amounting to evidence of fraud, as a circumstance of hardship which would stay the interposition of the Court. Thus, in a case before Eyre C.B., that Judge said that, independently of all consideration of fraud, "the Court upon the mere consideration of its being so hard a bargain will not enforce it."[1] So, in a case where there was a contract between two men each *sui juris* for the sale of an estate worth 10,000*l.* for 6,000*l.* down and 14,000*l.* more, payable at the death of a man aged sixty-four or sixty-five, and there were no circumstances of pressure or circumvention, Lord Alvanley M.R. refused, on a cross-bill, to set aside the contract; but he also refused specific performance of it on the ground of its being a hard bargain.[2] And in an earlier case, where a purchaser had, during the South Sea mania, purchased a house under the Court for 10,500*l.*, and paid a deposit of 1,000*l.*, the purchaser, submitting to forfeit his deposit, was discharged by Lord Macclesfield on the ground of the general delusion which the nation was under at the time of the contract, and the imaginary values then put by people on estates, and this in spite of a most able argument by Lord Nottingham, who argued on behalf of his granddaughters the plaintiffs.[3]

Mere inadequacy not a defence.

§ 444. But it appears to have been established by the decisions of Lord Eldon and Grant M.R., that mere inadequacy of consideration is no defence to specific performance, unless it amount to an evidence of fraud, and so would furnish a ground even for cancelling the contract.[4] "Unless the inadequacy of price," said Lord

[1] *Tilly* v. *Peers*, cited by Sir S. Romilly *arg.* 10 Ves. 301.

[2] *Day* v. *Newman*, 2 Cox, 77; S. C. cited by Sir S. Romilly *arg.* 10 Ves. 300.

[3] *Savile* v. *Savile*, 1 P. Wms. 745; S. C. 5 Vin. Abr. 516, pl. 25. See also *Vaughan* v. *Thomas*, 1 Bro. C. C. 556.

[4] *Per* Lord Eldon in *Stilwell* v.

Eldon in one case, "is such as shocks the conscience and amounts in itself to conclusive and decisive evidence of fraud in the transaction, it is not itself a sufficient ground for refusing a specific performance."[1] And in an earlier case, where, a sale by auction having taken place for about half the value of the estate, Lord Rosslyn had refused specific performance, Lord Eldon, on a re-hearing, although he ultimately decided the case on a question of evidence, doubted the principle of the decree, and expressed an opinion that a sale by auction could not be set aside for mere inadequacy of price.[2] His Lordship also applied the same principle in the instance of an annuity transaction.[3] The doctrine was adopted by Grant M.R. and Lord Erskine, and is now, it is conceived, the well-established rule of the Court.[4] An illustration of it may be found in the case of *Abbott* v. *Sworder*,[5] where an estate was bought for 5,000*l.*, the value of which was considered by Knight Bruce V.C. to be 3,500*l.*; but this inadequacy of consideration was held both by him and also by Lord St. Leonards to be no bar to specific performance, which was accordingly decreed at the suit of the vendor.

Falcke v. *Gray.*

§ **445**. One case before Kindersley V.C. must be referred to, as it seems to break the current of authorities indicated in the last preceding paragraph. His Honour in that case considered the older cases on the subject, and came to the conclusion that mere inadequacy of price, without the least impropriety of conduct on the part of the plaintiff, was a sufficient defence:

Wilkins, Jac. 282; cf. *Harrison* v. *Guest*, 6 De G. M. & G. 424, affirmed in D. P. 8 H. L. C. 481.

[1] In *Coles* v. *Trecothick*, 9 Ves. 246.

[2] *White* v. *Damon*, 7 Ves. 30.

[3] *Underhill* v. *Horwood*, 10 Ves. 209.

[4] *Burrowes* v. *Lock*, 10 Ves. 470; *per* Lord Erskine in *Lowther* v. *Lowther*, 13 Ves. 103; *Collins* v. *Brown*, 1 Cox, 428; *Bower* v. *Cooper*, 2 Ha. 408; *Borell* v. *Dann*, 2 Ha. 450. See also *Griffith* v. *Spratley*, 2 Bro. C. C. 179; 1 Cox, 383; *Stephens* v. *Hotham*, 1 K. & J. 571; *Holmes* v. *Howes*, 20 W. R. 310.

[5] 4 De G. & Sm. 448.

and his Honour did not advert to the proposition that such inadequacy must amount to evidence of fraud, but treated it as one form of hardship which prevented the action of the Court.[1]

Reason of the rule.

§ **446**. The general rule, that the hardship of a contract is, independently of fraud, a ground for refusing its specific performance would seem to carry with it the particular rule that inadequacy of consideration, when amounting to hardship but not to fraud, should yet be a defence. But there appears (notwithstanding an expression of opinion from the Bench to the contrary[2]) great good sense in refusing to adopt such a rule. To make a contract for an insufficient consideration incapable of enforcement by the purchaser, would be practically to prevent a man from selling his property at less than its value, — however impossible it might be to sell it at its value, however desirous he might be to sell it at the price actually obtained, however desirable it might be for his interest that he should do so, and however unwilling or unable the purchaser might be to purchase at its full value. The rule would, when it did not stop the sale, yet further reduce the amount receivable by the vendor, because the purchaser would in effect indemnify himself for the risk he ran by offering less purchase-money than he otherwise would have done. The freedom of contract, including in it the freedom to enter into enforceable contracts, should never be infringed without sufficient cause. But furthermore, if inadequacy of consideration short of fraud were a bar to specific performance, the question would arise as to the amount of inadequacy which should so operate — a question not easy to answer.

The laws of Rome and France.

§ **447**. In the later Roman Law, these difficulties in the way of relieving against inadequacy of consideration in certain cases were overcome, at least as to immoveable property. By a Constitution of the

[1] *Falcke* v. *Gray*, 4 Drew. 651.

[2] *Nott* v. *Hill*, 2 Cas. in Ch. 120.

Emperors Diocletian and Maximian, the right of rescission for inadequacy of consideration was first introduced.[1] Their Constitution was adopted by Justinian. It fixed the arbitrary standard of half the real price as that which would give the seller a right to the interference of the Law: when the price paid did not amount to half the real value of the thing sold, the vendor might put the purchaser to his election, either to take back the purchase-money and restore the thing sold, or to keep the thing and make up the deficiency in the purchase-money.[2] The old French Law adopted the same principle, except in the case of sales between co-heirs and co-proprietors, where a defect of one-quarter of the price had the same effect as a like defect of one-half in other cases.[3] The present Law of France is embodied in Article 1674 of the Code Civil which is remarkable for the stringency of its provisions and for the discussion in the Conseil d'Etat of which it was the result, a discussion in which the First Consul took a prominent part.[4] It enables a vendor of an immoveable to require rescission, if he suffers injury to the extent of more than seven-twelfths of the price, though he may by the contract have expressly renounced such right, and have declared that the price given is the full value.

When inadequacy is to be ascertained

§ **448.** The question of the inadequacy of the consideration must of course be decided at the time of the contract, and not by the light of subsequent events. It is true that, in a case[5] already stated, the circumstance of the contract having been made during the excitement caused by the South Sea scheme was allowed as a reason why the Court relieved a purchaser

[1] Troplong, De la Vente, sect. 780.

[2] Cod. lib. iv. tit. 44, 2.

[3] Pothier, Tr. des Oblig. Part 1. chap. i, sect. 1, art. 5, § 1.

[4] Troplong, De la Vente, sect. 787 *et seq.*

[5] *Savile* v. *Savile*, *supra*, § 445. See *Kien* v. *Stukeley*, 1 Bro. P. C. 191, where the same ground was urged, but according to the report in Gilbert, the case was decided on another point.

from the performance of his contract; but the case is one which cannot now be considered as Law, and the principle involved seems unjust. It is now therefore well established that the time of the contract is the time for judging of its consideration: thus, to give one example, where an annuity for life forms part of the consideration, and the life drops before any payment is made, this does not render the consideration necessarily inadequate.[1]

Effect of valuation.

§ **449**. Where the contract refers the price to a valuer for him to ascertain between the parties, this fact does not of itself preclude the Court from inquiring into the adequacy of the consideration,[2] and this inadequacy of consideration would, of course, be strengthened as a defence if any circumstances arose which threw a doubt on the accuracy with which the valuation was made.[3]

Effect of under valuation.

§ **450**. The effect of an undervaluing by the valuers is a question which has however been but little discussed in our Courts: it has been debated with the usual diversity of opinion by the writers on Civil Law.[4] It is conceived that, if the undervalue were such as to convince the Court that the valuers had acted under fraud or mistake, the contract would be incapable of enforcement in Equity: otherwise, if the undervalue did not so convince the Court.

Sales of reversions.

§ **451**. The question of inadequacy of consideration in a sale of reversionary interests, whether arising in a suit to set aside the sale or in a suit for the performance of the contract, was formerly governed by special considerations. The Law upon this question has to a certain extent been altered by statute. It is necessary therefore to consider how the Law stood

[1] *Mortimer* v. *Capper*, 1 Bro. C. C. 156.

[2] *Parker* v. *Whitby*, T. & R. 366.

[3] *Emery* v. *Wase*, 8 Ves. 505.

[4] Troplong, De la Vente, sect. 158.

before the legislative alteration, and what is the extent of that alteration,

Before the Sales of Reversions Act.

§ **452**. Before the statute hereafter to be referred to, the defence of inadequacy of consideration in respect of contracts for the sale of reversions had two peculiarities which distinguished it from the like defence in the case of ordinary contracts. It was clear (i.) that the proof of inadequacy was a sufficient defence though there were no accompanying circumstances of fraud or oppression, and though the inadequacy did not amount to evidence of fraud;[1] (ii.) that the burden of proof lay on the plaintiff purchaser: it rested on him to show that the price was adequate, not on the defendant vendor to show that it was inadequate.[2]

Where principle did not apply.

§ **453**. The principle on which the Court acted in these cases was that a man possessed only of a future interest sells at a disadvantage: it therefore did not apply where the tenant for life and the reversioner concurred, as they together "form a vendor with a present interest":[3] and so where a vendor had a rent-charge of 500*l*. in possession and an estate in reversion, and he sold a perpetual rent-charge of 500*l*., he was not considered as within the principle now under consideration, he having it in his power to secure a perpetual rent-charge of that amount in possession.[4]

Present interest relatively small.

§ **454**. The mere fact, however, that some interest in possession was sold together with the reversion, did not, at least where the former was not considerable, take the case out of the rule;[5] as, for instance, where an annuity in possession was sold together with the

[1] *Playford* v. *Playford*, 4 Ha. 546; *Peacock* v. *Evans*, 16 Ves. 512; *Ryle* v. *Brown*, 13 Pri. 758; S. C. *sub nom. Ryle* v. *Swindells*, M'Clel. 519.

[2] *Peacock* v. *Evens*, and *Ryle* v. *Brown*, *ubi sup.*; *Kendall* v. *Beckett*, 2 R. & My. 88; *Hincksman* v. *Smith*, 3 Russ. 433.

[3] *Wood* v. *Abrey*, 3 Mad. 417.

[4] *Wardle* v. *Carter*, 7 Sim. 490.

[5] *Per* Lord Eldon in *Davis* v. *Duke of Marlborough*, 2 Sw. 154.

reversion, the estimated value of the annuity being only about one-sixth of that of the reversion.[1]

Where sale by auction.

§ **455**. Again, the principle did not apply where the reversionary interest was sold by auction;[2] and this for two reasons. First, "there being no treaty between vendor and purchaser, there can be no opportunity for fraud or imposition on the part of the purchaser. The vendor is, in no sense, in the power of the purchaser."[3] Secondly, it being clearly established that the market price of the reversionary interest, and not the estimate of actuaries, was the criterion by which the Court decided the question of undervalue,[4] and a sale by auction being a mode of ascertaining that market price, it followed that the consideration for the transaction and the value in the eye of the Court must in such cases be one and the same, and that, in the absence of fraud, no question of undervalue could arise.

The Sales of Reversions Act, 1867.

§ **456**. Such was shortly the state of the Law before the Act 31 Vict. c. 4 (the Sales of Reversions Act, 1867). By that Act it was enacted that no purchase, made *bonâ fide* and without fraud or unfair dealing, of any reversionary interest in real or personal estate, should thereafter be opened or set aside merely on the ground of undervalue.

Effect of the Act as to actions for rescission.

§ **457**. As regards actions for the rescission of contracts for the sale of reversions, the operation of this Act is clear. It makes mere inadequacy no sufficient ground for relief; but it leaves entirely unaffected the jurisdiction which relieves against the fraud which infects catching bargains with heirs, reversioners, or expectants in the life of the father. The doctrines of the Court which throw protection round unwary young

[1] *Earl of Portmore* v. *Taylor*, 4 Sim. 182.

[2] *Shelley* v. *Nash*, 3 Mad. 232.

[3] *Per* Leach V.C., id. 236.

[4] *Wardle* v. *Carter*, 7 Sim. 490; *per* Wigram V.C. in *Borell* v. *Dann*, 2 Ha. 452; *Earl of Aldborough* v. *Trye*, 7 Cl. & Fin. 436, 460; *Edwards* v. *Burt*, 2 De G. M. & G. 55. Consider *Perfect* v. *Lane*, 30 Beav. 137; 3 De G. F. & J. 369; *Lord* v. *Jeffkins*, 35 Beav. 7.

men in the hands of unscrupulous persons ready to take advantage of their necessities are entirely unchanged.[1]

As to specific performance.

§ 458. But the Act is silent as regards the specific performance of contracts relating to reversions. Does it therefore leave the law just as it was? or does it for all purposes place sales of reversions on the same footing as other sales so far as regards the question of inadequacy of consideration?

No decision has, it is believed, been given upon these questions: but it is submitted that the true conclusion is, that every contract for the sale of a reversion which cannot be relieved against ought *primâ facie* to be performed; that the object of the Act was to place *bonâ fide* and honest sales of reversions on the same footing as other sales; and that henceforth in specific performance actions there will rest on the defendant the burthen of proving inadequacy of consideration, and such inadequacy as shocks the conscience of the Court and constitutes evidence of fraud, or as is accompanied by other circumstances of oppression or unfairness.

Origin of rule as to burthen of proof.

§ 459. It only remains to add as affording some support to this conclusion that the rule throwing the burthen of proof of adequacy on the purchaser was adopted in specific performance suits in obedience to decisions to that effect in suits to set aside the transaction; and not on any independent ground affecting such suits in particular.[2]

[1] *Tyler* v. *Yates*, L. R. 11 Eq. 265; 6 Ch. 664; *Earl of Aylesford* v. *Morris*, L. R. 8 Ch. 484; *Beynon* v. *Cook*, L. R. 10 Ch. 389; *O'Rorke* v. *Bolingbroke*, 2 App. Cas. 814; *Nevill* v. *Snelling*, 15 Ch. D. 679; *Fry* v. *Lane*, 40 Ch. D. 312; *James* v. *Kerr*, 40 Ch. D. 449; *Rae* v. *Joyce*, 29 L. R. Ir. 500; *Brenchley* v. *Higgins*, 83 L. T. 751, affirming S. C. 82 L. T. 143 (purchase at an undervalue *plus* unfair dealing on the part of the defendant).

[2] See *Kendall* v. *Beckett*, 2 R. & My. 884; *Hinchsman* v. *Smith*, 3 Russ. 433; and notice the cases there cited and relied upon in the judgment.

CANADIAN NOTES.

Inadequacy of Consideration.

Some cases founded in part on the inadequacy of the consideration will be found at page 220*a* and following pages, under the caption of "Hardship of the Contract."

CHAPTER VIII.

WANT OF MUTUALITY IN THE CONTRACT.[1]

Mutuality required.

§ **460**. A CONTRACT to be specifically enforced by the Court must, as a general rule, be mutual,—that is to say, such that it might, at the time it was entered into, have been enforced by either of the parties against the other of them.[2] When, therefore, whether from personal incapacity to contract, or the nature of the contract, or any other cause, the contract is incapable of being enforced against one party, that party is, generally, incapable of enforcing it against the other, though its execution in the latter way might in itself be free from the difficulty attending its execution in the former.[3]

Instances.

§ **461**. Thus a tenant in tail cannot enforce a contract entered into by a tenant for life, because the tenant in tail could not be sued on it.[4] an infant cannot sue, because he could not be sued,[5] for a specific performance:[6] a purchaser from a person who at the time of

[1] A very learned and exhaustive discussion of this topic is to be found in a series of papers on the "Defence of Lack of Mutuality," by Professor William Draper Lewis, published in the American Law Register (University of Pennsylvania) for May, July, August, September, and October, 1901, and May, 1902.

[2] In *Williams* v. *Williams*, L. R. 2 Ch. 294, 304, re was held to be mutuality in verbal family arrangement. Consider *Turner* v. *May*, 32 L. T. N. S. 56.

[3] Consider, however, *James Jones & Sons* v. *Tankerville* (*Earl*), [1909] 2 Ch. 440, 443; 78 L. J. Ch. 674, where a timber contract was, in effect, specifically enforced by means of an injunction, notwithstanding an objection on the ground of want of mutuality.

[4] *Armiger* v. *Clarke*, Bunb. 111; *Ricketts* v. *Bell*, 1 De G. & Sm. 335.

[5] "You cannot get specific performance against an infant": *per* Lindley L.J. in *Lumley* v. *Ravenscroft*, [1895] 1 Q. B. at p. 684.

[6] *Flight* v. *Bolland*, 4 Russ. 298.

the sale had no estate in, or power over, the property sold, or a material part of it, may defend himself on the score of the vendor's original incapacity to perform his part:[1] a father cannot enforce a contract on the part of his mother-in-law to pay him an allowance in consideration of his giving up to her the custody of his infant children during a specified part of every year:[2] and where A. agreed with B. not to join in barring an entail, and B. agreed to convey to A. certain parts of the estate on his entering into possession, and it was held, on the authority of *Collins* v. *Plummer*,[3] that such a contract could not be specifically enforced against A., a specific performance of B.'s part of the contract was refused at the suit of A.'s representatives.[4] To the same principle may, perhaps, be referable the decision in *Avery* v. *Griffin*[5] (decided in the year 1868), where it was held that a contract entered into by several devisees in trust for sale, of whom one was a married woman, could not be enforced by the purchaser. So where the relief sought was analogous to the specific performance of a grant of an office, the Court held that,

The case of *Clayton* v. *Ashdown*, 9 Vin. Abr. 393, may perhaps be explained on the ground of a ratification by the infant after attaining his majority, or as being an application in Equity of the legal principle that the contract, though voidable by the infant, binds the party of full age. The infant cannot recover a deposit paid on the contract, except on the ground of fraud. *Wilson* v. *Keats*, Peake, Add. Cas. 196.

[1] *Haggart* v. *Scott*, 1 R. & My. 293. Cf. *Forrer* v. *Nash*, 35 Beav. 167; *Brewer* v. *Broadwood*, 22 Ch. D. 105; *Bellamy* v. *Debenham*, [1891] 1 Ch. 413; *Lee* v. *Soames*, 36 W. R. 884.

[2] *Kennedy* v. *May*, 11 W. R. 358.

[3] 1 P. Wms. 104.

[4] *Hamilton* v. *Grant*, 3 Dow, 33.

[5] L. R. 6 Eq. 606. In the case of a similar contract made in the year 1896, it was held that the married woman trustee could not convey the property, being real estate, to the purchaser except with the concurrence of her husband, and by a deed acknowledged by her. *Re Harkness & Allsopp's Contract*, [1896] 2 Ch. 358. But the Married Women's Property Act, 1907, s. 1, has empowered a married woman without her husband to dispose or join in disposing of real or personal property held by her solely or jointly with any other person as trustee or personal representative as if she were a *feme sole*.

the duties and services incident to the office being personal and confidential in their character, specific performance could not have been decreed against the plaintiff at the suit of the defendant; and consequently, that the plaintiff could not sue the defendant, though there were no personal duties to be performed by the defendant.[1] Again, where the plaintiffs had agreed to perform certain services in working a railway, which were of such a confidential nature that the Court could not have enforced them if the defendants had sued the plaintiffs; and the defendants were to pay money, and do nothing else; the Court refused specific performance, on the ground, amongst others, of want of mutuality.[2] The like objection prevailed where the plaintiff sued on a contract under which he was to construct a railway, and offered to make the railway and asked for payment.[3]

In contracts under powers.

§ **462**. A doubt was at one time entertained whether there existed the proper mutuality between a person having entered into a contract to take a lease from a tenant for life with a leasing power and the remainderman:[4] but that doubt is now resolved, and it seems clear that such a contract may be enforced by either of these parties.[5]

In *Ingle* v. *Vaughan Jenkins*[6] specific performance of

[1] *Pickering* v. *Bishop of Ely*, 2 Y. & C. C. C. 249.

[2] *Johnson* v. *Shrewsbury and Birmingham Railway Co.*, 3 De G. M. & G. 914; *Stocker* v. *Wedderburn*, 3 K. & J. 393; *Ord* v. *Johnston*, 1 Jur. N. S. 1063; 4 W. R. 37 (Stuart V.C.). See also *Hill* v. *Gomme*, 1 Beav. 540; *Bromley* v. *Jefferies*, 2 Vern. 415, *sed qu.* It has been decided in Ireland that a contract by a purchaser with a husband and wife is not bad for want of mutuality, and may be enforced by them. *Donelly* v. *Anderson*, 1 Ir. Ch. R. 706. The grounds of this decision do not appear very conclusive. Cf. *Avery* v. *Griffin*, L. R. 6 Eq. 606.

[3] *Peto* v. *Brighton, Uckfield, and Tunbridge Wells Railway Co.*, 1 H. & M. 468.

[4] *Per* De Grey C.J. in *Campbell* v. *Leach*, Amb. 749.

[5] *Shannon* v. *Bradstreet*, 1 Sch. & Lef. 52, particularly 64. See *infra*, § 589.

[6] [1900] 2 Ch. 368; approved in C. A. *Capital and Counties Bank* v. *Rhodes*, [1903] 1 Ch. 631, 633.

such a contract was enforced against a remainderman at the suit of the executor of the person who had contracted with the tenant for life. The case is interesting because of a curious question of merger which arose in it. The first tenant for life under a settlement, having power to grant ninety-nine years' building leases, agreed to grant such a lease of a portion of the settled estate to the second tenant for life, at a small ground rent, upon the latter building a house on the property to be leased. After the house had been built, at a cost of 1,500*l.*, the first tenant for life died, and the second became legal life-tenant in possession; but the lease was not granted in the latter's lifetime. The remainderman resisted the executor's claim, on the ground that the equitable interest created by the agreement had become merged, or extinguished in the legal life estate of the termor. It was held, however, that that was not so; and that, the principle being that a Court of Equity looks to the benefit of the person in whom two interests coalesce, and it being clearly for the termor's benefit that his equitable interest should not merge, there was no merger in Equity.

Time at which mutuality is to be judged of.

§ **463**. The mutuality of a contract is, as we have seen, to be judged of at the time it is entered into; so that it is no objection to the plaintiff's right, that the defendant may by delay, or other conduct on his part subsequent to the contract, have lost his right against the plaintiff.[1] And accordingly it has been held to be no defence on the part of a railway company for them to show that they had after the contract suffered the time during which, by their statutory powers, they could purchase the lands to expire:[2] if

[1] *South Eastern Railway Co.* v. *Knott*, 10 Ha. 122.

[2] *Hawkes* v. *Eastern Counties Railway Co.*, 1 De G. M. & G. 737, 755; S. C. 5 H. L. C. 331, 365. The observations of Lord Cranworth (then L.J.) in *Lord James Stuart* v. *London and North Western Railway Co.*, 1 De G. M. & G. 721, to the contrary, may probably be taken to be

such a defence were sustained, it would be to allow defendants to take advantage of their own neglect.

From the time of the execution of the contract being the time to judge of its mutuality it further follows, that the subsequent performance by one party of terms which could not have been enforced by the other will not prevent the objection which would arise from the presence of such terms.[1]

Exceptions.

§ 464. The exceptions or apparent exceptions and limitations to the doctrine of mutuality may now be considered.[2]

i. Unilateral contracts.

§ 465. (i.) The contract may be of such a nature as to give to the one party a right to the performance which it does not give to the other,—as for instance, where a lessor covenants to renew upon the request of his lessee:[3] or where the contract is in the nature of an undertaking.[4] But these are merely cases of conditional contracts: and when the condition has been performed, as for instance, in the case above stated, by a request to renew, the contract becomes absolute and mutual and capable of enforcement alike by either party.[5]

overruled by his Lordship's concurrence in *Hawkes' case*, in the House of Lords. See also *Scottish North Eastern Railway Co.* v. *Stewart*, 3 Macq. 382, where, however, the point really determined was one of construction.

[1] *Hope* v. *Hope*, 8 De G. M. & G. 731, 746, overruling the observations of Lord Romilly M.R. in S. C. 22 Beav. 361.

[2] It has been suggested by a learned critic (in 19 Law Quarterly Review, July, [1903] at p. 311), that these exceptions, etc., are all referable to one and the same general principle, viz. that the defence of want of mutuality will not avail to prevent the Court from exercising its beneficial jurisdiction where the contract can be properly enforced without any possible injustice to the defendant, provided a corresponding equitable remedy becomes available against the plaintiff on or before his institution of the action.

[3] *Chesterman* v. *Mann*, 9 Ha. 206. See *Bell* v. *Howard*, 9 Mod. 302, 304.

[4] *Palmer* v. *Scott*, 1 R. & My. 391.

[5] Cf. *Wooding* v. *Wooding*, 1 J. & H. 424, where a conditional contract had become absolute by the exercise of an option of purchase. As to the meaning of a contract to give the "first refusal" of land, see *Manchester Ship Canal Co.* v.

Conditional contract.

§ **466**. In *Wylson* v. *Dunn*,[1] it was held by Kekewich J., that the doctrine of mutuality does not apply to a contract where the vendor had in the first instance told the purchaser, and the purchaser knew from all the circumstances of the case, that the vendor had no title, and was not likely to have one for some time. The learned Judge seems to have considered the contract as a conditional one, which was revocable till the condition was fulfilled, and that it then became binding.

Chesterman v. *Mann*.

§ **467**. In cases arising out of unilateral contracts, the Court will exercise its discretion as to specific performance with great care, and, it seems, view even somewhat narrowly the conduct of the party claiming the benefit of his unilateral right to make the contract absolute.[2]

ii. Waiver.

§ **468**. (ii.) Mutuality may be waived by the subsequent conduct of the person against whom the contract could not originally have been enforced: thus, where a purchaser contracts for an estate with a person having no title, or not such as he affects to sell, and the contract therefore is not mutual, for want of interest in the vendor,—yet, if the purchaser investigate the title and make requisitions, or concur in proceedings for the purpose of remedying the defect, he is afterwards precluded from setting up the original want of mutuality in the contract.[3]

A purchaser who becomes aware of a defect in the vendor's title, which defect cannot be removed without the concurrence of a third person whose concurrence the vendor has no power to require, may generally, before judgment, repudiate the contract.[4] This right of repudiation must be distinguished from the Common

Manchester Racecourse Co., [1901] 2 Ch. 37.

[1] 34 Ch. D. 569.

[2] *Chesterman* v. *Mann*, 9 Ha. 206.

[3] *Salisbury* v. *Hatcher*, 2 Y. & C. C. C. 54; *Hoggart* v. *Scott*, 1 R. & My. 293.

[4] Consider *Re Hucklesby and Atkinson's Contract*, 102 L. T. 214

law right of rescission, and arises out of that want of mutuality, which, unless waived, is usually fatal to relief by way of specific performance: but it (the right to repudiate) must be exercised, if it is to be exercised at all, as soon as the defect is ascertained.[1]

§ **469**. And so where, from the relation of the parties to one another, the contract is originally binding on the one and not on the other, the latter may by action waive that want of mutuality, and enforce the specific performance of the contract; as in the case of an action by a *cestui que trust* against his trustee for the performance of a contract for sale, such a contract being originally binding on the trustee, and not on the beneficiary.[2] Before the alteration of the law effected by the Voluntary Conveyances Act, 1893, the case of a contract for sale by a voluntary settlor was similar; for though he was incapable of enforcing the contract against an unwilling purchaser,[3] the purchaser might waive the want of mutuality and enforce it against him.[4] Instances.

§ **470**. (iii.) Another apparent exception to the principle in question is afforded by the doctrine which was established very soon after the passing of the Statute of Frauds, that, in case of contracts which by that statute are required to be in writing, a party who has not signed the contract may enforce it against one who has.[5] iii. Contract signed by one party only.

[1] *Halkett* v. *Earl of Dudley*, [1907] 1 Ch. 590, at pp. 596, 597; 76 L. J. Ch. 330.

[2] *Ex parte Lacey*, 6 Ves. 625.

[3] *Smith* v. *Garland*, 2 Mer. 123; *Johnson* v. *Legard*, T. & R. 281; *Clarke* v. *Willott*, L. R. 7 Ex. 313. See, too, *Re Carter and Kenderdine's Contract*, [1897] 1 Ch. 776, overruling *Re Briggs and Spicer*, [1891] 2 Ch. 127; and *supra*, § 406, and notes there.

[4] *Buckle* v. *Mitchell*, 18 Ves. 100; and see *Rosher* v. *Williams*, L. R. 20 Eq. 210.

[5] *Hatton* v. *Gray*, 3 Vin. Abr. 525, pl. 4, in 36 Car. II.; S. C. 2 Cas. in Ch. 164; *Buckhouse* v. *Crosby*, 2 Eq. Ca. Ab. 32, pl. 14; and see, as to the interest of the party who has not signed, *Morgan* v. *Holford*, 1 Sm. & Giff. 101. See, too, *infra*, § 515.

Reasons

§ 471. It has been alleged in support of this doctrine, in the first place, that the statute only requires the contract to be signed by the party to be charged therewith or his agent and is silent as to the signature of the other party.[1] But this reasoning seems inconclusive; because the doctrine of mutuality is independent of the statute, and where one party has signed and the other has not, the rights of the parties, which before the statute were mutual, have by force of it ceased to be such.[2]

A more satisfactory reason is that, by instituting proceedings, the plaintiff has waived the original want of mutuality, and rendered the remedy mutual.[3]

Contract in deed-poll.

§ 472. On the same ground, a contract contained in a deed-poll was enforced, notwithstanding an objection taken from the unilateral nature of the instrument.[4]

iv. Where vendor has only partial interest.

§ 473. (iv.) Where the vendor has not substantially the whole interest which he contracted to sell, he cannot enforce the contract against the purchaser, and yet the purchaser can generally enforce it against him by compelling him to convey what he can, with an abatement of the purchase-money as compensation for the deficiency. This subject will be found discussed in a subsequent chapter.[5]

Doubts of Lord Redesdale.

§ 474. In two Irish cases decided by Lord Redesdale, in each of which the party seeking to enforce the contract was at the time when he entered into it aware of the defect in the other party's title,[6] the principle

[1] *Coleman* v. *Upcot*, 5 Vin. Abr. 527, pl. 17. *Child* v. *Comber*, 3 Sw. 423 n.; *Buckhouse* v. *Mohun*, id. 431 n.; *Seton* v. *Slade*, 7 Ves. 265, *Lord Ormond* v. *Anderson*, 2 Ball & B. 363.

[2] See *per* Leach V.C. in *Boys* v. *Ayerst*, 6 Mad. 323.

[3] *Child* v. *Comber*, 3 Sw. 423 n.; *Seton* v. *Slade*, 7 Ves. 265; *Fowle* v. *Freeman*, 9 Ves. 351; *per* Grant M.R. in *Western* v. *Russell*, 3 V. & B. 192; *Martin* v. *Mitchell*, 2 J. & W. 413; *Flight* v. *Bolland*, 4 Russ. 298.

[4] *Otway* v. *Braithwaite*, Finch, 105. See also of a bond, *Butler* v. *Powis*, 2 Coll. 156.

[5] Part V. chap. ii. § 1257 *et seq.*

[6] That this circumstance is not necessarily fatal to relief, see *infra*, § 1266; *Barker* v. *Cox*, 1 Ch. D. 161.

stated in the last preceding section was held not to apply.

§ 475. In one of these cases, a tenant for life entered into a contract with the plaintiff to grant a lease, which he could not do without the consent of trustees:[1] the consent was refused, the contract being in fact intended to give a fine to the tenant for life in fraud of the power: the intended lessee filed his bill against the tenant for life, and contended that he was at least entitled to such a lease as the tenant for life could grant out of his estate. But Lord Redesdale dismissed the bill for want of mutuality. "No man," he said, "signs an agreement but under a supposition that the other party is bound as well as himself: and therefore if the other party is not bound, he signs it under a mistake";[2] and his Lordship considered that the principle above stated only applies where, on the faith of a contract, one party has put himself in a situation from which he cannot extricate himself, and is therefore willing to forego part of his contract,—where an injury would be sustained by the plaintiff, unless he were to get such an execution of the contract as the defendant could give. *Lawrenson and Butler.*

In the other case, Lord Redesdale further observed upon the specific performance of contracts by a tenant for life exceeding his power.[3] "I think," said his Lordship, "Courts of Equity should never enforce such contracts, whether with a view to the party himself or to the person entitled in remainder. In the first place, it is unconscionable in the tenant for life to execute such a lease, because it brings an incumbrance on the estate of the remainderman, and puts him to litigation to get rid of it: and as to the tenant for life himself, it is compelling him to do what is to be the *Harnett v. Yielding.*

[1] *Lawrenson and Butler*, 1 Sch. & Lef. 13.

[2] 1 Sch. & Lef. at p. 21.

[3] *Harnett v. Yielding*, 2 Sch. & Lef. 549; *contra*, *Neale v. Mackenzie*, 1 Ke. 474.

foundation of a future action for damages, if he die before the twenty-one years. The Court will never do this, but will leave the party at once to bring his action for damages. And I also conceive that this sort of contract, obtained by a person who knew at the time the nature of the title, is unconscionable in him, as he makes himself a party knowingly to that which is a fraud on the remainderman; and, under such circumstances, he has no claim to the assistance of a Court of Equity."[1]

The principle is well established.

§ **476**. This view of the jurisdiction is certainly narrower than that entertained by previous Judges: it has been remarked to be such by Lord Langdale M.R.,[2] and has been disapproved of by Lord St. Leonards. "I doubt," said his Lordship, speaking of Lord Redesdale's dismissal of the bill in the first of the cases above alluded to, "whether that can be maintained in the law of the Court where there is no fraud in the transaction. If there be a *bonâ fide* intention to execute the power, and the contract cannot be carried into effect, I do not see why the interest of the tenant for life should not be bound to the extent he is able to bind it, unless there be some inconvenience."[3] And the principle thus stated is now firmly established, notwithstanding the objection for want of mutuality.[4]

[1] 2 Sch. & Lef. p. 559. See also p. 553.

[2] In *Thomas* v. *Dering*, 1 Ke. 746.

[3] *Dyas* v. *Cruise*, 2 J. & Lat. [illegible], 487.

[4] See *infra*, Part V. chap. [illegible], § 1257.

CANADIAN NOTES.

Want of Mutuality Cured by Performance.

Where a father enters into a contract whereby he parts with the custody and control of his child, with the *bona fide* intention of advancing the welfare of the child, there is nothing in such a contract illegal or contrary to public policy, and, although where such a contract is executory on both sides, the Court cannot decree specific performance by reason of want of mutuality, yet where the contract has been faithfully performed, so far as the father and child are concerned, so that their status has become altered, the Court will, if possible, enforce *in specie* the performance of the contract by the other party to it. Where, therefore, the parents of the plaintiff agreed with H. and his wife to give up to them their daughter the plaintiff, then six years old, to bring up as their own, and make her sole heiress to their property at their death, and where it appeared that the agreement was *bona fide* intended by the father for the ultimate benefit of the plaintiff, and that the plaintiff had remained with H. and his wife for twenty years, rendering them efficient service, and it appeared that H. intended her to have his property, and regarded the agreement as binding, so that he considered it unnecessary to make a will, it was held that the agreement could be enforced against H.'s representatives, and that it must be decreed accordingly. It was also held that, inasmuch as if the parents of the plaintiff had brought a suit upon the agreement in this case and recovered, they would be trustees of the proceeds for her, the plaintiff might maintain the suit in her own name.

Boyd Ch. said that this was not a suit in which the plaintiff's right to relief depended upon the doctrines specially pertaining to suits for specific performance, using that term in its technical sense, as restricted to executory contracts. As pointed out by Lord Selborne in *Wolverhampton R. Co. v. London & North Western*

R. Co., L.R. 16 Eq. 439, some confusion had arisen from transferring considerations applicable to suits for specific performance properly so called to questions which had arisen as to the propriety of the Court requiring something or other to be done *in specie* . . . "All that was engaged to be done on the part of the plaintiff's parents had been done, but not until the death of Hall and his wife were they entitled to call for the performance of his part of the bargain as to the property he might die possessed of, so that it was manifest the parties did not contemplate a contemporaneous performance of the agreement in this aspect of it. The question was not now whether the contract originally would have been enforceable by the Court *in specie;* doubtless as in all personal contracts of a continuing character, and as in all voluntary contracts involving a renunciation of parental rights, that could not have been granted by the Court, but, the agreement having been faithfully performed by the father and the child on their part, should any objection that there was in the agreement itself of want of mutuality be allowed to prevail at this stage? It might be conceded that the Court could not have enforced this contract at the outset, but by its terms the parties did not contemplate then obtaining the property now in question. The transaction was intended to be a conditional one." The principle referred to by Bacon V.-C., in *Corcoran* v. *Eastwood*, L.R. 15 Eq. 131, was held to apply, "that where a man makes a representation to another in consequence of which that other contracts engagements, or alters his position, or is induced to do any other act which either is permitted or sanctioned by the person making the representation, the latter cannot withdraw from the representation, but is bound by it conclusively." *Roberts* v. *Hall*, 1 O.R. 388.

Want of mutuality sometimes arises from the fact that one side of the contract is for personal services which cannot be enforced. The following case deals with such a question.

In *Hewitt* v. *Brown*, 16 Grant's Ch. 670, the plaintiff, Hewitt, being in possession of land belonging to the defendant and being entitled to remain in possession for another year, the defendant in order to obtain immediate

possession, agreed that in consideration thereof he would give another piece of land to the plaintiff's husband and wife for the life of the wife, the husband further agreeing that he would look after and take care of the former property whenever the defendant was absent, and would, during the winter, see to the defendant's cattle and stock. In pursuance of this agreement possession was delivered of the respective parcels and the husband rendered some services, being all that were required of him. It was held that this agreement was enforceable notwithstanding the stipulation as to personal services.

"The objection," said Spragge V.-C., "is that the Court cannot enforce that part of the agreement relating to the personal services, a part to be performed by the plaintiffs, and therefore will not enforce any part of the agreement in their favour. I should have regretted very much if this difficulty had been insuperable as it would have been an obstacle in many cases to the Court preventing the commission of very great injustice, for the Court could not prevent the displacing of a party by ejectment who had personal duties to discharge as part of the consideration for his possession, although he might have discharged all those duties and even although those duties might have been but a small part of the consideration and he had fully paid all the rest, and, in addition, have punctually discharged all the personal duties which he was to discharge. It would be a technical rule in the way of this Court preventing a great wrong and I am glad to find that such a rule does not prevail." The learned Chancellor here refers to Fry on Specific Performance, sec. 558.

In the event a perpetual injunction was granted subject to be dissolved on any default on the part of the plaintiff to perform the personal services stipulated for.

Plaintiff by Suing may make Remedy Mutual.

A resident of Buffalo, United States, agreed in writing with the defendant to exchange lands in Buffalo for lands of the defendant in Ontario, and brought action for specific performance of the contract. The contention was made that, as the plaintiff's land was situated in

a foreign country, and the plaintiff a resident of a foreign country, the defendant could not have obtained a remedy from the plaintiff on the contract, and, therefore, the remedy was not mutual. It was considered a sufficient answer to this objection that the plaintiff, having brought his action here and thereby submitted to the jurisdiction of the Court, had waived the want of mutuality and rendered the remedy mutual, but it was also pointed out that the fact of the land which was the subject of the contract being in a foreign country did not prevent the Court from awarding specific performance, if the parties were within jurisdiction. *Montgomery* v. *Roppensburg*, 31 O.R. 433.

CHAPTER IX.

ILLEGALITY OF THE CONTRACT.

Illegality a bar to performance of a contract.

§ **477**. The illegality of a contract, or of any part of a contract, is of course a bar to its specific performance, as well as to every other proceeding by which either of the parties may seek to enforce it.[1] The interference of the Court is prevented, whether the contract was illegal at the time of its being entered into, or was then legal but has been rendered illegal by subsequent statute law before its execution.[2] But in the latter case the Court is, it seems, anxious to find some means of executing the contract so far as it may be done without violating the law.[3]

In foreign contracts.

§ **478**. In the case of foreign contracts, they must, in order to be enforced here, be legal according to the law of this country; and this notwithstanding that such foreign contracts may have been made with a view to performance abroad and to foreign laws. It is not enough that they are valid according to the law of the country where they were made. For "when the Courts of one country are called upon to enforce contracts entered into in another country, the question to be considered is not merely whether the contract sought to be enforced is valid according to the laws of the country in which it was entered into, but whether

[1] See *infra*, § 485.

[2] *Atkinson* v. *Ritchie*, 10 East, 530, 534; *Barker* v. *Hodgson*, 3 M. & S. 267; *Esposito* v. *Bowden*, 4 El. & Bl. 963. See also *Winnington* v. *Briscoe*, 8 Mod. 51; and *infra*, § 913.

[3] *Bettesworth* v. *Dean of St. Paul's*, Sel. C. in Ch. 66; 3 Bro. P. C. 359; *infra*, § 1008.

it is consistent with the laws and policy of the country in which it is sought to be enforced." [1]

What constitutes illegality.

§ **479**. What constitutes illegality in all the various species of contracts which may exist between man and man is a subject of enormous dimensions, regulated in part by the statute law of the realm, in part by consideration of public policy,[2] and in part even by the rules which the Courts have adopted for the general protection of all suitors.[3] It will be needful here only to enter into the subject so far as it peculiarly affects actions for specific performance. And in this connection reference may be made to a recent case,[4] in which it was held that, although an option to purchase, which was void for remoteness, could not be specifically enforced, still the contract to give the option was not an illegal contract, and accordingly damages were recoverable for breach of it.

Peculiar nature of the defence.

§ **480**. A defence founded on the illegality of a contract differs in its nature from most other defences: the objection is rather that of the public speaking through the Court, than of the defendant as a party to the action. The law disallows all proceedings in respect of illegal contracts, not from any consideration of the moral position and rights of the parties, but upon grounds of public policy. For if A. and B. enter into a contract for some illegal act to be performed by A., to which both are alike privy, and A. do his part in the business, B. has, it seems, no moral right to refuse performance of his part, provided there be nothing immoral in that part abstracted from the general end of the contract; as, for instance, if, under a contract to ship goods contrary to law, A. ship the goods, B. has

[1] *Hope* v. *Hope*, 8 De G. M. & G. 731, 743; *per* Lord Ellenborough C.J. in *Potter* v. *Brown*, 6 East, at p. 131.

[2] As to this class, see *Egerton* v. *Lord Brownlow*, 1 H. L. C. 1, and the cases there collected.

[3] *Cooth* v. *Jackson*, 6 Ves. 12.

[4] *Worthing Corporation* v. *Heather*, [1906] 2 Ch. 532, 536, 538.

no ground in natural equity for refusing to pay the stipulated price: A. and B. were equal in the culpability of the contract, but B. does a fresh wrong by refusing payment:[1] but it is a wrong for which no remedy is afforded by the law, for *ex dolo malo non oritur actio*. "It is not for his (the defendant's) sake," said Lord Mansfield C.J., "that the objection is ever allowed; but it is founded on general principles of policy, which the defendant has the advantage of, contrary to the real justice between him and the plaintiff, —by accident, if I may so say."[2] Where the defendant has received the benefit of the contract, this defence is evidently an unrighteous one, and will accordingly be received by the Court with some degree of disfavour.[3]

§ **481**. The principle on which this defence reposes is shown by the cases on the specific performance of awards; for the illegality of the act directed to be done by the award will be a ground for refusing specific performance, although the unreasonableness of the act would be no ground, it being a decision by the judge chosen by the parties.[4] It is further illustrated by this, that where, in a suit for specific performance, a fact not put in issue by either party has come out on the evidence affecting the legality of the contract, it has been noticed by the Court, which has not proceeded without directing an inquiry.[5] Awards.

§ **482**. As to the clearness of the illegality which will How far

[1] There is a difference of opinion amongst the jurists as to the binding nature of the promise, in the case above stated, in *foro conscientiæ*; though all agree that it cannot be enforced. See Grot. de Jur. Bell. ac Pac. lib. ii. c. xi. s. 9; Pothier, Tr. des Oblig. Part I. chap. 1, sect. 1, art. 3, § 6.

[2] In *Holman* v. *Johnson*, Cowp. 343.

[3] *Shrewsbury and Birmingham Railway Co.* v. *London and North Western Railway Co.*, 16 Beav. 44. See also *supra*, § 335, and cf. *Williams* v. *The St. George's Harbour Co.*, 2 De G. & J. 547, 558.

[4] *Wood* v. *Griffith*, 1 Sw. 43.

[5] *Parker* v. *Whitby*, T. & R. 366; *Evans* v. *Richardson*, 3 Mer. 469.

the illegality must be made out.

be a bar to specific performance, there is perhaps some slight diversity of expression. In *Johnson* v. *Shrewsbury and Birmingham Railway Co.*,[1] Knight Bruce L.J. laid it down that, before the Court would enforce the specific performance of a contract, it must be satisfied that there is not a reasonable ground for contending that the contract is illegal or against the policy of the law; and in another case,[2] Turner L.J. refused to enforce a contract for sale which he held to have been entered into for the purpose of acquiring the right to set aside a transaction for fraud committed on the vendor to the plaintiff; he declined to determine whether the contract was tainted with champerty or maintenance; but held that the right to complain of fraud was not a marketable commodity. But in a case on a contract by a solicitor retiring from a firm, to allow his name to be used after his retirement, Lord Hatherley (then Wood V.C.) observed, "the agreement must be legal or illegal, and it is not within the discretion of the Court to refuse specific performance because an agreement savours of illegality. It must be shown to be illegal."[3]

Where a trust is constituted.

§ **483.** Where a trust is constituted, designed to give effect to a contract in itself incapable of being enforced, and the trust is in itself perfectly lawful and independent of the contract except so far as that may be necessary to explain the constitution of the trust, there the trust may be enforced, and by means of it the contract incidentally performed. This principle was

Powell v. *Knowler.*

acted on in the case of *Powell* v. *Knowler*,[4] before Fortescue M.R., where A. and B. entered into a contract for the division of an estate to be recovered, which was incapable of being enforced on the ground of

[1] 3 De G. M. & G. 914. See also *City of London* v. *Nash*, 3 Atk. 512; S. C. 1 Ves. Sen. 12.

[2] *De Hoghton* v. *Money*, L. R. 2 Ch. 164.

[3] *Aubin* v. *Holt*, 2 K. & J. at p. 70.

[4] 2 Atk. 224.

champerty, and the party who, according to the contract, was to convey part of the estate to the other, by a codicil directed the contract to be carried into execution, and created a trust for that purpose; the trust was specifically enforced against the trustee.

The principle illustrated.

§ 484. The principle of this case is in analogy with that of several other cases. Thus where an act, though the result of an unlawful contract, is itself lawful, it may form the consideration for a lawful contract, as, for instance, the actual transfer of stock, the contract for which was illegal.[1] Similarly a trustee into whose hands money is paid on account of a third person cannot set up the illegality of the trust under which the money was so paid, though the *cestui que trust* could not have enforced his right against the payer directly, as in that case he could only have got at the money through the illegal contract.[2]

Sykes v. *Beadon.*

§ 485. The position of the Court with regard to illegal contracts was stated by Jessel M.R., in *Sykes* v. *Beadon*,[3] as follows: "I think," said his Lordship, "the principle is clear that you cannot directly enforce an illegal contract, and you cannot ask the Court to assist you in carrying it out. You cannot enforce it indirectly: that is, by claiming damages or compensation for the breach of it, or contribution from the persons making the profits realized from it. It does not follow that you cannot, in some cases, recover money paid over to third persons in pursuance of the contract; and it does not follow that you cannot, in other cases, obtain, even from the parties to the contract, moneys which they have become possessed of by representations that the contract was legal, and which belonged to the persons who seek to recover them."[4]

Trade unions.

§ 486. Trade unions being, apart from the Trade

[1] *M'Callan* v. *Mortimer*, 9 M. & W. 636.

[2] *Thomson* v. *Thomson*, 7 Ves. 470; *Tenant* v. *Elliott*, 1 B. & P. 3.

[3] 11 Ch. D. 170.

[4] 11 Ch. D. at p. 197.

Union Act, 1871, illegal associations, the Court will not, by reason of the terms of section 4 of that Act, at the instance of a member of such an union, enforce a contract contained in its rules for providing benefits for its members.[1]

[1] *Rigby* v. *Connol*, 14 Ch. D. 482; *Wolfe* v. *Matthews*, 21 Ch. D. 195. Cf. *Duke* v. *Littleboy*, 28 *N.* R. 977. The Act of 1871 mentioned in the text was amended in various respects by 39 & 40 Vict. c. 22 (the Trade Union Act Amendment Act, 1876). See, too, the Trade Disputes Act, 1906 (6 Edw. 7, c. 47).

CHAPTER V.

CONTRACTS ULTRA VIRES.

Contracts by corporations must be within their powers.

§ 487. CORPORATIONS created for special purposes have a power to contract, but within certain limits only, and all contracts in excess of their powers, or *ultra vires*, are void, and therefore necessarily incapable of being enforced in any legal proceeding.[1] This subject has of late years undergone great discussion in respect of contracts by railway[2] and other companies.

But are presumed to be good.

§ 488. A contract entered into by such a corporation in the proper form is *primâ facie* good, and the onus lies on the person alleging it to be void to show that it is in excess of the corporation's powers, and not on the person relying on it to show that the corporation was authorized to enter into it. Corporations have by law a power to enter into all contracts not expressly or impliedly prohibited;[3] and therefore all corporate bodies are *primâ facie* bound by contracts under their corporate

[1] See *Baroness Wenlock* v. *River Dee Co.*, 10 App. Cas. 354, 362; 54 L. J. Q. B. 577; *A.-G.* v. *Great Eastern Railway Co.*, 5 App. Cas. at p. 186; 49 L. J. Ch. 545; *Trevor* v. *Whitworth*, 12 App. Cas. 409, 433; 57 L. J. Ch. 28. With respect to a chartered company, however, "it must not be assumed that, if a chartered company does some act which it is forbidden to do by its charter, that act is necessarily void as *ultra vires*." *Per* Swinfen-Eady J., in *British South Africa Co.* v. *De Beers Consolidated Mines*, [1910] 1 Ch. at p. 374; affirmed in C. A., [1910] 2 Ch. 502; 103 L. T. 1.

[2] *E.g. Corbett* v. *South Eastern & Chatham Railways Managing Committee*, [1906] 2 Ch. 12, 20, reversing S. C. [1905] 2 Ch. 280.

[3] *Per* Erle J. in *Mayor of Norwich* v. *Norfolk Railway Co.*, 4 El. & Bl. 397, 413. Cf. *Mayor of Scarborough* v. *Cooper* (sale by municipal corporation in consideration of a perpetual yearly chief rent), [1910] 1 Ch. 68.

Where the presumption is rebutted

seals; "but this *primâ facie* right," said Lord Cranworth, "does not exist in any case where the contract is one which, from the nature and object of incorporation, the corporate body is expressly or impliedly prohibited from making."[1] "Where a corporation," said Lord Wensleydale,[2] "is created by an Act of Parliament for particular purposes, with special powers, their deed, though under their corporate seal, and that regularly affixed, does not bind them, if it appears by the express provisions of the statute creating the corporation, or by necessary or reasonable inference from its enactments, that the deed is *ultra vires*, that is, that the legislature meant that such a deed should not be made."

Shrewsbury, &c., Railway Co. v. L. and N. W. Railway Co.

§ **489**. This doctrine was very fully discussed in a case to which it is proposed now briefly to advert.

In the case of *The Shrewsbury and Birmingham Railway Co.* v. *The London and North Western Railway Co.*,[3] the contract between the companies was briefly to the effect that the North Western Company should give up to the Shrewsbury Company seven-thirteenths of the profits of the carriage of passengers and goods over a part of the North Western line, in consideration of receiving, in return, six-thirteenths of the profits made by the Shrewsbury Company on a certain portion of their line. In the course of the protracted litigation which arose out of this contract, opposing opinions were given by the highest authorities as to whether it was

[1] In *Directors, &c. of the Shrewsbury and Birmingham Railway Co.* v. *Directors, &c. of The North Western Railway Co.*, 6 H. L. C. 135, 136.

[2] *In South Yorkshire Railway and River Dun Co.* v. *Great Northern Railway Co.*, 9 Exch. 81; accordingly *Bateman* v. *Mayor, &c. of Ashton-under-Lyne*, 3 H. & N. 323.

[3] Before Lord Cottenham, 2 Mac. & G. 321; before Lord Truro, 3 Mac. & G. 70; before Q. B., 17 Q. B. 625; before Lord [illegible] M.R., 16 Beav. 111; before [illegible] Court of Appeal in Chancery, 1 De G. M. & G. 115; and in D. P., 6 H. L. C. 113, and see *Lancaster and Carlisle Railway Co.* v. *North Western Railway Co.*, 2 K. & J. 293; *Hare* v. *London and North Western Railway Co.*, 2 J. & H. 80; *Midland Railway Co.* v. *Great Western Railway Co.*, 21 W. R. 657.

ultra vires or not, Lord Cottenham and the Queen's Bench inclining to the opinion of its validity, and Turner L.J. and Lord Cranworth sitting in the House of Lords leaning strongly to the opinion that it was in excess of the powers of the companies. If such a contract was valid as to part of the line, why should it not be valid as to the whole? and if so, there would be no impediment, it was urged, to two companies bringing their funds into a common stock, and dividing them [illegible] their shareholders in any stipulated proportion.

Limitations of the argument.

[illegible] be foreign to the objects of this [illegible] the very numerous cases which have [illegible] of *ultra vires*, involving as they [illegible] careful consideration of the statutes [illegible] ord to the class of corporations in [illegible] Charter or Act of Parliament or memo- [illegible] ation of the particular corporation, and [illegible] to question in each case.[1]

Difference between *ultra vires* a corporation and *ultra vires* its agents.

§ 97. The question of *ultra vires* as applicable to corporations must be carefully distinguished from the question of *ultra vires* as applicable to the agents or officers of those bodies. An act which is beyond the powers of the corporation can never be good and can never be made good by ratification or acquiescence or in any way short of Act of Parliament.[2] On the other hand, an act which is within the powers of the body but beyond the powers of the board of directors or other managers, may and often does become binding on the corporation by its ratification or acquiescence: and so again acts which are beyond the powers of the managers except on the observance of certain conditions may, if within the powers of the body corporate, be held good

[1] See Bruce's Doctrine of Ultra Vires.

[2] See *Ashbury Railway Carriage & Iron Co.* v. *Riche*, L. R. 7 H. L. 653; and *Holmes* v. *Tremh*, [1898] 1 I. R. 319, 334.

See *Grant* v. *United Kenzie Switchback Railways Co.*, 10 C. B. N. S. 139—140; 38 L. J. Ch. 214; *Irvine* v. *Union Bank of Australia*, 2 App. Cas. 366; 46 L. J. P. C. 87.

by a judicial inference from the conduct of the corporation that the conditions have been observed. The first class of acts are void from the nature of the corporation: the second are objected to as having been beyond the scope of the agent's authority.

Difference of question between corporators and between corporation and strangers.

§ 492. Hence it must not be assumed that the question of *ultra vires* is in all respects the same when it arises between the members of a company and its directors, and when it arises between the company and a third person.

Where *ultra vires* is and is not a defence.

§ 493. Some contracts are of such a nature that every one must know them to be beyond the powers of the corporation with which he is dealing, as *e.g.*, a contract by a railway company to buy a thousand gross of green spectacles, or a contract by a company formed to make a railway from A. to B. for the construction of a railway from C. to D. Such contracts as these are equally void, whether the question arise between the company and a stranger or between members of the corporation. But the case is quite different as regards many other contracts which may or may not be really entered into for the purposes of the company. Directors might buy iron rails not really for the purposes of the line but for speculation. This contract would be void as against the shareholders, but might be perfectly good in favour of the vendor to the company. In short, the mere fact that a contract by the directors is *ultra vires*, as between them and the shareholders, does not necessarily disentitle the other party to the contract from suing upon it. To do so, it is further necessary that the party suing should have known at the time of the contract that it was intended for a purpose unconnected with the incorporation of the company. The nature of the contract will show this in some cases: in others it will not.[1]

[1] *Per* Lord Campbell C.J. and Erle J. in *Mayor of Norwich* v. *Norfolk Railway Co.*, 4 El. & Bl. 397, 415, 418; *per* Lords Campbell

Vendor of land to company not bound to see that it is strictly required.

§ 494. From this principle it follows that, where a public company is authorized to take land for extraordinary purposes, a person who agrees to sell his land to this company is not bound to see that it is strictly required for such purposes; but if he acts *bonâ fide* and without knowledge that the land is not so required, or that the transaction is any misapplication of the funds of the company, the contract is binding in his favour, and may be enforced by him in Equity:[1] and the same holds good where the company, really requiring part of an estate, purchase more than is required.[2]

Irregularity.

§ 495. Furthermore a contract will not be void as against a third person dealing *bonâ fide* with the corporation, because there may have been the omission to observe some formality required by the terms of its constitution, or because there may have been some irregularity on the part of the directors or officers of the body entering into it on their behalf. Thus, for instance, it has been held to be no defence to an action against a company upon a debenture sealed with their common seal that the borrowing of the money thereby secured was not sanctioned by the resolution of an extraordinary general meeting as required by its deed of settlement.[3]

and St. Leonards in *Eastern Counties Railway Co.* v. *Hawkes*, 5 H. L. C. 338, 355, 372; *Re Contract Corporation*, L. R. 8 Eq. 14; *Green* v. *Nixon*, 23 Beav. 530; *Royal British Bank* v. *Turquand*, 5 El. & Bl. 248; 6 El. & Bl. 327.

[1] *Eastern Counties Railway Co.* v. *Hawkes*, 5 H. L. C. 331, 349, 355.

[2] S. C.

Royal British Bank v. *Turquand*, 5 El. & Bl. 248; 6 El. & Bl. 327; *Agar* v. *Athenæum Life Assurance Society*, 3 C. B. N. S. 725; *Grady's Case*, 1 De G. J. & S. 488; *Prince of Wales Assurance Co.* v. *Harding*, El. B. & E. 183. See, too, *Fountaine* v. *Carmarthen, &c. Railway Co.*, L. R. 5 Eq. 316, at p. 322; 37 L. J. Ch. 429; *County of Gloucester Bank* v. *Rudry Merthyr Colliery Co.*, [1895] 1 Ch. 629, 633; 64 L. J. Ch. 451; *Dack* v. *Tower Galvanizing Co.*, [1904] 2 K. B. 314, 318; 70 L. J. K. B. 625.

CHAPTER XI.

STATUTE OF FRAUDS AND PART PERFORMANCE.

Fourth section of the statute

§ 496. By the 4th section of the Statute of Frauds[1] it is, amongst other things, enacted that no action shall be brought whereby to charge any person "upon any contract or sale[2] of lands, tenements, or hereditaments, or any interest in[3] or concerning them,[4] unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

It follows from this enactment that the plaintiff suing on a contract in relation to land must prove two things—first, that there was in fact a contract concluded between the parties; and secondly, that there

[1] 29 Car. II. c. 3.

[2] As to the grammatical construction of this clause, see *per* Kay J. in *M'Manus* v. *Cooke*, 35 Ch. D. at p. 687.

A contract for the sale of debentures containing a floating charge on a company's landed property is a contract for an interest in land within this section: *Driver* v. *Broad*, [1893] 1 Q. B. 539, 744. See, too, *Jarvis* v. *Jarvis* (machinery consisting of trade fixtures), [1893] W. N. 138; 63 L. J. Ch. 10; 69 L. T. 412; and *Morgan* v. *Russell & Sons* (slag to be severed and removed by purchaser), [1909] 1 K. B. 357; 78 L. J. K. B. 187.

[3] In *Boston* v. *Boston*, [1904] 1 K. B. 124, 126, 127; 73 L. J. K. B. 17, the contract was, in substance, to the effect that if the defendant would buy a particular house—which he did buy—the plaintiff (his wife) would make him a present of it. But the contract created no obligation to acquire an interest in land, it did not affect the owner of the land specified, nor did it create or deal with the interest of any one in it. It was held by the Court of Appeal that the contract was not one to which the 4th section of the statute applied.

is a sufficient note or memorandum of the contract to satisfy the statute. The writings which have passed between the contracting parties may be most important evidence of both these propositions: or, again, some of the writings may show that notwithstanding other writings which, if taken alone, appeared to evidence a contract, there was no contract in fact: or, again, the parol evidence may show that, though there is an apparent memorandum of contract, there was in fact no contract.

The section refers to the procedure.

§ **497**. This 4th section affects not the contract itself, but the right of either party to sue the other upon it: and it was decided in *Leroux* v. *Brown*[1] that it refers not to the solemnities of the contract, but to the procedure, and consequently that an action will not lie in this country on a contract made in a foreign country, and valid there, which, if made here, would have been incapable of being sued on by reason of this section. "The statute relates to the kind of proof required in this country to enable a plaintiff suing here to establish his case here. It does not relate to lands abroad in any other way than this: it regulates procedure here, not titles to land in other countries."[2]

The decision in *Leroux* v. *Brown*,[1] though still law, has not escaped criticism,[3] and is difficult to reconcile with the well settled rule[4] which requires that the writing relied on as taking a case out of the statute should be in existence before action brought; a requirement which would be unreasonable and contrary to the

[1] 12 C. B. 801.

[2] *Per* Lindley L.J. in *Rochefoucauld* v. *Boustead*, [1897] 1 Ch. at p. 207.

[3] *Williams* v. *Wheeler*, 8 C. B. N. S. 299, 316; *Gibson* v. *Holland*, L. R. 1 C. P. at p. 8. The case is, however, cited as an authority for the proposition that the signature required by the 4th section is matter of procedure in the judgment of the Queen's Bench Division in *Jones* v. *Victoria Graving Dock Co.*, 2 Q. B. D. at p. 323.

[4] *Bill* v. *Bament*, 9 M. & W. 36; *Lucas* v. *Dixon*, 22 Q. B. D. 357; *Re Holland, Gregg* v. *Holland*, [1902] 2 Ch. 360, 375.

usual practice, if it related only to procedure and did not go to the solemnities of the contract.

The statute often a defence. Division of the subject

§ **498**. It is obvious that in many cases a defence to an action for specific performance may be grounded upon this 4th section of the Statute of Frauds. It is therefore proposed to consider (i.) how such a defence may be raised, and (ii.) what constitutes a sufficient agreement or memorandum or note of agreement within the meaning of the statute. And as, notwithstanding the express language of the statute it was held by the Court of Chancery and is now the law of the land that certain circumstances may preclude a defence founded upon the statute, it is necessary to consider a third question, namely, (iii.) what, according to the principles of Equity, takes a contract out of the statute.

i. *How the defence may be raised.*

Former practice.

§ **499**. Before the Judicature Acts, the defence of the Statute of Frauds was raised in Chancery by demurrer or plea or answer, or plea and answer, according to circumstances, which it is not now necessary to consider. For by the effect of those statutes and the Rules of the Supreme Court, demurrers, pleas, and answers have all disappeared, and a uniform system of pleading has been introduced into both divisions of the Court.

The present practice under the R.S.C.

§ **500**. Ord. XIX. r. 20 provides that when a contract is alleged in any pleading, a bare denial of the contract by the opposite party shall be construed only as a denial in fact of the express contract alleged, or of the matters of fact from which the same may be implied by law, and not as a denial of the legality or sufficiency in law of such contract, whether with reference to the Statute of Frauds or otherwise.

Again, Ord. XIX. r. 15 refers to the Statute of Frauds as one of the things which must be expressly

raised by the pleadings of the party who desires to obtain its benefit.

Benefit of statute must be claimed.

§ 501. In cases, therefore, in which pleadings exist the Statute of Frauds must be expressly raised by the pleading of the person who seeks to use it as a defence. In any case arising under proceedings in a summary manner where there are no pleadings, the statute should be set up by affidavit or otherwise as the circumstances may admit.[1]

How to be claimed.

§ 502. It is not necessary that the defendant should claim the benefit in the very words of the statute; but he must claim it in words equivalent, so as to call the attention of the other party to the circumstance that the benefit of the statute is claimed.[2]

Where defendant makes default in pleading.

§ 503. If the plaintiff delivers a statement of claim, and the defendant delivers no defence, it appears clear that the defendant cannot set up the statute at the hearing of the plaintiff's motion for judgment, for then the Court is to give such judgment as upon the statement of claim the Court shall consider the plaintiff to be entitled to.[3]

ii. *What satisfies the statute.*

Written statement.

§ 504. The object of the Statute of Frauds being, as regards the contracts now under consideration, to

[1] In *Humphries* v. *Humphries*, [1910] 1 K. B. 796; affirmed, [1910] 2 K. B. 531; 79 L. J. K. B. 944, 949, the defendant to a County Court action for rent claimed under an agreement for a lease denied the existence of any concluded agreement, but did not, either by notice before the hearing or by argument at the hearing, raise any defence under s. 4 of the Statute of Frauds. Judgment was given against him, and the plaintiff having subsequently brought another action for subsequent rent, it was held that the defendant could not raise a defence under s. 4 in the second action.

[2] *Per* Wigram V.C. in *Bateson* v. *Nicholson*, 6 Jur. 624. As to distinctness of pleading now required, *Byrd* v. *Nunn*, 7 Ch. D. 284; *James* v. *Smith*, [1891] 1 Ch. 384, affirmed [1891] W. N. p. 175, in which case it was held by Lindley L.J. that, though the defendant need not have pleaded a particular section of the statute, still he, having pleaded the 4th section, could not be allowed to amend his defence at the trial by pleading the 7th section.

[3] See R. S. C. Ord. XXVII. r. 11.

prevent the mischief arising from the resort to parol evidence to prove the existence and the terms of the alleged contract, it is obvious that the mischief is avoided wherever there exists, under the hand of the party sought to be charged, a written statement containing, either expressly or by necessary inference, all the terms of the contract,—that is to say, the parties (described either by names or descriptions or reference sufficient to preclude any fair dispute as to their identity),[1] the subject-matter of the contract,[2] the consideration,[3] and the promise,[4]—and leaving nothing open to future treaty.[5]

Nature of the document immaterial.

§ **505**. This therefore is sufficient to satisfy the statute, and provided this be found, no formality is required, nor does it signify at all what is the nature or character of the document containing such written statement,—whether it be a letter written by the party to be charged to the person with whom he contracted, or to any other person, or a deed, or other legal instrument, or an affidavit.[6] "The Court is not in quest of the intention of parties, but only of evidence under the hand of one of the parties to the contract that he has entered into it. Any document signed by him and containing the terms of the contract is sufficient for that purpose."[7]

[1] *Potter* v. *Duffield*, L. R. 18 Eq. [illegible]. See, for a further discussion of the mode of description, Part III. *post*, where the cases are cited.

See *New Valley Drainage Commissioners* v. *Dunkley*, 4 Ch. D. 1, where a plan on which the parties, contemporaneously with their signature [illegible] contract (which did not refer to any plan), signed a memorandum referring to the contract was held to be sufficiently identified with the contract, and to contain the description in it; and *Oxford Consolidating* v. *Houldsworth*, [1910] A. C. 357.

[2] "A contract in writing must express as part of the contract the consideration": *per* Chitty L.J. in *Re Kharaskhoura, &c. Syndicate*, [1897] 2 Ch. at p. 467.

[3] *Laythoarp* v. *Bryant*, 2 Bing. N. C. 735.

[4] *Ogilvie* v. *Foljambe*, 3 Mer. 53.

[5] *Burkworth* v. *Young*, 4 Drew. 1, 14. Cf. *Moritz* v. *Knowles*, [1899] W. N. 40; reversed in C. A. *ibid.* 83.

[6] *Per* Bowen L.J. in *Re Hoyle*, [1893] 1 Ch. at p. 99. In the same case (at p. 100) A. L. Smith L.J.

The question of what is necessary to be agreed upon, and therefore what is necessary to be expressed, in order that a written memorandum shall be evidence of a completed contract, will be found more fully discussed in the chapter[1] on the Incompleteness of the contract.

The writing must express a concluded contract existing at the time when the memorandum was signed.

§ 506. There is of course no binding contract when the writing appears only to be terms agreed on as a basis for a contract, and not the contract itself;[2] or where it provides that any of the terms are afterwards to be settled,[3] or where the matter is unconcluded, and one party may still withdraw his consent;[4] or where there appears any design of further negotiation;[5] or where one of the parties was at the time when the memorandum was signed—which is the point of time at which the statute requires the plaintiff to prove a concluded contract existing[6]—incapable of contracting bindingly.[7] Therefore where the purchaser's solicitor offered 25,000*l.* for the purchase of an estate, which the defendant's agent accepted, "subject to the terms of a contract being arranged between his [the vendor's] solicitor and yourself," the Court considered this to be a contract to enter into a contract with respect to which some terms were already agreed on, and the rest were to be settled by future arrangement, and that if they could be agreed on, this was to become

intimated that an entry in a man's own diary, if it were signed by him and the contents were sufficient would do.

[1] Part III. chap. iii. And see *Blakeney* v. *Hardie*, I. R. 8 Eq. 581; *Carrigy* v. *Brock* (collateral contract), I. R. 5 C. L. 501.

[2] *Frost* v. *Moulton*, 21 Beav. 590.

[3] *Wood* v. *Midgley*, 5 De G. M. & G. 41.

[4] *Earl of Glengal* v. *Barnard*, 1 Ke. 769 affirmed as *Lord Glengal* v. *Thynne*, St. Leon. Law of Prop. 56. See, too, *Hussey* v. *Horne-Payne*, 4 App. Cas. 311.

[5] *Tawney* v. *Crowther*, 3 Bro. C. C. 318; *Stratford* v. *Bosworth*, 2 V. & B. 341; *Wilcox* v. *Redhead*, 28 W. R. 795.

[6] *Munday* v. *Asprey*, 13 C. B. at p. 857.

[7] *Avery* v. *Griffin*, L. R. 6 Ex. 606 (decided in the year 1868). Cf. *Re Harkness & Allsopp's Contract*, [1896] 2 Ch. 358.

a valid contract: but such a contract never having been come to, the Court dismissed the purchaser's bill asking for a specific performance.[1] On this principle the approval of a draft does not of itself constitute a contract.[2]

Treaty only.

§ 507. The Court will refuse to act even where it only "rests reasonably doubtful whether what passed was only treaty, let the progress towards the confines of agreement be more or less."[3]

A formal contract intended.

§ 508. But the mere fact, though appearing on the paper, that a more formal contract is intended to be executed, will not prevent a paper duly signed and containing all the terms from being a contract, any more than will a reference to deeds thereafter to be executed.[4] Therefore where A. wrote to B., "I offer you 3,000*l.* for the estate," and B. replied, "I accept your offer, and if you approve of the inclosed, sign the same, and I will on receipt of the deposit sign you a copy," (the inclosure was not produced), the Court held that there was a binding contract, and treated the inclosure as a mere means of carrying that contract into effect:[5] and in another case, a correspondence about the taking of a house was held to constitute a sufficient contract, though the agent of the lessor accepted the offer thus, "These terms I have submitted

[1] *Honeyman* v. *Marryat*, 21 Beav. 14; S. C. 6 H. L. C. 112. See, too, *Winn* v. *Bull*, 7 Ch. D. 29. Whether the expression in the memorandum that the contract is subject to the approval of the title by the purchaser's solicitor is enough to make the contract conditional appears doubtful. Compare the observations of Lord Cairns in *Hussey* v. *Horne-Payne*, 4 App. Cas. at pp. 321, 322, with the judgments of the Court of Appeal in S. C. 8 Ch. D. 675 *et seq.* See also *Hudson* v. *Buck*, 7 Ch. D. 683; and *Chipperfield* v. *Carter*, 72 L. T. 187 ("lease to be approved in the customary way by my solicitor").

[2] *Doe d. Lambourn* v. *Pedgriph*, 4 Car. & P. 312.

[3] *Per* Lord Eldon in *Huddleston* v. *Briscoe*, 11 Ves. 592.

[4] *Fowle* v. *Freeman*, 9 Ves. 351; *Kennedy* v. *Lee*, 3 Mer. 441. See *per* Lord Cranworth in *Ridgway* v. *Wharton*, 6 H. L. C. 264; *per* Lord Langdale M.R. in *Thomas* v. *Dering*, 1 Ke. 741; *Cowley* v. *Watts*, 17 Jur. 152; *Gray* v. *Smith*, 43 Ch. D. 208; and *supra*, § 295.

[5] *Gibbons* v. *North Eastern Metropolitan Asylum District*, 11 Beav. 1.

to Mrs. S., and I am authorised to say they are accepted, and that her solicitor will draw up a proper agreement for signature, which I will forward to you."[1]

When the first document not binding.

§ 509. But wherever the formal contract contemplated is to be anything more than merely ancillary to the real contract,—wherever any new term not expressed or implied in the earlier contract might be introduced into the formal one, the first document will not by itself be binding. And wherever the concluded nature of the arrangement does not evidently appear on the writings, the fact that a subsequent and more formal contract was entered into will be strong evidence that the previous negotiations were not intended to amount to a contract.[2]

Chinnock v. *The Marchioness of Ely*

§ 510. In the case of *Chinnock* v. *The Marchioness of Ely*[3] the plaintiff had proposed certain terms of purchase to the defendant's agents, who had replied to the plaintiff that they were instructed by their client to proceed with the sale to him, and that a draft contract was being prepared and would be forwarded to him for approval in a few days. It was contended on the plaintiff's behalf that this letter clearly recognized the fact that there had been a complete sale to him, and also amounted to a distinct acceptance of certain terms previously stated by him in writing. But it was held by Lord Westbury that the true meaning of the letter was that the defendant was willing to accept the plaintiff's terms, if the plaintiff would agree to the draft contract about to be sent to him. "I entirely accept," said his Lordship,[4] "the doctrine contended for by the plaintiff's Counsel, and for which they cited the cases of *Fowle* v. *Freeman*,[5] *Kennedy* v. *Lee*,[6] and *Thomas* v. *Dering*,[7] which establish, that if there had

[1] *Skinner* v. *McDonall*, 2 De G. & Sm. 26.

[2] *Ridgway* v. *Wharton*, 6 H. L. C. 238, and particularly pp. 268, 305.

[3] 4 De G. J. & S. 638.

[4] 4 De G. J. & S. 645.

[5] 9 Ves. 351.

[6] 3 Mer. 441.

[7] 1 Ke. 729.

been a final agreement, and the terms of it are evidenced in a manner to satisfy the Statute of Frauds, the agreement shall be binding, although the parties may have declared that the writing is to serve only as instructions for a formal agreement, or although it may be an express term that a formal agreement shall be prepared and signed by the parties. As soon as the fact is established of the final mutual assent of the parties to certain terms, and those terms are evidenced by any writing signed by the party to be charged or his agent lawfully authorized, there exist all the materials, which this Court requires, to make a legally binding contract. But if to a proposal or offer an assent be given subject to a provision as to a contract, then the stipulation as to the contract is a term of the assent, and there is no agreement independent of that stipulation."

§ **511**. The law upon this point has been summarized as follows by Jessel M.R.[1]: — The law stated by Jessel M.R.

"It comes, therefore, to this, that where you have a proposal or agreement made in writing expressed to be subject to a formal contract being prepared, it means what it says; it is subject to and is dependent upon a formal contract being prepared. When it is not expressly stated to be subject to a formal contract it becomes a question of construction, whether the parties intended that the terms agreed on should merely be put into form, or whether they should be subject to a new agreement the terms of which are not expressed in detail."

In that case accordingly a writing purporting to be an agreement for a lease, but expressed to be "made

[1] In *Winn* v. *Bull*, 7 Ch. D. at p. 32. Followed in *Brocket* v. *Neville*, 3 Sch. Jo. 321. See, too, *Rummens* v. *Hobins*, 3 De G. J. & S. 88; *Orford* v. *Provand*, L. R. 2 P. C. 135; *Watts* v. *Ainsworth*, 31 L. J. Ex. 118; *Hepworth* v. *Knight*, 33 L. J. C. P. 298; *Hawkesworth* v. *Chaffey*, 55 L. J. Ch. 335, 54 L. T. 7; *Santa Fé Land Co.* v. *Forrest' Land, Timber, and Railways Co.*, 29 T. L. R. 534.

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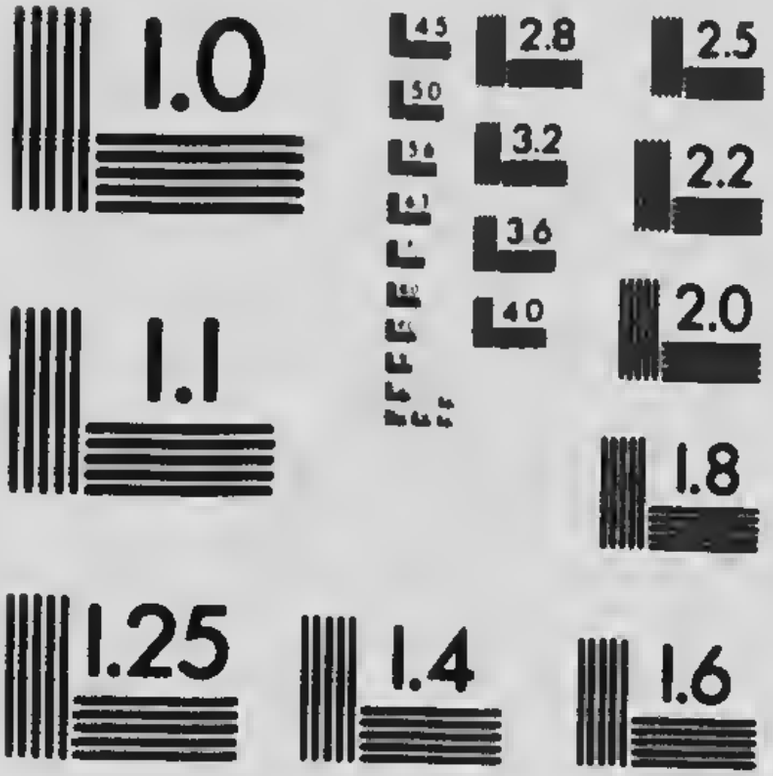

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subject to the preparation and approval of a formal contract," was held not to be a concluded contract.[1]

Crossley v. Maycock.

§ 512. "If," said Jessel M.R. in another case, "there is a simple acceptance of an offer to purchase, accompanied by a statement that the acceptor desires that the arrangement should be put into some more formal terms, the mere reference to such a proposal will not prevent the Court from enforcing the final agreement so arrived at. But if the agreement is made subject to certain conditions then specified or to be specified by the person making it, or by his solicitor, then, until those conditions are accepted, there is no final agreement such as the Court will enforce."[2]

Solicitors "to prepare contract."

§ 513. In a case in which estate agents received an offer for sale, and replied that they were instructed to accept it, and had asked their principal's solicitor "to prepare contract," it was held that notwithstanding these words the acceptance was complete.[3]

Rossiter v. Miller.

§ 514. In the case of *Rossiter* v. *Miller*,[4] the agent of the plaintiffs (vendors) wrote to the defendant (purchaser) reciting a parol offer which the defendant had made to him, and accepting it on behalf of the plaintiffs, and said: "I have requested Messrs. H. & M. to forward you the agreement for purchase." The

[1] See, too, *Brien* v. *Swainson*, 1 L. R. Ir. 135; also *Lloyd* v. *Nowell* (where it was held that the vendor could not waive such a stipulation), [1895] 2 Ch. 744; 44 W. R. 43; *Page* v. *Norfolk*, 70 L. T. 23; 38 Sol. Jo. 205 (no concluded contract); *Watson* v. *McAllum* (letters not constituting a contract), 87 L. T. 547; and *Clark* v. *Robinson*, 51 W. R. 443. In the last-cited case *Filby* v. *Hounsell*, [1896] 2 Ch. 737, was discussed.

[2] *Crossley* v. *Maycock*, L. R. 18 Eq. at p. 181; followed in *Jones* v. *Daniel*, [1894] 2 Ch. 332.

[3] *Bonnewell* v. *Jenkins*, 8 Ch. D. 70.

[4] 3 App. Cas. 1124, reversing the decision of the Court of Appeal, 3 Ch. D. 648. So, too, *North* v. *Percival*, [1898] 2 Ch. 128, at p. 132 (this case was questioned by Neville J., in *Santa Fé Land Co.* v. *Forests' Land, Timber, and Railways Co.*, 26 T. L. R. 534); and *Filby* v. *Hounsell*, [1896] 2 Ch. at p. 742. Cf. the observations of James L.J. in *Smith* v. *Webster*, 3 Ch. D. at p. 56, and distinguish *Brien* v. *Swainson*, 1 L. R. Ir. 135.

purchaser replied in terms of acceptance; and it was held by the House of Lords that the contract was complete, notwithstanding the expressed intention to forward a formal contract.

Agreement signed by one party only.

§ 515. The statute requiring that the agreement, or the memorandum or note thereof, shall be signed by the party to be charged therewith, or his agent, and not requiring that it shall be signed by both parties to the contract, it has been held, both in Courts of Equity [1] and also in Common Law Courts,[2] that a signature by the party against whom the contract is sought to be enforced is sufficient.

Signature.

§ 516. The statute requires a signature and not a subscription;[3] therefore all that is requisite to satisfy the statute as to the signature is, that the name be inserted by the party in such a manner as to govern and authenticate the entire instrument. Accordingly, a letter beginning "Mr. Foljambe presents his compliments" was held duly signed.[4] The same was the case where A. wrote "A. has agreed," &c.;[5] where B. wrote "A. agreed with B.," &c.,[6] and where an auctioneer named Peter Roe, who had been duly authorized by the vendor to sell, wrote "witness—Peter Roe" at the foot of a memorandum of agreement containing the vendor's name.[7] An affidavit made by a person has been also held sufficient.[8]

Must be a writing of the name.

§ 517. The signature must be the actual writing of the name, or the doing of some act intended by the person to be equivalent to the actual signature of the name, such as the mark by a marksman. Therefore a

[1] See *supra*, § 470.

[2] *Egerton* v. *Mathews*, 6 East, 307; *Allen* v. *Bennet*, 3 Taunt. 169; *Laythoarp* v. *Bryant*, 3 Bing. N. C. 735. See the editors' n. to *Sweet* v. *Lee*, 3 Man. & Gr. 462.

[3] *Per* Lord Westbury in *Caton* v. *Caton*, L. R. 2 H. L. 142.

[4] *Ogilvie* v. *Foljambe*, 3 Mer. 53.

[5] *Propert* v. *Parker*, 1 R. & My. 625. See also *Western* v. *Russell*, 3 V. & B. 187; *Morison* v. *Turnour*, 18 Ves. 175.

[6] *Bleakley* v. *Smith*, 11 Sim. 150.

[7] *Wallace* v. *Roe*, [1903] 1 I. R. 32.

[8] *Barkworth* v. *Young*, 4 Drew. 1.

letter beginning "My dear Robert," and concluding with the words "Do me the justice to believe me the most affectionate of mothers," was held not to be signed within the statute.[1]

In pencil.

§ **518**. A signature in pencil is not necessarily deliberative, and may be equally binding within the statute as one in ink.[2] And even a printed name may avail; so that where a vendor inserted in a printed invoice with his name on it the name of the purchaser, it was held that there was such a ratification and adoption of the printed name as made it a signature, and satisfied the statute.[3] In like manner a stamp may no doubt be used for the purpose of signing.[4] And the writing of the name of the sender of a telegram by the telegraph clerk, where the sender had himself signed the instructions for the message, has been held to be a good signature by an agent in that behalf.[5]

In print.

Initials.

It seems too that the setting down of the initials may be a sufficient signature.[6]

How far intent to sign necessary.

§ **519**. It cannot be denied that there is some conflict of authority on the question how far the writing of his name by the party must be with the intent of signing. There is authority for the proposition that such a writing, even with a different intent, may amount to a binding signature. "It has been decided," said Lord Eldon (then Lord Chief Justice of the Court of Common Pleas), "that if a man draw up an agreement in his own handwriting, beginning 'I, A. B.

[1] *Selby* v. *Selby*, 3 Mer. 2.

[2] *Lucas* v. *James*, 7 Ha. 410, 419.

[3] *Schneider* v. *Norris*, 2 M. & S. 286; *per* Lord Eldon in *Saunderson* v. *Jackson*, 2 B. & P. 239; *Torret* v. *Cripps*, 27 W. R. 706; 48 L. J. Ch. 567. Distinguish *Hucklesby* v. *Hook*, [1900] W. N. 45; 82 L. T. 117.

[4] *Bennett* v. *Brumfitt*, L. R. 3 C. P. 28. See also 1 Mad. Ch. 376, and the illustration there given from the stamping of Letters Patent by King William III.

[5] *Godwin* v. *Francis*, L. R. 5 C. P. 295.

[6] See *Phillimore* v. *Barry*, 1 Camp. 513; *Jacob* v. *Kirk*, 2 Moo. & R. 221; *Sweet* v. *Lee*, 3 Man. & Gr. 452;—cited St. Leon. Vend. 116.

agree, &c.,' and leave a place for a signature at the bottom, but never sign it, it may be considered as a note or memorandum in writing within the statute. And yet it is impossible not to see that the insertion of the name at the beginning was not intended to be a signature, and that the paper was meant to be incomplete until it was further signed;"[1] and in a subsequent case his Lordship said: "It is true, that, where a party, or principal, or person to be bound, signs as, what he cannot be, a witness, he cannot be understood to sign otherwise than as principal."[2]

But in other cases the Courts have had regard to the intention of the writing alleged to operate as a signature. The Court of Queen's Bench on this ground held that a person capable of being a witness, and signing as such, will not be bound by the instrument as a party, or as agent of a party:[3] and where the names were written at the beginning of a paper embodying a contract which concluded with the words "as witness our hands," and no signatures followed, it was considered by the Court of Common Pleas not to satisfy the statute, because the concluding words evidently showed an intention that the paper should be signed at the foot.[4]

Incidental introduction of name for different purpose.

§ **520.** Some points, however, are clear. It is clear that the incidental introduction of his name by the party to be charged for some distinct and different purpose will not do: as where A. wrote on a memorandum

[1] In *Saunderson* v. *Jackso...* 2 B. & P. 239; referring apparently to *Knight* v. *Cuckford*, 1 Esp. 190 (Eyre C.J.).

[2] *Coles* v. *Trecothick*, 9 Ves. at p. 251. In *Welford* v. *Beazeley* (3 Atk. 503) it appears that the person who subscribed the articles as witness, and was held bound by the signature, was *not* a party to the articles.

[3] *Hosbell* v. *Archer*, 2 A. & E. 500, where the Court doubted the above dictum of Lord Eldon in *Coles* v. *Trecothick*; but see the observations of Lord St. Leonards, Vend. 116.

[4] *Hubert* v. *Treherne*, 3 Man. & Gr. 743; S. C. s.n. *Hubert* v. *Turner*, 4 Scott, N. R. 486. Cf. *Reg.* v. *Tart*, 28 L. J. Q. B. 173.

for a lease the words "the rent to be paid to A.:" it was held to be no signature by him.[1]

The statute a weapon of defence, not offence.

"I adhere," said Lord Selborne in the House of Lords,[2] "to what I said, when sitting in the Court of Chancery, in the case of *Jervis* v. *Berridge*,[3] that the Statute of Frauds 'is a weapon of defence, not offence,' and 'does not make any signed instrument a valid contract by reason of the signature, if it is not such according to the good faith and real intention of the parties.'"

Caton v. *Caton.*

§ **521**. The same principle was affirmed by the House of Lords in the case of *Caton* v. *Caton*,[4] where specific performance was sought of certain heads of arrangement set out in a written memorandum and there called "conditions of a basis for a marriage settlement mutually agreed upon in the event of marriage between the undermentioned parties;" the parties so referred to being the plaintiff, then a widow, and the writer of the memorandum, who subsequently became her husband, and whose estate was sought to be charged. The document was not signed by the writer, but his name and initials appeared incidentally in several parts of it; and it was argued for the plaintiff that his name and initials, occurring as they did below the words "undermentioned parties," were sufficiently connected with those words to enable the Court to treat the document as a memorandum signed by him within the statute. The argument, however, was unsuccessful. "If," said Lord Westbury, in the course of his speech,[5] "a signature be found in an instrument incidentally only or having relation and reference only to a portion of the instrument, the signature cannot have that legal

[1] *Stokes* v. *Moore*, 1 Cox, 219; *Hawkins* v. *Holmes*, 1 P. Wms. 770.

[2] In *Hussey* v. *Horne-Payne*, 4 App. Cas. at p. 323.

[3] L. R. 8 Ch. at p. 360. See, too, *per* Stirling J. in *Pattle* v. *Hornibrook*, [1897] 1 Ch. at pp. 30, 31, (defendant's signature not final—no contract), referring to *Pym* v. *Campbell*, 6 E. & B. 370, 373.

[4] L. R. 2 H. L. 127.

[5] L. R. 2 H. L. at p. 143.

effect and force which it must have in order to comply with the statute, and to give authenticity to the whole of the memorandum."

Actual signature with intent to authenticate the document.

§ **522**. On the other hand, it seems that if there be an actual signature written with the intention of signing or authenticating the document, it is not the less operative because the signature was attached for a purpose different from that of satisfying the statute.[1] Thus, in a recent case in the Queen's Bench Division, the signature by the chairman of a board of directors in their minute book, pursuant to the 67th section of the Companies Act, 1862, of a resolution of the board to the effect that a particular draft contract should be engrossed and exe ted, was held to operate as a sufficient signature within the statute, so as to bind the company to an admission of the contract, notwithstanding that the chairman's signature had been put to the minute merely in order to verify its accuracy and without any intention of attesting or verifying the contract.[2] "The question," said Lush J. in delivering the judgment of the Court, "is not what its [the minute's] object was, but whether it was a written and signed statement of the contract."[3]

Eley v. *The Positive, &c. Assurance Co.*

§ **523**. But in another case, that of *Eley* v. *The Positive Government Security Life Assurance Co.*,[4] the question being whether a clause contained in the Articles of Association of a company to the effect that a particular person should be the solicitor of the company, was a contract with this person, the Judges of the Exchequer Division held that if it was such a contract at all, the signatures affixed to the Articles having been affixed *alio intuitu* could not satisfy the statute. In the Court above[5] the case was disposed

[1] See, however, *per* Lord Selborne in *Hussey* v. *Horne-Payne*, 4 App. Cas. at p. 323.

[2] *Jones* v. *Victoria Graving Dock Co.*, 2 Q. B. D. 314.

[3] 2 Q. B. D. at p. 324.

[4] 1 Ex. D. 20. See also *Browne* v. *La Trinidad*, 37 Ch. D. 1.

[5] 1 Ex. D. 88.

of irrespective of the statute, on the ground that the Articles of Association were a matter between the shareholders *inter se* or the shareholders and the directors, and did not create any contract between the solicitor and the company.

Suggestion as to the true principle.

§ **524.** It is submitted that no writing of a name at the beginning, or end, or in the course of a paper, is a signature within the statute, unless the Court conclude that it was there placed with the intention of authenticating the entire paper: but that if there be such a writing of a name, it is immaterial whether the signature was attached with the intention of evidencing the contract or for any other purpose whatever.[1] All motives, objects, and purposes beyond that of authenticating the paper are immaterial.[2]

Agent.

§ **525.** Where the contract purports to be signed by an agent, it must be alleged and proved by the plaintiff that the person who signed as agent was authorized to act as agent for the purpose of concluding a binding contract of the nature of the contract set up.[3] It is not enough in the case of a sale that the agent was appointed to negotiate for a sale:[4] it is not enough that he was appointed as the person to whom intending purchasers were to apply to treat and see the property:[5] and further it has been held that a written request by the

[1] See *Evans* v. *Hoare*, [1892] 1 Q. B. at pp. 596, 597, in which case a memorandum of agreement containing the defendants' names had been written out by their authorized agent, and then presented to the plaintiff for signature by him.

[2] See the judgments in *Bailey* v. *Sweeting*, 9 C. B. N. S. 843.

[3] *Blore* v. *Sutton*, 3 Mer. 237; *Ridgway* v. *Wharton*, 3 De G. M. & G. 677; 6 H. L. C. 238; *Firth* v. *Greenwood*, 1 Jur. N. S. 806 (Wood V.C.); *Rice* v. *O'Connor*, 12 Ir. Ch. R. 424; overruling S. C. 11 Ir. Ch. R. 540. House agents and estate agents, as such, have no authority to enter into contracts for their employers: they have only to find persons who are willing to contract, and submit their names and offers to the employers. *Thuman* v. *Best*, [1907] W. N. 170.

[4] *Chadburn* v. *Moore*, [1892] W. N. 126; 61 L. J. Ch. 674; 41 W. R. 39; 67 L. T. 257. See *contra*, *Prior* v. *Moore*, 3 Times L. R. 624, *sed qu.*

[5] *Godwin* v. *Brind*, L. R. 5 C. P. 299, n.

owner of freeholds to procure a purchaser for them, and to advertise them at a certain price, is no authority to enter into an open contract of sale, and is probably no authority to contract for sale at all.[1] But an authority to sell real estate *primâ facie* entitles the agent not only to negotiate for a sale, but also to sign a binding contract of sale.[2] Further, an excess of authority on the part of an agent will not necessarily vitiate a contract, and where such an excess is under the circumstances not unreasonable, specific performance may, notwithstanding the excess, be enforceable.[3]

How appointed.

§ 526. As the statute does not require an agent for signing a contract to be appointed in writing, the general law applies in such cases, and consequently the appointment may be made as well by parol as by writing.[4] But the fact of an appointment by parol must, of course, if denied, be proved by the person alleging it.[5]

Where the Court will conclude in favour of the agency.

1. Direct evidence

2. Inference.

§ 527. The Court may conclude in favour of the agency in any of the following ways:—

(1.) The Court may come to this conclusion from direct evidence, oral or written, of the appointment; or,

(2.) By inference from the acts, letters, or conduct of the parties, or from their relations to one another, or, in short, from any evidence legitimately raising the inference of agency.[6]

[1] *Hamer* v. *Sharp*, L. R. 19 Eq. 408. Distinguish *Saunders* v. *Dance*, 52 L. T. 644.

[2] *Rosenbaum* v. *Belson*, [1900] 2 Ch. 267, 271.

[3] *Bromet* v. *Neville*, 53 Sol. Jo. 324.

[4] *Waller* v. *Headon*, 5 Vin. Abr. 521, pl. 45; *Coles* v. *Trecothick*, 9 Ves. 234, 250; *Clinan* v. *Cooke*, 1 Sch. & Lef. 22; *Emmerson* v. *Heelis*, 2 Taunt. 38; *per* Tindal C.J. in *Acdal* v. *Levy*, 10 Bing. at p. 378; *Heard* v. *Pilley*, L. R. 4 Ch. 548; *Cave* v. *Mackenzie*, 46 L. J. Ch. 561.

[5] *James* v. *Smith*, [1891] 1 Ch. 384; 63 L. T. 529; 39 W. R. 396; affirmed [1891] W. N. 175; 65 L. T. 544.

[6] *Dyas* v. *Cruise*, 2 Jon. & L. 461; *Sharp* v. *Milligan*, 22 Beav. 606; *Pole* v. *Leask*, 28 Beav. 562; affirmed in D. P. 33 L. J. Ch. 155; *Rossiter* v. *Miller*, 3 App. Cas. 1124.

3. Representation.

(3.) An alleged principal, though he may in fact have given no authority to the alleged agent, may by representations which he has made to the other party, or by inducing him to lay out money on the faith of the alleged agency, be estopped from denying the agency.[1]

4. Ratification.

(4.) Ratification may take the place of agency. Here the maxim applies, *omnis ratihabitio retrotrahitur et mandato æquiparatur*, and therefore the subsequent ratification of a contract, entered into by a person then unauthorized as agent, takes it out of the statute;[2] and this ratification need not be by any express act; it is enough if the party whose authority is required take the benefit of the contract, or even if, with a full knowledge of it, he passively acquiesce in it for a length of time longer than that reasonably to be allowed for the expression of dissent.[3] But it will not be implied from vague expressions to a third person.[4]

Essentials of a valid ratification.

§ 528. For a valid ratification it is necessary that the person who ratifies the contract should have been in existence at its date;[5] and further, that he should be the person in whose name the agent has professed the act.[6] Thus, where the pretended agent professed to contract in writing on behalf of a married woman,

[1] *Ridgway* v. *Wharton*, 6 H. L. C. 238, 297; *per* Lord Cranworth in *Ramsden* v. *Dyson*, L. R. 1 H. L. at p. 158.

[2] *Maclean* v. *Dunn*, 4 Bing. 722; *Ridgway* v. *Wharton*, 6 H. L. C. 238, 296. See, too, *Fitzmaurice* v. *Bayley*, 6 El. & Bl. 868; 8 ib. 664; 9 H. L. C. 78.

[3] *Bigg* v. *Strong*, 3 Sm. & G. 592; affirmed 6 W. R. 536; *Rice* v. *O'Connor*, 12 Ir. Ch. R. 424, 431. And see *per* Lord Hatherley in *Phillips* v. *Homfray*, L. R. 6 Ch. at p. 778.

[4] *Ridgway* v. *Wharton*, 6 H. L. C. 238.

[5] *Kelner* v. *Baxter*, L. R. 2 C. P. 174; *Scott* v. *Lord Ebury*, L. R. 2 C. P. 255; *Melhado* v. *Porto Alegre, &c. Railway Co.*, L. R. 9 C. P. 503; *In re Northumberland Avenue Hotel Co.*, 33 Ch. D. 16.

[6] *Wilson* v. *Tumman*, 6 Man. & Gr. 236; *per* Parke J. in *Fleet* v. *Ashby*, 10 B. & C. at p. 298. See, too, *Marsh* v. *Joseph*, [1897] 1 Ch. 213; and cf. *Athy Guardians* v. *Murphy* (1896), 1 I. R. 65.

it was held that the husband could not ratify the contract, as he had not been named as a principal.[1] A contract made by a man purporting and professing to act on his own behalf alone, and not on behalf of a principal, but having an undisclosed intention to give the benefit of the contract to a third party, cannot be ratified by that third party, so as to render him able to sue, or liable to be sued, on the contract. The hypothesis of ratification is that the ratifier is already in appearance the contractor, and that, by ratifying, he holds as done for him what already purported or professed to be done for him.[2]

Auctioneer.

§ 529. It is now clearly decided that, at sales by auction, auctioneers are agents of the purchaser as well as of the vendor.[3] This conclusion seems to have been arrived at from the necessity of the case, and the peculiar nature of the mode of sale.[4] "The nature of the proceeding by auction,—" said Lord Langdale M.R.,[5] "the bidding for the purpose of making the purchase—the necessity of making a statement of the bidding—the direction to the auctioneer to write down the bidding, which is perhaps involved in the very process of bidding, and some other circumstances, afford intelligible ground for the decision in *Emmerson* v. *Heelis*,[6] and the approbation which has since been bestowed upon it." Where this necessity does not exist, as in a subsequent purchase in private from the

[1] *Saunderson* v. *Griffiths*, 5 B. & C. 909; and see *Brook* v. *Hook*, L. R. 6 Ex. 89.

[2] *Keighley, Maxsted & Co.* v. *Durant*, [1901] A. C. at pp. 253, 259, reversing [1900] 1 Q. B. 629, C. A.

[3] *Emmerson* v. *Heelis*, 2 Taunt. 38; *White* v. *Proctor*, 4 Taunt. 209; *Kemeys* v. *Proctor*, 3 V. & B. 57; S. C. 1 J. & W. 350; *Buckmaster* v. *Harrop*, 7 Ves. 341; S. C. 13 Ves. 456; *Kenworthy* v. *Schofield*, 2 B. & C. 945; *Edgell* v. *Day*, L. R. 1 C. P. 80, 84; *Sims* v. *Landray*, [1894] 2 Ch. at p. 320; cf. *Bartlett* v. *Purnell*, 4 A. & E. 792.

[4] *Gosbell* v. *Archer*, 2 A. & E. 500; *Earl of Glengal* v. *Barnard*, 1 Ke. 788, affirmed in D. P. as *Lord Glengal* v. *Thynne*, St. Leon. Law of Prop. 56.

[5] In *Earl of Glengal* v. *Barnard*, 1 Ke. at p. 788.

[6] 2 Taunt. 38.

auctioneer, no such agency arises.[1] Where, however, after an unsuccessful sale by auction, but before the auctioneer had left the rostrum, a purchaser ascertained from the auctioneer's clerk the amount of the reserved bidding, and agreed to take the property at that price, and signed a bidding paper for it, but subsequently denied the authority of the auctioneer to act as the vendors' agent, it was held impossible for him to contend that the sale ought not to be treated as one by auction.[2] But the authority which the purchaser at an auction confers upon the auctioneer being an authority to make a minute or record of the bidding at the time and as part of the transaction, the auctioneer cannot bind the purchaser by signing a memorandum of contract at a later time,—a week, for instance, after the sale.[3]

Authority of auctioneer.

§ 530. In order to prove that the auctioneer on a sale by auction was the vendor's agent, it is only necessary to prove by whose instructions he acted;[4] and it seems that after the hammer has fallen the vendor is not entitled to revoke the authority of the auctioneer, although, at the time when the vendor seeks to revoke it, no written contract has been signed.[5]

Agent of agent.

§ 531. As an agent may not without express authority delegate his authority to another, an auctioneer cannot without permission appoint another to conduct the sale,[6] and, for the same reason, the clerks of agents are not agents for the principal, unless the principal has assented to their acting as such.[7] The auctioneer's clerk at an auction has not by custom authority as the purchaser's agent to enter his name at the time of the sale in a

Auctioneer's clerk.

[1] *Mews* v. *Carr*, 1 H. & N. 484.

[2] *Else* v. *Barnard*, 28 Beav. 228.

[3] *Bell* v. *Balls*, [1897] 1 Ch. at p. 671; 45 W. R. 378.

[4] Consider *Pike* v. *Wilson*, 1 Jur. N. S. 59.

[5] *Doy* v. *Wells*, 30 Beav. 220. See further, as to the auctioneer's authority, *McMullen* v. *Hellberg*, L. R. 6 C. L. at p. 465; *Brett* v. *Clowser*, 5 C. P. D. at p. 386.

[6] Dart, V. & P. (7th ed.) 199.

[7] *Coles* v. *Trecothick*, 9 Ves. 234. Cf. *Bird* v. *Boulter*, 4 B. & Ad. 443.

book,[1] but it may be shown that the purchaser, by word, sign, or otherwise, authorized the making of such entry:[2] and where that is shown, the clerk's signature is a signature on behalf of the purchaser sufficient to satisfy the Statute of Frauds.[3] It has even been contended that the exigencies of the case require that, on sales by auction at the present day, the auctioneer's clerk, sitting publicly beside him, should be held authorized, generally, to sign memoranda on behalf of purchasers; but that contention has been judicially rejected as groundless.[4]

Solicitor.

§ 582. In one case, a solicitor employed in a marriage treaty, who drew up a minute of the arrangement come to at an interview, was held not to be an agent lawfully authorized to bind the parties, so as to make the insertion of their names in the minute a signature within the statute;[5] nor has a solicitor, instructed on behalf of one of the parties to prepare a formal contract, authority to sign for his client any memorandum or note of the contract within the statute.[6] It is no part of the solicitor's duty to do so.[7] But where letters had been written by an agent, within the scope of his authority, recognizing and insisting on the terms of an alleged contract on which his principal was sued, the letters were held by the Court of Appeal to constitute a memorandum sufficient to satisfy the statute.[8]

[1] *Pierce* v. *Corf*, L. R. 9 Q. B. 210. See, too, *Potter* v. *Peters*, [1895] W. N. 37; 64 L. J. Ch. 357; 72 L. T. 621.

[2] As to what such entries must contain, see *Rishton* v. *Whatmore*, 8 Ch. D. 467; *infra*, § 544.

[3] *Sims* v. *Landray*, [1894] 2 Ch. at p. 320.

[4] *Bell* v. *Balls*, [1897] 1 Ch. at pp. 669, 670, where the ordinary practice at sales by auction is stated.

Earl of Glengal v. *Barnard*, 1 Ke. 769, affirmed in D. P. as *Lord Glengal* v. *Thynne*, St. Leon. Law of Prop. 56. See also *De Bril* v. *Thomson*, 3 Beav. 169; *Hammersley* v. *De Bil*, 12 Cl. & Fin. 45.

[5] *Smith* v. *Webster*, 3 Ch. D. 49. See, too, *Forster* v. *Rowland*, 7 H. & N. 103. Distinguish *Jolliffe* v. *Blumberg*, 18 W. R. 781; and see *Moritz* v. *Knowles*, [1899] W. N. 10, 83.

[6] *Bowen* v. *Duc d'Orléans*, C. A. 16 T. L. R. 226, 227.

[7] *John Griffiths Cycle Corporation* v. *Humber & Co.*, [1899] 2 Q. B.

Telegraph clerk.

§ **533**. A telegraph clerk despatching a message from written instructions of a party to a contract has been held the agent of such party to sign his name in the message.[1]

Revocation of agent's authority.

§ **534**. The authority of an agent may be revoked at any time before it is acted upon, and such revocation may be proved by parol.[2] But where the agent has been habitually employed, and so held out by the principal as such, the latter will be bound by his acts, if within the scope of his former authority, until reasonable notice of its revocation.[3]

Death of principal.

§ **535**. In general, the death of the principal works a revocation of an agent's authority, and any contract made by the agent after, though without notice of the death, is void.[4] This is, however, subject to certain exceptions in the case of agents appointed by power of attorney in favour of purchasers.[5]

Agency a question of fact.

§ **536**. The question of agency is, of course, one of fact.

Letters.

§ **537**. It follows from what has been said that letters passing between the parties themselves, or between the party sought to be charged and some third party, even including amongst such third parties the writer's own agent, may be used to supply such evidence of the contract as the statute requires. It may be convenient to consider these cases under the following heads, viz.: (1) where there is an unsigned writing containing all

111; 68 L. J. Q. B. 959; 81 L. T. 310. The decision of the C. A. was reversed by the House of Lords, but on another ground. *Humber & Co.* v. *John Griffiths Cycle Corporation*, [1901] W. N. 110.

[1] *Godwin* v. *Francis*, L. R. 5 C. P. 295.

[2] *Vynior's case*, 8 Co. 82; *Manser* v. *Back*, 6 Ha. 443.

[3] *Trueman* v. *Loder*, 11 A. & E. 589; *Ex parte Swan*, 7 C. B. N. S. 400, 432. But an agent for sale of goods whose authority has been revoked cannot validly pledge the goods even to persons who have no notice or means of knowing of the revocation. See *Fuentes* v. *Montis*, L. R. 3 C. P. 268; S. C. L. R. 4 C. P. 93.

[4] *Watson* v. *King*, 4 Camp. 272; *Smout* v. *Ilbery*, 10 M. & W. 1; *Carr* v. *Livingstone*, 35 Beav. 11.

[5] Conveyancing Act, 1882, ss. 8 and 9.

the terms of the contract, and the letters are adduced as incorporating that writing, and furnishing the signature of one or both of the parties; (2) where the principal writing is incomplete in one or more of its terms, and the letters are referred to to supplement the defect; and (3) where they are adduced as themselves constituting the contract and the written evidence of it.

1. Letters referred to for signature.

§ 538. (1.) In order to make a contract binding under the Statute of Frauds, it is not necessary that it should be all contained in one paper, signed by the party to be charged; but the terms of the contract may be contained in one paper, and the signature may be found in some other paper, provided that such second paper refer to the paper which does contain the terms.[1]

Parol evidence admitted.

§ 539. For the ascertainment and identification of the actual paper referred to, parol evidence is admissible:[2] for the one paper cannot be physically contained in the other paper. In the same way, in the case of a bequest in a will, the thing given and the person to whom it is given must be mentioned in the instrument, but the actual identification of the thing and the person must, from the nature of the case, be dehors the instrument, and therefore a matter of parol evidence.[3]

There must be a reference.

§ 540. There must, however, be a reference: therefore, where the contract made no reference to an advertisement respecting the property which was sought to be introduced to supply a term, it was held that this could not be done:[4] and so also the mere admission in

[1] *Allen* v. *Bennet*, 3 Taunt. 169; *Ridgway* v. *Wharton*, 3 De G. M. & G. 677; S. C. 6 H. L. C. 238. See also *per* Lord Eldon in *Coles* v. *Trecothick*, 9 Ves. 250; *Gaston* v. *Frankum*, 2 De G. & Sm. 561; *Powell* v. *Dillon*, 2 Ball & B. 416; *Long* v. *Millar*, 4 C. P. D. 450; *Pickles* v. *Sutcliffe* (incorporation of conditions of sale), [1902] W. N. 209. Where the terms of the contract are contained in several documents, all must be produced. See *Post* v. *Marsh*, 16 Ch. D. 395.

[2] *Per* Lord Redesdale in *Clinan* v. *Cooke*, 1 Sch. & Lef. 33.

[3] See *supra*, § 342.

[4] *Clinan* v. *Cooke*, 1 Sch. & Lef. 22. Distinguish *Nene Valley Drainage Commissioners* v. *Dunkley*, 4 Ch. D. 1.

writing of a contract, without ascertaining its terms, is inoperative.[1]

To terms in writing.

§ **541**. Further, the reference must be to terms in writing: therefore where a writing duly signed referred not to a writing, but to terms arranged by parol, there was no valid contract.[2] But the terms, if in fact in writing, need not appear on the face of the other paper to be so: so that a reference in one paper to "terms agreed on," when in fact the only terms agreed on were in writing, was held sufficient.[3]

How far the reference must be express.

§ **542**. Whether the reference must be express and on the face of the paper containing the signature, or whether it be enough that a jury or judge of fact would conclude from the circumstances and contents that the two papers are parts of one correspondence, may be open to doubt. The latter is probably the better view. It has been held by the Court of Appeal that an envelope may be referred to in order to supply the name of the person to whom a letter, proved to have been sent by post inclosed in the envelope, was addressed.[4]

Is parol evidence admissible to connect the documents?

§ **543**. Another question does not seem free from controversy. Is it the rule that the two papers must be such that the judge of fact would connect them without the aid of verbal evidence,[5] or that verbal evidence may be given not only to identify, but to connect them?[6]

Entry in auctioneer's book.

§ **544**. In a case arising on an entry of a contract in an auctioneer's book, where the entry contained no reference to the conditions, subject to which the sale

[1] *Rose* v. *Cunynghame*, 11 Ves. 550; *Clerk* v. *Wright*, 1 Atk. 12.

[2] *Ridgway* v. *Wharton*, 3 De G. M. & G. 77; S. C. 6 H. L. C. 238.

[3] *Baumann* v. *James*, L. R. 3 Ch. 508; *Cave* v. *Hastings*, 7 Q. B. D. 125.

[4] *Pearce* v. *Gardner*, [1897] 1 Q. B. 688.

[5] See *Long* v. *Millar*, 4 C. P. D. 450, and particularly *per* Brantwell L.J., at p. 452.

[6] Cf. *Pierce* v. *Corf*, L. R. 9 Q. B. 210, with *Oliver* v. *Hunting*, 44 Ch. D. 205; and see *Potter* v. *Potter*, [1895] W. N. 37; 64 L. J. Ch. 357; 72 L. T. 624 (parol evidence held not admissible).

took place, Hall V.C. said that the entry must contain such a reference to the conditions as to identify them upon production as being the conditions mentioned in the entry.[1]

§ **545.** In *Tawney* v. *Crowther*,[2] the contract was reduced into writing, and was in possession of the defendant, who, in answer to a letter from the plaintiff's solicitor, asking him to meet him and sign the contract, wrote a letter, in which he mentioned his having been from home, acknowledged having said his word should be as good as his bond, and that there was time enough before Michaelmas to settle everything; and again said "that his word should always be as good as any security he could give:" Lord Thurlow, first on a plea of the statute, and subsequently on the answer, which insisted on the statute, held that the letters and the paper together constituted a valid contract. "If a letter cannot be referred to the agreement," said his Lordship, "or does not contain proper terms, I cannot treat it as out of the statute; but I confess, on what appears here, the papers do refer to that agreement, and contain a promise to perform it; the defendant did intend by the letter to raise a confidence that the agreement should be performed."[3] Lord Redesdale has expressed his disapprobation of this case, considering that the promise was intended to be of an honorary and not of a legal and binding nature;[4] and the correctness of the decision has been questioned by Lords Cranworth and Brougham in the case of *Ridgway* v. *Wharton*.[5] From the note at the end of the case in Brown's Reports[6] it appears that the decree was by consent. *Tawney v. Crowther.*

§ **546.** In another case, the defendants' letters referred Other

[1] *Rishton* v. *Whatmore*, 8 Ch. D. 467.

[2] 3 Bro. C. C. 161, 318.

[3] 3 Bro. C. C. at p. 320.

[4] See Belt's n. 3 Bro. C. C. 153.

[5] 6 H. L. C. 265, 271. See *per* Lord St. Leonards, S. C. 293.

[6] 3 Bro. C. C. (Belt's ed.), p. 320.

Illustrations.

distinctly to the conditions of sale, which were in their hands, signed by the plaintiff, and the Court of Queen's Bench held that no parol evidence was necessary to connect the two, and that there was a binding contract.[1] And where A. wrote to B., proposing to let a public-house on certain terms, and B.'s clerk met A. and discussed the terms of the lease, and afterwards B. replied that he was willing to take the premises of A., this was held to refer to the terms contained in A.'s letter, and therefore to constitute a contract.[2]

2. Letters to supply a term.

§ **547.** (2.) Letters may be used to supply a term wanting in the principal writing; thus where, in a memorandum, the lessor's name was not mentioned, and subsequently a letter from the lessee, referring to this document, mentioned his (the lessor's) name in a manner from which the Court could imply that he was lessor, there was held to be sufficient evidence of the contract.[3] But where two persons came to a verbal agreement for the sale and purchase of an estate, and the vendor thereupon signed and handed to the purchaser a memorandum of the particulars of the property and the price, which, however, did not contain the purchaser's name; and afterwards the vendor signed and sent to the purchaser a letter, saying, "I am about to relet the land at S. The Lady Day rents will be mine and the Michaelmas yours;" it was held that the defect in the memorandum was not supplied by the letter.[4]

3. Letters

§ 548. (3.) Letters may themselves constitute the

[1] *Dobell* v. *Hutchinson*, 3 A. & E. 355. See also *Saunderson* v. *Jackson*, 2 B. & P. 238; and *Jackson* v. *Lowe*, 1 Bing. 9.

[2] *Wood* v. *Scarth*, 2 K. & J. 33. See, too, *Morris* v. *Wilson*, 5 Jur. N. S. 168, followed by Romer J. in *Filby* v. *Hounsell*, [1896] 2 Ch. 737; *Wylson* v. *Dunn*, 34 Ch. D. 569; *Studds* v. *Watson*, 18 Ch. D. 305.

[3] *Warner* v. *Willington*, 3 Drew. 523. See this case, *infra*, § 557, and the observations of Romer J. in *Coombs* v. *Wilkes*, [1891] 3 Ch. at p. 81; also *Pearce* v. *Gardner*, [1897] 1 Q. B. 688, where the name of a party was supplied from an envelope.

[4] *Skelton* v. *Cole*, 1 De G. & J. 587.

contract and the written evidence of it; and the cases in which a contract is thus constituted by correspondence between the parties are very numerous: some of them have already been discussed.[1]

as constituting the contract.

§ **549**. It is one of the first principles of a case of this kind that where the contract, or the note or memorandum of the terms of the contract, has to be found in letters, the whole of the correspondence which has passed must be taken into account.[2] Accordingly, in a case where the first two letters of a correspondence, taken by themselves, appeared to amount to a complete contract, but there really were other terms, which when those letters were written were unsettled and in the result remained unsettled, the House of Lords held that there was no concluded contract.[3]

The correspondence must be considered as a whole.

§ **550**. There are many reasons to recommend this rule as to the consideration of the whole of the correspondence. The subsequent letters may show that at the time of the supposed contract there was on neither side that intention to contract which is of the essence of a contract: or again, the correspondence may show a subsequent agreement to vary or rescind an agreement previously made.

"I think," said Jessel M.R.,[4] that it very often happens that both parties use expressions in letters which read alone would amount to a contract, if we did not know that in fact neither of the parties intended those general expressions to constitute a contract."

§ **551**. The effect of subsequent letters may perhaps

[1] See *supra*, § 286. See also *Western* v. *Russell*, 3 V. & B. 187; *Coupland* v. *Arrowsmith*, 18 L. T. N. S. 755; *Rossiter* v. *Miller*, 5 Ch. D. 648; 3 App. Cas. 1124; *Bonnewell* v. *Jenkins*, 8 Ch. D. 70.

[2] *Per* Lord Cairns in *Hussey* v. *Horne-Payne*, 4 App. Cas. at p. 316.

[3] *Hussey* v. *Horne-Payne*, 4 App. Cas. 311. See this case considered in *Bolton Partners* v. *Lambert*, 41 Ch. D. 307; and *Bristol, &c. Bread Co.* v. *Maggs*, 44 Ch. D. 616.

[4] *May* v. *Thomson*, 20 Ch. D. 705, 706.

be thus stated. If the subsequent correspondence leads to the conclusion that at the date of the letters relied on as the memoranda of the contract there was no contract in fact, then the plaintiff must fail: if, on the other hand, the whole evidence shows that at that date there was a consensus between the parties upon the terms expressed in the letters relied upon, then the subsequent correspondence, unless amounting to a new contract or an agreement for rescission can have no effect upon the existence of the contract.

Effect of conduct on letters.

§ 552. The influence of subsequent correspondence was carried very far in the case of the *Bristol, Cardiff, and Swansea Aerated Bread Co.* v. *Maggs*,[1] where Kay J. held that the plaintiff was precluded from relying on letters as evidence of a contract, not because at the date of those letters there was no contract, but because the plaintiff's solicitor subsequently began a negotiation with a view to introduce new terms. "Having treated these two letters," said the learned judge, "as part of an incomplete bargain, it would be most inequitable to allow them to say, 'Although we thus treated the matter as incomplete and a negotiation only, yet the defendant had no right to do so, but was bound by a completed contract.'"[2]

The case, therefore, is put not on the non-existence of the contract in fact, but upon an equitable estoppel resulting from the subsequent negotiation by the plaintiff's solicitor. This proposition seems worthy of farther discussion. A new negotiation for a new term does not seem necessarily to involve the desire to rescind or abandon an existing contract, nor is it conclusive evidence that no contract had in fact been previously entered into.

Bellamy v. Debenham.

§ 553. In *Bellamy* v. *Debenham*,[3] North J. discussed the language used by Kay J. in *Bristol, &c. Bread*

[1] 44 Ch. Div. 616.

[2] At p. 625.

[3] 45 Ch. D. 481; affirmed on another ground, [1891] 1 Ch. 412.

Co. v. *Maggs*, and said: "In my opinion, subsequent negotiations, first commenced on new points after a complete contract in itself has been signed, cannot be regarded as constituting part of the negotiations going on at the time when it was signed." This seems to be good law. It would seem clear that if the letters of proposal and acceptance in fact contain all the terms agreed on at the time, and were written with the intent of binding the writers, this complete contract could not be affected by subsequent negotiations not resulting in a new contract.

Parts of letters not available.

§ **554**. The plaintiff cannot insist on some terms or some letters and reject others.[1] If the letters taken as a whole do not constitute the contract, the plaintiff must fail.[2]

Letter to third person.

§ **555**. The contract may even be sufficiently evidenced by a letter addressed to a third person, provided it ascertain the terms of the contract.[3]

Letters repudiating a contract.

§ **556**. It is desirable to consider the effect of letters which repudiate or disown a contract referred to in them. Where the letters deny that a contract ever existed, it would seem impossible to treat them as the evidence or an admission of a contract; but where the letters repudiate on the ground of matter subsequent, as for example, of damage done to goods bought, there a statement of the terms of the contract in the letters may satisfy the statute.[4]

Warner v. *Willington.*

§ **557**. The subject was discussed in the case of *Warner* v. *Willington*,[5] before Kindersley V.C. In that case there was a memorandum for a lease, signed by the defendant, the proposed lessee, but deficient in the

[1] *Post* v. *Marsh*, 16 Ch. D. 395.

[2] *Nesham* v. *Selby*, L. R. 13 Eq. 191; affirmed L. R. 7 Ch. 406.

[3] *Per* Lord Hardwicke in *Welford* v. *Beazley*, 3 Atk. 503; *Child* v. *Comber*, 3 Sw. 423, n.; *Seagood* v. *Meale*, Prec. Ch. 560. See also *Barkworth* v. *Young*, 4 Drew. 1, particularly 13.

[4] *Bailey* v. *Sweeting*, 9 C. B. N. S. 843; *Nesham* v. *Selby*, L. R. 13 Eq. 191; 7 Ch. 406; cf. *Jackson* v. *Oglander*, 13 W. R. 936.

[5] 3 Drew. 523.

lessor's name, and then a letter by the defendant, withdrawing the memorandum, but referring to the lessor's name: and the Vice-Chancellor held that the letter supplied the original defect in the memorandum, and converted it into a contract binding under the statute. It is submitted that this decision is not without difficulties on principle; for it would seem that the whole letter must be looked at, and then that affirms the memorandum to be, what in fact without the letter it was, namely, a mere offer: and, further, the case appears difficult to reconcile with other decisions. Thus, where buyers have written letters distinctly referring to invoices of the goods, but insisting that they were not bound to accept the goods, and thus repudiating the contract, the Courts, have held that there is no sufficient writing within the 17th section of the Statute of Frauds:[1] and in a case in the Exchequer, in which *Warner* v. *Willington* was cited, the Court considered that it would be treating the Statute of Frauds as nothing, if a letter, merely declining to accept goods under a parol contract or an insufficient written contract, were held to take the case out of the statute.[2] And again, in a case in Chancery Turner L.J. treated the argument that a letter declining to enter into a contract could constitute one as too strained to require any observation.[3]

Parol contract before marriage, written after.

§ 558. It is now distinctly settled, after some difference of opinion, that a written memorandum of contract after marriage, in pursuance of a parol one before, takes the case out of the statute.[4]

[1] *Cooper* v. *Smith*, 15 East, 103; *Richards* v. *Porter*, 6 B. & C. 437; *per* Lord Denman in *Dobell* v. *Hutchinson*, 3 A. & E. 371; *Goshell* v. *Archer*, 2 A. & E. 500.

[2] *Goodman* v. *Griffiths*, 1 H. & N. 574.

[3] *Wood* v. *Midgley*, 5 De G. M. & G. 41, 46.

[4] *Taylor* v. *Beech*, 1 Ves. Sen. 297; *per* Lord Cottenham in *Hammersley* v. *De Biel*, 12 Cl. & Fin. 64, n.; *per* Turner L.J. in *Surcome* v. *Pinniger*, 3 De G. M. & G. 571; *Barkworth* v. *Young*, 4 Drew. 1, approved in C. A., *Re Holland*, *Gregg* v. *Holland*, [1902] 2 Ch. 360. See also *Hodgson* v. *Hutchenson*, 5 Vin.

Pleading a contract within the statute.

§ **559**. With regard to the mode in which a contract within the statute should be pleaded, the Rules of the Supreme Court under the Judicature Acts have swept away the diversity which existed in the pleadings at Common Law and in Chancery. An allegation of a contract is sufficient without stating it to be in writing, and the defendant who admits the contract in fact, but denies its sufficiency with regard to the statute, must specially raise the point by his defence.[1]

Contract implied from letters, conversations, or circumstances.

§ **560**. Another important provision of the Rules of the Supreme Court is to the effect that where a contract is to be implied from a series of letters or conversations or otherwise from a number of circumstances, it is sufficient in pleading to allege such contract as a fact and to refer generally to such letters, conversations, or circumstances without setting them out in detail; and that if in such a case the person so pleading desires to rely in the alternative upon more contracts than one, as to be implied from such circumstances, he may state the same in the alternative.[2]

iii. *What takes a contract out of the statute.*

Sale by Court, admission, fraud, or part performance.

§ **561**. Courts of Equity hold that, notwithstanding the express language of the statute, a case may be taken out of its operation by any one of the following circumstances:—(1.) by the sale being by the Court, (2.) by an admission in the defence of a contract in fact, where the defence does not insist on the statute, (3.) by fraud,[3] and (4.) by a parol contract and part performance, which is, as we shall see, but a particular case of fraud. In the two first cases the reason is that

Abr. 322, pl. 34. In *Randall* v. *Morgan*, 12 Ves. 67, Grant M.R. expressed doubts on this point.

[1] R. S. C. Ord. XIX. rr. 15, 20. Cf. as to the distinctness now required in pleadings, *Bigot* v. *Nunn*, 7 Ch. D. 284; and see *supra*, § 500.

[2] R. S. C. Ord. XIX. r. 24.

[3] See, too, *infra*, § 814 (mistake).

the danger of that which the statute was meant to guard against does not arise, and in the third and fourth that the statute shall not be made use of to cover a fraud.

1. Sale by the Court.

§ 562. (1.) It was held that a sale in the Court of Chancery by private contract, in pursuance of an order confirming a Master's report, was exempted from the Statute of Frauds, and consequently might be enforced against the representative of a purchaser who had not signed it.[1] The considerations upon which this decision was based are that the judicial character of the proceeding is such as to prevent the hazard of uncertainty and perjury which the statute was intended to prevent, and moreover that, in such a case, the purchaser, having been a party to the proceedings in which the order for sale to him was made, is bound by the order, and would be guilty of contempt in refusing to pay the purchase-money.

Ordinary sale by auction.

§ 563. The same rule was held to apply to sales in the ordinary way by auction before a Master,[2] and would no doubt apply to sales under the present practice;[3] but not to ordinary sales by public auction: because, it is said, such sales might be without written or printed particulars and conditions, and also, no doubt, because they are in no way proceedings connected with the Court.[4]

2. Admissions in pleadings.

§ 564. (2.) An admission of a parol contract in the answer of a defendant to the bill of complaint was, under the old practice, held to take the case out of the statute where the answer did not insist upon the statute, and this because the admission took the case out of the mischief which the statute was designed to

[1] *Att.-Gen.* v. *Day*, 1 Ves. Sen. 218; *per* Grant M.R. in *Blagden* v. *Bradbear*, 12 Ves. 472; *per* Lord Cottenham in *Ex parte Cutts*, 3 Deac. 267; *Lord* v. *Lord*, 1 Sim. 503.

[2] *Att.-Gen.* v. *Day*, *ubi supra*.

[3] See St. Leon. Vend. 86; Dart, V. & P. (7th edit.) p. 218.

[4] *Blagden* v. *Bradbear*, 12 Ves. 466, 472. See, too, *Mason* v. *Armitage*, 13 Ves. at p. 35.

remedy.[1] Another reason suggested for the rule was that the contract, though originally in parol, was, after admission, evidenced by writing under the signature of the party, which would be a sufficient compliance with the statute as interpreted by the decided cases.[2]

Effect of admissions under present practice

§ 565. The substantial result of the present system of pleading is to continue this effect of an admission of the contract in fact, and furthermore to treat the contract as admitted unless it is actually denied. For it results from the Rules of the Supreme Court[3] that if the contract be not expressly denied to exist in fact, and expressly stated not to satisfy the Statute of Frauds, it will be held that the defendant has admitted both its existence and its sufficiency to satisfy the statute.

Death of person making admission.

§ 566. In the case of the death before judgment of the person making such an admission, his representatives will be bound by his admission on b made parties to the action.[4] But the admission b vendor that he had contracted to sell an estate to a person since deceased will not bind the personal representatives of such deceased purchaser; nor will an admission by a purchaser that he had contracted to buy an estate bind the real representatives of the alleged vendor: for it is now clearly settled that, in order to entitle the real or personal representative to enforce the execution of a contract to the prejudice to the other, there must have been, at the death of the deceased contractor, a contract by which he was legally bound, and which the Court would have compelled him specifically to execute; and it is consequently open to any of the parties interested, notwithstanding the admissions or submissions of any of the other parties,

[1] *Gunter* v. *Halsey*, Amb. 586; *Lemondson* v. *Sweed*, Gilb. 45. See also *per* Lord Rosslyn in *Rondeau* v. *Wyatt*, 2 H. Bl. 68.

[2] Story, Eq. Jur. s. 755.

[3] R. S. C. Ord. XIX. rr. 15, 17, 20.

[4] *Att.-Gen.* v. *Day*, 1 Ves. Sen. 218, 221.

to take every objection which the deceased might himself have taken if living.[1] Thus the admission of a contract by the executors of a testator will not bind the residuary legatee.[2]

3 Fraud.

§ 567. (3.) The principle upon which the Court regards fraud as forming an exception to the statute was stated by Lord Eldon as follows: "Upon the Statute of Frauds, though declaring that interests shall not be bound except by writing, cases in this Court are perfectly familiar deciding that a fraudulent use shall not be made of that statute; where this Court has interfered against a party meaning to make it an instrument of fraud, and said he should not take advantage of his own fraud even though the statute has declared that in case those circumstances do not exist, the instrument shall be absolutely void. One instance is the case of instructions upon a treaty of marriage; the conveyance being absolute, but subject to an agreement for a defeasance, which though not appearing by the contents of the conveyance, can be proved *aliunde*: and there are many other instances."[3]

"It is established," said Lindley L.J. in *Rochefoucauld* v. *Boustead*,[4] "by a series of cases, the propriety of which cannot now be questioned, that the Statute of Frauds does not prevent the proof of a fraud; and that it is a fraud on the part of a person to whom land is conveyed as a trustee, and who knows it is so conveyed, to deny the trust and claim the land himself. Consequently, notwithstanding the statute, it is competent for a person claiming land conveyed to another to prove by parol evidence that it was so conveyed upon trust

[1] *Buckmaster* v. *Harrop*, 7 Ves. 341, S. C. 13 Ves. 456. *See Earl of Radnor* v. *Shafto*, 11 Ves. 448, overruling *Lacon* v. *Mertins*, 3 Atk. 1. See also *Potter* v. *Potter*, 1 Ves. Sen. 437.

[2] *Buckmaster* v. *Harrop*, 7 Ves. 341; S. C. 13 Ves. 456.

[3] *Mestaer* v. *Gillespie*, 11 Ves. at p. 627.

[4] [1897] 1 Ch. at p. 206 (a case on the 7th section of the statute). See, too, *Re Duke of Marlborough*, [1894] 2 Ch. 133, 141.

for the claimant, and that the grantee, knowing the facts, is denying the trust, and relying upon the form of conveyance and the statute, in order to keep the land himself."

Collateral contract.

§ **568**. Accordingly, if it can be shown that the written contract which is sought to be enforced was only signed in consequence of some collateral contract having been come to, the plaintiff must either submit to the collateral contract or have his action for specific performance dismissed; and this although the collateral contract is not evidenced in writing. Thus, in *Clarke* v. *Grant*,[1] where trustees of a charity sought specific performance of a written contract to take a lease, and the main defence was a parol contract of the same date as the written one and affecting the parcels, Grant M.R. held that evidence to prove the parol contract was admissible, that, if it were proved, it would be against equity and a fraud on the defendant to insist upon his performance of a contract, which he had only signed on the faith of an alteration being made in one of its terms.

Fraudulent refusal to recognize collateral parol promise.

§ **569**. In the last-mentioned case the defendant set up the collateral contract: but the cases go much further and show that the plaintiff may, on the ground of fraud, obtain the benefit of a collateral parol promise which the person who claims under the written contract fraudulently refuses to recognize. In one case Lord Thurlow allowed the plaintiff to give parol evidence that, at the time the contract (which was subsequently reduced to writing) was entered into, an undertaking had been given by the assignee of the lease to the assignor for indemnity against the rents and covenants; his Lordship laying down that "where the objection is taken before the party execute the agreement and the other side promise to ratify it, it is to be considered a fraud on the party if such promise is not kept."[2]

[1] 14 Ves. 519, 525.

[2] *Pember* v. *Mathers*, 1 Bro. C. C. 52; *Pearson* v. *Pearson*, 27 Ch. D. 145, 148. Cf. *Snelling* v. *Thomas*,

Provision for defeasance or redemption fraudulently omitted.

§ **570**. So in the case of transactions which are really for mortgages or charges, if the written instrument be in terms absolute and have been obtained on a promise to execute a defeasance, or if the clause for redemption have been fraudulently omitted, the mortgagor or chargor has been allowed to come to the Court and to reduce the absolute conveyance to a mortgage or charge.[1]

Jervis v. *Berridge*.

§ **571**. So again, in *Jervis* v. *Berridge*,[2] where the plaintiffs assigned the benefit of a contract to the defendant upon certain terms, some only of which were reduced into writing, it was held that, under the circumstances of the case, the memorandum was only ancillary to the verbal contract, and any use of it by the defendant for a purpose inconsistent with the verbal contract was fraudulent. Lord Selborne in the course of his judgment[3] stated the principle now in discussion in words which have already been quoted.[4]

Trustee for real purchaser.

§ **572**. So again, if A. have in his hands money of B. and at B.'s request lay it out in the purchase of an estate, A. cannot, on the ground that the land is conveyed to him, claim the estate as his own and exclude parol evidence that he was a trustee for B.[5]

The principle of the foregoing cases.

§ **573**. In all these cases, to exclude parol evidence and to adjudge specific performance of the contract as evidenced by the writing alone, would be to work the

L. R. 17 Eq. 303, where the plaintiff failed to establish the collateral contract alleged by him.

[1] 1 Eq. Ca. Abr. 20, pl. 5; *Walker* v. *Walker*, 2 Atk. 98; *England* v. *Codrington*, 1 Eden, 169; *Williams* v. *Owen*, 5 My. & Cr. 303, 306; *Lincoln* v. *Wright*, 4 De G. & J. 16; *Douglas* v. *Culverwell*, 3 Giff. 251; S. C. 1 De G. F. & J. 20.

[2] L. R. 8 Ch. 351.

[3] L. R. 8 Ch. at p. 360. In his speech in the House of Lords, in *Hussey* v. *Horne-Payne*, 1 App. Ca. at p. 323, Lord Selborne expressly re-affirmed the doctrine laid down in the quotation referred to in the text.

[4] *Supra*, § 520.

[5] *Per* Kindersley V.C. in *Lincoln* v. *Wright*, 28 L. J. Ch. 707, 1 S. C. on appeal, 1 De G. & J. 16. See *Ryall* v. *Ryall*, 1 Atk. 59; *Willis* v. *Willis*, 2 Atk. 71; *per* Grant M.R. in *Leach* v. *Leach*, 10 Ves. at p. 517.

very mischief which the statute was intended to prevent; viz., to fix the party sought to be charged with a contract which he never in fact entered into.

Fraud in relation to marriage articles.

§ **574**. So again, the want of writing could not be set up successfully by a man who had fraudulently prevented the writing from coming into existence.[1] Thus where the defendant, on a treaty for the marriage of his daughter with the plaintiff, signed a paper comprising the terms of the agreement arrived at, but afterwards, and with a view to rid himself of the obligation imposed by it, induced his daughter to wheedle the plaintiff to give up the writing and then to marry her, —the plaintiff was held entitled to relief and obtained a decree on the ground of fraud.[2]

Mere non-performance of contract to sign a document.

§ **575**. But this want of writing must be due to fraud and not to mere non-performance of a contract to sign a writing. No doubt the opposite view was formerly taken, and it was thought, that an allegation that it was part of the parol contract between the contracting parties that the contract should be reduced into writing would take the case out of the statute, on the ground of fraud. Accordingly, where a bill containing such an allegation was met by a plea of the statute, Lord North, after argument, ordered the defendant to answer so much of the bill only as charged that the contract was to be put into writing.[3] It seems obvious, however, that such a procedure affords a most easy means of evading the intention of the statute, and introducing the mischief it was designed to remedy: and accordingly, the law is clearly established, that such an allegation does not withdraw the case from the

[1] *Maxwell* v. *Lady Montacute*, Prec. Ch. 526; 1 Eq. Ca. Ab. 19; *Whitchurch* v. *Bevis*, 2 Bro. C. C. 565; cf. *Wood* v. *Midgley*, 2 Sm. & G. 115, reversed 5 De G. M. & G. 41; and see Story, Eq. Juris. § 768.

[2] *Mullet* v. *Halfpenny*, cited in Peachey on Settlements, 28.

[3] *Leake* v. *Morris*, 1 Dick. 14; S. C. s. n. *Leake* v. *Morrice*, 2 Cas. in Ch. 135; *Hollis* v. *Whiteing*, 1 Vern. 151; *Hollis* v. *Edwards*, 1 Vern. 159.

operation of the statute, and that, after a parol contract, a refusal to sign a written one is no fraud of which the Court can take cognizance.[1]

Marriage contract.

§ 576. The same principle as regards fraud was once considered to apply to marriage contracts, which also are within the 4th section of the statute. In *Dundas* v. *Dutens*,[2] Lord Thurlow decided that a post-nuptial settlement recited to be made in pursuance of an ante-nuptial parol contract was not a voluntary settlement, and that because a refusal to perform the previous contract would have been a fraud; but this decision is in effect overruled by the case of *Warden* v. *Jones*,[3] where Lord Cranworth remarked that, were the decision in *Dundas* v. *Dutens* correct, the whole policy of the statute would be defeated.[4]

Wills.

§ 577. In cases of wills obtained by a promise to dispose of the property in a particular way the Court will, notwithstanding the language of the Statute of Frauds that every will must be in writing, and the language of the Wills Act to the same effect, give effect to the verbal arrangement by raising a trust on the property devised or bequeathed by the will.[5]

4. Of part performance.

§ 578. (4) The part performance of a contract by one of the parties to it may, in the contemplation of Equity, preclude the other party from setting up the Statute of Frauds, and thus render it, although merely resting in parol, capable of being enforced by way of specific performance, though not by way of damages, even since the Judicature Acts.[6]

The principle of

§ 579. This exception seems to be based on the view

[1] *Whitchurch* v. *Bevis*, 2 Bro. C. C. 565; *Wood* v. *Midgley*, 5 De G. M. & G. 41, reversing S. C. 2 Sm. & Gif. 115.

[2] 1 Ves. Jun. 196; S. C. 2 Cox, 235. See, too, *Viscountess Montacute* v. *Maxwell*, 1 P. Wms. 620.

[3] 2 De G. & J. 76, 85.

[4] Cf. *Trowell* v. *Shenton*, 8 Ch. D. at p. 324, where, however, the question turned on Lord Tenterden's Act.

[5] *Podmore* v. *Gunning*, 7 Sim. 644; *Chester* v. *Urwick* (No. 3), 23 Beav. 407; *McGormick* v. *Greene*, L. R. 4 H. L. 82.

[6] See *per* Chitty J. in *Lavery* v. *Pursell*, 39 Ch. D. 508.

that if a man have made a bargain with another, and allowed that other to act upon it, he may have created an equity against himself which he cannot resist by setting up the want of a formality in the evidence of the contract out of which the equity in part arose.[1] The principle is not unknown to the law of Scotland,[2] and seems to be the same as that which gave rise to the real contract in Roman Law, —a contract in which the connection between the parties was clothed with obligation, and so ceased to be *nudum pactum*, by force of the actual delivery of the subject of the contract. "In the real contract," says Sir Henry Maine, "performance on one side is allowed to impose a legal duty on the other, evidently on ethical grounds."[3] the exception.

§ **580**. In order thus to withdraw a contract from the operation of the statute, several circumstances must concur: 1st, the acts of part performance must be such as not only to be referable to a contract such as that alleged, but to be referable to no other title; 2ndly, they must be such as to render it a fraud in the defendant to take advantage of the contract not being in writing; 3rdly, the contract to which they refer must be such as in its own nature is enforceable by the Court; and 4thly, there must be proper parol evidence of the contract which is let in by the acts of part performance. Essentials.

§ **581**. First, "the acts relied upon as part performance must be unequivocally and in their own nature referable to some such agreement as that alleged."[4] But if the acts go as far as this, they are admissible, for it seems evident that all that can be gathered from acts of part performance is the existence of some contract in pursuance of which they are done, 1. The acts must refer to a contract.

[1] *Per* Lord Selborne in *Maddison* v. *Alderson*, 8 App. Cas. 476.

[2] *Stewart* v. *Kennedy*, 15 App. Cas. 75.

[3] Ancient Law, p. 343. See also p. 349.

[4] *Per* Lord Selborne in *Maddison* v. *Alderson*, 8 App. Cas. 479.

and the general character of the contract: they cannot, unless possibly in some very singular case, be themselves sufficient evidence of the particular contract alleged, because they cannot in themselves show all the terms of the contract from which they flow. They may be evidence of an unknown contract, but the making known what that contract is must be the result of the evidence which the acts in question are allowed to introduce.[1] It cannot be denied that there is some want of exactitude in the statements sometimes made in this respect, as for instance, where it is said that the acts must be referable to the alleged contract: and Lord Redesdale seems to have held that, to admit parol evidence, the part performance must be such as to show the very same contract as the plaintiff alleged. So that in a case where the plaintiff stated a parol contract for a lease for three lives, and payment of rent in part performance, and the defendant admitted a contract, but for one life and not for three; his Lordship said that the Statute of Frauds put it out of the power of the Court to execute the contract for the lease for three lives, the part performance being perfectly consistent with the contract alleged by the defendant, and that therefore there was no case to admit proof of a further contract.[2]

They need only be referred to some contract and consistent with that alleged.

§ **582**. The true principle, however, of the operation of acts of part performance seems only to require that the acts in question be such as must be referred to some contract, and may be referred to the alleged one; that they prove the existence of some contract, and are consistent with the contract alleged.[3] This is very well illustrated by a case in the Common Pleas on the 17th section of the Statute of Frauds, by which acceptance is

[1] See *per* Lord Alvanley M.R. in *Forster* v. *Hale*, 3 Ves. 712; *per* Wigram V.C. in *Dale* v. *Hamilton*, 5 Ha. 381. Cf. *Gray* v. *Smith*, 43 Ch. D. 208.

[2] *Lindsay* v. *Lynch*, 2 Sch. & Lef. 1, 8. See *infra*, § 639.

[3] See *Isaacs* v. *Evans*, [1894] W. N. 261; 16 Times L. R. 114, 480.

treated as such an act of part performance as dispenses with the necessity of writing.[1] It was there held, that bare acceptance of the goods by the vendee was sufficient to satisfy that section of the statute, so that, although the vendee, immediately after accepting them, stated that he did so on terms different from those on which the vendor delivered them, yet the acceptance having established the fact of a contract of sale, parol evidence of its terms was admissible. It was there strongly urged that the acceptance must be equivalent to a memorandum in writing, and must show all the terms of the contract; but the doctrine was denied by the learned Judges, both during the argument and by their decision of the case. Williams J., in the course of his judgment, said, "The Legislature has thought that where there is a fact so consistent with the existence of a contract of sale as the actual acceptance of part of the goods sold, the necessity of a written evidence of the contract might safely be dispensed with. But it is clear that it was not meant to go to all the terms of the contract; and that acceptance is no evidence of the price, but only establishes the broad fact of the relation of vendor and vendee. So where there is proof of part performance, the jury must settle all the other facts that go to make up the contract."[2]

Mr. Austin quoted.

§ **583**. In like manner, Mr. Austin, in one of his Fragments, has called attention to the "distinction between such solemnities of a contract as are merely evidence of *a* contract and such as are evidence of *a* contract and of its *terms*." "Earnest, for instance," he adds, "is merely evidence that a contract was made: its subjects, its terms, &c., must be established by evidence *aliunde*."[3]

The acts must not be referable to

§ **584**. To make the acts of part performance effective to take the contract out of the Statute of

[1] *Tomkinson* v. *Staight*, 17 C. B. 697.

[2] 17 C. B. at p. 707.

[3] Lectures on Jurisprudence (3rd edit.), p. 910.

any other title.

Frauds, they must be consistent with the contract alleged and also such as cannot be referred to any other title than a contract, nor have been done with any other view or design than to perform a contract :[1] therefore, if a tenant in possession sue for the specific performance of an alleged contract for a new lease, the mere fact of his continuance in possession will have no weight as an act of part performance of the contract, being referable to his character as tenant.[2] Where a tenant under a term alleged the rebuilding of a party-wall, which was in a ruinous state during his term, as part performance of a contract by his landlord to grant a renewed term : it was held that the act was equivocal, as it might have been done by him in respect of his title under the old as well as under the alleged new term.[3] The cases in which possession is an act of part performance will be considered presently.[4]

ii. The acts must render non-performance a fraud.

§ **585**. Secondly, the principle upon which the Court exercises jurisdiction in adjudging specific performance of parol contracts followed by a part performance, is the fraud and injustice which would result from allowing the party charged to refuse to perform his part, after performance by the other upon the faith of the contract and with the knowledge of the party charged :[5] and this principle extends not only to contracts which, but for such part performance, would be void by reason of the Statute of Frauds, but also to such as, being entered into by corporations, are invalid for want of their corporate seal.[6]

[1] *Gunter* v. *Halsey*, Amb. 586. Consider *Price* v. *Salusbury*, 32 Beav. 446; and *Dickinson* v. *Barrow*, [1904] 2 Ch. 339, 344; 73 L. J. Ch. 701.

[2] *Wills* v. *Stradling*, 3 Ves. 378. See, too, *per* Lord Eldon in *Ex parte Hooper*, 19 Ves. 479; *per* Plumer M.R. in *Morphett* v. *Jones*, 1 Sw. 181; 5 Vin. Abr. 323, pl. 44; *Phillips* v. *Alderton*, 24 W. R. 8; and *Brennan* v. *Bolton*, 2 Dr. & War. 349. Distinguish, however, *Hodson* v. *Heuland*, [1896] 2 Ch. 428.

[3] *Frame* v. *Dawson*, 14 Ves. 386.

[4] *Infra*, § 601 *et seq.*

[5] *Per* Grant M.R. in *Buckmaster* v. *Harrop*, 7 Ves. 346.

[6] See *infra*, § 648, and *Stevens's Hospital* v. *Dyas*, 15 Ir. Ch. R. 405, 421.

§ 586. "Courts of Equity," said Lord Cottenham,[1] "exercise their jurisdiction, in decreeing specific performance of verbal agreements, where there has been part performance, for the purpose of preventing the great injustice which would arise from permitting a party to escape from the engagements he has entered into, upon the ground of the Statute of Frauds, after the other party to the contract has, upon the faith of such engagement, expended his money or otherwise acted in execution of the agreement. Under such circumstances, the Court will struggle to prevent such injustice from being effected; and, with that object, it has, at the hearing, when the plaintiff has failed to establish the precise terms of the agreement, endeavoured to collect, if it can, what the terms of it really were." The principle stated by Lord Cottenham.

§ 587. Such being the principle on which the Court acts, it follows that, wherever the acts of the party to be charged have caused no change of circumstances in the other party,[2] and wherever the acts of part performance by the one are not such as to render refusal by the other party to perform the contract a fraud in him, however clearly they may evidence the existence of a contract, there the jurisdiction in question can have no application; and this may be the case either from the character of the person permitting the acts, or from the nature of the acts themselves. No relief where refusal to perform is no fraud.

§ 588. From what has been said, it appears that the acts of part performance must in all cases be done by the person asserting the contract with the knowledge of the person sought to be charged that the acts are being done and are being done on the faith of the contract; without such knowledge there would be neither injustice nor fraud. The acts must be done with the knowledge of the person to be charged.

§ 589. On the ground that the character of the person permitting the acts prevented the notion of Where not fraudulent from

[1] In *Mundy* v. *Jolliffe*, 5 My. & Cr. at p. 177.

[2] *Caton* v. *Caton*, L. R. 1 Ch. 137; S.C. in D. P., L. R. 2 H. L. 127.

character of the person.

fraud, it has been decided that where a plaintiff seeks to enforce against a remainderman a parol contract entered into between the plaintiff and the tenant for life, acts of part performance which would have bound the tenant for life will not bind the remainderman, unless it can be shown that he permitted the acts of the plaintiff with a knowledge of the contract entered into by the tenant for life.[1] For to constitute fraud, there must coincide in one and the same person knowledge of some fact and conduct inequitable having regard to such knowledge. And again, on the same principle, where the acts are those of persons not parties to the contract, they will not be binding: so that, for instance, acts done by arbitrators towards the performance of their duty, are not part performance of a parol contract for a compromise and division of estates by arbitrators.[2]

From the nature of the act.

§ 390. From the nature of the act, it follows, that though, as we shall hereafter see, it has been a question how far the acceptance of part of the purchase-money binds the vendor, the payment of this on the part of the purchaser can in nowise bind him, because to refuse to complete the contract after paying "part of the purchase-money, would be no fraud upon the seller, but his own loss."[3] The question was raised in a case where the co-heirs of a purchaser sought the enforcement of the contract against his personal representatives, and set up his part payment as a part performance making it a binding contract:[4] but, on the ground above stated, Grant M.R. decreed against the claim of the heirs.

[1] *Blore* v. *Sutton*, 3 Mer. 237; *Whitbread* v. *Brockhurst*, 1 Bro. C. C. 404; *per* Lord Redesdale in *Shannon* v. *Bradstreet*, 1 Sch. & Lef. 72; *per* Lord Cranworth in *Morgan* v. *Milman*, 3 De G. M. & G. 33. See, too, *Flesher* v. *Trotman*, 3 Giff. at p. 9; *O'Fay* v. *Burke*, 8 Ir. Ch. R. 225; *Hope* v. *Cloncurry*, I. R. 8 Eq. 555.

[2] *Coath* v. *Jackson*, 6 Ves. 12

[3] 7 Ves. at p. 345.

[4] *Buckmaster* v. *Harrop*, 7 Ves. 341; S. C. on appeal, 13 Ves. 456.

From there being alternative remedies.

§ **591**. Upon the same principle it seems doubtful whether any acts which admit of alternative remedies, one by the execution of the contract and another by some other means, as, for instance, a compulsory taking under the Lands Clauses Consolidation Act, can be taken as part performance; because there is no fraud on the other party if the remedy other than that by execution of the contract be pursued.[1]

iii. The contract must be such as can be enforced.

§ **592**. Thirdly, the contract which the acts of part performance allow to be set up by parol evidence must be of such a nature as that the Court would have had jurisdiction to enforce it specifically if it had been in writing. In this respect the jurisdiction of the High Court is the same as that of the Court of Chancery. The rule in the latter Court was that where there was jurisdiction in the original subject-matter, viz., the contract, the want of writing would not deprive the Court of it, where there was part performance. But the want of writing could not itself be made the ground of jurisdiction, for if that were so, all parol contracts required by the Statute of Frauds to be in writing, and in part performed, might have been enforced in Equity: which was not the case. Accordingly a demurrer to a bill for work and labour done, alleging fraud and part performance, was allowed by Lord Cottenham.[2]

To what contracts does doctrine of part performance apply?

§ **593**. As was to be expected, the fusion of Law and Equity has given rise to questions as to the extent of the doctrine of part performance. Is this equitable doctrine to be applied to all cases, or only to contracts where it would have been applied by the Court of Chancery? This question may be safely answered by

[1] See *per* Lord Cranworth in *Morgan* v. *Milman*, 3 De G. M. & G. 35.

[2] *Kirk* v. *Broadley Unrep.*, 2 Ph. 640. The case of *Pembroke* v. *Thorpe* (3 Sw. 437, n.) may appear at variance with this view, but will be reconciled by considering that Lord Hardwicke held the Court to have an original jurisdiction in respect of building contracts. See *supra*, § 98.

saying that its application is to be thus restrained. But what is then its extent?

In *Britain* v. *Rossiter*,[1] the limits of the doctrine were stated differently by each of the three learned judges: the M.R. (Lord Esher) confined it to "cases concerning land," Cotton L.J. to "questions relating to land," and Thesiger L.J. to "sales of land."

In *Maddison* v. *Alderson*,[2] Lord Selborne in his speech in the House of Lords referred to the decision in *Britain* v. *Rossiter*, and seems to have doubted how far it was consistent with the views of Lord Cottenham in *Hammersley* v. *De Biel*[3] and *Lassence* v. *Tierney*.[4]

And in *McManus* v. *Cooke*,[5] Kay J. criticized the case of *Britain* v. *Rossiter*, and discussed several relevant authorities, and concluded that probably it would be more accurate to say that the doctrine of part performance of a parol agreement "applies to all cases in which a Court of Equity would entertain a suit for specific performance if the alleged contract had been in writing."

It may be questioned whether this statement of the extent of the doctrine would not be made more accurate by omitting the words "for specific performance."

It does not apply to damages.

§ **594**. It has been further held that the doctrine of part performance does not extend to enable the Court to award damages on a parol contract.[6]

Where want of a seal.

§ **595**. The necessity of original jurisdiction in case the contract had been in writing in order to induce the Court to interfere in cases of parol contracts is illustrated by cases in which there has been a want not of writing, but of a seal. Thus where the plaintiff stated a claim against a company for work and labour done on the estate of the company, and alleged that,

[1] 11 Q. B. D. 123.
[2] 8 App. Cas. 467, 474.
[3] 12 Cl. & Fin. 61, n.
[4] 1 McN. & G. 551.
[5] 35 Ch. D. 681. See, too, *Scott* v. *Rayment*, L. R. 7 Eq. at p. 115; and *Crowley* v. *O'Sullivan*, [1900] 2 I. R. 178, 190.
[6] *Lavery* v. *Pursell*, 39 Ch. D. 508, 519.

as the contract was not under seal, and as the company claimed the legal estate in the land, he had no remedy except in Chancery, a demurrer by the company to the plaintiff's bill was allowed.[1]

Where the engagement of an honorary character

§ **596**. So, again, where the engagement is of an honorary and not of a legal character, part performance gives the Court no jurisdiction.[2] Thus in the case of *Lord Walpole* v. *Lord Orford*,[3] where two testators on the same day, and in the presence of the same witnesses, executed mutual wills; one of the testators having died, it was argued that there was part performance under circumstances which could only be referred to a contract between the testators to make such wills: but Lord Rosslyn, though inferring an agreement of some sort, held it to have been a merely honourable engagement, and one which the Court therefore could not carry into effect.

Or incomplete.

§ **597**. On the same principle, there can be no part performance of an incomplete contract. For acts to amount to part performance, the contract "must be obligatory, and what is done must be done under the terms of the agreement and by force of the agreement."[4]

Laird v. *Barkenhead Railway Co.*

§ **598**. Where, however, the owner of a ship-building yard proposed to construct a siding from it to a railway station close at hand, and obtained from the railway company a general assent to his proposal, and proceeded to make the siding, without the details of the arrangement having been agreed upon, and after the construction of the siding was allowed to use it on terms embodied in an informal memorandum; it was held that even had there not been any actual user the Court

[1] *Crampton* v. *Varna Railway Co.*, L. R. 7 Ch. 562. Cf. *Mayor, &c. of Oxford* v. *Crow*, [1893] 3 Ch. 535.

[2] Cf. supra, § 316.

3 Ves. 402.

[4] *Per* Lord Brougham in *Lady E. Thynne* v. *Earl of Glengall*, 2 H. L. C. 158; *Ex parte Foster, Re Foster*, 22 Ch. D. 797.

would probably have found means to enforce the completion of some arrangement by which the company would have been compelled to allow the siding to be used on reasonable terms, and that, the memorandum showing what were reasonable terms, an arrangement on that footing would be enforced.[1]

Where possession adverse.

§ 599. It is perhaps scarcely needful to observe that where the possession taken is not under a contract but adverse, the circumstance that there is no Common Law remedy does not suffice to give the Court jurisdiction.[2]

Particular acts.

§ 600. The general character of the acts which are requisite to constitute part performance for the purpose in question having been stated, it is proposed now to show the result of these principles in respect of some particular acts.[3]

Possession.

§ 601. Possession is in some cases equivocal in respect of the title to which it is to be referred:[4] in other cases it is not: therefore the possession of a tenant, after the expiration of a lease, which was referable only to a contract for a renewal, has been considered part performance of such a contract.[5]

Possession of stranger acknowledged.

§ 602. Still more clearly "the acknowledged possession of a stranger in the land of another is not explicable except on the supposition of an agreement, and has therefore constantly been received as evidence of an antecedent contract."[6] Thus, to refer to an

[1] *Laird* v. *Birkenhead Rail. Co.*, Johns. 500.

[2] *East India Co.* v. *Nathumbadoo Veerasawmy Mudaliy*, 7 Moo. P. C. C. 182.

[3] Consider, in addition to the cases referred to in the text, *Kelly* v. *Walsh*, 4 L. R. Ir. 275, where giving consent to a lease was held to be, under the circumstances of the case, an act of part performance.

[4] See *Wills* v. *Stradling*, 3 Ves. 381; *Lamare* v. *Dixon*, L. R. 6 H. L. 414; *Millard* v. *Harvey*, 31 Ves. 237.

[5] *Powell* v. *Dew*, 1 Y. & C. C. C. 345; 12 L. J. Ch. 158; cf. *Bascoaster* v. *Harrop*, 13 Ves. 456, 471; *Millard* v. *Harvey*, 13 W. R. 125, 10 Jur. N. S. 1167; *Powell* v. *Lovegrove*, 8 De G. M. & G. 357, 67. Distinguish *Brady's case*, 15 W. R. 753.

[6] *Per* Plumer M.R. in *Morphett* v. *Jones*, 1 Sw. 181. See accordingly *Butcher* v. *Stapely*, 1 Vern. 363.

often cited case, where a parol contract for a lease was made, and the terms of it were agreed on between the proposed lessor and lessee, and by the direction of the lessor the lessee instructed a solicitor, who acted for both parties, to reduce the terms to writing; and the solicitor took a note of the terms thus stated to him, and from it prepared a draft contract embodying those and other terms, which he submitted to the lessor, who afterwards, without objecting to it, let the lessee into possession, and directed the solicitor to prepare a lease in pursuance of the draft contract; and a draft lease was accordingly prepared, to which the lessor objected, and gave the tenant notice to quit:—the Court held that there was part performance of the contract, and enforced the same accordingly.[1] And continuance in possession may, if unequivocally referable to the contract alleged, be a sufficient act of part performance, although the taking of possession was antecedent to the contract.[2] *Pain v. Coombs.*

§ **603**. Even where the possession has been taken without consent, yet if the owner afterwards allow the stranger to remain in possession this will, it seems operate as an act of part performance.[3] Possession acquiesced in.

§ **604**. Possession is, it must be observed, part performance both by and against the stranger and the owner:[4] the owner has allowed the stranger to do an act on the faith of the contract, viz., enter on the land: the stranger has allowed the owner to do an act on the Possession tells for and against both parties alike.

Pyke v. *Williams*, 2 Vern. 455; *Earl of Aylesford's case*, 2 Str. 783; *Stewart* v. *Denton*, 1 Fonbl. Eq. 187; *Savage* v. *Carroll*, 1 Ball & B. 265; *Kane* v. *Bulf*, 2 Ball & B. 343; *Dale* v. *Hamilton*, 5 Ha. 381; *Pain* v. *Coombs*, 3 Sm. & Gif. 449; S. C. 1 De G. & J. 31.

[1] *Pain* v. *Coombs*, 1 De G. & J. 31. See, too, *Miller* v. *Finlay*, 5 L. T. N. S. 510.

[2] *Hudson* v. *Headland*, [1896] 2 Ch. 428.

[3] *Gregory* v. *Mighell*, 18 Ves. 328; *Pain* v. *Coombs*, 1 De G. & J. 31, 46. See, too, *per* Lord Kingsdown in *Ramsden* v. *Dyson*, L. R. 1 H. L. p. 170.

[4] *Wilson* v. *West Hartlepool Railway Co.*, 2 De G. J. & S. 475, 485.

faith of the contract, viz., withdraw from the land. They are therefore both bound.

Possession as against a company.

§ **605**. Possession is, as already pointed out, part performance as well against a company as against a natural person.[1]

In contracts other than of sale or lease.

§ **606**. It is not only in contracts for a sale or a lease that possession is part performance. It may let in parol evidence of any contract explaining the possession. Thus where A. was in possession of his own land subject to a mortgage, and he, as he alleged, contracted with B. that B. should purchase the land from the mortgagee, and hold it for the benefit of A., subject to certain terms for the repayment of the purchase-money; and B. afterwards set up the purchase as being an absolute one for his own benefit; the continued possession of A. as owner of the land was held to be part performance of the contract alleged by him.[2] In another case A. by parol agreed to allow B. the occupation of a leasehold house for life, on payment merely of ground rent, rates, and taxes. B. was put into possession: and that possession was held to preclude any objection on the ground of the statute.[3]

Marriage contracts.

§ **607**. Many cases have also arisen in respect of marriage contracts, where the part performance has excluded the operation of the statute. Thus in a case, where there was a parol promise before marriage to give certain property to the married pair by the father of the intended wife: the marriage took place, and was followed by the delivery up of possession to the son-in-law, expenditure of money by him, and the absence of all disturbance on the part of the father-in-law: these acts were held to be in part performance of the alleged ante-nuptial contract.[4] And so where

[1] S. C.

[2] *Lincoln* v. *Wright*, 28 L. J. Ch. 705; S. C. 7 W. R. 124, 350; 4 De G. & J. 16.

[3] *Cedes* v. *Pilkington*, L. R. 19 Eq. 174.

[4] *Same* v. *Pinniger*, 3 De G. M. & G. 71. See also *Floyd* v. *Buckland*, 2 Ves. 268.

a father verbally promised, in consideration of his daughter's marriage, to give her a house as a wedding-present, and immediately after the marriage put the daughter and her husband into possession, and continued himself to pay what became due to a building society in respect of an existing mortgage on the house, it was held by the Court of Appeal (affirming the decision of Malins V.C.) that the possession took the case out of the statute, and that the balance due to the building society on the father's death was payable out of his estate.[1]

Family arrangements.

§ **608**. The same principle applies in cases of family arrangements involving the giving up, partition, or exchange of land; so that though such arrangements may be by parol, yet if they be followed by uninterrupted exclusive enjoyment of the several lands in pursuance of the arrangement, the Court will specifically enforce them.[2]

Effect of lapse of time.

§ **609**. In considering this effect of possession where the acquiescence has been of very long duration, the Court will regard the lapse of time as a circumstance against allowing the statute to be set up.[3]

Laying out of money.

§ **610**. The laying out of money, provided it be such as would only be likely to take place in pursuance of such a contract as that alleged, and it be with the privity of the other party, is an act of part performance.[4]

[1] *Ungley* v. *Ungley*, 4 Ch. D. 73; 5 Ch. D. 887; followed in *Sharman* v. *Sharman*, 67 L. T. 834.

[2] *Stockley* v. *Stockley*, 1 V. & B. 23; *Neale* v. *Neale*, 1 Ke. 672; *Williams* v. *Williams*, 2 Dr. and Sm. 378, affirmed L. R. 2 Ch. 294 (see especially, pp. 304, 305); *Cood* v. *Cood*, 33 Beav. 314. Cf. *Dillwyn* v. *Llewelyn*, 10 W. R. 412, 742; 8 Jur. N. S. 425, 1068, in which case a memorandum of gift of land, followed by possession and expenditure of money by the donee with the approbation of the donor, was held by Lord Westbury to create a binding obligation, entitling the donee to a conveyance in fee of the legal estate in the land.

[3] *Blackford* v. *Rockpatrick*, 6 Beav. 232; cf. *Crook* v. *Corporation of Seaford*, L. R. 10 Eq. 678; 6 Ch. 551.

[4] *Wills* v. *Stradling*, 3 Ves. 378; *Howard* v. *Patent Ivory Co.*, 33 Ch. D. 156. See, however, *per* Lord Cranworth L.C. in *Caton* v. *Caton*, L. R. 1 Ch. at p. 148.

Therefore, where a proposed lessee entered and built, the acts were held to be such;[1] and again, the alteration of a garden fence and the plantation of a meadow with the privity of the other party, and partly at his expense, by a tenant in possession, were held acts of part performance, evidencing a contract to demise the meadow for a term.[2] So the expenditure of money, in alteration and repairs of the property, by a sub-lessee with the knowledge of the owner has been held to be part performance of the contract by the owner to let to the sub-lessor.[3]

How different from possession.

§ 611. The expenditure of money differs, it will be observed, from possession, in two respects: the one, that whilst mere possession is referable to a tenancy at will, as well as to a larger estate, the laying out of any considerable sums of money is rationally to be referred only to some contract to confer a substantial interest in the property; the other, that whilst possession cannot be supposed to be continued by a stranger without the knowledge of the owner, a person in possession may well lay out money without the owner's cognizance: and what is therefore necessarily inferred in the one case must be proved in the other.

Expenditure and other acts admitting of compensation.

§ 612. There are cases where it has been held that, as money spent in repairs easily admits of compensation, such expenditure is no part performance, and consequently does not avail to take a case out of the

[1] *Savage* v. *Foster*, 5 Vin. Abr. 524, pl. 43; *Reddin* v. *Jarmyn*, 16 L. T. 449.

[2] *Sutherland* v. *Briggs*, 1 Ha. 26. See also *Stockley* v. *Stockley*, 1 V. & B. 23; *Toole* v. *Medlicott*, 1 Ball & B. 393; *Mundy* v. *Jolliffe*, 5 My. & Cr. 167; *Surcome* v. *Pinniger*, 3 De G. M. & G. 571; *Farrall* v. *Davenport*, 3 Giff. 363; *Norris* v. *Jackson*, ib. 396. Distinguish *Millard* v. *Harvey*, 34 Beav. 237.

[3] *Williams* v. *Evans*, L. R. 19 Eq. 547. See, too, *Shillibeer* v. *Jarvis*, 8 De G. M. & G. 79, 87; and *Dickinson* v. *Barrow*, [1904] 2 Ch. 339; 73 L. J. Ch. 701, where alterations of a new house, suggested by the defendant, were made during the progress of the building by the plaintiffs, the builders. Distinguish *Hope* v. *Hall*, L. R. 4 Eq. 242; *Gardner* v. *Fooks*, 15 W. R. 388.

statute:[1] and where the acts relied on are proper to be brought before a jury, and can be answered in damages, or are in the nature of acts of preparation,[2] they will not be considered as part performance. But nothing can be clearer than that there are many acts, easily enough admitting of compensation, which yet amount to such part performance as will enable the Court to enforce a parol contract.

Payment of purchase-money.

§ 613. If the laying out of money in alterations in pursuance of a contract is a part performance of it, it may be supposed that making a payment of the purchase-money payable under the contract was yet more clearly a part performance. But this cannot be said to be the case. For it seems now to be decided that the payment by the purchaser to the vendor of the whole[3] or a part, whether substantial or unsubstantial, of the purchase-money, is not an act of part performance which will take the parol contract out of the statute.

Why not an act of part performance.

§ 614. The best explanation of this doctrine is said by Lord Selborne[4] to be that the payment of money is an equivocal act, and not in itself, until the connection is established by parol testimony, indicative of a contract concerning land. But other grounds for this decision have been alleged, as that the mention of part payment in the 17th section of the Statute of Frauds, and the silence in that respect of the 4th section, must be taken to show that the Legislature did not intend that part payment should be binding in cases of the sale of lands:[5] and again, that the money may be repaid, and that both parties will then

[1] *Frame* v. *Dawson*, 14 Ves. 386; cf. *Forster* v. *Hale*, 3 Ves. at p. 713.

[2] *O'Reilly* v. *Thompson*, 2 Cox, 271.

See *per* Knight Bruce L.J. in *Hughes* v. *Morris*, 2 De G. M. & G. at p. 356; *Britain* v. *Rossiter*, 11 Q. B. D. 123, 130.

[4] In *Maddison* v. *Alderson*, 8 App. Cas. 478.

[5] *Clinan* v. *Cooke*, 1 Sch. & Lef. 22; *Watt* v. *Evans*, 4 Y. & C. Ex. 579.

be in the situation in which they before the contract, without either party's ha g gained any inequitable advantage over the other.[1] This is a case where, for the act done, there are alternative remedies, one by the execution of the contract, and the other by repayment,—and the election to put the other party to the latter remedy is no fraud. It has been truly said that this reasoning overlooks the possibility of an insolvency intervening and preventing the repayment of the purchase-money.[2] Whatever be the true grounds of the doctrine, the doctrine itself is well established.

Vacillation of the law on this subject.

§ 615. The law upon this subject was, however, for a time somewhat vacillating. Lord Cowper held part payment not to be part performance.[3] Subsequently, in a case before Lord Hardwicke, he, on the contrary, held part payment to be part performance;[4] but this as a general proposition was early overruled. The question then arose whether, although payment of a small instalment was inoperative, payment of the whole or of a substantial part of the price would not be an act of part performance. Lord Rosslyn maintained the affirmative of this question;[5] but Lord Redesdale denied any such distinction;[6] and Lord Rosslyn's decision seems now to be overruled, upon the ground that it is impossible satisfactorily to discriminate between substantial and unsubstantial part payments.[7]

Payment of auction duty.

§ 616. Payment of the auction duty has been held not to be part performance, it being by the revenue laws essential to the contract, and "that without which

[1] *Clinan* v. *Cooke*, 1 Sch. & Lef. 22.

[2] 13 Ves. 461, note by the reporter.

[3] *Lord Pengall* v. *Ross*, 2 Eq. C. Ab. 46.

[4] *Lacon* v. *Mertins*, 3 Atk. at p. 4. See also *Child* v. *Comber*, 3 Sw. 423, n.

[5] *Main* v. *Melbourn*, 4 Ves. 720. See the arguments in *Wills* v. *Stradling*, 3 Ves. 378, and *Simmons* v. *Cornelius*, 1 Rep. in Ch. 138 (a case before the statute).

[6] In *Clinan* v. *Cooke*, 1 Sch. & Lef. 22.

[7] *Watt* v. *Evans*, 4 Y. & C. Ex. 579. See *Ex parte Hooper*, 19 Ves. 479.

there would have been no contract cannot be said to be in part performance of the contract."[1]

Payment of additional rent.

§ 617. The same vacillation, which characterized the course of the authorities on payment of the purchase-money as part performance, has attended the cases dealing with the question whether payment of an additional rent is to be treated as part performance. In the earliest case on the subject, it was laid down that such a payment, if shown or admitted to be on the foot of the contract, is a circumstance of part performance.[2] It was subsequently determined not to be,[3] but this decision appears to be overruled by the case of *Nunn* v. *Fabian*,[4] where a landlord, having verbally agreed with his tenant to grant him a lease for twenty-one years at an increased rent, died before the execution of the lease, but after having received from the tenant one quarter's rent at the increased rate: and it was held that this payment constituted a sufficient act of part performance to take the case out of the statute.

Nunn v. *Fabian*.

Review of the cases on payments

§ 618. It is not easy to think that the whole group of cases dealing with the payment or expenditure of money on the footing of a contract is satisfactory. It

[1] *Per* Grant M.R. in *Buckmaster* v. *Harrop*, 7 Ves. at p. 346.

[2] *Wills* v. *Stradling*, 3 Ves. 378.

O'Herlihy v. *Hedges*, 1 Sch. & Lef. 123.

[3] L. R. 1 Ch. 35. Consider *Howe* v. *Hall*, L. R. 4 Eq. 212; *Archbold* v. *Howth*, L. R. 1 C. L. 608. In *Humphreys* v. *Green*, 10 Q. B. D. 148, some doubt was cast on *Nunn* v. *Fabian* by Lord Esher (then Brett L.J.). But in *Connor* v. *Fitzgerald*, 11 L. R. (Ir.) 106, the V.C. followed *Nunn* v. *Fabian*, and so did Bryne J. in *Miller & Aldworth, Limited* v. *Sharp*, [1899] 1 Ch. 622. It is to be observed that in *Nunn* v. *Fabian* the tenant was in occupation of the property in question. In *Thursby* v. *Eccles* (70 L. J. Q. B. 91; 49 W. R. 281) the defendant had verbally agreed to rent a furnished flat for thirteen weeks at £4 10*s.* a week, and had paid a week's rent in advance; but, owing to a dispute, he had never taken possession; and it was held by Bigham J. that, under those circumstances, the payment was not such an act of part performance as to take the case out of the statute. His Lordship said that he saw no distinction in principle between the payment of part of the purchase-money and payment of part of the rent.

as part performance.

would seem reasonable to hold one or other of two things: that all payments of money made by one contracting party with the knowledge of the other, and on the faith of the contract, should be deemed acts of part performance for the purpose in question: or that none of such acts should be deemed to be part performance, and that the Court should in all these cases think that the possibility of repayment deprived them of any effect on the Statute of Frauds. It does not seem reasonable to halt between the two opinions.

Marriage.

§ **619**. Marriage alone is not a part performance of a contract in relation to it: for to hold this would be to overrule the Statute of Frauds, which enacts that every agreement in consideration of marriage to be binding must be in writing.[1] Accordingly, where there was, before marriage, a contract by parol for the settlement of part of the wife's property, and that the husband should take the rest, which he did, but there was no settlement made; and the wife subsequently filed her bill, stating these facts, for the purpose of obtaining a declaration of her rights in certain property coming to her, and the husband by his answer admitted the statements in the bill, and a deed was then prepared purporting to be a settlement on the wife in pursuance of the contract, and was signed but not acknowledged by the wife: in a suit by a plaintiff claiming under the settlement against the heir, it was held that there was no part performance by marriage, nor any other part performance of the parol contract, and that it was void and all the subsequent proceedings ineffectual.[2]

Caton v. *Caton.*

§ **620**. In a case already referred to, the intended

[1] *Per* Lord Hardwicke in *Taylor* v. *Beech*, 1 Ves. Sen. 297 (see as to this case *McManus* v. *Cooke*, 35 Ch. D. 681, 691); *per* Lord Thurlow in *Dundas* v. *Dutens*, 1 Ves. Jun. 199. As to this case, see the observations of Lord Romilly M.R. in *Warden* v. *Jones*, 23 Beav. 487; S. C. on appeal, 2 De G. & J. 76. Consider *Gilchrist* v. *Heybert*, 20 W. R. 348.

[2] *Lassence* v. *Tierney*, 1 Mac. & G. 551.

husband and wife, previously to marriage, agreed by a writing, which was held to be unsigned, that the husband should have the wife's property for her life, paying her a certain sum by way of pin-money, and that she should have it back again after his death; and instructions were given for a marriage settlement to have that effect; but no settlement was ever executed, the husband promising, as the wife alleged, to make a will giving her all his property—a promise which, if made, he did not keep. After the husband's death the wife sought specific performance of the ante-nuptial arrangement, but it was held that there was no contract in writing within the statute, and that the marriage was no part performance.[1] This decision was affirmed by the House of Lords,[2] but the question of part performance was not there argued.

Acts connected with marriage.

§ **621**. There may, of course, often be acts connected with the marriage which, as independently of it, they would be acts of part performance, are not the less so from being done in connection with it, and therefore differ from cases where the marriage is the sole act relied on. Thus, in a case which was ultimately decided by the House of Lords, it was held that the execution by the husband of a settlement in pursuance of a parol contract entered into by him with the lady's father previously to the marriage, being something over and above the marriage, was an act of part performance of the parol contract entered into previously to it.[3] In the case of *Warden* v. *Jones*[4] it was held by Lord Romilly M.R. that the execution of a settlement is no act of part performance where the previous parol contract is between the intended husband and wife only, and not between the husband

[1] *Caton* v. *Caton*, L. R. 1 Ch. 137.

[2] L. R. 2 H. L. 127.

[3] *Hammersley* v. *De Biel*, 12 Cl. & Fin. 45, 64, n.; *Surcome* v. *Pinniger*, 3 De G. M. & G. 571.

[4] 23 Beav. 487, on appeal 2 De G. & J. 76.

and some third person, and that such a settlement must be considered a voluntary deed; and this decision was affirmed by Lord Cranworth.

Marriage in fraud of previous parol contract.

§ **622**. The cases in which the Court relieves on the ground of marriage in fraud of a parol contract entered into previously must, of course, be distinguished from cases in which the marriage itself is set up as part performance of the contract.[1]

Cohabitation.

§ **623**. But though marriage be not, cohabitation may be a sufficient act of part performance. In a separation deed, the husband covenanted with a trustee for the payment of an annuity to his wife: shortly before the death of the husband, his wife returned to him upon the faith of a promise made by the husband to the wife and her trustee, that if she would do so he would continue to pay the annuity and would charge it upon his real estate. He died without having done so, and it was held that the contract could be enforced against the devisees of the husband, on the ground of part performance.[2]

Previous acts.

§ **624**. As acts done prior to a contract cannot be referred to it as done in pursuance of it, they can never be treated as acts of part performance.[3]

Preparatory acts.

§ **625**. And so also acts subsequent to the contract and even in pursuance of it, if not strictly in performance of the contract as between the parties to it, but preparatory to such performance, cannot be taken as part performance. It is evident that acts of this sort may be, and for the most part are, the mere acts of the party doing them: the other party is not necessarily cognizant of them, and consequently he is not so bound

[1] See *supra*, § 576.

[2] *Webster* v. *Webster*, 1 Sm. & G. 489, affirmed 1 De G. M. & G. 437. Cf. *Alderson* v. *Maddison*, 5 Ex. D. 293, where service as housekeeper and giving up other prospects in life were regarded by Stephen J. as part performance; but his decision was reversed on appeal, 7 Q. B. D. 174; 8 App. Cas. 467, *sub nom.* *Maddison* v. *Alderson*.

[3] *Parker* v. *Smith*, 1 Coll. 608, 623.

by them as to render it fraudulent in him subsequently to refuse to carry the contract into effect. Therefore giving instructions for a lease,[1] putting a deed into a solicitor's hands to prepare a conveyance,[2] giving orders for a conveyance to be drawn and going several times to view the estate,[3] the execution and registration of the deeds by the vendor,[4] and the admeasurement of the estate,[5] have all been decided not to be acts of part performance binding on the other party to the contract. So, again, where it was a condition of the contract that the plaintiff should obtain a release of a right from a third party, which the plaintiff did obtain by payment of a valuable consideration; it was held to be merely a preparatory act on the part of the plaintiff, and not a part performance of the contract.[6] And the appropriation of money by a party, though it may be with a view to an intended purchase, is not of itself any part performance or evidence of any contract.[7] Instances.

§ **626**. To the same principle may probably be referred the case of *Whaley* v. *Bagnel*[8] in the House of Lords. A. agreed by parol with B. for the purchase of lands: B. delivered a rent-roll to A., which showed by its heading that a contract had been entered into between them for the sale of the lands comprised in it at twenty-one years' purchase, and an abstract of the title deeds was also delivered to A. for the purpose of effecting the sale: B. informed his creditors by letter that he had agreed to sell the land to A.: he took A. over the estate, introduced him as landlord to *Whaley* v. *Bagnel*

[1] *Cole* v. *White*, cited 1 Bro. C. C. 409.

[2] *Redding* v. *Wilkes*, 3 Bro. C. C. 400.

[3] *Clerk* v. *Wright*, 1 Atk. 12; *Cooke* v. *Tombs*, 2 Anstr. 420.

[4] *Hawkins* v. *Holmes*, 1 P. Wms. 770; cf. *Phillips* v. *Edwards*, 33 Beav. at pp. 111, 115.

[5] *Pembroke* v. *Thorpe*, 3 Sw. 437, n.

[6] *O'Reilly* v. *Thompson*, 2 Cox, 271.

[7] *East India Co.* v. *Nathumbadoo Veerasowmy Moodelly*, 7 Moo. P. C. C. 482, 497.

[8] 1 Bro. P. C. 345.

the tenants, and refused to renew leases and do other acts of management as owner, in these cases referring the tenants to A. B. also set up the contract against an elegit, and on the strength of it obtained a verdict finding him not to be seised of the lands in question; but notwithstanding all these circumstances, a plea of the Statute of Frauds was allowed.

Phillips v. Edwards.

§ **627.** In *Phillips* v. *Edwards*,[1] land being vested in a trustee for a married woman with power to lease at her request in writing, the two verbally agreed to let it, and executed a lease of it; but before her solicitor had parted with the deed, and before the plaintiffs (the would-be lessees) had executed the counterpart, the married woman (who had made no written request to the trustee) signified her intention to retire from the transaction. It was held by Lord Romilly M.R. that her execution of the lease was no part performance, and that there was no binding contract.

Parker v. Smith.

§ **628.** But where the contract between A. and B. comprises acts between A. and B., and also between B. and C., and A. may be supposed to have an interest or to have stipulated in respect of the acts between B. and C., part performance with knowledge of this part of the contract renders it binding on A. This seems to be illustrated by the case of *Parker* v. *Smith*.[2] There a lessor entered into a parol contract with a colliery company, holding a lease from him, and consisting of four partners, of whom two were his sons, that one of his sons and one of the other partners should retire and leave the benefit of the business to the remaining two, and that thereupon he would consider the subject of rent, which it was found was put too high in the original lease, and refer the subject to a competent person, and on the report of that person being made, would, if the report should seem right,

[1] 33 Beav. 440. [2] 1 Coll. 608.

adopt it, and grant a new lease. The dissolution of partnership so agreed on took place, and the two continuing partners released the others: these acts, being referable only to the contract, were held to take the case out of the Statute of Frauds, and specific performance of the contract to grant the lease was enforced against the lessor's assignees in bankruptcy. This case has, it must be added, been doubted by Lord Selborne.[1]

Surrender of lease

§ **629**. In an Irish case, B. being tenant to A. surrendered his lease on the faith of a parol contract by A. to grant a new lease to C.: the surrender was held an act of part performance, and the contract was enforced against A.'s representatives.[2]

Nature of the evidence of the contract

§ **630**. Fourthly, the effect of part performance being, as we have seen, to show that there is a contract, and to let in parol evidence of the terms of that contract, it becomes necessary to inquire on what evidence or admission of the contract the Court will act.

Classification of the cases.

§ **631**. The cases which require to be considered may be classified as follows:—

(1.) Where the defendant admits the contract as alleged.

(2.) Where the defendant denies the contract as alleged, and the plaintiff supports his case by one witness only.

(3.) Where the defendant denies the contract as alleged, and the evidence proves a contract, but different from that alleged by the plaintiff.

(4.) Where the defendant denies the contract as alleged, but admits another contract.

1. Contract admitted in pleadings.

§ **632**.—(1.) An admission of the contract in the pleadings of course precludes the necessity of further proof: and the fact that the defence claims the benefit of the Statute of Frauds is immaterial in case of part

[1] In *Maddison* v. *Alderson*, 8 App. Cas. 482.

[2] *Re Cooke's Trustees' Estate*, 5 L. R. Ir. 99.

performance, for that excludes the operation of the statute.[1]

2. Denied by defendant's pleadings.

§ **633**. (2.) Under the practice of the Court of Chancery, where the contract was positively denied by the answer and was proved only by the unsupported evidence of one witness, that was not allowed to prevail: but where the one witness was corroborated in his statements by circumstances, the proof might prevail over the denial.[2] But now that the defence is not put in upon oath, the Court would no doubt feel itself justified, in a proper case, in acting upon the evidence of a single witness against the unsworn denial of the defendant. But if the defendant, in answer to interrogatories or by his evidence, swore positively to the denial, the Court would probably refuse to act upon the affirmative evidence of a single witness, if uncorroborated.

3. Variation between the contracts alleged and proved.

§ **634**. (3.) In considering the cases in which a variation has arisen between the contract alleged and that proved, it must be borne in mind that the burthen of proving his case rests, of course, on the plaintiff, and therefore, if there be any such conflict of evidence as leaves any uncertainty in the mind of the Court as to what the terms of the parol contract were, its interference will be refused.[1]

Instances.

§ **635**. Therefore, where there were variations between the evidence of the one witness and a memorandum of the contract in a pocket-book which was produced, the witness mentioning 1,000 guineas exclusive of timber as the price, whilst the pocket-book made no mention of the timber, the Court dismissed the bill.[1] And where a contract was alleged by the bill, another

[1] *Coath* v. *Jackson*, 6 Ves. 12.

[2] *East India Co.* v. *Donald*, 9 Ves. 275; *Morphett* v. *Jones*, 1 Sw. 172; *Toole* v. *Medlicott*, 1 Ba. & B. 393.

[3] *Lindsay* v. *Lynch*, 2 Sch. & Lef. 1; cf. *Price* v. *Salusbury*, 32 Beav. 116.

[1] *Reynolds* v. *Waring*, You. 340.

proved by the plaintiff's one witness, and a third admitted by the two defendants, specific performance was decreed according to the contract set up by the answers; but Lord Rosslyn considered that in strictness the bill ought to have been dismissed.[1] In a more recent case, where one contract was alleged and another proved, the bill was dismissed without prejudice to the filing of another bill.[2] The inclination of Lord Cottenham's mind seems to have been to struggle with apparently conflicting evidence, rather than to dismiss the bill, where there had been part performance.[3] In one case Turner L.J. observed that "there are cases in which the Court will go to a great extent in order to do justice between the parties when possession has been taken, and there is an uncertainty about the terms of the contract."[4] And in the case of *Orford* v. *Provand*,[5] where there had been part performance of a contract alleged to be vague in its terms, Sir William Erle in delivering the judgment of the Privy Council said, "With respect to the supposed vagueness of the memorandum of agreement, their Lordships propose to consider what is the true construction of that memorandum, having regard to the terms of the instrument and to the surrounding circumstances, and also in reference to this suit for specific performance, and to the conduct of the parties in the interval between the making of the agreements and the commencement of the suit."[6]

What variations are immaterial.

§ **636**. Where the variation between the contract alleged and that proved consists in the plaintiff's admission of some term against himself, or omission of

[1] *Mortimer* v. *Orchard*, 2 Ves. Jun. 243; cf. *London and Birmingham Railway Co.* v. *Winter*, Cr. & Ph. 57.

[2] *Hawkins* v. *Maltby*, L. R. 5 Ch. 188. The fresh bill was filed: L. R. 6 Eq. 505; 4 Ch. 200.

[3] *Maudy* v. *Jolliffe*, 5 My. & Cr. 167.

[4] *East India Co.* v. *Nathumbadoo Veerasawmy Moodelly*, 7 Moo. P. C. C. 482, 497. See *supra*, § 635.

[5] L. R. 2 P. C. 135.

[6] See also *Hart* v. *Hart*, 18 Ch. D. 670, 685.

some term in his favour;[1] or where the term which constitutes the variation is immaterial, from its being merely the expression of what would be implied or from its having been actually performed, the Court will not refuse the evidence of the contract. So that where a tenant alleged that he was to pay taxes and do necessary repairs, and the contract proved did not contain this term:[2] and again, where a plaintiff admitted a contract to drain the lands generally, and he only proved one to drain where necessary, and he also stated as part of the contract that he was to lay certain arable land into pasture, which was not proved by the evidence:[3] in each of these cases, the variation was considered as no reason for rejecting the evidence of the contract.[4]

Inquiry.

§ 637. It is perhaps not quite clearly decided whether the Court can, in any case, direct an inquiry into the terms of a contract, when it has not been sufficiently proved to enable the Court to pronounce a final judgment upon the evidence before it. Lord Manners[5] strongly expressed an opinion that the Court has no such jurisdiction, a view which seems to have met with the approval of the highest authorities.[6] And in the case of *Crook* v. *Corporation of Seaford*,[7] where Stuart V.C. had made an order giving the parties liberty to apply in Chambers in reference to the performance of the contract, Lord Hatherley said that he felt some difficulty about the decree, for it was the duty of the Court to ascertain whether there was a contract, and if not to dismiss the bill; but being

[1] *Clifford* v. *Turrell*, 1 Y. & C. C. C. 138, affirmed 9 Jur. N. S. 633; *Frith* v. *Frith*, [1906] A. C. 254, 258; *Lanyon* v. *Martin*, 13 L. R. (Ir.) 297.

[2] *Gregory* v. *Mighell*, 18 Ves. 328.

[3] *Mundy* v. *Jolliffe*, 5 My. & Cr. 167.

[4] See *supra*, § 292.

[5] *Savage* v. *Carroll*, 2 Ball & B. 451.

[6] St. Leon. Vend. [illegible]; Story, Eq. Jur. § 764; cf. *London and Birmingham Railway Co.* v. *Winter*, Cr. & Ph. 57.

[7] L. R. 10 Eq. 678; 6 Ch. 551.

himself of opinion that a contract had been made out, his Lordship varied the order by striking out the reference to Chambers, and declaring what the contract between the parties was, and ordering specific performance of it.

The present practice.

§ **638**. The authorities upon the point now under discussion, to which reference has been made, were all under the old practice, and were greatly influenced by the incapacity of the Court of Chancery, except under very unusual circumstances, to permit an amendment of the record at the hearing. The High Court may be expected to feel itself freed from some of the difficulties which arose under the old practice in dealing with cases where one contract was alleged and another proved: it will probably, for the most part, feel it possible to deal with the matter once for all, and not to postpone the real discussion till a further proceeding shall have been taken: it is probable that the main question will always appear to be, Was there really and in truth a contract or not? that if there was, the Court will generally allow the needful amendment to put that contract in issue: that if there was not, it will generally give judgment for the defendant, without reserving any right to the plaintiff to institute fresh proceedings. But the circumstances will govern the discretion of the Court in each case which may arise.

1. Alleged contract denied, but another admitted.

§ **639**.—(4.) It remains to consider the cases in which the contract alleged by the plaintiff has been denied, but another has been admitted by the defendant. In such cases, if the acts of part performance were consistent alike with the one contract and the other, Lord Redesdale seems to have considered that there was no case to admit proof of the contract alleged by the bill, and that the acts of part performance must be such as to show them to have been done in pursuance of the very same contract as that alleged.[1] It is, however,

[1] *Lindsay* v. *Lynch*, 1 Sch. & Lef. 1. See *supra*, §§ 581—584.

submitted, that this view of the case is inconsistent with the general doctrine of the operation of the acts of part performance: that they open the whole question of the terms of the contract to parol evidence: and that as a written contract where there are acts of part performance may be added to by parol,[1] so a contract set up by the defence may be modified by parol. If this were not so, the plaintiff would be at the mercy of the defendant: for whereas if he simply denied the contract, the plaintiff would have an opportunity of proof by parol; when he set up some other contract, all that evidence would be excluded.[2]

Part reduced to writing.

§ **640**. It may be added that the existence of a signed but incomplete contract is no obstacle in the way of proving the additional terms by parol where there is part performance:[3] for the whole might have been proved by parol, and so may part. The doctrine of parol variation has, of course, no application, where by reason of acts of part performance parol evidence is admissible.

[1] *Sutherland* v. *Briggs*, 1 Ha. 26, at p. 35.

[2] Cf. *Tomkinson* v. *Staight*, 17 C. B. 697.

[3] *Sutherland* v. *Briggs*, 1 Ha. 26, 35. Consider *Price* v. *Salusbury*, 32 Beav. 446

CANADIAN NOTES.

What Contracts are Within Statute of Frauds.

In *Witham* v. *Smith*, 5 Grant's Ch. 203, where a sale of lands had been made by a sheriff it was held that the contract must be in writing under the Statute of Frauds.

Collateral Agreements and Subsidiary Conditions Proved Notwithstanding Statute.

In *Anderson* v. *Douglas*, 18 Man. 254, the headnote is as follows:

"When two parties enter into a formal written agreement for the sale and purchase of land, containing all the particulars necessary to make it binding under the Statute of Frauds and all the terms they intend to embody in it and there is no suggestion of accident, fraud or mistake in the preparation or execution of it, specific performance of it may be decreed notwithstanding that the parties at the same time verbally agreed upon a number of collateral agreements, or subsidiary conditions for conveniently carrying out the written agreement and notwithstanding the Statute of Frauds. The following variations or additions to the written contract made in that way in this case were held not to stand in the way of specific performance being decreed, the plaintiff being willing to carry out the agreement as thereby modified.

(1) The vendor was to allow a deduction of thirty dollars per acre from the price mentioned for any deficiency in the estimated acreage that might be found upon actual measurement.

(2) The purchaser agreed to accept possesion at a date two weeks later than the time fixed by the agreement for taking possession.

(3) Taxes, interest on the mortgage and insurance premium were to be adjusted as to the date of the agreement, which was silent on these points.

(1) It was understood that although the plaintiff had a certificate of title under the real property act, the defendant's solicitor was to examine the title and say if it was all right, whilst the written contract declared that the purchaser accepted the vendor's title and should not be entitled to call for an abstract, or evidence of title, or any deed, papers or documents other than those in possession of the vendor.

It was also held by Howell C.J.A. that evidence of these variations should not have been received in the absence of anything in the defendant's pleadings setting them up. Phippen J.A. held that the evidence had been properly received and Perdue J.A. that it should not have been admitted at all.

Statute of Frauds must be Pleaded.

Where the defendant denies an alleged agreement of which the plaintiff seeks specific performance, the defendant should claim the benefit of the Statute of Frauds in order to exclude parol evidence of the contract. *Butler v. Church*, 16 Grant's Ch. 205.

Where the plaintiff by his bill sought to compel the specific performance of a contract which, from the statements of the bill, it was plain had been created by parol and the plaintiff relied on acts of part-performance, to take the case out of the Statute of Frauds, it was held that it was not necessary that the defendant should do more than claim the benefit of the statute, without alleging that there had not been a note in writing. "Had the bill stated the agreement generally and had the defendant, admitting the agreement as stated, and not alleging that it rested on parol, contented himself with craving the benefit of the statute, we incline to the opinion that the argument of the learned counsel for the plaintiff should have prevailed, but it is unnecessary to decide that point now because we think that the bill plainly proceeds upon a parol agreement and relies exclusively upon part-performance, thus taking the case out of the statute. Under the circumstances, it cannot be necessary that the answer should negative that which is disaffirmed by the bill itself. *Townsley v. Charles*," Grant's Ch. 313.

Where lands were sold by a trading corporation under a power of sale contained in a mortgage and the purchaser at such sale signed an agreement to purchase and afterwards filed a bill seeking specific performance with compensation for the loss of crops, which were advertised with the land but actually belonged to third parties, and the defendant, the corporation, answered the bill admitting the fact of their being mortgagee and proceeded with sundry statements such as: "when the plaintiff bid for and was declared the purchaser of the land, . . . the sum bid by the plaintiff was a low price, . . . that the plaintiff was not in fact the real purchaser of the lands at the said sale, . . . that the company was not bound to put the plaintiff in possession but never did any act to prevent their taking possession and . . . that possession was taken by the plaintiff;" and the answer claimed no benefit from the statute and did not deny having made the contract, neither did it raise any objection to the want of the corporate seal; it was held that this sufficiently admitted the agreement itself and, no protection of the statute having been claimed that the plaintiff was entitled to a decree with compensation for the loss of the crops. *Clearee* v. *North Scotland Canadian Mortgage Co.*, 27 Grant's Ch. 508.

"Statute is a Shield, not a Sword."

Where a deed was executed to another, on the understanding and faith that he was to execute a deed back of a portion of land, it was held, in *Clarke* v. *Eby*, 13 Grant's Ch. 371, that the grantee was bound to reconvey. "It was not intended that Wright should hold this portion of the land in trust for the petitioner, as when one man conveys absolute to another, on the understanding that, though absolute in form, the deed is merely in trust, and no writing was taken to evidence it, the grantor trusting and intending to trust merely to the honour of the grantee. It is more like a case of bargain and sale, where the vendor executes a deed of the land to his vendee who is to execute back a mortgage. He afterwards refuses to execute this mortgage but retains the deed. Could he, when called upon by suit in this Court, be

heard to say 'You took my promise to execute the mortgage, but this was not in writing. You trusted, therefore, to my word and to my honour, and to these the Statute of Frauds is a bar. If the statute could not be a defence in such a case, it is not so in this which is similar in character in that aspect."

In *Fleming* v. *Duncan*, 17 Grant's Ch. 76, an attorney took a conveyance of certain property in trust for a client, but did not sign any writing acknowledging the trust. A parol agreement was subsequently entered into that the attorney would accept the property in discharge of two notes which he held against the client. After the making of the agreement, the attorney put the two notes in suit in the name of a third person and obtained judgment by default. It was held that the judgment was no bar to a suit by the client for specific performance of the agreement. It was held also that the defendant could not set up the Statute of Frauds. From the professional and fiduciary relations which the attorney occupied towards the plaintiff, it was his duty to see that the trust and agreement in the plaintiff's favour were put into writing and he could not claim any advantage from having neglected that duty.

In pursuance of a verbal agreement for the sale of lands, the purchase money being payable by instalments to be secured by mortgage on the premises bargained for and other lands owned by the purchaser, a deed and mortgage were drawn up which were signed and sealed by the vendor and mortgagor respectively, neither instrument referring to the other, and the deed expressing that the purchase money had been paid. The vendor and mortgagor took away the respective instruments signed by them for the purpose as alleged of procuring the execution thereof by their respective wives. The vendor subsequently refused to perfect the transaction, and, on a bill filed by the purchaser for specific performance, it was held that the conveyance so executed by the vendor was a sufficient contract of sale within the Statute of Frauds, that the presumption on the face of such instrument was that the purchase money had been paid, which being admitted by the plaintiff to be incorrect,

the purchaser was entitled to a decree for specific performance, paying the price in hand. The evidence having clearly established the bargain as alleged by the plaintiff, though his bill omitted to state the terms and mode of payment as agreed upon, the Court offered him the alternative of taking a decree for specific performance with payment of purchase money in hand or to amend his bill setting up the exact terms of the bargain. *Gillatley* v. *White*, 18 Grant's Ch. 1.

Statute of Frauds Obviated by Part performance.

In *Bogert* v. *Patterson* 14 Grant 624, the defendants who had an interest in gold land, having discovered the owner of the outstanding title, employed the plaintiff to buy up the same, agreeing to give him one-fourth of the land for his trouble on his paying one-fourth of the consideration, and to reconvey to the owner of such title another one-fourth part. The title having been bought up the defendants did reconvey the one-fourth to the owner, but refused to carry out their agreement with the plaintiff. It was held that the agreement was one which would be specifically performed. The agreement was not in writing, or not signed by the defendant, but it was held that there was a clear part performance by the plaintiff.

In *Coates* v. *Coates*, 14 O.R. 195, it was held that the staying of an action according to an agreement between the parties was a sufficient part performance to take a case out of the Statute of Frauds and warrant a decree for specific performance.

The part-performance of a contract, not evidenced by writing under the Statute of Frauds, in order to entitle the plaintiff to a decree for specific performance, must be such as is referable to the contract and not to any other title. It has been pointed out by the author that the cases on this subject are not reconcilable. In *Butler* v. *Church*, 16 Grant's Ch. 205, the point arose in a case in which the act of part-performance relied upon was the continuance in possession by a tenant coupled with

acts inconsistent with a tenancy, which were held to be sufficient part-performance to let in parol evidence of the contract. Sprague V. C. referred to the matter as follows: "I have not treated the case hitherto as one of parol contract partly performed but I am inclined to think that part-performance within some of the cases is proved. Mr. Justice Story puts the case of a continued possession by one who entered as tenant and says: 'If in the case of a tenancy, the nature of the holding be different from the original tenancy, as by the payment of a higher rent, or by other unequivocal circumstances referable solely and exclusively to the contract, then the possession may take the case out of the statute.' He goes on to say that especially will this be so when the party let into possession has expended money in building, or repairs, or other improvements. I can hardly say that there is much difference in the character of the improvements, before and since October, 1856, except in the erection of a barn, which was put up to replace one the roof of which had fallen in, and one would say certainly that the expense of such an erection would rather be by the owner of the land than by a tenant. But that the nature of the holding was changed was abundantly evident. Anyone examining the entries of the books must be convinced of this. What the new holding was is another thing. It might be a tenancy of a different nature, or it might be a contract of purchase. The occupier was in possession in a different character. It was in substance a new possession, though without the formality of giving up the one possession and being put into possession in a new character. But, being in possession in a character not referable to his former tenancy, it was open to him, I apprehend, to shew how and in what character he was in possession."

The learned Vice-Chancellor proceeds to refer to the cases relating to this subject, citing among others the case of *Vaun* v. *Fabian*, L.R. 1 Ch. Ap. 35, which is probably the case that goes farthest in the direction of recognizing acts of part-performance as sufficient to let in parol evidence of the contract. In that case, the part performance relied on was the payment of the increased rent fixed by the agreement.

The doctrine of part-performance is also discussed by VanKoughnet Ch. in the case of *Grant* v. *Brown*, 13 Grant's Ch. 256, in which relief was refused.

A verbal agreement was entered into between the owners of two adjoining half lots that each should give a strip of equal width from his land for a lane from the public highway to the clearing, which they should make upon their respective lots, the agreement not being expressly limited as to time. A rail fence was accordingly built by each on their respective sides of the lane which they used in common for fifteen years until the death of one of the parties. Upon a bill filed to restrain the defendant from closing up the portion of the lane situate on his land, it was proved that the greater part of the lane was on the defendant's land and that there had been no expenditure on the plaintiff's land or on the lane upon the faith of the agreement.

Proudfoot, V. C. decreed specific performance of the agreement for the lane, holding that the agreement must be presumed to have been for a lane in perpetuity, and that the acts of the parties were such as to justify the acceptance of parol evidence of the agreement, but this decision was reversed, as the site of the fence and the user of the included land could not be referable to the original agreement, that agreement being that each should give a strip of equal width. Even had the lane been formed of equal portions of the land of both parties, no agreement to keep it open in perpetuity could, under the circumstances, be presumed. It was conceded that specific performance of a contract to grant an easement would be enforced. *Craig et al.* v. *Craig*, 2 U.A.R.

In *Jennings* v. *Robertson*, 3 Grant's Ch. 513, a question arose as to the effect of a party already in possession of property entering into a parol contract for the purchase of the property, the intention of both parties being that the purchaser should go on making improvements. It was held that his doing so, with the knowledge of the agent of the proprietor, through whom the contract had been made, without objection on his part, was such an action on the contract as would take the case out of the statute of Frauds. The contention was made for the defendant that the acts of part-performance relied on by

the plaintiff were insufficient, upon the principle that nothing could be regarded as an act of part performance which could not of itself, irrespective of extraneous evidence, indicate and that unequivocally the very agreement of which it was said to have been an act of part-performance, and that the improvements which the plaintiff was admitted to have made wanted altogether this character as they were plainly referable to the unauthorized occupation previously acquired by him. In answer to this contention, the learned Chancellor, Blake, enters upon an elaborate examination of the authorities down to the date of the judgment in 1852, concluding that the acts of part performance were sufficient to warrant the specific performance of the contract.

In *Black* v. *Black*, 2 Grant's Error & Ap. 119, the owner of real estate who was old and enfeebled had, for the purpose of inducing his son to relinquish his own farm and come and reside with him and take care of the father during his life, promised the son to give him the farm upon which he, the father, was residing, and the son subsequently removed with his family to reside with the father. After remaining in the house for a few days the son's wife and family, during his temporary absence, removed from the house of the father in consequence of disagreements with him and before the son returned the father died. It was alleged that the father had made a will devising the property, but after his death no trace of any will could be discovered nor was there any satisfactory account given of it. A witness to the alleged will gave evidence of its execution by the testator, but it was not shewn that there had been a second witness to it nor were its provisions shewn. It was held, reversing the decree of the Court below, that there was not such an act of part performance as would take the case out of the Statute of Frauds.

Per Esten V. C.: "I do not say that it is not an agreement which ought to be specifically performed. It is a purchase of land in a peculiar manner; it is, however, a parol agreement, and therefore, contrary to the Statute of Frauds. It is true that part performance of a parol agreement will take it out of the statute, but it must be such a performance as renders it unjust and a fraud to

to fulfil the whole agreement. In the present case the only acts of part performance are the removal of the family and furniture and staying a few days and waiting upon the old man. At his death all that the plaintiff had to do when he found his hopes unfulfilled was to return to his own place and resume his former occupation. It is true he had lost a little time, and perhaps a little money, but this is not, I think, of sufficient importance to induce the Court to set aside the statute, especially as the plaintiff brought it upon himself by his own mismanagement and moreover failed essentially in performing the agreement on his part."

In the *Corporation of Huron* v. *Ker*, 15 Grant's Ch. 265, it was held that where a guarantee did not sufficiently comply with the Statute of Frauds, but the transaction related to an interest in land for one year, and the principal had gone into possession under the contract and retained possession, the contract was binding on both principal and surety, on the ground of part performance.

In *Neal* v. *Tuckaberry*, 10 Grant's Ch. 109, a bill was filed by the owner of a mill alleging a verbal agreement with the proprietor of land adjoining for the right to pen back the water of a stream running through his land and which was used for driving the mill of the plaintiff, in consideration of which he was to open up a road across his farm for the use and convenience of such land owner, but no writing was ever drawn up evidencing the agreement. The owner of the land subsequently sold and conveyed this estate and his vendee instituted proceedings against the mill owner for damages by reason of the penning back of the water which had the effect of overflowing a considerable portion of his land. The evidence in the cause being positive as to the agreement to permit the penning back of the water and the road across the farm of the plaintiff having been used by the proprietor of the land and his vendee the Court decreed a specific performance of the parol agreement.

The headnote in *Farquharson* v. *Williamson* is as follows:

"A., by power of attorney, authorized his wife to sell and convey certain lands upon such terms as she

should seem suitable and convenient and immediately afterwards left the province and died abroad. The wife employed B to find a purchaser, who accordingly agreed with the plaintiff for a sale at a certain price, payable by instalments with interest, upon payment whereof he was to receive a conveyance, and B gave his own bond for a deed, in which were contained the terms and conditions of the sale. The wife subsequently approved of and ratified the bargain so made and B, with her consent, let the purchaser into possession of the property bargained for.

"Upon the bill being filed for specific performance of the contract, it was held that this was not a contract in writing, within the meaning of the Statute of Frauds, but that sufficient appeared to authorize the Court to decree a specific performance as a part contract, upon the terms of the bond, as being partly performed, and within the terms of the authorities." *Farquharson* v. *Williamson*, 1 Grant's Ch. 93.

In *McDonald* v. *McKinnon*, 27 Grant 12, it was also held that the plaintiff's abandonment of his intention of leaving the province and remaining with his brother supporting their mother and sister was sufficient part performance of an agreement that the brother should convey him a portion of the land on which plaintiff was then residing and assisting in their support.

The decision of the Master to the contrary was overruled.

In *Garson* v. *Garson*, 3 O.R. 139, the defendant, in 1871, wrote to his son who had left home to work for himself that if he would return he would give him fifty acres of his farm and a share of the cattle and sheep when the plaintiff got married, but if he stayed away he would sacrifice his own and his father's interests. Upon receipt of the letter the plaintiff returned and remained on the farm working it with his father, except at certain times when he went away to work for wages for himself. It was proved that the father had pointed out the fifty acres which he intended to give his son and the son entered and erected a house thereon with his father's approval and occupied it with his family, having married in 1879. It was held that the

plaintiff was entitled to specific performance of this agreement.

The case of *Orr* v. *Orr*, was relied upon by the defendant as to which Gait J. said, "That case differs from this case in this essential particular; there was no written evidence that the mother of the plaintiff, who died in possession of the land, ever gave or promised to give the land then in question to the plaintiff. It was a claim for specific performance of an alleged promise made years after the death of the owner and I fully concur in the remarks made by Richards C.J. when he says, 'on the whole, I think it will cause great and serious mischief through this country, where so large a portion of the population are farmers owning their own land, if it is understood that conversations in the family, or amongst neighbours, as to how the farm is to be divided when the father dies, are to be taken as constituting a contract which can be enforced in equity.'"

Distinction Between Contract to Remunerate and Mere Expectation

In a number of cases the plaintiff has relied on the performance of services as a ground for a decree on the footing of an agreement to provide for the plaintiff by will, and the Court has had to distinguish between an agreement for such compensation and mere expectation on the part of the plaintiff or such expectation coupled with an intention on the part of the parent or other person, but not amounting to an agreement. The following cases deal with this distinction.

In *Orr* v. *Orr*, cited below, the father of the plaintiff died, leaving a widow and nine children, the plaintiff, the eldest son, being then sixteen years old, and he continued to reside with his mother on a farm which she owned, for about six years, when, becoming dissatisfied with his position, he informed his mother thereof, and that he had determined to leave the farm and work for himself, whereupon his mother urged him to remain, work the farm, and assist her in bringing up the family, and she would give him the south half of the farm and the other half to a younger brother, on condition of the plaintiff supporting her for life. The plaintiff in conse-

quence remained with the family and erected a brick dwelling on the south half of the farm, of which house he agreed to give and did give his mother a certain part for the use of herself and a grand-daughter. The brothers and sisters of the plaintiff were all aware that the plaintiff claimed under this alleged agreement or promise, and the south half of the lot was always designated as his. The plaintiff continued to fulfil the terms stipulated for until the death of his mother, about seven years afterwards, but she died without having executed a deed to the plaintiff. Eighteen years afterwards, a brother of the plaintiff, having bought up the shares of four of the co-heirs, instituted proceedings in ejectment against the plaintiff, claiming to be absolutely entitled to five undivided ninths of the whole property. Thereupon the plaintiff filed a bill seeking to restrain such action, and to enforce the specific performance of the alleged agreement with the mother.

It was held on appeal, reversing the decree of the Court below, that what had occurred could not be treated as an agreement to convey, but was at most to be looked upon only as a promise or expectation held out by the mother to the son to induce him to remain with her and, as such, was not capable of being specifically enforced in equity. *Orr* v. *Orr*, 21 Grant's Ch. 397.

This case was followed in *Jibb* v. *Jibb*, 24 Grant's Ch. 487, in which the plaintiff alleged that, having remained at home, working for his father until he was of the age of twenty-five or twenty-six years, he then told him that he must have wages, whereupon the father agreed that he would purchase a certain farm and that, if plaintiff would remain at home and work until the land was paid for, he would convey the same to the plaintiff; that the plaintiff accordingly remained with and worked for his father until the farm was fully paid for and that the father put the plaintiff in possession. In answer to a bill for specific performance of the alleged agreement, the father positively denied the agreement alleged by the bill, although he admitted that he had bought the land intending to devise it to the plaintiff and that he had executed a will so disposing of it and alleged that he intended not to alter the disposition thereby made the

of. The Court, under these circumstances, refused the relief prayed, and dismissed the bill with costs. Spragge Ch., referring the conflict of evidence between the father and the son, as to the facts and terms of the agreement, proceeds to discuss the general question in the following terms:

"There seems upon the evidence no doubt that the father purchased this land with the avowed intention of giving it to the son at some future time, but there is all the difference in the world between an intention, however clearly and frequently expressed, and an agreement upon consideration. Upon this point which is a very clear one, I will only refer to the language of Richards C.J. in *Orr* v. *Orr*, 21 Grant's Ch. 425. 'If children are not disposed to reside with their parents, and give to them that comfort and assistance which their duty requires, trusting to the affection of the parents to bestow on them a share of their worldly goods, then, if they wish to shew that an agreement has been made which is to bind the parent by force of law, and not by the better feeling of affection, Courts ought to require that such an agreement shall be established by the clearest evidence, and it should be held to be an almost invariable rule, when a parent tells a child that if he lives with him and works the farm he will give it to him, that the child is to understand, unless it is unmistakeably shewn that the parent intends to bind himself so that he cannot change that intention, that those are his views and intentions, but he will feel himself perfectly at liberty to alter that disposition of his property if he finds his own altered circumstances, or want of kindness or affection on the part of his son, induces him to change his views.'"

In *McDonald* v. *Rose*, 17 Grant's Ch. 657, a father and son entered into mutual bonds, the father agreeing that just before his death he would convey the farm to his son in fee and the son agreeing that he would during his father's life, work, till, and improve the farm in a good and farmerlike manner and would consult his father in all things reasonable. Quarrels took place afterwards; the son treated his father badly, though he did nothing which at law would be a breach of the condition of the bond, and ultimately the father left the

farm, the son retaining the possession until ejected at the father's suit. It was held in a suit by the son against his father that the contract should not be enforced against the father.

The decision is put in part on the ground of want of mutuality in the remedy, Mowat V.-C. pointing out that it was contrary to the rule of the Court to enforce a contract the consideration for which was personal services to be rendered, but apart from that consideration, the Court, as a matter of discretion, would never in the lifetime of the parties enforce such a contract as the present, especially after its execution had been interrupted by quarrels and after the son had permitted himself to treat the father in so vile a way as the evidence established against the plaintiff.

In *Walker* v. *Boughner et al.*, 18 O.R. 448, it was held that where a contract on the part of a testator founded upon a valuable and sufficient consideration, that he will leave by his will to the other contracting party a sum of money as a legacy, is clearly made out, the representatives of the testator may be compelled to make good his obligation, but where the testator, the grandfather of the plaintiff, promising to make the same provision for her by will as he should make for his own daughters, took her from the home of her parents, at the age of twelve, adopted her and maintained her while she worked for him for nine years, but, although he made his daughters residuary legatees, left the plaintiff nothing by his will and paid her nothing for her services, and she sued his executors for specific performance of the contract or promise, and in the alternative for wages, it was held that the case did not fall within the rule, the promise made and the consideration for it being both of too uncertain a character to entitle the plaintiff to come to the Court for specific performance, but that the circumstances gave rise to an implied contract for the payment of wages and took the case out of the ordinary rule that children are not to look for wages from their parents or those *in loco parentis* in the absence of special contract whilst they form a part of the household.

The rule was stated by Armour C.J. to be that where a party renders services to another in the expectation of

a legacy and in sole reliance on the testator's generosity, without any contract express or implied that compensation shall be provided for him by will, and the party for whom such services are rendered dies without making such provision, no action lies; but where, from the circumstances of the case, it is manifest that it was understood by both parties that compensation should be made by will, and none is made, an action lies to recover the value of such services.

In *Cross* v. *Cleary et al.*, 29 O.R. 542, the plaintiff sought to recover from the executors of the will of a deceased person the whole of his estate upon the strength of a verbal agreement which she alleged was made between her and the deceased. Her evidence was that he said, "You give me a home as long as I live and when I die you have what is left." To this she answered, "All right." And he then said, "That is an agreement." The same story was repeated by the daughter and son-in-law of the plaintiff, who said they were present when the agreement was made. Two other witnesses swore that the deceased told them that he had agreed to leave the plaintiff his property when he died. He was maintained by her for eight years after the alleged agreement was made but made his will in favour of other persons.

It was held that, apart from the Statute of Frauds, the evidence was not such as the Court could act upon by decreeing specific performance of the alleged agreement, in substitution for the actual will of the deceased, duly executed, and admitted to probate, without objection from the plaintiff or anyone else. Such an agreement must be supported by evidence leaving upon the mind of the Court as little doubt as if a properly executed will had been produced and proved before it.

In *McKay* v. *McKay*, 15 Grant's Ch. 371, on a motion for an injunction to stay an ejectment brought by the devisees of the plaintiff's father, the plaintiff's case was that his father had verbally agreed to give the plaintiff the land for work which, after coming of age, the plaintiff had done for his father; that two years afterwards the plaintiff, on his marriage, went into possession, with his father's permission, but subsequently to his father's having refused to give him a deed or to part with the con-

trol of the property, and that the plaintiff remained in possession to his own use for eight years, when his father died, leaving a will by which he devised the property to the defendant. It was held that the plaintiff could not enforce the alleged agreement and the injunction was refused. "The plaintiff took possession relying on his father's bounty and expressly informed that his father by allowing him to have possession did not mean to part with his own control over the property, circumstances which were considered by the full Court in *Foster* v. *Emmerson*, 5 Grant 525, as sufficient to disentitle sons to relief in such a case, even though they had made large improvements, while this plaintiff's improvements have been very small."

In *McGugan* v. *Smith*, 21 S.C.R. 263, a girl of fourteen lived with her grandfather who promised her that if she would remain with him until he died, or until she was married, he would provide for her by his will as amply as for his daughter. She lived with him until she was twenty-five when she married. The grandfather died shortly after, leaving her by his will a much smaller sum than his daughter received and she brought an action against the executors for specific performance of the agreement to provide for her as amply as for the daughter, or, in the alternative, for payment for her services during the eleven years.

On the trial of the action, it was proved that while living with her grandfather, she had performed such services as tending cattle, doing field work, managing a reaping machine and breaking in and driving wild and ungovernable horses. It was held, reversing the decision of the Court of Appeal, that the alleged agreement to provide for her by will was not one of which the Court could decree specific performance, but that she was entitled to remuneration for her services.

Strong J. said he had no doubt that the agreement sought to be enforced was one as to which specific performance could not be decreed. He very much doubted if it had any validity at all as an agreement, or, if it was anything more than a representation or promise of future favours, but he agreed that she was entitled to remuneration.

CHAPTER XII.

FORMALITIES REQUIRED IN CONTRACTS BY CORPORATIONS.

Practical import ance of the subject.

§ 641. QUESTIONS relative to the formalities requisite to render a contract binding on a body corporate have so often arisen in proceedings for specific performance that it is expedient to give an outline of the law on this point.

Contract by corporation must generally be under common seal. Exceptions.

§ 642. When the party seeking to enforce a contract,[1] or whom it is sought to charge with a contract, is a corporation, the contract must, subject to the exceptions mentioned below, be under the common seal; it being the rule of law[2] that in no other way can a corporation express its intentions. This rule is, however, subject to certain important exceptions.

i. Some contracts of trading corporations.

§ 643. (i.) The rule does not apply to the contracts of trading corporations[3] having relation to the trade which they are constituted to carry on, nor to contracts of so everyday a character as would make the affixing of the common seal to them a practical inconvenience.[4]

[1] *Mayor, &c. of Kidderminster* v. *Hardwick*, L. R. 9 Ex. 13; *Mayor, &c. of Oxford* v. *Crow*, [1893] 3 Ch. 535; *Athy Guardians* v. *Murphy*, [1896] 1 I. R. 65, 75.

[2] 1 Bla. Com. 475.

[3] *South of Ireland Colliery Co.* v. *Waddle*, L. R. 3 C. P. 463; 4 C. P. 617. Consider *Holmes* v. *Trench*, [1898] 1 I. R. 319, in which case Chatterton V.C. said (at p. 333) that, "in the absence of any special restriction," a corporation may contract without seal for the purchase or sale of property necessary for carrying on the business for which the corporation was created."

[4] *Sande* v. *St. Neots Union*, 8 Q. B. 110; *Clarke* v. *Cuckfield Union*, 21 L. J. Q. B. 319; *Nicholson* v. *Bradfield Union*, L. R. 1 Q. B. 620; *Lawford* v. *Billericay Rural Council*, C. A., [1903] 1 K. B. 772; 72 L. J. K. B. 554 (approving the two last-cited cases); *Smith* v. *Birmingham and Staffordshire Gas Light Co.*, 1 A. & E. 526.

ii. Under statutory provisions.

§ **644**. (ii.) There are various statutes enabling certain classes of corporations to contract otherwise than under their common seal. The principal provisions for this purpose now in force are comprised in the Companies Clauses Consolidation Act, 1845, which regulates railways and other undertakings of a public character, and in the Companies (Consolidation) Act, 1908, which applies to companies constituted under it, or under the repealed Companies Acts, 1862 to 1908.

Companies Clauses Act, 1845, s. 97.

§ **645**. The Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 97,[1] is as follows:—

"The power which may be granted to any such committee [of directors] to make contracts as well as the power of the directors to make contracts on behalf of the company, may lawfully be exercised as follows, (that is to say,)

With respect to any contract which, if made between private persons, would be by law required to be in writing, and under seal, such committee or the directors may make such contract on behalf of the company in writing, and under the common seal of the company, and in the same manner may vary or discharge the same:

With respect to any contract which, if made between private persons, would be by law required to be in writing, and signed[2] by the parties to be charged therewith, then such committee or the directors may make such contract on behalf of the company in writing, signed by such committee or any two of them, or any two of the directors, and in the same manner may vary or discharge the same:

With respect to any contract which, if made

[1] See *Leominster Canal Navigation Co.* v. *Shrewsbury and Hereford Railway Co.*, 3 K. & J. 651, 672, 673.

[2] *Finlay* v. *Bristol and Exeter Railway Co.*, 7 Ex. 409, 417; 21 L. J. Ex. 117; 7 Rail. Cas. 449.

between private persons, would by law be valid although made by parol only,[1] and not reduced to writing, such committee or the directors may make such contract on behalf of the company by parol only without writing, and in the same manner may vary or discharge the same:

And all contracts made according to the provisions herein contained shall be effectual in law, and shall be binding upon the company and their successors, and all other parties thereto, their heirs, executors, or administrators, as the case may be; and on any default in the execution of any such contract, either by the company or any other party thereto, such actions or suits may be brought, either by or against the company, as might be brought had the same contract been made between private persons only."

§ **646**. The 76th and 77th sections of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), are as follows: Companies (Consolidation) Act, 1908, ss. 76, 77.

"76.—(1.) Contracts on behalf of a company may be made as follows (that is to say):—

(i.) Any contract which, if made between private persons, would be by law required to be in writing, and if made according to English law to be under seal, may be made on behalf of the company in writing under the common seal of the company, and such contract may be in the same manner varied or discharged:

(ii.) Any contract which, if made between private persons, would be by law required to be in writing,[2]

[1] *Homersham* v. *Wolverhampton Waterworks Co.*, 6 Ex. 137, 141; 20 L. J. Ex. 193; 6 Rail. Cas. 790; *Low* v. *London and North-Western Railway Co.*, 18 Q. B. 632, 638; 21 L. J. Q. B. 631.

[2] See *Beer* v. *London and Paris Hotel Co.*, L. R. 20 Eq. 412; *Jones* v. *Victoria Graving Dock Co.*, 2 Q. B. D. 314; also *Re Queensland Land and Coal Co.*, [1894] 3 Ch. 181, 185; 63 L. J. Ch. 810; 71 L. T. 115; 42 W. R. 600; and *Simultaneous Colour Printing Syndicate* v. *Foweraker*, [1901] 1 K. B. 771; 70 L. J. K. B. 153 (cases of contracts by companies to issue debentures).

signed by the parties to be charged therewith, may be made on behalf of the company in writing signed by any person acting under its authority, express or implied, and may in the same manner be varied or discharged:

(iii.) Any contract which, if made between private persons, would by law be valid although made by parol only, and not reduced into writing, may be made by parol on behalf of the company by any person acting under its authority, express or implied, and may in the same way be varied or discharged.

(2.) All contracts made according to this section shall be effectual in law, and shall bind the company and its successors and all other parties thereto, their heirs, executors, or administrators, as the case may be.

(3.) Any deed to which a company is a party shall be held to be validly executed in Scotland on behalf of the company if it is executed in terms of the provisions of this Act, or is sealed with the common seal of the company and subscribed on behalf of the company by two of the directors and the secretary of the company, and such subscription on behalf of the company shall be equally binding whether attested by witnesses or not.

77. A bill of exchange or promissory note shall be deemed to have been made, accepted, or endorsed on behalf of a company, if made, accepted, or endorsed in the name of, or by or on behalf or on account of, the company by any person acting under its authority."

Former statutory provisions.

§ 647. Somewhat similar provisions with regard to the contracts of companies were contained in the Joint Stock Companies Registration Act (7 & 8 Vict. c. 110), ss. 44—46; the Joint Stock Banks Registration Act (7 & 8 Vict. c. 113), s. 22 (as to bills of exchange and promissory notes only); the Joint Stock Companies Act, 1856, s. 41; the Companies Act, 1862, s. 47; and

the Companies Act, 1867, s. 37. But these Acts have been repealed.

(iii.) From the doctrine of part performance.

§ 648. (iii.) Another exception arises from the doctrine of part performance: for it appears to be clear that such part performance as will prevent an ordinary defendant from setting up the defence of the Statute of Frauds, will prevent a defendant company from setting up either that defence or a defence grounded on the absence of the corporate seal, or of the statutory formalities, in accordance with which the company may be enabled to contract. This was clearly laid down in the case of *Wilson* v. *West Hartlepool Harbour and Railway Co.*,[1] and there are other authorities leading to the same conclusion.[2]

It must, however, be added that part performance by a company of a contract not under seal, which is not in its nature the subject of specific performance, as, *e.g.*, a contract for work and labour, will not give the Court jurisdiction.[3]

The subject more fully discussed in other works.

§ 649. The subject chiefly dealt with in this chapter is more fully discussed in various works on corporations and companies with which our law libraries abound, amongst which the well-known work of Lord Lindley has long held the foremost place.

[1] 34 Beav. 187; 2 De G. J. & S. 475.

[2] *Marshall* v. *Corporation of Queenborough*, 1 S. & S. 520; *Maxwell* v. *Dulwich College*, 7 Sim. 222; *London and Birmingham Railway Co.* v. *Winter*, Cr. & Ph. 57, 63; *Earl of Lindsey* v. *Great Northern Railway Co.*, 10 Ha. 664; *Crook* v. *Corporation of Seaford*, L. R. 10 Eq. 678; 6 Ch. 551; *Mayor, &c. of Drogheda* v. *Holmes*, 5 H. L. C. 160.

[3] *Crampton* v. *Varna Railway Co.*, L. R. 7 Ch. 562; *supra*, § 106. Cf. *Young & Co.* v. *Mayor, &c. of Royal Leamington Spa*, 8 App. Cas. 517; and *British Insulated Wire Co.* v. *Prescot Urban District Council*, [1895] 2 Q. B. 463, in which cases contracts which had been performed by the plaintiffs were held to be unenforceable against urban authorities by reason of non-compliance with obligatory provisions as to sealing, &c. contained in sect. 171 of the Public Health Act, 1875.

CHAPTER XIII.

MISREPRESENTATION.

Effect of a misrepresentation.

§ 650. A MISREPRESENTATION, whether fraudulent or innocent, having relation to the contract, made by one of the parties to the other of them, is a ground for refusing the interference of the Court in specific performance at the instance of the former party; and may in certain cases be a ground for its active interference in setting aside the contract at the instance of the latter.[1] Representations are most usually by word, written or spoken, but they may be by act, as, for instance, by the performance of fraudulent experiments, on the faith of which a contract was entered into for a licence under a patent.[2]

Elements of a misrepresentation.

§ 651. Such misrepresentations may be resolved into some or all of the following elements, namely,—first, a statement actually untrue: secondly, the making of that statement by a party to the contract: thirdly, the condition of mind of the person making the statement as to its truth or untruth: fourthly, the intent in the party making the statement to induce the other party to enter into the contract: fifthly, the reliance on the statement by the party to whom it is made: sixthly, the statement having such a relation to the contract as that the statement being false makes the contract unconscionable.

[1] *Edwards* v. *M'Leay*, Coop. 308; S. C. 2 Sw. 287; *Gibson* v. *D'Este*, 2 Y. & C. C. C. 542, reversed in D. P. *sub nom. Wilde* v. *Gibson*, 1 H. L. C. 605; S. Lead. Law of Prop. 611.

[2] *Lovell* v. *Hicks*, 2 Y. & C. Ex. 46.

Division and limitation of the subject

§ 652. It will be desirable to discuss these points separately; and, in doing so, it must be remembered that it makes a material difference whether the misrepresentation in question is alleged by way of defence to an action for specific performance, or to a Common Law action on the contract, or as the ground for an action of deceit,[1] or for the rescission of the contract, or somewhat less than the ingredients requisite for either of the two latter proceedings[2] will suffice to prevent the active interference of the Court in specific performance. The object of the present chapter being to consider misrepresentations in relation to specific performance, it is, of course, only incidentally and very partially discussed in any other relation.

Misrepresentation how related to fraud

§ 653. A misrepresentation may or may not be a fraud. Where it is false to the knowledge of the person making it, it is a fraud. Where its falsity was not known, it may have been carelessly made, or even in perfect innocence: and yet the fact that the statement was false may render it unconscionable in the person who made the statement to enforce the contract which it produced.

1. A statement made and untrue.

§ 654 (i.) The first point calls for little remark. It is obvious that, to constitute misrepresentation there must be a statement, and that statement must be untrue.

Mere silence.

§ 655. Mere silence is, generally speaking, neither misrepresentation nor fraud: and, as will be shown in the next chapter, it is quite open to a vendor or purchaser to maintain such silence, though its effect may be that the other party acts under a misapprehension.

[1] As to actions of deceit, see the leading case of *Derry* v. *Peek*, 14 App. Cas. 337; 58 L. J. Ch. 864; 61 L. T. 265; 38 W. R. 33.

[2] *Attwood* v. *Small*, 6 Cl. & Fin. 232, 395, 444; *Lovell* v. *Hicks*, 2 Y. & C. Ex. 46, 54; *Aberaman Ironworks* v. *Wickens*, L. R. 4 Ch. 101, reversing the decree of Malins V.C. L. R. 5 Eq. 485; *Redgrave* v. *Hurd*, 20 Ch. D. 1. Consider *Arkwright* v. *Newbold*, 17 Ch. D. 301.

[1] See *infra*, § 705.

But silence may amount to misrepresentation, as where, in the course of communications about a title, the solicitor of one party so wrote that he assumed certain things; the assumption was erroneous to the knowledge of the solicitor of the other party, but he let the matter pass in silence: this was held to be a misrepresentation.[1]

§ **656**. The statement must be untrue, and in determining this question it will not suffice to show that the language used is capable of a meaning which would make it untrue, if it is conceived, be held to be untrue unless it is proved that the speaker intended or knew that the person accepted it in a sense in which it was untrue. When a statement is to be held untrue.

§ **657**. (The fact that silence is relied on as a misrepresentation, or that a statement made by a party to the contract or by a stranger.) "If," said Lord Romilly, "a third person, by representing to A. that it will be highly for his benefit, and by false representations induces him to enter into a contract with B. but B. makes no false representation, and is neither party nor privy to any such, then the contract is valid, and stands good in this Court. But the person who, by false representations, induced the other to enter into that contract is liable, in an action, to make good to the person he has misled the damage he has sustained by acting on the misrepresentation made to him."[2] *Ducanty's case*[3] and *Ex parte Worth*[4] bring this principle into clear relief: for in those cases it has been held that if directors as agents of the company issue a false report, and third persons, influenced by this report, contract with the company for shares, the contract may be avoided: but that if the same

[1] *Andrew* v. *Aitken*, 31 W. R. 125.

[2] *Clarke* v. *Dickson*, E. B. & E. 153; cf. *Smith* v. *Chadwick*, 9 App. Cas. 187.

[3] In *Ducanty's case*, 26 Beav. at p. 270.

[4] 26 Beav. 268.

[4] 4 Drew. 529.

third persons contract with individual shareholders for shares, the contract cannot be avoided.

What agency must be proved.

§ 658. It is, of course, enough that the agent was appointed to bring about the contract for the principal, and that he made the misrepresentation. It is not needful that he should have been appointed the agent to make the misrepresentation.[1] Thus, in the cases in which contracts have been rescinded against companies, the representations have been made by the directors, who, of course, have no express authority to make a misrepresentation.[2]

iii. The state of mind of the party making the statement.

§ 659. (iii.) As to the state of mind of the person making the statement as to its truth or falsehood; it is to be observed that though there can be no fraud without the knowledge of the untruth of the statement yet there may well be misrepresentation, *i.e.*, the representation may be erroneous, though not known to be so.

As to knowledge of the error of falsity.

§ 660. We are not here concerned with an action to rescind a contract or an action for deceit, or a defence to an action for damages on the ground of fraud or misrepresentation: we are concerned with actions for specific performance: in such, it is conceived to be clear that a false statement, though believed to be true, if made with a view to a contract by a party to the contract, is a good defence. In *Wall* v. *Stubbs*,[3] Plumer V.C. observed, "that whether the misrepresentation be wilful or not, of a fact latent or patent, such misrepresentation may be used to resist a specific performance, unless the purchaser really knew how the fact was."

Wall v. *Stubbs*.

Higgins v. *Samels*.

§ 661. This point was particularly considered by Lord Hatherley (when V.C.) in *Higgins* v. *Samels*,[4] in

[1] *Barwick* v. *English Joint Stock Bank*, L. R. 2 Ex. 259; *Mullens* v. *Miller*, 22 Ch. D. 194; *British Mutual Co.* v. *Charnwood Forest Rail. Co.*, 18 Q. B. D. 714.

See, *e.g.*, *Rose River Silver Mining Co.* v. *Smith*, L. R. 4 H. L. 64; cf. *Gibson's case*, 2 De G. & J. 275, 283; and *Nicol's case*, 3 De G. & J. 387; 28 L. J. Ch. 257.

[2] 1 Mad. 80.

[3] 2 J. & H. 160, 166.

which case the defendant resisted specific performance on the ground of misrepresentation by the plaintiff, and it did not appear that the plaintiff knew the falsity of the statement which he made. His Lordship concluded that it was not necessary to prove that the representation complained of was made with a knowledge that it was false; and in so concluding relied on *Taylor* v. *Ashton*[1] and *Evans* v. *Edmonds*.[2] The latter case arose on a covenant in a separation deed, to which fraud was pleaded, and Maule J. said, "I conceive that if a man, having no knowledge whatever on the subject, takes upon himself to represent a certain state of facts to exist, he does so at his peril: and, if it be done either with a view to secure some benefit to himself, or to deceive a third person, he is in law guilty of a fraud, for he takes upon himself to warrant his own belief of the truth of that which he so asserts."[3] Indeed executed contracts have been rescinded on the ground of their having been induced by false statements which were believed to be true by the persons making them.[4]

Misrepresentation by agent in Common Law actions.

§ **662**. Questions of considerable nicety have been raised at Common Law as to the effect of the misrepresentation by an agent, where the principal is innocent and neither authorized nor knew of the misstatement. It has been discussed whether such misrepresentations render the principal liable in an action for deceit.[5] It

11 M. & W. 401.

13 C. B. 777.

13 C. B. at p. 786. See also *Peek* v. *Gurney*, L. R. 6 H. L. 377.

[1] *Rawlins* v. *Wickham*, 3 De G. & J. 304 (as regards the deceased partner); *Hart* v. *Swaine*, 7 Ch. D. 42 much observed upon in *Joliffe* v. *Baker*, 11 Q. B. D. 255; *Palmer* v. *Johnson*, 13 Q. B. D. 351. Distinguish *Brett* v. *Clowser*, 5 C. P. D. 376; and cf. *per* Lord Selborne in *Brownlie* v. *Campbell*, 5 App. Cas. at p. 938.

[2] *Udell* v. *Atherton*, 7 H. & N. 172; *Barwick* v. *English Joint Stock Bank*, L. R. 2 Ex. 259. See also *Fuller* v. *Wilson*, 3 Q. B. 58, and in Cam. Scac. as *Wilson* v. *Fuller*, 3 Q. B. 68, which was an action for deceit, ultimately decided on the ground that the cause of the injury was the plaintiff's own misapprehension: and cf. *per* Lord Hatherley in *Brownlie* v. *Campbell*, 5 App. Cas. at p. 941.

has in a celebrated case been held, that where an agent, without designing to deceive, made a representation which was false, but which he did not know to be so, whilst the principal had the knowledge of the actual facts, but did not make the representation, there was no evidence to support a plea of fraud or covin.[1]

Always fatal to specific performance.

§ **663**. But as an innocent misrepresentation by a party to the contract is a bar to his seeking specific performance of it, such questions do not seem to arise in actions of this nature: for it seems clear that any misrepresentation of an agent leading up to the contract, though both principal and agent were innocent, would debar the principal from specific performance.

In Equity a man may be bound by inadvertent misrepresentation.

§ **664**. It may probably be laid down that there are many cases in Equity in which a man is bound who makes a representation which is not true, though without knowledge of its untruth, and this even though the mistake be innocent: for a man, before making a representation, ought not only not to know it to be untrue, he ought to know that it is true.[2] So in a case where a trustee was charged by the Court in respect of a misrepresentation made to a purchaser, and the trustee alleged that he did not at the time

[1] *Cornfoot* v. *Fowke*, 6 M. & W. 358, discussed and explained in *The National Exchange Co.* v. *Drew*, 2 Macq. 103; and see *Barwick* v. *English Joint Stock Bank*, L. R. 2 Ex. 259. In *Pearson & Son* v. *Dublin Corporation*, [1907] A. C. 351, Lord Halsbury, referring to *Cornfoot* v. *Fowke* and to p. 357, "If it was supposed to decide that the principals and agent could be so divided in responsibility that (like the schoolboy's game of 'I did not take it, I have not got it') the united principal and agent might commit fraud with impunity, it would be quite new to our jurisprudence. One of the learned judges who decided the case of *Cornfoot* v. *Fowke* explained it by saying that it was only decided on a point of pleading, and another by saying that it was attempted to add a term to a written contract which was not in it. Whether these were satisfactory reasons I do not care to inquire. It is enough to say that the case is not law at all as supposed to affirm the proposition to which I have referred.

[2] *Aaron's* v. *Medlycott*, 9 Ves. 13, 21.

recollect the fact thus misrepresented, Grant M.R. said "the plaintiff cannot dive into the secret recesses of his (the trustee's) heart, so as to know whether he did or did not recollect the fact, and it is no excuse to say that he did not recollect it."[1] In like manner, it may be added that in the cases of agents rendering themselves personally liable, it is the same whether they represent what they know to be false, or what they do not know to be true.[2]

iv. The intent of the misrepresentation.

§ **665.** (iv.) The misrepresentation must have been made in relation to the contract in question, and with a view to induce the other party to enter into it: it must be capable of being described as *dans locum contractui*.[3] Hence, unless under very special circumstances, it must have been made at the time of the treaty,[4] and not have relation to some collateral matter, or other relation or dealing between the parties.[5]

National Exchange Co. v. Drew.

§ **666.** This point was much discussed in a Scotch case in the House of Lords. There, a tottering joint-stock company had put out flourishing annual reports of its condition, and shortly after the last of these reports, and with a view to prevent its shares falling in the market and to counteract certain unfavourable rumours, the company, through their manager, urged the defenders to purchase additional shares in the concern, and assured them that the company would advance the necessary funds, and that the stock should

[1] *Burrowes* v. *Lock*, 10 Ves. 470; accordingly *Price* v. *Macaulay*, 2 De G. M. & G. 339; and see *per* Lord Selborne in *Brownlie* v. *Campbell*, 5 App. Cas. at pp. 935, 936.

[2] *Per* Alderson B. in *Sasoon* v. *Haig*, 10 M. & W. 16.

See *per* Lord Brougham in *Attwood* v. *Small*, 6 Cl. & Fin. at p. 444; *per* Lord Wensleydale in *Smith* v. *Kay*, 7 H. L. C. at p. 755.

[3] *Per* Leach V.C. in *Harris* v. *Kemble*, 1 Sim. 122. As to the question whether a representation by an insurance company in a published prospectus can be presumed, in the absence of specific evidence to have been the basis of an insurance effected with them, see *Wheelton* v. *Hardisty*, 8 El. & Bl. 232.

Harris v. *Kemble*, 1 Sim. 111, 128, overruled, but as to the application and not as to the principle, 5 Bli. N. S. 730. See also *Harris* v. *King*, 1 Stark. 75.

be held until it could be sold at a profit, without the defenders being called on to pay any money: the shares became valueless, and the company sued for the money advanced, to which the defenders pleaded the fraud of the company: to this plea it was, amongst other things, objected that the loan was one independent transaction, and the purchase another, and that the alleged misrepresentation in the purchase did not vitiate the loan. But it was held by their Lordships that the defence was good, Lord Cranworth putting it on the ground that the transaction did not constitute a loan in the ordinary sense of the word, but a special contract by the company to purchase for the defenders, to be repaid only in a particular manner; and Lord St. Leonards holding that the purchase and the loan were one transaction, though consisting of two parts,—that if there had been no loan there would have been no purchase, and if there had been no purchase there would have been no loan.[1]

Purchaser in faith of prospectus not received from its authors.

§ **667.** On the other hand, it was held by the House of Lords in a noteworthy case that a purchaser of shares in the market, upon the faith of a prospectus which he had not received from its authors, could not so connect himself with them as to render them liable for the misrepresentation contained in it.[2] In earlier cases it had been held, that a report published by the directors of a company as addressed to its shareholders, but intended to come and coming into the hands of any person who might wish to purchase shares, was a representation made by the directors to any person

Earlier cases affected by *Peek* v. *Gurney*.

[1] *The National Exchange Co.* v. *Drew*, 2 Macq. 103.

[2] *Peek* v. *Gurney*, L. R. 6 H. L. 377; 43 L. J. Ch. 19, distinguished *Andrews* v. *Mockford*, [1896] 1 Q. B. 372; 65 L. J. Q. B. 302; 74 L. T. 728. In regard to the liabilities of directors and others for statements in prospectuses, the provisions of the Companies (Consolidation) Act, 1908, ss. 80, 81, and 84, must now be borne in mind. See, too, *Barry* v. *Croskey*, 2 J. & H. 1; and consider *Barrett's case*, 4 De G. J. & S. 30.

who might obtain the report and on the faith of it buy shares;[1] and that false representations made by the directors of a company to the secretary of the Stock Exchange to obtain an official quotation entitled a person who, knowing the rules of the Exchange, had bought on the faith of the quotation so obtained, in suing the directors in damages:[2] but in *Peek* v. *Gurney* Lord Chelmsford, while not doubting the propriety of the former of these two cases, expressed strong dissent from the latter.

It need hardly be said that if, in any case where an action for deceit would lie, the result of the misrepresentations had been a contract between a director and one of the public, and the director had sued the purchaser in specific performance, the purchaser would have had a clear defence.

Nocd's case.

§ **668**. Where directors as agents of the company prepared false reports and a circular addressed to the shareholders and customers of the bank, and intended for them, and one of the directors took these papers to a person who was neither a shareholder nor a customer, and thereby induced him to become a shareholder, it was held that the company were not bound, on the two grounds, (1) that the authority was given to the directors as a body and not to each one individually, and (2) that the paper was prepared for one purpose and applied by an individual director for another.[4]

v. The reliance on the statement.

§ **669**. (v.) Another circumstance essential to misrepresentation as a defence to specific performance is, that it was in reliance upon the statements in question that the party to whom they were made entered into the contract. In *Attwood* v. *Small*,[5] which was a case

[1] *Scott* v. *Dixon*, 29 L. J. Ex. 62.

Bedford v. *Bagshaw*, 4 H. & N. 538. See also *Clarke* v. *Dickson*, 6 C. B. N. S. 453.

[3] L. R. 6 H. L. at pp. 397, 398.

[4] *Nocd's case*, 3 De G. & J. 387; 28 L. J. Ch. 257. Consider *Barrett's case*, 3 De G. J. & S. 30.

[5] 6 Cl. & Fin. at p. 447.

for the rescission of the contract (and for this point the plaintiff's case for rescission and the defendant's case against specific performance seem alike), Lord Brougham, after referring to the earlier cases, said, "Now, my Lords, what inference do I draw from these cases? It is this, that general fraudulent conduct signifies nothing; that general dishonesty of purpose signifies nothing; that attempts to overreach go for nothing; that an intention and design to deceive may go for nothing, unless all this dishonesty of purpose, all this fraud, all this intention and design, can be connected with the particular transaction, and not only connected with the particular transaction, but must be made to be the very ground upon which this transaction took place, and must have given rise to this contract."

Redgrave v. Hurd.

§ **670.** In *Redgrave* v. *Hurd*,[1] this question was much considered, and the case of *Attwood* v. *Small* was much discussed. In *Redgrave* v. *Hurd*, the misrepresentation was in respect of a solicitor's practice, and the judge who tried the case concluded that the defendant did not rely on the misrepresentations, but bought without regard to them. From this conclusion the Court of Appeal dissented, and in the course of his judgment[2] Jessel M.R. said, "If it (*i.e.*, the representation made) is a material representation calculated to induce him (*i.e.*, the party resisting performance) to enter into the contract, it is an inference of law that he was induced by the representation to enter into it." This is probably an erroneous statement; but the law probably justifies this view that if the representation be of a kind likely to be influential on the mind, the Court will so hold it on very slight evidence, unless the contrary be satisfactorily shown by evidence or admission. But in every case the question whether or no reliance was placed upon the statement made is a question of fact, and not an inference of law.[3]

[1] 20 Ch. D. 1.

[2] At p. 21.

[3] *Per* Lord Blackburn in *New Brunswick*, 9 App. Cas. at p. [illegible]

The statements must not be the sole inducements.

§ 671. It is not, of course, necessary that the statements which were false should have been the sole inducements to the contract. The presence of true statements will not remove or cancel the effect of false ones.[1]

Vagueness of the representation

§ 672. In considering whether the defendant relied on the misrepresentation of the plaintiff, the Court will discriminate between such representations as are in conscience a part of the bargain, whether incorporated into the legal contract or not, and mere vague commendations, as the holding out of mere hopes or expectations which ought to put the other party upon further inquiry; and in judging of this, it is important to consider whether the thing stated may lie in the knowledge of the party making the representation or whether it must lie beyond his knowledge. Thus, for instance, with regard to mines, a distinction will be drawn between a specific account of what was to be seen in the mine, and a general description of its prospects and capabilities, which from the very nature of the property must be problematical and doubtful.[2] So, again, the misrepresentations relied on must be statements of alleged facts and not mere expressions of opinion.

Instances.

§ 673. Accordingly, where an advowson was sold by auction, and the particulars stated that a voidance of the preferment was likely to occur soon, but made no mention of the present incumbent, and the auctioneer at the sale stated in explanation that the living would be void on the death of a person aged eighty-two; and in fact the then incumbent was only

Smith v. *Land, &c. Corporation*, [illegible] D. 7, especially *per* Bowen L.J. [illegible] 16, criticizing the language of Jessel M.R. in *Redgrave* v. *Hurd*, 20 [illegible] D. 1, 21. Some language of [illegible] Hoskyns L.C. in *Arnison* v. *Smith*, 41 [illegible] 369, has been thought to favour the view of Jessel M.R. in *Redgrave* v. *Hurd*.

[2] *Clarke* v. *Dickson*, 6 C. B. N. S. 453; *Voulfes* v. [illegible], 3 De G. & J. 387. *Jennings* v. *Broughton*, 17 Beav. 234; 5 De G. M. & G. 126; cf. *Behrens* v. *Yates*, 4 Ch. D. 148.

thirty-two years of age: Grant M.R. held the representation made by the particulars so vague and indefinite that its only effect ought to have been to put the defendant upon making inquiries, and accordingly granted specific performance.[1] And so, again, the representation that land was uncommonly rich water-meadow, whereas, in fact, it was very imperfectly watered, was held not to be a bar to performance: and the like was held as regards a statement to the effect that the land in course of time might be covered with warp and considerably improved at a moderate cost.[2]

Vendor's statements must be unambiguous.

§ **674**. But generally speaking, in statements made by the vendor as to property, he is bound to make them free from all ambiguity, and "the purchaser is not bound to take upon himself the peril of ascertaining the true meaning of the statement;"[3] and in all cases of commendation by the vendor, a specific statement as to the character of the thing sold is to be distinguished from general laudation. The statement that a lime which would be produced by stone to be got in an unopened field would be of a particular quality, was held sufficiently precise to furnish a defence.[4]

Commendation by vendor.

Other grounds for considering that there was not reliance.

Clapham v. Shillito.

§ **675**. Besides the vagueness of the representation there are other grounds upon which the Court will conclude that it was not relied upon by the party to whom it was made: these were discussed by Lord Langdale M.R. in the case of *Clapham* v. *Shillito*.[5] His Lordship there said: "Cases have frequently

[1] *Fearon* v. *Norcome*, 3 Mer. 701; *Scott* v. *Hanson*, 1 Sim. 13; 5 C. L. R. & My. 128. See also on this point, *Fenton* v. *Browne*, 14 Ves. 144. *Brealy* v. *Collins*, You. 317; *Brooke* v. *Roundthwaite*, 5 Ha. 298.

Dimmock v. *Hallett*, L. R. 2 Ch. 21.

[2] See Lord St. Leonards in *Mort-*

v. Cotter, 6 Jon. & La. [illegible]; *Wall* v. *Stubbs*, 1 Mad. [illegible]; *Watson* v. *Rogerson*, 1 De G. & Sm. 351; *Caballero* v. *Henty*, L. R. 9 Ch. 447.

[3] *Higgins* v. *Samson*, 2 J. & H. 460. See too, *Gibson* v. *Goldsmid*, 5 Beav. 465, reversed 15 W. [illegible]; 7 Beav. 140.

occurred in which upon entering into contracts misrepresentations made by one party have not been, in any degree, relied on by the other party. If the party to whom the representations were made himself resorted to the proper means of verification, before he entered into the contract, it may appear that he relied upon the result of his own investigation and inquiry, and not upon the representations made to him by the other party: or if the means of investigation and verification be at hand, and the attention of the party receiving the representations be drawn to them, the circumstances of the case may be such as to make it incumbent on a Court of justice to impute to him a knowledge of the result, which, upon due inquiry, he ought to have obtained, and thus the notion of reliance on the representations made to him may be excluded. Again, when we are endeavouring to ascertain what reliance was placed on representations, we must consider them with reference to the subject-matter and the relative knowledge of the parties. If the subject is capable of being accurately known, and one party is, or is supposed to be, possessed of accurate knowledge, and the other is entirely ignorant, and a contract is entered into after representations made by the party who knows, or is supposed to know, without any means of verification being resorted to by the other, it may well enough be presumed that the ignorant man relied on the statements made to him by him who was supposed to be better informed: but if the subject is in its nature uncertain,—if all that is known about it is matter of inference from something else, and if the parties making and receiving representations on the subject have equal knowledge and means of acquiring knowledge, and equal skill, it is not easy to presume that representations made by one would have much or any influence upon the other."[1]

[1] 7 Beav. at pp. 149, 150.

Mere presence of means of knowledge

§ 676. It must not from this be inferred that the mere presence of the means of detecting the misstatement prevents the deceived person from relying on it.[1] If a statement be made by A. to B. and the means of verification be offered, B may rely on the statement and refuse the investigation: but if he accept the investigation and find or might have found the statement false, he cannot afterwards allege that he relied on the statement: for in fact he did not.

Resort to other means of knowledge

§ 677. He who, because he does not rely on what is stated to him, resorts to other means of knowledge cannot afterwards say that the misrepresentation was what he relied on. "If," said Lord Holt C.J., alluding to the circumstances of the case before him, "the vendor gives in his particular of the rents, and the vendee says he will trust him and inquire no further, but rely upon his particular; then, if the particular be false, an action will lie; but if the vendee will go and inquire further what the rents are, there it seems unreasonable he should have any action, though the particular be false, because he did not rely upon the particular."[2]

Attwood v. *Small*

§ 678. It was on this ground that the House of Lords ultimately decided the celebrated case of *Attwood* v. *Small*.[3] The British Iron Company had sent a deputation of their directors down to Mr. Attwood's works for the express purpose of verifying his representations, and they expressed their satisfaction with the proofs produced: by this line of conduct they precluded themselves from being able to rely on any previous misrepresentations: for if a purchaser chooses to judge for himself, and does not avail himself of all the

[1] *Central Railway Co. of Venezuela* v. *Kisch*, L. R. 2 H. L. 99, affirming S. C. 3 De G. J. & S. 122; *Smith* v. *Land, &c. Corporation*, 28 Ch. D. 7, *per* Lord Halsbury L.C. in *Aaron's Reefs* v. *Twiss*, [1896] A. C. 273, at p. 279; 65 L. J. P. C. 74 L. T. 794.

[2] *Lysney* v. *Selby*, 2 Lord Ray. 1118, 1120.

[3] 6 C. B. & Fin. 232.

knowledge and means of knowledge open to him, he will not afterwards be allowed to say that he was deceived by the representations of the vendor. This decision was given in a suit for rescission, and not upon a defence to a specific performance; but for the present point these seem to be alike.' But the mere fact of resorting to some means of knowledge is not always inconsistent with reliance upon a statement made.[1]

§ **679**. The principle is further illustrated by the case of *Jennings* v. *Broughton*,[2] where the plaintiff, having bought shares in a mine, afterwards sought to set aside the sale on the ground of misrepresentation as to the state of the mine; but he having visited the mine himself, and the alleged misstatements being such as he was competent to detect, the Court held that his purchase of shares had not been made in reliance on the representations, and the bill was dismissed both by Lord Romilly M.R. and the Court of Appeal in Chancery. "I desire," said Knight Bruce L.J., "to be understood as at once giving my opinion against the plaintiff with regard to every 'object of sense' which on either visit to the mine he may, as an educated man of ordinary intelligence, having the use of his eyes, his mind on the alert and his interest awakened, be reasonably taken (whether much or little of a workman or a philosopher) to have observed."[3] With this last-mentioned case may advantageously be brought into comparison the case of *Higgins* v. *Samels*,[5] where the representation was as to the character of the lime which could be made from the stone under a field, and where after this statement the defendant and two friends made

Jennings v. Broughton.

Higgins v. Samels.

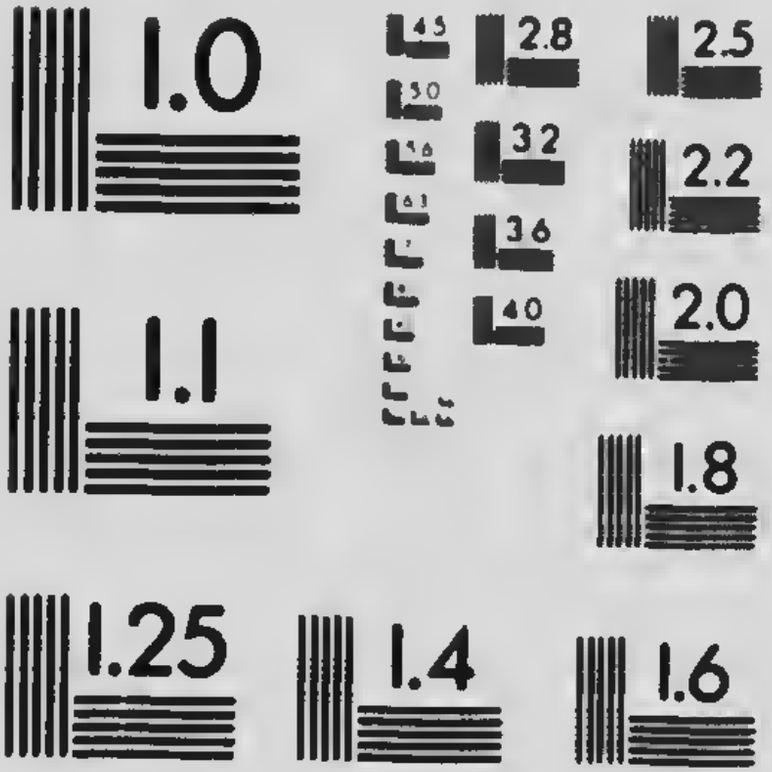
[1] Cf. *Abercrombie Ironworks* v. *Wilkens*, L. R. 1 Ch. 101, reversing S. C. L. R. 5 Eq. 485; *Earlebrother* v. *Gibson*, 1 De G. & J. 602.

Redgrave v. *Hurd*, 20 Ch. D. 1, 19.

[2] 5 De G. M. & G. 126, affirming S. C. 17 Beav. 234.

[3] 5 De G. M. & G. at p. 134. See also *Haycroft* v. *Cope*, 25 Beav. 140; and *Jeffreys* v. *Evans*, 1 Ch. D. 118.

[5] 2 J. & H. 160.



a cursory inspection of the field in company with the plaintiff, and it did not appear that any of the persons were competent to judge by inspection of the quality of the stone for the purpose of lime burning. In this case Lord Hatherley (then V.C.) considered that the inspection did not preclude the defendant from relying upon the misrepresentation.

Lowndes v. Lane.

§ **680**. Where a purchaser complained of a representation that the woods sold had yielded 250*l.* per annum on an average of fifteen years, on the ground that though they might in fact have done so, yet that they would not have done so in a fair course of husbandry, his objection was held to be displaced by proof that he had been put in possession of a paper from which he might have ascertained that the woods had been unequally cut.[1]

Other knowledge itself.

§ **681**. The allegation of misrepresentation may also be effectually met by proof that the party alleging it was from the beginning cognizant of all the matters complained of,[2] or after full information concerning them continued to act on the footing of the contract, or to deal with the property comprised in it as if held under the contract: as, for instance, where a lessee of a mine after knowledge of alleged misrepresentation, continued to work it.[3]

Misrepresentation of law.

§ **682**. Whether a misrepresentation not of fact, but of law, would afford a defence to an action for specific performance has not, it is believed, been decided.[4] But for the purposes of holding a defendant liable to make good a representation, or of rescinding a contract,[5] it is certain that it must be a statement not of law, but of

[1] *Lowndes* v. *Lane*, 2 Cox, 363. See, too, *Clarke* v. *Mackintosh*, 1 Giff. 134; 11 W. R. 652.

[2] Cf. *Nene Valley Drainage Commissioners* v. *Dunkley*, 4 Ch. D. 1, 4, where misdescription was alleged.

[3] *Vigers* v. *Pike*, 8 Cl. & Fin. 562, 650; *Hume* v. *Pocock*, L. R. 1 Eq. 423; 1 Ch. 379.

[4] Cf. *infra*, § 797 (mistakes of law).

[5] See *Wauton* v. *Coppard*, [1899] 1 Ch. at p. 97.

fact.[1] No one is at liberty to say that he does not know the law.

Misrepresentation as to title.

§ 683. Questions of title are mixed questions of law and fact: but where the vendors knew of a fact which destroyed their title to a material part of the property sold (viz., the fact that it was a recent encroachment from a common), and nevertheless represented that they were the owners in fee simple or had free power to dispose of the inheritance of the whole of the property sold, and the abstract they delivered did not disclose the material fact, it was held by Grant M R. and Lord Eldon that a bill for rescission could be maintained. This was the case of *Edwards* v. *M'Leay*.[2]

The doctrine of *Edwards* v. *M'Leay* not of universal application.

§ 684. But it must not thence be inferred that every representation that the vendor has a good title will enable the purchaser to set aside an executed contract or successfully resist specific performance.[3]

Gibson v. *D'Este*.

§ 685. The authority of *Edwards* v. *M'Leay* was followed and relied on by Knight Bruce V.C. in the celebrated case of *Gibson* v. *D'Este*,[4] in which he decided that the knowledge in the vendor or her agent of a right of way over the property sold of which the purchaser was not aware, and which was not stated to him by the vendor or her agent, was a ground for the rescission of the contract. This decision was, however, overruled by the House of Lords, on the principle that, in order to set aside a purchase perfected by conveyance and payment of the purchase-money, there must be proof of the direct personal knowledge and concealment by the principal, and not merely by an agent, and that

[1] *Beattie* v. *Lord Ebury*, L. R. 7 Ch. 777, affirmed in D. P., L. R. 7 H. L. 102; *Legge* v. *Croker*, 1 Ball & B. 506.

[2] Coop. 308; 2 Sw. 287; St. Lead. Law of Prop. 649. See *Turner* v. *West Bromwich Union*, 9 W. R. 155; *Hart* v. *Swaine*, 7 Ch. D. 42, 47.

[3] *Legge* v. *Croker*, 1 Ball & B. 506; *Hume* v. *Pocock*, L. R. 1 Eq. 423; 1 Ch. 379; *Browndie* v. *Campbell*, 5 App. Cas. 925, 937. Cf. *Brett* v. *Clowser*, 7 C. P. D. 376.

[4] 2 Y. & C. C. C. 542.

such proof was wanting in the case.[1] This decision has by no means given universal satisfaction,[2] but whether correct or not, it leaves intact the doctrine established in *Edwards* v. *M'Leay*.

Where defect is patent.

§ 686. Where a misrepresentation has been made by the vendor with regard to some patent defect in the thing sold, and it is proved that the purchaser had seen the thing sold, so that this defect must have been known to him, he will not be able to avail himself of the defect as a bar to specific performance. This was decided by Grant M.R. in the case of *Dyer* v. *Hargrave*,[3] where a farm was described as all lying within a ring-fence, whereas it did not in fact so lie; but it was clearly proved that the defendant had lived in the neighbourhood all his life, had seen the farm before purchasing it, and must have known whether it did lie in a ring-fence or not; and on these facts the Master of the Rolls decided that the defendant was clearly excluded from insisting upon the misrepresentation as a defence. This principle will of course only apply where the thing in respect of which the representation is made is one perfectly visible to everybody.[4]

Analogy with warranties.

§ 687. The decision in *Dyer* v. *Hargrave*[5] was supported by Grant M.R.[6] by the analogy of warranties at Common Law, in which, however general, defects apparent at the time of the bargain are not included, because they can form no subject of deceit or fraud; so that, for example, a person who buys a horse knowing it to be blind in both eyes, cannot sue for this defect on a general warranty of soundness.[7]

The evidence of

§ 688. But for the vendor thus to countervail the

[1] *Sed vide Wilde* v. *Gibson*, 1 H. L. C. 605. See *Brownlie* v. *Campbell*, 5 App. Cas. 925, 937; *Seddon* v. *North Eastern Salt Co.* (executed contract for sale of chattel or chose in action), [1905] 1 Ch. 326; and consider *Brett* v. *Clowser*, 5 C. P. D. 376, 388.

[2] St. Leon. Law of Prop. 614.

[3] 10 Ves. 505. See *supra*, § 679.

[4] *Grant* v. *Munt*, Coop. 173; *infra*, § 868 *et seq.*

[5] In 10 Ves. at p. 507.

[6] *Bayly* v. *Merrel*, Cro. Jac. 679; *Margetson* v. *Wright*, 7 Bing. 603.

effects of his own misrepresentation, the evidence of knowledge in the other party must be conclusive: he "must show very clearly that the purchaser knew that to be untrue which was represented to him as true; for no man can be heard to say that he is to be assumed not to have spoken the truth."[1]

knowledge must be clear.

§ **689**. Such being the proof required, it is very certain that the mere circumstance of other means of knowledge being open to the purchaser will not have this effect, even though, independently of any statement, the party relying on the representation would in law have been taken to have had notice of the contrary. The doctrine of notice has no application where there has been a representation as to the fact of which notice would be implied:[2] the proof must go further, and clearly show the purchaser to have had communicated to his mind information of the real state of facts.[3]

Other means of knowledge open to the purchaser not enough.

Doctrine of notice does not apply.

§ **690**. Therefore, where a distinct representation has been made, it will not be countervailed by any general statement or any circumstances from which an inference inconsistent with the representation might be drawn, even though in the absence of such representation they might be sufficient to put the other party on inquiry.[4]

General statement inconsistent with the misrepresentation is not enough.

§ **691**. Nor will it prevent the effect of a misrepresentation that the party making it recommended the other to consult his friends and professional advisers, for "no man can complain that another has too implicitly relied on the truth of what he has himself stated."[5]

Recommendation to other party to consult his adviser.

[1] *Per* Knight Bruce L.J. in *Price* v. *Macaulay*, 2 De G. M. & G. 346; *Wilson* v. *Short*, 6 Ha. 366, 378; *Dyer* v. *Hargrave*, 10 Ves. 505; *Legland* v. *Illingworth*, 2 De G. F. & J. 248; *Colby* v. *Gadsden*, 34 Beav. 416, reversed 13 W. R. 1185.

[2] *Drysdale* v. *Mace*, 2 Sm. & Gif. 225, 230; cf. *per* Jessel M.R. in *Jones* v. *Rimmer*, 14 Ch. D. at p. 590.

[3] *Price* v. *Macaulay*, 2 De G. M. & G. 339. See also *Gibson* v. *D'Este*, 2 Y. & C. C. C. 542, 572.

[4] *Wilson* v. *Short*, 6 Ha. 366, 377.

[5] *Reynell* v. *Sprye*, 1 De G. M. & G. 660, 710; *Dobell* v. *Stevens*, 3 B. & C. 623.

Misrepresentation as to lease.

§ 692. Thus where a misrepresentation is made by a vendor in respect of a lease, of the covenants in which the purchaser would[1] by law be implied to have notice, the vendor will be equally bound by his statement as if no such implication arose.[1]

As to character of building.

On the same principle it was decided that where a vendor represented the house to be substantially and well built, and it proved to be the contrary, the vendor was not entitled to specific performance, though the defendant might of course have inquired into its actual state.[2]

As to profits of theatre.

§ 693. In *Harris* v. *Kemble*[3] there was a contract consequent upon certain misrepresentations as to the profits of a theatre: Leach V.C. was of opinion that these representations being manifestly founded on accounts which were equally open to both parties (they being joint owners of the theatre), and being justified by the accounts, did not avoid the contract; but his decision was overruled by Lord Lyndhurst, and afterwards by the House of Lords, on the ground that the representations were made with a view to the contract, and that the accounts were so kept as to render it difficult without employing an accountant to draw any certain conclusion from them.

Sale with all faults.

§ 694. The circumstance that the vendor sold "with all faults," though it may serve to put the purchaser on his guard, will not enable the vendor to say that the purchaser did not rely on any representation made, or prevent the purchaser from avoiding the sale, if that representation were false.[4]

Assignment of a contract affected by mis-

§ 695. The principle that, in order to render a misrepresentation operative, there must be reliance on it by the party who uses it as a defence, applies to the

[1] *Van* v. *Corpe*, 3 My. & K. 269; *Flight* v. *Barton*, id. 282; *Pope* v. *Garland*, 4 Y. & C. Ex. 394, 401. Distinguish *Paterson* v. *Long*, 6 Beav. 590.

[2] *Cox* v. *Middleton*, 2 Drew. 209.

[3] 1 Sim. 111, particularly 120; S. C. 5 Bli. N. S. 730.

[4] *Schneider* v. *Heath*, 3 Camp. 506. See also *infra*, § 876.

case of the assignment of a contract originally affected by such a circumstance: thus it seems that if A. contract with B., and in so doing there are misrepresentations on the part of A. which would prevent his enforcing the contract against B., and B. assign the contract to C., on whom no fraud is practised and who is not affected by the original misrepresentation, in such circumstances the contract might be enforced against C., for he placed no reliance on the misrepresentation made to B.[1] representation.

§ **696**. From the same principle it follows that if A. make a misrepresentation to the agent of B., which is believed by the agent to be true but known by B. to be false, B. cannot avail himself of this as a defence to specific performance.[2] Statement to agent known by principal to be false.

§ **697**. (vi.) It is, for obvious reasons, necessary, to constitute a misrepresentation which will prevent a specific performance, that the statement in question shall be so material to the contract built on it that, if the statement be false, the contract becomes one which it would be unconscionable for the party having made the statement to enforce. In other words, the misrepresentation must be shown to have operated to the prejudice of the defendant.[3] Therefore, where A. induced a purchaser to think that he was contracting with B. through his (A.'s) agency, whereas he was, in fact, contracting with A. himself, but there was nothing to induce the belief that he would not have contracted on the same terms with A., or that he had sustained any loss or inconvenience from acting under the mistake, the Court enforced performance of the contract.[4] But it is sufficient if the misrepresentation operate to the prejudice of the defendant to a very small extent.[5] vi. The misrepresentation must be essential

[1] *Smith* v. *Clarke*, 12 Ves. 477, 484.

[2] *Nelson* v. *Stocker*, 4 De G. & J. 458.

[3] See *Pollhill* v. *Walter*, 3 B. & Ad. 114.

[4] *Fellowes* v. *Lord Gwydyr*, 1 Sim. 63; S. C. 1 R. & My. 83; cf. *Flint* v. *Woodin*, 9 Ha. 618.

[5] *Cadman* v. *Horner*, 18 Ves. 10.

"A man may with impunity," said North J., in *Archer* v. *Stone*,[1] "tell a lie in gross in the course of negotiations for a contract. But he cannot, in my opinion, tell a lie appurtenant. That is to say, if he tells a lie relating to any part of the contract or its subject-matter, which induces another person to contract to deal with his property in a way which he would not do if he knew the truth, the man who tells the lie cannot enforce the contract."

Misrepresentation not avoided by conditions.

§ 698. In *Nottingham Patent Brick Co.* v. *Butler*,[2] the land was subject to covenants preventing its use as a brick field in favour of a group of purchasers from an original vendor. The conditions of sale stated that the property was sold subject to any matter or thing affecting the same whether disclosed at the time of sale or not, and that any error or omission in the particulars should not annul the sale or entitle the purchaser to compensation. The contract was brought about by a representation in substance that the land could be used for brickmaking. It was held that the purchaser could rescind and recover his deposit, notwithstanding the conditions of sale.

Cases considered under the head of Fraud.

§ 699. The effect of misrepresentation on the contract and the rights of the parties under it is further considered in connection with cases of fraud in the next chapter.

§ 700. The right to rescind on the ground of misrepresentation is adverted to in the chapter on Rescission of the Contract.[3]

The distinction of the casuists between *error antecedens* and *concomitans* was the same as that referred to in this section. Error "dividitur in *antecedentem* qui dat causam contractui, ita ut, eo absente, contractus non fieret, et in *concomitantem*, seu incidentem, quo etiam absente adhuc contractus iniretur. . . . Si error circa solam qualitatem accidentalem contigerit, quæ simul cum substantiâ rei non ingreditur objectum substantiale contractûs, hic validus omnino persistet." Mariani Examen, § 279.

[1] 78 L. T. at p. 35.

[2] 15 Q. B. D. 261; 16 Q. B. D. 778. See also *Heywood* v. *Mallalieu*, 25 Ch. D. 357.

[3] *Infra*, Part III. chap. xxiv. § 1059.

CANADIAN NOTES.

Misrepresentation—Degree of Latitude Allowed.

Although a vendor is allowed great latitude in the statements or exaggerations he may make as to the general qualities and capabilities of land he is about to offer for sale, still he will not be permitted to make direct mis-statements and misrepresentations as to matters of fact which would naturally have the effect of inducing parties resident at a distance to bid for the property. Therefore, where an advertisement of property about to be sold described it as being a farm of 81½ acres, twenty acres cleared and fenced, on the faith of which the plaintiff purchased, when in fact there was not any clearing or fencing made upon the premises, the Court, Blake, V.-C., in pronouncing a decree for specific performance at the instance of the purchaser, directed a reference to the Master to make an allowance in respect of the matters misrepresented and ordered the vendor to pay the costs of the suit. *Stammers v. O'Donnough*, 28 Grant's Ch. 307.

Over-praise not Fatal to Contract.

An agreement was made between two parties for the exchange of their respective lots, one claiming that his lot was worth $900 and the other that his lot was worth $800. They ultimately agreed to exchange, the latter paying $100 in money for the difference in the assumed value. Neither had any knowledge of the other's lot, but the truth was that the plaintiff's was worth only $400. It was held that the doctrine of *caveat emptor* applied and that the plaintiff was entitled to enforce the contract, on the ground that inadequacy of price or consideration alone was not a sufficient ground for escaping from a contract. "It was said that there was misrepresentation of value as well as the inadequacy of consideration. The misrepresentation, however, was not of a sort which re-

lieves a party. Every misrepresentation is wrong, and inexcusable in point of morals, but if a party enters into a contract for the purchase of property it has been thought best that he should be made to abide by the contract though the opposite party may, in the negotiations, have over-praised or over-valued his property." *McRae* v. *Froom*, 17 Grant's Ch. 357.

Representations as to Obvious Matters—Caveat Emptor.

By the advertisement of an intended sale of land in lots, it was stated that the soil was well adapted for gardening purposes and a considerable portion of the property was covered with a fine growth of pine and oaks which would yield a large quantity of cordwood, the remainder being covered with an ornamental second growth of evergreen and various other kinds of trees. A purchaser at the sale, which took place upon the property set up as a defence to a suit for specific performance that the soil was not such as was represented and was unfit for gardening purposes and that the trees upon the property were not such as set forth in the advertisement. It was held that these representations, having been made in respect of matters which were objects of sense, and as to which an intending purchaser ought in prudence to have examined for himself, formed no ground for relieving the purchaser upon the contract and the specific performance was decreed. *Crooks* v. *Davis*, 6 Grant's Ch. 317.

Caveat Emptor Applied Notwithstanding Misrepresentation.

In *Hannah* v. *Graham*, 17 Man. 532, defendant resisted the plaintiff's claim for specific performance of a contract for the sale of a farm of his, alleging that he had wholly relied on the plaintiff's representations that the farm consisted of a black sandy loam, eighteen or twenty inches deep, with clay bottom, free from white sand, worth fifteen dollars per acre and that these representations were all untrue. The defendant had not inspected the land before purchasing, but had consulted

parties other than the plaintiff as to the quality, location and value of the property. The trial Judge's findings of fact, both as to the representations and as to their falsity, were adverse to the defendant. The Court, while expressing doubt as to whether they would have decided the same way, held that the finding of the trial Judge could not properly be reversed. The trial Judge had held that, apart altogether from the conflict of testimony, the plaintiff could not succeed in having the contract rescinded on the ground set up, as public policy required that persons should be expected to exercise ordinary prudence in their business dealings, instead of calling on the Courts to relieve them of the consequences of their own inattention and negligence.

Phippen J.A. dissented following *Redgrave v. Hurd*, 20 C.D. 1, and *Smith v. Land Corporation*, 28 C.D. 7

CHAPTER XIV.

FRAUD.

Fraud.

§ 701. FRAUD[1] of course includes not only misrepresentation when fraudulent, which has already been considered, but also all other unconscionable and deceptive dealing of either party to any contract.

It comes before the Court in several relations.

§ 702. Fraud comes before the Court in several relations:—as a defence to an action for damages on the contract; as the ground for an action for deceit; as a ground for setting aside an executory or even an executed contract; as forming an exception to the Statute of Frauds (in which relation it has been considered in the chapter[2] on that statute); and lastly, as a defence to an action for specific performance. With the last only we are now directly concerned.

Fraud in obtaining contract.

§ 703. Fraud may arise either in the obtaining of the contract, or in the course of its performance.

Fraud in the obtaining of the contract has long been held a ground for the cancellation of the contract; and *à fortiori* it presents to the party defrauded a complete defence to an action for specific performance.

Fraud in performing contract.

§ 704. Whether fraud in the course of its performance is in all cases a ground for the rescission of

[1] "Fraud is infinite in variety; sometimes it is audacious and unblushing; sometimes it pays a sort of homage to virtue, and then it is modest and retiring; it would be honesty itself if it could only afford a . . . But fraud is fraud all the same, and it is the fraud, not the manner of it, which calls for the interposition of the Court." *Per* Lord Macnaghten in *Reddaway* v. *Banham*, [1896] A. C. at p. 221. "Fraud vitiates every contract and every clause in it." *Per* Lord James of Hereford in *S. Pearson & Son* v. *Dublin Corporation*, [1907] A. C. at p. 362.

[2] Part III. chap. xi. § 567 *et seq.*

a contract is a point which cannot be considered as finally settled: it certainly appears to be so in all cases in which rescission is the only adequate remedy.[1] It is conceived that in no case could a party guilty of fraud in the performance of a contract ask the Court to interfere for the purpose of enforcing its further performance. Thus if A. were to contract with B. for the sale of an estate at such a price as C. should fix and then were to bribe C. to fix a very high price, A. could never, it is submitted, bring an action against B. for the performance of the contract either at a price to be fixed by C. or by any third person.

Suppression of a fact.

§ 705. In the chapter on Misrepresentation it has been seen, that the suggestion of what is false is a ground for refusing specific performance, and also in certain cases for rescinding contracts: the same results flow from the non-disclosure of a fact which is material, and which it is the duty of one party to the contract to disclose to the other,[2] or from the active suppression and concealment of a fact which is material, and which the other party would have come to know, but for such suppression and concealment.

Silence.

But mere silence as regards a material fact which the one party is not under an obligation to disclose to

[1] *Panama and South Pacific Telegraph Co.* v. *India-rubber, Guttapercha and Telegraph Works Co.*, L. R. 10 Ch. 515.

[2] The question as to what facts which might influence the mind of one party it is the duty of the other, if knowing of them, to communicate, is one of great difficulty. It is discussed by Cicero in a well-known passage (De Offic. lib. iii. c. 12 *et seq.*); culpable concealment being in his opinion "cum quod tu scias id ignorare emolumenti tui causâ velis eos quorum intersit id scire." c. 13. The limitation put by Grotius on this principle would probably be adopted by our law, "non ergo generaliter sequendum illud ejusdem Ciceronis, celare eos, cum tu quod scias id ignorare emolumenti tui causâ velis eos quorum intersit scire: sed tum demum id locum habet, cum de iis agitur quæ rem subjectam per se contingunt." De Jur. Belli ac Pacis, lib. ii. c. 12. s. 9. See also Pothier, Tr. du Contrat de Vente, Part II. chap. 2. Consider *Blenkhorn* v. *Penrose*, 29 W. R. 237; *Jones* v. *Peuder*, L. R. 9 Q. B. 531. It is the duty of a vendor to disclose restriction covenants, *Hone* v. *Gakstatter*, 53 Sol. Jo. 286.

the other cannot be a ground for rescission or a defence to specific performance.[1] "Silence is innocent and safe where there is no duty to speak."[2]

It becomes then most material to consider what facts either party to a contract is bound to disclose to the other.

Obligation to disclose.

§ 706. The obligation to disclose arises in various ways.[3]

i. Where fiduciary relationship.

(i.) Where the parties to a contract stand in some pre-existing relationship to one another of a fiduciary character (as, for example, the relation of agent and principal[4]), they can only deal after the most full disclosure. The relations of trustee and *cestui que trust*,[5] solicitor and client, partner and partner, are all well known to be of a fiduciary kind. The cases arising out of such relationships show that when there is a non-disclosure of that which it is the plaintiff's duty to disclose, no specific performance can be granted.

ii. Where antecedent wrong done.

§ 707. (ii.) Sometimes the obligation to disclose may even arise from an antecedent wrong done by the one party to the other. "If," said Lord Hatherley, "a man knows that he has committed a trespass of a very serious character upon his neighbour's property, and finding it convenient to screen himself from the

[1] See, for instance, *Turner* v. *Green*, [1895] 2 Ch. at p. 208, in which case it was held that the plaintiff's solicitor was not bound to disclose, at an interview with the defendant to arrange an agreement for the compromise of an action, some material information which the solicitor had received in a telegram; also *Greenhalgh* v. *Brandley*, [1901] 2 Ch. 324; *Re Ward and Jordan's Contract*, [1902] 1 I. R. 72; and *Percival* v. *Wright*, [1902] 2 Ch. 421; 51 W. R. 31. Distinguish *Carlish* v. *Salt*, [1906] 1 Ch. 335, 340; 75 L. J. Ch. 175.

[2] *Per* Lord Macnaghten in *Chadwick* v. *Manning*, [1896] A. C. at p. 238.

[3] See *Davies* v. *London and Provincial Marine Insurance Co.*, 8 Ch. D. 469, 474.

[4] See *Imperial Mercantile Credit Association* v. *Coleman*, L. R. 6 H. L. 189; *Dunne* v. *English*, L. R. 18 Eq. 524.

[5] Probably in the case of a tenant for life purchasing from his trustees there is a relationship imposing a similar obligation. See *per* James L.J. in *Divonson* v. *Talbot*, L. R. 6 Ch. at p. 37.

consequences, makes a proposal for the purchase of that property, he certainly ought to communicate to the person with whom he is dealing the exact state of the circumstances of the case:"[1] and on that ground and under those circumstances specific performance was refused.

iii. From character of contract.

§ **708.** (iii.) Sometimes the obligation to disclose arises from the character of the contract itself. For there are certain contracts which are said to be *uberrimæ fidei*: *i.e.*, they are contracts which from their nature demand a full disclosure of all material facts by the one contracting party to the other: such are contracts for marine insurance, and contracts for the formation of a partnership. In these cases silence may be fraud.[2] So again, in the case of the contract between a company and a person taking shares, the Courts have held that there is an obligation to disclose material circumstances.[3]

Latent defect.

In the case of a contract for the sale of a chattel having a latent defect, there exists an obligation to disclose that defect.[4]

iv. From course of negotiation.

§ **709.** (iv.) Sometimes the obligation to disclose arises from the course of the negotiation itself.

It is evident that the making of one statement during a negotiation may create an obligation to make another: so, if in the course of a negotiation A. make a statement to B. which is false in fact and which A. subsequently discovers to be false, he is under an obligation to state that discovery; or if A. make a statement to B. which at the time is true but in the course of the negotiations becomes false, A. becomes

[1] *Phillips* v. *Homfray*, L. R. 6 Ch. 770, 779.

[2] See *per* Lord Blackburn in *Brownlie* v. *Campbell*, 5 App. Cas. at p. 951.

[3] *New Brunswick, &c. Co.* v. *Muggeridge*, 1 Dr. & Sm. 363; *Central Railway Co. of Venezuela* v. *Kisch*, L. R. 2 H. L. 99; *Henderson* v. *Lacon*, L. R. 5 Eq. 249. Consider *Arkwright* v. *Newbold*, 16 Ch. D. 301.

[4] *Horsfall* v. *Thomas*, 1 Hurl. & Colt. 90.

under an obligation to state that change of fact to B.[1]

"When," said Lord Blackburn, addressing the House of Lords, "a statement or representation has been made in the *bonâ fide* belief that it is true, and the party who has made it afterwards comes to find out that it is untrue, and discovers what he should have said, he can no longer honestly keep up that silence on the subject after that has come to his knowledge, thereby allowing the other party to go on, and still worse inducing him to go on, upon a statement which was honestly made at the time when it was made, but which he has not now retracted when he has become aware that it can be no longer honestly persevered in. That would be fraud too, I should say, as at present advised. And I go on further still to say, what is perhaps not quite so clear, but certainly it is my opinion, where there is a duty or obligation to speak, and a man in breach of that duty or obligation holds his tongue and does not speak, and does not say the thing he was bound to say, if that was done with the intention of inducing the other party to act upon the belief that the reason why he did not speak was because he had nothing to say, I should be inclined myself to hold that that was fraud also."[2] Lord Blackburn quoted.

§ **710**. Again, entire silence can hardly deceive: but an imperfect statement may be a perfect untruth. For instance, if the owners of a business, desiring to sell it to a company, put out a prospectus containing various statements, each in itself correct, but keep silence on a material fact, it would seem well worthy of consideration whether these persons who were under no antecedent obligation to make any statement have not, by saying something, assumed an obligation to tell not Imperfect statement.

[1] *Roynell* v. *Sprye*, 1 De G. M. & G. 660, 703; *Traill* v. *Baring*, 4 De G. J. & S. 318, 329.

[2] In *Brownlie* v. *Campbell*, 5 App. Cas. at p. 950.

only the truth but the whole truth.[1] So where a proposed creditor describes a transaction to the proposed sureties, the description may be evidence of a representation that there is nothing in the transaction that might not naturally be expected to take place between the parties to the transaction described.[2]

v. From obligation subsequent to the contract.

§ **711.** (v.) Further, it must, to prevent confusion, be observed that there are obligations to disclosure which arise from the contract itself: as, for example, the obligation on a vendor of real estate honestly to disclose his title. This is a duty arising out of and subsequent to the contract, and the non-performance of this duty cannot constitute fraud *dans locum contractui*. With these we are not at present concerned.

vi. Statutory obligation.

§ **712.** (vi.) Lastly, an obligation to disclosure may arise from statute. Thus, by the 38th section of the Companies Act, 1867, it was provided that every prospectus of a company, and every notice inviting persons to subscribe for shares in any joint-stock company, should specify the dates and the names of the parties to any contract entered into by the company, or the promoters, directors, or trustees thereof, before the issue of such prospectus or notice. That section has been repealed[3]; but the 81st section of the Companies (Consolidation) Act, 1908, provides that every prospectus issued by or on behalf of a company, or by or on behalf of any person who is or has been engaged

[1] Consider *Peek* v. *Gurney*, L. R. 6 H. L. 377; also the provisions of the Companies (Consolidation) Act, 1908, ss. 80, 81, and 84. See, too, *Greenwood* v. *Leather Shod Wheel Co.*, [1900] A. C. 421, 431; 69 L. J. Ch. 131, approving *Drincqbier* v. *Wood*, [1899] 1 Ch. 393; 68 L. J. Ch. 181.

[2] *Lee* v. *Jones*, 17 C. B. N. S. 482, 503.

[3] Sc. by the Companies Act, 1900, s. 33, which Act was in its turn repealed by the Companies (Consolidation) Act, 1908, s. 286, subss. (1) and (2). But a right of action accrued or accrued under the repealed section of the Act of 1867 may be enforced notwithstanding the repeal. See, *e.g.*, *Cackett* v. *Keswick*, [1902] 2 Ch. 456; *Broome* v. *Speak*, [1905] 1 Ch. 586, 602: affirmed *s.n. Shepheard* v. *Broome*, [1904] A. C. 342, 346.

or interested in the formation of the company, must state (*inter alia*) "the dates of and parties to every material contract, and a reasonable time and place at which any material contract or a copy thereof may be inspected: provided that this requirement shall not apply to a contract entered into in the ordinary course of the business carried on or intended to be carried on by the company, or to any contract entered into more than two years before the date of issue of the prospectus."

Mere silence generally permissible in either party.

§ 713. But it has never (it is believed) been held by our Courts that there is any general obligation to disclosure on the part of a vendor or purchaser of chattels or realty, though the person maintaining silence may know that the other party is acting under an erroneous impression. "*Aliud est celare, aliud tacere; neque enim id est celare quicquid reticeas.*"[1]

It has been justly observed by Mr. W. W. Story[2] that "it is the general policy of the law, in order to induce vigilance and caution and thereby to prevent those opportunities of deceit which lead to litigation, to throw upon every man the responsibilities of his own contracts and to burden him with the consequences of his careless mistakes." "I am not aware," said Lord Chelmsford, addressing the House of Lords in the case of *Peek* v. *Gurney*,[3] "of any case in which an action at Law has been maintained against a person for an alleged deceit, charging merely his concealment of a material fact which he was morally but not legally

[1] Cicero De Off. lib. iii. c. 13. Cicero continues: "*sed cum, quod tu scias, id ignorare emolumenti tui causâ velis eos, quorum intersit id scire.*" The passage has been cited by Lord Mansfield in *Carter* v. *Boehm* (3 Bur. 1910), and by Knight Bruce L.J. in *Nelthorpe* v. *Holgate* (1 Coll. 221). If the whole is to express the principles of our law, *velis* must, it is conceived, import not only will, but some act consequent thereupon. *Davenport* v. *Charsley*, 34 W. R. 391. See *supra*, § 705, note 1.

[2] Law of Contracts (5th ed.), s. 644. See, too, *supra*, § 705.

[3] L. R. 6 H. L. at p. 356; and see p. 403.

bound to disclose." The case of *Keates* v. *The Earl of Cadogan*,[1] is an authority for the proposition that there is no obligation on a proposed lessor of a house in a ruinous and unsafe condition to inform the proposed lessee of its state. In *Horsfall* v. *Thomas*,[2] it was decided that the vendor of a chattel is under no obligation to disclose a patent defect. In *Smith* v. *Hughes*[3] the Court of Queen's Bench determined that the passive acquiescence of the seller of chattels in the self-deception of the buyer does not entitle the latter to avoid the contract. In *Greenhalgh* v. *Brindley*,[4] the vendor of a house was held not to be debarred from enforcing a contract for the sale of it by reason of his non-disclosure of a deed acknowledging that he was not entitled to the access of light to the windows. Lastly, in *Edwards-Wood* v. *Marjoribanks*,[5] a contract was made for the sale of an advowson, nothing being said or asked as to the income of the living, which was in fact subject to a charge in favour of the Governors of Queen Anne's Bounty, for repayment of a sum borrowed from them to rebuild the parsonage: the purchaser filed his bill for specific performance with compensation, but got a decree only for specific performance without compensation: and from this he ineffectually appealed, first to the Lords Justices, and lastly to the House of Lords.

Silence of purchaser.

§ **714**. Again, as regards the purchaser, he is not under an obligation to communicate any circumstance which may enhance the value of the thing bought by him. So that, for instance, a man knowing of the

[1] 10 C. B. 591.

[2] 1 H. & Colt. 90.

[3] L. R. 6 Q. B. 597.

[4] [1901] 2 Ch. 324. See, too, *Re Ward and Jordan's Contract*, [1902] 1 I. R. 73, where, on a contract for sale of a public house, the vendor's omission to disclose the fact that one conviction had been endorsed on the licence was held not to be a material omission entitling the purchaser to refuse to complete.

[5] 1 Giff. 384; 3 De G. & J. 329; 7 H. L. C. 806. See also *Haywood* v. *Cope*, 25 Beav. 140.

existence of a mine under an estate may validly deal with the owner who is ignorant of this fact, without any communication of it.[1] And so where a first mortgagee, with power of sale, having entered into an arrangement not amounting to a binding contract for the advantageous sale of part of the mortgaged property, afterwards bought up at a reduced price the interest of the second mortgagee without informing him of the arrangements for sale, a bill by the second mortgagee to set aside the sale, on the ground of the suppression of information by the purchaser, was dismissed by Lord Romilly M.R., and subsequently by Lord Cranworth.[2] Nor is the purchaser liable to an action for deceit for misrepresenting the seller's chance of sale, or the probability of his getting a better price than that offered.[3]

Aggressive concealment.

§ 715. The case is, however, quite different when, in addition to silence, something is done by the one party to conceal from the other some fact material to that other party. Thus where a wall which required to be maintained against the Thames was industriously concealed, a bill for specific performance was dismissed, though without costs.[4]

Fothergill v. Phillips.

So again where colliery-owners entered into a contract for the purchase of a farm adjoining their colliery not only without disclosing, but (it would seem) studiously concealing the fact, of which the vendors were at the time wholly ignorant, that they (the purchasers) had wrongfully taken 2,000 tons of coal from under the farm, the Court dismissed the purchasers' bill for specific performance, and on the vendors' bill ordered the contract to be cancelled.[5] This case, perhaps, turns on the fact that the thing concealed was a wrong done

[1] *Fox* v. *Macreth*, 2 Bro. C. C. 400, 420; cf. *Walters* v. *Morgan*, 3 De G. F. & J. at p. 723.

[2] *Dolman* v. *Nokes*, 22 Beav. 402. *Vernon* v. *Keys*, 12 East, 632.

[3] *Shirley* v. *Stratton*, 1 Bro. C. C. 440. Distinguish *Cook* v. *Waugh*, 2 Giff. 201.

[4] *Fothergill* v. *Phillips*, L. R. 6 Ch. 770.

by the one party to the contract to the other. And where A. agreed to sell his land at B. at a halfpenny per square yard, which amounted to about 500*l.*, when the real value was 2,000*l.*, and the defendant asked the attorney whom he employed to calculate the amount before the contract was signed, not to tell the plaintiff how small it was, the Court granted an interlocutory injunction to stay proceedings at Law.[1] In *Hill* v. *Gray*[2] the plaintiff had employed an agent to sell a picture, and the defendant bought it under the belief that it had belonged to a third person. The case has sometimes been thought to support the proposition that mere silence may be fraudulent. But in *Keates* v. *Earl of Cadogan*[3] Jervis C.J. pointed out that the case really turned on the "aggressive deceit" on the part of the agent of the seller: and if the case cannot be supported on this ground it seems not to be law.[4]

On sale with all faults.

Even as regards a sale with all faults, the industrious and active concealment of faults would be fraudulent.[5]

Purchaser may not make any false representation or suggestion.

§ 716. So, though the purchaser may keep silence as to the advantages of the estate, he must not go any further than silence. "A very little," said Lord Eldon, "is sufficient to affect the application of that principle. If a word, if a single word be dropped which tends to mislead the vendor, that principle will not be allowed to operate." Accordingly, in the case before his Lordship, the purchaser having made such suggestion of what was not true, the contract was set aside:[6] and in a case where a solicitor bought of a person in difficulties who was selling without professional advice, and who truly represented the nature and title of the property

[1] *Deane* v. *Rastron*, Anstr. 61.

[2] 1 Stark. 434.

[3] 10 C. B. 591.

[4] See *per* Lord Chelmsford in *Peek* v. *Gurney*, L. R. 6 H. L. 391.

[5] *Baglehole* v. *Walters*, 3 Camp. 154; *Schneider* v. *Heath*, id. 506.

[6] *Turner* v. *Harvey*, Jac. 169, 178; and see *Walters* v. *Morgan*, 3 De G. F. & J. at pp. 723, 724; *Davies* v. *Cooper*, 5 My. & Cr. 270.

as such that no one but a professional man would purchase it, specific performance was refused.[1]

Silence not fraud, but unfair.

§ 717. It is possible that silence which would not constitute fraud may yet constitute such unfairness in a contract as to stay the hand of the Court. The case of *Elliard* v. *Lord Llandaff*,[2] if it is to be supported on the ground of the silence of the lessee as to the fact that one of the lives in the surrendered lease was, at the time of signing the contract, *in extremis*, rests upon this principle: and was so put by Lord Manners in deciding it.[3]

Putting at auctions.

§ 718. The employment of a puffer at auctions is in some circumstances regarded as fraud, affecting the contract made at the auction. The cases prior to the statute to be presently mentioned[4] seem to fall under three heads.

i. Where sale without reserve.

§ 719. (i.) Where the sale is announced to be without reserve, this excludes any interference on the part of the vendor which can under any possible circumstances affect the right of the highest bidder to have the property knocked down to him, and that without reference to the amount to which the highest bidding shall go.[5] Therefore the employment by the vendor in such a sale of one or more persons to keep up the price on his behalf amounts to fraud in the contemplation of the Court,[6] and is a bar to specific performance.[7] Where the vendors, assignees of an insolvent, put up his life interest in certain property for sale by auction without reserve, having previously entered into an

[1] *Davis* v. *Abraham*, 5 W. R. 165. Cf. *Summers* v. *Griffiths*, 35 Beav. 27.

[2] 1 Ball & B. 211.

See also *supra*, § 402; and see the observations of Chitty J. on *Lloyd's case* in *Turner* v. *Green*, [1895] 2 Ch. at pp. 209—211.

[3] *Infra*, § 724.

[5] *Per* Lord Cottenham in *Robinson* v. *Wall*, 2 Ph. 375.

[6] *Thornett* v. *Haines*, 15 M. & W. 367, where the earlier cases are cited.

[7] *Meadows* v. *Tanner*, 5 Mad. 31. As to an intending purchaser buying off bidders, see *Heffer* v. *Martyn*, 15 W. R. 390; 36 L. J. Ch. 372: and cf. *Re Carew's Estate*, 26 Beav. 187.

arrangement with a person whose wife was interested in remainder, that he should bid 35,000*l.* and be the purchaser, unless a higher sum should be bid, and this fact was concealed, it was held to taint the sale to the defendant at the auction, though he purchased for 49,800*l.*[1]

All parties having liberty to bid.

§ 720. The statement that a sale is without reserve may of course be modified by other statements: as in one case of a sale under the Court, where it was stated that the sale was without reserve, but that all parties to the suit had liberty to bid: the plaintiff bid against the purchaser and ran him up, and the Court of Appeal in Chancery held that the result of the two statements, though not very consistent, was such that the purchaser could not complain.[2]

ii. One puffer employed.

§ 721. (ii.) Where there is no declaration that the sale is without reserve, and no right of bidding is expressly reserved to the vendor, and he employs one person to prevent the property going at an undervalue; this has been thought not to be fraud in the contemplation of a Court of Equity,[3] though it clearly was in that of the Courts of Common Law.[4] The distinction, however, was disapproved of, if not doubted, by Lord Cranworth in the case of *Mortimer* v. *Bell*.[5]

A defence in Chancery.

§ 722. Inasmuch as a contract, if originally void by the Common Law, ought not to be enforced by Equity, the defendant in a suit in the Court of Chancery for specific performance might avail himself of the defence furnished by this fraud at Law, and that formerly by means of a trial of the question at Law.[6]

iii. Several puffers.

§ 723. (iii.) Even in the absence of any declaration

[1] *Robinson* v. *Wall*, 10 Beav. 61; S. C. 2 Ph. 372.

[2] *Dimmock* v. *Hallett*, L. R. 2 Ch. 21.

[3] *Smith* v. *Clarke*, 12 Ves. 477; *Woodward* v. *Miller*, 2 Coll. 279; *Flint* v. *Woodin*, 9 Ha. 618; *Bramley* v. *Alt*, 3 Ves. 620.

[4] *Per* Lord Wensleydale in *Thornett* v. *Haines*, 15 M. & W. 372; *Crowder* v. *Austin*, 3 Bing. 368.

[5] L. R. 1 Ch. 10.

[6] *Woodward* v. *Miller*, 2 Coll. 279.

that the sale is without reserve, the employment of two or more persons as putters has in all Courts been considered fraudulent, inasmuch as only one person can be necessary to protect the property, and the employment of more can only be to enhance the price.[1]

§ 724. The decision in the case of *Mortimer* v. *Bell* above mentioned led to the passing of an Act of Parliament (the 30 & 31 Vict. c. 48), which was introduced by Lord St. Leonards. The Sale of Land by Auction Act, 1867

The 4th section of this Act enacts that, after the passing of the Act, whenever a sale by auction of land would be invalid at Law by reason of the employment of a putter, the same shall be deemed invalid in Equity as well as at Law. Section 4.

Land is defined, in the 3rd section of the Act, to include hereditaments of whatever tenure: but the difference of the view of Courts of Common Law and Equity as to fraud in ctions of chattels (if such difference exist) is left in its pristine vigour.

§ 725. The 5th section of the Act enacts that the particulars or conditions of sale by auction of any land shall state, (a) whether such land will be sold without reserve, or (b) subject to a reserved price, or (c) whether a right to bid is reserved: and Section

(a) If the land be sold without reserve, it is not lawful for the seller to employ any person to bid at such sale, or for the auctioneer to take knowingly any bidding from any such person.

(b) In the event of the land being sold subject to a reserved price the Act is silent, but it has been held that in the absence of express stipulation, it is not lawful to employ any person to bid up to the reserved price.[2]

But (c) in the event of a reservation of a right to Section 6,

[1] *Per* Lord Wensleydale in *Thornett* v. *Haines*, 15 M. & W. 372. See also *Rex* v. *Marsh*, 3 Y. & J. 331; *Brandley* v. *Alt*, 3 Ves. 620.

[2] *Gilliat* v. *Gilliat*, L. R. 9 Eq. 60.

the seller to bid, it is lawful for him or for any one person on his behalf to bid at such auction in such manner as he may think proper (sect. 6).[1]

Fraud by agents.

§ 726. As with regard to misrepresentation, so with regard to fraud in general, delicate questions arise where the fraud alleged is that of the agent practised on third persons, and the principal is sued on the ground of deceit or for rescission by reason of such fraud.[2] But in actions for specific performance these questions cannot arise. If the principal of the fraudulent agent were the plaintiff, he would not be at liberty to avail himself of that agency in part and repudiate it in the rest of the transaction: to such a case the well-established principle of Equity that innocent parties cannot derive benefits from the fraud of others[3] would apply. If on the other hand the fraud were that of the defendant's agent, the plaintiff by suing on the contract would have waived the fraud and ratified the contract.

Agency of directors.

§ 727. A particular class of cases arising from the agency of directors and the fact that corporations are incapable of personal fraud has occupied much attention in the Courts of late years, and has evoked a considerable variation of opinion amongst the learned Judges.[4] But the question can hardly arise in cases of specific performance for the reason indicated in the last preceding section.

Fraud by a mere stranger.

§ 728. Will the fraudulent act of a mere stranger, to

[1] See *Pugsley* v. *Jepson*, 9 L. J. C. P. 329; 36 L. T. 251.

[2] See *supra*, § 662.

[3] *Bridgman* v. *Green*, Wilm. Not. 58; *Huguenin* v. *Baseley*, 14 Ves. 289; *Neal's case*, 3 De G. & J. 387, 438.

[4] *Kruger* v. *Great Western Railway Co.*, 5 H. L. C. 79; *Barnes* v. *Pennell*, 2 Ib. 497; *New Brunswick and Canada Railway Co.* v. *Conybeare*, 7 Ib. 711 (S. C. 4 Giff. 339; 1 De G. F. & J. 578); *National Exchange Co. of Glasgow* v. *Drew*, 2 Macq. 103; *Neal's case*, 3 De G. & J. 387; *Western Bank of Scotland* v. *Addie*, L. R. 1 H. L. Sc. 145; *Mackay* v. *Commercial Bank of New Brunswick*, L. R. 5 P. C. 394; *Sharp* v. *Francis*, 3 App. Cas. 106; *Henderson* v. *City of Glasgow Bank*, 3 App. Cas. 317, 329; cf. *Barry* v. *Mutual Banking Co.* v. *Charnwood Forest Railway Co.*, 18 Q. B. D. 711, 717.

which the plaintiff was neither party nor privy, deprive him of his right to enforce the performance of a contract.' The question has never, it is believed, been judicially answered. But upon the general equitable principle that no person though innocent can derive a benefit from the fraud of another, the contract, if resting absolutely *in pari*, could not be enforced. If the plaintiff were an assign for value of the contract, or if the contract were partly performed, the conclusion might probably be different.[1]

§ **729**. The foregoing passage was discussed by Kekewich J. in the case of *Union Bank* v. *Munster*.[2] There a mortgagee had brought an action for foreclosure or sale against the mortgagor, in which an order for sale was made, of which the mortgagee had the conduct. A., an agent for B., the owner of the equity of redemption, after the biddings of the defendant had gone beyond the reserve fund, bid without any intention of really performing the contract, which neither A. nor B. had the means to perform. As the result of these bids the defendant gave more than he would otherwise have done. The Court, without deciding whether the fraud of a stranger will or will not prevent specific performance in some circumstances, held that the conduct of A. did not. If the mere mistake of the defendant is a defence in specific performance,[3] it would seem that mistake produced by the fraud or misconduct of a third party may also furnish a defence.

§ **730**. The effect of fraud on the contract tainted by it extends to the entirety of the contract, though the fraud may only have arisen or been practised as regards one term or one part of that contract. Hence the party guilty of the fraud cannot enforce the contract to any extent, even though he may waive the part affected by the fraud.

The fraud affects the entire contract.

[1] Consider *Coldcutt* v. *Brock*, 20 Beav. 524.

[2] 37 Ch. D. 51.

[3] See *infra*, § 755.

So does misrepresentation.

§ **731**. The same results follow from misrepresentation, even though innocent.

In a case where there was a misrepresentation which the Judge considered not to have been wilful, but to have arisen from misunderstanding as to the surrender of a lease on part of the property which was to be exchanged, and the plaintiff offered to take the land subject to the lease, and thus, as he contended, to abide by the contract, exonerated from what was affected by the misrepresentation; so that the question distinctly arose whether the misrepresentation avoided the contract *in toto* or only *quoad hoc*; Plumer M.R. said, "there is no authority anywhere, no case where the Court has, when misrepresentation was the ground of a contract, decreed the specific performance of it; and nothing would be more dangerous than to entertain such a jurisdiction. The principle on which performance of an agreement is compelled, requires that it must be clear of the imputation of any deception. The conduct of the person seeking it must be free from all blame: misrepresentation, even as to a small part only, prevents him from applying here for relief. The reason of this is obvious: if it be so obtained, the contract is void both at Law and in Equity. When an agreement has been obtained by fraud, is the effect to alter it partially, to cut it down or modify it only? No; it vitiates it *in toto*; and the party who has been drawn in is totally absolved from obligation. if so, what equity has the other party, who, by his misconduct has lost one contract, to call on the Court for his benefit to make a new one? If the defendant were willing to consent to it, and to enter into a new agreement, it would be a different case; but if he refuses, if he insists that he is absolved from it, what equity can there be in favour of the other?" [1]

Rawlins v. Wickham.

§ **732**. The view that fraud operates on the entire

[1] *Viscount Clermont* v. *Tasburgh*, 1 J. & W. at pp. 119, 120.

contract was adopted and approved by the Court of Appeal in Chancery in *Rawlins* v. *Wickham*,[1] which was a suit for rescission: where the defendant urged that justice would be done not by rescinding the contract, but by directing the representation to be made good: but the contention was rejected by Knight Bruce and Turner L.JJ., on the ground that the misrepresentation gave a right to avoid the entire contract.

The two-fold effect of fraud.

§ **733.** The effect of fraud on the contract is twofold. First, it renders the contract voidable at the election of the defrauded party: secondly, it operates as a personal bar to specific performance. These two effects are for many purposes distinguishable: for example, the right to rescind may be lost, and the right to object to specific performance may remain. These two effects will therefore be considered separately.

Contract voidable, not void.

§ **734.** The first effect of fraud is to render the whole contract voidable, but voidable only. The contract is not void: it is not a nullity. "It is now well settled," said Lord Campbell C.J. in *The Deposit and General Life Assurance Co. Registered* v. *Ayscough*,[2] "that a contract tainted by fraud is not void but only voidable at the election of the party defrauded." It is valid till disaffirmed, not void till affirmed.[3]

Consequences of contract's being voidable only.

§ **735.** From this distinction, many important consequences follow: it follows that the defrauding party is bound until the defrauded party elects to the contrary, and that he can never set up any invalidity in the contract: it follows that the defrauded party is equally bound, until he rescinds:[4] it follows that the property

[1] 3 De G. & J. 304. See also *Kennedy* v. *Panama, &c. Mail Co.*, L. R. 2 Q. B. 580, 587.

[2] 6 El. & Bl. 761. See also *Nicol's case*, 3 De G. & J. 387, 431; *Clarke* v. *Dickson*, El. B. & E. 148; *Oakes* v. *Turquand*, L. R. 2 H. L. 325, 346; *Urquhart* v. *Macpherson*, 3 App. Cas. 831.

[3] See *per* Lord Cairns in *Reese River Silver Mining Co.* v. *Smith*, L. R. 4 H. L. at p. 69.

[4] *Deposit and General Life Assurance Co., Registered* v. *Ayscough*, 6 El. & Bl. 761.

the subject of the contract passes to the purchaser, whether defrauding or defrauded, until avoidance: it follows that all mesne dispositions by the defrauding party to third persons not parties or privies to the fraud are valid, so that third persons may acquire absolute interests and rights under the fraudulent contract;[1] and lastly, it follows that the defrauded party may, by electing to be bound or by losing his right to repudiate, become absolutely bound by the contract.

How right to rescind may be precluded.

§ 736. The right of rescinding a contract may, however, be precluded or lost by any one of the following circumstances, viz., (i.) impossibility: (ii.) the vesting of an interest under the contract in an innocent person which renders rescission inequitable: (iii.) the election of the defrauded party to abide by the contract: or (iv.) the inability of the defrauded party to perform the obligation which rests upon him to make restitution on his part.[2]

i. Rescission impossible.

§ 737. (i.) The rescission has become impossible when its object is to get back something which is actually destroyed, as, *e.g.*, if A. sought to rescind a contract for the sale of a sheep to B., which sheep B. had killed and eaten.[3]

The rescission would be equally impossible, but for a legal and not a physical reason, if B. instead of killing the sheep had sold it: for the contract between A. and B., not being void, vested the property in B. and consequently before rescission B. could make a good title to C., and C. could hold free from any right of rescission in A.[4] It is too late for the defrauded vendor to declare his election to rescind when the property has passed from the fraudulent vendee to a third person.[5]

[1] *Stevenson* v. *Newnham*, 13 C. B. 285, 302.

[2] *See Clough* v. *London and North Western Railway Co.*, L. R. 7 Ex. 26.

[3] Pothier, du Contrat de Vente, s. 318.

[4] *Kingsford* v. *Merry*, 11 Ex. 577; *Load* v. *Green*, 15 M. & W. 216, 219.

[5] *White* v. *Garden*, 10 C. B. 919.

ii. Rescission inequitable.

§ 738. (ii.) The rescission is inequitable when third persons innocent of the fraud have acquired interests under the contract, and such innocent persons would consequently be injured by its rescission. So in the great case arising out of Overend, Gurney & Co.'s failure, it was held by the House of Lords that the person who took shares by reason of a fraudulent misrepresentation could not after a winding-up order rescind this contract, and have his name removed from the list, because the creditors of the company had acquired an interest in the enforcement of the contract which, as they were innocent, the shareholder could not defeat by rescinding.[1] This reasoning, of course, does not apply to private partnerships: to allow rescission against a company after winding-up would be to interfere with the rights of creditors, whilst to permit it in the case of a private partnership leaves all their rights intact.[2]

iii. Election to abide by the contract.

§ 739. (iii.) An election to abide by the contract will prevent its rescission. A person defrauded into making a contract has but an election, and an election once determined is determined for ever.[3] Whether this election must be made within a reasonable time, or whether the party entitled to elect may do so at any time, unless he has in the meanwhile lost that right on some other ground, as, *e.g.*, the acquisition of rights by third parties, is a question left open by a modern case on this subject.[4] It is certain, however, that in the case of rescission for fraud, the election once determined

[1] *Oakes* v. *Turquand*, L. R. 2 H. L. 325; *Major's case*, 4 De G. & J. 575.

[2] *Tennent* v. *City of Glasgow Bank*, 4 App. Cas. 615, observed upon by Stirling J. in *Re Roundwood Colliery Co.*, [1897] 1 Ch. at p. 382; *Adam* v. *Newbigging*, 13 App. Cas. 308, 322.

[3] Conyn. Dig. Election, c. 2. *Clough* v. *London and North Western Railway Co.*, L. R. 7 Ex. 26, 34. Consider *Gordon* v. *Street*, [1899] 2 Q. B. 641, 643; and *United Shoe Machinery Co. of Canada* v. *Brunet*, [1909] A. C. at p. 339; 78 L. J. P. C. 101.

[4] *Morrison* v. *Universal Marine Insurance Co.*, L. R. 8 Ex. 40, 197, particularly 205. See too, *Gordon* v. *Street*, *ubi supra*.

in favour of the contract precludes any subsequent rescission.[1]

Contracts to take shares.

§ **740.** In the case of contracts to take shares induced by a misrepresentation of the objects of the company, it is now determined that the date of the allotment of the shares is the very latest date to which the reasonable time for election extends.[2]

How election may be made.

§ **741.** The election to abide by a contract may be by express words or may be inferred from acts done with a knowledge of the invalidity of the contract.[3] The election is not necessarily formal or express.

Election final.

As soon as the fraud is discovered the right to elect arises: and if this has been exercised by affirming the contract, the subsequent discovery of fresh incidents of the same fraud will not give rise to a new right to rescind.[4]

iv. Inability to make restitution.

§ **742.** (iv.) The person who seeks rescission and thereby restitution to his state before the contract must do the like on his part and make restitution: "*Restitutio in integrum*," said Lord Cranworth,[5] "can only be had where the party seeking it is able to put those against whom it is asked in the same situation in which they stood when the contract was entered into."

If by any act on his part, done even in ignorance of the fraud, the defrauded party has made this impossible, he cannot obtain rescission:"[6] as, *e.g.*, if A. has by fraud been induced to buy a sheep of B. and seeks the

[1] *Campbell* v. *Fleming*, 1 A. & E. 40; *Clough* v. *London and North Western Railway Co.*, L. R. 7 Ex. 26. See also *Gray* v. *Fowler*, L. R. 8 Ex. 249.

[2] *Oakes* v. *Turquand*, L. R. 2 H. L. 325, and particularly 352, where the earlier cases are considered.

[3] *Per* Lord Lyndhurst in *Attwood* v. *Small*, 6 Cl. & Fin. 432; *Macbryde* v. *Weekes*, 22 Beav. 533. Comyn, Dig. Election, c. 1. *Clough* v. *London and North Western Railway Co.*, L. R. 7 Ex. 26; *Morrison* v. *Universal Marine Insurance Co.*, L. R. 8 Ex. 197, 203; *United Shoe Machinery Co. of Canada* v. *Brunet*, [1909] A. C. at p. 339; 78 L. J. P. C. 101.

[4] *Campbell* v. *Fleming*, 1 A. & E. 40.

[5] In *Western Bank of Scotland* v. *Addie*, L. R. 1 H. L. Sc. at p. 163.

[6] S. C. 156.

repayment of the money paid to B., he must offer to restore the sheep, and if he has himself killed the sheep he cannot seek such rescission,[1] though he may still maintain his action against B. for the fraud practised on him. So, again, no fraud in bringing about a marriage settlement will enable the defrauded party after marriage to rescind it.[2]

Clarke v. Dickson.

In the case of *Clarke* v. *Dickson*,[3] the plaintiff sought to rescind a contract for the sale of shares in a mine, and the following facts were held to be several grounds of objection all falling under this principle: (1) that he had held the shares for three years, and that they were not the same shares at the beginning of the time as at the end; (2) that he had received dividends; (3) that he had concurred in the conversion of the concern from a partnership on the cost-book principle, into a joint-stock corporation; and (4) that at the time of the offer to restore, the company was being wound up and all chance of profit was gone.

Western Bank of Scotland v. Addie.

§ **743**. In a subsequent case in the House of Lords the plaintiff complained of fraud in inducing a contract on his part to take shares in an unincorporated banking company: and the circumstances that the plaintiff had in ignorance of the fraud taken part in proceedings to convert this company into an incorporated company, and that the company was in course of winding up, were held to preclude the plaintiff from rescission. Lord Cranworth thought that the former circumstance would of itself have been sufficient.[4]

[1] See *Clarke* v. *Dickson*, El. B. & E. 148. *Nicol's case*, 3 De G. & J. 387, 431; *Maturin* v. *Tredennick*, 12 W. R. 740; *Great Luxembourg Railway Co.* v. *Magnay*, 25 Beav. 586. This case, so far as it determined that the plaintiffs had lost their remedies besides rescission, seems bad law. See *Kimbe* v. *Barber*, L. R. 8 Ch. 56.

[2] *Johnston* v. *Johnston*, 32 W. R. 1016; 33 W. R. 30.

[3] El. B. & E. 148. See, too, *Sheffield Nickel Co.* v. *Unwin*, 2 Q. B. D. 214, 223; *Urquhart* v. *Macpherson*, 3 App. Cas. 831; and consider *Maturin* v. *Tredennick*, 12 W. R. 740.

[4] *Western Bank of Scotland* v. *Addie*, L. R. 1 H. L. Sc. 145.

Adam v. Newbigging.

With these previous cases may profitably be compared the case of *Adam* v. *Newbigging*, also in the House of Lords.[1] There the plaintiff had been by misrepresentation induced to enter into a partnership with the defendant, and the plaintiff was held not to be precluded from rescinding the contract by reason of the concern's having gone from bad to worse during the time between the contract and the action.

Does the receipt of any benefit prevent rescission?

§ 744. The receipt of dividends before discovery of the fraud was relied upon in the case of *Clarke* v. *Dickson*,[2] as precluding rescission; and there are other authorities to show that, at Common Law, the reception of any benefit under a contract will preclude its rescission for default of performance by the other party.[3] But it is submitted that no such rule prevails where the rescission is on the ground of fraud, and that where a benefit has been received and is capable of restoration either in kind or by way of compensation, and the defrauded party offers such restoration, he has not lost his right to rescind.

For to return to the illustration of the sheep: if, before the discovery of the fraud, A. has sheared the sheep, it appears reasonable to hold that such change in the condition of the sheep will not deprive A. of his right to rescind, if he offer to restore the sheep and account for the wool.

Instances.

So, in *Earl Beauchamp* v. *Winn*,[4] the House of Lords held that the construction of a warping-drain and the inclosure of a common would not have prevented the rescission of a contract for the sale of the land on the ground of mistake: and in *The Lindsay Petroleum Co.* v. *Hurd*,[5] the Privy Council took the same view of

[1] 13 App. Cas. 308.

[2] El. B. & E. 148.

[3] *Hunt* v. *Silk*, 5 East, 449; *Blackburn* v. *Smith*, 2 Ex. 783.

[4] L. R. 6 H. L. 223, 232.

[5] L. R. 5 P. C. 221. See also per Crompton J. in *Deposit and General Life Assurance Co., Registered*, v. *Ayscough*, 6 El. & Bl. 761.

the facts that possession had been taken under the contract and a trial well sunken. In that case the Court below had offered an account of the profit of the well, if any, which was not accepted.

Restitution rendered impossible by act of third person.

§ **745**. In the rule as above stated,[1] the act precluding restoration is referred to the party bound to restore. Is it essential that it should be by his act, or is it enough that even by another's act the restoration is impossible? To return once more to the sheep. Can the defrauded purchaser claim to rescind though the sheep have died by the act of God? The point seems to have never been decided. On the one side there are cases in which are found general statements of the law which imply that the impossibility of restoration from whatever cause is a bar to rescission.[2] And it may be open to question whether any real distinction can be drawn between the innocent act of the defrauded party which precludes him from restoration, and the act of God, or of a third person, leading to a similar result. On the other side is the language of Crompton J. in *Clarke* v. *Dickson*,[3] that "the true doctrine is that a party can never repudiate a contract after, by his own act, it has become out of his power to restore the parties to their original condition."

The French Law.

§ **746**. As our law is far from clear on this point it may be useful to refer to the principles of French Law as expounded by Pothier.[4] According to him an action for rescission was not precluded by the change or destruction of the thing sold. If the destruction took place without the act of the plaintiff, he was not bound to do more than he could. If the horse had died, the plaintiff must give back his skin: if the cow sold had

[1] *Supra*, § 736.

[2] *Hunt* v. *Silk*, 5 East, 449; *Buckland* v. *Smith*, 2 Ex. 783; 21 L. J. Ex. 155, approved in P. C. *Urquhart* v. *Macpherson*, 3 App. Cas. 831. See, too, *Sheffield Nickel Co.* v. *Unwin*, 2 Q. B. D. 214, 222.

[3] 1 Traité du Contrat de Vente, ss. 220—223.

died of a contagious disease, and been buried, he need return nothing. If, on the other hand, the change or destruction was due to the act of the plaintiff, he was bound to account to the defendant for the value of the thing but did not lose his action.

Innocent misrepresentation does not generally give right to rescind.

§ 747. The right to rescind does not arise from an innocent misrepresentation, unless it be such as to show that there is a complete difference in substance between what was supposed to be and what was taken so as to constitute a failure of consideration.[1]

Other remedies open though rescission impossible.

§ 748. It must not be assumed that in every case in which the right of rescission is lost, every other remedy in respect of the transaction is lost also. This is not the case. Thus a person induced to take shares by fraud may have lost the right of rescinding the contract, but may yet sue the deceiver for indemnity against the loss resulting from the contract.[2] A principal authorizes an agent to buy shares at 3*l.* per share on the agent's representation that he can procure them for that price: the agent has in fact just bought them for 2*l.* a share: the principal having sold the shares before the discovery of the fraud cannot rescind the contract, but may sue the agent for the difference between 3*l.* and 2*l.* per share.[3]

Fraud is a personal bar to relief.

§ 749. The second effect of fraud on the contract is this: it "operates," as expressed by Lord Lyndhurst "as a personal bar to the relief."[4] This is an operation independent of the rescission of the contract: and though there can be no doubt that, where the defrauded party has elected to be bound by the contract, he has

[1] *Kennedy* v. *Panama, &c. Mail Co.*, L. R. 2 Q. B. 580; *Seddon* v. *North Eastern Salt Co.* (no rescission of executed contract for sale of chattel or chose in action on the ground of innocent misrepresentation), [1905] 1 Ch. 326; *Torrance* v. *Bolton*, L. R. 8 Ch. 118. Cf. *Brett* v. *Clowser*, 5 C. P. D. 376; and *Adam* v. *Newbigging*, *supra*, § 745.

[2] *Peek* v. *Gurney*, L. R. 6 H. L. 377.

[3] *Kimber* v. *Barber*, L. R. 8 Ch. 56.

[4] In *Harris* v. *Kemble*, 5 Bli. N. S. at p. 751.

also waived the right to insist on the persona bar, it does not follow that he has also lost the right to set up that bar where rescission has become impossible from the interests of third persons, or from the impossibility of restitution arising either from the act of God or of third persons or from his own act before knowledge of the fraud. In all these cases, it is conceived that the defendant might still urge the fraud as a bar to specific performance;—just as at Common Law he might, after having lost his right to rescind in any of the ways last indicated, maintain an action of deceit against the defrauding party.[1]

An innocent misrepresentation may, as well as a fraudulent one, constitute a personal bar to relief.[2] Innocent misrepresentation.

§ 750. Where it appears that the execution of a contract in the manner insisted on by the plaintiff will result in a fraud upon the public, the Court will not enforce the performance of the defendant's part of the contract. Thus in a case where the plaintiffs sought to compel the defendant to perform an alleged contract by him to edit a guide-book with a title-page stating it to be the work of K. (a well-known editor of such books), who, in fact, had nothing to do with it, it was held that the defendant was justified in staying his hand and breaking off the delivery of "copy" of his manuscript, on the ground that such a title-page was calculated to deceive the public.[3] Fraud on the public

[1] *Clarke* v. *Dickson*, El. B. & E. 148.

Clermont v. *Tasburgh*, 1 J. & W. 112.

Post v. *Marsh*, 16 Ch. D. 395.

Cf. *Oldham* v. *James*, 15 Ir. Ch. R. 81.

CANADIAN NOTES.

Fraud.

In *Walmsley v. Griffith et al.*, 10 O.A.R. 327, the plaintiff negotiated with the defendants, Griffiths, for the purchase of the land in question, and at different times obtained from them writings giving him the option to purchase for $20,000. Defendants, Griffiths, set up that these negotiations were had with plaintiff as their agent with the view of effecting through him a sale to the Independent Order of Oddfellows at the same or a higher price for the defendants, Griffiths. After these options had been given to the plaintiff, he, on the forenoon of the 17th of February, 1882, agreed to sell to the Oddfellows for $25,000, and afterwards, on the same day, he went to the defendants, Griffiths, and offered to purchase for $19,500 in lieu of the $20,000, previously named. He was asked by the Griffiths whether the sale to the Oddfellows was off, to which he replied that it was, and, in the same conversation, informed the Griffiths that he could not sell the property for $20,000 as a reason why he should get it for $19,500, for if sold to another he, plaintiff, would be entitled to commission of $500, and the Griffiths thereupon agreed to sell to plaintiff for $19,500. Subsequently, on the same day, plaintiff entered into a contract in writing to sell to the Oddfellows for $25,000.

It was held that, without reference to the question of agency to sell, the evidence shewed that a sale to the Oddfellows was in contemplation of both parties and was the foundation of the transaction, and that the misrepresentation by the plaintiff in regard to the sale to the Oddfellows was such as disentitled him to a decree for specific performance. Burton J.A. dissented, but it was clear from his judgment that he assumed the facts to be different from those assumed by other members of the Court which were as above stated.

In *Livingstone v. Acre*, 15 Grant's Ch. 640, the defendant, a man of weak intellect, was fraudulently in-

duced to execute a quit claim deed of a piece of land to which he was entitled as heir at law, but no consideration was given for such deed. The land was afterwards conveyed to the plaintiff for valuable consideration. After the lapse of more than fifteen years, the defendant brought ejectment against the plaintiff and it was decided that the title had not passed by the deed executed by him. The plaintiff thereupon instituted proceedings to reform the deed, or, treating it as a contract only, to specific performance thereof.

It was held that, though the plaintiff had equities as a purchaser for value, yet the defendant had an equity to set aside the deed that he had been deceived into executing, and that his equity being the elder, and he having the legal title in his favour, the Court could not interfere to give the plaintiff relief.

It was also held that, although the defendant's laches or acquiescence for so long a period might be a reason for refusing him relief were he in court as a plaintiff still, they did not constitute a ground for granting the plaintiff the relief sought, and under the circumstances the Court dismissed the bill.

Contract Procured by Misleading Conduct.

In *Henderson* v. *Thomson*, 41 S.C.R. 145, an intending purchaser, by disguising his intention under the role of a disinterested friend, and representing that he would act in a friendly way on behalf of the owner in securing a purchaser for her property, induced the owner to accept an offer for the purchase of it which probably would not otherwise have been accepted without independent investigation. It was held that specific performance of the agreement for sale thus procured should not be enforced. The case of *Fellowes* v. *Lord Gwydyr*, 1 Sim. 63, is discussed in the judgment and distinguished. *Per* Duff J.: "I will only add a word about *Fellowes* v. *Lord Gwydyr*. When that case comes to be examined by a Court competent to review it, it may be found that whatever is to be said about the decision itself, the reasoning on which it was based by Lord Lyndhurst, as well as by the Vice-Chancellor, is not quite recon-

able with principles established by more recent decisions. In *Pollock* v. *Lord Croughy*, the parties were at arms length and the Lord Chancellor, moreover, declined to draw the inference that the misleading conduct of the vendors had operated upon the mind of the purchaser to induce him to make the purchase."

Puffing Distinguished

A sale of lands by auction being about to take place, an intending purchaser, in conversation with a person who had previously purchased a portion of the same property, was told by him that he intended buying additional portions thereof, and that he expected the property would fetch about £70 or £80 an acre, and that he was prepared to go as high as £100 per acre for that portion which he intended to buy. It was shewn that, by an arrangement between the owner of the estate and this person, it was agreed that he should have the lots desired by him at the same price that he had paid for the first purchase, no matter at what price they were knocked down to him, and they were accordingly bid off by him at a much higher figure than that formerly paid by him. It was held that this was not puffing, although it might have the effect of misleading the intending purchaser who swore that he had relied on the opinion of this party, but as he did not swear that he had been influenced by the example of this person or the information thus given by him, the Court decreed a specific performance of the contract for the purchase of certain portions of the estate bid off by him at the auction. *Crooks* v. *Davies*, 6 Grant's Ch. 317.

CHAPTER XV.

MISTAKE.

Kinds of mistake that occur in contracts.

§ **751.** THERE being at least two parties to every contract, it follows that mistake may be, 1st, the mistake of the defendant alone; or 2ndly, the common mistake of both plaintiff and defendant; or 3rdly, the mistake of the plaintiff alone. The first and second species will require discussion, as grounds of defence to an action for specific performance; the second and third will both raise the question how far the plaintiff may enforce performance with a correction of the error. It will be necessary to consider mistake not only as a defence to a specific performance, but also to some extent as giving a plaintiff a right to rescission or rectification of the contract.

Principle of the defence.

§ **752.** Mistake may be of such a character as in the view of a purely Common Law Court to avoid the contract on the ground of want of consent or of total failure of consideration.[1] But Equity does not confine the defence of mistake to these cases. The principle upon which it proceeds is this:—that there must be a contract legally binding, but that this is not enough, —that to entitle the plaintiff to more than his Common Law remedy, the contract must be more than merely legal. It must not be hard or unconscionable: it must be free from fraud, from surprise, and from mistake: for where there is mistake, there is not that

[1] *Raffles* v. *Wichelhaus*, 2 H. & C. 906; *Kennedy* v. *Panama, &c. Mail Co.* L. R. 2 Q. B. 580.

consent which is essential to a contract in Equity: *non videntur qui errant consentire.*[1]

Mistake sometimes, but not always, a bar to performance.

§ 753. In some cases, mistake furnishes an absolute bar to specific performance: in other cases it affords no such ground, if the plaintiff be willing to make a reasonable compensation to the defendant for the mistake made: whether a given case falls within one or other of these categories depends on all its circumstances.[2]

As to the Statute of Frauds.

§ 754. Again, the Statute of Frauds has not affected the situation of a defendant against whom specific performance is sought,[3] and it therefore leaves it open to him to produce any evidence for his purpose, which is not to establish a contract, but to rebut an equity which the plaintiff insists has arisen out of a contract.

Parol evidence admitted for defence.

§ 755. The cases of mistake have, it is true, seemed to present rather peculiar difficulties to the admission of parol evidence, because it has been argued that to do so is to overrule the Statute of Frauds and to contradict the writing by parol. Its admission is, however, the settled doctrine of the Court, and that not merely for purposes of defence to a specific performance, but, as we shall hereafter see, for the purpose of correcting the mistake. The question of its admission by way of defence was much debated in the case of the *Marquis Townshend* v. *Stangroom*,[4] where Lord Eldon said, "It cannot be said, that because the legal import of a written agreement cannot be varied by parol evidence, intended to give it another sense, therefore in Equity, when once the Court is in possession of the legal sense, there is nothing more to inquire into. Fraud is a distinct case, and perhaps more

Marquis Townshend v. *Stangroom.*

[1] Dig. Lib. 50, tit. 17, t. 116. See *Wilding* v. *Sanderson*, [1897] 2 Ch. 534; *Scott* v. *Coulson*, [1903] 2 Ch. 249; 72 L. J. Ch. 600, affirming S. C. [1903] 1 Ch. 453.

[2] *London and Birmingham Railway Co.* v. *Winter*, Cr. & Ph. 57, 62; *McKenzie* v. *Hesketh*, 7 Ch. D. 675.

[3] *Per* Grant M.R. in *Clark* v. *Grant*, 14 Ves. 519.

[4] 6 Ves. 328.

examinable at Law: but all the doctrine of the Court as to cases of unconscionable agreements, hard agreements, agreements entered into by mistake or surprise, which therefore the Court will not execute, must be struck out, if it is true, that because parol evidence should not be admitted at Law, therefore it shall not be admitted in Equity upon the question, whether, admitting the agreement to be such as at Law it is said to be, the party shall have a specific execution, or be left to that Court, in which, it is admitted, parol evidence cannot be introduced."[1] "No person," said Lord Redesdale, "shall be charged with the execution of an agreement, who has not, either by himself or his agent, signed a written agreement; but the statute does not say that if a written agreement is signed, the same exception shall not hold to it that did before the statute."[2]

Mistake of the defendant.

§ 756. It follows from what has been stated, that where the defendant has been led into any mistake or error, the plaintiff cannot enforce the contract with the mistake. Therefore where, in a sale by auction, the plaintiff had induced the defendant, who was the vendor, to think that he should not bid, and so put him off his guard, and the estate was, by a misapprehension on the part of the person employed to make the reserved bidding, allowed to be knocked down to the plaintiff, the Court, on the ground of mistake, though there was no fraud, declined to enforce the sale.[3] In another case the estate was sold in lots: the particular stated that the timber on lots four and five was to be taken at a valuation: in addition to this, one of the conditions of sale specified that the purchaser was to take the timber (speaking generally

[1] 6 Ves. at p. 333. Accordingly *Mauser* v. *Back*, 6 Ha. 443.

In *Cleaton* v. *Cooke*, 1 Sch. & Lef. 39.

[2] *Mason* v. *Armitage*, 13 Ves. 25; *Pym* v. *Blackburn*, 3 Ves. 34; *Day* v. *Wells*, 30 Beav. 220.

without reference to any particular lot) at a valuation. Grant M.R. said that the express declaration as to lots four and five was so likely to mislead a purchaser as to the meaning of the conditions, that supposing that the right construction of the condition was that it applied to all the lots, it would be inequitable to enforce specific performance of the contract.[1] Again, where[2] on a sale by auction, the plan annexed to the particulars of the property (a house and grounds) showed a shrubbery on the western boundary, and the defendant, going to inspect the property before the sale with the plan in his hand, found on the western side a belt of shrubs with an iron fence outside it enclosing three ornamental trees, and he then bought the property, believing that the fence was the boundary, but the real boundary was a line of shrubs within the shrubbery and did not enclose the trees, the Court of Appeal held that the mistake was increased by at least *crassa negligentia* on the part of the vendors, and accordingly dismissed with costs their bill for specific performance.

Where contributed to by plaintiff.

§ 757. In the preceding cases, it will be observed that the plaintiff contributed to the mistake of the defendant: and there is no doubt that the circumstance that the plaintiff has by his words or his silence or in any way contributed to the error of the defendant, even though he may have done so unintentionally, greatly strengthens the defendant's case.[3]

Mistake purely of defendant.

§ 758 Even where the mistake is purely due to the defendant himself or his agent, the Court will in some cases refuse specific performance:[4] indeed, it will

[1] *Higgenson* v. *Clowes*, 15 Ves. 516. See, too, *per* Jessel M.R. in *Jones* v. *Rimmer*, 14 Ch. D. at p. 592: *Moxey* v. *Bigwood*, 4 De G. F. & J. 351; and cf. *Phelps* v. *White*, 5 L. R. Ir. at p. 335.

[2] *Denny* v. *Hancock*, L. R. 6 Ch. 1.

[3] *Baskcomb* v. *Beckwith*, L. R. 8 Eq. 100; cf. *Caballero* v. *Henty*, L. R. 9 Ch. 447; *Bray* v. *Briggs*, 20 W. R. 962; *Wilding* v. *Sanderson*, [1897] 2 Ch. 531.

See *per* Jessel M.R. in *Jones* v. *Rimmer*, 14 Ch. D. at p. 592.

sometimes furnish active assistance on the ground of the mistake of the party himself as well as of another, as is strongly shown by a case in which a professional man was held entitled as plaintiff to the rectification of an error in a deed of his own drawing.[1] The cases, too, on intoxication furnish an analogy to this doctrine: for that circumstance is a ground of defence, though it may have been in nowise brought about by the plaintiff.[2]

Mistake of a bidder and of a vendor.

§ **759.** On this principle, where a person, who was employed to bid for one of two distinct estates offered for sale at the same time and place, came into the auction-room, and after hearing the description of a lot which was perfectly different from that for which he was engaged to bid, kept bidding in a hasty and inconsiderate manner for, and ultimately purchased, this lot, which by his own gross mistake, he thought to be the lot for which he was to bid, the Court refused specifically to carry out the sale.[3] And where a vendor by mistake offered to sell an estate for 1,100*l.*, which figure he had by a wrong addition reached instead of 2,100*l.*, the Court refused the purchaser specific performance and dismissed his bill without costs.[4]

Other instances.

§ **760.** So where a vendor had revoked the authority of the auctioneer as to part of the property, and the auctioneer inadvertently sold the whole, the Court refused specific performance, though the purchaser was justified in believing that he purchased all he claimed by his bill.[5] Again, where a description of parcels was

[1] *Ball* v. *Storie*, 1 S. & S. 210; cf. *Cox* v. *Smith*, 19 L. T. N. S. 517.

[2] See *supra*, § 403.

Malins v. *Freeman*, 2 Ke. 25; cf. *Von Praagh* v. *Everidge*, [1902] 2 Ch. 266; reversed in C. A., [1903] 1 Ch. 434; 72 L. J. Ch. 260.

[3] *Webster* v. *Cecil*, 30 Beav. 62. As to the costs in this case, see *per* James L.J. in *Tamplin* v. *James*, 15 Ch. D. at p. 221. Such a mistake will not be a ground for opening biddings, which can now only be opened for fraud. *Griffiths* v. *Jones*, L. R. 15 Eq. 279.

[4] *Manser* v. *Back*, 6 Ha. 443; followed in *Re Hare and O'More's Contract*, [1901] 1 Ch. 93.

[5]

prepared by the vendor's solicitor from a previous description, which had been prepared by another solicitor on the report of a surveyor, and the description turned out to be erroneous as to quantity, the Court would not enforce the sale on the vendor, unless the case were one for compensation, and the purchaser would submit to it.[1] And where a vendor sold a manor, being at the time ignorant of its exact extent, and both parties at the time of the contract believed that what it included was something different from what it really did, and the manor proved to comprise valuable property that the vendor did not know to be within it, the purchaser's bill for specific performance was dismissed.[2]

Howell v. *George*.

§ **761**. Where a defendant was tenant for life of an estate, under a settlement which contained a proviso, that if he purchased and settled an estate in fee simple in possession in some convenient place or places of a value equal to or greater than the estate comprised in the settlement, then his estate should become the property of the tenant for life; and he, imagining that he had, with the concurrence of his wife, an absolute power of disposition over the settled estate, entered into a contract for sale: Plumer V.C. refused to carry it into effect by an exercise of the proviso in the settlement, considering that such a performance of the contract would be attended with great difficulty, and that the defendant had not contracted for that purpose or with that intention.[3]

Mistake of

§ **762**. In a case where a corporation was contracting

[1] *Leslie* v. *Tompson*, 9 Ha. 268. See also *per* Lord Cottenham in *Alvanley* v. *Kinnaird*, 2 Mac. & G. 7; *Helsham* v. *Langley*, 1 Y. & C. C. C. 175; *Neap* v. *Abbott*, C. & Coop. Rep. (1837 8) 333. And cf. *McKenzie* v. *Hesketh*, 7 Ch. D. 675.

[2] *Baxendale* v. *Seale*, 19 Beav. 601. See, too, *Earl of Durham* v. *Legard*, 34 Beav. 611; *Richards* v. *North London Railway Co.*, 20 W. R. 191.

[3] *Howell* v. *George*, 1 Mad. 1. Cf. *Hood* v. *Oglander*, 34 Beav. at pp. 518, 519.

by an agent, and he swore to his sense and understanding of the contract he entered into being to a certain effect which the contract did not justify, and a bill was filed against the corporation, one ground upon which Knight Bruce L.J. dismissed an appeal against the corporation was this mistake of the agent.[1] It would open a wide field of defence if every misapprehension of the legal effect of a contract furnished a valid one. But perhaps the Court considers with more favour as a defence the allegation of mistake in an agent than in a principal.[2] defendant's agent

§ **763.** Where there has been no misrepresentation, and there is no ambiguity in the terms of the contract, the defendant cannot be allowed to evade the performance of it by the simple statement that he has made a mistake.[3] In a case before Lord Romilly M.R., where the defendant alleged that he misunderstood the particulars of sale, his Lordship observed that "if there appear on the particulars no ground for the mistake, if no man with his senses about him could have misapprehended the character of the parcels, then I do not think it is sufficient for the purchaser to swear that he made a mistake or that he did not understand what he was about."[4] And so where, according to the true construction, the contract made the intended lease determinable at the option of either party, but the lessee insisted that he signed it in the belief that it gave the option to him only, the Court overruled the defence based on the alleged mistake.[5] Cases where mistake of defendant no defence.

§ **764.** So again where the property sold (an inn and shop) was described in the particulars as consisting *Tamplin v. James.*

[1] *Wycombe Railway Co.* v. *Donnington Hospital*, L. R. 1 Ch. 268.

[2] *Per* Turner L.J. in *Morrison* v. *Barrow*, 1 De G. F. & J. 638.

[3] *Per* Baggallay L.J. in *Tamplin* v. *James*, 15 Ch. D. at p. 217; *Morley* v. *Clavering*, 29 Beav. 84.

[4] *Swaisland* v. *Dearsley*, 29 Beav. 430. This statement of the law was cited and approved by Baggallay L.J. in *Tamplin* v. *James*, 15 Ch. D. at p. 218.

[5] *Powell* v. *Smith*, L. R. 14 Eq. 85.

of Nos. 454 and 455 on the title map, containing by admeasurement 20 perches more or less, and in the occupation of Mrs. K. and Mr. S., all which statements were correct,—and correct plans of the property were exhibited at the auction; and the purchaser deposed that he did not see the plans, but had known the property from his boyhood, and bought it in the belief that it included two plots of garden ground which had for many years been occupied with the gardens behind the inn and shop respectively; it was held by Baggallay L.J. (sitting for Malins V.C.) and by the Court of Appeal that the purchaser was not entitled to be released from his bargain.[1] "If," said James L.J., "a man will not take reasonable care to ascertain what he is buying, he must take the consequences. . . . It is not enough for a purchaser to swear 'I thought the farm sold contained twelve fields which I knew, and I find it does not include them all.' or 'I thought it contained 100 acres and it only contains 80.' It would open the door to fraud if such a defence was to be allowed. Perhaps some of the cases on this subject go too far, but for the most part the cases where a defendant has escaped on the ground of a mistake not contributed to by the plaintiff, have been cases where a hardship amounting to injustice would have been inflicted upon him by holding him to his bargain, and it was unreasonable to hold him to it."[2]

§ **765**. Indeed, it seems on general principles clear that one party to a contract can never defend himself against it by setting up a misunderstanding on his part as to the real meaning and effect of the contract, or any of the terms in which it is expressed. To permit such a defence would be to open the door to perjury and to destroy the security of contracts.[3] Whether

[1] *Tamplin* v. *James*, 15 Ch. D. 215.

[2] 15 Ch. D. at p. 221.

[3] Consider the observations of Kekewich J. in *Van Praagh* v. *Everidge*, 71 L. J. Ch. 598; [1902]

the objection to such evidence is derived from the doctrine that every person who becomes a party to a contract, contracts to be bound in case of dispute by the interpretation which a Court would put on the language used, or from any other doctrine, the objection seems to be certainly valid.[1]

Mistake of one party as ground for rescission

§ **766**. So the mistake purely of one party to a contract not induced by the other will often fail as a ground for rescinding the contract by the party making the mistake. So where the defendants sold to the plaintiffs 100 chests of tea *ex Star of the East*, and the sale was made by a sample produced by the defendants as from that ship, when in fact it had nothing to do with that cargo, and the defendants gave notice that they would on that account treat the contract as void, the Court of Queen's Bench determined that there was no equity in the defendants simply to rescind the contract.[2]

Mistake of one party a ground for election.

§ **767**. Again, the mistake of the defendant may be a reason for putting the plaintiff to his election either to have his action dismissed, or to take performance of the contract as it was understood by the defendant.[3]

Parol variation set up by defendant.

§ **768**. We may now proceed to consider the effect of a parol variation set up by the defendant as a ground for refusing the specific performance of a written contract alleged by the plaintiff. It depends on the particular circumstances of each case whether the variation "is to defeat the plaintiff's title to have a specific performance, or whether the Court will

[1] Ch. 266, at pp. 272, 273; and the case of *Goddard* v. *Jeffreys*, 30 W. R. 269, 270, there (at p. 271 referred to. The decision in *Van Praagh* v. *Everidge* was reversed in C. A., [1903] 1 Ch. 434; 72 L. J. Ch. 260.

[2] See *Stewart* v. *Kennedy*, 15 App. Cas. 108; *Hart* v. *Hart*, 18 Ch. D. 670. Cf. *Hickman* v. *Berens*, [1895] 2 Ch. 638, 645, and consider *Wilding* v. *Sanderson*, [1897] 2 Ch. 534.

[3] *Scott* v. *Littledale*, 8 El. & Bl. 815.

[4] *Preston* v. *Luck*, 27 Ch. D. 497.

perform the contract, taking care that the subject-matter of this parol agreement or understanding is also carried into effect, so that all parties may have the benefit of what they contracted for."[1]

i. Where enforced

§ **769**. (i.) Where the parol variation set up by the defendant shows that after the parties to the contract had mutually agreed with one another, an error occurred in the reduction of the contract into writing, and it appears that the written contract varied according to the defendant's contention represents the true contract between the parties, the Court will, it seems, enforce specific performance of the contract so varied.

Instances.

§ **770**. Thus, where a bill was brought for the specific performance of a contract to grant a lease at a rent of 9*l*. per annum, and the defendant insisted that it ought to have been a term of the contract that the plaintiff should pay all taxes: Lord Hardwicke granted specific performance, and directed that the terms of the verbal contract should be carried into effect by the covenants to be inserted in the lease.[2] Again, where a bill prayed the execution of a contract for the sale of an estate, and the defendant resisted, and proved parol declarations by the auctioneer as to a right of common, and that previously to the sale the particular had been altered as to a certain right of common; the plaintiff proposed that his bill should be dismissed, but Lord Eldon pursued the course which the defendant insisted on, which was specifically performing the contract as contended for by the defendant, thus saving the expense of a cross-bill by him.[3]

ii. Where action dismissed.

§ **771**. (ii.) But where the mistake or parol variation set up by the defendant does not show a mere mistake in the reduction of the contract into writing,

[1] *Per* Lord Cottenham in *London and Birmingham Railway Co* v. *Winter*, Cr. & Ph. at p. 62; *Smith* v. *Wheatcroft*, 9 Ch. D. 223. Cf. *Morgan* v. *Griffith*, L. R. 6 Ex. at p. 72.

[2] *Joynes* v. *Statham*, 3 Atk. 388.

[3] *Fife* v. *Clayton*, 13 Ves. 546. See also *Gwynn* v. *Lethbridge*, 14 Ves. 585.

but that one party understood one thing and the other another, there is no such contract as the Court will enforce, and the plaintiff's action is consequently dismissed.

Therefore, where the Court thought that the plaintiff and defendant had both been mistaken in a contract which contained certain ambiguous conditions as to the payment for timber, the bill was dismissed.[1]

Enforcement of variation unfair.

§ **772.** The same result follows where, from any other circumstance, the enforcement of the parol variation set up by the defendant would be unfair on either party. Accordingly, where the plaintiff set up a contract which the defendant successfully resisted by parol evidence of a subsequent contract, and the plaintiff insisted on a performance of the contract so set up; Strange M.R. refused to grant it, on the grounds that it would be a surprise on the defendant to insist, under the prayer for general relief, on the performance of a contract which was not put in issue by the record, and that the plaintiff had really caused the litigation by his refusal to adopt the real contract.[2] Again, where the defendant proved a parol variation, and a great lapse of time had occurred, and compensation in respect of the term in dispute must have been allowed, if the contract had been enforced, for the period whilst the doubt about the terms of the contract had been subsisting, the plaintiff's bill was dismissed, but without costs.[3]

So in *Linsday* v. *Lynch*,[4] where the plaintiff had refused throughout to adopt the contract which the

[1] *Clowes* v. *Higginson*, 1 V. & B. 524. See the judgment in this case observed on by Lord St. Leonards, Vend. 133, and by Stuart V.C. in *Dan* v. *Verity*, 17 W. R. at p. 568. See, too, *Butterworth* v. *Walker*, 13 W. R. 168.

[2] *Legal* v. *Miller*, 2 Ves. Sen. 299. See the statement of this case by Grant M.R. in *Price* v. *Dyer*, 17 Ves. 361. See also *Smith* v. *Wheatcroft*, 9 Ch. D. 223.

[3] *Garrard* v. *Grinling*, 2 Sw. 244.

[4] 2 Sch. & Lef. 1, 10—11. See *Jeffery* v. *Stephens*, 9 Jur. N. S. 947; 8 W. R. 127; *Smith* v. *Wheatcroft*, 9 Ch. D. 223.

defendant admitted, the bill was dismissed, but without prejudice to another bill.

Plaintiff put to his election

§ 773. (iii.) Where, as is often the case, the Court does not decide that the parol variation falls clearly under either of the previous cases, but merely that the defendant contracted under mistake, it puts the plaintiff to his election either to have his action dismissed, or to have the contract executed with the parol variation.

Higginson v. Clowes

§ 774. Thus, in *Higginson* v. *Clowes*,[1] where the conditions of sale were likely to have misled the defendant, and the defendant contended for a different construction from that of the plaintiff, Grant M.R. offered the plaintiff either to have his bill dismissed, or to have the contract executed on the defendant's construction. The counsel for the defendant contended that it was not competent to the plaintiff to have his bill dismissed but that the defendant, without filing a cross-bill, might have a specific performance of the contract. Grant M.R., however, held that that right existed where the defendant's construction was adopted by the Court, but that where, as in the case before him, the Court did not decide that the defendant's construction was right, but only that he had contracted under a mistake created by the plaintiff, the bill was merely dismissed. In a subsequent suit[2] on the same contract, where the parties were inverted, Plumer V.C., holding that there had been a mistake on both sides, refused specific performance on the construction of the defendant in the first suit.

§ 775. In *Ramsbottom* v. *Gascoigne*,[3] where the written contract confined a reference of expenses to those of conveyance, but the defendant proved by the parol

[1] See, in addition to the cases cited *infra*, *Browne* v. *Marquis of Sligo*, 10 Ir. Ch. R. 1.

[2] 15 Ves. 516.

[3] 1 V. & B. 521.

[4] 1 V. & B. 165. Query, was not specific performance forced on the defendant's construction, as the error appears to have been merely in the reduction of the contract into writing?

evidence of the attorney that it was the intention of both parties that the plaintiff, who was the purchaser, should also pay the expenses of making out the defendant's title, Grant M.R. put the plaintiff to his election, either to have the contract performed in the way contended for by the defendant, or to have his bill dismissed. And in a subsequent case, where the defendant proved a parol variation, the same Judge again left the plaintiff either to have a specific performance with this variation, or to have his bill dismissed.

§ **776**. In a case where parol evidence was admitted on behalf of the defendants to show that a contract by several persons to enter into bonds in 1000*l.* ought to have been for one joint bond in that amount by all; Plumer V.C. left it to the plaintiff to have his bill dismissed, or to take a decree for the joint bond, or to take an issue on which the witnesses could be examined.[2]

Lord Gordon v. Marquis of Hertford

§ **777**. In *Clarke* v. *Moore*,[3] where a landlord sought specific performance of a contract for a lease, and the defendant set up a parol contract to abate the rent, to which the plaintiff at the bar submitted, the lease was directed with the abatement and each party was left to bear his own costs: and in another case, where it appeared that, in addition to the written contract, there had been an understanding between the agent of the plaintiff and the defendant as to payment for timber and certain expenses, the plaintiff consenting to adopt the terms as part of his contract, specific performance was granted.[4]

Clarke v. Moore

§ **778**. Where there is a stipulation which one of the contracting parties may reasonably have understood to

Other instances of variation.

Clarke v. *Grant*, 14 Ves. 519. As to this case, see *Dear* v. *Verity*, 17 W. R. at p. 569.

Lord Gordon v. *Marquis of Hertford*, 2 Mad. 106.

1 Lon. & L. 723.

[4] *London and Birmingham Railway Co.* v. *Winter*, Cr. & Ph. 57; cf. *Barnard* v. *Cox*, 26 Beav. 254; *Donald* v. *Scott*, 10 Ir. Ch. R. 196. Distinguish *Snelling* v. *Thomas*, L. R. 17 Eq. 303.

be implied in the contract, and did so understand,—as, for instance, the insertion of a usual clause in a lease,—specific performance will not be enforced against such party except with such condition included.[1] And where a plaintiff sought relief on the ground of a covenant for renewal, which had for one hundred and fifty years been acted on in a manner different from its terms,—namely, by continually increasing the fine, and not the rent: the Court held that the covenant could not be carried into execution according to its original terms, but might be on the plaintiff's submitting to a conscientious modification of it, to meet the circumstances of the case.[2] In this instance acquiescence, and not mistake, was the ground of the variation.

Variation, how set up.

§ 779. The parol variation may be alleged by the plaintiff for the purpose of offering the defendant his election;[3] or it may be set up by the defendant by way of defence. If, in the absence of its being thus alleged, it comes out on the evidence, the Court will inquire into it before disposing of the case.[4] The Court will do the same where the variation is alleged by the defendant, and so far proved as to raise a suspicion of its existence, and yet not to satisfy the Court.[5]

Evidence.

§ 780. From the great danger which would otherwise arise, the Court will not allow a person to escape from a written contract on slight parol evidence of mistake on his own part. So in one case Lord Hatherley (then V.C.) said that the oath of the defendant that he had inserted in his letter a term which he in fact omitted, and the oath of his agent that he had received instructions to the like effect, in letting the house,

[1] *Ricketts* v. *Bell*, 1 De G. & Sm. 335. Consider *Chappell* v. *Gregory*, 34 Beav. 250.

[2] *Davis* v. *Hone*, 2 Sch. & Lef. 341.

[3] *Robinson* v. *Page*, 3 Russ. 114.

[4] *Parken* v. *Whitby*, T. & R. 366; *London and Birmingham Railway Co.* v. *Winter*, Cr. & Ph. 57; cf. *Helsham* v. *Langley*, 1 Y. & C. C. C. 175.

[5] *Van* v. *Corpe*, 3 My. & K. 269.

would not have sufficed; but the defendant having in his letter referred to the offer as having been previously made to another party, and that party swearing that in the offer as made to him the term omitted in the subsequent offer was contained, the Court held that sufficient evidence of mistake on the defendant's part had been given, and allowed the defence.[1]

Common error.

§ 781. The common error or mistake of both parties as to the subject-matter of the contract is, on the principles already stated, a clear ground for resisting specific performance: so where the plaintiff being entitled to estates during the life of A. entered into a contract with regard to the timber on the estates with the remainderman: and it subsequently appeared that A. was at the time dead, though this circumstance was unknown to both parties; Lord Romilly M.R., and afterwards the Lord Justices, refused specific performance and dismissed the bill with costs.[2]

Mistake of both parties a ground for rescission.

§ 782. Further, where both parties to a contract are at the time of the contract in mistake or error as to the matters in respect of which they are contracting, this not only will furnish a ground for resisting specific performance, but also may enable the Court to rescind the contract.[3]

[1] *Wood* v. *Scarth*, 2 K. & J. 33.

[2] *Cochrane* v. *Willis*, 34 Beav. 1; L. R. 1 Ch. 58. Cf. *per* Turner L.J. in *Murrell* v. *Goodyear*, 1 De G. F. & J. at p. 449. See, too, *Watson* v. *Marston*, 1 De G. M. & G. 230, where, however, Turner L.J. said (at p. 238), "Specific performance is not to be withheld merely upon a vague idea as to the true effect of the contract not having been known."

[3] See *Torrance* v. *Bolton*, L. R. 14 Eq. 124; 8 Ch. 118. In *Jones* v. *Clifford*, 3 Ch. D. at p. 793, Hall V.C. intimated the opinion that the Court would, even in the case of a completed contract, give relief against a common mistake in the same way as it would against fraud. And this was done in *Scott* v. *Coulson*, [1903] 1 Ch. 453, affirmed in C. A., [1903] 2 Ch. 249; 72 L. J. Ch. 600, where a contract for sale of a life-policy, entered into by both parties in the belief that the assured was alive whereas he in fact was dead, was set aside, at the suit of the vendors, after it had been completed by assignment. In this connection, consider *Thompson* v. *Hickman*, [1907] 1 Ch. 550, 561, where Neville J. said that *Davies* v. *Fitton* (2 Dr. & War. 225) and *May* v.

Calverley v. Williams.

§ **783.** Thus, in *Calverley* v. *Williams*,[1] Calverley brought his bill against Williams for a conveyance of seven acres of copyhold land, part of an estate sold by auction and purchased by the plaintiff as being comprehended in the advertisement of the sale, and described as in the possession of Groombridge. The defendant resisted this claim, on the ground that he did not intend to include those seven acres, or know that they were in the possession of Groombridge. Lord Thurlow, in giving judgment, said, "No doubt, if one party thought he had purchased *boni fide*, and the other party thought he had not sold, there is a ground to set aside the contract, that neither party may be damaged; because it is impossible to say one shall be forced to give that price for part only which he intended to give for the whole or that the other shall be obliged to sell the whole for what he intended to be the price of part only."

Instances of grant and refusal of rescission.

§ **784.** Again, where both vendor and purchaser of an alleged estate in fee in remainder on an estate tail were ignorant that at the time the tenant in tail had suffered a recovery, so that in fact no estate in remainder existed, the Court rescinded the contract.[2]

And where A. proposed certain terms of assurance to the agent in London of a Scotch insurance office, and by mistake wrote down other terms in his proposal,

Platt ([1900] 1 Ch. 616) appeared to him to be decisions to the effect that the Court would not, upon the ground of mutual mistake, rectify a conveyance which had been executed in conformity with a previous agreement in writing come to between the parties; and *Beale* v. *Kyte*, [1907] 1 Ch. 564, where vendors, who had not been guilty of any laches, were held entitled to rectification of an error in the conveyance which was the result of a common mistake. See, too, *Leuty* v. *Hillas*, 2 De G. & J. 110; and distinguish *Delacha* v. *Sawbridge*, [1901] 2 Ch. 98, 109, where the relief of rescission on the ground of common mistake was asked for, but not granted.

[1] 1 Ves. Jun. 210; *per* Lord Erskine in *Stapylton* v. *Scott*, 13 Ves. 427. See, too, *Davis* v. *Shepherd*, L. R. 1 Ch. 410; *Price* v. *Ley*, 4 Giff. 235, affirmed 11 W. R. 175.

[2] *Hitchcock* v. *Giddings*, 1 Pri. 135.

to which proposal the Scotch office assented, the Court at the instance of A. (refusing to reform the contract) rescinded it, and directed the repayment of the premiums paid.[1]

But where there was a common mistake as to the total acreage of some land, thirty-six acres of which the vendor contracted to sell, it was held that, the mistake being one which did not really touch the substance of the contract, the vendor was not entitled to rescission.[2]

Mistake produced by defendant a ground for rescission.

§ 785. Again, mistake of the plaintiff produced by the innocent misrepresentation of the defendant,[3] or by the defendant's not doing his duty in respect of the contract, may be ground for rescission. In a case where the vendor described the garden of a house as inclosed by a rustic wall with a tradesman's side entrance: and knew but did not disclose that the wall was no part of the property sold, and that the tradesman's entrance was used only by sufferance, the Court rescinded the contract.[4]

Cooper v. *Phibbs.*

§ 786. In a case brought before the House of Lords on appeal from Ireland, the appellant believing himself to be a stranger to a fishery agreed to take a lease of it: the respondents believing themselves to be entitled to the property agreed to grant the lease: it turned out that the appellant was entitled to the property and not the respondents, and the House declared that the contract was entered into by the parties to it under mistake and in ignorance of the actually existing rights and interests of the parties in the fishery, and that the contract was not binding in Equity upon the appellant and respondents, but ought to be set aside subject to certain terms which the special circumstances

[1] *Fowler* v. *Scottish Equitable Life Insurance Society*, 28 L. J. Ch. 225; 7 W. R. 5.

[2] *North* v. *Percival*, [1898] 2 Ch. at pp. 131, 132.

[3] *Adam* v. *Newbigging*, 13 App. Cas. 308; 34 Ch. D. 582. Cf. *Wilding* v. *Sanderson*, [1897] 2 Ch. 534, 550.

[4] *Brewer* v. *Brown*, 28 Ch. D. 309.

of the case and the principles of good conscience were held to impose.[1]

Mistake a ground for rectification.

§ 787. But where neither party to the contract is in error as to the matters in respect of which they are contracting, and there is an actually concluded contract, but there is an error common to both the parties in the reduction of the contract into writing, there the Court interferes for the purpose of reforming the contract, and not of rescinding it.[2] For by so doing neither party will be damaged: whereas by enforcing it as it stood, one party would be necessarily injured; and by rescinding it, both would be deprived of the benefit of the contract.

Lord Thurlow in *Calverley* v. *Williams*.

§ 788. Accordingly in a case already stated, where the question was whether a certain seven acres were or were not included in the contract, Lord Thurlow, after stating that if the parties to the contract had mistaken each other in this respect, it must be rescinded, said: "Upon the other hand, if both understood the whole was to be conveyed, it must be conveyed. But again, if neither understood so, — if the buyer did not imagine he was buying, any more than the seller imagined he was selling, this part,—then this pretence to have the whole conveyed is as contrary to good faith upon his side, as the refusal to sell would be in the other case."[3]

Henkle v. *Royal Exchange Assurance Co.*

§ 789. The jurisdiction of the Court in this respect was clearly asserted by Lord Hardwicke in the case of *Henkle* v. *Royal Exchange Assurance Co.*,[4] which was a bill seeking, after the loss, so to rectify a policy, on the ground of common mistake, as to turn the loss on the insurer, which but for such variation must have been

[1] *Cooper* v. *Phibbs*, L. R. 2 H. L. 149; *infra*, § 802. See also *Bingham* v. *Bingham*, 1 Ves. Sen. 126; *Raffles* v. *Wichelhaus*, 2 H. & C. 906; *Earl Beauchamp* v. *Winn*, L. R. 6 H. L. 223. Cf. *Thompson* v. *Hickman* (rectification), [1907] 1 Ch. 550, 561; and *Beale* v. *Kyte*, ibid. 564.

[2] *Murray* v. *Parker*, 19 Beav. 305.

[3] *Calverley* v. *Williams*, 1 Ves. Jun. 210.

[4] 1 Ves. Sen. 317.

borne by the insured. "No doubt," said his Lordship, "but this Court has jurisdiction to relieve in respect of a plain mistake in contracts in writing, as well as against frauds in contracts; so that if reduced into writing contrary to intent of the parties, on proper proof that would be rectified:" but for want of such proper proof the bill was dismissed.

Baker v. Paine.

§ **790**. In another case, before the same Judge, the captain of an East India ship, by articles of agreement, bargained and sold all his china ware and merchandize, brought home in his last voyage, to the defendant: the articles of agreement were drawn up, from minutes made by the parties, by an attorney, who, misunderstanding the transaction, drew up the articles in an erroneous and absurd manner: the captain, who was the party aggrieved by the error, brought his bill for an account of what was due on the contract, and insisted on its rectification: he was allowed to give parol evidence of the error and of the usage of trade to show the nature of the real transaction and the consequent mistake in the articles.[1]

Rectification requires a prior contract.

§ **791**. It follows from the nature of the jurisdiction that there can be no rectification where there is not a prior actual contract by which to rectify the written document: so that, for instance, a policy cannot be rectified[2] by the slip, because the slip constituted no contract, and there was no contract till the policy was signed and the premium paid.[3]

Mistake of one party not a ground for compulsory rectification.

§ **792**. It equally follows that the mistake of one party to a contract can never be a ground for compulsory rectification, so as to impose on the second party the erroneous conception of the first.[4] The error

[1] *Baker* v. *Paine*, 1 Ves. Sen. 456; 6 Ves. 336, n.

[2] See *Morocco and &c. Trading Co.* v. *Fry*, 13 W. R. 310.

[3] *Mackenzie* v. *Coulson*, L. R. 8 Eq. 368.

[4] *Sells* v. *Sells*, 1 Dr. & Sm. 42; *Rooke* v. *Lord Kensington*, 2 K. & J. 753; *Thompson* v. *Whitmore*, 1 J. & H. 268; *Earl of Bradford* v. *Earl of Romney*, 30 Beav. 431.

Election between annulment and rectification.

of the plaintiff alone may, however, where (but, it is conceived, only where) there has been fraud or conduct equivalent to fraud on the part of the defendant,[1] be a ground for putting the defendant to elect between having the transaction annulled altogether or submitting to the rectification of the deed in accordance with the plaintiff's intention.[2]

Parol evidence admitted for rectification.

§ **793**. Parol evidence is admitted to show the common mistake of both parties in reducing the contract into writing, and as the ground for rectifying it. "I think it impossible," said Lord Thurlow, "to refuse, as incompetent, parol evidence which goes to prove that the words taken down in writing were contrary to the concurrent intention of all parties."[3]

But must be clear.

§ **794**. But in order thus to procure the rectification of a contract, the proof must be clear, irrefragable, and the "strongest possible."[4] As the point to be proved is that the concurrent intention of all the parties to the contract was different from that expressed by the written contract, the Court will attentively regard the admission or denial of the defendant as one of those parties.[5] It need scarcely be added that the

[1] *May* v. *Platt*, [1900] 1 Ch. at p. 623.

[2] *Garrard* v. *Frankel*, 30 Beav. 445; *Harris* v. *Pepperell*, L. R. 5 Eq. 1; *Paget* v. *Marshall*, 28 Ch. D. 255. See, too, *Bloomer* v. *Spittle*, L. R. 13 Eq. 427, questioned in *Beale* v. *Kyte*, [1907] 1 Ch. 564. In his judgment in *Harris* v. *Pepperell*, Lord Romilly M.R. pointed out the distinction between the decisions in *Garrard* v. *Frankel* and in *Earl of Bradford* v. *Earl of Romney*, 30 Beav. 431.

[3] In *Lady Shelbourne* v. *Lord Inchiquin*, 1 Bro. C. C. 341.

[4] *Henkle* v. *Royal Exchange Assurance Co.*, 1 Ves. Sen. 317; *per* Lord Eldon in *Marquis Townshend* v. *Stangroom*, 6 Ves. 333; *Fowlow* v. *Slater*, 25 L. J. Ch. 875; 27 L. T. 268; *Fallon* v. *Robins*, 16 Ir. Ch. R. 422. Lord Thurlow's language in *Henkle* v. *Royal Exchange Assurance Co.* was criticized by Lord Chelmsford L.C. in *Fowler* v. *Fowler*, 4 De G. & J. at p. 264.

[5] 6 Ves. 334; *Mortimer* v. *Shortall*, 2 Dr. & War. 363, 374. In *Pitcairn* v. *Ogbourne*, 2 Ves. Sen. 375, 379, the evidence was considered sufficient to overcome the defendant's denial. See, too, *Garrard* v. *Frankel*, 30 Beav. 445; *Harris* v. *Pepperell*, L. R. 5 Eq. 1; and *Bloomer* v. *Spittle*, L. R. 13 Eq. 422, questioned in *Beale* v. *Kyte*, [1907] 1 Ch. 564.

Court will only act on parol evidence when satisfied that there is no existing writing which contains the original instructions or contract.[1]

Latent ambiguity.

§ 795. Where there is a writing by which an executed deed is to be rectified, and in that writing there is a term in respect of which there is a latent ambiguity, parol evidence may be admitted to explain it, and thus assist in the rectification of the deed.[2]

Division of mistake.

§ 796. Mistakes are usually divided into mistakes of fact[3] and of law. The former kind have always been held to give occasion to the jurisdiction of Equity in mistake.

Mistakes of law.

§ 797. As regards mistakes of law, the maxim usually referred to was *Ignorantia legis non excusat*: and the older authorities seem to show that Courts of Equity would neither set aside contracts for mistake in law,[4] nor allow such mistake to be set up as ground for resisting specific performance of contracts in other respects free from objection.[5]

The law stated by Lord Chelmsford.

§ 798. This view of the law was thus stated by Lord Chelmsford in addressing the House of Lords in 1858:[6]—"Mistake is undoubtedly one of the grounds for equitable interference and relief: but then it must be mistake not in matters of law, but a mistake of facts. The construction of a contract is clearly matter of law; and if a party acts upon a mistaken view of

[1] *Lackersteen* v. *Lackersteen*, 30 L. J. Ch. 5; 6 Jur. N. S. 1111.

[2] *Murray* v. *Parker*, 19 Beav. 305.

It may be observed that mistake of fact is not the less a ground for relief because the person who has made the mistake had the means of knowledge. *Willmott* v. *Barber*, 15 Ch. D. 97, 106; S. C. 17 Ch. D. 772.

[3] *Marshall* v. *Collett*, 1 Y. & C. Ex. 232, 238; *Cockerell* v. *Cholmley*, 1 R. & My. 418.

[4] *Pullen* v. *Ready*, 2 Atk. 587; *per* Lord Alvanley M.R. in *Gibbons* v. *Caunt*, 4 Ves. 849; *Stockley* v. *Stockley*, 1 V. & B. 23, 30; *Maddy* v. *Hungerford*, 2 Vern. 243. See also *Bilbie* v. *Lumley*, 2 East, 469; *Croome* v. *Lediard*, 2 My. & K. 251; *Price* v. *Dyer*, 17 Ves. 356.

[5] *Midland Great Western Railway of Ireland* v. *Johnson*, 6 H. L. C. 810, 811.

his rights under a contract, he is no more entitled to relief in Equity than he would be at Law."[1]

Misrepresentation of law.

§ 799. With the authorities referred to in the two last preceding sections may be compared those others, which show that a misrepresentation of law, at least if innocently made, does not bind and create any civil liability.[2]

Court will now relieve against mistakes of law.

§ 800. Recent decisions, however, have lessened if not destroyed the importance of the distinction between mistakes of fact and of law. In *Stone* v. *Godfrey*[3] Turner L.J. said that he felt no doubt that the Court had power to relieve against mistakes in law as well as mistakes in fact.

Anchor case.

§ 801. Acting on this view, Lord Hatherley (when Vice-Chancellor) remitted to his original rights against Company A. a creditor of that company who had given up that right in consideration of the substituted security of Company B., which purchased the business of the first Company A., when that purchase was held void as *ultra vires*.[4]

Cooper v. *Phibbs.*

§ 802. The point came twice before the House of Lords in the years 1867 and 1873. In *Cooper* v. *Phibbs*,[5] where the appellant, believing himself to be a stranger to his own land agreed to take a lease of it, and was relieved from his mistake, his belief was founded on an erroneous impression of the effect of certain documents of title: and Lord Westbury said: "It is said *Ignorantia juris haud excusat*; but in that maxim the word *jus* is used in the sense of denoting general law, the ordinary law of the country. But when the word *jus* is used in the sense of denoting a private right, that maxim has no application. Private

Lord Westbury on *Ignorantia juris haud excusat.*

[1] See *Powell* v. *Smith*, L. R. 14 Eq. 85.

[2] *Rashdall* v. *Ford*, L. R. 2 Eq. 750; *Beattie* v. *Lord Ebury*, L. R. 7 Ch. 777; L. R. 7 H. L. 102.

[3] 5 De G. M. & G. 76; *Daniell* v. *Sinclair*, 6 App. Cas. 181, 199.

[4] *Re Saxon Life Assurance Co., Anchor case*, 2 J. & H. 408.

[5] (1867) L. R. 2 H. L. 149; 17 Ir. Ch. R. 73; *supra*, § 786.

right of ownership is matter of fact: it may be the result also of matter of law: but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is, that that agreement is liable to be set aside as having proceeded upon a common mistake."[1]

§ **803**. Again, in *Earl Beauchamp* v. *Winn*, Lord Chelmsford in addressing the House said "that the ignorance imputable to the party was of a matter of law arising upon the doubtful construction of a grant. This is very different from the ignorance of a well-known rule of law. And there are many cases to be found in which Equity, upon a mere mistake of the law, without the admixture of other circumstances, has given relief to a party who has dealt with his property under the influence of such mistake."[2]

Lord Chelmsford in *Earl Beauchamp* v. *Winn*.

§ **804**. It seems to follow that, at least as a defence to specific performance, common error of law of both parties, or even the sole error of the defendant, when resulting in mistake important to both parties to the contract as to some of the matters dealt with by the contract, would be sufficient. But it is submitted that neither the common error of both parties nor the sole error of the defendant as to the operation and effect of the contract can be a ground for resisting specific performance.[3]

Result of the authorities.

§ **805**. Again, as in cases of hardship the turning of events in a way different from what the parties anticipated will not furnish a ground of defence; so in regard to mistake, if persons choose to speculate upon facts, and the view on which they acted proves to be a mistaken one, that circumstance will furnish no defence on which the Court will act.[4]

Speculation as to facts.

[1] *Cooper* v. *Phibbs*, L. R. 2 H. L. at p. 170.

[2] (1873) L. R. 6 H. L. at p. 234. Cf. *Heald* v. *Walls*, 18 W. R. 398.

[3] See *supra*, § 763.

[4] See at Common Law, *Harris* v. *Loyd*, 5 M. & W. 132.

Mistake not about the essence of the contract.

§ 806. Where there is a mistake of both parties, but not about the very subject of the contract, it will not be a ground for rectifying the contract. Therefore where both parties were under a mistake as to the duration of a leasehold interest, so that the price was considerably less than if the actual extent of the interest had been known, and the vendors filed a bill asking for a reassignment of the extra term which the purchasers took under the assignment, Knight Bruce V.C. held that the lease was the substance sold and not a term of the supposed duration, and that the vendors ought to have known what was the condition of the property they proposed to sell, and accordingly dismissed the bill.[1]

The Roman law.

§ 807. In like manner the Roman jurists held that mistake as to the substance of the thing avoided the contract: but if there be only a difference in some quality or accident, though the misapprehension may have been the actuating motive, yet the contract remains binding.[2]

Where the writing purposely differs from the contract.

§ 808. The Court, on a clear principle, will not interfere for the rectification of a written contract where it was by the intention of the parties to it that the writing did not comprise all the terms of the actual contract; for what is done on purpose is evidently not done by mistake. Therefore where there was a contract for an annuity, and the parties to it designedly omitted a proviso for redemption, thinking it would render the transaction usurious, the Court refused to rectify the deed.[3] The parties "desired the Court," said Lord Eldon,[4] "not to do what they intended, for

[1] *Okill* v. *Whittaker*, 1 De G. & Sm. 83, affirmed 2 Ph. 338.

[2] *Kennedy* v. *Panama &c. Mail Co.*, L. R. 2 Q. B. 580, and authorities there cited.

[3] *Lord Irnham* v. *Child*, 1 Bro. C. C. 92; *Lord Portmore* v. *Morris*, 2 Bro. C. C. 219; *Hare* v. *Shearwood*, 3 Bro. C. C. 168; S. C. 1 Ves. Jun. 241.

[4] In *Marquis Townshend* v. *Stangroom*, 6 Ves. 332; *Wilson* v. *Jones*, 36 W. R. 573.

the insertion of that proviso was directly contrary to their intention, but they desired to be put in the same situation as if they had been better informed, and consequently had a contrary intention."[1]

Subsequent parol contract

§ 809. Where the parol variation which the plaintiff or defendant seeks to set up is a subsequent contract in parol between the parties to a written contract, the case in nowise comes within the doctrine of mistake, and the parol variation is inadmissible under the Statute of Frauds, except in cases where the refusal to perform it might amount to fraud.[2]

Instances.

§ 810. Therefore where A., by writing, agreed with B. to grant him a lease, to commence on the 21st of April, B. being merely the agent of C.; and subsequently A. and C. agreed by parol that the lease should commence from the 24th of June instead of the 21st of April, and be made to C. instead of to B., and C. and B. sought a specific performance of the written contract as varied by the subsequent parol one, a plea of the Statute of Frauds was necessarily allowed.[3] And where there was a contract in writing, and the defendant set up a subsequent parol contract, by which the parties mutually abandoned the terms of the written contract and then agreed upon new terms; Grant M.R. held that these new terms were merely meant to modify or add to the terms of the original contract; that therefore the parol contract could not be set up as a waiver of the first, and that the subsequent terms not having been in any way acted on, the second contract formed no defence to the first, the execution of which he accordingly directed.[4] Again, where the written contract was silent as to restrictive covenants, but there was some evidence of a subsequent contract

[1] See also *Pitcairn* v. *Ogbourne*, 2 Ves. Sen. 375; cf. *Cripps* v. *Jee*, 4 Bro. C. C. 472.

[2] See *per* Grant M.R. in *Price* v. *Dyer*, 17 Ves. 364.

[3] *Jordan* v. *Sawkins*, 3 Bro. C. C. 388; S. C. 1 Ves. Jun. 402.

[4] *Price* v. *Dyer*, 17 Ves. 356.

to take the lease subject to a certain restrictive covenant as to trade, the Statute of Frauds was held to be a bar to the performance which the plaintiff sought of this subsequent parol contract.[1]

Specific performance, with rectification of mistake

§ 811. The question how far a plaintiff can enforce specific performance of a contract with a parol variation, or in other words, with a rectification of a mistake, was on the authorities before the Judicature Act, 1873, not perfectly clear: but the weight of authority appeared to be in favour of the proposition that a plaintiff could not sue for the specific performance of a contract with a parol variation. This is now altered by the last-mentioned statute.[2]

Before proceeding to consider the cases on this point we may briefly advert to principles.

Mistake of plaintiff alone.

§ 812. With regard to a mistake of the plaintiff alone, it is at once obvious that to allow him to correct this mistake, and enforce the contract so corrected on the other party to it, would be a great injustice.

Mistake of both parties

§ 813. With regard, however, to a mistake of both parties to a contract in the reduction of the contract into writing, there can be no objection in point of justice to the plaintiff asking to have that mistake corrected, and to have the real contract carried into execution.

Mistake in reference to Statute of Frauds.

§ 814. It may be said that a plaintiff seeking to correct and enforce a contract which is within the Statute of Frauds is suing in contravention of that Act. But the objection seems untenable. For every action to correct by parol evidence a written contract, whether executed or executory, is in some sense a suing on the contract: yet the jurisdiction of Equity in cases of mistake in written contracts is clear. Mistake, like

[1] *Snelling* v. *Thomas*, L. R. 17 Eq. 303.

[2] See *infra*, § 815. A fuller discussion of this question than that following is to be found in the first and second editions of this work. The Judicature Act, 1873, has seemed to justify a briefer treatment of it.

fraud,[1] must be deemed an exception to the statute in Equity.

Cases of authorities excluding parol evidence for plaintiff

§ 815. There was, however, a series of cases which seemed to establish the proposition, that in the Court of Chancery a plaintiff could not be allowed to sue for the specific performance of a contract with a parol variation. The principal cases in this series were *Rich* v. *Jackson*, before Lord Rosslyn;[2] *Wedlam* v. *Hearn*, before Sir W. Grant,[3] *Clinan* v. *Cooke*, before Lord Redesdale;[4] *Spurr* v. *Campbell*, before Lord Cottenham;[5] *Manser* v. *Back*, before Wigram V.C.;[6] *Attorney-General* v. *Sitwell*,[7] before Alderson B.; and *Davies* v. *Fetton*,[8] before Lord St. Leonards.[9]

Cases for admission of parol evidence for plaintiff.

§ 816. This current of authorities, however strong, can yet scarcely be considered uniform in favour of the position that the plaintiff could never avail himself of a parol variation. There are dicta of Lord Hardwicke's in the cases of *Walker* v. *Walker*[10] and *Joynes* v. *Statham*[11] which, notwithstanding the remarks upon them of Lord Redesdale[12] and of Grant M.R.,[13] imply, it is submitted, a somewhat different view of the question of that already stated. In like manner, it is believed that arguments against the course of authority

[1] See *supra*, § 567.

[2] 1 Bro. C. C. 514; 6 Ves. 331, n. 7 Ves. 211; 6 R. R. 113; S. C. 2 W. & T. Lead. Cases in Equity (7th ed.) 513, and cases there collected. In *Thompson* v. *Hickman*, [1907] 1 Ch. 550, Neville J. said (at p. 561), "The doctrine of *Wedlam* v. *Hearn* appears to me to have no bearing upon a case of rectification. Specific performance comes under a head of equitable jurisdiction quite distinct from rectification."

[3] 1 Sch. & Lef. 22, 38.

[4] Mv. & C. 180.

[5] Ib. 41.

[6] 1 Y. & C. Ex. 539.

[7] 2 Dr. & W. 225. As to this case, see *per* Neville J. in *Thompson* v. *Hickman*, [1907] 1 Ch. 550, 561.

[8] See also *Higginson* v. *Clowes*, 15 Ves. 516, 524; *Wood* v. *Winchester*, 1 V. & B. 375, 378; *Nurse* v. *Lord Seymour*, 13 Beav. 254; *London and Birmingham Railway Co.* v. *Winter*, Cr. & Ph. 57, 61; *Emmett* v. *Dewhurst*, 3 Mac. & G. 587; and the observations of Farwell J. in *May* v. *Platt*, [1900] 1 Ch. at p. 622.

[9] 2 Atk. 98, S. C. 6 Ves. 335, n.

[10] 3 Atk. 388.

[11] In *Clinan* v. *Cooke*, 1 Sch. & Lef. 35.

[12] In *Wedlam* v. *Hearn*, 7 Ves. at pp. 219, 220.

above stated may be drawn from the cases of *Pember* v. *Mathers*,[1] before Lord Thurlow; *Marquis Townsend* v. *Stangroom*,[2] before Lord Eldon; *Clifford* v. *Turrell*,[3] before Knight Bruce V.C.; and *Martin* v. *Pycroft*,[4] before the Lords Justices in Chancery.[5]

§ **817**. The great American jurists, Mr. Justice Story and Chancellor Kent, were likewise clear in their opinion that a Court of Equity ought, if necessary, at one and the same time, to reform and enforce a contract.[6]

Effect of the Judicature Act, 1873, s. 24 (7).

§ **818**. This vexed question has, it is believed, been finally solved by the Judicature Act, 1873, s. 24, sub-s. 7. That statute requires the High Court in any cause to grant all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any and every legal and equitable claim properly brought forward by them respectively in such cause, so that so far as possible all matters in controversy between the said parties respectively may be completely and finally determined and all multiplicity of legal proceedings concerning any of such matters avoided. Under this provision the High Court has entertained an action for the reformation of a contract and for the specific performance of such reformed contract, in a case in which the Statute of Frauds did not create a bar.[7]

Cases of rectification and relief in same suit.

§ **819**. It may be added, that there are cases somewhat resembling specific performance, where in the same suit the plaintiff has had an instrument rectified

[1] 1 Bro. C. C. 52.

[2] 6 Ves. 328.

[3] 1 Y. & C. C. C. 138; cf. *Frith* v. *Frith*, [1906] A. C. 254, 258.

[4] 2 De G. M. & G. 785.

[5] See also *per* Sir W. Grant in *Clarke* v. *Grant*, 14 Ves. 524; *Harrison* v. *Gardner*, 2 Mad. 198; *Robinson* v. *Page*, 3 Russ. 114.

[6] 1 Story, Eq. Jur. § 161; *Kelsalbrack* v. *Livingstone*, 1 Johns. Ch. Rep. 148.

[7] *Olley* v. *Fisher*, 34 Ch. D. 367; followed by Kay J. in *Shrewsbury and Talbot Cab, &c. Co.* v. *Shaw*, 89 L. T. Jour. 274. See, however, *May* v. *Platt*, [1900] 1 Ch. at pp. 621, 622.

and then obtained consequential relief: as where a bond and deposit of deeds were given to secure an advance, and the bond by mistake appeared to be usurious; the plaintiff proved the mistake, had the bond rectified, and was held entitled to the consequential relief to which an ordinary obligee and equitable mortgagee is entitled.[1] In another case a client entered into a contract with his solicitor for the payment of a fixed sum of money in lieu of costs, and the contract contained mistakes as to the name and rights of the client, which, if construed strictly, would have excluded the solicitor from all rights under the contract. In consequence of these mistakes, the solicitor by his bill alleged that he had no remedy at Law, and accordingly prayed that the contract might be rectified, and an order made for payment of the sum of money under the contract, as if at the time of its execution it had expressed the intention of the parties: the Court made a decree directing the payment of the money.[2]

Misdescription in contract.

§ **820.** It may here be added that a misdescription in the contract may be attributable to (i.) the plaintiff alone or (ii.) the defendant alone, or (iii.) both parties; and in either of the former cases it may be either fraudulent or innocent. If it be fraudulent, the party guilty of the fraud of course cannot avail himself of it in any way: if it be innocent, then (i.) if it be attributable to the plaintiff alone and induce mistake, it falls under the head of mistake induced by the plaintiff;[3] (ii.) if it be attributable to the defendant alone, it comes under the head of mistake purely due to the defendant;[4] and lastly (iii.) if it be attributable to both parties, it falls under the head of common error or mistake.[5]

[1] *Hodgkinson* v. *Wyatt*, 9 Beav. [illegible].

[2] *Stedman* v. *Collett*, 17 Beav. 608.

[3] *Supra*, §§ 756, 812.

[4] *Supra*, §§ 758 *et seq.*

[5] *Supra*, §§ 781, 813.

CANADIAN NOTES.

Mistake.

In *Needler* v. *Campbell*, 17 Grant's Ch. 592, the lessee of a timber limit offered to take $400 for it and letters passed which amounted to a contract at law to sell at that price. The offer, however, had been made in contemplation of a reservation and condition which had been spoken of at an interview between the parties but which were not mentioned in the letters. It was held that the purchaser was not entitled in equity to a specific performance without the reservation and condition. Mowat V.C. assumed that the letters set forth in the bill were sufficient evidence of a legal contract, "but it is not of every legal contract that Courts of Equity grant specific performance and it is a general rule that if a written agreement happens to omit a term which one of the parties understood to form part of the bargain, or happens not to be in some other material respect what he intended to agree to and understood that he was agreeing to, Courts of Equity will not enforce the written contract against him, as they hold it to be against conscience for the other party to take advantage of the omission or mistake. It is also the rule that parol evidence is admissible to shew the omission or mistake by way of defence to a bill for specific performance.

The owner of the west half of a lot of land, supposing himself to be the owner of the east half, entered into a contract with the defendant for the exchange of lands owned by the defendant for the said east half and the east half was conveyed accordingly. The plaintiff then filed a bill to compel the defendant to accept a conveyance of the west half of the lot and to specifically perform the contract entered into between them by conveying the lands agreed to be given for the east half, alleging mistake in the insertion of "east" instead of "west." It appeared that the two halves were of about equal value, and that the defendant had no personal knowledge of

either, but as the contract was for the east half, and the mistake was that of the plaintiff alone, the Court held that the west half could not be substituted for the east half and refused the relief asked. It is obvious that if in such a case the contract had been reformed as desired by the plaintiff, the Court would have been imposing upon the defendant a contract which he had never made. *Cottingham* v. *Boulton*, 6 Grant's Ch. 186.

In *McDonell* v. *McDonell*, 21 Grant's Ch. 342, it was held that specific performance of the agreement between the plaintiff and defendant could not be enforced because of the *bona fide* understanding on the part of one of the parties as to the provisions of the agreement. Blake V.-C. said, referring to this class of cases, that the difficulty was not to apply the law pertinent to them but to ascertain whether, as a matter of fact, a misapprehension did exist in the mind of the defendant under which he entered into an agreement which would not otherwise have been concluded by him. "I feel that the utmost caution must be exercised in distinguishing between the case where an actual misunderstanding or misapprehension did exist, and one where the defendant, simply rueing his bargain, seeks to prevent the decree for the performance of the contract being pronounced against him. In the former case it is against conscience to aid the plaintiff and the Court remains neutral. In the latter, this Court holds the contract as binding on the parties as does a Court of law. Lord Justice Knight Bruce shortly puts the principle on which the Court acts in these cases. 'It is sworn by the vendor's agent that this was his sense and understanding. It may appear singular and may be the subject of observation, but it is sworn to, and this is a case of specific performance. It would be contrary to the rules of this Court to enforce specific performance against a defendant so swearing, and in fact so proving.'"

Unilateral Mistake.

In *Miller* v. *Dahl*, 9 Man. 444, the head-note reads: "Specific performance of an agreement will not be refused on the ground of a mistake of one of the parties to

it, where the mistake was not known to the other party, and there was nothing in the language or conduct of the other party which led or contributed to the mistake, unless hardship amounting to injustice would be inflicted upon the party by holding him to his bargain and it would be unreasonable to hold him to it, or give the other party an unconscionable advantage." The language of James L.J. in *Tamplin* v. *James*, 15 C.D. 215, is quoted with approval. "Perhaps some of the cases on this subject go too far, but, for the most part, the cases where a defendant has escaped on the ground of a mistake not contributed to by the plaintiff have been cases where a hardship amounting to injustice would have been inflicted upon him by holding him to his bargain, and it was unreasonable to hold him to it."

The same principle is affirmed by Newlands J. in *Milestone* v. *City of Moose Jaw*, 1 Sask L.R. 440. On the other hand, in *Hobbs* v. *E. & N. Ry. Co.*, 6 B.C. 228, Drake J. said with reference to the facts in that case: "The defendants say that Mr. Trutch made a mistake if he did not in fact inform the plaintiff that the minerals did not pass, and acted contrary to his express instructions, and that they were under the impression that such instructions had been carried out. This is not a case of mutual mistake, but of an alleged mistake of the vendor's. The purchaser in no way induced or contributed to the error. He was paying a slightly higher price for land than was charged by the Provincial Government which reserves only mines royal and coal. The Court exercises a jurisdiction to relieve when a mistake is proved even in cases where it is only on one side. The principle referred in the argument as laid down in Story's Equity, Vol 1, 13th ed., 147, is that a person cannot have relief unless the party benefited by the mistake is disentitled in equity and good conscience from retaining the advantage he acquired. This broad statement has not been acted on in its entirety. In *Wycombe Ry. Co.* v. *Donnington Hospital*, L.R. 1 Ch. 273, Knight Bruce L.J. says: "It would be contrary to the rules of this Court to enforce specific performance against a defendant swearing and proving that his sense and understanding of the agreement in question was different from that of the

purchaser" . . . "The general result of the cases is that the Court has jurisdiction in any case of mistake which has been proved to exercise their jurisdiction and grant equitable relief."

In *Sea* v. *McLean & Anderson*, 1 B.C., part II., 67, where the defendants were trustees selling under a power contained in a will they offered for sale the lot of land supposed to contain about sixty acres more or less. It was bought at $36 per acre and the survey made afterwards shewed that it contained 117 acres. It was held that the ignorance of the defendant, the vendors, as to the exact acreage of the lot was not such a mistake as entitled them to relief.

In *Hobbs* v. *The Esquimalt & Nanaimo Ry. Co.*, 29 S.C.R. 450, the company executed an agreement to sell certain lands to Hobbs, the plaintiff, who entered into possession, made improvements and paid the purchase money whereupon a deed was delivered to him which he refused to accept, as it reserved the minerals on the land, while the agreement was for an unconditional sale. In an action by the plaintiff for specific performance of the agreement, the Company contended that in its conveyances the word "land" was always used as meaning land minus the minerals. It was held, reversing the judgment of the Supreme Court of British Columbia, 6 B.C. 288, Taschereau J. dissenting, that the contract for sale being expressed in unambiguous language, and plaintiff having had no notice of any reservation, it could not be rescinded on the ground of mistake, and he was entitled to a decree for specific performance. *Per* King J.: "Here the parties were *ad idem* as to the terms of the contract. It was expressed in perfectly unambiguous language in the offer of the plaintiff and in the acceptance of the defendants, and the alleged difference is in the wholly esoteric meaning which one of them gives to the plain words."

The reasoning of Lord McNaughton in *Stewart* v. *Kennedy*, 15 Ap. C. 105, and of James L.J. in *Tamplin* v. *James*, 15 Ch. Div. 215, is followed, and the learned Judge concluded that the alleged mistake was an unreasonable and careless one, and, in view of the fact that the plaintiff went into possession under the contract, he

did not think it could be said to be unconscionable or highly unreasonable to enforce the specific performance of the contract, these being the only circumstances, under the authorities cited, in which such a unilateral mistake would afford ground for relief.

Caveat Emptor.

Upon an agreement for the sale of real estate, which had been previously laid out into building lots, the purchaser's agent signed a memorandum to the following effect: "The purchase from the bank is to cover the entire property of the Calcutt estate within the original boundaries except that sold off, with appurtenances and privileges, so that the purchaser may make arrangements with the purchasers of lots to close the streets laid out if desirable." The purchaser refused to complete the purchase on the ground that, without the power of shutting up one of the streets, the object for which he had effected the purchase would be entirely frustrated, which object he had communicated to the agent of the vendors at the time of negotiating the purchase. It was held, notwithstanding, that the purchaser was bound to complete the contract. "The case of *James* v. *Freeland*, 5 Grant 302, in this Court, appears to be analogous in its circumstances and in principle. In that case, as in this, the purchaser, while declaring to the vendor the purpose and object of his purchase, took upon himself to judge of the fitness of the property purchased to answer the end for which he designed it. Here the purchaser knew, as well as the vendor, the circumstance of the sale of the lots; he does not pretend that anything was concealed from him or that he purchased in ignorance of any material fact. I do not think that he shews any sufficient reason why specific performance should be refused." The *Commercial Bank* v. *McConnell*, 7 Grant's Ch. 323.

Compare the following case and see also cases at page 130*a et seq.*

The defendant agreed for the purchase of a factory, situated near a small stream, intending to carry on in the building the trade of soap and candle manufacturer. After the contract had been entered into, the defendant

discovered that he would not have a right to throw the refuse of his factory into the stream, and without the privilege of so using the stream, the property would be useless for the purpose he had intended to apply it to and of which the vendors were aware at the time of entering into the contract. It was held, notwithstanding, that the vendee was bound to complete the contract, although the vendors had not pointed out this fact at the time of the sale. Esten V.-C. in his judgment shewed that the cases are in conflict as to the granting of specific performance in such circumstances.

This case was decided in 1855, and since that date many cases have been decided which will be found in the author's text. *James* v. *Freeland*, 5 Grant's Ch. 302.

Parol Term set up by Defendant.

In *Jones* v. *Dale* 16 O.R. 717, the plaintiff agreed in writing to sell the defendant certain lands for $3,500 of which the defendant should pay $500 on the date of the agreement, to be represented, however, by two horses and two organs which he was to deliver to the plaintiff. The defendant sold the organs and parted with one of the horses. On the plaintiff subsequently bringing action for specific performance, the Court ordered the defendant to pay $500 in lieu of the horses and organs. There was also a term in the agreement which was intentionally omitted from the writing, but as to the tenor of which both parties agreed, viz., that the defendant was to retire from the sewing machine business if the plaintiff used the store for sewing machines and organs. If he sold the store, defendant could go on and sell sewing machines. The contention of the defendant was that this should be embodied in the judgment for specific performance. The plaintiff objected to that course although admitting that he was bound by this part of the agreement.

It was held that the omitted portion of the agreement should be inserted in the judgment as claimed, on the principle that he who comes into equity must do equity

CHAPTER XVI.

INCAPACITY OF THE COURT TO PERFORM PART OF THE CONTRACT.

Subject of the chapter.

§ 821. The Court will not, as a general rule, compel specific performance of a contract, unless it can execute the whole contract;[1] or, as Lord Romilly M.R. expressed it, "This Court cannot specifically perform the contract piecemeal, but it must be performed in its entirety if performed at all."[2] It often therefore becomes important to inquire whether a contract is entire or divisible, or, in other words, what is the whole contract which must be executed; and it is proposed in the present chapter, first, to inquire what contracts are divisible; secondly, to illustrate the general doctrine of the Court above stated; and, thirdly, to consider the exceptions or apparent exceptions to the rule.

Contract divisible or not.

§ 822. It is obvious that the decision of the question whether a contract is entire or divisible, must depend on the particular nature of each contract, and the terms in which it is concluded: but some general rules may be gathered from the cases.

[1] It has been suggested by a learned critic (in 19 Law Quarterly Review, [1903] at p. 311), that the rule might be more comprehensively stated as follows: "The Court will not specifically enforce part of a contract except where that part can be separately enforced without any possible injustice to the defendant."

[2] *Merchants' Trading Co.* v. *Banner*, L. R. 12 Eq. at p. 23; *cf. per* Turner L.J. in *Kermot* v. *Potter*, 3 De G. F. & J. at p. 150. Distinguish *James Jones & Sons* v. *Tankerville (Earl)*, [1909] 2 Ch. 440; 78 L. J. Ch. 674, a case of a contract for the sale of timber to be cut and removed by the purchaser.

Property in one lot.

§ 823. A contract for the sale of property in one lot will generally be considered indivisible. Thus, in a case where two undivided seventh shares of land were sold in one lot, the Court refused to enforce specific performance where a good title could be made to one-seventh only:[1] and the purchaser of the entirety will, of course, not be compelled to take six undivided seventh parts of the estate.[2] And so in a case where two persons were owners of an estate in undivided moieties, and the plaintiff sought to enforce an alleged contract by them to lease the coals under it, but could not prove any such contract against one of the owners, one ground on which the bill was dismissed against the other owner also was that he had never contracted to lease one share alone. If he had held himself out and contracted as the owner of the whole, the case would have been different.[3] But, in the absence of misrepresentation or misconduct, the general rule is that, where a person is jointly interested in an estate with another person, and purports to deal with the entirety, specific performance will not be granted against him as to his share.[4]

Ship and freight.

§ 824. But where properties are of two descriptions,—as, for example, a ship and the freight,—the fact that they are both included in one instrument, and dealt with for one entire sum, does not seem conclusively to render the contract indivisible.[5]

Distinct lots.

§ 825. After some vacillation in the older cases,[6] it has been decided at Common Law, that where property is sold in distinct lots, there is a separate contract for

[1] *Roffey* v. *Shatcross*, 2 Bro. C. C. 118, n.; S. C. v. n. *Roffey* v. *Shollcross*, 1 Madd. 227.

[2] *Dalby* v. *Pullen*, 3 Sim. 29.

[3] *Pyle* v. *Griffith*, 1 De G. M. & G. 80, 85. See the observations of Farwell J. upon this case in *Heater* v. *Pearce*, [1900] 1 Ch. at p. 315.

[4] *Loosley* v. *Ravenscroft*, [1897] 1 Q. B. at p. 675.

[5] *Mestaer* v. *Gillespie*, 11 Ves. 621, 629.

[6] See the cases reviewed by Lord Brougham in *Casamajor* v. *Strode*, 2 My. & K. 720. *Chambers* v. *Griffiths*, 1 Esp. 150, seems to be overruled.

each lot,[1] each buyer having a complete right of action after he is declared the purchaser of each lot.[2] And in Equity the same is *primâ facie* the case, so that, in the absence of special circumstances, a vendor is entitled to compel the purchaser of two lots to complete his purchase of the one, though he may fail in making out a title to the other.[3] But where from the nature of the contract, or the property that is the subject of it, or upon matters known to both parties, one of them can prove that the one transaction was dependent on the other, the two form one contract, although there may be no express statement to that effect.[4] And the parties by their subsequent dealing may convert two or more distinct contracts into an entire one, as by entering into one contract for the sale of the several subject-matters at one aggregate price.[5] Thus, where A. purchased by auction three lots of 100 shares each, and after the sale received the shares, paid the price, and received a bill of parcels describing the transaction as a sale of 300 shares: it was held, that as each lot was knocked down there was a distinct contract for the sale of 100 shares, but that the subsequent dealings showed that the parties treated the transaction as one entire sale of 300 shares.[6]

Different prices.

§ **826.** The mere fact of different prices being fixed for different parts of the subject-matter of the contract, will not necessarily make it divisible: so where a person went into a shop and bought various goods at distinct prices for each, the contract was still held to be single.[7]

[1] *James* v. *Shore*, 1 Stark. 426. *Roberts* v. *Lord Dormer*, 1 B. & Ad. 77; *per* Coleridge J. in *Scrivener* v. *Pearson*, 1 A. & E. 536.

Emmerson v. *Heelis*, 2 Taunt. 38, 45.

Lowen v. *Guest*, 1 Russ. 326; and also *Buckmaster* v. *Harrop*, 7 Ves. 341; S. C. 13 Ves. 456.

[2] *Casamajor* v. *Strode*, 2 My. & K. 722; *Poole* v. *Shergold*, 2 Bro. C. C. 118; S. C. 1 Cox, 273; and, at Common Law, *Gibson* v. *Sparrow*, Peake Add. C. 49.

[3] *Dykes* v. *Blake*, 1 Bing. N. C. 463.

[4] *Franklyn* v. *Lamond*, 4 C. B. 637.

[5] *Baldey* v. *Parker*, 2 B. & C. 37.

And where one price was fixed for the land, and another (a valuation price)[1] for the timber, and the vendor could not show a title to all the timber by reason of the copyhold tenure of parts of the estate, which were not distinguishable from the freehold; the Court held that that was only one contract, that consequently the vendor was only bound to make out the title according to the contract, and that the title to the land was the title to the timber; and, as the conditions of sale provided for the copyhold tenure as to the lands, the contract was enforced as a whole.[2]

Cross-contract of sale

§ 827. In a case in which, by the same contract, A. contracted to sell an estate to B., and B. contracted to sell another estate to A., the contracts in respect of the two estates were held to be independent of one another; whilst in a case of cross-contracts for the sale of goods, the Court of Exchequer held the contracts dependent.[3]

Stipulation for piecemeal execution

§ 828. Where the contract itself contains a provision for its piecemeal execution, the contract is treated as divisible. So in a building contract, where the landowner agreed to grant separate leases of separate plots as and when the buildings on each plot reached a certain stage, it was held that the contract might be performed in separate parts, and that it was no answer to the builder or his assign who sued for its performance as regards one plot to show that it was not performed by the builder as regards other plots.[4]

Contemporaneous contracts

§ 829. In like manner, where there are two contemporaneous contracts which the parties intended to be separated, the Court will treat them as separate, and will not allow an objection to the one contract to bar the performance of the other.[5]

[1] Cf. *Richardson* v. *Smith*, L. R. 5 Ch. 648, and *supra*, § 366.

[2] *Crosse* v. *Lawrence*, 9 Ha. 462; *Crosse* v. *Keene*, 9 Ha. 469.

[3] *Cromie* v. *Lobbard*, 2 My. & K. 51.

[4] *Atkinson* v. *Smith*, 11 M. & W. 695.

[5] *Wilkinson* v. *Clements*, L. R. 8 Ch. 96.

[6] *Odessa Tramways Co.* v. *Mendel*, 8 Ch. D. 235.

Court will not perform part.

§ 830. It is, as we have already seen, a principle of the Court, that it will not compel specific performance of executory contracts unless it can at the time execute the whole contract on both sides. On this principle, where there was a contract between two neighbouring landholders to change the course of a stream, and one of the terms of the contract was that, [illegible] any damage should accrue to the lands of the [illegible]ant from a dam which was agreed to be erected, [illegible] would give an equivalent in land to the [illegible] quantity of land to be ascertained by [illegible] being a thing which the Court could [illegible], and the Court holding that the [illegible] into a covenant to do it would not be [illegible]rmance of the contract, the bill was [illegible] whole contract could not be carried [illegible] And where the owner of a patented [illegible]ed into a contract with certain persons, who with himself were to form a company, to the promotion of which he was to give his services for two years, and he was to do his best to improve the invention for the benefit of the company, and on the refusal of these persons to go forward with the company, the patentee filed a bill for the specific performance of the contract: the Court held, on demurrer, that as it would have been impossible to enforce against the plaintiff the stipulations on his part, he could not sue for performance; and further, that the Court could not carry the contract into effect by directing the parties to execute a deed, for the contract was to do certain acts, and not to execute covenants to do them.[1]

Mc Onie's Trading Co. v. Bannatyne.

§ 831. So, again, where a contract was entered into by a shipbuilder to alter a ship, and it was agreed that in default of performance by him the owners might enter and make the alterations: default was made by

[1] *Greenaic* v. *Edwards*, 2 Dr. & War. 80.

[2] *Stocker* v. *Wedderburn*, 3 K. & J. 393.

the shipbuilder, whereupon the owners filed a bill to enforce their right to enter and make the alterations: but on demurrer the bill was dismissed.[1]

Consideration a future act.

§ 832. So wherever that which the plaintiff is to give as the consideration moving from him is something to be done at a future time, and which the Court cannot enforce, specific performance of the contract will be refused.[2]

Other illustrations of the principle.

§ 833. The principle that the Court will not partially enforce contracts is illustrated by many other cases. Thus, where there was a partnership contract for an absolute term of years, leaving undefined the amount of capital and the manner in which it was to be provided, this being a contract which in its entirety the Court could not enforce, the Court refused to enforce it in part, by refusing the representatives of a deceased partner a decree for the dissolution of the partnership and the sale of the partnership property.[3] In another case the Court refused to separate the parts of an award which were capable of specific performance from those which were not.[4] And again, where the contract was that the landlord of a residential flat should employ a porter, who should do certain specified work for the benefit of the tenant, that was held to be one indivisible contract, and the Court declined to interfere by injunction to compel performance of part of it.[5]

Ogden v. Fossick.

§ 834. It is, as will have been already gathered, immaterial whether the things which the Court cannot specifically enforce are to be done by the plaintiff or by the defendant. So where the defendant agreed to grant a lease of a coal wharf to the plaintiff, and the plaintiff agreed to employ the defendant as manager, it was held

[1] *Merchants' Trading Co.* v. *Banner*, L. R. 12 Eq. 18.

[2] *Per* Wigram V.C. in *Waring* v. *Manchester, Sheffield, and Lincolnshire Railway Co.*, 7 Ha. 492.

[3] *Dacres* v. *Collins*, 6 Ha. 118.

[4] *Nickels* v. *Hancock*, 7 De G. M. & G. 300. See also *Vansittart* v. *Vansittart*, 4 K. & J. 62, affirmed 2 De G. & J. 249.

[5] *Ryan* v. *Mutual Tontine Association*, [1893] 1 Ch. 116.

that the two parts of the agreement were inseparably connected, and specific performance of the part relative to the lease was refused.[1]

Where execution of deed not ordered.

§ 835. Where the contract stipulates for future acts, but is silent as to any deed to be executed to secure their performance, the Court, as we have seen, will not consider the execution of such a deed any performance of the stipulation. Other cases have arisen, where the contract contemplates some deed or obligation. Where there was a contract to execute works of such a nature that the Court could not superintend their performance, and in the contract was a stipulation that the contractors should give a bond to secure the performance of the contract: the Court, refusing to decree performance of the works, refused also to decree the execution of the bond, as that would have been a piecemeal performance of the contract, and the stipulations as to the works were the substance of the contract, and that as to the bond only incident to them.[2]

Where execution of deed ordered.

§ 836. But where the contract is to do a thing, and to execute a deed for that purpose, and this deed covers, so to say, the whole of the contract, or the whole of so much of the contract as is incapable of immediate performance, the Court will, it seems, enforce the contract by the execution of the deed, though the acts to be done be future and to be done from time to time.[3] The real contract here which the Court enforces is a contract to execute the deed.

Wilson v. *West Hartlepool Harbour and Railway Co.*

§ 837. In *Wilson* v. *The West Hartlepool Harbour and Railway Co.*,[4] the company agreed to sell to the plaintiff a plot of land near their line, and the contract contained terms as to the company laying down a

[1] *Ogden* v. *Fossick*, 4 De G. F. & J. 426; and see *Frith* v. *Frith*, [1906] A. C. 254, 261.

[2] *South Wales Railway Co.* v. *Wythes*, 1 K. & J. 186; S. C. 5 De G. M. & G. 880.

[3] *Granville* v. *Betts*, 18 L. J. Ch. 32.

[4] 34 Beav. 187; 2 De G. J. & S. 475.

branch railway, and as to the plaintiff using preferentially the defendants' line of railway. Lord Romilly M.R. granted specific performance, and his decree was affirmed by the judgment of Turner L.J., who held that the parties must have intended that the user of the railway which was necessarily prospective should be secured by covenant. Knight Bruce L.J. dissented. The view of Turner L.J. appears consonant to the ordinary course of business and in furtherance of justice.

The principle applied to marriage contracts.

§ 838. The cases on marriage contracts strongly illustrate the principle that the entire contract must be carried into effect. With regard to these, it has been urged that as the Court interferes in behalf of those who are purchasers, or considered as such by the Court, but declines to aid volunteers, so when the Court specifically executes a settlement, its interference should be confined to limitations in favour of purchasers, and not extended to volunteers. The Court, however, has applied the principle, that the whole or no part of the contract shall be executed, to marriage contracts as well as to other contracts. "There is no instance," said Lord Hardwicke,[1] "of decreeing a partial performance of articles, — the Court must decree all or none; and where some parts have appeared very unreasonable, the Courts have said we will not do that, and therefore as we must decree all or none, the bill has been dismissed." In a case where a husband sued the heir of his wife, who was the settlor, on a covenant to settle lands, the specific performance was not restricted to his estate, but carried to a limitation to a niece of the wife, who was of course a collateral.[2]

§ 839. The cases of exception, or rather of apparent exception, to the principle in question may now be considered.

Separate execution confined to [illegible]

§ 840. (i.) It is hardly needful to repeat that the

[1] In *Gervaise* v. *Nash*, 1 Atk. 190.
Berenger v. *Berenger*, 2 Y. & C. C. C. 451; S. C. 1 Ph. 698.

principle will not apply to contracts which, though they may be entire and single in themselves, contemplate a separate and piecemeal performance of separate parts. There, in the absence of other objection, the Court will carry into effect the intention of the parties.[1]

ii. Where the contract is executed.

§ 841. (ii.) The principle in question is strictly applicable to executory contracts.[2] It does not apply in terms to executed contracts. In *Rigby* v. *Great Western Railway Co.*[3] the company had demised the Swindon refreshment rooms to the plaintiffs for 99 years: the lease contained various covenants, one of which the plaintiffs sought to enforce by injunction: an objection was made that the lease contained other covenants which the Court could not enforce: and Wigram V.C. made these observations:[4] "I cannot go the length of the defendants' proposition that the plaintiffs are not to be protected by injunction, only because there are other covenants to be performed by them which may be possibly broken hereafter. It would be more correct to say that where the mutual rights of the parties rest in covenant, each party is *primâ facie* entitled to enforce his right in Equity or at Law, according to the nature of the covenant which may be broken. I cannot doubt but that this Court would, at the suit of a landlord, restrain a tenant for years, under a husbandry lease, from ploughing up ancient pasture, where he had bound himself by covenant not to do so; and it would be no answer to such a bill for the tenant to say, that the landlord was under covenant to find him rough timber for repairs, which covenant might possibly be broken by the landlord before the expiration of the lease. That is a very different case from that of *Gervais* v. *Edwards*." On the other hand, I am not prepared to go the length

[1] *Wilkinson* v. *Clements*, L. R. 8 Ch. 96. See, too, *Odessa Tramways Co.* v. *Mendel*, 8 Ch. D. at p. 244.

[2] See *supra*, §§ 38, 39.

[3] 15 L. J. Ch. 266; S. C. on appeal, 2 Ph. 44.

[4] 15 L. J. Ch. at p. 271.

[5] 2 Dr. & War. 80.

of the plaintiffs' argument. It would not be difficult to suppose a case in which great injustice might be done by compelling a party specifically to perform a particular covenant."

Wolverhampton, &c. Railway Co. v. L. and N. W. Railway Co.

§ 842. A similar view was enunciated and acted upon by Lord Selborne in the case of *Wolverhampton & Walsall Railway Co.* v. *London & North Western Railway Co.*,[1] where the plaintiffs sought an injunction on the ground of the stipulations contained in a contract between the companies sanctioned by Act of Parliament. It was argued that the contract contained terms, such as those providing for the proper development of local traffic, which the Court could not perform: but the argument was repelled by the Lord Chancellor, on the ground of the distinction between injunction as a right flowing from an executed contract and the specific performance of executory contracts.

Difference between executory and executed contracts illustrated from partnership articles.

§ 843. A familiar illustration of this difference between executory and executed contracts occurs in the case of partnership articles. The Court will not, generally speaking, enforce a contract to enter into a partnership whilst it remains executory:[2] but nevertheless, when the partnership has been constituted, the Court will by injunction enforce the performance of particular terms, though it may be incompetent to enforce all the terms:[3] this is the common course of practice in the Court.

Veil from leases.

§ 844. Another familiar illustration arises on leases. The Court will restrain the breach of a covenant in a lease, though it may contain other covenants which the Court could not possibly perform.

iii. Relief on contracts not by way of specific performance.

§ 845. (iii.) The principle in question is not to be extended to all cases of legal or even equitable relief on contracts, though the contracts may be executory. The fact that future acts may have to be done under

[1] L. R. 16 Eq. 433.

[2] *Scott* v. *Raymont*, L. R. 7 Eq. 112. See *infra*, § 1510.

[3] *Kemble* v. *Kean*, 6 Sim. 333.

a contract is no bar to relief grounded on a right perfect in itself, and resulting from past transactions also under the contract.

§ **846**. Thus, where in a contract for the execution of railway works the contractors, previously to their completion, filed a bill against the railway company, alleging fraud in the engineer in withholding certificates of work done, and asking amongst other things for an account of work done: it was held on demurrer, that though the works were not complete and though the Court might not be able specifically to perform such a contract, the plaintiffs had a right, perfect in itself, of which they had been deprived by the alleged acts of the defendants, and that they were therefore entitled to some relief in Equity.[1] And so, it seems that if by a partnership contract it were stipulated that accounts should be made up half-yearly, and that one partner should have a salary proportionate to the profits to be so ascertained, he might from time to time institute actions to have the accounts so taken according to the contract, though its other terms might not be the subject of an action for specific performance.[2] Instances.

§ **847**. To this principle we may probably refer the case of *Lytton* v. *The Great Northern Railway Co.*,[3] where, there being a contract by the company to make and maintain a siding so long as it should be of convenience, the clause as to maintaining it was held no objection to a bill for the specific performance of the contract to make it, the question of repairs being a matter for inquiry when a breach of that part of the contract should occur. *Lytton* v. *The Great Northern Railway Co.*

§ **848**. (iv.) In the next place, it must be observed that where the contract can be completely performed at the time, though there may be future acts dependent iv. Contract may be completely

[1] *Waring* v. *Manchester, Sheffield, and Lincolnshire Railway Co.*, 7 Ha. 482.

[2] *Per* Wigram V.C. in the last-cited case, 7 Ha. at p. 496.

[3] 2 K. & J. 394.

performed, though there are future acts.

on it, the Court will be able to grant specific performance: as, *e.g.*, a contract for the immediate sale of timber to be cut down at a future time, or at intervals, and the purchase-money for it to be paid by instalments.[1] The cases already stated, where the Court will direct the execution of a covenant to do future acts, illustrate the same principle.[2]

v. Where part can not be performed through defendant's default.

§ 849. (v.) It seems very questionable whether the principle that the Court will not perform part of a contract if it cannot perform all, ever applied to cases where the impossibility of carrying a part into execution was due to the default of the defendant who set up this defence. To permit it to prevail would be counter to the maxim that no man shall take advantage of his own wrong. In the case of the defendant only possessing a part of the interest which he has stipulated to sell, the defect as to the other part is, as we have seen, no bar to specific performance at the suit of the purchaser.[3] In one case there was a contract between three railway companies having reference to a purchase and an amalgamation: for the purchase no further parliamentary powers were needed, but for the amalgamation they were, and as regards one of the companies they could not be obtained because a majority of its shareholders were adverse to the scheme. In a suit relating to the purchase the last mentioned company set up as a defence the impossibility of carrying into effect the contract as to the amalgamation; but Lord Cottenham overruled the demurrer, and doubted whether the defendant company could say to the plaintiffs, that they should not have the benefit of such part of the contract as the defendants could perform, because they could not without an Act of

[1] *Per* Lord S. Leonards in *Gr*... 110, 18 L. J. Ch. 67.
mas v. *Edwards*, 2 D. & W. ... [2] *See supra*, §§ 8...
p. 53. Cf. *James* v. ... *Supra*, § 173 and see *Tolerable Cha*... [1906] 2 ... § 12.7 of *sup.*

Parliament perform the whole, and they declined applying to Parliament to give them the necessary powers.[1]

Lord Cairns' Act.

§ 850. But whatever difficulties may have previously existed on this point, seem to have been removed by Lord Cairns' Act (21 & 22 Vict. c. 27),[2] and it may, it is conceived, be laid down, that whatever the thing which the Court cannot enforce is a condition inserted for the plaintiff's benefit in respect of which the defendant is in default, and where the Court would, before the passing of the Act, have had jurisdiction to enforce the contract on the plaintiff's waiver of the condition for his benefit, there the Court can now grant specific performance of the contract so far as it is enforceable specifically, and direct the defendant to pay damages (whether substantial or nominal)[3] for his non performance of the condition which the Court cannot specifically enforce. Thus, in *Soames* v. *Edge*,[4] the plaintiff had agreed to grant a lease to the defendant so soon as he should have built a new house on the land: and the defendant agreed to accept the lease when required and to build the new house: the plaintiff filed his bill praying specific performance of the contract to build and take the lease, also for damages, either in addition to or substitution for such relief: on demurrer the defendant urged that the Court could not execute the contract to build, that the lease was dependent on the house being built, that the plaintiff had not waived the condition, and consequently that Lord Cairns' Act did not apply: this argument was repelled by Lord Hatherley (then a Vice-Chancellor), who overruled the demurrer and

Soames v. Edge.

[1] *Great Western Railway Co.* v. *Birmingham and Oxford Junction Ry. Co.* 2 Ph. 597, 605. See *Norris* v. *Jackson*, 1 J. & H. 319, and particularly 328.

[2] This Act has been repealed by the Statute Law Revision Act, 1883, but without affecting the jurisdiction conferred by it. *Sayers* v. *Collyer*, 28 Ch. D. 103, 107.

[3] *Sayers* v. *Collyer*, 28 Ch. D. 103.

[4] 1 Johns. 669.

held, that on the plaintiff's waiver of the condition[1] he should have had jurisdiction before the Act, and that therefore since the Act he could give relief as to part by way of specific performance, and as to the rest by way of damages.

Norris v. Jackson.

§ 851. The limits of this principle are well illustrated by a case of *Norris* v. *Jackson*,[2] which shortly followed the case just referred to. In that case Cook, through whom the defendant claimed, in 1850 agreed with the plaintiff to grant him a lease of a certain house and farm, and on or before the 11th October, 1852, to put the house into sufficient repair and to erect suitable coach-houses, &c. as Norris and Cook should jointly agree upon, to the intent that the house and premises should be made fit for the occupation of Norris and his family: and Norris agreed that upon due performance by Cook of the foregoing stipulations he would accept the lease. These repairs were never done: but there was no allegation in the bill that Cook had evaded giving his consent to any arrangements: and the plaintiff did not waive but insisted on his right to have such repairs done, as the Court should think proper to fit the house for the occupation of himself and his family. The Court held that this was beyond its powers: that there was no contract which could be performed with respect to repairs, nor any contract binding the plaintiff to take a lease till the repairs had been done. The bill was consequently dismissed on demurrer.

vi. Where the contract has negative and positive stipulations.

§ 852. (vi.) It was formerly laid down that where the positive part of an executory contract could not be performed by the Court, it would not enforce the negative by injunction: so that, for example, where an actor had agreed to act at a certain theatre, that being

[1] As to waiver by the party to a contract of stipulations inserted solely for his benefit, see *infra* § 987.

[2] 1 J. & H. 319. See, too, *infra* § 896.

a contract which the Court could not enforce, it refused to restrain him by injunction from acting elsewhere:[1] and where there was a contract for hiring and exclusive service during seven years, and for partnership at the end of that time on such terms as should be mutually agreed on; the contract being one which the Court could not perform as a whole, it refused to enforce by injunction the covenant for exclusive service.[2] Again, where the defendants had agreed to furnish the plaintiffs with the drawings for maps which the plaintiffs were exclusively to sell; the Court, being unable to compel the defendants to furnish these drawings, refused an injunction to restrain the defendants from themselves selling the maps.[3]

Lumley v. *Wagner*.

§ 853. This question was very much discussed in the case of *Lumley* v. *Wagner*,[4] where, there being an executory contract in part positive and in part negative, and the positive part being such as the Court was unable to enforce specifically, it yet interfered in respect of the negative part by means of injunction. In that case, the defendant entered into a contract with the plaintiff to sing at his theatre, and not to sing at any other; and Lord St. Leonards granted an injunction restraining the defendant from singing at any other theatre than the plaintiff's, though the specific performance of the positive part would have been certainly beyond the Court's power. The principle was acted on in some earlier cases,[5] and has been applied in several later ones.[6]

Kemble v. *Kean*, 6 Sim. 333.

Kimberley v. *Jennings*, 6 Sim. 340.

Baldwin v. *Society for Diffusing Useful Knowledge*, 9 Sim. 393.

Clarke v. *Price*, 2 J. Wils. 157.

[1] 1 De G. M. & G. 604. See, too, *Catt* v. *Tourle*, L. R. 4 Ch. 654 (where the Court considered that the covenant in question, though in terms positive, was in substance negative).

[2] *Dietrichsen* v. *Cabburn*, 2 Ph. 52; *Great Northern Railway Co.* v. *Manchester, Sheffield, and Lincolnshire Railway Co.*, 5 De G. & Sm. 138. See also *Hills* v. *Croll*, 1 De G. M. & G. 627, n.; S. C. 2 Ph. 60 (explained in *Catt* v. *Tourle*, L. R. 4 Ch. 654). *Doggett* v. *Egerton*, 16 W. R. 302.

[3] *E.g.*, *Donnell* v. *Bennett*, 22

Negative stipulation implied

§ 854. It has been thought to follow from the language of some parts of the judgment in *Lumley* v. *Wagner* that the principle of that case is not confined to cases where the negative stipulation is express, but applies also to others where the negation is implied. Accordingly, in one case where an actor had entered into a contract to perform on certain nights at Sadler's Wells Theatre, but without any stipulation that he would not perform elsewhere, Lord Hatherley (then Wood V.-C.) restrained him from acting at any other place than the plaintiff's theatre on the nights on which he had agreed to act there.[1] In *Fechter* v. *Montgomery*[2] Lord Romilly M.R., though refusing an injunction on other grounds, does not seem to have doubted the jurisdiction in a like case: and in *Montague* v. *Flockton*,[3] Malins V.-C. granted an injunction on a similar contract by an actor after a full discussion and consideration of the authorities. This case, however, appears to have been decided under a misapprehension of Lord St. Leonards' judgment in *Lumley* v. *Wagner*,[4] and has been disapproved of in the Court of Appeal.[5]

Negative implied in charter party.

§ 855. Another class of cases in which the Courts have implied a negative are suits on charter-parties. *De Mattos* v. *Gibson*[6] was the first case where this question arose. There the defendant Curry, being about to purchase a ship contracted by charter-party with the plaintiff to carry for him a cargo of coals from Newcastle to Suez. Curry then bought the ship and

Ch. D. 835; *Grimston* v. *Cunningham*, [1894] 1 Q. B. 125; *William Robinson & Co.* v. *Heuer*, [1898] 2 Ch. 451.

[1] 1 De G. M. & G. 604. Cf. *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.*, [1901] 2 Ch. at p. 51.

[2] *Webster* v. *Dillon*, 3 Jur. N. S. 132; 5 W. R. 867.

[3] 33 Beav. 22. See, too, *Leavitt* v. *Williams* (Jessel M.R.), 21 Sol. Journ. 706; and distinguish *Grimston* v. *Cunningham*, [1894] 1 Q. B. at pp. 130, 131.

[4] L. R. 16 Eq. 189.

[5] 1 De G. M. & G. 604.

[6] In *Whitwood Chemical Co.* v. *Hardman*, [1891] 2 Ch. at pp. 429, 430.

[7] 1 De G. & J. 276, which the case can be traced through its stages up to the appeal from the hearing of the cause.

mortgaged it to Gibson with notice of the charter-party. The bill was filed to restrain Gibson from interfering with the voyage contracted for: Curry was afterwards added as a defendant and the plaintiff moved for an injunction before Lord Hatherley (then Wood V.C.), who refused the motion on the ground that the case was not within the principle of *Lumley* v. *Wagner*, and that the whole matter sounded in damages. The Lords Justices on appeal granted an injunction, Knight Bruce L.J. holding it to be the duty and within the power of the Court to prevent the commission or continuance of the breach of such a contract, when, its subject being valuable, as for instance a trading ship or some costly machine, the original owner and possessor, or a person claiming under him with notice, having the physical control of the chattel, is diverting it from the agreed object, that object being of importance to the others. Turner L.J. put his judgment upon the fitness of retaining matters as they were until at the hearing the important questions in the suit should be decided. The cause then came before Lord Hatherley (then Wood V.C.) at the hearing, who after a full argument dismissed the bill: and his decision was brought by appeal before Lord Chelmsford, who held that a vessel under charter "ought to be regarded as a chattel of peculiar value to the charterer, and that although a Court of Equity cannot compel a specific performance of the contract which it contains, yet that it will restrain the employment of the vessel in a different manner, whether such employment is expressly or impliedly forbidden, according to the principle so fully expressed in the case of *Lumley* v. *Wagner*." But he affirmed the dismissal of the bill on the ground that neither of the defendants had done anything actively to hinder the voyage.

§ **856**. The case of *Scrin* v. *Deslandes*,[2] before Lord *Scrin v. Deslandes.*

[1] De G. M. & G. 604. [2] 30 L. J. Ch. 157; 9 W. R. 218.

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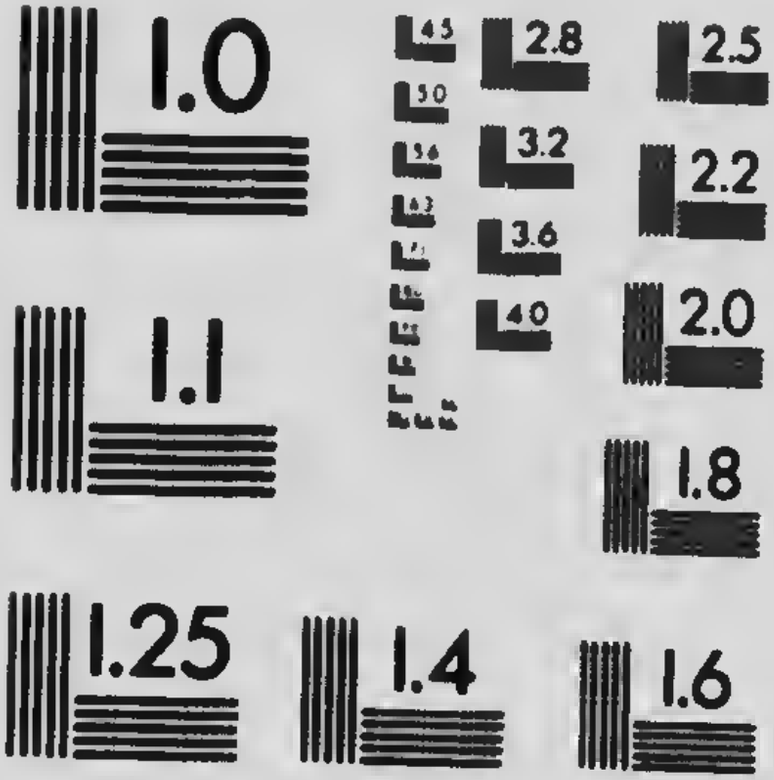

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Romilly M.R., followed *De Mattos* v. *Gibson*,[1] and there an injunction was granted, both on interlocutory motion and at the hearing, to restrain the defendant from doing any act inconsistent with the charter-party, which did not contain any express negative clauses.

Limits of the doctrine.

§ **857**. It is not easy to see the limits to which the doctrine of an implied negative might be carried: for as A. and not-A. include the whole world, it follows that a contract to sell to A. or to sing at A. must imply a negation of a sale to not-A. or a singing at not-A.: and if injunction is to be granted where specific performance might be impossible, the logical conclusion of the doctrine would be a great and rather formidable enlargement of the jurisdiction of Equity.[2] Such an enlargement of the doctrine would be contrary to a dictum of Lord Cottenham, couched in the form of a question in *Heathcote* v. *The North Staffordshire Railway Co.*,[3] where he asked, "If A. contract with B. to deliver goods at a certain time and place, will Equity interfere to prevent A. from doing anything which may or can prevent him from so delivering the goods?"

Lord Hatherley's view.

§ **858**. In *De Mattos* v. *Gibson*, Lord Hatherley (then V.C.) thought that the implication of a negative stipulation was to be confined to cases in which "the breach of a positive agreement involves specific damage beyond that of the mere non-performance of the agreement itself"—the special damage (in Miss Wagner's case) resulting from her singing elsewhere at a rival theatre, *ultra* the non-performance of her contract to sing at the plaintiff's theatre: and in another case, the same learned Judge observed that the instances in which the Court had found it possible to infer the negation were very few and special.[4]

See, too, *Le Blanch* v. *Granger*, 35 Beav. 187.

[1] 4 De G. & J. 276.

[2] See *per* Lindley L.J. in *Whitwood Chemical Co.* v. *Hardman*, [1891] 2 Ch. at p. 426.

[3] 2 Mac. & G. at p. 112.

[4] *Peto* v. *Brighton, Uckfield, and Tunbridge Wells Railway Co.*, 1 H. & M. 468, 486.

Jessel M.R. in *Fothergill* v. *Rowland*.

§ 859. In *Fothergill* v. *Rowland*[1] Jessel M.R. had before him a bill, based on a contract for the sale of all the coal from a particular colliery for a certain period, which prayed for an injunction against selling the colliery, except subject to the contract, and against disposing of the coal except for the purpose of the performance of the contract. His Lordship observed that he could not find or seize any distinct line dividing the two classes of cases, that is, the class in which the Court not being able to grant specific performance grants an injunction, and the class in which it does not grant the injunction: and he therefore, following the dictum of Lord Cottenham, allowed a demurrer.

The doctrine of *Lumley* v. *Wagner* not to be extended.

§ 860. The doctrine in *Lumley* v. *Wagner*[2] has been criticised by Lord Selborne: and after his observations it is doubtful whether the mere presence of a negative stipulation can be relied on, if the contract is not such in its nature as to be the proper subject of equitable jurisdiction. "It was sought in that case," said his Lordship,[3] "to enlarge the jurisdiction on a highly artificial and technical ground, and to extend it to an ordinary case of hiring and service, which is not properly a case of specific performance: the technical distinction being made, that if you find the word 'not' in an agreement—'I will not do a thing'—as well as the words 'I will,' even although the negative term might have been implied from the positive, yet the Court, refusing to act on an implication of the negative, will act on the expression of it. I can only say, that I should think it was safer and the better rule, if it should eventually be adopted by this Court, to look in all such cases to the substance and not to the form. If the substance of the agreement is such that it would

[1] L. R. 17 Eq. 132. Distinguish *Jones* v. *North*, L. R. 19 Eq. 426; and see *Keith, Prowse & Co.* v. *National Telephone Co.*, [1894] 2 Ch. 147, at p. 153; 42 W. R. 380.

[2] 1 De G. M. & G. 604.

[3] In *Wolverhampton and Walsall Railway Co.* v. *London and North Western Railway Co.*, L. R. 16 Eq. 440.

be violated by doing the thing sought to be prevented, then the question will arise, whether this is the Court to come to for a remedy. If it is, I cannot think that ought to depend on the use of a negative rather than an affirmative form of expression. If, on the other hand, the substance of the thing is such, that the remedy ought to be sought elsewhere, then I do not think that the forum ought to be changed by the use of a negative rather than an affirmative."

Brett v. *East India, &c. Shipping Co.*

The view thus plainly expressed by Lord Selborne had been indicated in an earlier case before Lord Hatherley, when Vice-Chancellor. The object of the bill in that case was to enforce the specific performance of a contract to employ the plaintiff as broker, which contained a stipulation that the plaintiff's name should appear in all advertisements of the company. To it the defendants demurred, and the only point on which the Judge entertained any serious question was whether the stipulation as to advertisements did not bring the case within the principle of *Lumley* v. *Wagner*:[1] but he determined that it did not, and that, as the defendants did not employ the plaintiff as broker, the Court could not restrain their issue of advertisements omitting his name.[2]

Lumley v. *Wagner* an anomaly not to be extended.

§ **861**. In a case already cited[3] (in which a company's manager had agreed to "give the whole of his time to the company's business," and, there being no negative stipulation, an injunction was refused) Lindley L.J. said he looked upon *Lumley* v. *Wagner*[4] "as an anomaly which it would be dangerous to extend." In accordance with this view, Kekewich J.,

[1] 1 De G. M. & G. 604.

[2] *Brett* v. *East India and London Shipping Co., Limited*, 2 H. & M. 404.

[3] *Whitwood Chemical Co.* v. *Hardman*, [1891] 2 Ch. at p. 429. The decision in this case was considered and applied in *Mutual Reserve Fund Life Association* v. *New York Life Assurance Co.*, C. A. 75 L. T. 528. See further *Peperno* v. *Harmiston*, 31 Sol. Jo. 154.

[4] 1 De G. M. & G. 604.

in *Davis* v. *Foreman*,[1] declined to enforce by injunction a stipulation, contained in a contract of service, which, though negative in form, was positive in substance. And again, where a negative stipulation in such a contract was of so wide and general a character as to be unreasonable, Romer J. refused to enforce it.[2]

Conclusions from the authorities.

§ 862. The position of that branch of the law on which *Lumley* v. *Wagner*[3] is the leading authority can hardly be said to be very satisfactory. It may, it is conceived, be concluded that the principle of this case will not be extended: that negative stipulations will not be implied except in the cases where the Courts have already done so: and that even the presence of an express negative stipulation will not be found a sufficient ground for jurisdiction unless the contract is of a kind of which specific performance can be granted. In other words, it is probable that the Court will hereafter, except so far as it may be bound by existing authorities, consider whether the contract in respect of which the injunction is sought is or is not of a kind fit for specific performance: that, if it be, the Court will tend to restrain acts inconsistent with it, whether there be negative words or not: that if it be not of a kind fit for specific performance, no injunction will be granted, even though negative words may be present.[4]

Unenforceable terms all on plaintiff's side.

§ 863. In cases where the contract on which an injunction is sought contains stipulations, some of which the Court can, and others which it cannot enforce,

[1] [1894] 3 Ch. 654, 658. This decision was followed by Eve J. in *Kirchner & Co.* v. *Gruban*, [1909] 1 Ch. 413, where the Court refused to grant an injunction which would in effect specifically enforce a contract of service. Compare *Metropolitan Electric Supply Co.* v. *Ginder*, 49 W. R. 508; 84 L.T. 818 (contract affirmative in form but negative in substance).

[2] *Ehrman* v. *Bartholomew*, [1898] 1 Ch. 671. Cf. *Harris* v. *Boots Cash Chemists (Southern)*, [1904] 2 Ch. 376, 383 (covenant to perform and observe the negative covenants in a lease). Distinguish *William Robinson & Co.* v. *Heuer*, [1898] 2 Ch. 411, where a definite negative and severable agreement was enforced by means of an injunction.

[3] 1 De G. M. & G. 604.

[4] *Donnell* v. *Bennett*, 22 Ch. D. 835

and the latter are wholly on the plaintiff's part, no difficulty arises; because, though the Court may be unable to enforce them directly, it does so indirectly, inasmuch as the moment the plaintiff fails in performing his part of the contract, the injunction would be dissolved.[1]

vii. Where the arrangement is partly honorary.

§ **864**. (vii.) Where an arrangement come to between two persons is intended to be of a complex character, partly legal and partly honorary, the Court will, if there be no other impediment, specifically perform the legal contract, leaving the honorary part of the arrangement to rest, as was intended, on the honour of the parties. So that, where this latter part is *malum prohibitum* and not *malum in se*, it will not obstruct the Court in its execution of the other part of the arrangement which amounted to contract.[2]

viii. Where the contract is alternative.

§ **865**. (viii.) Where the contract is in any matter alternative, so that the parts of it are mutually exclusive one of the other, and the plaintiff has a right to ask for the performance of one part, the Court may treat this as independent of the other: thus, in a contract to grant a lease with an option to the lessee to purchase, this option was held so far independent of the contract for a lease, that a default on the part of the plaintiff in insuring, which would have prevented his suing for a lease, did not prevent his suing on the option to purchase.[3]

ix. Where the part which the Court could not enforce has been performed.

§ **866**. (ix.) In one case Lord Romilly M.R. appears to have expressed the opinion, that where a part of the contract which the Court could not perform has been actually performed before suit, the incapacity of the Court as to this part would furnish no defence as to the other part. But the doctrine appears to have been rejected by the Court of Appeal.[4]

[1] *Stocker* v. *Wedderburn*, 3 K. & J. 393, 405.

[2] *Carolan* v. *Brabazon*, 3 Jon. & L. 200, 213.

[3] *Green* v. *Low*, 22 Beav. 625.

[4] *Hope* v. *Hope*, 22 Beav. 351: S. C. 8 De G. M. & G. 731, 746. See also *Walrond* v. *Walrond*, John. 18, and § 938, *infra*.

CANADIAN NOTES.

The following case touches the questions arising out of the much debated case of *Lumley* v. *Wagner*, the principles with respect to which can hardly be considered as yet settled.

In *Bentley* v. *Bentley*, 12 Man. 436, the question arose as to the implication of negative covenants from an affirmative covenant and Bain J. laid down the principle thus stated in the head-note: "Where there is an affirmative covenant in an agreement, and the parties have themselves settled and set out in the contract what the defendant is not to do, no further negative covenant will be implied from the affirmative one"; but, even if it, that is the affirmative covenant, stood alone, "the terms of the contract between the parties are such that I do not think it could be held that it necessarily implies any specific negative agreement on the part of the defendant, and unless an affirmative covenant implies a negative one so clearly and definitely that, to use the expression of Lindley M.R., you can put your finger upon it, the Court will refuse to interfere by injunction."

CHAPTER XVII.

DEFECT IN THE SUBJECT-MATTER OF THE CONTRACT.

Nature of the defence.

§ 867. Another ground on which the specific performance of a contract may be resisted is the existence of some essential defect in the subject-matter of it, or some variation from the description contained in the contract. This is, of course, not a question of title; the acceptance of the title will not prevent the defendant from setting up the defence that the title relates to a different subject-matter from that which he contracted for.[1] The cases in which this variation arises between the thing and some representation made in respect of it are considered under the head of Misrepresentation;[2] the cases in which no such representation has been made it is now proposed briefly to consider.

Defects patent or latent.

§ 868. The material distinction to be considered is between defects which are patent and visible to every one and those which are latent; for just as at Common Law a warranty, however general, is not taken to include defects apparent at the time of the bargain, as no one could have been deceived by them; so, whilst latent defects are a ground for refusing specific performance, patent defects are not.[3]

Patent defects.

§ 869. Accordingly, where a man bought a meadow with a road round it and a way across it which were

[1] *Bentley* v. *Craven*, 17 Beav. 204.
[2] *Supra*, § 650.
[3] *Dyer* v. *Hargrave*, 10 Ves. 505; *supra*, § 688; cf. Pothier, Tr. du Contrat de Vente, Part II. chap. 1, sect. 3, § 1.

not noticed in the description, Lord Rosslyn nevertheless enforced specific performance with costs:[1] and the circumstance that an estate, described as inclosed in a ring-fence, was not so inclosed, was held by Grant M.R. no defence to a suit for performance.[2]

Shackleton v. Sutcliffe.

§ 870. But where the objection taken by the purchaser, who was defendant, was the existence of certain water easements, and it was proved that the defendant had long lived in the neighbourhood, was well acquainted with the property, had in passing the road constantly seen some of the wells on the lower land supplied from the upper land, which was the subject of the contract, and had on the morning of the sale been upon the land; Knight Bruce V.C. expressed his opinion, but without giving the reasons, that no such degree of knowledge or notice had been proved as to preclude the purchaser from taking the objection.[3] In this case, it may be observed, the objection to the upper lands was the existence of certain rights granted with the lower lands to enter the upper lands, fetch water from a spring, and to cut and cleanse gutters for the conveyance of the water to the lower lands and similar easements. Now the wells, gutters, and all the other objects of sense might probably have existed without necessarily involving these easements; and if so, it follows that the defect was in its nature latent and not really patent.

Latent defects.

§ 871. With regard to the latency of defects, it is to be observed that the Court will not demand a minute examination on the part of the purchaser, even where the vendor does not make any representation:[4] to render a defect patent it must, it seems, be an obvious and unmistakeable object of sense.

[1] *Oldfield* v. *Round*, 5 Ves. 508; and see *Pope* v. *Garland*, 1 Y. & C. Ex. 404; *Cook* v. *Waugh*, 2 Giff. 201.

[2] *Dyer* v. *Hargrave*, 10 Ves. 505.

[3] *Shackleton* v. *Sutcliffe*, 1 De G. & Sm. 609.

[4] Cf. *per* James L.J. in *Denny* v. *Hancock*, L. R. 6 Ch. at p. 12.

Defect consisting in undisclosed liability.

§ 872. The defect need not be in the actual physical subject-matter of the contract, it may consist in the existence of some liability of which the other party is ignorant: so a vendor of a lease described as subject to the usual covenants cannot, of course, enforce specific performance where the lease is subject to unusual ones.[1] Again, the vendor of a lease who has been silent as to the existence of onerous and unusual covenants cannot force on a purchaser a lease containing such covenants, unless he give the purchaser before contract a fair opportunity of ascertaining for himself the terms of the covenants,[2] and that under such circumstances that he ought, as a reasonable man, to have acquainted himself with them.[3] So, where a vendor of leasehold property had before the sale received from his landlord a notice of re-entry in default of the premises being repaired, and did not communicate the existence of this notice to the purchaser, who, however, knew of the state of the premises, the contract was held void at the suit of the purchaser, who had been ejected;[4] and at Common Law the undisclosed fact that the property in question is liable to be taken under the powers of an Act of Parliament has been held a valid ground for rescinding the contract.[5] A vendor of real estate is bound to disclose any material defect in the title, or in the subject of the sale, which defect

[1] *Hampshire* v. *Wickens*, 7 Ch. D. 555 (where the subject of what are usual covenants is fully considered, as regards leaseholds; *Re Lander and Bayley's Contract*, [1892] 1 Ch. 11 (usual covenants in lease of public house); cf. *Tibdesley* v. *Clarkson*, 30 Beav. 419; *Re Higgins and Hitchcox*, 21 Ch. D. 95.

Reeve v. *Berridge*, 20 Q. B. D. 523; *Re White and Smith's Contract*, [1896] 1 Ch. 637; *Re Haedicke and Lipski's Contract*, [1901] 2 Ch. at p. 669.

[2] *Molyneux* v. *Hawtrey*, [1903] 2 K. B. 487, 491; 72 L. J. K. B. 873.

[3] *Stevens* v. *Adamson*, 2 Stark. 422.

Ballard v. *Way*, 1 M. & W. 520. Distinguish from the cases cited in this section, *Edwards Wood* v. *Marjoribanks* (1 Giff. 381; 3 De G. & J. 329; 7 H. L. C. 806), where the purchaser of an advowson was held not entitled to any compensation in respect of a charge on the living under a grant from Queen Anne's Bounty.

is exclusively within his knowledge, and which the purchaser could not be expected to discover for himself with the care ordinarily used in such transactions.[1]

Defect unknown to both parties.

§ 873. The existence of a defect, unknown at the time of the contract both to the vendor and the purchaser, will not, it seems, be a bar to the enforcement of the contract,[2] unless, probably, where the defect is such as lies properly in the knowledge of the vendor.

Variation which is not a defect.

§ 874. When the variation between the thing and the description of it seems rather in the nature of an excess than of a defect, and so in favour of the purchaser, the vendor is nevertheless disabled from enforcing the contract on an unwilling purchaser. Thus freehold land cannot be forced on a purchaser who bought it as copyhold. "It is unnecessary," said Lord Romilly M.R., "for a man who has contracted to purchase one thing to explain why he refuses to accept another."[3]

Uncertainty in subject matter, and in description of it.

§ 875. Where an uncertainty exists as to the subject-matter of the contract, but the description by which it was sold is equally uncertain, there is of course no variation or defect. Therefore where property was sold by a general description as being part freehold and part leasehold, and the exact boundary between the freehold and leasehold parts of the estate could not be

[1] *Carlish* v. *Salt*, [1906] 1 Ch. 335, 341; 75 L. J. Ch. 175, where the material facts constituting a latent defect in the title were the service of a party wall notice, and the issue of the usual award throwing upon the owner liability to contribute part of the cost of the party wall works; *Howe* v. *Gokstatter*, 53 Sol. Jo. 286 (non-disclosure of restrictive covenants).

[2] *Per* Wigram V.C. in *Lucas* v. *James*, 8 Ha. 418. Distinguish *Hope* v. *Walter*, [1900] 1 Ch. 257, reversed S. C. [1899] 1 Ch. 433 (property sold as a brothel). See also *Parkhurst* v. *Lee*, 2 East, 314.

[3] *Ayles* v. *Cox*, 16 Beav. 23. See the observations of Lord St. Leonards on this case, Vend. 251 et. also *Stanton* v. *Tattersall*, 1 Sm. & G. 529. Copyholds cannot, of course, be forced on a purchaser of freeholds: *Hick* v. *Phillips*, Prec. in Ch. 575; cf. *Twining* v. *Morris*, 2 Bro. C. C. at p. 331.

ascertained, this circumstance furnished no defence to a suit for specific performance.[1]

Sale with all faults

§ 876. A purchaser may of course contract for the purchase of a thing with all faults, and he then takes on himself the knowledge of the title and of the qualities of the subject. The cases on the effect of this clause in a contract seem to show, — first, that such a contract is binding, however many may be the defects in the subject, and whether they be latent or patent, and whether discoverable by the purchaser or not;[2] secondly, that it will not protect the vendor where he takes positive means to conceal the defects,[3] as where a vessel was moved off her ways, where she lay dry, into the water in order to conceal her worm-eaten bottom and broken keel;[4] and thirdly, that it will not protect the vendor when he makes a misrepresentation, and that misrepresentation is embodied in the contract,[5] or is both false and fraudulent.[6] The Court refuses to direct any inquiry as to title where the sale is with all faults, and the vendor only sells such interest as he has.[7]

Effect on the contract of a defect.

§ 877. The effect on the specific performance of the contract of a defect in the thing sold, or a variation from the description, is twofold, according to its magnitude. If, in the view of the Court, it be unessential, the contract may yet be performed, but with

[1] *Monro* v. *Taylor*, 3 Mac. & G. 713. As to conditions respecting such a mingling of tenures, see also *Crosse* v. *Lawrence*, 9 Ha. 462; *Crosse* v. *Kane*, id. 169; cf. *Jeffrys* v. *Fairs*, 1 Ch. D. 448. *Davis* v. *Shepherd*, L. R. 1 Ch. 410, is, of course, clearly distinguishable.

[2] *Baglehole* v. *Walters*, 3 Camp. 154; *Pickering* v. *Dowson*, 4 Taunt. 779, overruling Lord Kenyon M.R.'s decision in *Mellish* v. *Motteux*, Peake, 115, that the stipulation in question only applies to faults which the purchaser can discover or the vendor is ignorant of.

[3] *Baglehole* v. *Walters*, 3 Camp. 154.

[4] *Schneider* v. *Heath*, 3 Camp. 506.

[5] Ibid.

[6] *Early* v. *Garrett*, 9 B. & C. 928; *Springwell* v. *Allen*, 2 East, 448, n.

[7] See *infra*, § 1323. See also *Hume* v. *Pocock*, L. R. 1 Eq. 123; 1 Ch. 379.

compensation; if it be essential, it confers on the party injured the right of rescinding the contract and defeating its performance.[1] The distinction between these two classes of cases will be considered in the chapter on Compensation.[2]

[1] *Stanton* v. *Tattersall*, 1 Sm. & G. 529; *Turquand* v. *Rhodes*, 16 W. R. 1074; cf. *McKenzie* v. *Hesketh*, 7 Ch. D. at p. 682.

[2] Part V. chap. ii.

CANADIAN NOTES.

Material Misdescription.

In *Morehouse* v. *Hewish*, 22 O.A.R. 172, where a city building lot was described in an agreement for exchange as having a depth of 130 feet, more or less, and had in fact a depth of only 117 feet, with a lane in rear, 12 feet wide, specific performance at the suit of the owner was, under the particular circumstances of the case, refused. Hagarty C.J.O. stated the rule to be as established in *Flight* v. *Booth*, 1 Bing N.C. 370, as follows: "In this state of discrepancy between the decided cases we think it is at all events a safe rule to adopt that where the misdescription, although not proceeding from fraud, is in a material and substantial point so far affecting the subject matter of the contract that but for such misdescription the purchaser might never have entered into the contract at all, in such cases the contract is avoided altogther and the purchaser is not bound to resort to the clause of compensation." His Lordship added, "This seems to have a most rational and refreshing sound amid the rather discordant notes of the law of vendor and purchaser."

The foregoing case must be distinguished from cases where the purchaser gets all he bargained for but not all he thought he was to get.

In *Hickson* v. *Clarke*, 25 Grant's Ch. 173, the defendant agreed to purchase a piece of land, with a water privilege attached, for the avowed purpose of erecting a mill on the land, and storing or booming the logs for his mill in the water adjoining. It was held that this did not bind the vendor to retain the water in its then state for the purpose of securing to the defendant the benefit of such booming or storage and that, notwithstanding the loss of the water privilege by reason of one of the dams having fallen into decay, the defendant was bound specifically to perform his agreement.

It was conceded that in a grant or a contract for a grant, the necessary consequences or incidents of such a grant were implied, but it was no necessary consequence of the grant with a water privilege attached, that the dam which had fallen should be kept in repair. The plaintiff would have a water privilege in that he was entitled to boom his logs in any water that there might be opposite the lot purchased. It would be going too far to imply an obligation on the part of the defendant to keep the dam from going into decay. There would be a danger of thus importing into the contract something which neither party had contemplated and which if asked for as a term of the contract might have been refused by the vendor.

See also case on an award, p. 771A.

CHAPTER XVIII.

WANT OF A GOOD TITLE.

Title must be free from doubt.

§ 878. WHERE the vendor of land sues the purchaser for a specific performance of the contract, the defendant is entitled to have the action dismissed, if it appear that the plaintiff cannot make out a good title to the land. The defendant may have the action thus dismissed at the trial, provided the defect in title has been prominently put forward in the pleadings, and the Court can then decide the question,[1] or even where the objection appears on the evidence at the trial, and is a different objection from that on which the defendant had relied.[2] But the question more usually arises after the reference of title has been made.

The title which the vendor must show must be a title in himself, or in those whom he has a legal or equitable right to require to join in the conveyance: he has no right to say that some other person is willing to enter into a contract, and to force the title of that other person on the purchaser.[3]

Former practice.

§ 879. The old practice of the Court of Chancery, in all cases of dispute as to the title of the estate sold,

[1] *Lucas* v. *James*, 7 Ha. 418, 425. Cf. *Bates* v. *Kesterton*, [1896] 1 Ch. 159 (a vendor's action).

[2] *Baskcomb* v. *Phillips*, 29 L. J. Ch. 380; 6 Jur. N. S. 363.

[3] *Re Bryant and Barningham*, 44 Ch. D. 218. Distinguish *Re Baker and Selmon's Contract*, [1907] 1 Ch. 238, 243, where, at the date of the contract, the vendor had the legal estate as trustee, without any power of or trust for sale, but with the written request of all the beneficiaries to sell; and it was held that he had a right to compel their concurrence, and so could make a good title.

was to decide either for or against the validity of the title, and either to compel the purchaser to take it as good, or to dismiss the bill on the score of its being bad.[1] But the case of *Marlow* v. *Smith*,[2] before Jekyll M.R., followed by *Shapland* v. *Smith*,[3] before Lord Thurlow, established the practice of allowing a class of titles which, without affirming them to be bad, the Court considered so doubtful that it would not compel a purchaser to take them.[4]

Present rule.

Observations on the rule.

§ 880. Lord Eldon, though feeling himself bound to adhere to this as an established rule, on more than one occasion expressed his dissent from it on principle, and bewailed the great mischiefs which had resulted from it.[5] But such expressions of opinion did not make the rule: and it has been recognized by the House of Lords as one of the established rules of a Court of Equity.[6]

"It is not right," said Cozens-Hardy M.R. in a recent case,[7] "for the Court to force a title upon a purchaser which merely may mean that he is buying a lawsuit. The old rule that some titles are so doubtful that they ought not to be forced upon a purchaser is still in force, and in some degree ought to be more readily adopted than it was under the old law, because of the existing cheap and rapid mode in which questions of construction can be determined."

Arguments.

§ 881. Against the rule it has been urged that it

[1] [illegible] C. C. 76, n.

[2] 2 [illegible] 198.

[3] 1 Bro. C. C. 75. Lord Eldon was in the habit of treating this as the first case in which the later rule had prevailed: but in *Sloper* v. *Fish*, 2 V. & B. 149, Grant M.R. referred to the earlier case, and stated that the rule in question had been repeatedly acted on by Lord Hardwicke.

[4] See also *Cooper* v. *Denne*, 4 Bro. C. C. 80; S. C. 1 Ves. Jun. 565; *Sheffield* v. *Lord Mulgrave*, 2 Ves. Jun. 526; *Roake* v. *Ashfield*, 5 Ves. 647; *Willcox* v. *Bellaers*, T. & R. 491.

[5] In *Vancouver* v. *Bliss*, 11 Ves. 465; and in *Jervoise* v. *Duke of Northumberland*, 1 J. & W. 568.

[6] See *per* Lord Westbury in *Parker* v. *Tootal*, 11 H. L. C. at p. 158.

[7] *Re Nichols' and Von Joel's Contract*, [1910] 1 Ch. at p. 46.

is logically absurd, as well as practically injurious; for every title is good or bad, and if so, the Court ought to know nothing of a doubtful title. For the rule it has been urged in effect that, having regard to the nature of an action for specific performance, the rule in question is necessary in point of practical justice, and correct in reasoning. It must be remembered that the judgment of the Court in such an action is *in personam* and not *in rem*; that it binds only those who are parties to the action, and those claiming through them, and in no way decides the question in issue as against the rest of the world;[1] and that doubts on the title of an estate are often questions liable to be discussed between the owner of the estate and some third person not before the Court, and therefore not bound by its decision.[2] If therefore there be any reasonable chance that some third person may raise a question against the owner of the estate after the completion of the contract, the Court may consider this to be a circumstance which renders the bargain a hard one for the purchaser, and one which in the exercise of its discretion it will not compel him to execute. Though every title must in itself be either good or bad, there must be many titles which the Court cannot pronounce with certainty to belong to either of these categories in the absence of the parties interested in supporting both alternatives, and without having heard the evidence they might have to produce, and the arguments they might be able to urge: and it is in the absence of these parties that the question is generally agitated in proceedings for specific performance. The Court, when fully informed, must know whether a title be good or bad; when partially informed, it often may and ought to doubt.[3]

against and for the rule.

[1] See *per* Jessel M.R. in *Osborne v. Rowlett*, 13 Ch. D. at p. 781.

[2] See *per* Turner V.C. in *Glass v. Richardson*, 9 Ha. at p. 701.

[3] Consider *Re Reilly and Brady's Contract*, [1910] 1 I. R. 278.

Amount of doubt.

§ **882.** It is by no means easy to express what amount of doubt upon a point there must be, to induce the Court to refuse specific performance: and this difficulty has been increased by the ebb and flow of judicial opinion and decision for and against the rule, which has characterized the cases of the last quarter of a century. One mode of measuring the doubt has been by applying the question, whether it is such a title as that the Judge himself would lend his own money upon it. The Court "has almost gone the length," said Lord Eldon, "of saying that unless it is so confident that if it had 95,000*l.* to lay out on such an occasion, it would not hesitate to trust its own money on the title, it would not compel a purchaser to take it."[1]

Marketable title.

§ **883.** In another case, Lord Eldon put the question for the Court as being, "whether the doubt is so reasonable and fair, that the property is left in his (the purchaser's) hands not marketable:"[2] but a marketable title being "one which, so far as its antecedents are concerned, may at all times and under all circumstances be forced on an unwilling purchaser,"[3] the observation seems not much to assist us in measuring how great the doubt must be.

In *Williams* v. *Scott*,[4] the Privy Council held that it would be inequitable to force upon a purchaser a title derived by the vendor by purchase from himself as trustee for sale. "It is not merely," said Sir Ford North, delivering the judgment of their Lordships, "that the purchaser would be running the risk of proceedings being taken by the *cestuis que trust* to re-open the transaction. The purchaser would be saddled with a property which he would be unable for many

[1] In *Jervoise* v. *Duke of Northumberland*, 1 J. & W. 569. See also *Sheffield* v. *Lord Mulgrave*, 2 Ves. Jun. 526; *per* Turner V.C. in *Pyrke* v. *Waddingham*, 10 Ha. 9.

[2] In *Lord Braybroke* v. *Inskip*, 8 Ves. 428.

[3] *Per* Turner V.C. in *Pyrke* v. *Waddingham*, 10 Ha. 8.

[4] [1900] A. C. 499, 508.

years to put upon the market, unless recourse was had to some special restrictive condition which might seriously reduce the price a purchaser would be willing to pay for it."

Formerly performance refused, though Court in favour of title.

§ **884**. It was formerly held that, although the Court might entertain an opinion in favour of the title, yet if it were satisfied that that opinion might fairly and reasonably be questioned by other competent persons, it would refuse specific performance. Thus, in a case before Leach V.C., he expressed the strong inclination of his opinion to be in favour of the title, and yet refused the relief sought by the plaintiff;[1] and in the case of *Pyrke* v. *Waddingham*,[2] in which Turner V.C. discussed the subject now before us, he expressed an opinion in favour of the title, but nevertheless dismissed the vendor's bill with costs. For this reason it was held that the Court would not force a title on a purchaser in opposition to the decision of another Court, though it might think that decision to be wrong.[3] Accordingly the Court of Appeal in Chancery in one case dismissed an appeal, though thinking the title good, on the ground of the opinion of the Judge below:[4] though the same measure of deference was not extended to the opinion of a conveyancing counsel of the Court.[5]

Present tendency of the Court.

§ **885**. It is difficult to say how far these cases can now be relied on; for, since the case of *Pyrke* v. *Waddingham*,[6] there has been a considerable oscillation in the tendency of judicial decisions.

§ **886**. On the one hand, the very same title which Turner V.C. refused to force on a purchaser in *Pyrke* v *Waddingham*,[6] was forced on another purchaser by Lord Romilly M.R., not on the ground that the principles

[1] *Price* v. *Strange*, 6 Mad. 159, 161.

[2] 10 Ha. 1; cf. *Rogers* v. *Waterhouse*, 4 Drew. 329.

Rose v. *Calland*, 5 Ves. 186.

[4] *Collier* v. *McBean*, L. R. 1 Ch 81; and see *Hamilton* v. *Buckmaster*, L. R. 3 Eq. 323.

[5] *Hamilton* v. *Buckmaster*, L. R. 3 Eq. 323.

[6] 10 Ha. 1.

laid down in that case were erroneous, but that they did not justify the decision.[1]

Decision of inferior Court.

§ 887. Again, as regards the decision of an inferior Court;—the Judges of the Court of Appeal have held that they are in no wise bound by such decisions, and that where they consider that there is no reasonable doubt, the adverse decision of the inferior Court will not be a sufficient reason to refuse the plaintiff relief.[2]

Lord St. Leonards' view.

"With respect to the common cases of doubtful title," said Lord St. Leonards, "I cannot agree with the proposition, that an unfavourable decision in the Court of inferior jurisdiction renders the title doubtful. The Judge of the superior Court would still be bound to exercise his own discretion and decide according to his own judgment."[3] This language has been cited with approval by the Court of Appeal in Chancery in England.[4]

§ 888. On the other hand, the case of *Pyrke* v. *Waddingham*[5] has received the sanction of the Earl of Selborne and Baggallay and Lush L.JJ., in a case in which they adopted the principles laid down in that case, and refused to force a purchaser to take a title in respect of which there were serious grounds for doubt.[6]

Nature of the doubt.

§ 889. The doubt which may prevent the Court from compelling the purchaser to accept a title may be a doubt either of law or of fact; and, as to law, it may be connected with the general law of the realm,[7] or with

[1] *Mullings* v. *Trinder*, L. R. 10 Eq. 449. See also *Bull* v. *Hutchens*, 32 Beav. 615 (*lis pendens*), and *Wrigley* v. *Sykes*, 21 Beav. 337. See also *Highgate Archway Co.* v. *Jeakes*, L. R. 12 Eq. 9; *Bell* v. *Holtby*, L. R. 15 Eq. at p. 193; *Austin* v. *Tawney*, L. R. 2 Ch. 143; *Osborne to Rowlett*, 13 Ch. D. 771. 781; *Wise* v. *Piper*, ib. 848, 855.

[2] *Beioley* v. *Carter*, L. R. 4 Ch. 230; *Alexander* v. *Mills*, L. R. 6 Ch. 124; *Radford* v. *Willis*, L. R. 7 Ch. 7, reversing S. C. L. R. 12 Eq. 105.

[3] *Sheppard* v. *Doolan*, 3 Dr. & War. at p. 8. See, too, *per* Jessel M.R. in *Osborne to Rowlett*, 13 Ch. D. at p. 781. Consider *Cook* v. *Dawes*, 3 De G. F. & J. at p. 130.

[4] In *Beioley* v. *Carter*, L. R. 4 Ch. at pp. 236, 240.

[5] *Palmer* v. *Locke*, 18 Ch. D. 381.

[6] *Sloper* v. *Fish*, 2 V. & B. 145; *Blosse* v. *Lord Clanmorris*, 3 Ba. & B. 2; *Re Thackwray and Fenny*, 40 Ch. D. 34; but as to this see §§ 802, 803.

the construction of particular instruments;[1] and, as to fact, it may be in reference to facts appearing on the title, or to facts extrinsic to it.[2] Again, it may be about a matter of fact which admits of proof, but has not been satisfactorily proved,[3] or about such a matter as from its nature admits of no satisfactory proof, as the negative proposition that there was no creditor of the vendor capable of taking advantage of an act of bankruptcy.[4]

Cases in which Court would consider title doubtful

§ 890. It is not easy to give any perfect classification of the doubts which would and of those which would not prevail with the Court, but the following attempt may not be useless. The Court would, it is conceived, consider the title doubtful in the following cases: —

i. Probability of litigation great.

(i.) Where the probability of litigation ensuing against the purchaser in respect of the matter in doubt is considerable, or, as it was put by Alderson B.,[5] where there is "a reasonable decent probability of litigation." The Court, to use a favourite expression, will not compel the purchaser to buy a lawsuit.[6] Thus—to mention some recent instances—the Court declined to force the title upon the purchaser where it appeared that some infants, who had by customary feoffments conveyed their shares of gavelkind land to the vendor, might possibly, on attaining twenty-one,

[1] *Lincoln* v. *Arcedeckne*, 1 Coll. 38; *Eristow* v. *Wood*, 1 Coll. 480; *per* Turner V.C. in *Pyrke* v. *Waddingham*, 10 Ha. 9.

[2] Ibid.

Smith v. *Death*, 5 Mad. 374.

[3] *Lowes* v. *Lush*, 11 Ves. 547.

In *Cattell* v. *Corrall*, 4 Y. & C. Ex. 237.

[4] *Price* v. *Strange*, 6 Mad. 159, 165; *Sharp* v. *Adcock*, 4 Russ. 374; *Hoseltine* v. *Simmons*, 6 W. R. 268; *Pegler* v. *White*, 33 Beav. 403. Consider *Potter* v. *Parry*, 7 W. R. 182; *Burnell* v. *Firth*, 15 W. R. 546. See, too, *Williams* v. *Scott*, [1900] A. C. 499; *Re New Land Development Association and Gray*, [1892] 2 Ch. 138; and *Re Calcott and Elvin's Contract*, 67 L. J. Ch. 327; 46 W. R. 457, 459. In *George* v. *Thomas*, 52 W. R. 416; 90 L. T. 515, an honest claim by a third person, affecting the vendor's title, having been brought to the notice of the Court, Swinfen Eady J. declined to make an immediate decree, at the vendor's instance, for specific performance, and ordered the action to stand over for a definite time, in order to see whether the third person would meanwhile take proceedings to substitute his claim.

assert some claim against the land;[1] also where a person claiming to be entitled to the benefit of a condition for reverter had given a notice amounting to a threat of litigation, although the Court considered the condition to be obnoxious to the rule against perpetuities and therefore void;[2] and again where a lease contained the usual qualified covenant against assigning without the lessor's consent, and the lessor had declined to consent to an assignment to the purchaser.[3] The unwillingness of the Court is increased where the title depends on a question of fact to be proved by oral testimony of witnesses whom, at the time when the controversy is raised, it may be difficult to find, or who may be dead, or out of the jurisdiction.

ii. Past adverse decision doubted.

(ii.) Where there has been a decision by a Court of co-ordinate jurisdiction adverse to the title or to the principle on which the title rests, though the Court thinks that decision wrong.[4]

iii. Past favourable decision doubted.

(iii.) Where there has been a decision in favour of the title which the Court thinks wrong.[5]

iv. Construction of inartificial instrument.

(iv.) Where the title depends on the construction and legal operation of some ill-expressed and inartificial instrument, and the Court holds the conclusion it arrives at to be open to reasonable doubt in some other Court.[6]

v. Title resting on presumption of doubtful fact.

(v.) Where the title rests on a presumption of fact of such a kind that if the question of fact were before a jury, it would be the duty of the Judge not to

[1] *Re Maskell and Goldfinch's Contract*, [1895] 2 Ch. 525, 529; cf. *Re Douglas and Powell's Contract*, [1902] 2 Ch. 296, 314; 71 L. J. Ch. 850.

[2] *Re Hollis' Hospital (Trustees of) and Hague's Contract*, [1899] 2 Ch. 540, 555.

[3] *Re Marshall and Salt's Contract*, [1900] 2 Ch. 202. See, too, *Re Ferrell's Contract*, [1903] 1 Ch. 65; 72 L. J. Ch. 44; 51 W. R. 73.

[4] *Per* Lord Romilly M.R. in *Mathias* v. *Trinder*, L. R. 10 Eq. at p. 454.

[5] Ibid.

[6] *Per* James L.J. in *Alexander* v. *Mills*, L. R. 6 Ch. at p. 132.

give a clear direction in favour of the fact, but to leave the jury to draw their own conclusion from the evidence.

To this principle we may probably refer many of those cases where a doubt as to a fact has prevailed; as where the title depended upon proof that there was no creditor who could take advantage of an act of bankruptcy committed by the vendor:[1] or where the title depended upon the absence of notice of an incumbrance, of which absence the vendor produced some evidence,[2] or upon the presumption arising from mere possession,[3] or upon the absence of notice to the vendor of a defect in the title to a lease,[4] or upon the establishment of facts and dealings of a complicated, and in some instances of an ambiguous, nature.[5]

Voluntary settlor plaintiff.

And it has already[6] been noticed that, in cases arising under the law as it stood before the passing of the Voluntary Conveyances Act, 1893, the Court would allow a voluntary settlor to force on an unwilling[7] purchaser a title depending on the invalidity of the settlement.[8] "One difficulty in the way of assisting him," said Lord Eldon, "is, that he has no equity to defeat the act which he has done himself: but another consideration which has weighed in such cases is, that if you compel a purchaser to take an estate at the instance of such a man, you cannot be quite sure that there may not have been some intermediate acts, which by matter *ex post facto* may have made the settlement good which in its origin was not good."[9]

[1] *Lowes* v. *Lush*, 14 Ves. 547.

Frost v. *Hesse*, 4 De G. M. & G. 495.

[2] *Egton* v. *Dicken*, 4 Pri. 303.

[3] *Re Handman and Wilcox's Contract*, [1902] 1 Ch. 599. Distinguish *Megridge* v. *Clapp*, [1892] 3 Ch. 382, and (*per* Lindley L.J.) 395; 61 L. J. Ch. 534; 40 W. R. 663; 67 L. T. 100.

[4] *Re Douglas and Powell's Contract*, [1902] 2 Ch. at pp. 313, 314.

[5] *Supra*, § 406.

[6] *Peter* v. *Nicolls*, L. R. 11 Eq. 391.

[7] *Smith* v. *Garland*, 2 Mer. 123; *Burke* v. *Dawson*, St. Leon. Vend. 592; *Clarke* v. *Willott*, L. R. 7 Ex. 313. Distinguish *Small* v. *Torley*, 25 L. R. Ir. 388.

[8] In *Johnson* v. *Legard*, T. & R.

vi. Presumption of fact fatal to title

(vi.) Where the circumstances amount to presumptive (though not necessarily conclusive) evidence of fact fatal to the title; as, *e.g.*, that the exercise of a power under which the vendor claimed was a fraud upon the power.[1]

Cases where Court would not consider title doubtful

§ 891. On the contrary, it is conceived that the Court would consider the title not to be doubtful in any of the following cases; viz.,

i. Probability of litigation small.

(i.) Where the probability of litigation ensuing against the purchaser in respect of the doubt is not great, the Court, to use Lord Hardwicke's language in one case, "must govern itself by a moral certainty, for it is impossible in the nature of things, there should be a mathematical certainty of a good title." Accordingly, in the case before Lord Hardwicke, his Lordship enforced specific performance, although there was a reservation of mines, because the Court was satisfied that there was no subject-matter for the reservation to act upon, or that all legal right to exercise it had ceased.[2] So in another case, Lord Romilly M.R. forced on an unwilling purchaser a title depending on the validity of a purchase by a solicitor from his client, on proof of the validity of the transaction, though given in the absence of the client, who, it was urged, might possess other evidence and ultimately set aside the sale.[3] Again, where one link in the title was a voluntary conveyance, but the circumstances were such as practically to negative the suggestion of a subsequent conveyance for value

291. See, too, *Clarke* v. *Willott*, L. R. 7 Ex. 313. For an instance of a decree (in the year 1875) for specific performance at the suit of a purchaser, notwithstanding a previous voluntary grant by the defendant, see *Rosher* v. *Williams*, L. R. 20 Eq. 210.

[1] *Warde* v. *Dixon*, 28 L. J. Ch. 315; S. C. *s. n. Warde* v. *Dixon*, 7 W. R. 148.

[2] In *Lyddall* v. *Weston*, 2 Atk. [illegible].

[3] See, as to this case, *per* Grant M.R. in *Seaman* v. *Vawdrey*, 16 Ves. 393; *Martin* v. *Cotter*, 3 Jon. & Lat. 496.

[4] *Spencer* v. *Topham*, 22 Beav. 573. See, too, *Falkner* v. *Equitable Reversionary Society*, 4 Drew. 352.

by the donor, the Court adjudged specific performance.[1] And in cases where the circumstances led to a presumption that a restrictive covenant affecting the user of the property sold had been released or waived, the title has been forced on the purchaser.[2]

(ii.) Where there has been a decision adverse to the title by an inferior Court, which decision the superior Court holds to be clearly wrong.[3] ii. Case adverse decision wrong.

(iii.) Where the question depends on the general law of the land. "As a general and almost universal rule, the Court is bound as much between vendor and purchaser, as in every other case, to ascertain and so determine as it best may what the law is, and to take that to be the law which it has so ascertained and determined."[4] A striking instance of this is furnished by *Re Cox and Kinderdine's Contract*,[5] where the Court of Appeal compelled a purchaser to take a title which depended upon the true construction of sect. 47 of the Bankruptcy Act, 1883, although Stirling J., in *Re Briggs and Spicer*,[6] had held a title bad which depended upon precisely the same point.[7] iii. Question dependent on general law.

(iv.) Where the question, though one of construction, turns on a general rule of construction, unaffected by any special context in the instrument and the Court is in favour of the title.[8] iv. Where general rule of construction.

(v.) Where the title depends on a presumption, v. Where presump

Noyes v. *Paterson*, [1894] 3 Ch. 267.

Hepworth v. *Pickles*, [1900] 1 Ch. 108; *Re Summerson*, *Downê* v. *Summerson*, ibid. 112, n. In the last cited case the property had been sold under an order of the Court.

[2] *Supra*, § 887.

[3] *Per* James L.J. in *Alexander* v. *Mills*, L. R. 6 Ch. at pp. 131, 132; *Forster* v. *Abraham*, L. R. 17 Eq. 351; *Osborne to Rowlett*, 13 Ch. D. 774; *Re Thompson and McWilliams' Contract*, [1896] 1 I. R. 356 (power of administrator *durante minore ætate* to sell); but cf. *Re Thackeray and Young*, 10 Ch. D. 39.

[4] [1897] 1 Ch. 776.

[5] [1891] 2 Ch. 127.

[6] See *per* Cozens-Hardy L.J. in *Re Handman and Wilcox's Contract*, [1902] 1 Ch. at p. 609. Cf. *Mogridge* v. *Clapp*, [1892] 3 Ch. 382; 61 L. J. Ch. 534, 40 W. R. 662; 67 L. T. 100.

[7] *Radford* v. *Willis*, L. R. 7 Ch. 7.

tion in favour of the fact.

provided it be such, that if the question were before a jury, it would be the duty of the Judge to give a clear direction in favour of the fact, and not to leave the evidence generally to the consideration of the jury.[1] So where the recital of deeds raised the presumption that they contained nothing adverse to the title, the mere loss of the deed, where the title was fortified by sixty years' undisputed possession, was held not to create a reasonable doubt:[2] and so again, where the validity of a title depended on no execution having been taken out under certain judgments, between the 27th September, 1769, and the 23rd May, 1770, and nothing was shown to have been done which could be referred to such an execution, the Court considered the title good.[3] To this head may perhaps be referred the fact that, previously to the passing of the Voluntary Conveyances Act, 1893, the Court would (except at the suit of the settlor)[4] compel specific performance of a title depending on the invalidity of a voluntary conveyance as against a purchaser for valuable consideration without notice,[5] the Court, as it seems, having in cases of that kind acted on the presumption of the conveyance not having been rendered valid by subsequent dealings.

vi. Suspicion of *mala fides*.

(vi.) Where the doubt raised rests not on proof or presumption, but on a suspicion of *mala fides*. This point has given rise to some diversity of opinion. In *Hartley* v. *Smith*[6] the title depended on a deed of grant of chattels, containing a stipulation for the grantor's continuing conditionally in possession; and Leach V.C., without deciding whether such a deed was in itself fraudulent and an act of bankruptcy, declined to force the title on the purchaser, on the

[1] *Emery* v. *Grocock*, 6 Mad. 54; *Barnwell* v. *Harris*, 1 Taunt. 430.

[2] *Prosser* v. *Watts*, 6 Mad. 59; *Magennis* v. *Fallon*, 2 Moll. 561.

[3] *Coaster* v. *Macklew*, 2 Sim. 242.

[4] *Supra*, §§ 406, 469, 890.

[5] *Butterfield* v. *Heath*, 15 Beav. 408; *Buckle* v. *Mitchell*, 18 Ves. 100.

[6] Buck, Bankr. C. 368.

ground that its validity depended on its being made upon good consideration and *bonâ fide*, and that these were circumstances, the existence of which the purchaser had no adequate means of ascertaining. "My opinion therefore is," said the Vice-Chancellor, "that a Court of Equity ought not to compel this purchaser to accept this title; because assuming the deed not to be fraudulent *ex facie*, it still may be avoided by circumstances extrinsic, which it is neither in the power of the purchasers nor of this Court to reach."[1]

Dictum of Leach V.C. observed upon.

§ **892.** This dictum seems to allow no room to the presumption of *bona fides*, and to make the possibility of fraud in extrinsic facts a sufficient objection to the title: accordingly, it has not been accepted in all its generality. It "must not," said Alderson B. of this dictum, "be pushed to the farthest extent which the words will possibly bear:"[2] and accordingly, that Judge held good a title under a deed which extrinsic evidence might have shown to be invalid, as comprising all the property of the grantor, or as made to give a fraudulent preference to some creditors over others, or as made in contemplation of bankruptcy, because there was no ground apparent for making any of these objections to it.[3]

Green v. Pulsford.

§ **893.** In *Green* v. *Pulsford*[4] the vendor claimed under an appointment made by a husband and wife to their eldest daughter, under a settlement which gave them successive life estates, with remainder to their children as they should appoint, and in default of appointment between such children; and the parents had incumbered their life interests, and shortly after the appointment, they and their daughter executed a mortgage: these were circumstances which might create

[1] P. 380. See also *Boswell* v. *Mendham*, 6 Mad. 373.

[2] 1 Y. & C. Ex. 236.

[3] *Cattell* v. *Cornell*, 1 Y. & C. Ex. 228.

[4] 2 Beav. 71.

in every one's mind a suspicion that the appointment was a fraud on the settlement, and that was strengthened by a notice from a younger son to the purchaser not to complete, and that the appointment was such a fraud: but inasmuch as the notice alleged no facts, and gave no information not apparent on the abstract, and was not followed up by any proceedings, the Court considered that the title was not open to any sufficient doubt, and forced it on the purchaser. In an earlier case, where there were somewhat similar grounds for suspecting the *bonâ fides* of an appointment, Lord Eldon pursued the same course, and enforced specific performance.[1]

Alexander v. Mills.

§ 894. In another case, the purchaser showed that the title was made under a sale by newly appointed trustees to a person who had previously bought the interest of the tenant for life, and who eighteen months afterwards made a profit on his purchase: but the Court held these circumstances immaterial.[2]

Title under will.

§ 895. Again, a purchaser is not entitled in the absence of circumstances of suspicion to refuse a title made under a will, because the will has not been proved against the heir or he does not join:[3] so that where, during a litigation of thirteen years, no question had been raised impeaching the validity of the will, and a person who had claimed under another will had withdrawn from all contention against the one first mentioned, Lord Hatherley (then Wood V.C.) compelled the purchaser to take a title under the will.[4]

Costs.

§ 896. Where the Court comes to the conclusion that a good title can be made it generally orders the purchaser to pay the costs of the litigation, so as to

[1] *M'Queen* v. *Farquhar*, 11 Ves. 467. See also *Grove* v. *Bastard*, 2 Ph. 619; S. C. 1 De G. M. & G. 69; and *Re Huish's Charity*, L. R. 10 Eq. 5.

[2] *Alexander* v. *Mills*, L. R. 6 Ch. 124.

[3] *Colton* v. *Wilson*, 3 P. Wms. 190; *per* Lord Eldon in *Morrison* v. *Arnold*, 19 Ves. 670; *Waddell* v. *Nixon*, 17 Beav. 160.

[4] *M'Culloch* v. *Gregory*, 3 K. & J. 12.

assure his title and show that the Court entertains no doubt upon it.[1]

Bringing in adverse claimant.

§ 897. Modern legislation affords machinery under which, in some cases at least, the person making an adverse claim may be brought into the litigation, and that, which in his absence might have remained doubtful, may receive judicial determination.[2] It seems worthy of consideration whether this principle could not be further extended.

Proof of performance of lessee's covenants.

§ 898. In connection with the topic of title, it may be noticed that where there is an open contract for the sale and purchase of leasehold property, the purchaser is entitled (subject to the statutory provision about to be mentioned) to proof of due performance of all the covenants in the lease up to the date for completion. Section 3 (4) of the Conveyancing and Law of Property Act, 1881, requires him, on production of the receipt for the last payment due for rent under the lease before the date of actual completion of the purchase, to assume such performance "unless the contrary appears." This leaves it open to the purchaser to show the contrary; and, by doing so, he may, it is conceived, establish a good defence to an action for specific performance.[3]

Special case.

§ 899. In a case where parties stated facts in the form of a special case, and required the opinion of the Court whether on these facts a good title was shown,

[1] *Per* Jessel M.R. in *Osborne to Rowlett*, 13 Ch. D. at p. 798; cf. *Nicholls* v. *Corbett*, 31 Beav. at pp. 381, 382; *Hood* v. *Lord Barrington*, L. R. 6 Eq. at p. 224; *Woods* v. *Hyde*, 16 W. R. at p. 340; *Re Tanqueray-Willaume and Landau*, 20 Ch. D. 465. In *Radford* v. *Willis* (L. R. 7 Ch. 7, 11) the purchaser was "excused" from paying costs.

[2] See the provisions of the Land Transfer Act, 1875, ss. 93, 94, stated *infra*, § 1142.

[3] See *Re Highett and Bird's Contract*, [1902] 2 Ch. 214; 71 L. J. Ch. 508; affd. C. A. [1903] 1 Ch. 287 (note, however, the observations of Romer L.J. at p. 293); 72 L. J. Ch. 220. See also s. 3 (11) of the Conveyancing, &c. Act, 1881, and *Palmer* v. *Green*, 25 L. J. Ch. at p. 842; *Re Higgins and Percival*, 57 L. J. Ch. at p. 808; 59 L. T. 213.

the Court declined to consider the question of the title being doubtful: it confined itself to the question asked, whether or no a good title was shown.[1]

[1] *Governors for Relief of Poor Widows of Clergymen, &c.* v. *Sutton*, 27 Beav. 651, a case under Sir Geo. Turner's Act (13 & 14 Vict. c. 35), ss. 2, 18. That Act has been repealed (by 46 & 47 Vict. c. 49), but a similar procedure has been substituted by R. S. C. Ord. XXXIV. r. 8.

CANADIAN NOTES.

Want of Good Title.

The Canadian cases on the subject of want of title will be found at the end of chapter 4, part V., page 673*a*.

CHAPTER XIX.

FAILURE OF THE CONSIDERATION.

Events affecting the subject-matter.

§ 900. It will be necessary to inquire under what circumstances events which neither determine the existence of the subject-matter of the contract or essentially affect it will furnish a defence in specific performance. Events affecting the subject-matter, but not essentially, may give rise to a claim for compensation, but will not prevent performance of the contract.

i. *Events prior to the contract.*

Operation of prior events.

§ 901. Events may happen before the conclusion of a contract which may either (1) determine the existence of its subject-matter, or (2) materially affect such subject-matter. The former class of events do not, properly speaking, avoid the contract, but prevent its ever arising, on the ground of the common mistake: the latter class of events give the party injuriously affected a right to avoid the contract.[1]

Hitchcock v. Giddings.

§ 902. In one case, the contract was for the sale of an estate in fee in remainder on an estate tail: a conveyance had been executed and a bond given for payment of the purchase-money, when it was discovered, for the first time, that at the time of the sale no such remainder existed, the tenant in tail having previously suffered a recovery: the Court rescinded the contract, and ordered the bond to be delivered up

[1] Consider *Pritchard* v. *Merchants' &c. Life Assurance Society*, 3 C. B. N. S. 622.

and repayment to be made of all interest which had been paid on it.[1]

Cochrane v. Willis.

§ **903**. In another case, where, in order to preserve the timber on an entailed estate from being cut down by the assignee in the insolvency of a tenant for life, the owner of the next life estate and the tenant in tail contracted with the assignee that he should be deemed to be entitled to the timber as if it had been cut down and carried away by him on a specified day prior to the contract, but should not actually cut it before another specified day; and at the time when this contract was made, the insolvent was dead, but no party to the contract was aware of that fact: the Court of Appeal declined, on the grounds of mistake, and absence of consideration, to enforce the contract.[2]

Emmerson's case.

§ **904**. Again, where a contract for the sale and purchase of shares in a company was entered into at a time when in fact, though neither vendors nor purchaser knew it, a petition for winding-up the company had been presented, the Court of Appeal refused to enforce the contract.[3]

Destruction of subject-matter of contract.

§ **905**. A contract relating to a chattel implies, at Common Law, the existence of the chattel and its existence in the form or of the description specified in the contract, and consequently an event destroying the chattel before the contract is concluded puts an end to it. Therefore, where a contract for the sale of a life annuity was concluded in England on the 28th of February, and the annuitant died in New South Wales on the 6th of the same month, there was held to be no contract:[4] and where a floating cargo was sold, and it subsequently appeared that at the time of the sale the captain had sold the cargo abroad, in consequence of

[1] *Hitchcock* v. *Giddings*, 4 Pri. 135.

[2] *Cochrane* v. *Willis*, L. R. 1 Ch. 58.

[3] *Emmerson's case*, L. R. 1 Ch. 433, reversing the order of Lord Romilly M.R., L. R. 2 Eq. 231.

[4] *Strickland* v. *Turner*, 7 Ex. 208; cf. *Cochrane* v. *Willis*, L. R. 1 Ch. 58.

the damage it had sustained at sea, the Exchequer Chamber and the House of Lords held the contract to be incapable of being enforced.[1] But no warranty being implied at Common Law as to condition, the sale of a ship at sea, which at the time happened to have been stranded, was held binding, for the subject of the contract still continued a ship.[2] The impossibility of performing a contract of which the subject-matter is extinct would of course prevent the interference of a Court of Equity in these cases, if on other grounds it could give relief.[3]

The question excluded by contract.

§ 906. But a person may so contract as to preclude himself from raising any question as to the existence or determination of the subject-matter at the time of the contract.[4]

When is the contract complete?

§ 907. The question of the time at which the contract became complete frequently arose in cases of sales by the Court of Chancery, because until the report had been confirmed absolute, or, according to the subsequent practice, until eight days after the certificate of the purchase had been signed by the Judge in Chambers, the biddings might be re-opened.[5] In these cases, the question was whether the contract was to be treated as concluded by the sale before the Master or the Chief Clerk, subject only to being defeated by the opening of the biddings, in which case the confirmation related back to the day of sale, and that day divided events prior and events subsequent to the contract; or, on the other hand, whether the contract was to be considered concluded only when it became absolute and indefeasible by the confirmation. In the case of *Vesey* v. *Elwood*,[6] Lord St. Leonards decided on the former of these views, that the sale transferred

[1] *Couturier* v. *Hastie*, 8 Ex. 40; reversed in Cam. Scac. 8 Ex. 402; the reversal affirmed 5 H. L. C. 673.

[2] *Barr* v. *Gibson*, 3 M. & W. 390. See *infra*, §§ 990, 991.

[3] *Hanks* v. *Pulling*, 25 L. J. Q. B. 377; S. C. (*s. n. Hanks* v. *Pulling*) 1 W. R. 607. Cf. *infra*, §§ 1323, 1324.

[4] 15 & 16 Vict. c. 80, s. 34.

[5] 3 Dr. & War. 71.

the property, subject only to the risk of its being opened. This was the view of Lord Eldon also, in *Anson* v. *Towgood*,[1] though it seems at variance with the previous cases[2] before him. The other view was supported by the statement of Lord Langdale M.R.:— "by the established rule of the Court, the purchaser is to be considered as the owner of the estate from the date of the order confirming the report;"[3] but as the circumstance which in this case gave rise to the question was not only after the sale but after the confirmation, also, the case is probably not of the same weight on the point now under discussion, as if the circumstance had been after sale but before confirmation.

Sale of Land by Auction Act, 1867.

§ **908**. But the former practice of opening biddings has now been discontinued by statute, and it has been enacted that the highest *bonâ fide* bidder at the sale, provided he shall have bid a sum equal to or higher than the reserved price (if any), shall be declared and allowed the purchaser, unless the Court or Judge shall, on the ground of fraud or improper conduct in the management of the sale, upon the application of a person interested in the land (such application to be made to the Court or Judge before the Chief Clerk's certificate of the result of the sale shall have become binding), either open the biddings, holding such bidder bound by his bidding, or discharge him from being the purchaser.[4] Under this enactment it seems clear that the purchase is complete when the sale at or above the reserve price, if any, has taken place.[5]

[1] 1 J. & W. 637.

[2] *Ex parte Minor*, 11 Ves. 559 (which may perhaps be supported by the general power of the Court in dealing with such contracts): *Twigg* v. *Fifield*, 13 Ves. 517. *Robertson* v. *Skelton*, 12 Beav. 260, 265; cf. *Paramore* v. *Greenslade*, 1 Sm. & G. 511.

[3] 30 & 31 Vict. c. 48, s. 7.

[4] Cf. *Newman* v. *Hook*, 10 C. B. 561.

ii. *Events subsequent to the contract.*

Sometimes a defence

§ **909**. Events subsequent to the contract will, in some cases, furnish a defence to an action for specific performance: in other cases they will not.

Where contract subject to an implied condition

§ **910**. Where from the nature of the contract it appears that the contracting parties contemplated its fulfilment only in the event of the continued existence of some subject-matter or thing, the contract is held to be subject to an implied condition that it shall cease with the subject-matter or thing; and if, before performance, the thing cease to exist, the contract goes with it.[1]

Contracts for sale of land

§ **911**. In the case of contracts for the sale of land, it has been laid down with regard to events happening after their being signed, that the question on whom the advantage or loss resulting from them would fall, and whether, therefore, the Court would enforce specific performance without reference to them—or whether, on the other hand, they might determine the contract—is to be decided by whether or not the title had then been actually accepted.[2] But the more correct doctrine appears to be that the equitable estate passes on the signature of the contract if there be a good title, though that may not be shown till afterwards. "It is," said Plumer V.C., "the established doctrine of Equity, that if a contract to purchase is to be completed at a given period, and the title is *finally made out*, the parties continuing in treaty, and the purchaser not by any acts released from his bargain, the estate is considered as belonging to the purchaser from the date of the contract, and the money from that time as belonging to the vendor."[3]

Taylor v. *Caldwell*, 3 Best & S. 826: discussed and applied in *Krell* v. *Henry*, coronation processions, C. A., [1903] 2 K. B. 740, 754; 72 L. J. K. B. 791: see, too, *Chandler* v. *Webster*, C. A., [1904] 1 K. B. 493; *Elliott* v. *Crutchley*, ibid. 565; *Howell* v. *Coupland*, 1 Q. B. D. 258. Distinguish *Herne Bay Steamboat Co.* v. *Hutton*, (naval review cancelled), [1903] 2 K. B. 683; 72 L. J. K. B. 879.

[2] *Wyatt* v. *Bishop of Exeter*, 1 Pri. 292, 295, n.; and see *Paine* v. *Meller*, 6 Ves. 349.

[3] In *Harford* v. *Purrier*, 1 Mad. 538. See, too, *infra*, § 1392.

A condition not performed

§ 912. Where the contract is in its inception expressly conditional, the transfer of the equitable estate from the vendor to the purchaser takes place not on the conclusion of the contract, but on its becoming absolute by the performance of the condition, and until that event the property sold remains at the risk of the vendor. This is well illustrated by a case which was decided by the Judicial Committee of the Privy Council, on appeal from the Court of Chancery in Canada. A contract was entered into for a lease for five years, from the 1st of April, 1849, the landlord undertaking to erect by that time a new warehouse on part of the ground to be demised, and to put the old warehouse in repair, the amount of rent to be determined with reference to the amount expended on the buildings. The new building was not completed, nor the old warehouse repaired, on the 1st of April, but no objection was made by the intended lessees, who then continued to occupy part of the premises under a former contract. Shortly afterwards, the whole premises were destroyed by fire. The landlord brought a bill for specific performance of the contract, and for the defendants to rebuild the premises and accept a lease. It was held, in the first place, that if time were of the essence, it had been waived by the defendants, but that this did not waive the obligation on the lessor as to building, and that the defendants were not bound to accept a lease till that was performed; and, in the second place, that, treating the contract to take a lease as a contract to purchase, the warehouse was never purchased by the lessees until it was completed by the lessor; and, consequently, that until that was done it was not the property of the lessees, nor at their risk.[1]

Subsequent illegality.

§ 913. In the case of a contract legal at the time it was entered into, but subsequently and before judgment rendered illegal by statute, it seems to be clear on

[1] *Counter* v. *Macpherson*, 5 Moo. P. C. C. 83.

principle that no specific performance could be granted except where the Court could still execute the contract *cy près*:[1] a contract thus rendered illegal would in the contemplation of the Court have become impossible.[2]

Events subsequent to the contract becoming absolute

§ 914. But when the contract has been completely made, the thing sold is at the risk of the purchaser, who must bear all subsequent losses, and is entitled to all subsequent gains:[3] subsequent events, therefore, can neither determine the contract nor give either party a right to resist its performance.[4]

The principle formerly not clearly recognized

§ 915. Formerly this principle does not appear to have been as clearly recognized as it is now: thus, where a great subsequent advantage accrued to one party, Lord Hardwicke seems to have doubted how far the Court would decree performance on the original terms of the contract.[5] And where A. contracted to sell his estate for an annuity during his life, the time appointed for conveyance was the 31st of October, but the annuity was to commence from the 5th of April previous, and to be paid half-yearly: the half-year's payment, due on the 5th of October, was not paid or tendered, and on the 12th of November A. died from an accident: Lord Bathurst and the House of Lords dismissed a bill for specific performance.[6] Lord St. Leonards[7] attributes this decision to the neglect to make or tender the payment; but it does not seem clear that the case was not considered by the Judges who decided it as one of inadequate consideration, and treated as a case of hardship.

See *infra*, § 1004.

Atkinson v. *Ritchie*, 10 East. 530, 534; *Barber* v. *Hodgson*, 3 M. & S. 267; *Esposito* v. *Bowden*, 4 El. & Bl. 963. See also *Winnington* v. *Briscoe*, 8 Mod. 51, and *supra*, § 477.

Instit. l. iii. tit. 24, sec. 3; Pothier, Tr. du Contrat de Vente, Part IV.

[4] *Per* Lord Manners in *Revell* v. *Hussey*, 2 Ball & B. 287.

[5] *Davy* v. *Barber*, 2 Atk. 489. See also *Stent* v. *Bailis*, 2 P. Wms. 217.

[6] *Pope* v. *Roots*, 1 Bro. P. C. 370.

[7] Vend. 244.

Illustrations of the principle as now established.

§ 916. The principle as now established is illustrated by numerous cases. Thus, where money was left to be laid out in land to be settled to the use of A. in tail, remainder to B. in fee, and A. and B. agreed to divide the money, and before the contract had been carried into execution A. died without issue, the contract was nevertheless specifically performed.[1] So a contract to sell for an annuity will not be avoided by the death of the annuitant, even before any payment.[2] So where, subsequently to the contract for the sale of a house, the house is burnt down, the loss falls on the purchaser: and in such an event the purchaser will not, in the absence of any provision in the contract, be entitled to the benefit of an existing insurance against fire effected by the vendor.[3] And again, where a trader agreed to take two persons into partnership for a period of eighteen years, in consideration of a sum to be paid by instalments, and before they were all paid he became a bankrupt, the assignees were held entitled to the remaining instalments.[5]

Failure or winding-up of company

§ 917. Another class of cases which have illustrated the same principle has arisen from the failure or winding-up of a company after a contract has been entered into for the purchase of shares in it but before the contract has been completed. Such an event furnishes no defence to an action for specific performance of the contract to buy the shares.[6]

[1] *Carter* v. *Carter*, Forrest, 271.

[2] *Mortimer* v. *Capper*, 1 Bro. C. C. 156; *Jackson* v. *Lever*, 3 Bro. C. C. 605.

[3] *Paine* v. *Meller*, 6 Ves. 349. In *Case* v. *Ruddle*, 2 Vern. 280, the earthquake which destroyed the houses appears to have taken place after the contract had been carried into effect. See Raithby's note on the case, and 1 Bro. C. C. 156, n.

[4] *Poole* v. *Adams*, 12 W. R. 683; *Rayner* v. *Preston*, 14 Ch. D. 297, affirmed in C. A. 18 Ch. D. 1; cf. *Edwards* v. *West*, 7 Ch. D. 858, and distinguish *Reynard* v. *Arnold*, L. R. 10 Ch. 386.

[5] *Akhurst* v. *Jackson*, 1 Sw. 85. See also *per* Lord Eldon in *Coles* v. *Trecothick*, 9 Ves. 246.

[6] *Paine* v. *Hutchinson*, L. R. 3 Eq. 257; 3 Ch. 388; *Coles* v. *Bristow*, L. R. 6 [illegible]19, 759 (reversed on a different [illegible] and, L. R. 4 Ch. 3[illegible]; *Hawkins* v. *Maltby*, L. R. 4 Eq. 572; 3 Ch. [illegible] Eq. 505; 4 Ch.

Extinction of subject-matter by lapse of time after issue of writ and before trial.

§ **918.** Where a contract, capable of being specifically executed at the time of the issuing of the writ, has by lapse of time between that and the trial become incapable of execution in the ordinary way, so as to confer future benefits, the question arises, what course ought to be pursued. This question came before Plumer M.R. in *Nesbitt v. Hope*,[1] where a bill was filed before the term expired for a specific performance of a contract to accept a lease, but, without fault on either side, the term expired before the hearing. The case was decided upon another point, but the Judge evidently inclined to the opinion, that the Court would not decree the execution of a formal lease after the expiration of the term. In accordance with this view, Lord Cranworth expressed the opinion that it would require very special circumstances indeed to induce the Court to decree specific performance of a lease after the expiration of the term.[2] "What the Court," said his Lordship,[3] "really would be decreeing in such case would not be the specific performance of an agreement for a lease, but merely that the lessee should make himself a specialty debtor in respect of past benefits received." It is, however, to be remarked, that the circumstances of the case before Plumer M.R. and before his Lordship were different, inasmuch as in the former the delay seems to have been entirely due to the Court; whereas in the latter no steps were taken until just before the expiration of the term, so that it was impossible for the plaintiff to obtain a decree until the term was at an end.[4]

200; *Clapman* v. *Shepherd*, L. R. 2 C. P. 228; *Taylor* v. *Stray*, 2 C. B. N. S. 175; *Stray* v. *Russell*, 1 El. & El. 888.

[1] 1 Sw. 223.

[2] *Walters* v. *Northern Coal Mining Co.*, 5 De G. M. & G. 629.

[3] 5 De G. M. & G. at p. 639. See also *Hoyle* v. *Livesey*, 1 Mer. 381, and *De Brassac* v. *Martyn*, 11 W. R. 1020, where the Court intimated that the plaintiff's proper course would have been to apply to have the case advanced so as to be heard before the expiration of the term.

[4] Cf. *Anon.* v. *White*, 3 Sw. 108, n., where, before the lease contracted for was executed, events rendered the intended subject-matter of the lease useless to the intended lessee; and

Opinion of Alderson B.

§ **919**. On the other hand, the opinion of Alderson B. was somewhat at variance with the doctrine above stated. "The moment the bill is filed," said his Lordship,[1] "the rights of the parties remain fixed, or ought so to do. I cannot accede to the doctrine in *Nesbitt* v. *Meyer*.[2] How can the constitution of the Court alter the rights of the parties?" The decision in the case in the Exchequer seems, however, reconcileable with those before stated; for the prayer of the bill was for the specific performance of a contract for a lease, and for an account of arrears of rent on the footing of the contract, and it was held that although by the expiration of the term before the hearing the specific performance could not be granted, yet that the plaintiff was entitled to a decree for an account.

Kenney v. *Wexham*.

§ **920**. And similarly, in a previous case, Leach V.C. held that a bill might be maintained by a purchaser for the specific performance of a contract for a life annuity, although the annuitant had died not only before the hearing, but before the bill was filed, where there were arrears of the annuity between the time of the purchase and the death of the annuitant, to which the purchaser had an equitable title under the contract: but his Honour said that it might be a question whether such a bill could be maintained if the death of the annuitant were to happen so that the purchaser took no benefit under his contract, as might happen where his title was to commence at a future time.[3]

The point now unimportant.

§ **921**. These cases perhaps left the exact state of the law on this point somewhat difficult to state. But now that both legal and equitable remedies may be obtained in one proceeding, and every prudent plaintiff will ask for both, the point appears of little practical importance.

the Court directed only a *quantum damnificavit*.

[1] *Wilkinson* v. *Torkington*, 2 Y. & C. Ex. 726, 728.

[2] 1 Sw. 223.

[3] *Kenney* v. *Wexham*, 6 Mad. 355. See *Strickland* v. *Turner*, 7 Ex. 208.

CHAPTER XX.

DEFAULT ON THE PART OF THE PLAINTIFF.

Plaintiff must show performance and willingness to perform

§ **922.** With regard to the matters to be done by the plaintiff according to the terms of the contract, it is, from obvious principles of justice, incumbent on him, when he seeks the performance of the contract, to show, first, that he has performed or been ready and willing to perform, the terms of the contract on his part to be then performed;[1] and secondly, that he is ready and willing to do all matters and things on his part thereafter to be done; and a default on his part in either of these respects furnishes a ground upon which the action may be resisted.[2] We will first consider cases of default in respect of terms of the contract which ought to have been already performed

[1] 2 Eq. Cas. Abr. 33. See also the language of Lord Hardwicke and Gilbert C.B., cited *infra*, §§ 945, 946; and cf. *Ghillis* v. *McGhee*, 13 Ir. Ch. R. 18. But where there has been only a trivial breach by the plaintiff, he may nevertheless be entitled to succeed. See *Hooper* v. *Bromet*, 89 L. T. 37, 39—40: 90 L. T. 234.

[2] See *infra*, § 935; *Walker* v. *Jeffreys*, 1 Ha. 341. In *Measures Brothers* v. *Measures*, [1910] 1 Ch. 336, 345; affirmed, [1910] 2 Ch. 248, the defendant had agreed with the plaintiff company, of which he was a director, to hold office for seven years at a fixed salary, and covenanted that during a specified period after ceasing to hold office he would not carry on business in competition with the company. Before the expiration of the seven years a compulsory order for winding-up was made against the company. It was held that the order operated as a wrongful dismissal of the defendant, and that the company, having become unable to complete the performance of its agreement to employ the defendant, was not entitled to enforce specific performance of the defendant's restrictive covenant. Cf. *General Bill-posting Co.* v. *Atkinson*, [1909] A. C. 118, 122, affirming S. C., [1908] 1 Ch. 537.

I. *The performance of past*

Of what terms plaintiff must show performance.

§ **923**. Of what terms must the plaintiff show the performance? The answer is that he must show performance of—

(i.) All conditions precedent,

(ii.) The express and essential terms of the contract,

(iii.) Its implied and essential terms, and

(iv.) All representations made at the time of the contract on the faith of which it was entered into:

Of what not.

but that he need not show performance of

(v.) Non-essential terms,

(vi.) The terms of a collateral contract, or

(vii.) Terms of which the defendant has prevented or waived the performance.

Lastly, it will be necessary to consider

(viii.) Terms, the performance of which has become impossible without the plaintiff's fault or default.

i. Conditions precedent.

§ **924**. (i.) As to conditions precedent, the plaintiff must of course show their performance, and he cannot obtain a decree for specific performance upon an undertaking that he will perform them.[1] As the non-performance of a condition precedent is only in some cases the default of the plaintiff, the subject of conditions is considered in a subsequent chapter.[2]

ii. Express terms.

§ **925**. (ii.) As to the express terms nothing more need now be said. The only important point will be considered when we come to the difference between essential and non-essential terms.

iii. Implied terms.

§ **926**. (iii.) The performance must extend to such of the implied terms as are essential. Thus where an

[1] *Williams* v. *Brisco*, 22 Ch. D. 441. Cf. *Holmes* v. *Tranch*, [1898] 1 I. R. 319, 334, where a corporation's power to contract for the purchase of land was not to come into existence unless or until a condition precedent had been performed.

[2] Part III. chap. xxii.

intended lessor agreed to finish a house for an intended lessee, who was to do the repairs during the intended term, the Court held that in such a contract was implied an undertaking to deliver it in complete tenantable repair proper for houses of the character demised: and this undertaking not having been, in the judgment of the Court, performed, the intended lessor's bill for specific performance was dismissed with costs.[1] The case might probably have been determined as one rather of construction than of the implication of terms, *i.e.*, that to finish a house means to finish so that the house shall be in proper repair.

iv. Representations of future acts

§ **927.** (iv.) Performance must be shown of representations of future acts made at the time of the contract on the faith of which the contract was entered into. These representations[2] need not amount to a guarantee, nor in case of non-performance give a right to an action either for damages or for cancellation of the contract: but yet, if made and not performed, they are a defence to an action for specific performance.[3]

Instances

§ **928.** Thus where a vendor at a sale represented that he would make improvements in the access to the property sold, and failed to do so, the Court refused specifically to perform his contract;[4] and the same was the decision of the Court in a case where the vendor by his agent represented that a church should be erected in the immediate neighbourhood of the building ground which was the subject of the contract, and that he would complete certain streets, and the purchase was made on the faith of these representations, which the plaintiff, however, never carried into effect.[5]

Plans.

§ **929.** We may here briefly inquire into how far

[1] *Tildesley* v. *Clarkson*, 30 Beav. 419; cf. *Oxford* v. *Provand*, L. R. 2 P. C. at p. 156. Distinguish *Chappell* v. *Gregory*, 34 Beav. 250.

[2] As to what representations will in Equity be considered as part of the contract, see *supra*, § 312 *et seq.*

[3] *Lamare* v. *Dixon*, L. R. 6 H. L. 414.

[4] *Beaumont* v. *Dukes*, Jac. 422.

[5] *Myers* v. *Watson*, 1 Sim. N. S. 523.

maps or plans of the property, exhibited by the vendor at the time of entering into the contract, form representations of the kind we are now considering.[1]

Contract silent as to plan.

§ 930. Where the parties have matured their agreement into a contract, and that contract is silent on the subject of such map or plan, the Court will not from such exhibition infer a contract.[2] This applies alike to private contracts and to special Acts of Parliament, so that notices given, and plans and sections deposited, are not to be used in construing an Act afterwards, except so far as they are referred to, and thus incorporated in the Act of Parliament itself.[3] But where they are so referred to and incorporated, effect must be given to them according to the terms of the Act.[4]

Intended division by roads shown on plan.

§ 931. Where the map thus exhibited delineates the intended division of the property by new roads, the vendor may not afterwards divide the land in a manner so different as to attract a population entirely different from that which would have been produced by the execution of the plan proposed by the map.[5]

[1] Cf. *Glave* v. *Harding*, 27 L. J. Ex. 286, as to the effect of plans on (alleged) implied grants of easements. Note, too, that, in ordinary simple cases, the purchaser is entitled to have a plan upon the conveyance, and a conveyance by reference to that plan. *Re Sansom and Narbeth's Contract*, [1910] 1 Ch. 741, 750; *Re Sparrow and James' Contract*, [1910] 2 Ch. 60.

[2] *Feoffees of Heriot's Hospital* v. *Gibson*, 2 Dow, 301; *Squire* v. *Campbell*, 1 My. & Cr. 459. Cf. and distinguish *Nene Valley Drainage Commissioners* v. *Dunkley*, 4 Ch. D. 1, where the plan was held to be incorporated with, though not referred to in, the contract. See, too, *Re Lindsay and Forder's Contract*, 72 L. T. 832, where a plan annexed to the particulars of sale was held to form part of the contract; and *Gordon-Cumming* v. *Houldsworth*, [1910] A. C. 537.

[3] *North British Railway Co.* v. *Tod*, 12 Cl. & Fin. 722; *Bourdon* v. *London and North Western Railway Co.*, 1 Mac. & G. 112.

[4] *Att.-Gen.* v. *Tewkesbury and Malvern Railway Co.*, 1 De G. J. & S. 423; *Little* v. *Newport, Abergavenny, and Hereford Railway Co.*, 12 C. B. 752.

[5] *Peacock* v. *Penson*, 11 Beav. 355, 361. In *Whitehouse* v. *Hugh*, [1906] 1 Ch. 253, affirmed in C. A., [1906] 2 Ch. 285, Kekewich J. expressed the opinion that a plan by itself cannot be regarded as a representation that a particular mode of laying out or dealing with land must be followed without variation. It is, however, to be observed that, in that

Exact performance of scheme not obligatory.

§ 932. But though the exhibition of a map may bind to this extent, it will not oblige to an exact performance of the scheme it embodies. Thus where a plan was referred to in the contract, and used as a description of the part of the property in question, and on this plan the measurement and width of the street were marked, but there was nothing in the contract which distinctly pointed out that part of the plan as binding the parties, Lord Langdale M.R. held that it did not form part of the contract, so as to entitle one party to relief against an encroachment on the width of the street.[1] And so, if a vendor prepares a plan of a building estate, showing plots with houses marked on them, and a purchaser is shown that plan, or sees it, before contracting to purchase some of the plots, the purchaser is not entitled to assume, without anything more and without any inquiry, that the whole estate is governed by a building scheme that each plot shall be definitely and without variation built upon strictly in accordance with the indications on the plan.[2]

Randall v. Hall.

§ 933. In another case the particulars referred generally to an accompanying plan, and on the plan several roads were marked out so as to provide frontages for all the lots, and the lines of roads were marked out on the land itself in accordance with the plan: Knight Bruce V.C. held that, in the absence of any clause in the particulars or conditions of sale providing for any rights of way beyond a road leading into the nearest highway, such road was all that the purchaser was entitled to.[3]

Plan accurately representing present state

§ 934. Where the sale plan, instead of, as in the previous cases, representing an intended and future state of the property, accurately represents it in its

case, there was a condition whereby the vendors expressly reserved to themselves the power of allowing a variation of the plan.

[1] *Nurse* v. *Lord Seymour*, 13 Beav. 251. Distinguish *Roberts* v. *Kerr*, 1 Taunt. 495; *Espley* v. *Wilkes*, L. R. 7 Ex. 298.

[2] *Tucker* v. *Vowles*, [1893] 1 Ch. at p. 268.

[3] *Randall* v. *Hall*, 4 De G. & Sm. 343.

of property.

actual and present state, it has been held that it will not carry the case higher than a view of the property. Therefore where a plan represented a well on lot 4 communicating with a reservoir on lot 2, and the communicating with the inn which was the lot 4 which the plaintiff purchased, and the vendor conveyed lots 2 and 4 without any reservation to the plaintiff of a right to a flow of water from the well, the plaintiff's demand for compensation for the loss of the water was refused.[1] Lord St. Leonards, however, considered this case open to observation.[2]

v. Default must be of an important term

§ 935. (v.) In the averment of performance by the plaintiff, Equity, as already stated, discriminates between the essential and the non-essential terms of a contract; and to furnish the defendant with a ground for resisting the action, the non-performance of the plaintiff must be of a term important and considerable.[3] The Court of Chancery frequently interfered at the instance of a party who might have been debarred from relief at Common Law, because unable to allege performance in the very terms of the contract, which is by the Common Law essential.[4] Thus, for example, where A. contracted to sell property to B., and by the same contract it was also stipulated that A. should continue tenant from year to year of the land, and it happened that from embarrassed circumstances he was unable to fill the tenancy, this was, from the determinable nature of the holding, held to be a matter of no consideration, and so not a bar to specific performance of the contract for sale.[5] And all the cases in which the Court grants a vendor asking for specific performance indulgence in

[1] *Fowler* v. *Turner*, 11 L. J. Ch. 161.

[2] St. Leon. Vend. 20.

[3] *Modlen* v. *Snowball*, 31 L. J. Ch. 44; 10 W. R. 21, affirming S. C. 29 Beav. 641; *Reeves* v. *The Greenwich Tanning Co., Limited*, 2 H. & M. 54.

[4] See *per* Lord Redesdale in *Jones* v. *Hone*, 2 Sch. & Lef. 347; *supra*, § 51.

[5] *Lord* v. *Stephens*, 1 Y. & C. Ex. 222.

the making out of his title, or allows him to enforce the contract with compensation, are, of course, illustrative of the principle now before us.

Oxford v. Provand

§ **936** In a case before the Privy Council, the judgment may at first sight appear to go so far as to assert that no default of performance on the part of the plaintiff, short of that which goes to the whole consideration for the promise sued on, is available as a defence against specific performance.[1] But probably such reading is incorrect, and the intention of their Lordships was to draw the distinction between essential and non-essential terms.

vi. Default in respect of collateral contract

§ **937.** (vi.) Where that, on the non-performance of which by the plaintiff the defendant relies, is in its nature a collateral and separate contract, or is part of or referable to such a contract, though between the same parties and entered into at the same time, and having relation to the same subject-matter as the contract which the plaintiff seeks to enforce, the Court will not consider the default by the plaintiff in respect of the one contract, as any bar to the specific performance of the other, though such default may give the defendant a cross right of action on legal or equitable grounds.[2]

Instances.

§ **938.** Thus where A. contracted with B., the owner of a plot of land, to erect a villa on it, and to keep it insured in the joint names of A. and B. in the County Fire Office, and B. agreed as soon as the house should be completed, to grant a lease of the plot to A., and that if A. should not perform his part, the contract for the lease should be void; and the contract also stipulated that A. should have the option of purchasing the fee within two years; A. erected the villa, but insured in a wrong office, and in his own name alone, and then brought his bill for a sale under the option to purchase;

[1] *Oxford* v. *Provand*, L. R. 2 P. C. H. L. 141. 135; cf. *Lamare* v. *Dixon*, L. R. 6

[2] *Phipps* v. *Child*, 3 Drew. 709.

and it was held by Lord Romilly M.R. that this option was independent of the right to a lease, and that notwithstanding the plaintiff's default in respect of the latter right, the former subsisted, and he accordingly decreed a specific performance.[1]

Gibson v. Goldsmid

§ 939. So, where in a deed for the dissolution of partnership, one partner assigned to another certain foreign shares, and covenanted for further assurance; and the other partner covenanted with the former for indemnity against certain liabilities: a further assurance of the shares became necessary, and on a bill filed to enforce specific performance of the covenant to that effect, it was held by Knight Bruce and Turner L.JJ., overruling Lord Romilly M.R., that a breach of the covenant to indemnify which the plaintiff had entered into with the defendant was no defence to the suit. The two covenants were independent, so that the performance of the one was not to be resisted by reason of the non-performance of the other.[2]

vii. Performance waived by defendant.

§ 940. (vii.) A defendant who has waived the performance by the plaintiff of what was on his part to be performed cannot, of course, use the non-performance as a defence: but the burthen of proving this waiver of course rests on the plaintiff.[3]

Non-performance the fault of defendant.

§ 941. Still more clearly, if possible, is non-performance by the plaintiff excused when that has resulted from the neglect or default of the defendant.[4] So where the purchaser prevents the vendor from

[1] *Green* v. *Low*, 22 Beav. 625. Compare *Raffety* v. *Schofield*, [1897] 1 Ch. 937, where, as it was not a condition precedent to the exercise by the tenant of an option of purchase given by a building agreement that he should not have made any default under that agreement, it was held that the option had been well exercised, notwithstanding that the tenant had made such default. See, too, *supra*, § 865; and *Starkey* v. *Barton*, [1909] 1 Ch. 284, 289.

[2] *Gibson* v. *Goldsmid*, 5 De G. M. & G. 757; reversing S. C. 18 Beav. 584. Distinguish *Measures Brothers* v. *Measures* (interdependent contracts), in C. A., [1910] 2 Ch. 248.

[3] *Lamare* v. *Dixon*, L. R. 6 H. L. 414.

[4] *Hotham* v. *East India Co.*, 1 T. R. 638.

completing his title, he will be compelled to forego an objection he may raise on the score of that incompleteness.[1]

§ **942**. With regard to infancy, an infant heir cannot avail himself of his disability to excuse the non assertion of his right under an executory contract made with his ancestor, when the immediate performance of his part of the contract is essential to the interest of the other party; as, for example, of a contract to lay out money in building within three years.[2] Infancy

§ **943**. (viii.) We shall now consider how far the impossibility of performing the plaintiff's part arising without any fault or default on his part furnishes an excuse for non-performance.[3] viii. Impossibility of performance

In those cases in which all that was to have been performed by the plaintiff has become entirely incapable of being executed, the plaintiff cannot demand the performance by the other party, because his non-performance is a total failure of the consideration which was to have moved from him.

But where the impossibility refers not to the substantial, but only to the exact and literal performance of the contract, the Court will struggle with matters of form in order to do complete justice between the parties; but it will carefully avoid going so far as to make a new contract between them.[4] Hence arise the cases on Compensation.[5]

§ **944**. As to the cases in which the plaintiff has performed a substantial part of his contract, and then the remaining part has become impossible by reason of circumstances not dependent upon him and without his Substantial part performed.

[1] *Murrell* v. *Goodyear*, 1 De G. F. & J. 432 (S. C. before Stuart V.C., 2 Giff. 51).

Griffin v. *Griffin*, 1 Sch. & Lef. [illegible].

Consider *Measures Brothers* v. *Measures*, [1910] 1 Ch. 386, 345; affirmed, [1910] 2 Ch. 248, where there was what amounted to default on the part of the plaintiffs.

[2] *Counter* v. *Macpherson*, 5 Moo. P. C. C. 83, 108.

[3] See *infra*, Part V. chap. ii.; also *Norris* v. *Jackson*, 3 Giff. 306.

fault, a distinction has been drawn between those cases in which the plaintiff has not, by performing that part of the contract which he has performed, altered his position, and those cases in which he has so altered his position by his part performance; Equity refusing to enforce performance of the contract by the other party in the former case, and enforcing it in the latter.

Gilbert's *Lex Pretoria* quoted

§ 945. This distinction rests almost entirely on the authority of Gilbert C.B. in a passage in his "Lex Pretoria,"[1] but has been approved by subsequent writers,[2] and seems worthy of attentive consideration. "Here," says his Lordship in the passage in question, "it is to be noted that the plaintiff that exhibited his bill upon the foot of performing the bargain on his part, ought to show that he has performed all that is to be done on his part, or is ready to do it; for where any part (which he should have performed) is become impossible to be performed at the time of exhibiting his bill, then he can have no specific execution, because he cannot specifically execute on his own part: as in the case of my Lord Feversham, which was on a marriage agreement, whereby he contracted to settle the manor of Holmly on his wife and the heirs of their bodies, and clear it of incumbrances, and settle a separate maintenance on his wife, and likewise sell some pensions in order to make a further provision for his wife and the issue of that marriage; and Sir George Sandys, the father in-law, agreed to settle 3,000*l.* per annum on the Lord Feversham for life, remainder to the wife for life, and so to the issue of the marriage. Lord Feversham cleared the manor of Holmly, settled it accordingly, and settled the separate maintenance, but did not sell the pensions, nor settle the further provisions: the wife died without issue, and the Lord Feversham preferred his bill to have the 3,000*l.* per

[1] Pp. 240—242.

[2] 1 Foubl. Eq. Book I. c. 6, s. 3; Story, Eq. Jur. s. 772.

annum settled on him during his life: but decreed because Lord Feversham was *in statu quo* as to all that part of the agreement which he had performed, and having not performed the whole, and the other parts being now impossible, and no compensation being possible to be adjusted for it, he had no title in Equity to have performance of Sir George's part of the agreement, since such performance could not be mutual. But the issue of Lord Feversham might have been relieved, because in no default. *Lord Feversham* v. *Watson*, Rep. t. Finch, 145; 2 Freem. 35; Skin. 287."

To make the foregoing statement perfectly clear, it should be added that, in the settlement made by the plaintiff, the reversion expectant on the default of issue by his late wife was reserved to him in fee, so that the settlement had in the event operated nothing.[1]

When plaintiff shall have relief.

§ **946**. "But if," continues the Lord Chief Baron, "a man has performed so much of his part of the agreement as he is not *in statu quo*, and is in no default for not performing the residue, then he shall have a specific execution from the other party of the agreement: as if a man has contracted for a portion with his wife, and has agreed to settle upon the wife and her issue, lands of such a value free from incumbrances, and he sells part of his land to disincumber, and is going on to disincumber and settle the rest: then if the wife dies without issue before the settlement be actually made, yet he shall have a portion, because he cannot be *in statu quo*, having sold part of his lands, and there is no default in him, since he was going on to disincumber and settle the rest: therefore the accident of the death of his wife doth not alter his right to his wife's portion. *Meredith* v. *Wynne*, Eq. Abr. 70, p. 15; Gilb. Eq. Rep. 70; Prec. Ch. 312; 2 Vern. 448."

The rule

§ **947**. To prevent error, it may be well to observe

[1] 2 Powell on Contracts, 22.

does not apply to marriage contracts.

that, as regards marriage contracts, the rule under consideration, as well as many other rules relating to the specific performance of purely executory contracts, does not apply. "There is," said Lord Hardwicke, "a difference between agreements on marriage being carried into execution and other agreements; for all agreements besides are considered as entire, and if either of the parties fail in performance of the agreement in part, it cannot be decreed *in specie*, but must be left to an action at Law: in marriage agreements it is otherwise, for though either the relations of the husband or wife should fail in the performance of their part, yet the children may compel a performance: if the mother's father, for instance, hath agreed to give a portion, and the husband's father hath agreed to make a settlement, though the mother's father do not give the portion, yet the children may compel a settlement, for non-performance on one part shall be no impediment to the children's receiving the full benefit of the settlement; so if there be a failure on the part of the father's relations, it is the same."[1]

The distinctions in this respect as regards marriage contracts are numerous, but as they are not properly within the scope of this volume, they need not here be further noticed.

II. *The performance of future acts.*

Default in respect of acts to be done.

§ **948**. We may now consider the obligation which lies on the plaintiff, in an action for specific performance, of being ready and willing to perform all acts that on his part yet remain to be performed.

Trustees in bankruptcy.

§ **949**. On the ground of this obligation, trustees in bankruptcy are not able as plaintiffs to enforce a contract entered into by the bankrupt, which would

[1] In *Harry* v. *Ashley*, 3 Atk. 611. Cf. *Lee* v. *Lee*, 4 Ch. D. 175; *Joshua* v. *Key*, 19 W. R. 342, 864.

have involved covenants on his part, unless they will personally enter into the covenants into which the bankrupt would have entered:[1] whereas where specific performance is sought not by but against persons having a fiduciary interest only, they are only bound to covenant so as to bind the property and not themselves personally.[2]

Bankruptcy of plaintiff.

§ 950. And so of bankruptcy: if the plaintiff be the vendor, the commission of an act of bankruptcy, though without proof of the existence of any debt to support a petition, is a bar to an action for specific performance, because the plaintiff may be incapable of conveying the estate, which may belong not to him, but to his trustee.[3] And, further, the commission by the vendor of an act of bankruptcy in the interval between the signing of the contract and the date for completion generally entitles the purchaser to refuse to complete, and to recover any deposit which he may have paid.[4] If on the other hand the plaintiff be the purchaser, he cannot enforce the contract, because he is incapable of so paying the money to the vendor, as that the vendor shall be certain of being able to retain it against the trustees.[5]

Disclaimer by trustee.

§ 951. Bankruptcy does not of itself discharge a contract, either for the sale of an estate of inheritance or for a lease; for, with regard to the latter, the trustee may covenant in the same manner as the bankrupt would have been bound to.[6] By the 146th section of

[1] *Ex parte Sutton*, 2 Rose, 86; *Willingham* v. *Joyce*, 3 Ves. 168; *Powell* v. *Lloyd*, 2 Y. & J. 372; *per* Grant M.R. in *Weatherall* v. *Geering*, 12 Ves. 513.

[2] *Page* v. *Broom*, 3 Beav. 836; *Phillips* v. *Everard*, 5 Sim. 102; *Stephens* v. *Hotham*, 1 K. & J. 571; and see further, as to covenants by trustees, *Warley* v. *Frampton*, 5 Ha. 560; *Onslow* v. *Lord Londesborough*, 10 Ha. 67; *Copper Mining Co.* v. *Beach*, 13 Beav. 478; *Hodges* v. *Blagrave*, 18 Beav. 404; *Hare* v. *Burges*, 4 K. & J. 45.

[3] *Lowes* v. *Lush*, 14 Ves. 547. Cf. *McNally* v. *Gradwell*, 16 Ir. Ch. R. 512, 518.

[4] *Powell* v. *Marshall, Parkes & Co.*, [1899] 1 Q. B. 710.

[5] *Franklin* v. *Lord Brownlow*, 14 Ves. 550.

[6] *Brooke* v. *Hewitt*, 3 Ves. 253.

the statute 12 & 13 Viet. c. 106, the vendors of lands might compel the assignees to elect whether they would abide by or decline an agreement for sale:[1] and now by the 55th section of the Bankruptcy Act, 1883,[2] where any property of the bankrupt consists of unprofitable contracts, the trustee, notwithstanding he has endeavoured to sell, or has taken possession of such property, or exercised any act of ownership in relation thereto, may by writing signed by him, subject to certain provisions of that section, disclaim such property, and thereupon the liability is determined as from the date of the disclaimer.

Accordingly, specific performance cannot be enforced against a purchaser's trustee in bankruptcy without his consent.[3] It may, however, be enforced against the trustee in bankruptcy of a vendor.[4] And where, before the bankruptcy of a vendor, there have been mutual dealings between him and the purchaser within the meaning of section 38 of the Bankruptcy Act, 1883, resulting in mutual debts between them, the purchaser may be entitled, as against the trustee in bankruptcy, to specific performance upon the terms of the debt due to him from the vendor being set off against the debt due from him in respect of an unpaid balance of purchase-money.[5]

Insolvency.

§ **952.** The insolvency of the plaintiff is a ground of defence:[6] and to constitute this defence in the

[1] Cf. *Buckland* v. *Papillon* L. R. 2 Ch. 67.

[2] This 55th section—which has been amended in some respects by sect. 13 of the Bankruptcy Act, 1890—also provides, by sub-sect. 6, for the rescission by the Court of contracts made with the Bankrupt, on the application of persons who are, as against the trustee, entitled to the benefit or subject to the burden of such contracts.

[3] *Holloway* v. *York*, 25 W. R. 627.

[4] *Pearce* v. *Bastable's Trustee in Bankruptcy*, [1901] 2 Ch. 122, where the subject-matter of sale was leasehold property, and the trustee sought to disclaim the contract without disclaiming the lease.

[5] *Re Taylor, Ex parte Norvill*, [1910] 1 K. B. 562.

[6] *Crosbie* v. *Tooke*, 1 My. & K. 431; *Price* v. *Assheton*, 1 Y. & C. Ex. 411.

case of a continuing contract as a lease, it is not necessary that the plaintiff should be proved to have given up all his property for the benefit of his creditors, but there must be proof of general insolvency, so as to show that the plaintiff is not in a situation to perform the covenants on his part.[1] Thus Lord Eldon, remarking on the insolvency of an intended lessee as being an objection of more or less weight depending on the circumstances, in the case then before him dissolved an injunction against an ejectment by the landlord.[2]

Subsequent affluence.

§ 953. How far insolvency would be an objection, if the plaintiff had subsequently become affluent, does not appear to have been decided.[3]

Insolvency after assignment of interest.

§ 954. Where the interest under a contract has been assigned, the insolvency of the original contractor, who is the assignor, is no defence, though that of the assignee would be.[4]

Felony.

§ 955. On like grounds, the felony of a plaintiff would be a bar to specific performance.[5]

Loss of deeds.

§ 956. And the same principle is illustrated by a case where the deeds were destroyed. It was a suit by a vendor on an ordinary contract for sale of lands: in such a contract is implied, as an essential term on the part of the vendor, the proof of the due execution of the deeds which constitute his title, and the delivery up of them to the purchaser: the deeds having been subsequently destroyed by fire, the performance of this term by the plaintiff was rendered impossible, and the contract could not be specifically performed.[6]

[1] *Neale* v. *Mackenzie*, 1 Ke. 471; *Willingham* v. *Joyce*, 3 Ves. 168; *McNally* v. *Gradwell*, 16 Ir. Ch. R. 512, 519.

[2] *Buckland* v. *Hall*, 8 Ves. 92.

[3] *Price* v. *Assheton*, 1 Y. & C. Ex. 92, 93; cf. *Neale* v. *McKenzie*, 1 Ke. 474; *McNally* v. *Gradwell*, 16 Ir. Ch. R. 512, 519.

[4] *Crosbie* v. *Tooke*, 1 My. & K. 431.

[5] *Willingham* v. *Joyce*, 3 Ves. 168.

[6] *Bryant* v. *Busk*, 4 Russ. 1; cf. *Moulton* v. *Edmonds*, 1 De G. F. & J. 216, where the secondary evidence of the execution of the missing deeds was held sufficient.

CANADIAN NOTES.

Default on the Part of Plaintiff.

In *Moir* v. *Palmatier*, 13 Man. 34, the plaintiff became tenant of a farm under lease from Cotter for one year, at an annual rental of four hundred and fifty dollars, payable on the fifteenth of October in each year. Contemporaneously with the lease, an agreement for purchase of the property was entered into between the plaintiff and Cotter by which the latter agreed to accept as part payment of the purchase money all sums of money which should be paid by the plaintiff as rent under the lease, and the plaintiff covenanted at the expiration of eight years from the date of the instrument to pay the balance of the purchase money with interest. There was also a covenant of Cotter to convey upon payment, an option to the plaintiff to pay off the full amount and receive the conveyance at any time and, finally, a proviso making time of the essence of the agreement and stating that unless the payments were punctually made, the said party of the first part should, at his option, declare the agreement null and void, when all payments thereafter should be forfeited and the party of the first part should be at liberty to resell the land, the party of the second part thereby agreeing to convey to the said party of the first part his interest in the same when and as soon as the default occurred. Cotter conveyed the land in fee to the defendant Palmatier, subject to the lease and agreement. Default having occurred in the payment of the rent due October 15th, 1897, the defendant leased the property to the defendant Mills with the option of purchase, before the end of the first year of the term, and Mills at once entered into possession.

It was held that the lease and a ement between Cotter and the plaintiff should not be considered as independent contracts, and that Cotter or his assignee

might rescind the agreement of sale for default in payment of any rent called for by the lease; Secondly, that a formal notice or declaration of rescission of the contract was not necessary as the plaintiff was aware of the lease to Mills, his taking possession under it, and Palmatier's intention to rescind; Thirdly, that plaintiff, having made default, as regarded an essential part of the agreement, was not entitled to the exercise of the discretion of the Court to order specific performance in his favour after the position of the parties had been entirely changed.

Richards J. also held that the laches of the plaintiff barred her from the remedy of specific performance against the defendant Mills who had made valuable improvements without notice that the plaintiff intended to claim specific performance.

Vendor's Duty to Prepare Conveyance.

In *Ellerman* v. *Carruthers*, 1 Sask. L.R. 157, it was held that in an action for specific performance, it was not incumbent upon the purchaser to tender a conveyance before action, it being the duty of the vendor to prepare and execute the same.

Conditions Precedent.

In *Bolton* v. *Bethune*, 21 Grant's Ch. 110, by an agreement between the vendor and purchaser, it was agreed that so soon as a title to the land and premises satisfactory to the solicitors of the vendee could be afforded to him, the vendee should purchase the said land at the price of $4,000 cash. It was held that, in the absence of *mala fides*, the approval of the title by the solicitors of the vendee was a condition precedent to the right of the vendor to call for a specific performance of the agreement.

The case of *Lord* v. *Stephens* is distinguished because in that case the contract required that there should be a title satisfactory to the purchaser himself who, according to the construction contended for on his behalf, might himself have arbitrarily have put an end to the contract on pretence of an unsatisfactory state of

the title. "This Lord Abinger thought so unreasonable as to require a construction of the contract different from that which the language of the parties *prima facie* imported. This was certainly, speaking with deference to the opinion of so eminent a Judge, taking a great liberty with the agreement which the party had chosen to enter into. There is, however, an important distinction between that case and the present, inasmuch as in the case now in judgment the parties have by their agreement, referred the question of title not to the purchaser himself but to the purchaser's solicitors.

CHAPTER XXI.

ACTS IN CONTRAVENTION OF THE CONTRACT.

Nature of the defence.

§ 957. In the last chapter we considered cases in which the plaintiff had disentitled himself by default on his part: we shall now consider the closely allied cases where he has disentitled himself, not by default merely, but by acts in fraud or contravention of the contract, or at variance with it, or tending to its rescission and the subversion of the relation established by it. For where the party to a contract who asks the intervention of the Court for its specific execution has been guilty of such conduct, that circumstance may be put forward as a defence to the action. Sometimes the facts may be evidence of a mutual agreement between the parties to rescind the contract: but even where not amounting to this, they may be sufficient to disentitle the plaintiff to ask for the intervention of the Court in specific performance.

Acts which would have worked forfeiture.

§ 958. Still more plain is the case, if the acts be such as would have worked a forfeiture of all benefit of the contract if it had been executed; it would be idle for the Court to compel a grant of that which, if granted, would have been forfeited,[1]—to create a legal relation which, if created, would be immediately dissoluble.[2]

In cases of contracts for leases.

§ 959. The cases by which this principle is most extensively illustrated are on contracts for leases. With

[1] See *per* Lord Romilly M.R. in *Lewis* v. *Bond*, 18 Beav. at p. 87.

[2] *Per* Turner V.C. in *Gregory* v. *Wilson*, 9 Ha. 687.

regard to these, it is well established that where a person, holding under an agreement, commits waste, treats the land in an unhusbandlike manner, or acts in breach of covenants which would be contained in the lease, and for which acts a right of re-entry would accrue to the landlord, such person cannot enforce a specific performance of the contract.[1] The same has been held in respect of covenants to repair.[2]

Waste.

§ 960. It seems that even where the lease, when executed, would contain no proviso for re-entry, yet such acts, when amounting to a forfeiture, as for example, a gross case of waste, which is in all cases a forfeiture of the place wasted, would prevent a specific performance of the contract.[3]

The acts must be gross and wilful.

§ 961. In order that acts may thus be a bar to the plaintiff's relief, they must, it has been said, be gross and wilful.[4] That expression seems to have been originally applied to cases in which the breaches would not work a forfeiture of the legal interest.[5] If applicable at all to cases where there would be a proviso for re-entry for breach, it seems to mean that the acts must be (1) such as would work a forfeiture at Common Law, and (2) such as would not justify or permit relief against the forfeiture[6] in a Court of Equity.

Lease ordered to bear date of contract.

§ 962. Where the Court of Chancery found such a conflict of evidence as left it in doubt whether there had been such a breach of covenant as to render it proper and expedient to refuse specific performance on that ground, it took the course of directing the lease to

[1] *Per* Lord Eldon in *Hill* v. *Barclay*, 18 Ves. 63; *Lewis* v. *Bond*, 18 Beav. 85; *Gregory* v. *Wilson*, 9 Ha. 683.

[2] *Nunn* v. *Truscott*, 3 De G. & Sm. 301.

[3] See *per* Lord Eldon in *Duke of Somerset* v. *Gourlay*, 1 V. & B. 73.

[4] *Parker* v. *Tasnell*, 2 De G. & J. 559, 573.

[5] *Hare* v. *Burges*, 5 W. R. 585.

[6] For the statutory provisions now in force with respect to relief against forfeiture of leases, see the Conveyancing, &c. Act, 1881, s. 14, and the Conveyancing &c. Act, 1892, ss. 2—5.

bear the date of the contract, and leaving the parties to settle their legal rights at Law.[1]

§ **963**. It follows from what has been said that three classes of cases fall to be considered as arising out of contracts for leases. Cases under contracts for leases classified.

(i.) Where the acts complained of have led to the refusal of relief:

(ii.) Where they have not led to this refusal: and

(iii.) Where the relief has been granted and the question of breach left for decision at Common Law.

i. *Where the acts complained of have led to refusal of specific performance.*

§ **964**. In *Thompson* v. *Gwyon*[2] a lease had been granted with a proviso for re-entry on breach of any of the covenants, and a covenant to grant a further term at the end of the original term, if it should not have been sooner determined by the lessee's acts or defaults: the lessee paid all his rent, and continued in possession to the end of the term, but had in fact committed breaches of covenant during the term, of which the lessor was not cognizant till after its determination: a bill for specific performance of the covenant to renew was dismissed, and an injunction against an ejectment was refused, on the ground that the lessor ought not to be placed in a worse position at the expiration of the term than he would have been if he had known of the breach, and availed himself of it during the term. *Thompson* v. *Gwyon*.

§ **965**. In *Gregory* v. *Wilson*[3] possession had been taken under a contract for a lease: breaches were alleged of the covenants which should have been inserted in the lease to insure and also to repair: it was *Gregory* v. *Wilson*.

[1] *Rankin* v. *Lay*, 2 De G. F. & J. 65. See *infra*, § 974 *et seq.*

[2] 5 Sim. 65. See also *per* Lord Esher M.R. in *Swain* v. *Ayres*, 21 Q. B. D. 294; and *Greville* v. *Parker*, J. C., [1910] A. C. 335.

[3] 9 Ha. 683.

contended as to the first that the receipt of rent after knowledge was a waiver of all the breaches, but the Court held such waiver to have no longer operation at Law than on the breaches antecedent to the receipt, and not to preclude the effect of the subsequent breaches of the continuing covenant: as to the breaches of the covenant to repair, it was urged that they were neither wilful nor obstinate, and that accordingly they might be relieved against in Equity: but the Court held that as they were not attributable to mistake or accident and were persisted in, they were, in the contemplation of the Court, wilful and obstinate. The bill was accordingly dismissed.

Lewis v. Bond.

§ **966**. In another case the defendant was lessee under a restrictive covenant against carrying on a beershop: the plaintiff got a contract from the defendant for a sub-lease with knowledge of the defendant's title and of the covenant. The plaintiff entered under the contract and persisted in carrying on a beershop: his bill for specific performance was dismissed with costs.[1]

ii. *Cases where relief has not been refused.*

Breach trivial or waived.

§ **967**. There may be cases of breach of covenant for which merely nominal damages could be obtained, or there may be cases where a breach having been committed may have been waived: and in favour of such cases an exception may be made to the general rule that the plaintiff must prove performance of the contract on his part.[2] On this principle, Jessel M.R. in the case of *Besant* v. *Wood*[3] held that trifling breaches by a husband of the covenants on his part in a separation deed did not debar him from enforcing the deed.

Breach not working

§ **968**. But as regards breaches of covenant under contracts for leases, it seems that the breach which

[1] *Lewis* v. *Bond*, 18 Beav. 85. 352.
[2] *Walker* v. *Jeffreys*, 1 Ha. 341, [3] 12 Ch. D. 605.

the Court would neglect must be either such a breach as would not work a forfeiture at Common Law, or such that the legal forfeiture would be relieved against in a Court of Equity: for the Court will not relieve more readily whilst the whole thing rests in contract than it will after the legal relation has been actually created.[1] The effect of the 14th section of the Conveyancing Act of 1881, as amended by the Conveyancing Act of 1892 (sects. 2—5), has been to enlarge the area of cases in respect of which relief against forfeiture can be obtained.

Also late for lettuce

§ **969.** In one case a lessor of mines covenanted to grant a further term, and the lessee covenanted to work the mines: on a suit by the lessee for a specific performance of the covenant to grant a further term, it appeared that the lessee had not worked the mines in consequence of their being drowned out: the Court, though it did not decide the point, inclined to think that this would be no bar to relief.[2]

Walker v. *Jeffreys*

§ **970.** The case of *Parker* v. *Taswell*[3] may usefully be consulted as the law bearing on this question was there much considered, but the Court came to the conclusion that according to the true construction of the contract there had been no breach of covenant.

Parker v. *Taswell.*

§ **971.** As regards all cases where the landlord is defendant and raises an objection on the ground of breach of covenants which ought to be in the lease, if the plaintiff shows that the landlord never complained before action, the landlord must prove a strong case to get the benefit of his objection.[4]

Where landlord defendant has not complained before action

§ **972.** In *Gordon* v. *Smart*,[5] where a contract to grant a building lease had been entered into, and the plaintiff, claiming under this contract, had erected a brewhouse on part of the ground, which, it was

Gordon v. *Smart.*

[1] *Gregory* v. *Wilson*, 9 Ha. 683.

[2] *Walker* v. *Jeffreys*, 1 Ha. 341. 2 De G. & J. 559.

[3] *Mundy* v. *Jolliffe*, 5 My. & Cr. 167, 177.

[4] 1 S. & S. 66.

contended, would be an injury to the adjoining property of the lessor; this was argued, but unsuccessfully, to be a reason for refusing specific performance, Leach V.C. saying that it was not necessarily a nuisance: he left open the question whether, if it had in itself been a nuisance, that would have been a defence in such a suit.

Irish Tenantry Acts.

§ 973. It seems that under the Irish Tenantry Acts the breach by the tenant of covenants in the lease will not be a bar to specific performance of a covenant for renewal.[1] Certainly they will not so operate unless they be gross and perhaps also wilful.[2]

iii. *Where specific performance was granted and the question of breach of covenants left for decision at Law.*

Practice of the Court of Chancery.

§ 974. Where the Court of Chancery found such a conflict of evidence as left it in doubt whether there had been such a breach of covenant as to render it proper and expedient to refuse specific performance on that ground, it took the course of directing the lease to bear the date of the contract, or a date anterior to the alleged breaches, and required from the plaintiff an undertaking to admit in any action which might be brought under such lease for the recovery of the demised property, or upon any breaches of covenant to be contained in such lease, that such lease was executed on the day on which it should bear date.

Establishment of the practice.

§ 975. This practice was first introduced by the case of *Pain* v. *Coombs*:[3] it was followed by the Court of Appeal in *Lillie* v. *Legh*:[4] it was discussed, adopted, and approved in *Rankin* v. *Lay*,[5] and had thus become

[1] *Trant* v. *Dwyer*, 2 Bli. N. S. 11. See, however, *Thompson* v. *Guyon*, 5 Sim. 65; *supra*, § 964.

[2] *Hare* v. *Burges*, 5 W. R. 585.

[3] 1 De G. & J. 34 (S. C. before Stuart V.C. 3 Sm. & G. 449).

[4] 3 De G. & J. 204. Cf. *Powell* v. *Lovegrove*, 8 De G. M. & G. at p. 365.

[5] 2 De G. F. & J. 65. See, too, *Poyntz* v. *Fortune*, 27 Beav. [illegible]; *Browne* v. *Marquis of Sligo*, 10 Ir. Ch. R. 1; *Curtan* v. *Bury*, id. 387.

the well-established practice of the Court of Chancery.

Anticipated practice under the Judicature Acts.

§ **976**. It would be presumptuous to inquire whether the Court did wisely in directing deeds to bear false dates,[1] or in requiring persons to admit as a fact that which was not a fact. But it may be allowable to rejoice in the expectation that, under the improved judicature now in existence, no such decrees as those last referred to will be made. The High Court will probably decide the whole case at once.[2]

iv. *General principle further illustrated.*

Other illustration of the principle.

§ **977**. Other cases have arisen which illustrate the general principle, in cases not arising out of contracts for leases.

Where an estate was sold upon the condition, amongst others, that immediate possession should be given, and in the course of disputes which subsequently arose about the title, the vendors tendered the purchaser his deposit, demanded back possession, drove the purchaser's stock off the estate, and gave notice to the tenants not to pay their rent to him,—this was conduct inconsistent with the condition of the sale, and was held to operate as a bar to specific performance at the suit of the vendors.[3]

Blackett v. *Bates.*

§ **978**. In another case it was thought by Lord Cranworth doubtful whether a bill could be maintained for the specific performance of an award after the plaintiff had taken proceedings to set it aside.[4]

Royon v. *Paul.*

§ **979**. Where a vendor had given notice of his intention to resell under the contract, it was held that he had

[1] The fraudulent making of a deed with a false date is, or may be, forgery. *Reg.* v. *Ritson*, L. R. 1 C. C. R. 200.

[2] In Ireland, however, the practice was followed in a modern case. *McIlroy* v. *Traill*, [1898] 1 I. R. 459, 460.

[3] *Knatchbull* v. *Grueber*, 1 Mad. 153; S. C. 3 Mer. 124.

[4] *Blackett* v. *Bates*, L. R. 1 Ch. 117, reversing S. C. 2 H. & M. 270.

precluded himself from afterwards seeking for specific performance.[1]

Railway company.

§ **980**. Again, a railway company cannot first enter into a contract for the purchase of land, then take proceedings under their compulsory powers in a way which assumes that there is no subsisting contract, and then fall back upon and seek to enforce the original contract.[2]

Small breaches of good faith.

§ **981**. Still it is not every breach of good faith which will prove a bar. Where the plaintiff has been guilty of small breaches of good faith, for which the defendant had a remedy in his own hands, and where, if the interference of the Court were refused, the plaintiff would be without any adequate remedy, such breaches of good faith have been held not to be a bar to relief, though they may affect the costs.[3]

[1] *Royou* v. *Paul*, 28 L. J. Ch. 555. Distinguish *Laughton* v. *Port Erin Commissioners*, J. C., [1910] A. C. 565, 569.

[2] *Bedford and Cambridge Railway Co.* v. *Stanley*, 2 J. & H. 746.

[3] *Holmes* v. *Eastern Counties Railway Co.*, 3 Jur. N. S. 737; cf. *Besant* v. *Wood*, 12 Ch. D. 605.

CANADIAN NOTES.

Lease not Inconsistent with Agreement to Convey.

In *Poliquin v. St. Boniface*, 17 Man. 593, it was held that a person was not estopped by entering into a lease of land which has expired before the commencement of the action from bringing an action for specific performance of an agreement for the sale of the land to him by the lessor alleged to have been made before the signing of the lease. *Per* Phippen J.A., the existence of the lease was not necessarily inconsistent with the contract of sale, and, therefore, did not create an estoppel.

CHAPTER XXII.

NON-PERFORMANCE OF CONDITIONS.

Contracts not to be performed until absolute.

§ 982. A CONTRACT may be originally conditional, and contingent upon the performance of some act or the happening of some event. Where that has occurred, the contract becomes absolute, and rests on the same footing for all purposes as if it had been originally made positively and without reference to any contingency.[1] But until it has thus become absolute, no person can be entitled to call for its performance, or to sue for its non-performance.[2] Where, therefore, the contract is in its origin conditional, it may afford a ground of defence that the condition has not been performed.

Instances.

§ 983. A case before Lord Romilly M.R. may be cited as an illustration of this obvious principle. The defendant agreed to take a lease of a public-house from the plaintiff, provided the retail licence were obtained, and the plaintiff agreed to use his utmost efforts to obtain this licence. The defendant entered into possession to qualify himself as a publican for the licence and obtained a licence from the justices, but under compulsion of the justices and threat of refusal, he gave to the justices a verbal promise that no excisable liquor should be sold for consumption on the premises. It was held that the condition was not

[1] *Per* Lord Romilly M.R. in *Regent's Canal Co.* v. *Ware*, 23 Beav. 586.

[2] *Scott* v. *Corporation of Liverpool*, 1 Giff. 216; 3 De G. & J. 334. Cf. *Abbot* v. *Blair*, 8 W. R. 672; *Douglas* v. *Sidmouth Railway and Harbour Co.*, 14 W. R. 361.

performed and specific performance was refused.[1] Again, in the case of a covenant to renew a lease it was held that the performance of the covenants to repair was a condition precedent, and the breach of them constituted a defence.[2] But where A. had agreed to purchase from B. the lease of a public-house on condition that a mortgagee of the lease would consent to accept A. as mortgagor in place of B., and the mortgagee at first refused, but afterwards before the date fixed for completion gave his consent, it was held that the condition had been duly fulfilled, and that A. was not justified in treating the contract as at an end, on the ground of the mortgagee's original refusal. In such a case, the condition is one which may, generally, be fulfilled at any time before completion.[3]

Condition express or implied.

§ **984**. A contract may be conditional either by express words of condition, or because the Court, upon a consideration of its terms, gathers that to have been the intention of the contracting parties. This is of course a question to be decided on the terms of each contract. It will, therefore, be sufficient briefly to allude to two or three cases of practical moment.

§ **985**. In a recent case there was a contract to grant a lease to a nominee of the plaintiff, or to a company which he intended to form; he had not formed the company: it was held that his naming a nominee and the acceptance of the lease by the nominee constituted

[1] *Mollen* v. *Snowball*, 29 Beav. 611, affirmed 31 L. J. Ch. 44; 10 W. R. 24. Distinguish *Tadcaster Tower Brewery Co.* v. *Wilson*, [1897] 1 Ch. 705, where the nature and extent of the vendor's obligations under a contract for sale of a licensed public-house were discussed. See, too, *Re Ward and Jordan's Contract*, [1902] 1 I. R. 73.

[2] *Bastin* v. *Bidwell*, 18 Ch. D. 238; *Greville* v. *Parker*, J. C., [1910] A. C. 335. Distinguish *Starkey* v. *Barton*, [1909] 1 Ch. 284, 290, where a tenancy agreement gave the plaintiff an option to purchase the defendant's interest in a house, provided the plaintiff should in the meantime "have duly paid the said rent hereby reserved," and it was held that "duly" did not mean "punctually," and that all conditions precedent to the exercise of the option had been performed.

[3] *Smith* v. *Butler*, [1900] 1 Q. B. 694, 699.

a condition precedent for default of which he could not obtain judgment.[1]

Railway contracts.

§ **986**. In the case of contracts by railway companies, the question has sometimes arisen how far they are conditional on the formation of the railway. In one case, where a company before incorporation contracted with a landowner, the contract provided for a bridge over the railway, a certain deviation of the line, and other works entirely dependent on its formation, and also for the payment of 4,500*l*. as purchase-money for certain lands to be taken by the company, and for consequential damage to the landowner's estate. The contract was expressly conditional on the Act passing. It passed, but the railway was abandoned, and the time for taking the lands had expired. Nine-tenths of the contract, as Knight Bruce L.J. remarked, had become impracticable by reason of the abandonment of the railway: and the Lords Justices, though not deciding the point, evidently inclined to the opinion that the contract was conditional, not only on the passing of the Act, but on the making of the railway.[2] And in the subsequent case of *Lord James Stuart* v. *London and North-Western Railway Co.*,[3] Lord Cranworth L.J. expressed a similar opinion. These cases have been doubted,[4] but rather on the point of jurisdiction than of the construction of the contracts; and they have certainly received great support from the case of *Gage* v. *Newmarket Railway Co.*[5] There the company had covenanted with the plaintiff that, in the event of a Bill for extending their powers being passed in the then present session, the company should, before they

[1] *Williams* v. *Brisco*, 22 Ch. D. 441.

[2] *Webb* v. *Direct London and Portsmouth Railway Co.*, 1 De G. M. & G. 521, reversing S. C. 9 Ha. 129.

[3] 1 De G. M. & G. 721. This case in the Court below is reported, 15 Beav. 513. See also 5 H. L. C. 351.

[4] *Hawkes* v. *Eastern Counties Railway Co.*, 1 De G. M. & G. 737; S. C. 5 H. L. C. 331.

[5] 18 Q. B. 457. See also *Edinburgh, Perth, and Dundee Railway Co.* v. *Philip*, 2 Macq. 514.

should enter on any part of the plaintiff's land, pay him 4,900*l.* purchase-money for any portion of his land not exceeding forty-three acres, which the company might require and take, and 7,100*l.* as landlord's compensation for damages arising by the severance thereof. It was held that the covenant was not for the payment of an absolute sum as a consideration for the plaintiff's withdrawing his opposition, but a payment as purchase-money and compensation for severance, which could not be due when no land was required or taken, and no severance effected for which compensation could arise. In the case of *The Scottish North-Eastern Railway Co.* v. *Stewart*[1] the House of Lords arrived at a similar conclusion upon the contract there in question.

Waiver.

§ 987. The performance of conditions precedent may of course be waived by the persons entitled to their performance;[2] but any waiver to be binding must be made intentionally and with a knowledge of the circumstances of the case.[3]

It may here be noticed that in *Hawksley* v. *Outram*[4] it was held by the Court of Appeal that the plaintiff (purchaser) might waive certain provisions of the contract which clearly were intended solely for his benefit, and thereupon might have specific performance of the rest of the contract. But in a subsequent case,[5] where the plaintiff (vendor) and the defendant (purchaser) had signed a memorandum of agreement for the sale and purchase of a leasehold property subject to the preparation by the vendor's solicitor and completion of a formal contract, it was held by Kekewich J. that the stipulation as to a formal contract was not necessarily for the benefit of the vendor alone, and accordingly could not be waived by him.

[1] 3 Macq. 382.

[2] *Bratson* v. *Nicholson*, 6 Jur. 620.

[3] *Earl of Darnley* v. *London, Chatham, and Dover Railway Co.*, L. R. 2 H. L. 43 (S. C. 1 De G. J. & S. 204; 3 ib. 24).

[4] [1892] 3 Ch. 359, at pp. 376, 378. Cf. *supra*, § 850.

[5] *Lloyd* v. *Nowell*, [1895] 2 Ch. 744.

CHAPTER XXIII.

INCAPACITY OF THE DEFENDANT TO PERFORM HIS PART OF THE CONTRACT.

Contract conditional on capacity, &c.

§ **988**. THERE are certain cases in which the contract is construed to be conditional on individual capacity, or on the continued existence of some state of facts or thing. "Contracts for personal service, for matters dependent on personal capacity, as to write a book or paint a picture, are conditional on the continuance of the ability, mental or corporeal, to perform them."[1] So again, where from the nature of the contract it appears that the parties contracted upon the footing of the existence at the time of performance of some particular specified thing, and there is no express or implied warranty that the thing shall exist, a condition is implied that the party to do the act shall be excused, in case before breach performance becomes impossible by the perishing of the specified thing without the default of the party. This principle has been applied to a contract to let a music hall, which was destroyed by fire before the day arrived;[2] and to a contract to sell 200 tons of potatoes grown on particular land.[3]

Such contracts cannot be sued on.

§ **989**. All these contracts, being conditional and not positive, are not within the rule that, where there is a positive contract to do a thing not illegal, the contractor must perform it or pay damages for not doing it, though

[1] *Per* Bramwell B. in *Hall* v. *Wright*, El. B. & E. at p. 778; *Poussard* v. *Spiers*, 1 Q. B. D. 410, 414.

[2] *Taylor* v. *Caldwell*, 3 B. & S. 826.

[3] *Howell* v. *Coupland*, 1 Q. B. D. 258. See also *Appleby* v. *Myers*, L. R. 2 C. P. 651.

it has become impossible. On such contracts no action can be maintained, whether for damages or for specific performance.

Where incapacity of defendant a defence.

§ 990. But in contracts positive and not conditional, the incapacity of the defendant to perform his part of the contract, whilst it furnishes no answer to an action for damages,[1] affords a ground of defence against specific performance.[2] This contention does not, like that in the case of conditional contracts, rest upon the nature or terms of the contracts, nor, like that grounded on the capacity of the plaintiff to perform his part, rest upon any principle of justice that operates in favour of the defendant, but is based upon the necessity of the case arising out of the nature of the relief sought.

Instances.

§ 991. Where a bill was filed against the provisional committee of a projected railway company for the specific performance of a contract to deliver to the plaintiff a certain number of scrip certificates; there being no allegation that the defendants had any scrip which they could deliver, but a statement from which the contrary might rather be inferred, a demurrer was allowed on the ground that the bill did not show any capacity in the defendants to perform the contract.[3] So where a defendant showed that he had sold the property in question for a valuable consideration to a third party, no performance could be enforced:[4] and so again, assuming that a covenant to produce deeds can be obtained by way of specific performance of a covenant for further assurance, it seems that the Court will not attempt so to carry it into effect where the deeds are not in the proposed covenantor's power.[5] So again a contract by directors to accept shares in payment of

[1] *Hall* v. *Wright*, El. B. & E. 746; *Brown* v. *Royal Insurance Co.*, 1 El. & El. 853.

[2] *Per* Lord Hardwicke in *Green* v. *Smith*, 1 Atk. 573.

[3] *Columbine* v. *Chichester*, 2 Ph. 27; *Ferguson* v. *Wilson*, L. R. 2 Ch. 77.

[4] *Denton* v. *Stewart*, 1 Cox, 258, 17 Ves. 276, n.

[5] *Hallett* v. *Middleton*, 1 Russ. 243.

calls being legally impossible of performance cannot be enforced.[1] And where a charitable corporation, which had no power of selling except under the Lands Clauses Act, contracted to sell land without having the price settled in the manner prescribed by the Act, the Court refused to decree specific performance.[2]

Lunacy

§ **992**. Again, lunacy supervening after the contract and before performance may prevent the lunatic from doing a personal act in performance of a contract, as *e.g.*, entering into a covenant for quiet enjoyment:[3] though under the Lunacy Act, 1890, the Court may vest in the plaintiff the property contracted to be sold by the lunatic.[4]

Defendant author of his own incapacity.

§ **993**. It is immaterial for this purpose that the defendant is the author of his own incapacity. "Put the extreme case," said Kindersley V.C.,[5] "of a vendor burning a title-deed: the Court could not make a decree that he should deliver it up, and be imprisoned if he does not."

Capacity when to be judged of.

§ **994**. It is not necessary to the specific performance of a contract, that it should be one which the parties at the time of entering into it had the power of carrying into effect, nor one with regard to which it depends on themselves alone whether they would ever be able to perform it. For where a party enters into a contract without at the time having the power of performing it, and afterwards acquires that power, he is bound to perform the contract he entered into.[6] Therefore a defendant cannot object at an early stage of an action for specific performance that he has not the interest he

[1] *Ellis* v. *Colman*, 25 Beav. 662. See also *Sewell* v. *Webster*, 29 L. J. Ch. 71.

[2] *Wycombe Railway Co.* v. *Donnington Hospital*, L. R. 1 Ch. 268. See, too, *Bridgend Gas and Water Co.* v. *Dunraven*, 31 Ch. D. 219.

[3] *Cooper* v. *Harmer*, 57 L. J. Ch. 160.

[4] *R. Pugani*, [1892] 1 Ch. p. 238.

[5] In *Sewell* v. *Webster*, 29 L. J. Ch. at p. 73.

[6] *Hoirigd* v. *Marshall*, 1 H. L. C. 191, 211; *Carne* v. *Mitchell*, 15 L. J. Ch. 287.

has contracted to sell, as he cannot be permitted to say that he did not mean to acquire that interest.[1] And so where a defendant had contracted to give a certain indemnity to be secured on real estate, and alleged that he had not real estate of sufficient value, and contended that the plaintiff ought to accept a personal indemnity, it was held that he was bound to purchase real estate of sufficient value.[2]

Illustrations of the principle.

§ **995.** The same principle is exemplified in a case which was decided in the 34th year of Charles II. During the civil wars, the then Duke of Newcastle had gone abroad, and whilst he was thus absent, the defendant, who was his heir apparent, without authority from the then Duke, sold and conveyed to the plaintiff certain estates of the Duke, and received the purchase-money, and applied it for the benefit of the family. The defendant having subsequently succeeded to the dukedom and the estates in question as heir, he was, by Lord Nottingham, held bound to make good his sale, and was decreed to do so accordingly.[3] At the time of the contract, specific performance would have been impossible on the part of the defendant, but it had subsequently become possible by the devolution of the estate contracted to be sold.

Application to parliament required.

§ **996.** On the same principle, the Court will not in all cases consider as void, contracts, whether by private persons or companies, which require the interposition of the legislature before they can be carried into effect, and accordingly will in the meanwhile protect the property in issue.[4]

[1] *Per* Lord Eldon in *Browne* v. *Warner*, 14 Ves. 412.

[2] *Walker* v. *Barnes*, 3 Mad. 247.

[3] *Clayton* v. *Duke of Newcastle*, 2 Cas. in Ch. 112.

[4] *Great Western Railway Co.* v. *Birmingham and Oxford Junction Railway Co.*, 2 Ph. 597; *per* Lord St. Leonards in *Hawkes* v. *Eastern Counties Railway Co.*, 1 De G. M. & G. 756, *Devenish* v. *Brown*, 26 L. J. Ch. 23; 4 W. R. 783 (Wood V.C.); *Frederick* v. *Corwell*, 3 Y. & J. 511. As to contracts requiring proposed legislation to render them legal, see *Mayor of Norwich* v. *Norfolk Railway Co.*, 4 El. & Bl. 397.

Estate not the vendor's

§ 997. With regard to real estate, the statute 32 Hen. VIII. c. 9 prevents the sale of a pretended right to land by a person out of possession; but if a person, instead of selling a pretended right, contracts on a certain future day to convey an estate, and he is on the day possessed of it, the contract appears not to be within the operation of the statute, and to be binding on both parties.[1]

Goods not in possession of vendor

§ 998. And so also with regard to goods, the legality of contracts for the sale of such property not at the time in the possession of the vendor is well established;[2] so that, notwithstanding the decision of Lord Macclesfield [illegible] now probably be enforced, [illegible] under the jurisdiction of the Court.[3]

Consent of third parties.

§ 999. As the consent of [illegible] or may be, a thing impossible to procure, a [illegible] who has entered into a contract to the performance of which such consent is necessary, will not, in case such consent cannot be procured, be decreed to obtain it, and thus perform an impossibility.[5]

Sale of wife's estate.

§ 1000. Where the husband, or husband and wife, had entered into a contract to sell the estate of the wife, the Court of Chancery used formerly to decree the husband to procure his wife's consent, and in default committed him to gaol until she yielded.[6] But the absurdity of such a course is obvious; because the

[1] *De Medina* v. *Norman*, 9 M. & W. 820; and see further as to this statute, *supra*, § 233.

[2] *Hibbl-thwaite* v. *M'Morine*, 5 M. & W. 462.

[3] *Cuddee* v. *Rutter*, 5 Vin. Abr. 538, pl. 21.

[4] *Holroyd* v. *Marshall*, 10 H. L. C. 191; and see § 82, *supra*.

[5] *Howe* v. *George*, 1 Mad. 1; *Grey* v. *Hesketh*, Ambl. 268; S. C. 3 Burn's Eccl. Law (9th ed.), 624. See also *Weatherell* v. *Geering*, 12 Ves. at p. 511; *Marsh* v. *Milligan*, 3 [illegible] N. S. 979 (Wood V.C.); *Beesto Stutely*, 6 W. R. 296; 27 L. J. [illegible] 156; *Mara* v. *Meara*, 8 I. Ch. R. 37; and *Willmott* v. *Barber*, 15 Ch. D. 96. Distinguish *Leitch* v. *Simpson*, I. R. 5 Eq. 613.

[6] *Barrington* v. *Horn*, 3 Vin. Abr. 547, pl. 35; S. C. 2 Eq. Cas. Abr. 17, pl. 7; *Hall* v. *Hardy*, 3 P. Wms. 187; *Daniel* v. *Adams*, Ambl. 495; *Morris* v. *Stephenson*, 7 Ves. 474.

Court of Chancery was thus putting all the compulsion it could upon the wife to induce her to do an act, of which the essence is that it is done without compulsion; the Court of Chancery was distressing her to give her consent, whilst the Court of Common Pleas was examining her to see that she was acting from free will alone; and it accordingly became established that the Court would not interfere specifically to perform contracts where a wife's consent was requisite, and she refused to give it.[1] In a case decided in the year 1869,[2] where a husband, who had only an estate *pur autre vie* in property with the possibility of a tenancy by the curtesy, the remainder in fee on the determination of the particular life being vested in his wife, entered into a contract to sell the fee simple (of which he was at the time of the contract believed by the purchaser to be the owner), the Court held the husband bound to convey all the interest that he had, and to make compensation to the purchaser for the wife's interest, which she was not bound to convey. But in an almost contemporaneous case,[3] where husband and wife agreed to sell the fee simple of an estate which on the face of the contract was clearly the wife's estate, and she afterwards refused to convey, the purchaser's bill for specific performance by the husband at an abated price was dismissed by the Court of Appeal in Chancery.

Execution *cy près*.

§ **1001**. It must not, however, be understood that the incapacity of the defendant to perform a contract literally and exactly in all its parts will enable him to refuse to perform it in substance. The plaintiff has in many cases the right to call on the defendant to

[1] *Bryan* v. *Wooley*, 1 Bro. P. C. 181; *Emery* v. *Wase*, 8 Ves. 505; *Frederick* v. *Coxwell*, 3 Y. & J. 514; *Howell* v. *George*, 1 Mad 1; *Buck* v. *Whelley*, in D. P. 1 Mad. 7, n.; *Martin* v. *Mitchell*, 2 J. & W. 413, 425; *per* Lord Mansfield C.J. in *Davis* v. *Jones*, 1 N. R. 269.

[2] *Barnes* v. *Wood*, L. R. 8 Eq. 424. See *infra*, §§ 1263—1267.

[3] *Castle* v. *Wilkinson*, L. R. 5 Ch. 534.

perform the contract as best he can, though the defendant's incapacity to perform it fully might be a bar to him, if he filled the position of plaintiff. All the cases in which the plaintiff enforces a contract so far as the defendant can perform it and obtains compensation from him for the part unperformed are instances of this.[1] Some other cases of the same sort may be mentioned.

Death of co-contractor, tenant in tail.

§ **1002**. If two tenants in tail in common were to contract to sell an estate and one of them died before completion, the issue in tail of the one dying would not be bound by the contract; but it seems that the purchaser might, if he chose, sue the survivor for a conveyance of his moiety on payment of a half of the purchase-money.[2]

Carey v. Stafford.

§ **1003**. So in *Carey* v. *Stafford*,[3] in the Exchequer in 1725, where a man executed a deed affecting to convey lands therein described of the yearly value of 22*l*. to his servant, and no such lands existed, the Court compelled him to convey lands of equal value.

Lease by copyholder.

§ **1004**. And so if a copyholder were to contract to grant a lease for a longer term than the custom allowed, he would, it seems, be compelled to effectuate his contract in substance, by from time to time executing leases for such terms as he could, till he had made up the term contracted for.[4]

Errington's case.

§ **1005**. *Errington's case*,[5] though not on a specific performance, is another illustration of this principle. He had contracted for 9,000*l*. to build a bridge over the Tyne, and to maintain it for seven years, and had entered into a bond in that sum conditioned for performance of the contract: the bridge was built, but thrown down by a flood; and it was held

[1] See Part V. chap. ii. § 1257 *et seq.*

[2] *Per* Lord Hardwicke in *Att.-Gen.* v. *Day*, 1 Ves. Sen. at p. 224.

[3] 3 Sw. 427, n.

[4] *Paxton* v. *Newton*, 2 Sm. & Gif. 437.

[5] *Per* Lord Redesdale in *Davis* v. *Hone*, 2 Sch. & Lef. 351; *Errington* v. *Aynesly*, 2 Bro. C. C. 341.

that no bridge on that site could stand. Thereupon he filed his bill for relief from the bond; and upon his building a bridge upon a neighbouring site where it could stand, and submitting to an issue of *quantum damnificatus* by the change of site, he was relieved from the penalty of the bond.

Contract modelled so as to be legal.

§ 1006. Where a contract is in its original form obnoxious to difficulties on the score of illegality, but can nevertheless be lawfully performed in substance, the Court will so model it as to effectuate this purpose. Thus it having been made by statute illegal to contract for the tenant to pay the tithe rent-charge, a contract for a lease, stipulating that the tenant should pay a certain sum for rent and also the rent-charge, may be carried into effect by the Court by means of a lease reserving as rent the two sums in the contract treated respectively as rent and rent-charge.[1]

Modelling confined to formal matters.

§ 1007. But such modelling can only apply to matters of form. So where an incumbent was under a statute able to grant a lease with a rent payable quarterly, and he contracted to grant a lease with rent payable half-yearly, the Court declined to compel the lessee to take a lease with a reservation of rent payable quarterly: the mode of reservation of rent was held to be an essential part of the contract.[2]

Contract partly invalidated by legislation.

§ 1008. The Court will probably be anxious to execute a contract *cy près*, where by subsequent legislation a contract originally valid may have become invalid in part. Thus where a Dean and Chapter, prior to the disabling statute of 13 Eliz., covenanted for the renewal of a lease for ninety-nine years, and the plaintiff brought his bill asking for a renewal for such term as the corporation could grant under the statute, it was ultimately decided by the House of Lords, in accordance with the opinion of Jekyll M.R., but overruling the judgments

[1] *Carolan* v. *Brabazon*, 3 Jon. & L. 200.

[2] *Jenkins* v. *Green*, No. 2, 3 Beav. 140.

of Lord King, Lord Raymond C.J., and Price J., that the plaintiff was entitled to this *cy près* relief.[1]

Contract modelled so as to be possible.

§ 1009. It seems that in some cases in which the contract would be incapable of being specifically enforced in its very terms for other reasons than illegality, it may be executed by the Court *cy près*, if such a plan be feasible. In one case there was a contract entered into by the defendants within two years to procure the heir-at-law of A. B. to convey certain estates to the plaintiff, or within the same period to petition the House of Lords for, and to use their utmost endeavours to procure, an Act of Parliament for substituting a trustee in place of the heir, in case such heir could not be found, or there was no heir; on a bill filed for the performance of this contract, the Court decreed the defendants to allow their names to be used in an application to Parliament for the Act.[2] A contract by a person to use his utmost endeavours seems to be one which the Court could not specifically execute.

Railway cases.

§ 1010. In some railway cases, the Court has shown a great inclination to regard what it considers as the substance of the contract. In one case, company A. contracted with the plaintiff for the purchase of the lands required for their proposed line, and for the withdrawal of his opposition in consideration of 20,000*l.* to be paid to him, in case their Bill should pass into law: there was a rival company B., which would require different lands of the plaintiff: by an agreement, made between the two companies during the proceedings before the Committee of the Commons, it was agreed that a reference should be made as to which of the two lines should be carried into effect, and that the successful company should take to all the engagements of the other. The line of company B. was approved, and

[1] *Bellasyse* v. *Dean and Chapter of St. Paul's*, Sel. C. in Ch. 66 (Nov. 1726); 3 Bro. P.C. 389; *supra*, § 60.

[2] *Frederick* v. *Cotwell*, 3 Y. & J. 514.

company A.'s Bill was accordingly withdrawn; company B. refused to pay the plaintiff the 20,000*l.*, alleging, amongst other things, that it was conditional on the Bill of company A. passing, and that the lands required were not those contracted for; but on a bill filed by the plaintiff against them, their demurrer was overruled by Shadwell V.C. and Lord Cottenham.[1] In a subsequent case, however, the same Vice Chancellor considered the passing of a Bill of an amalgamated company sufficiently distinct from the passing of the Bill of one of the companies to relieve the amalgamated company from a contract binding in case of the Bill of the one company passing.[2] The decree was affirmed by Lord Cottenham, but on a different ground.[3]

Impossibility of one alternative.

§ 1011. Where a contract is in the alternative, so as to give an election to the party to perform it, and one of the alternatives is at the time of the contract, or subsequently becomes, impossible, the question arises how far the contracting party is bound to the performance of the alternative that remains possible. The cases seem to divide themselves into (i.) those where one alternative is impossible at the time of the contract, (ii.) where it becomes so subsequently to the contract, but before election, by the act of God, or (iii.) by the act of the other party to the contract, or (iv.) by the act of a stranger, and (v.) those cases where the impossibility arises after election. These different cases must be briefly considered.

i. One alternative originally impossible.

§ 1012. (i.) Where at the time of the contract one alternative is impossible or void, the party to execute the contract is bound to the performance of the other

[1] *Stanley* v. *Chester and Birkenhead Railway Co.*, 9 Sim. 264; S. C. 3 My. & Cr. 773.

[2] *Greenhalgh* v. *Manchester and Birmingham Railway Co.*, 9 Sim. 416.

[3] 3 My. & Cr. 784. See further, as to the results of amalgamation, *Earl of Lindsey* v. *Great Northern Railway Co.*, 10 Ha. 664; *King* v. *Accumulative Assurance Co.*, 3 C. B. N. S. 151; *Kearns* v. *Leaf*, 1 H. & M. 681.

alternative.[1] So where the condition of a bond was to pay a certain sum, or render in execution a person who had been previously discharged, and the Court held the latter alternative illegal and void, it was decided that the obligor was bound to perform the other, and that not having done so, the bond was forfeited.[2] And where an award directed that a sum of money should be paid or be secured to be paid, and did not define the security to be given, and the question was whether the award was not void for uncertainty: it was held not to be so, on the ground that if an award direct one of two things to be done in the alternative, and one is void for uncertainty or is impossible, it is yet incumbent on the party to perform the other of them.[3]

ii. One alternative rendered impossible by the act of God.

§ 1013. (ii.) The leading authority on the second class of cases is *Laughter's case*,[4] where it is laid down, "that where a condition of a bond consists of two parts in the disjunctive, and both are possible at the time of the bond made, and afterwards one of them becomes impossible by the act of God, the obligor is not bound to perform the other part." On this case it may be remarked in the first place, that the case itself did not require the enunciation of the principle,[5] as both alternatives in the bond there put in suit were rendered impossible;[6] and in the second place, it is to be observed, that subsequent decisions show that the principle was stated too broadly, and that even at Common Law the intention of the parties has been gathered from the particular language of each instrument. In the case of *Studholmes* v. *Mandell*,[7] the Court said that the rule

[1] Com. Dig. Condit. K. 2; *Wigley* v. *Blackwal*, Cro. Eliz. 780.

[2] *Da Costa* v. *Davis*, 1 B. & P. 242.

Simmonds v. *Swaine*, 1 Taunt. 549.

[3] 5 Rep. 21 b; S. C. *s. n. Eaton's case*, Moore, 357; *s. n. Eaton* v. *Laughter*, Cro. Eliz. 398; accordingly *Warner* v. *White*, T. Jon. 95.

[4] *Barkworth* v. *Young*, 1 Drew. 1, 21.

[5] See the case in Cro. Eliz. 398.

[6] 1 Lord Raym. 279; *Anon.*, 1 Salk. 170.

and reason of *Laughter's case* ought not to be taken so largely as Coke has reported it, but according to the nature of the case; and Treby C.J. quoted a case in which a bond was conditioned either to make a lease for the life of the obligee before such a day or to pay 100*l.*, and the obligee having died before the day, it was held in the Common Pleas that the obligor should pay the 100*l.* And in *Drummond* v. *Duke of Bolton*,[1] in an action on a bond conditioned to pay or secure to the plaintiff or her children by William Ashe, her then intended husband, 3,000*l.* within six months after the defendant should become Duke of Bolton, the defendant pleaded that William Ashe died without having any children before the defendant became Duke: but the plea was overruled, on the ground that the intention of the parties must be regarded, and that it could never have been their intention that the money should not be paid to the plaintiff in case she should not have a child by William Ashe at the time of the plaintiff becoming Duke, though if she then had a child, the defendant might have had his election to whom to pay the money.

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§ **1014**. And this view of the law was fully supported in a case before Kindersley V.C., on a promise by A., on the marriage of his daughter with B., that he would at his death leave to his daughter an equal portion with his other children. The daughter died in the lifetime of her father, leaving children, and this circumstance was argued to be a discharge from the contract by an act of God. But the Vice Chancellor held that the contract might have been performed in either of two ways,—namely, by A.'s making a provision for his daughter by will or by his dying intestate: and that though the death of the daughter precluded him from performing it in the first way, he was not thereby

[1] Say, 243. See also *per* Walmesley J. in *More* v. *Morecomb*, Cro. Eliz. 864.

exonerated from performing it in the second, and that the bill, by which the husband prayed for an equal share in the testator's residuary estate, was not on that ground demurrable.[1] His Honour, after referring to some of the previous cases, expressed his opinion that it is impossible to lay down any universal proposition either way, and that each case must depend upon the intention of the parties: but that where this intention is clear that one of the parties shall do a certain thing, but he is allowed his option to do it in one or other of two modes, and one of these modes becomes impossible by the act of God, he is bound to perform it in the other mode: and that, in the case before the Court, it was manifestly the intention of the parties that, in one way or other, the daughter should have an equal share of the testator's property; and that if the father was prevented by the act of God from performing his obligation in one way, he was bound to perform it in the other way, which was possible.[2]

Jones v. *Hore*.

§ **1015**. In *Jones* v. *Hore*[3] a father on the marriage of his daughter covenanted by some act *inter vivos* or by will to leave his daughter a certain provision: no act *inter vivos* was done by the covenantor, nor did his will contain any provision for her: the daughter died in the lifetime of her father: the Court of Common Pleas, on a case stated for its opinion by direction of Wigram V.C., held that the covenantee had no cause of action, on the ground, it appears, of the provision by will having failed by the death of his daughter, and a consequent exemption from liability to perform the other alternative. The Vice Chancellor, though expressing an opinion that by this view the intention

[1] *Barkworth* v. *Young*, 4 Drew. 1. P. 25. The rule of the Civil Law seems to agree with this. "Si quis illud vel illud stipulatus sit, tot obligationes sunt quot corpora: quare, si altera res ex quâcunque causâ dari non potest, altera nihilominus debi[illegible]" Warnkönig, Instit. Jur. Rom. Priv. lib. iii. c. 2, t. 1, 793.

[2] 7 Ha. 267; S. C. 9 C. B. 1.

[3] 8

of the parties was disappointed, as the provision was intended to be absolute, and the mode of making it only intended to be left to the discretion of the covenantor, yet confirmed the certificate, and dismissed the bill with costs.

iii. One alternative prevented by the other party.

§ 1016. (iii.) Where one of the alternatives becomes impossible by the act or default of the party for whose benefit the contract is to be executed, the other alternative is discharged and need not be performed.[1] Therefore in debt on an obligation conditioned for the delivery up by the defendant to the plaintiff of three obligations in which the plaintiff was bound to the defendant, or for the execution to the plaintiff of such release of them as should be devised by the plaintiff's counsel before Michaelmas, a plea that neither the plaintiff nor his counsel devised any release before Michaelmas was held good by a majority of the Judges in the Queen's Bench, on the ground that, where the obligee disables the obligor to perform the one part, the law discharges him from the other.[2] This authority was followed by another case in the same Court, in which, in debt on a bond by the defendant conditioned to grant an annuity within six months after the death of A., and if he refused, on request then to pay 300*l.*, a plea that no grant had been tendered within six months was held good.[3]

The principle of these cases.

§ 1017. The principle of these cases is obvious: the contract gives the party to perform an election, and creates an obligation to perform only the elected thing: but the other party has destroyed the election, and so has released the performing party from his obligation to do anything.

iv. One alternative

§ 1018. (iv.) Where one alternative is prevented by the act of a stranger rendering his performance

[1] Com. Dig. Condit. K. 2.

[2] *Grenningham* v. *Ewer*, Cro. Eliz. 396, 539.

[3] *Basket* v. *Basket*, 1 Mod. 2[illegible] 2 Mod. 200.

impossible, the other alternative must be performed. This was held in a case in the 4th of Henry VII., which decided that if one be obliged to enfeoff me of certain lands, or to marry A. S. before such a day, and a stranger marry A. S. before the day, the obligor must make a feoffment of the lands: but otherwise if the obligee married A. S. before the day, for then the other alternative is discharged.[1] prevented by a stranger.

§ 1019. (v.) If, after the party to perform has elected to perform one alternative, that alternative becomes impossible, the effect of the impossibility is precisely the same as in the case of a single contract, for by election the contract has become single. The performing party therefore is ordinarily liable in damages.[2] v. Elected alternative becoming impossible.

[1] Quoted in *Grenningham v. Ewer*, Cro. Eliz. 397.

[2] *Brown v. Royal Insurance Co.*, 1 El. & El. 853.


U.W.O. LAW

CANADIAN NOTES

Defence, Want of Power to Convey, etc.

In *Russell* v. *Romaine*, 3 Ont. A.R. 635, the bill was filed to enforce specific performance of an agreement to sell certain land, made by one R. since deceased. The original agreement was cancelled and on the 22nd of May, 1866, another agreement for sale contained in a lease of the land from R. to the plaintiff was substituted therefor. In November, 1865, when the original agreement was entered into, R., who held two mortgages on the land in question, thought he had obtained an absolute title thereto, by proceeding in a foreclosure suit on these mortgages. It afterwards, however, appeared, that long prior to the first of the mortgages, held by R. the mortgagor, T.H., had by a voluntary deed conveyed fifty acres of the land to his son, E.H. Subsequently to the first mortgage to R. but prior to the second mortgage E. H. mortgaged the fifty acres to one A. E. H. was not made a party to the foreclosure suit, but A. was served with notice of the proceedings in the Master's office and, not having appeared, he and the mortgagor were declared foreclosed. Soon after the above agreement for sale, in September, 1866, R. fyled a bill against T. H., E. H. and A. for the foreclosure of his two mortgages against all these defendants, when a decree was made declaring the deed to E. H. to be void against R., and that A.'s mortgage was subject to the first mortgage, but had priority over the second mortgage held by R. and he was directed to pay into Court a certain sum as the price of redemption, which payment was made at the appointed time. It appeared that the plaintiff had actual notice of E. H.'s outstanding equity of redemption before he made any improvements, and that he made them in reliance upon R. holding him harmless. It was held, affirming the decree of Proudfoot V. C., that the plaintiff was not entitled to a decree for specific performance against the

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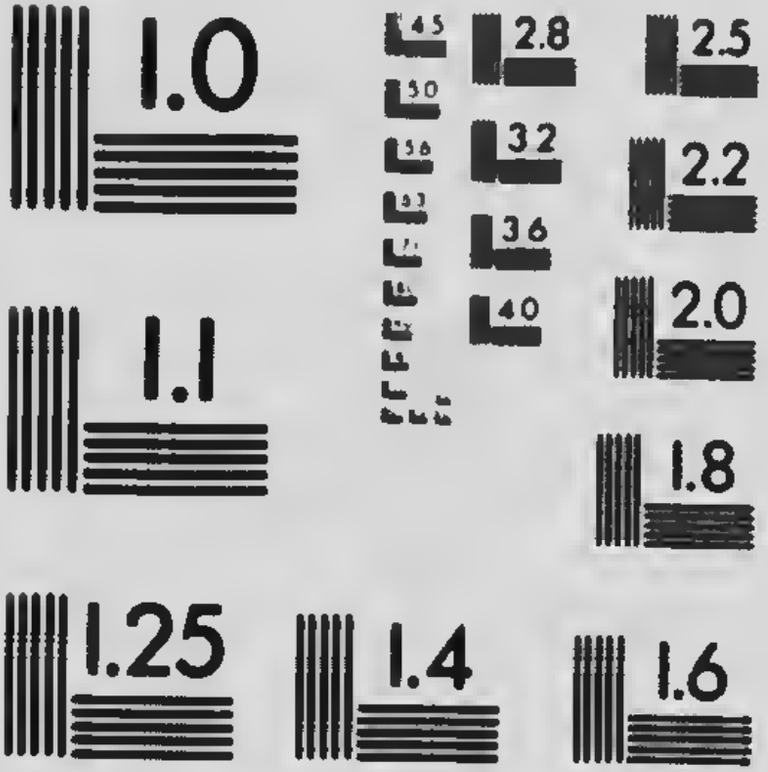

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representatives of R. as they had no power to convey, nor against A. because there was no privity between him and the plaintiff, and no equity to make them bound by the agreement.

It was also held that the plaintiff was not entitled to a lien on the land for his improvements, and also, that the plaintiff had not acquired any rights by virtue of the Statute of Limitations, inasmuch as his possession was that of a tenant and was not exclusive of the mortgagor.

In a contract for the sale of property, it was agreed that it should be paid for in part by an assignment of a mortgage to be obtained from a third party. The purchaser afterwards alleged the refusal of the mortgagee to assign. Under these circumstances, the Court directed an enquiry whether or not the mortgagee was still willing and able to assign the mortgage. *Per* Spragge V.C. "If it should turn out that the defendant cannot secure what is called the Engersin mortgage to be assigned to him or to the plaintiff, I am not clear that the plaintiff can have any decree. The Court will not, of course, decree that he shall procure such assignment any more than it would decree specific performance of an agreement to purchase a particular estate. . . . It may be said that the procuring of an assignment of this mortgage was only a mode of paying an agreed amount of purchase money and that the defendant should be compelled to pay according to that mortgage and to give security upon other lands of sufficient value, but that certainly would be a different thing from what was agreed to be done. The defendant agreed to pay part of the consideration in one particular way and no other." This was the judgment of the Court. *Arnold* v. *Hall*, 7 Grant's Ch. 47.

Destruction of Work Before Inspection Provided for by Contract.

Two incorporated trading companies agreed by writing under their corporate seals, the one to construct certain works for the other, which, on completion, were to be inspected by engineers on behalf of each of the contracting parties, and, upon the engineers approving of the works and reporting them as completed, they were

to be accepted as soon as completed by the party for whom they were done who were to be forever debarred from denying or contesting the due and proper execution, completion and acceptance of such works. The parties to perform the work, having, as they alleged, completed it, notified the others thereof, calling upon them to appoint an engineer as stipulated for which request was not complied with, and, subsequently, a portion of the works contracted for, a bridge, was destroyed.

On a bill filed for the purpose of compelling an acceptance of the work, the Court thought that the delay of one of the contracting parties until after such destruction to name an engineer as had been stipulated for in the agreement did not preclude the other from obtaining an inspection of the works, but that such inspection and approval must, under the circumstances, be had by reference to a Master.

Spragge V.-C. referred to the English cases, saying: "There is this difference between the English cases referred to and this case, that in the former, the thing to be ascertained was auxiliary to the carrying out of a contract upon which the parties were to act, while in this case it is only to set at rest the rights of the parties and then to stop. But, looking to the nature of the works to be performed by the plaintiffs, it was of the highest importance to them upon the completion of the works to have the fact of their completion established and settled so as not to be open to future question. It was a point expressly stipulated for, and we may assume was part of the consideration for their contract. I think the thing principally stipulated for was the ascertainment of the fact of the completion of the work; that fact ascertained, could no longer be questioned, and the prevention of future question was evidently the object of the provision. The mode of ascertaining it, I think, was subordinate. The mode agreed upon was doubtless a good one, but still I think we can regard it as a means to an end and I think if the end is still attainable by any just mode which the machinery of the Court can provide, it will be right to aid the plaintiffs in attaining it and not leave them to be disappointed of the end stipulated for because the means contemplated have been frustrated through the default

of the defendant. I think the English cases have proceeded upon this principle and in this spirit, and that it is only in circumstances that they differ from the case before us. I think this case is a proper one for relief. What is sought is expressly stipulated for and is material to the plaintiffs. I may add, though this may not be a sufficient ground in the absence of express agreement, its tendency is to prevent litigation." *Great Western Ry. Co.* v. *Des Jardins Canal Co.*, 9 Grant's Ch. 503.

CHAPTER XXIV.

RESCISSION OF THE CONTRACT.

Grounds of rescission.

§ 1020. THE rescission of a contract necessarily constitutes a bar to its performance by either of the parties to it. The rescission may result from—

(i.) A simple agreement between the parties to rescind the contract;

(ii.) An agreement between the parties to new terms which put an end to the terms of the old contract;

(iii.) An agreement between the original parties and a third person, by which the third person takes the place of one of the original contractors;

(iv.) An exercise of a power to rescind reserved by the contract to one or both of the contractors;

(v.) An exercise of the right to rescind which results to the injured party from misrepresentation, fraud or mistake in relation to the contract;

(vi.) An exercise of the right to rescind which results to one party from the other party's absolute refusal to perform the contract or unreasonable delay in its performance;

(vii.) An exercise of the right to rescind which results to one party from the other party's having made performance impossible;

(viii.) An exercise of the right to rescind which results to one party from the want of mutuality on the part of the other contracting party;

(ix.) An exercise of a statutory power to rescind in case of bankruptcy;

i. *A simple agreement to rescind.*

Agreement to rescind.

§ 1021. Generally speaking, the parties to a contract, supposing them both to continue *sui juris* and capable of contracting, have a right to determine it by an agreement to rescind it, or, to use other words, a waiver and abandonment by mutual consent of the parties: and this they may do even when the contract between them affects the interests of some third person; except, it seems, where there has been a part performance of it affecting the third person. So that where A. by deed contracted with B. that A.'s son should reside with and be brought up by B., who covenanted to leave him certain property, and there was no appreciable part performance as regards the child, so that his condition in life had not been altered, and no expectation on his part was defeated, it was held that A. and B. might by agreement rescind the deed, though it would, it seems, have been different if there had been any part performance affecting the child.[1]

Parol agreement to rescind writing or deed.

§ 1022. An agreement to rescind a contract which is in writing[2] or under seal[3] may clearly in Equity be by parol.

Objection from rule of law.

§ 1023. Against this conclusion various arguments have at various times been raised: it has been urged that the rule of law does not allow the variation of a contract that has been reduced to writing to be evidenced by parol: but to this it has been replied that rescission is not variation, that the law allows parol evidence of matters collateral to the contract,[4] and that rescission or waiver being in its nature subsequent and

[1] *Hill* v. *Gomme*, 1 Beav. 540; S. C. 5 My. & Cr. 250; *supra*, § 204.

[2] *Davis* v. *Symonds*, 1 Cox, 402, 405.

[3] *Hill* v. *Gomme*, 1 Beav. 540; *Lady Lanesborough* v. *Ockshott*, 1 Bro. P. C. 151. See, for the doctrine at Common Law, *Goss* v. *Lord Nugent*, 5 B. & Ad. 58; *Harvey* v. *Grabham*, 5 A. & E. 61.

[4] *Pym* v. *Campbell*, 6 El. & Bl. 370.

collateral to the contract may therefore be proved by parol testimony.[1]

Objection from Statute of Frauds.

§ 1024. Again, it has been urged that the Statute of Frauds precludes parol evidence of rescission of contracts relating to land: for a contract to waive a purchase of land as much relates to land as the original contract.[2] But it is replied that the rescinding contract is not the contract on which the action is brought, and that whilst the statute provides that no action shall be brought on any contract of the descriptions there specified, except it be in writing, it does not provide that every such written contract shall support an action. In the result it is perfectly well ascertained that a contract in writing, and by law required to be in writing, may in Equity be rescinded by parol;[3] and waiver by mutual parol agreement therefore furnishes a sufficient defence to an action for specific performance.[4]

Agreement to rescind evidenced by conduct.

§ 1025. Any circumstances or course of conduct from whence can be clearly deduced an agreement to put an end to the original contract will amount to a rescission of it. Thus, to give one or two examples: where, on default in payment of the purchase-money, one party said to the other that there must be an end of the negotiation, and the other assented, the contract was held to have been rescinded.[5] And where the vendor was allowed for a long period to remain in possession, and the purchaser's representatives seventeen years afterwards treated themselves, in a deed

[1] *Davis* v. *Symonds*, 1 Cox, 402, 406; *Vezey* v. *Rashleigh*, [1904] 1 Ch. 631, 636; 73 L. J. Ch. 422. This seems denied, as to waiver at Common Law, by Lord Hardwicke in *Bell* v. *Howard*, 9 Mod. 305.

[2] *Per* Lord Hardwicke in *Buckhouse* v. *Crosby*, 2 Eq. Cas. Abr. 33.

Gieman v. *Salisbury*, 1 Vern. 240; *Inge* v. *Lippingwell*, 2 Dick. 469; S. C. 5 Vin. Abr. 516, pl. 22; *per* Grant M.R. in *Ex parte Lord Rochester*, 7 Ves. 377. See also *Buckhouse* v. *Mohun*, 3 Sw. 434, n.; *Buckhouse* v. *Crosby*, 2 Eq. Cas. Abr. 32, pl. 14; *Vezey* v. *Rashleigh*, [1904] 1 Ch. 631; 73 L. J. Ch. 422.

[3] *Davis* v. *Symonds*, 1 Cox, 402; *Robinson* v. *Page*, 3 Russ. 114.

[4] *Carter* v. *Dean of Ely*, 7 Sim. 211.

between the parties, as entitled to interest on the debt which had been the consideration for the sale, and not to the rents and profits of the land, the contract was held to have been waived.[1]

Evidence must be clear.

§ 1026. But the Court must be satisfied of this total abandonment by both parties of the contract. "The Court," said Lord St. Leonards, "requires as clear evidence of the waiver as of the existence of the contract itself, and will not act upon less."[2] And in another case his Lordship said that, unless a party has by his conduct forfeited his right, "abandonment of a contract, according to the law of this Court, is a contract in itself;" and accordingly he refused to hold a loose conversation, which was alleged as a waiver of a contract for a lease, to amount to such a new contract.[3]

Absolute refusal of one party.

§ 1027. To these cases may be likened those where an absolute refusal of one party gives rise to a right to rescind in the other: the refusal must be clear, total, and unqualified.[4]

There must be total abandonment.

§ 1028. An agreement to rescind an existing contract must amount to a total abandonment of the whole contract, and not to a partial waiver of some of its terms: for to allow of such a proceeding in the case of a written contract would be to have a contract proved partly by writing, and partly by parol:[5] it would be a parol novation or variation[6] of a written contract, which is inadmissible where the law requires the contract to be evidenced by writing:[7] and therefore the

[1] *Earl of Rosse* v. *Sterling*, 4 Dow. 442. See also *Hill* v. *Gomme*, 1 Beav. 540; *Lowther* v. *Harver*, 41 Ch. D. 248, 268.

[2] *Carolan* v. *Brabazon*, 3 Jon. & L. 200, 209; *Whittaker* v. *Fox*, 14 W. R. 192; *Harrison* v. *Brown*, 14 W. R. 193, n.; *Clifford* v. *Kelly*, 7 Ir. Ch. R. 333; *Carton* v. *Bury*, 10 Ir. Ch. R. at p. 400.

[3] *Moore* v. *Crafton*, 3 Jon. & L. 438, 445; *Whittaker* v. *Fox*, 14 W. R. 192.

[4] *Ehrensperger* v. *Anderson*, 3 Ex. 148; *Avery* v. *Bowden*, 5 El. & Bl. 714; 6 id. 953; *infra*, § 1060.

[5] *Goss* v. *Lord Nugent*, 5 B. & Ad. 58.

[6] *Vezey* v. *Rashleigh*, [1894] 1 Ch. 634; 73 L. J. Ch. 422.

[7] *Infra*, § 1038.

agreement, or the circumstances from which it is inferred, must show an absolute dissolution and abandonment of the contract.[1]

Cases at Common Law.

§ 1029. The cases, of which many have arisen at Common Law (and which will be considered subsequently[2]), of the rescission of a contract by the one party, based on an absolute refusal to perform by the other, may well be brought under the head of agreement to rescind.

Conduct may prevent party's rights, yet not be a rescission.

§ 1030. It is to be borne in mind that the conduct of one party which may debar him from insisting on a contract may yet not prevent its being enforced against him or amount to a rescission of it:[3] and further, that there are many cases in which there has been such a departure in conduct from the contract between the parties, that the Court will refuse to execute the contract, though the effect of that conduct may not have been to substitute a valid contract for the old one, or absolutely to rescind the old one for all purposes.[4]

ii. *An agreement upon new terms.*

Second agreement inconsistent.

§ 1031. Where the parties to a contract come to a fresh agreement of such a kind that the two cannot stand together, the effect of the second agreement is to rescind the first. This is one form of *novatio* in the Roman Law.[5]

Alteration

§ 1032. But it is not every change in a term of the

Price v. *Dyer*, 17 Ves. 356; *Robinson* v. *Page*, 3 Russ. 114. Lord Thurlow seems to have thought that a part might be rescinded by parol, in *Jordan* v. *Sawkins*, 1 Ves. Jun. 401.

[2] See *infra*, § 1060.

[3] *Price* v. *Assheton*, 1 Y. & C. Ex. 82.

[4] An example of this seems to be afforded by the case of the *Paris Chocolate Co.* v. *Crystal Palace Co.*, 3 Sm. & Gif. 119.

[5] "Novatio est prioris debiti in aliam obligationem aut civilem aut naturalem transfusio et translatio: hoc est cum ex præcedenti causâ ita nova constituatur, ut prior perimatur." Dig. lib. xlvi. t. 2, c. 1. See also Instit. lib. iii. tit. 30, s. 3.

Not amounting to novation.

original contract which will amount to such a substitution as to extinguish that contract. Thus where there was a contract for a lease, and a parol agreement was subsequently made for the reduction of the rent which, it was contended, worked a rescission of the original contract, Lord St. Leonards said, "I should be sorry to hold that because a landlord abates the rent for a time or permanently, he therefore abandons the whole contract. . . . I should do a most mischievous thing were I to hold that a mere abatement of rent, which occurs every day, would altogether put an end to the existing contract, and create a new tenancy from year to year. The abatement of the rent was rather a confirmation of the existing tenancy, with a relaxation of one of the terms of it."[1]

Concession

§ 1033. So also a suggestion made by either party after contract for the purpose of obviating any difficulties in the completion of it, will not be taken to amount to a novation: so to hold would be to preclude parties from endeavouring to remove objections by concessions of any kind.[2]

Moore v. *Marrable*.

§ 1034. But where, the defendant being in possession of a house under a contract for a lease, the plaintiff and the defendant entered into a further contract to the effect that the plaintiff would accept H. W. as his tenant in lieu of the defendant and on the same terms the defendant undertaking to guarantee the rent during H. W.'s tenancy, and H. W. accordingly for several years occupied the property and paid rent, it was held that the latter contract must be considered a substitution for the former.[3]

Novation must be a valid contract.

§ 1035. As it is the existence of the new contract that works the extinction of the old, this new one must, of course, be a valid contract: so, that, for instance,

[1] *Clarke* v. *Moore*, 1 Jon. & L. 723, particularly 728 9.

[2] *Monro* v. *Taylor*, 8 Hn. 51. particularly 61.

[3] *Moore* v. *Marrable*, L. R. 1 C. P. 217.

where a second contract is alleged, but without consideration, the original contract will remain intact, and may be executed without regard to the second.[1]

Evidence.

§ 1036. This makes it requisite to consider the evidence of the new contract alleged.

1. Original contract by parol

(1.) Where the original contract is by parol, the new one may, of course, be by parol also.

2. Original contract in writing

§ 1037. (2.) Where the original contract was in writing, though not by law required so to be, the new contract may be evidenced in any way which establishes it according to the principles of the Court. Thus a contract, though under seal, may in the contemplation of a Court of Equity be waived by a course of conduct from whence the presumption of a new contract in substitution arises. "In ordinary partnerships," said Lord Eldon, "nothing is more clear than this, that although partners enter into a written agreement, stating the terms upon which the joint concern is to be carried on, yet if there be a long course of dealing, or a course of dealing not long, but still so long as to demonstrate that they have all agreed to change the terms of the original written agreement, they may be held to have changed those terms by conduct."[2] And accordingly, in another case, where a contract for a partnership was decreed to be specifically [illegible] Court directed an enquiry whether any and what [illegible]ations had been made in the original contract by the consent of the partners, and directed the deed [illegible] settled by the Master having regard to such var[illegible]

[illegible]inal [illegible]ct [illegible]w [illegible]ted [illegible] to be in writ[illegible]

§ 1038. (3.) Where the original contract is required to be in writing, the new one must [illegible] writing also, if the plaintiff insists on it as part [illegible] his case;[4] so that, for instance, where the relation

[1] *Robson* v. *Collins*, 7 Ves. 130.

[2] *Coast* v. *Harris*, T. & R. 496, 525; *Geddes* v. *Wallace*, 2 Bli. 270, 296; *Jackson* v. *Sedgwick*, 1 Sw. 460; per Lord Langdale M.R. in *Smith* v. *Jeyes*, 4 Beav. 505.

[3] *England* v. *Curling*, 8 [illegible] 129.

[4] *Vezey* v. *Rashleigh*, [1904] 1 C[illegible] 634; 73 L. J. Ch. 422.

landlord and tenant is constituted by writing, a contract for an abatement of rent set up by the plaintiff must be in writing also.[1] From the principles of the Court, however, in regard to part performance, an exception naturally arises, as the new contract may in this, as in any other case, be by parol, if supported by acts of part performance. Thus, for example, where W. leased to N. a house for eleven years, and was to allow 20*l.* for repairs, and this contract was signed and sealed by the parties, and N., finding that the repairs of the house would cost more than 20*l.*, laid out a further sum, in consequence of W.'s having promised to enlarge the term, but without mentioning for what term: Jekyll M.R. carried the parol contract into effect, on the ground that it was a new contract, and that the laying out the money was a part performance on the one part, which made it needful to execute the parol contract on the other.[2]

Where only extinguishment of original contract sought

§ 1039. But where the new contract is relied on only as an extinguishment of the old one, the mere fact that it is not in writing, and so could not be put in suit, seems to be no ground for denying its effect in rescinding the original contract. The Statute of Frauds does not make the parol contract void, but only prevents an action upon it; and it does not seem to be necessary to the extinction of one contract by another that the second contract could be actively enforced. The point has never, it is believed, been matter of decision.[3] But in point of principle it seems to stand on the same footing as a simple agreement to rescind.

[1] *O'Connor* v. *Speight*, 1 Sch. & Lef. 305.

[2] 5 Vin. Abr. 522, pl. 38.

[3] See Vinnius, Comment. in Inst. lib. iii. tit. 30. As to a parol contract at Common Law to vary (in effect) the terms of a deed, see *Nash* v. *Armstrong*, 10 C. B. N. S. 259.

iii. *In agreement with a third person.*

Third person substituted.

§ 1040. An agreement between the original parties and a third person, by which the third person takes the place of one of the original contractors, creates a new contract on the old terms between the new parties and rescinds the original contract.

Morton's case.

§ 1041. So where M. agreed with a company to take certain shares, and no payment was made by M., so that according to the contention of the liquidator of the company he had no right to the shares: and M. then transferred the shares to G., and G. was registered: it was held that, assuming the contention to be correct, the contract with M. was resting *in fieri*, and the transfer to which the company was a party constituted a new contract to take the same shares between the company and G., and that the old contract with M was discharged by the new contract with G.[1]

Re sale of shares.

§ 1042. So again where A. sold shares to B., and B. sold them to C., and A. executed a deed of transfer to C., which C. refused to register; A. brought a bill for specific performance against B., but it was held that A., having assigned the shares to C., had determined the privity of contract with B., and that he could not make a title to the shares. The main question in the case was whether C. was merely the nominee of B., or there was a substantive contract between A. and C.: the latter was the view taken under the circumstances.[2]

Novation in sales of shares.

§ 1043. In the chapter on contracts for the sale of shares,[3] it will be seen that questions of novation by the introduction of a third person arise upon sales on

[1] *Morton's case*, L. R. 16 Eq. 104. Cf. *Ex parte Beresford*, 2 Mac. & G. 197; *Moore* v. *Marrable*, L. R. 1 Ch. 217.

Slade v. *Fisher*, 5 De G. M. & G. 596; *Holden* v. *Hayn*, 1 Mer. 47; *Hall* v. *Laver*, 3 Y. & C. Ex. 191; *Stanley* v. *Chester and Birkenhead Railway Co.*, 9 Sim. 264; S. C. 3 My. & Cr. 773; *supra*, § 177.

[3] *Infra*, Part VI. chap. i.

the Stock Exchange. The reader is referred to the chapter for their bearing on the question of novation.

Other cases of novation.

§ **1044**. There are two other classes of contracts in respect of which the question of novation has frequently arisen—the first relating to continued dealings between A. and one set of partners and A. and another set of partners successors in trade to the former; and the second relating to the dealings of a person insured in one company and continuing to make payments to another with which the first had amalgamated, or to which it had assigned its business. The full discussion of these classes of cases would be too remote from the subject of these pages to be here proper.

iv. *Exercise of a power to rescind reserved by the contract.*

Express power to rescind.

§ **1045**. Generally speaking, one party to a contract cannot rescind it, except by consent of the other party: but this general principle is liable to exceptions. The first that falls to be noticed is where the contract reserves to one or both of the contracting parties a power in certain specified circumstances to rescind the contract.[1] Such stipulations are frequent in contracts for the sale of land. It will be desirable briefly to consider these stipulations.

Contract to be void in specified event.

§ **1046**. When a contract stipulates that on the happening of a certain event it shall be void, the construction put upon it by the Courts generally is, that it may on this event be rescinded by the party injured by such event. Thus a proviso that in case the vendor of an estate cannot deduce a good title, or the purchaser shall not pay the money at the appointed day, the contract shall be void, has been held to mean that

[1] *E.g. Marsden* v. *Sambell*, 28 W. R. 952; also *Whitbread & Co.* v. *Watt*, [1901] 1 Ch. 911. [1902] 1 Ch. 835, where the purchaser had an option to rescind.

in the former case the purchaser, and in the latter the vendor, may avoid the contract, and not that the contract is utterly void.[1]

Right, how to be exercised

§ 1047. A right to rescind a contract on the non-performance of an act, which act it is the duty of the party invested with the right of rescission to perform if he can, will not give such party a right to refuse to perform his part of the contract, but will be held to apply where the act cannot be done. Thus, where there is a condition, that, if any objection shall not be removed within a limited time, the vendor shall be at liberty to annul the contract, the vendor is not entitled to neglect to remove any objection, and then, on the strength of his own neglect, to annul the contract;[2] but the condition will entitle him to rescind the contract if, having done all that is incumbent on him, he fail to show a good title.[3] But where the right to rescind is limited to arise in case of his being unable or unwilling to do the act, the case is of course different, and he is generally exempted at his election from any obligation to do the act.[4] The person entitled to rescind is not bound to give notice of his intention so to do, nor to afford a *locus pœnitentiæ* to the other side.[5] But a notice of rescission given by a letter expressed to be written "without prejudice" is not a valid notice.[6]

The exercise must not be

§ 1048. Where the power to rescind is reserved in the event of the vendor's being unable or unwilling to

[1] *Roberts* v. *Wyatt*, 2 Taunt. 268. See also *Doe* d. *Nash* v. *Birch*, 1 M. & W. 402; *Hyde* v. *Watts*, 12 M. & W. 254.

[2] *Greaves* v. *Wilson*, 25 Beav. 290. Cf. *Re Jackson and Oakshott*, 14 Ch. D. 851; and *Smith* v. *Wallace*, [1895] 1 Ch. 385, 393.

[3] *Page* v. *Adams*, 4 Beav. 269.

[4] *Tanner* v. *Smith*, 10 Sim. 410; *Medley* v. *Cook*, 2 Ha. 106; *Duddell* v. *Simpson*, L. R. 2 Ch. 102, varying S. C. L. R. 1 Eq. 578; *Gray* v. *Fowler*, L. R. 8 Ex. 249. See, however, *Powell* v. *Powell*, L. R. 19 Eq. 422; *Re Jackson and Oakshott*, 14 Ch. D. 851.

[5] *Duddell* v. *Simpson*, *ubi supra*; *Re Dames and Wood*, 29 Ch. D. 626; *Re Starr-Bowkett Society and Sibun*, 42 Ch. D. 375.

[6] *Re Weston and Thomas' Contract*, [1907] 1 Ch. 244; 76 L. J. Ch. 179.

unreasonable.

comply with a requisition by the purchaser, can he exercise the power arbitrarily at his own will and pleasure, or can he not? Is he at liberty to exercise it without showing some reasonable ground for refusing to comply with the requisition, or must he show such ground? Opinions have not been uniform on this point. In one case[1] it was observed by Bacon V.C. that "the unwillingness is as much a part of the contract as the inability." In an earlier case[2] Turner L.J. seems to have been of a different opinion; and it must now be considered as the result of the authorities and dicta that a vendor cannot rescind capriciously and arbitrarily,[3] that is to say, without any reasonable cause.[4] So where a vendor who had reserved such a power to himself, in case of requisitions on conveyances, unreasonably insisted that certain words should be inserted in a conveyance, and the purchaser rightly resisted the insertion, it was held by Pearson J. that the vendor had no right to rescind.[5]

Burden of proof

§ **1049**. When the reasonableness of the exercise of the power is in question, on which side does the burthen

[1] *Re Dames and Wood*, 27 Ch. D. 172; but cf. *Re Monckton and Gilzean*, 27 Ch. D. 555.

[2] *Duddell* v. *Simpson*, 2 Ch. 102.

[3] *Re Dames and Wood*, 29 Ch. D. 626; *Re Starr-Bowkett Society and Sibun*, 42 Ch. D. 375; *Re Jackson and Haden's Contract*, [1905] 1 Ch. 603; [1906] 1 Ch. 412.

[4] *Quinion* v. *Horne*, [1906] 1 Ch. 596, 603; 75 L. J. Ch. 293, in which case Farwell J. pointed out that proof of *mala fides* on the part of the vendor is not necessary. "A man may be as irrational as he pleases, and yet be honest." Distinguish *Woolcott* v. *Peggie*, 15 App. Cas. 42, 44. In *Quinion* v. *Horne*, *ubi supra*, a charge of *mala fides* having been made and having failed, no costs were given to the purchaser (plaintiff), although he succeeded.

[5] *Hardman* v. *Child*, 28 Ch. D. 712; cf. *Re Monckton and Gilzean*, 27 Ch. D. 555, where the power was held not to include the objection made; and see *Re Weston and Thomas' Contract*, [1907] 1 Ch. 244; 76 L. J. Ch. 179, where, by a condition of sale, the vendors were to be at liberty to rescind in the event of any purchaser insisting upon a requisition which they should be, on any "reasonable ground," unwilling to comply with; and it was held that the vendors were not entitled to rescind merely because a purchaser asked them to clear off a small contingent incumbrance, and they did not choose to do so.

of proof lie? It may be suggested that it ought to lie on the party asserting that it has been unreasonably exercised. as to reasonableness.

§ 1050. Instances of the exercise of this right to rescind may be found in the cases referred to in this and the next section.[1] In one case the contract stipulated that if from any cause whatever the purchase was not completed by the time specified, the vendor was to be at liberty to annul the contract. At the day appointed the parties met, and the vendor offered and the purchaser accepted the vendor's undertaking to satisfy certain unsatisfied requisitions. Nevertheless the purchaser refused to pay the purchase-money, whereupon the vendor said that he would annul the contract if the money was not paid: the purchaser refused to pay till the requisitions were satisfied: the vendor on the same day annulled the contract by notice, and successfully maintained a bill for an injunction to restrain any proceedings at Law on the contract.[2] Instances of exercise of right.

§ 1051. In another case, one condition provided that if any objection to title were persisted in, the vendor might rescind the contract: another provided that if any mistake should appear in the description of the property or of the vendor's interest therein, compensation should be given. A question arose as to the rights of the lord of the manor to certain mines or minerals: the purchaser claimed compensation and the vendor rescinded: the purchaser brought his bill for performance with compensation: the vendor relied on his rescission. The Court held that the question in dispute was one of title, and that the vendor was therefore entitled to rescind.[3] Similarly it has been *Mawson* v. *Fletcher.*

[1] See, too, *infra*, § 1196; and *Re Simpson and Thomas Moy's Contract*, 53 Sol. Jo. 376, where it was held that the vendors, having acted honestly under a mistake, were entitled to rescind.

[2] *Hudson* v. *Temple*, 29 Beav. 536. Distinguish *Turpin* v. *Chambers*, ib. 104.

[3] *Mawson* v. *Fletcher*, L. R. 10 Eq. 212; 6 Ch. 91. Distinguish *Re Jackson and Haden's Contract*,

held[1] that the existence of a latent right of way may be an objection to title, entitling a vendor to rescind under a condition in that behalf, though falling within another condition providing for compensation for errors of description.

Vendor without title to the whole or a part of the property contracted to be sold.

§ 1052. A condition enabling the vendor to annul the sale if the purchaser should make any objection or requisition which the vendor should be unwilling on the ground of expense or otherwise to comply with, does not enable a vendor who shows no title whatever to rescind. Such a vendor was consequently made to pay damages for his non-performance.[2] But where the vendor, a mortgagee of leaseholds, had under a sub-demise a substantial interest in the term, though he could not make a title to the whole of it, he was held to be entitled to annul the sale, by virtue of a condition empowering him so to do in the event of any objection being made as to any "matter or thing relating or incidental to the sale," which words were considered by the Court to include a matter of conveyance.[3] Such a condition, however, is applicable only to an honest case.[4]

Within what time

§ 1053. Whether a right to rescind a contract must be exercised within a reasonable time after it arises, or

[1905] 1 Ch. 603; [1906] 1 Ch. 412, where vendors had contracted to sell a villa by a description wide enough to include the minerals under it, to which minerals they had no title; and it was held that they had by their own careless conduct precluded themselves from rescinding under a rescission condition, and that the purchaser was entitled to a conveyance with compensation in respect of the minerals, pursuant to another condition providing that any error or misstatement should form the subject of compensation.

[1] *Ashburner* v. *Sewell*, [1891] 3 Ch. 405, 409.

[2] *Bowman* v. *Hyland*, 8 Ch. D. 588, discussed and explained in *Re Jackson and Haden's Contract*, [1906] 1 Ch. 412, 419 (C. A.), where the failure of title was as to a part only of the property contracted to be sold; and see *Re Jackson and Oakshott*, 14 Ch. D. 851, cited *infra*, Part V. chap. i. § 1197.

[3] *Re Deighton and Harris's Contract*, [1898] 1 Ch. 458; 16 W. R. 311.

[4] *Re Deighton, &c. Contract*, *ubi supra*, at p. 463. Cf. *Smith* v. *Wallace*, [1895] 1 Ch. 385.

at any time before it is waived or abandoned, may be open to question.[1] But it is conceived to be clear that a party who, having a right to rescind, either himself does some act under the contract which involves or implies the continued existence of the contract, or suffers the other party to do such act without asserting the right to rescind, has thereby lost that right. And where a vendor, being in a position to rescind, tried to play fast and loose with the purchaser, intentionally delaying to inform him whether the contract was to go on or not, while he was seeking to effect a sale to another person, the purchaser was held entitled to treat the contract as rescinded.[2]

right must be exercised.

§ **1054**. Again, where conditions of sale stipulated that if there was any objection which the vendor should be unable or unwilling to remove he might rescind the contract, and the purchaser should be entitled to his deposit without interest or costs, it has been held that such a condition is confined to the objections first taken after the abstract is delivered, and that a treaty between the parties for the completion of the purchase is a waiver of the condition,[3] it being, of course, evidence of the vendor's willingness to remove the objection. Such a condition will apply, if it be acted on by the vendor the moment the defect is known to him, but will not allow him to spend time in fruitless efforts to remove the objection, and then to rescind the contract on the terms of the condition.[4] And so where money is payable by instalments, and there is a power to rescind on breach of the contract, the receipt of money due on a subsequent instalment is a waiver of the right to rescind

Waiver or loss of right to rescind.

[1] See *Morrison* v. *Universal Marine Insurance Co.*, L. R. 8 Ex. 40, 197, particularly 205; and see *Marsden* v. *Sambell*, 28 W. R. 952; *Kerr* v. *Cruise*, 1 B. P. C. L. 181; and *supra*, § 739.

[2] *Smith* v. *Wallace*, [1895] 1 Ch. at pp. 390, 391.

[3] *Tanner* v. *Smith*, 10 Sim. 410; *Morley* v. *Cook*, 2 Ha. 106. See also *Cutts* v. *Thodey*, 13 Sim. 206.

[4] *M'Culloch* v. *Gregory*, 1 K. & J. 286; *Lane* v. *Debenham*, 17 Jur. 1005.

for default in respect of a previous one.[1] So the receipt of royalty at a reduced rate is a bar to the exercise of a right of rescission reserved on the non-payment of royalty at a higher rate.[2] And a vendor who has elected to insist on specific performance of a contract cannot afterwards turn round and rescind it.[3]

Separate breaches.

§ 1055. Where the contract stipulates for a right of rescission in respect of separate breaches, the waiver of one will not waive another: so that where there was a contract for the payment of money by instalments, and that time should be of the essence, and further, a power to rescind on breach of the contract, it was held that each default of payment of an instalment at the stipulated time was a fresh breach of the contract, on which the right to rescind arose.[4]

Condition for rescission limited by another for compensation.

§ 1056. Where there are conditions for compensation and for rescission[5] the Courts will, for obvious reasons, generally construe them so as to confine the right to rescind to cases not within the condition for compensation. Thus, in a case in which particulars of sale by error, but without fraud or gross negligence on the part of the vendor, described part of the property as a customary leasehold holden of a manor renewable every twenty-one years on payment of a customary fine, and the property was in fact holden only for a term of twenty-one years with no customary right of renewal; the fourth condition of sale, after providing for the delivery of the abstract and of objections to the title, stipulated that the vendor should be at liberty at any time after the delivery of such objections to vacate the sale, and that the deposit was thereupon to be returned without interest, costs, or other compensation; the fifth condition of sale provided that the purchaser should

[1] *Hunter* v. *Daniel*, 4 Ha. 420.

[2] *Warwick* v. *Hoaque*, 3 Mac. & G. 60. See also *Langridge* v. *Payne*, 2 J. & H. 423.

[3] *Gardom* v. *Lee*, 3 H. & C. 651.

[4] *Hunter* v. *Daniel*, 4 Ha. 420.

[5] Cf. *infra*, §§ 1292, 1293.

accept the existing lease and the assignment to the vendor as a sufficient title to this property; and the sixth condition stipulated that if through any mistake the estate should be improperly described or any error or mis-statement be inserted in the particular, the same should not vitiate the sale, but that compensation should be made by either party, as the case might be. The purchaser filed a bill for specific performance with compensation, contending that the error was within the sixth condition: the vendor resisted performance and sought to vacate the contract, on the ground that it was within the fourth condition. Lord Hatherley (then V.C.), referring to the fifth condition as explaining the use of the word "title" in the condition, held that this was rather a mis-statement of the subject-matter of the sale than of the vendor's title to it, and therefore within the sixth and not within the fourth condition of sale; and he accordingly enforced specific performance with compensation:[1] and Lord Romilly M.R. put a like construction on similar conditions in a similar case.[2]

Cannot be exercised after adverse decision.

§ 1057. A right to rescind on the ground of the vendor being unable or unwilling to meet a requisition cannot be exercised after the vendor has sought to obtain a decision in his favour on the requisition, and judgment has been given against him: and this is the case even when the condition gives the power expressly, notwithstanding any previous litigation: litigation in this clause does not include adverse judicial decision.[3] But where a condition empowered the vendor to rescind, in the event of any objection being insisted on, "notwithstanding any intermediate negotiation," but the contract said nothing about intermediate litigation, and

[1] *Painter* v. *Newby*, 11 Ha. 26; *Nelthorpe* v. *Holgate*, 1 Coll. 203. See also *Mawson* v. *Fletcher*, L. R. 10 Eq. 212; 6 Ch. 91.

[2] *Hoy* v. *Smythies*, 22 Beav. 510.

[3] *Re Arbib and Class's Contract*, [1891] 1 Ch. 601.

the purchaser, having insisted on an objection, commenced an action for return of his deposit and other relief, a notice to rescind given by the vendor five days after the issue of the writ was held to be not too late. Still, if a vendor, having power to rescind notwithstanding any pending litigation, unreasonably allows proceedings by the purchaser to go on, and then at the last moment rescinds, he may be ordered to pay the costs of the proceedings.[2]

Action claiming rescission.

§ 1058. It remains to remark that the plaintiff, bringing an action for the specific performance of a contract, may claim in the alternative that, if the contract cannot be enforced, it may be rescinded and delivered up to be cancelled,[3] provided that the alternative relief is based on the same state of facts, though with different conclusions as to law.[4] When the action is brought by the vendor, and the purchaser has been in possession, this alternative claim may embrace an account of the rents and profits.[5] But, for the reason already stated, a suit to set aside a transaction for fraud or, in the alternative, for specific performance of a compromise could not be sustained in the Court of Chancery.[6] And notwithstanding the provisions of the Rules of the Supreme Court as to alternative claims for relief, it seems probable that the same conclusion would still be arrived at, on the ground that the claims were inconsistent and embarrassing.

[1] *Isaacs* v. *Towell*, [1898], 2 Ch. 285.

[2] *Re Spindler and Mear's Contract*, [1901] 1 Ch. 908, 910.

[3] *Mosley* v. *Virgin*, 3 Ves. 184; *Costigan* v. *Hastler*, 2 Sch. & Lef. 160, 166; *Slapylton* v. *Scott*, 13 Ves. 425; *Clarke* v. *Faux*, 3 Russ. 320; *King* v. *King*, 1 My. & K. 442; *Douglass* v. *London and North-Western Railway Co.*, 3 K. & J. 173; *Forster* v. *Great Eastern Railway Co.*, W. N. 1868, 122.

[4] *Rawlings* v. *Lambert*, 1 J. & H. 158; and see R. S. C. Ord. XX. r. 6.

[5] *Williams* v. *Shaw*, 3 Russ. 178, n.

[6] *Cawley* v. *Poole*, 1 H. & M. 50. Distinguish *Boyd* v. *Easton*, 7 Ch. D. 1.

v. *Rescission on the ground of fraud, misrepresentation, or mistake.*

Deceived party may rescind.

§ 1059. Either party to a contract who has been led into it by fraud, or fraudulent misrepresentation, may rescind the contract:[1] and either party to a contract who by the fraud of the other party has been prevented from obtaining the full benefit of it may rescind the contract.[2] This right is discussed in the chapter on Fraud.[3]

Mistake, and misrepresentation without fraud, are also under some circumstances grounds for rescission.[4] Where, for instance, the contract had been induced by a misrepresentation of fact made, not fraudulently, by the defendant's agent, rescission was decreed, and repayment of the deposit with interest was ordered.[5] In another case,[6] it was held that the purchaser was entitled, on the ground of non-fraudulent misrepresentation, to be discharged from the contract, and that, the whole contract being vitiated by the misrepresentation, the vendors could not avail themselves of a condition for rescission in the contract; and it was further held that, the sale having been under the direction of the Court, the costs recoverable by the purchaser included the costs occasioned by his bidding for and becoming the purchaser of the property.

Generally, when a person wishes to escape from his contract on the ground of misrepresentation, he must

[1] *Onions* v. *Cohen*, 2 H. & M. 354, 361.

[2] *Panama, &c. Telegraph Co.* v. *India-rubber, &c. Co.*, L. R. 10 Ch. 515.

[3] *Supra*, Part III. chap. xiv.: and cf. *Cargill* v. *Bower*, 10 Ch. D. 502, and *per* Lord Blackburn, in *Brownlie* v. *Campbell*, 5 App. Cas. at p. 949.

[4] See *supra*, § 782 (mistake); and cf. *Cullen* v. *O'Meara*, I. R. 1 C. L. 640; 4 C. L. 537 (misdescription); *Adam* v. *Newbigging*, 13 App. Cas. 308; S. C. 34 Ch. D. 583 (misrepresentation without fraud).

[5] *Wauton* v. *Coppard*, [1899] 1 Ch. 92, 98.

[6] *Hollinell* v. *Seacombe*, [1906] 1 Ch. 426, 431, 431; 75 L. J. Ch. 289.

come to the Court immediately. But when a purchaser discovers that a representation made to him by a vendor is untrue, and thereupon the vendor suggests that, if time be given him, the mis-representation may be cured and the purchaser put in as good a position as if the representation had been true, then the purchaser does not, by giving the vendor time, lose his right at the end of the time, if the vendor fails to make good his suggestion, to rely on the misrepresentation as a ground for determining the contract.[1]

A party suing for rescission on the ground of misrepresentation cannot consistently ask for any interlocutory order which would have the effect of enforcing specific performance of a part of the contract.[2]

vi. *Where one party has refused to perform or unreasonably delayed performance.*

Refusal to perform.

§ 1060. Where one party to a contract absolutely refuses to perform his part of the contract when the hour for performance has arrived,[3] the other party may accept that refusal and thereupon rescind the contract. So that where a man contracted to buy straw to be delivered by instalments, and to pay on delivery, and after a time refused to pay for the last load delivered, and insisted on always keeping one payment in arrear, the other party was held entitled to rescind the contract.[4] But to justify rescission for this reason the refusal to perform must not be mere non-performance or neglect in performance: "there must have been

[1] *Tibbatts* v. *Boulter*, 73 L. T. at p. 535.

[2] *Cook* v. *Andrews*, [1897] 1 Ch. at p. 270. In this case, however, an interim receiver was appointed, in order to preserve the property from forfeiture.

[3] *Danube and Black Sea Railway &c. Co.* v. *Xenos*, 11 C. B. N. S. 152, 13 C. B. N. S. 825.

[4] *Withers* v. *Reynolds*, 2 B. & Ad. 882. Distinguish *Cornwall* v. *Henson*, [1900] 2 Ch. 298, 303.

something equivalent to saying, 'I rescind this contract'—a total refusal to perform it, or something equivalent to that which would enable the plaintiff on his side to say, 'If you rescind the contract on your part, I will rescind it on mine.'[1]

Must be absolute.

§ **1061**. The true question is that laid down in the case of *Frost* v. *Burr*,[2] viz., whether the acts and conduct of the party (including no doubt the words as part of the conduct) evince an intention no longer to be bound by the contract, or, in other words, whether the conduct of the party who has broken the contract is such that the other party is entitled to conclude that the party breaking the contract no longer intends to be bound by its provisions.[3] The answer in every case is an inference from the facts. On this principle, that the refusal must be absolute, it was held, in a case where a defendant to a specific performance action stood by the defence that he was unwilling to complete that the plaintiff was not at liberty at the hearing, at which the defendant did not appear, to ask for an immediate judgment for rescission and repayment of the deposit.[4]

Refusal as to part.

§ **1062**. The cases go yet a step further, and show that even before the time for performance has come[5] there may be a breach by anticipation by reason of a wrongful repudiation before the time of performance.[6]

[1] *Clarapeyer* v. *Anderson*, 3 Ex. 118, *per* Parke B. at p. 158; *Hochster* v. *De la Tour*, 2 Ell. & Bl. 678; *Frost* v. *Burr*, L. R. 9 C. P. 208; *Mersey Steel and Iron Co.* v. *Naylor*, 9 App. Cas. 434.

L. R. 9 C. P. 208; approved by the Court of Appeal in *Mersey Steel Co.* v. *Naylor*, 9 Q. B. D. 648, affirmed 9 App. Cas. 434.

Rhymney Railway Co. v. *Brecon, &c. Railway Co.*, 69 L. J. Ch. at p. 813; S. C. 83 L. T. 111; 49 W. R. 116; *Cornwall* v. *Henson*, C. A., [1900] 2 Ch. 298, 303; reversing S. C. [1899] 2 Ch. 710.

[4] *Stone* v. *Smith*, 35 Ch. D. 188. As to the form of the judgment in this case, see [1909] 1 Ch. at p. 262.

[5] *Hochster* v. *De la Tour*, 2 Ell. & Bl. 678; *Frost* v. *Knight*, 7 Ex. 111; *Johnstone* v. *Milling*, 16 Q. B. D. 460, 473; and *Dansk Rekylriffel Syndikat Aktieselskab* v. *Snell*, [1908] 2 Ch. at p. 157. See, too, *Maconochy* v. *Clayton*, [1898] 1 I. R. 291, 309.

Insolvency

§ 1063. Where, on becoming insolvent, a contracting party practically gives notice to his creditors and those who have contracted with him that he does not mean to pay any of his debts or perform any of his contracts, there is a refusal which may be accepted by the other side, and that by conduct as well as by express rescission.[1]

Defect of subject matter

§ 1064. Again, where the contract is for the sale of a thing, and the only thing which the vendor can convey is different from the thing contracted for in an essential particular, the purchaser may treat this as a non-performance by the vendor which gives a right to rescind; and he may in some cases do this, as we have already seen, even when a clause for compensation exists in the contract.[2]

Delay.

§ 1065. The right to rescind [illegible] arises from unreasonable delay in performance will be considered in the next chapter.[3]

vii. *Where one party has made performance impossible.*

Election of other party.

§ 1066. It is a clear principle of law that if by any act of one of the parties the performance of a contract be rendered impossible, the other party may, at his election, rescind the contract:[4] so that where A. contracted with B. to supply B. with a chariot for five years, which A. was to repair, and before the five years had expired A. made over the chariot to his successor in trade, and thereby disabled himself from performing the unperformed part of the contract, B. was held at liberty to rescind it.[5] Similarly it seems clear that a contract to convey an estate may be rescinded if the

[1] *Ex parte Chalmers*, L. R. 8 Ch. 289; *Morgan* v. *Bain*, L. R. 10 C. P. 15; cf. *Scrimgeour's claim*, L. R. 8 Ch. 921.

[2] See *supra*, § 877.

[3] See, too, *Micholls* v. *Corbett*, 31 Beav. 376.

[4] *Panama, &c. Telegraph Co.* v. *India-rubber, &c. Co.*, L. R. 10 Ch. 515, 532.

[5] *Robson* v. *Drummond*, 2 B. & Ad. 303.

vendor convey the estate to a third person;[1] that a contract to pay in goods may be rescinded if the payer part with the goods;[2] that a contract to write an essay for a particular series may be rescinded if the publisher finally abandon the series;[3] that a contract to accept and pay for a telegraph cable on the certificate of an engineer may be rescinded if the party to deliver the cable bribe the engineer.[4]

Impossibility must be in an essential part

§ 1067. The impossibility must, it seems, arise in respect of some substantial or essential part of the contract;[5] though it is not perhaps clear on principle why a contracting party who disables himself from performing *modo et forma* should be at liberty to allege that the incapacity which he has produced is in a non-essential particular.

Impossibility provided be fraud.

§ 1068. But even though the particular in respect of which the impossibility arises may not be of the essence of the contract, yet if it be brought about by the fraudulent misconduct of the defendant, the plaintiff's right to rescind is clear in Equity. Thus where Company A. contracted with Company B. to lay a telegraph cable for Company B. and then bribed the engineer for whose services in certifying as to the work the contract provided, Mellish L.J. held that even if the certificate of the engineer could not be considered so much of the essence of the contract that the plaintiff would at Common Law have been entitled to rescind, yet that the fraudulent misconduct of the defendant company having made it impossible that the plaintiff company could have the full benefit of the contract, they were at liberty to rescind.[6]

[1] *Palmer* v. *Temple*, 9 A. & E. 508; *Lovelock* v. *Franklyn*, 8 Q. B. 371. *Ford* v. *Tiley*, 6 B. & C. 325.

[2] *Kyd* v. *Harwood*, 2 C. B. 905. *Planché* v. *Colburn*, 8 Bing. 14.

[3] *Panama, &c. Telegraph Co.* v. *India-rubber, &c. Co.*, L. R. 10 Ch. 515.

[4] *Panama, &c. Telegraph Co.* v. *India-rubber, &c. Co.*, L. R. 10 Ch. at p. 532.

[5] *Panama, &c. Telegraph Co.* v. *India-rubber, &c. Co.*, L. R. 10 Ch. 515.

viii. *Want of mutuality.*

Rescission for want of mutuality.

§ **1069**. In some cases at any rate the want of mutuality may be a ground justifying rescission. "Where a person," said the late Lord Romilly M.R., "sells property which he is neither able to convey himself, nor has the power to compel a conveyance of it from any other person, the purchaser as soon as he finds that to be the case may say, 'I will have nothing to do with it.'"[1] This view has been confirmed by subsequent cases, and has been recently acted on by the Court of Appeal.[2]

ix. *Statutory power.*

Bankruptcy Act, 1883, s. 55 (5).

§ **1070**. Under sect. 55 of the Bankruptcy Act, 1883, the Court having jurisdiction in a bankruptcy may, on the application of any person who is, as against the trustee, entitled to the benefit of or subject to the burden of a contract made with the bankrupt, make an order rescinding the contract on such terms as to payment by or to either party of damages for the non-performance of the contract, or otherwise, as to the Court may seem equitable; and any damages payable under the order to any such person may be proved by him as a debt in the bankruptcy.

[1] *Farrar* v. *Nash*, 35 Beav. 171.

[2] *Brewer* v. *Broadwood*, 22 Ch. D. 105; *Bellamy* v. *Debenham*, [1891] 1 Ch. 413. See, too, *Macaulay* v. *Clayton*, [1898] 1 I. R. 291, 300.

CANADIAN NOTES.

Rescission on Purchaser's Delay.

The Court will not encourage speculative purchasers. Where, therefore, it was shewn that the purchaser had not the means of paying for the property contracted to be sold, and, after several demands upon him to complete the purchase, the vendor sold to a third party, with the knowledge of the original purchaser who did not forbid the sale and appeared to acquiesce in it, but afterwards, when by reason of the construction of a railroad, the lands had increased very much in value, filed a bill to obtain a specific performance of the contract, the Court dismissed his bill with costs. *Langstaffe* v. *Mansfield*, 4 Grant's Ch. 607.

Rescinding Abortive Contract.

It was held by the Chancellor, in *Grange* v. *Conroy*, 1 Ch. Ch. Ont. 198, that in a suit by a vendor for specific performance, where a decree for sale has been made with a proviso that if the same prove abortive the contract is to be rescinded, and the sale has proved abortive and an application is made to rescind the contract, it must be shewn that the purchase money has not been paid.

CHAPTER XXV.

LAPSE OF TIME.

Nature of the defence.

§ **1071**. The lapse of time before application to the Court for its interference to enforce an uncompleted contract, or the fact that the plaintiff has not performed his part of the contract at the time specified, may furnish grounds of defence to an action for specific performance.

Time formerly differently regarded at Law and in Equity.

§ **1072**. Before the Judicature Acts, the plaintiff in a Common Law Court had to show that all things on his part to be performed had been performed within a reasonable time, or, where a time was specified in the contract, within the time so specified: and at Common Law time was thus always of the essence of the contract.[1] But in Equity the question of time was differently regarded: for Courts of Equity, discriminating between these formal terms of a contract, a breach of which it would be inequitable in either party to insist on as a bar to the other's rights, and those which were of the substance and essence of the contract,[2] and applying to contracts the principles which governed the interference of those Courts in

[1] *Berry* v. *Young*, 2 Esp. 640, n.; *Webb* v. *Fort*, 4 Taunt. 334; *Stowell* v. *Robinson*, 3 Bing. N. C. 928; *Alexander* v. *Godwin*, 1 Bing. N. C. 671; *Vernon* v. *Stephens*, 2 P. Wms. 66; and cf. *Noble* v. *Edwardes*, 5 Ch. D. 378. Where a condition as to time is a mutual stipulation and not a condition precedent, the lapse of time is of course no bar to an action on the contract. *Hall* v. *Cazenove*, 4 East, 477; *Havelock* v. *Geddes*, 10 East, 555; *Borneman* v. *Tooke*, 1 Camp. 377; *Lucas* v. *Godwin*, 3 Bing. N. C. 737; *Lamprell* v. *Billericay Union*, 3 Ex. 283.

[2] *Parkin* v. *Thorold*, 16 Beav. 59.

relation to mortgages,[1] held time to be *primâ facie* non-essential, and accordingly granted specific performance of the contracts after the time for their performance had been suffered to pass by the party asking for the intervention of the Court, if the other party had not shown a determination not to proceed.[2] "When," said Leach V.C., "a Court of Equity holds that time is not of the essence of a contract it proceeds upon the principle that, having regard to the nature of the subject, time is immaterial to the value, and is urged only by way of pretence and evasion."[3]

Provision of the Judicature Acts as to time.

§ 1073. Now, however, stipulations in contracts as to time or otherwise, which would not, before the date of the commencement of the Judicature Act, 1873, have been decreed to be or to have become of the essence of such contracts in a Court of Equity, receive in all Courts the same construction and effect as they would formerly have received in Equity.[4] In other words, the doctrines and rules of Equity as to the effect of lapse of time are now applicable to and govern every contract that falls within the jurisdiction of any of the Courts, superior or inferior,[5] of this country. So that, for instance, whilst before the Judicature Act the times fixed by a contract for payment and completion were, according to law, of the essence of the contract, so that non-payment by the default of the purchaser on the day fixed authorized the vendor to treat the contract as rescinded,—since the Judicature Act the purchaser has

[1] See *per* Lord Eldon in *Seton* v. *Slade*, 7 Ves. 273.

[2] *Pincke* v. *Curteis*, 4 Bro. C. C. 329; *Radcliffe* v. *Warrington*, 12 Ves. 326. See *per* Lord Redesdale in *Lennon* v. *Napper*, 2 Sch. & Lef. 684; *per* Lord Romilly M.R. and Lord Cranworth (when V.C.) in *Parkin* v. *Thorold*, 16 Beav. 59; 2 Sim. N. S. 1; *Baker* v. *Metropolitan Railway Co.*, 31 Beav. 504 (completion within a reasonable time).

[3] In *Dobree* v. *Rothschild*, 1 S. & S. at p. 508. Consider *Spencer* v. *Booth*, [1909] A. C. 576, 581.

[4] Jud. Act, 1873, s. 25 (7); Jud. Act, 1875, s. 10. Cf. *Noble* v. *Edwards*, 5 Ch. D. 378.

[5] See Jud. Act, 1873, s. 91.

a reasonable time after the stipulated day within which to pay before the vendor can rescind.[6]

These doctrines and rules, then, we now proceed to consider.

§ **1074**. It is proposed to discuss the subject in hand under the following heads; viz.:— Division of the subject.

(i) Cases where time was originally of the essence of the contract:

(ii) Cases where time, though not originally of the essence of the contract, has been engrafted into its essence by subsequent notice:

(iii) Cases where the delay has been so great as to constitute laches disentitling the party to the aid of the Court, and evidencing an abandonment of the contract irrespectively of any particular stipulation as to time:

(iv) Cases where time does not run:

(v) Cases where the objection on the ground of lapse of time is waived.

i. *Time originally of the essence of the contract.*

§ **1075**. Time is originally of the essence of the contract, in the view of a Court of Equity, whenever it appears to have been part of the real intention of the parties that it should be so, and not to have been inserted as a merely formal part of the contract.[1] As this intention may either be separately expressed, or may be implied from the nature or structure of the contract, it follows that time may be originally of the essence of a contract, as to any one or more of its terms, either by virtue of an express condition in the contract itself making it so, or by reason of its being implied. It will be convenient to consider the cases separately; premising, however, that the point that When time is of the essence.

[1] *Howe* v. *Smith*, 27 Ch. D. 89, at p. 103.

[6] *Hipwell* v. *Knight*, 1 Y. & C. Ex. 401.

time is of the essence of the contract is one which should be made by the party insisting on it without delay.[1]

By express condition.

§ **1076**. The Court of Chancery seems at one time to have gone so far in its disregard of time as to consider that it was of no consequence in Equity:[2] and accordingly Lord Thurlow[3] seems to have maintained that no expression in the contract could make time of the original essence of it. Lord Kenyon, M.R., however, maintained the contrary:[4] Lord Thurlow's doctrine was doubted by Lord Eldon:[5] and accordingly express stipulations rendering time of the essence have repeatedly been maintained as valid and binding in Equity,[6] in respect, for instance, of covenants for the renewal of leases,[7] and stipulations as to the time for payment of the deposit[8] or the balance of the purchase-money.[9]

Condition must be clear.

§ **1077**. In order to render time thus essential, it must be clearly and expressly stipulated, and must also have been really contemplated and intended by the parties that it shall be so: it is not enough that a time is merely mentioned during which or before which something shall be done.

Instances.

§ **1078**. Therefore in a case where the contract, dated the 23rd of October, was to grant a new lease "upon condition" of the intending lessee paying on or before the end of the month a premium of 1,000 guineas, Lord Eldon nevertheless refused (on an interlocutory application) to treat the period limited by the contract as essential, considering that, upon the facts of the

[1] *Monro* v. *Taylor*, 8 Ha. 51, 62.

[2] *Gibson* v. *Patterson*, 1 Atk. 12, which has been thought an erroneous report. See *Lloyd* v. *Collett*, 4 Bro. C. C. 469, n. (3).

[3] *Gregson* v. *Riddle*, cited by Romilly, *arg.* 7 Ves. 268.

[4] *Mackreth* v. *Marlar*, 1 Cox, 259.

[5] In *Seton* v. *Slade*, 7 Ves. 270.

[6] *Hudson* v. *Bartram*, 3 Mad. 440; *Lloyd* v. *Rippingale*, cited 1 Y. & C. Ex. 410.

[7] *Baynham* v. *Guy's Hospital*, 3 Ves. 295.

[8] *Honeyman* v. *Marryat*, 21 Beav. 14, 24.

[9] *Barclay* v. *Messenger*, 22 W. R. 522; 43 L. J. Ch. 449.

case, the amount of the premium was really the only thing contemplated by the parties, and that there was nothing to show that payment at a particular day was the object.[1]

So, again, where a day was specified for the delivery of the abstract, it was held non-essential, although the purchaser upon its expiration immediately refused to proceed:[2] and in *Parkin* v. *Thorold*,[3] where a day had been specified for the completion of the contract, Lord Romilly M.R. held it to be non-essential, though in so doing he differed from the previous observations of Lord Cranworth, made (when V.C.) in the same case at an earlier stage.[4] Lapse of time in payment of the purchase-money may generally be recompensed by interest and costs.[5]

Implied

§ **1079**. Time may be implied as essential in a contract, from the nature of the subject-matter with which the parties are dealing. "If, therefore," said Alderson B.,[6] "the thing sold be of greater or less value according to the effluxion of time, it is manifest that time is of the essence of the contract: and a stipulation as to time must then be literally complied with in Equity as well as in Law." In respect of reversionary interests, therefore, it is held to be of the essence of justice, that contracts for sale should be executed immediately and without any delay,[7] unless indeed the terms of the contract are such as to show that the parties contemplated the possible occurrence of a delay, and intended, in the event of that delay

[1] *Hearne* v. *Tenant*, 13 Ves. 287.

[2] *Roberts* v. *Berry*, 16 Beav. 31, affirmed 3 De G. M. & G. 284. Consider *Penn* v. *Cattell*, 27 L. T. 469.

16 Beav. 59; but see the judgment of Jessel M.R. in *Barclay* v. *Messenger*, 22 W. R. 522; 43 L. J. Ch. 449.

Parkin v. *Thorold*, 2 Sim. N. S. 1. Distinguish *Barclay* v. *Messenger*, 22 W. R. 522; 43 L. J. Ch. 449.

[3] *Penn* v. *Stephens*, 2 P. Wms. 66.

[4] In *Hipwell* v. *Knight*, 1 Y. & C. Ex. 416.

[5] *Newman* v. *Rogers*, 1 Bro. C. C. 391; *Spurrier* v. *Hancock*, 4 Ves. 667.

occurring, to keep the bargain alive.[1] Ordinarily, the purchaser of a reversion may not lie by until the position of the parties is altered, and then, when the reversion falls in, come and say "Give me the fund."[2]

Subject matter daily varying.

§ 1080. So, again, where the subject-matter is from its nature exposed to daily variation, the Court inclines to hold time to be material, as in the sale of the stock in a public-house,[3] in contracts for granting annuities on lives,[4] and in purchases of government stock.[5]

Commercial enterprise.

§ 1081. And so, again, where the object of the contract is a commercial enterprise, the Court is strongly inclined to hold time to be essential, whether the contract be for the purchase of land for such purposes, or more directly for the prosecution of trade.[6] This principle has been acted on in the matter of a contract respecting land which had been purchased for the erection of mills;[7] also in relation to a sale of pasture lands, required by the purchaser, as the vendor knew, for stocking,[8] and in several cases of contracts for the sale of public-houses as going concerns.[9] For the purchaser of a public-house presumably buys it for the purpose of carrying it on, and it would be ruinous to him if he were kept out of it.[10]

[1] *Patrick* v. *Milner*, 2 C. P. D. at p. 318. See *infra*, § 1087.

[2] *Lery* v. *Steadon*, [1899] 1 Ch. at p. 10, affirming the decision of Stirling J., [1898] 1 Ch. 178.

[3] *Coslake* v. *Till*, 1 Russ. 376; *Weston* v. *Savage*, 10 Ch. D. at p. 741.

[4] *Withy* v. *Cottle*, T. & R. 78.

[5] *Dolond* v. *Rothschild*, 1 S. & S. 590. See also *Lewis* v. *Lord Lechmere*, 10 Mod. 503.

[6] *Walker* v. *Jeffreys*, 1 Ha. 341, 348; *Coslake* v. *Till*, 1 Russ. 376.

[7] *Wright* v. *Howard*, 1 S. & S. 190.

[8] *Dyas* v. *Rooney*, 27 L. R. Ir. 1; affirming S. C. 25 L. R. Ir. 312

[9] *Seaton* v. *Mapp*, 2 Coll. 556 (where the essentiality of time was arrived at from the conditions as well as from the subject-matter); *Day* v. *Lahke*, L. R. 5 Eq. 476; *Cowles* v. *Gale*, L. R. 7 Ch. 12. See too, the judgment of Hall V.-C. in *Weston* v. *Savage*, 10 Ch. D. at p. 741, and *Claydon* v. *Green*, L. R. 3 C. P. 511; also *Tadcaster Tower Brewery Co.* v. *Wilson*, [1897] 1 Ch. at p. 711, in which case (at pp. 709, 710) the obligations of the vendor of a licensed public-house were discussed.

[10] *Per* James L.J. in *Cowles* v. *Gale*, L. R. 7 Ch. at p. 15.

§ **1082**. The same principle applies with especial force to contracts relating to mines. The nature of all mining transactions is such as to render time essential: for no science, foresight, or examination can afford a sure guarantee against sudden losses, disappointments, and reverses, and a person claiming an interest in such undertakings ought therefore to show himself in good time willing to partake in the possible loss as well as profit.[1] So in several cases time has been held of the essence in contracts for the sale of mines and works.[2] Mines

§ **1083**. Again, where the contract had relation to the supply of coal, and eleven months were allowed to elapse before filing the bill, the article being one fluctuating from day to day in its market price, the Court held the delay a ground for declining its interference:[3] and where the contract contemplated the payment of moneys to be applied towards obtaining patents, time was from the nature of the object in view held to be of the essence.[4] Coal. Patents.

§ **1084**. So, again, where a contract specified a time by which calls were to be paid up, or in default the shares were to be forfeited;[5] and where a contract gave an option to be exercised before a certain time to convert loan notes into shares:[6] in both these cases Shares.

[1] *Per* Knight Bruce L.J. in *Prendergast* v. *Turton*, 1 Y. & C. C. C. 119, and in *Clegg* v. *Edmondson*, 8 De G. M. & G. at p. 844.

[2] *Parker* v. *Frith*, 1 S. & S. 199, n.; *per* Lord Eldon in *City of London* v. *Mitford*, 11 Ves. 58; *Walker* v. *Jeffreys*, 1 Ha. 341; *Alloway* v. *Bevier*, 26 Beav. 575; and cf. *Eads* v. *Williams*, 4 De G. M. & G. 671; *Clegg* v. *Edmondson*, 8 ib. 787; *Hasham* v. *Llewellyn*, 21 W. R. 570, 766; *Glashrook* v. *Richardson*, 23 W. R. 51, *infra*, 1109; *Nicholson* v. *Smith*, 22 Ch. D. 610.

[3] *Pollard* v. *Clayton*, 1 K. & J. 462; *per* Lord Redesdale in *Crofton* v. *Ormsby*, 2 Sch. & Lef. 601. Cf. *Hasham* v. *Llewellyn*, 21 W. R. 570, 766, *infra*, § 1110.

[4] *Payne* v. *Banner*, 15 L. J. Ch. 227.

[5] *Sparks* v. *Liverpool Waterworks Co.*, 13 Ves. 428.

[6] *Campbell* v. *London and Brighton Railway Co.*, 5 Ha. 519, 529. See, too, *Sprague* v. *Booth*, [1909] A. C. at p. 581.

time was from the nature of the subject-matter of the contract held to be essential.[1]

It may here be noticed that where a contract for the sale of shares does not fix a time for the delivery of the certificates to the purchaser, the vendor's obligation is to deliver them within a reasonable time; and an unreasonable delay in performance of this obligation may justify the purchaser in refusing to accept the shares.[2]

Macbryde v. Weeks

§ 1085. The case of *Macbryde* v. *Weeks*,[3] is a strong illustration of the principle under discussion. There the plaintiff by the contract undertook to purchase a field adjoining his own, to procure an assignment of a term, and to do other things which usually require time: but the nature of the subject-matter of the contract, which was a colliery, was held to make time of the essence of the contract, to the extent of rendering it incumbent on the vendor to use his utmost diligence in completing the contract, and giving the purchaser a right to decline completing, if the vendor failed in so exerting himself. In this case the purchaser, after little more than two months had elapsed from the date of the contract, gave the vendor notice that, unless he completed it within another month, the purchaser would rescind, and the time so limited by the purchaser was held to be, under the circumstances, reasonable.

Surrounding circumstances.

§ 1086. The essentiality of time may also be implied from the surrounding circumstances connected in each case with the particular contract.[4] Thus where a man purchasing a house with the object of

[1] "On a contract for the sale of shares, time is of the essence of the contract both at law and in equity." *Re Schwabacher, Stern* v. *Schwabacher*, 98 L. T. at p. 129.

[2] *De Waal* v. *Adler*, 12 App. Cas. 141, 145.

22 Beav. 533, 539; cf. *Hudson* v. *Llewellyn*, 21 W. R. 570, 590, and, as to the notice, *infra*, §§ 1092 *et seq.*

[4] *Per* Turner L.J. in *Roberts* v. *Berry*, 3 De G. M. & G. at p. 291

immediately occupying it as his own residence stipulated in the contract that possession should be given on a specified day, and the vendor failed to show a good title by that day, it was held that the stipulation as to time was of the essence of the contract,[1] and the vendor, though he offered actual possession, failed to enforce specific performance.[2] Possession in such a contract means possession with a complete title previously shown.[3]

Condition showing time not of the essence

§ **1087.** The case of *Webb* v. *Hughes*[4] is not at variance with this principle, but illustrates a limitation of it. There, too, the house and land, the subject-matter of the contract, were required by the purchaser for immediate residential occupation, but the conditions of sale, after naming a day for completion, went on to provide that if, from any cause whatever, the purchase should not then be completed, the purchaser should pay interest on the unpaid purchase-money from that day until the actual completion of the purchase; and it was accordingly held that, inasmuch as parties to the contract evidently contemplated the possibility of the completion being postponed beyond the day named, time was not of the essence. The *ratio decidendi* of this case is obviously applicable whatever the nature of the subject-matter of the contract, and it has accordingly been applied even to the sale of a reversionary interest.[5]

Option to retirement from company.

§ **1088.** Again, where the members of a company in general meeting agreed to certain conditions on which dissenting members should be allowed to retire from the company, and one of those conditions fixed a date by which the option to retire was to be declared, the House of Lords held that that date was so essential

[1] See *Gedge* v. *Duke of Montrose*, 26 Beav. 45.

[2] *Tilley* v. *Thomas*, L. R. 3 Ch. 61. *Per* Rolt L.J., L. R. 3 Ch. at p. 68. As to possession, see also *Lake* v. *Dean*, 28 Beav. 607.

[3] L. R. 10 Eq. 281.

[4] *Patrick* v. *Milner*, 2 C. P. D. 342.

a part of the arrangement, that the directors had no power to allow any member to retire who had not declared his option within the limited time.[1]

Where delay would involve hardship.

§ 1089. Where hardship would result from considering time immaterial, as where delay in completion would involve one of the parties in a serious liability or loss, the Court will incline to consider time as being of the essence. Thus where a tenant without any definite interest, agreed for the sale of his goodwill and business to a purchaser to be completed on the 25th of March, that day was considered essential, inasmuch as if the contract were not then completed, the vendor might render himself liable as tenant for the ensuing year.[2] And so, again, where the body to participate in the purchase-money, being a Chapter, was liable to variation, non-payment of the consideration money at the specified time was held fatal to the subsistence of the contract.[3]

Time to some respects of the essence.

§ 1090. Where the vendor stipulates that time shall be of the essence in respect of some of the conditions in his favour, the Court inclines to hold it essential in respect of others also against him. Vendors so stipulating for the essentiality of time in their favour, "cannot fairly," said Knight Bruce V.C., "complain of being held strictly to the conditions themselves. . . . The plaintiffs' proposition is that the purchaser shall be held by a cable, and the vendors by a skein of silk."[4] Accordingly where it was, by one clause of the contract, provided that the vendors should deliver the abstract to the purchaser within twenty-one days from the date of the contract, and, by another clause,

[1] *Hudderfield* v. *Evans*, L. R. 3 H. L. 263.

[2] *Oxlade* v. *Till*, 1 Russ. 376; *Wells* v. *Maxwell* (No. 1), 32 Beav. 408, affirmed 33 L. J. Ch. 44; 11 W. R. 812; *Green* v. *Sevin*, 13 Ch. D. 589; *Roberts* v. *Berry*, 3 De G. M. & G. at p. 292; St. Leon. Vend. 227.

Carter v. *Dean of Ely*, 7 Sim. 211.

[3] *Scatson* v. *Hopps*, 2 Coll. 559, 564.

that the purchaser should send in his requisitions within twenty-eight days from the delivery of the abstract, and in this respect time should be of the essence of the contract; and the vendors did not deliver the abstract until more than two months after the date of the contract; the Court refused to hold the purchaser bound to comply with the stipulation as to the time for sending in requisitions, holding that, in such a case, the time for taking the objections, and the mode in which they are to be considered as waived, should depend upon the general principles of the Court.[1]

§ **1091**. Where the contract contains stipulations in favour of one party and not of the other, — as, for instance, an option, — or is in anywise unilateral, the Court, if it does not consider time as originally of the essence, will, as we shall hereafter see, look at it with more than usual strictness.[2] Where the contract is unilateral

ii. *Time made essential by notice.*

§ **1092**. Where time was not originally of the essence of the contract, but one party has been guilty of gross, vexatious, unreasonable, or unnecessary delay or default in relation to it, the other party becomes entitled to limit a reasonable time within which the contract shall be perfected by the other; and in default of obedience When time may be engrafted

[1] *Upperton* v. *Nicholson*, L. R. 6 Ch. 436; followed in *Re Todd & Walden's Contract*, [1908] 1 I. R. 213; where, a condition of sale having required the vendor to furnish an abstract "immediately after the sale," it was held that "immediately" meant "forthwith," and that delivery of the abstract on the 30th day after the sale was not in compliance with the condition.

[2] See *infra*, § 1103. As to the exercise of options, see *Moss* v. *Burton*, L. R. 1 Eq. 174 (lease); *Austin* v. *Tawney*, L. R. 2 Ch. 143 (purchase); *Dibbin* v. *Dibbin*, [1896] 2 Ch. at p. 350; *Priory Holroyd and Healey's Breweries* v. *Singleton*, [1899] 1 Ch. 86; [1899] 2 Ch. 261 (exercise of option by equitable assignees); and *Starkey* v. *Barton*, [1909] 1 Ch. 284 (purchase by tenant of landlord's interest).

to such notice the Court will not enforce specific performance, but will leave the parties to their strictly legal rights.[1] It is to be observed that it is only when such delay or default has happened that this right occurs. There is no general right in either party to limit a time. Where the right exists, and the vendor is the party in default and has received a deposit, the purchaser may, after reasonably exercising the right, maintain an action against the vendor for recovery of the deposit, with interest and the costs of investigating the title.[2]

Introduction of the principle.

§ **1093**. This beneficial principle is of comparatively recent introduction. In a case before Leach V.C. in 1821, he did not consider it to be then decided that time could thus be made essential by subsequent notice;[3] and where clear notice had been given that a purchaser would insist on completion by the time specified, Lord Erskine had previously refused to consider time as of moment in the contract.[4] But the principle is now well established.

The time limited by notice must be reasonable.

§ **1094**. It is not, of course, possible for either party arbitrarily and suddenly to put an end to negotiations as to title,[5] or other matters pending between the parties. The time specified by the notice must be reasonable, *i.e.*, long enough for the proper doing of the things required to be done:[6] if it be not so (and the question of reasonableness must be determined as at the date when the notice is given[7]), the notice will fail in engrafting time into the essence of the contract. Thus, in one case, six weeks, being a less time than the vendor

[1] *Taylor* v. *Brown*, 2 Beav. 180; *Benson* v. *Lamb*, 9 Beav. 502; *Nokes* v. *Lord Kilmorey*, 1 De G. & Sm. 444.

[2] *Compton* v. *Bagley*, [1892] 1 Ch. 313.

[3] *Reynolds* v. *Nelson*, 6 Mad. 18.

[4] *Radcliffe* v. *Warrington*, 12 Ves. 326.

[5] *Taylor* v. *Brown*, 2 Beav. 180; *Green* v. *Sevin*, 13 Ch. D. 589.

[6] *King* v. *Wilson*, 6 Beav. 124; but see *Macbryde* v. *Weekes*, 22 Beav. 533; *supra*, § 1085.

[7] *Crawford* v. *Toogood*, 13 Ch. D. 153.

took to furnish the abstract, were held to be an unreasonably short time for the vendor to insist on the purchaser's completing, and the notice was therefore inoperative;[1] in another case fourteen days were held not to be a reasonable time within which to require the plaintiffs to produce a deed and complete the title;[2] and in another, where, after negotiations as to the title had been going on for upwards of three years, the purchaser gave notice that, unless a good and marketable title were shown and made out within five weeks, he would treat the contract as at an end, the notice was held unreasonable and bad.[3] And again when the objection is one of conveyance and not of title, and the date for the completion of the contract is not of the essence, the proper course for the purchaser to pursue where the vendor has made default at the day, is to give him a notice to complete within a reasonable time, and that in default the contract will be rescinded.[4]

Previous refusal to remove objection.

§ 1095. But where a vendor has previously refused to remove an objection, a time which would be unreasonably short in the first instance for the removal of it may then become a reasonable period, after which the purchaser may treat the contract as rescinded.[5]

Conditional waiver of notice.

§ 1096. Again, where a notice to rescind was waived in case evidence requisite to prove the title was produced immediately, the evidence not having been produced, the bill was dismissed.[6]

Nature of the

§ 1097. And the nature of the contract re[illegible]g expedition obligatory, may make reasonable a [illegible]ice

[1] *Pegg* v. *Wisdom*, 16 Beav. 239. Distinguish *Smith* v. *Batsford*, 76 L. T. 179, where a notice by the vendor, requiring the purchaser to complete in ten days, was, under the circumstances held reasonable.

[2] *Parkin* v. *Thorold*, 16 Beav. 59 (cf. S. C. 2 Sm. N. S. 1). Distinguish *Compton* v. *Bagley*, [1892] 1 Ch. 313. See, too, *Wills* v. *Maxwell*, (No. 1), 32 Beav. 408, affirmed 33 L. J. Ch. 44; 11 W. R. 812; *Green* v. *Sevin*, 13 Ch. D. 589; *Crawford* v. *Toogood*, 13 Ch. D. 153.

[3] *McMurray* v. *Spicer*, L. R. 5 Eq. 527.

[4] *Hatton* v. *Russell*, 38 Ch. D. 334.

[5] *Nott* v. *Riccard*, 22 Beav. 307.

[6] *Stewart* v. *Smith*, 6 Ha. 222, n. (Leach V.C.).

subject matter.

which would otherwise be too short. Thus, where A. agreed to grant B. a mining lease, and for that purpose undertook to buy a field adjoining his own, to procure an assignment of a term, and do other acts requiring time, and nine weeks elapsed from the contract without any communication from A. to B. to show when the contract was likely to be completed, and B. then gave A notice to complete within one calendar month, and in default to rescind the contract: it was held that the nature of the subject-matter of the contract rendered expedition on the part of the lessor essential, and that the month's notice was reasonable.[1] And similarly, where the subject of the contract, entered into on the 25th of August, 1890, was a farm, and it was in the contemplation of the parties that the purchaser was personally going into possession, and that the purchase should be completed so as to allow of his entering into possession at or about the following Michaelmas, it was held that a notice given on the 13th of October, 1890, by the purchaser's solicitors to the vendor's solicitor, to the effect that unless a proper abstract was delivered within fourteen days the purchaser would treat the contract as at an end, was a reasonable notice.[2]

What notice requisite.

§ 1098. The notice to engraft time into the contract must be distinct, and unequivocal: thus, a notice that one party would consider the non-performance by a certain day as equivalent to a refusal to perform, was held not to amount to a notice that the contract would then be considered as rescinded.[3] The notice should, for certainty, be confined to the next act to be done by the party to whom it is given.

Where parol notice sufficient.

§ 1099. It does not appear to be necessary that the notice should be in writing: for this purpose statements made by the purchaser's agent at the time of signing

[1] *Mackrydc* v. *Weeks*, 22 Beav. 313, 318.

[2] *Compton* v. *Bagley*, [1892] 1 Ch. 18.

[3] *Reynolds* v. *Nelson*, 6 Mo. 333.

the contract, to the effect that time was essential, were in one case admitted as evidence.[1]

iii. *Lapse of time constituting laches or evidencing abandonment of contract.*

Delay as laches.

§ 1100. The Court of Chancery was at one time inclined to neglect all consideration of time in the specific performance of contracts for sale, not only as an original ingredient in them, but as affecting them by way of laches.[2] But it is now clearly established, that the delay of either party[3] in not performing its terms on his part, or in not prosecuting his right to the interference of the Court by the institution of an action, or, lastly, in not diligently prosecuting his action, when instituted,[4] may constitute such laches as will disentitle him to the aid of the Court, and so amount, for the purpose of specific performance, to an abandonment on his part of the contract.

Mackreth v. Marlar.

§ 1101. One of the earliest cases tending to establish this principle was *Mackreth* v. *Marlar*[5] before Lord Kenyon M.R.: Lord Loughborough followed it, and held in one case where a vendor delivered no abstract on or before the day for completion, nor till after an action for the deposit, and the purchaser had demanded back his deposit at the date for completion, that there was evidence of an abandonment of the contract by the vendor.[6] These cases were approved by Lord Alvanley M.R.:[7] and finally the doctrine in question was adopted and acted on by Lord Eldon: thus, for

[1] *Nokes* v. *Lord Kilmorey*, 1 De G. & Sm. 444. In that case the purchaser was defendant. Whether this makes a difference, *query*. See *per* Knight Bruce V.C. at p. 458.

See *supra*, § 1076.

[2] *Rich* v. *Gale*, 24 L. J. N. S. 745.

[3] *Moore* v. *Blake*, 1 Ball & B. 62.

[4] 1 Cox, 259.

[5] *Lloyd* v. *Collett*, 1 Bro. C. C. 469; *Harrington* v. *Wheeler*, 1 Ves. 686.

[6] *Hodgee* v. *Ford*, 1 Bro. C. C. 191.

example, in one instance he on this ground discharged a purchaser under a decree, error having been shown in the decree, though the parties were proceeding to rectify it.[1]

Laches a bar to relief.

§ 1102. The doctrine of the Court thus established, therefore, is that laches on the part of the plaintiff (whether vendor or purchaser), either in executing his part of the contract or in applying to the Court, will debar him from relief. "A party cannot call upon a Court of Equity for specific performance," said Lord Alvanley M.R.,[2] "unless he has shown himself ready, desirous, prompt, and eager;" or, to use the language of Lord Cranworth,[3] "specific performance is relief which this Court will not give, unless in cases where the parties seeking it come promptly, and as soon as the nature of the case will permit."[4]

Contract not mutual.

§ 1103. Where the contract is in anywise unilateral, as, for instance, in the case of an option to purchase, a right of renewal,[5] or of any other condition in favour of one party and not of the other, then any delay in the party in whose favour the contract is binding is looked at with especial strictness.[6] On this principle, the delay of a purchaser in deciding whether he will or will not accept the title is an injustice, because the

[1] *Lehmann* v. *Brazier*, 2 J. & W. 287; *Coster* v. *Turner*, 1 R. & My. 311. See also *Cahill* v. *Blake*, 19 Beav. 454.

[2] In *Milward* v. *Earl Thanet*, 5 Ves. 720, n.

[3] In *Ends* v. *Williams*, 1 De G. M. & G. at p. 691; 21 L. J. Ch. 531.

[4] See also *Alley* v. *Deschamps*, 13 Ves. 225; *Williams* v. *Williams*, 17 Beav. 213; *Firth* v. *Greenwood*, 1 Jur. N. S. 866 (Wood V.C.); *Mills* v. *Haywood*, 6 Ch. D. at p. 202.

[5] See *Hussey* v. *Domcile*, [1900] 1 I. .. 117, 115 (covenant to renew within a limited time upon the tenant nominating a new life within a specified time).

[6] *Allen* v. *Hilton*, 1 Foulk. Eq. 432; *Brooke* v. *Garrod*, 3 K. & J. 608; 2 De G. & J. 62; *Lord Bellagh* v. *Melton*, 2 Dr. & Sm. 278; *Weston* v. *Collins*, 13 W. R. 510. Distinguish *Ward* v. *Wolverhampton Waterworks Co.*, L. R. 13 Eq. 245; and see *Austin* v. *Tawney*, L. R. 2 Ch. 143, and *Nicholson* v. *Smith*, 22 Ch. D. 640, where the necessity of strict compliance with the terms of an option as to time was recognized, and held to have been satisfied.

purchaser can enforce the contract against the vendor whether the title be good or bad, whereas the vendor can only do so in case of a good title.[1]

Darnley v. L. C. & D. Railway Co.

§ 1104. So where a railway company agreed to make such crossings as the landowner's surveyor should within one month direct, and notify in writing to the company or their engineer, and the surveyor did not give any such direction or notification until after the expiration of the stipulated time, it was held that the landowner's right to have the crossings made under the contract was lost.[2]

Option to have lease

§ 1105. But where no time has been originally limited within which a tenant's option to have a lease must be exercised, and the landlord has never called upon the tenant to declare his option, mere lapse of time will not preclude the tenant[3] or his assign[4] or legal personal representative[5] from exercising it.

Acquiescence.

§ 1106. Acquiescence in the breach of a covenant will form a bar to its specific performance in Equity.[6]

What delay sufficient.

§ 1107. In many of the cases there has been a general dilatoriness in all the proceedings, so that it is almost impossible to state briefly the actual amount of delay which has been considered to bar the plaintiff's right to relief; but some notion of the present doctrine of the Court on this point will be gained from the following cases.

Instances

§ 1108. In the old case of *The Marquis of Hertford* v. *Boore*,[7] a delay of fourteen months was not considered a bar to the plaintiff's bill. But in *Eads* v.

[1] *Spurrier* v. *Hancock*, 4 Ves. 667, 672, 673.

[2] *Earl of Darnley* v. *London, Chatham and Dover Railway*, 1 De G. J. & S. 204; 3 ib. 24; L. R. 2 H. L. 43.

[3] *Wood* v. *Burton*, L. R. 1 Eq. 474.

[4] *Buckland* v. *Papillon*, L. R. 2 Ch. 67.

[5] *Re Adams and Kensington Vestry*, 24 Ch. D. 199; S. C. affd. 27 Ch. D. 394; cf. *Friary Holroyd and Healey's Breweries* v. *Singleton*, [1899] 1 Ch. at p. 90; [1899] 2 Ch. at p. 263.

[6] *Barret* v. *Blagrave*, 6 Ves. 191; *Sayers* v. *Collyer*, 28 Ch. D. 103.

[7] 5 Ves. 719.

Williams[1] (where the contract was for a lease of a coal mine), a delay of three and a half years was considered fatal; in *Southcomb* v. *The Bishop of Exeter*,[2] a delay from the 17th of January, 1842, to the 30th of August, 1843, was held to have the same effect; and in *Lord James Stuart* v. *The London and North-Western Railway Co.*,[3] Knight Bruce L.J. seemed to think that a delay from October, 1848, to July, 1850, must be fatal to such a bill.

After notice by the other party.

§ 1109. Where one party to the contract has given notice to the other that he will not perform it, acquiescence in this by the other party, by a comparatively brief delay in enforcing his right, will be a bar: so that in one case[4] two years' delay in filing a bill after such notice, in another case[5] one year's, and in a third[6] (where the contract was for a lease of collieries) five months' like delay were held to exclude the intervention of the Court.

iv. *Where time does not run.*

Contract substantially executed

§ 1110. Where the contract is substantially executed, and the plaintiff is in possession of the property, and has got the equitable estate, so that the object of his action is only to clothe himself with the legal estate, time either will not run at all as laches to bar the plaintiff from his right, or it will be looked at less narrowly by the Court;[7] for the plaintiff has not been

[1] 4 De G. & M. G. 674; 24 L. J. Ch. 501; cf. *supra*, § 1082.

[2] 6 Ha. 213.

[3] 1 De G. M. & G. 721. See also *Sparrier* v. *Hancock*, 1 Ves. 667; *Harrington* v. *Wheler*, 1 Ves. 686; *Guest* v. *Homfray*, 5 Ves. 818; *Thomas* v. *Blackman*, 1 Coll. 301, 313; *Sharp* v. *Wright*, 28 Beav. 150; *Moore* v. *Marrable*, L. R. 1 Ch. 217.

[4] *Heaphy* v. *Hill*, 2 S. & S. 29.

[5] *Watson* v. *Reid*, 1 R. & My. 236. See also *per* Lord Romilly M.R. in *Parkin* v. *Thorold*, 16 Beav. 73, and *Lehmann* v. *McArthur*, L. R. 3 Ch. 496.

[6] *Huxham* v. *Llewellyn*, 21 W. R. 570, 766. See, too, *Glashrad* v. *Richardson*, 23 W. R. 51 (delay of 3 months and 13 days).

[7] *Per* Lord Redesdale in *Creuze* v. *Ormsby*, 2 Sch. & Lef. 601.

sleeping on his rights, but relying on his equitable title, without thinking it necessary to have his legal right perfected.[1]

In leases.

§ 1111. Therefore, where a tenant holds under a contract for a lease, pays his rent, and has possession of the property and the enjoyment of all the benefits given him by the contract, the efflnxion of time will not be a ground for resisting its enforcement:[2] and so, where there was a contract for the lease of a shop and the sale of the stock, and the stock had been paid for, the plaintiff had been put into possession as lessee, and the rent had been paid,—in fact, everything had been done but the execution of the lease, which the defendant had refused to execute on a ground which was untenable,—specific performance of the lease was granted, notwithstanding considerable laches on the part of the plaintiff subsequent to the defendant's refusal, but therefore without costs.[3]

Possession must be under the contract

§ 1112. But possession, to save a purchaser from the usual consequence of delay, must be possession under the contract sought to be enforced, and the vendor must have known or have been bound to know that the purchaser claimed to be in possession under the contract. Accordingly in a case where the tenant of a tavern, with an option of purchasing it during his term, duly gave notice that he elected to purchase, but after some correspondence allowed the subject to drop, and then for upwards of five years remained in possession without ever insisting on the effectuation of the purchase, and from time to time making payments to the lessor's mortgagee for most of which he took receipts

[1] See *Curtin* v. *Bury*, 10 Ir. Ch. R. at p. 395; *Hooman* v. *Skelton*, 11 L. Ch. R. at p. 96.

[2] *Clarke* v. *Moore*, 1 Jon. & L. 723; *Sharp* v. *Milligan*, 22 Beav. 606 (affirmed by the L.JJ.); *Shepherd* v. *Walker*, L. R. 20 Eq. 659.

[3] *Burke* v. *Smyth*, 3 Jon. & L. 193. See also *per* Lord St. Leonards in *Ridgway* v. *Wharton*, 6 H. L. C. 292; and consider *Brophy* v. *Connelly*, 7 Ir. Ch. R. at p. 177; *Finucane* v. *Turner*, 13 Ir. Ch. R. 488, 491.

expressing them to be for rent, it was held by the Court of Appeal that his possession had not been such as to prevent his delay being fatal to his claim for specific performance.[1]

Pending negotiation.

§ **1113.** Nor will time run as laches pending a negotiation between the parties to the contract, even though it may be carried on without prejudice to a notice given by one party that he holds the contract rescinded.[2] But where the negotiation is about a point which is not the real cause of the delay, its pendency will not prevent the efflnxion of time operating as laches: so where, on a sale and purchase of lands, disputes arose about the title and a valuation incident to the purchase, but from the evidence it appeared that want of means in the purchaser who had instituted the suit, and not these disputes, was the real cause of delay, Knight Bruce V.C., though after some hesitation, refused specific performance, as the plaintiff in such suits must have more than a doubtful title.[3]

Delay arising from party objecting.

§ **1114.** When the delay arises from an untenable objection taken by one party, that party cannot avail himself of the delay caused by it, as a ground for the non-performance of the contract.[4] And generally, whenever the delay is attributable to the defendant, he will not be allowed to avail himself of it as a defence.[5]

Lamare v. *Dixon.*

§ **1115.** In *Lamare* v. *Dixon*[6] an intending lessee, relying on a verbal promise by the owner of some wine vaults that they should be made dry, signed a written contract to accept a lease of the vaults at a

[1] *Mills* v. *Haywood*, 6 Ch. D. 196.

[2] *Southcomb* v. *Bishop of Exeter*, 6 Ha. 213; *McMurray* v. *Spicer*, L. R. 5 Eq. 527; and cf. *Lehmann* v. *McArthur*, L. R. 3 Ch. at p. 504.

[3] *Gee* v. *Pearse*, 2 De G. & S. 225.

[4] *Monro* v. *Taylor*, 3 Mac. & G. 713, 723.

[5] *Morse* v. *Alexi*, 6 Mad. 26; *Shrewsbury and Birmingham Railway Co.* v. *London and North Western Railway Co.*, 2 Mac. & G. 321, 355; *per* Lord St. Leonards in *Ridgway* v. *Wharton*, 6 H. L. C. 292.

[6] L. R. 6 H. L. 414.

specified rent, and went into possession. The vaults not being made dry, the tenant constantly complained, and, though he paid rent, always paid it under protest; until, finally, after having actually occupied the vaults for upwards of two years, he refused to take the lease on the ground that the owner's promise had never been fulfilled. The House of Lords held that the tenant's payments were referable merely to his actual use and occupation of the premises, that such payments and possession did not amount to such acquiescence as to debar the tenant from defending his refusal on the ground of the non-performance of the promise which had been the inducement to the contract, and that the owner's delay and conduct in the matter generally disentitled him to insist on specific performance of the contract; but the House considered the delay which had occurred so chargeable to both parties that the bill, though dismissed, was dismissed without costs.

Leaving deposit.

§ **1116.** The fact that the purchaser has allowed the deposit to remain in the hands of the vendor from the time when the former rescinded the contract until the filing of the bill, has been decided not to affect the question of laches.[1]

Continuing in possession.

§ **1117.** So also continuing in possession, if under an arrangement to that effect, will not affect the question.[2]

Land taken under Railway Act.

§ **1118.** In a case already referred to, Lord Romilly M.R. expressed the opinion that time does not run as laches in the case of land taken under a Railway Act, until the time during which the company had the power to make the railway ceased, as the fact whether the company would require the land or not could not be ascertained until that time;[3] but this view was not

[1] *Watson* v. *Reid*, 1 R. & My. 236; *Southcomb* v. *Bishop of Exeter*, 6 Ha. 213, 224.

[2] *Southcomb* v. *Bishop of Exeter*, *ubi supra*.

[3] *Lord James Stuart* v. *London and North Western Railway Co.*, 15 Beav. 513; S. C. 1 De G. M. & G. 721.

adopted by Knight Bruce and Lord Cranworth L.JJ who seem to have thought that time would run from the date of the contract.

Mere claim

§ 1119. It is to be observed that a mere claim or protest by words or letters, though continual, un accompanied by any act to give effect to them, will not prevent time operating as laches against the party making the claim, nor keep alive a right which would otherwise be precluded.[1]

v. *Waiver of delay.*

Waived by conduct

§ 1120. Objections grounded on the lapse of time are waived by a course of conduct inconsistent with the intention of insisting on such an objection: and in this respect it is immaterial whether time was originally of the essence or was subsequently engrafted on the contract.[2]

Instances.

§ 1121. Therefore, where a title is in a state which may cause delay, or a good title has not been completely shown by the day for completion, and the purchaser goes on dealing about the title after that day, this will waive his right to insist on the time. So the examination of the abstract after the time will prevent a defendant insisting on time as essential, for he had no right to look into the abstract if he meant to abandon his purchase.[3] And such conduct will amount to a waiver, even though a formal notice to abandon the contract may have been given.[4] So again, insisting on the contract after the time limited for completion is an act waiving the right to insist on that time as essential.[5] But where a purchaser protests

[1] *Clegg* v. *Edmondson*, 8 De G. M. & G. 787, 810; *Lehmann* v. *Mc Arthur*, L. R. 3 Ch. 496, 504. *King* v. *Wilson*, 6 Beav. 124. *Pinche* v. *Curtois*, 1 Bro. C. C. 329.

[2] *Seton* v. *Slade*, 7 Ves. 265.

[3] *Hipwell* v. *Knight*, 1 Y. & C. Ex. 401.

[4] *Popplewell* v. *Wisden*, 16 Beav. 279.

against delay, and then under protest deals about the title, this will not, it seems, amount to a waiver.[1]

Intention and knowledge requisite

§ 1122. As a general principle, a stipulation as to time cannot be bindingly waived otherwise than by an intentional act, done with knowledge of all material circumstances. Accordingly in a case already cited, where a railway company agreed to do certain works to be directed by the award of a surveyor, to be made within a specified time, and the award was not made within that time, the company were held not to have waived the condition as to time by having, in ignorance of the fact that the award was made late, taken it up and paid the surveyor's charges for it.[2]

As to time for payment

§ 1123. Again as to time for payment: where an assignor of a lease insisted on a forfeiture of the assignment by reason of non-payment of part of the purchase-money at the time stipulated, he was held to have waived it by getting the assignee to pay the rent to the superior landlord, that not being consistent with the notion that the agreement was at an end.[3] In another case there was a contract that if the residue of the purchase-money was not paid at a certain day, the contract should be void: it was not paid, but the vendor, allowing the purchaser to retain possession and taking from him a warrant of attorney to confess judgment in ejectment, was held to have waived the condition.[4]

As to time for delivery of objections

§ 1124. As to the time for the delivery of objections, a subsequent correspondence as to title was in one case held to work a waiver:[5] and a similar result was in

Magennis v. *Fallon*, 2 Moll. 561, 577. See, too, *Dyas* v. *Rooney*, 25 L. R. Ir. 312; 27 L. R. Ir. 4, where there was held to have been no waiver. But see St. Leon. Vend. 291.

Lord of Burnley v. *London, Chatham, and Dover Railway*, 1 De G. J. & S. 204; 3 ib. 24; L. R. 2 H. L. 43.

Hudson v. *Bartram*, 3 Mad. 440; *Webb* v. *Hughes*, L. R. 10 Eq. 281.

[1] *Ex parte Gardner*, 1 Y. & C. Ex. 503.

Cutts v. *Thodey*, 13 Sim. 206.

another case held to follow from the subsequent renewal of negotiation as to price.[1]

Possession

§ 1125. So, again, taking possession after the default as to time may, it seems, preclude the objection:[2] but merely giving possession before the day for payment has arrived is no waiver of a vendor's right to insist upon payment on that day.[3]

Extension of time

§ 1126. The mere extension or giving of time, where time is of the essence of the contract, is only a waiver to the extent of substituting the extended time for the original time, and not an utter destruction of the essentiality of the time. And so where, by the terms of a contract for the sale of the benefit of a building contract a moiety of the price was to be paid on a specified day and the vendors afterwards by letter gave the purchaser until a later (named) day to make the payment, but the money was not paid by that day, Jessel M.R. held that time was originally of the essence of the contract and the letter only a qualified and conditional waiver of the original stipulation; and that, consequently, the vendors were entitled to treat the contract as at an end.[4]

Waiver of time of an act no waiver of the act.

§ 1127. It is perhaps scarcely needful to remark that a waiver as to the time in which an act is to be done is not necessarily in any degree a waiver of the act itself. So that where it was agreed that A. should repair some warehouses by the 1st of April, and that B. should then take a lease of them, and the repairs were not done by the day appointed, but B. continued to deal in a way which was held to amount to a waiver of the time as essential (if by the contract it had ever

[1] *Eads* v. *Williams*, 4 De G. M. & G. 674.

[2] *Roche* v. *Wood*, 1 J. & W. at p. 120.

[3] See *Barclay* v. *Messenger*, 22 W. R. 522, at p. 523; 43 L. J. Ch. 449.

[4] *Barclay* v. *Messenger*, 22 W. R. 522; 43 L. J. Ch. 449. In this case Jessel M.R. distinctly dissented from the view expressed by Lord Romilly M.R. in *Parkin* v. *Thorold* (16 Beav. 59), as to the effect of a letter extending the time for completion.

been so), and afterwards and before a lease was executed the warehouses were burnt down: it was held that B., though he had waived the essentiality of time, had not waived the condition that the repairs should be effected prior to his taking a lease, and consequently, that the proposed lessor A., and not the proposed lessee B., must bear the loss.[1]

Waiver decided at the trial

§ 1128. The question whether time was originally of the essence, and whether it has since been waived, is one of evidence, and can therefore be disposed of only at the trial.[2]

[1] *Coxhead* v. *Macpherson*, 3 Mac. & G. 637; 3 De G. F. & J. 307; 1 K. & J. 83, and see *Hughes* v. *Jones*, 3 De G. F. & J. 307.

[2] *Levy* v. *Lindo*, 3 Mer. 81.

CANADIAN NOTES.

Delay in Proceeding—Laches.

In *Westgate* v. *Westgate*, 28 U.C.C.P. 283, where an agreement had been fully executed by the plaintiff, and the defendant set up the objection of laches to a suit by the plaintiff for specific performance, it was said by Gwynne J. delivering the judgment of the Court, that laches cannot, in the sense of being a bar to equitable relief, with any degree of propriety be attributed to a person who has paid the full consideration of an agreement and has done everything necessary for him to do to entitle him to a legal conveyance.

In *McMahon* v. *O'Neill*, 16 Grant's Ch. 579, the question was raised whether delay in the prosecution of a suit for specific performance might be a bar to relief at the hearing, and a reference was made to the Master to ascertain what was the cause of the delay in prosecuting it. The bill having been filed on the 29th April, 1853 and the cause only brought to a hearing on the 28th January, 1862, the Master reported that the plaintiff's poverty was the cause of his delay in the proceedings. Vankoughnet Ch. had been of the opinion that the delay was no bar, Esten V.-C. holding the opposite opinion and Spragge V.-C. giving no opinion. The bill was eventually dismissed, Spragge V.-C. holding that, independently of the delay which occurred in the prosecution of the suit, the plaintiff was disentitled by his laches to specific performance.

In *Larkin* v. *Good*, 17 Grant's Ch. 585, the contention was made that plaintiff's right to a decree was barred by lapse of time, but it appeared that a previous bill for specific performance had been dismissed by consent of the plaintiff in consequence of misrepresentations by the defendant, and, in view of those circumstances and also of the fact that plaintiff had been absent from the province, it was held that the plaintiff's right to a decree was not barred by the lapse of time.

In *Walker* v. *Brown*, 14 Grant's Ch., 237, where the intestate had contracted for the purchase of a village lot in Bothwell, and paid part of the purchase money, and the vendor afterwards agreed to erect certain buildings for which the purchaser was to pay by instalments, the vendor to hold possession and receive the rents mean while on account, the purchaser having made default, died intestate. His heirs lay by for a number of years and until oil was discovered near Bothwell, in consequence of which property rose in value. They then filed their bill to enforce the purchase, but the Court dismissed it on the ground of laches.

In *Evans* v. *Evans*, 2 Grant's Error & Appeal, 156, a son, in whose favour an agreement had been made for the sale of land, payable in six years without interest, lay by for ten years before taking any proceedings to enforce the performance of the contract. No payment had been made on account of the purchase money, but it was claimed that the son was entitled to a credit for services rendered. A decree was pronounced in favour of the purchaser in an action for specific performance, but was reversed on appeal on the ground of laches, Draper C.J. and Esten V.-C. dissenting.

In *VanWagner* v. *Terryberry*, 5 Grant's Ch. 324, the headnote sets out the following facts:

"A person in possession of lands contracted in the year 1818 with the proprietor for the purchase thereof and about a year afterwards, without having paid any portion of the purchase money, absconded from the province, leaving some members of his family in possession of the property. In June, 1850, the owner, having failed to effect any settlement with the vendee, obtained possession in an action of ejectment which he had instituted, and in January, 1851, sold the property to another purchaser who went in upon the land and remained in possession until September of 1853, and laid out large sums in improvements, when the original vendee assigned his agreement to the plaintiff who thereupon filed a bill for the specific performance of the agreement."

The learned Chancellor, after setting forth these circumstances, repeated what he had said at the hearing.

that the case did not appear to him to admit of the smallest doubt. "A decree for specific performance would be subversive of the foundation upon which this jurisdiction rests and destructive of the principles of equity and good conscience which this Court is specially bound to conserve."

A somewhat similar case was that of *Crawford* v. *Birdsall*, 8 Grant 415, where the vendor had let the purchasers into possession, but some years afterwards on default of payment of the purchase money had obtained possession by ejectment. Subsequently the purchase money was tendered and refused, and the purchasers took no steps for eighteen years to enforce their claim. During all this time the vendor remained in possession as owner, the property having in the meantime greatly increased in value. The bill for specific performance was, under the circumstances, dismissed with costs.

In *Forsyth* v. *Johnson*, 11 Grant's Ch. 639, there was a lapse of fourteen years after the vendor's conveyance, before the bill for compensation was filed, the heir having been a minor all this time.

It was held that the vendor having caused this delay by his own arrangement with the infant's relations, which deprived the infant of their protection, this lapse of time was no bar to the suit. *Per* Mowat V. C.: "It would be most unjust that a purchaser, who had paid the greater part of the purchase money and had made perhaps valuable improvements, but had been guilty of some trifling default, which deprived him of a right to sue at law but had no effect in equity, should have no remedy in case of the seller subsequently selling the property to a purchaser without notice, and putting the money into his own pocket. If the wrongful sale in such a case is after the purchaser's death, and in collusion with the personal representatives, it would be equally unjust that the heir who would lose thereby perhaps a valuable property, should not be permitted to get compensation from the wrongdoer.

The purchaser under a contract for sale of land, is not entitled to a decree for specific performance by the vendor unless he has been prompt in the performance of

the obligations devolving upon him and always ready to carry out the contract on his part within a reasonable time, even though time was not of its essence; nor when he has declared his inability to perform his share of the contract. The purchaser waives any objection to the title of the vendor if he takes possession of the property and exercises acts of ownership by making repairs and improvements. *Wallace v. Hesshin*, 29 S.C.R. 171.

In the *Corporation of Huron v. Kerr*, 15 Grant's Ch. 265, which was an action for the specific performance of a contract entered into by a principal and sureties, some of the sureties, after possession was taken, refused to sign a formal lease for a year according to the terms of the contract. No proceedings were taken to enforce their undertaking under the guarantee until the year had expired, and the principal had given up possession, a default in respect of his rent. It was held that the delay was no bar to the suit.

In *Cotton v. Corbie*, 7 Grant's Ch. 50, specific performance of a contract for sale of a steamship was refused because of the lapse of time between the making of the contract and the time when the plaintiff was able to carry it into effect, the property having undergone great changes and depreciated in value in the meantime.

Justifiable Delay in Suing.

In *Towers v. Christie*, 6 Grant's Ch. 159, a purchaser of property was informed that the property, the subject of his purchase, had been re-sold. The time was not ripe for a conveyance to be made to the purchaser, the last instalment of the money payable not having yet become due. The purchaser assigned his interest to the plaintiff who brought an action for specific performance. *Per* Esten V.-C.: "A purchaser who is informed that the property the subject of his purchase has been re-sold by the vendor, is sometimes blamed if he does not seek the aid of the Court promptly, although his own contract may not be ripe for execution. He is no doubt entitled, if the possession be withheld from him, to institute a suit in order to recover. My own opinion is that if a purchaser, under such circumstances, notifies to the second

purchaser that he intends to insist upon his rights, and is only waiting till the proper time arrives to institute a suit for that purpose, he does all that can be required of him, and that, although he is entitled, he is not obliged to commence a suit for the recovery of its possession if in order to avoid a double litigation he is willing to submit to the loss of the possession and wait till he can obtain complete relief. In the present case we think it best to dismiss the bill without costs, prefacing that order with a declaration of the rights of the parties."

In *Hutchison* v. *Rapelje*, 2 Grant's Ch. 533, the steps were pointed out which a vendee of an estate who desires specific performance of the contract of sale, should take before filing a bill for that purpose, in order to entitle him to costs, the question being whether the bill had been prematurely filed. Spragge V.-C. thought it had been filed somewhat hastily, but the decree was granted in the event without costs.

Time, where Transaction is of Speculative Character.

In *Vicon* v. *Logie*, 4 Man. 366, there was great delay on the part of the vendor, who was seeking performance of a contract for the purchase of land. The transaction was one of a clearly speculative character, speculation being described by one of the witnesses as being "very wild" at the time. Taylor J. quoted Lord Romilly to the effect that there was no distinction between laches on the part of the vendor and of the purchaser, and, as it appeared that the vendor could not have made a clear title at the time the purchase money was payable, nor for three years thereafter, the Court declined to enforce the contract at the suit of the vendor against the purchaser.

Stipulations as to Time.

In *Barlow* v. *Williams*, 16 Man. 164, time was made the essence of the contract, but it was held that the intention of the parties must, nevertheless, be looked at, and that where the circumstances shewed that it was not the real intention of the vendors to insist on the contract being strictly carried out the stipulation was only in the nature of a penalty which the Court of Equity should relieve against.

In the same case it was held that the purchaser of land under an agreement to sell, who takes and retains possession, will not be barred from taking proceedings for specific performance although he delays them for more than six years.

In *Whitlaw* v. *River View Realty Co.*, 19 Man. 746, there was a provision in an agreement for the sale of land to the plaintiff that in case the purchaser should at any time make default in any of the payments to be made by him, etc., the vendors should be at liberty, at any time after such default, with or without notice, to either cancel the contract and declare the same void, or proceed to another sale of the land. Notice was accordingly given that by reason of default in the payment of two instalments due September, 1907, and September, 1908, respectively, they thereby cancelled the said agreement and declared the same void. Time was in the agreement declared to be of the essence of it. The plaintiff made a tender to the defendants on the 15th of June of the amount in arrear for principal and interest and defendants refused to accept it, whereupon the action for specific performance was commenced. Defendants did not set up as their defence either laches or abandonment of the contract on the plaintiff's part and on the appeal defendant's counsel said they did not rely on any such defence.

It was held that the contract was not rescinded by the notice as the plaintiff was not given an opportunity of making good his default, and that, even if the notice had in fact cancelled and annulled the contract, the Court could, and in this case should, laches not having been set up as a defence, grant relief against the forfeiture and decree specific performance at the suit of the plaintiff. Howell C.J. dissenting, held that the plaintiff had been guilty of such laches and unexplained delay that he was not entitled to any relief.

Stipulations as to Time—Time of the Essence—Property of Speculative Character.

In an action for specific performance even when time is of the essence of the agreement, if the party in default has done what in him lay to perform the contract, the

Court may exercise its discretion and grant the relief claimed. And where by such an agreement the conveyance was to be tendered by the plaintiff to the defendant, and the transaction closed on the first day of June, which fell on Sunday, when no tender was made, and the conduct of the defendant on the following day was such as to exclude a tender on that day, in an action for specific performance, the plaintiff was held entitled to judgment. The learned Judge found, in this case, that what took place on Monday excused the plaintiff from making a tender on that date, and that while there is nothing illegal at common law in a tender made on Sunday, it was not contemplated by the agreement that the transaction should be closed on that day. He held that the language of the Chancellor in *McSweeney* v. *Kaye*, 15 Grant 432, was applicable to the case, to this effect, that the law of this Court, when time is made of the essence of the contract would not be founded on equity or good sense if it were so rigid as to exclude from relief a party who in good faith and with diligence has striven to perform his part of the contract. He thought that in the present case the plaintiff had done what in her lay to complete the contract and that the reference by the defendant to his solicitor on the Monday, and the refusal by the solicitor on the Wednesday, put the plaintiff in the same position as if the refusal had been in terms, as he believed it to have been in fact, made on the Monday, and so, in his opinion, the plaintiff was excused from making a useless tender, as nothing subsequently done had caused such duty to spring into existence. *Cudney* v. *Giroe*, 20 O.R. 500.

In the case of *McSweeney* v. *Kaye*, above referred to, the agreement was conditioned upon payment on a certain day, and it was expressly stipulated that time should be of the essence of the contract. It was held that although the Court as a general rule would hold the party to perform the contract within the time limited, yet it might and would admit him to shew a good and valid reason for non-performance within the time, and in that case might order specific performance. On the other hand, in the case of *Crossfield* v. *Gould*, 9 Ont. App. R. 218, the Court held, on the construction of the contract,

that, looking at the nature of the property and the subject of the contract, time would without any stipulation in respect thereof be regarded as essential and it was intended by the parties that it should be so, and understood by them that it was so, and the subsequent correspondence shewed that it was expressly made so, and, therefore, plaintiffs were not entitled to a specific performance of the contract.

In *Robinson* v. *Harris*, 21 O.R., 13, it was held by the Queen's Bench that although, where the property in a contract for the sale or exchange of lands is of a speculative character the presumption is that time is of the essence of the agreement, such presumption may, as when a time is expressly fixed, be rebutted by the parties treating the contract as still subsisting after the time fixed for its completion.

In the Supreme Court of Canada it was held that time was originally of the essence of the contract, but there was a waiver by the defendant of a compliance with the provision as to time by entering into negotiations as to the title after its expiration, 21 S.C.R., 390.

In *McDonald* v. *Elder*, 3 Grant's Ch. 244, it was held that in decrees for specific performance of contract for purchase, a time for payment of the purchase money should be limited, or, in default, the bill dismissed, and in such cases also the decree should direct a set-off between the unpaid purchase money and the costs. The suit was on behalf of the purchaser.

A party had entered into an agreement to accept a lease of land, but, in preparing the conveyance in pursuance of such agreement, he insisted pertinaciously upon a stipulation being introduced into the lease which it was subsequently shewn he had not any right to call for, and he ultimately waived his claim to it. But as he had previously declared that he would never accept the lease which did not agree with his interpretation of the contract, the owner of the land had proceeded to erect a valuable building upon it. The proposed lessee thereupon filed a bill for specific performance of the agreement according to the interpretation put thereon by the lessor. It was held, reversing the decree of the Court of Chancery, that the plaintiff was not entitled to the relief

sought, and that his bill in the Court below should be dismissed with costs.

The case of *Carter* v. *Dean of Ely* was cited as a strong authority to shew that the defendant should not be held to the agreement in equity when the plaintiff, instead of being prompt and ready, or, as has been sometimes said, eager to carry out the contract on his part, has, by contending for something contrary to the agreement produced delay in a case where the rent was to commence with the giving of the lease. *Springer* v. *Gray*, 7 Grant's Ch. 276.

In *Peirson* v. *Canadian Permanent Western Canada Mortgage Corporation*, 11 B.C. 139, plaintiff agreed to purchase land from the defendant and pay the balance of the purchase price on July 1st, 1904, the agreement providing that time should be of the essence of the contract, and that, in case of plaintiff's failure to pay the balance at the time agreed, defendants should be at liberty to treat the contract as cancelled. The deed of the property was executed in Toronto and sent to the defendant's agent in Vancouver, to deliver to plaintiff when he paid up, but plaintiff did not pay the balance on the 1st of July and on the 18th defendants notified him that they treated the agreement as cancelled, and that they had resold the land. It was held that the defendants had exercised their option of rescinding the contract within reasonable time, and that the plaintiff was not entitled to any relief.

Where Plaintiff's Performance is not a Condition Precedent.

The owner of vacant land leased part of it for nine months at a nominal rent. The lessees covenanted to sink on the premises during the term a test well to the depth of a thousand feet for the purpose of obtaining oil, and it was provided that at any time during the term, the lessees should have the option of purchasing and the lessors to convey to them on their request, any five acres of the demised land at twelve dollars a lot and at the end of the term the lessees should have the option of purchasing the residue. The lessees set about making the

well but the machinery broke after they had reached a depth of 530 feet. There was no charge of any want of good faith or diligence on their part and the work which they had done and upon which they had expended sufficient to have completed the well had it not been for the accident, had enabled the lessor to sell a large number of his other village lots at advanced prices. It was held, affirming the judgment of the Court below, that the lessees were entitled to a specific performance of the covenant as to the five acres, notwithstanding the non-completion of the well to the stipulated depth, leaving the lessor to his remedy on the covenant. *Per* Mowat V.C.: "The general rule is, no doubt, against enforcing part of the contract where the other part was from its nature incapable of being specifically enforced, but this is a rule which does not apply to a contract like this, where it is manifest that the parties meant that the digging of the well should not be a condition precedent to the right of purchasing the five acres, for the plaintiffs were to be at liberty to buy the five acres at any time during the term, and therefore the next day after the execution of the lease, while the plaintiffs had the full nine months thereafter to dig the well."

The case was said to resemble the one expressly put by Lord St. Leonards in *Gerrais* v. *Edwards*, 2 Dr. & War. 80, as an example of those to which the rule referred to did not apply. In that case Lord St. Leonards is quoted as follows: "By the rule of the Court, if I am called upon to execute the contract, I must myself specifically execute every part of it. I cannot give a partial execution of the contract," but he adds, "if a man agreed to do a certain act, for example, to dispose of an estate with a covenant for something to be done hereafter, the Court can carry such a contract into specific execution. The decree would give all that was presently contracted for, the immediate transfer of the estate itself, and compel the party to enter into the covenant to do the particular thing."

It was further held that the fact of the plaintiffs not having completed the well within the time named did not disentitle them to relief on a bill filed subsequently. In coming to this conclusion the Court had reference to

the considerations above mentioned as to the amount of money expended on the work, the benefit derived by the defendant therefrom, the good faith of the plaintiffs and the fact that defendants had their remedy in damages on the covenant. *Hunt* v. *Spencer*, 13 Grant's Ch. 220.

Defendant Precluded by Conduct from Setting up Lapse of Time.

In *Foster* v. *Anderson*, 16 O.L.R. 565, the contract for the sale and purchase of land set up by the plaintiff, the purchaser, consisted of a written offer by him to buy and a written acceptance by the defendant of his offer. The offer contained, among other things, the following provision: "This offer to be accepted by September 25th, A.D. 1906, otherwise void and the sale to be completed on or before the 10th day of October, 1906. Time shall be of the essence of this offer. Deed to be prepared at the expense of the vendor and mortgage at my expense." It was held that time was of the essence as to all the terms of the contract, but that the duty of the purchaser to make tender of his purchase money did not arise until the vendor had done that which it was incumbent on her to do to put herself into a position to complete the sale. It was her duty to prepare the conveyance and submit the same for approval, having regard to the provision last quoted; and having failed to do so, her default precluded her from setting up the lapse of the time at which the sale should have been completed as an answer to the plaintiff's claim for specific performance.

Foster v. *Anderson*, 16 O.L.R. 565, affirmed by the Supreme Court, 12 S.C.R. 251.

Waiver of Stipulation as to Time.

In June, 1869, one Dennistoun agreed to sell and convey to Helme, 278 acres of land for $2,780, payable by certain instalments at certain specified times, the agreement signed by the parties expressing that time was to be of the essence of the bargain. In January, 1871, Helme by a similar instrument, agreed to sell to the plaintiff 100 acres for $1,000 to be paid to Dennistoun upon the terms contained in the said recited agreement, and the plaintiff then paid Dennistoun $60 on account. Both Helme and the plaintiff were admitted into posses-

sion of their lands on the execution of the respective agreements and so continued until 1874. In February of that year, both Helme and the plaintiff were in arrear, nothing having been paid since 1871, and Dennistoun complained to Helme of this, and of the manner in which the premises were managed, and it was then agreed between Dennistoun and Helme that Dennistoun should bring an action of ejectment, Helme agreeing to pay the costs thereof and all arrears of purchase money, together with an increased rate of interest. Ejectment was accordingly brought by Dennistoun against Helme and the plaintiff, but before the summons was served, or the plaintiff was aware of the proceedings, he paid to the attorney of Dennistoun, one hundred dollars, who endorsed a receipt for the amount on the agreement between Helme and the plaintiff as a payment on with a agreement. Helme took no steps to defend the ejectment and Dennistoun recovered judgment therein, although the plaintiff appeared and tried to defend for his hundred acres, and a writ of possession was issued and delivered to the sheriff with directions to give possession to Helme for Dennistoun, which was done accordingly, and Helme was continued in possession under an arrangement for the extension of time for payment of principal and interest. On a bill fyled by the plaintiff against Helme it was held, under these circumstances, that the receipt by Dennistoun of the hundred dollars after default had waived the condition making time of the essence of the contract, but that, having either omitted to set up these facts in defence of the ejectment, or, being so set up their not having formed an answer to the proceeding, the Court refused to open up the question after the adjudication at law, and dismissed the bill with costs.

Demorest v. *Helme*, 22 Grant's Ch. 133.

By the terms of a contract of sale of real estate belonging to an infant, it was stipulated that if at the end of seventeen months the approval of the Court of Chancery had not been obtained to the sale then made the contract should be at an end. The sale was not completed by the time specified and some months afterward the purchaser acquiesced in the proceedings taken to perfect the title. It was held that he had waived the condition

making time of the essence of the contract. The opinion was expressed that in such a case the purchaser should not file a bill for the rescission of the contract, but must wait until the vendor attempted to enforce the agreement against him. *Per* Spragge V. C.: "It would be a great advantage to a man to be able to ascertain by the judgment of a Court whether he was not released from a contract into which he has entered but it has always been supposed, I believe, that a man must wait until the contract is attempted to be enforced against him." *McDonald v. Garrett*, 7 Grant's Ch. 606.

Procedure where Time is not of the Essence.

In *McDonald v. Elder*, 1 Grant's Ch. 513, the Court had to consider the proper rule for cases in which time was not the essence of the contract, but one of the parties had unduly delayed the performance on his part. *Per* Blake Ch.: "Even when time is not of the essence of the contract, parties have not an indefinite period in which to perform the terms of the agreement. If they desire the assistance of a Court of Equity they are bound to apply promptly. Parties are, therefore, permitted to put an end to contracts which have not been duly performed, even where time is not of their essence, by reasonable notice. But then modern authorities by no means establish that it is competent for parties to such a contract arbitrarily to declare at any instant that it is determined on account of the non-observance of the stipulated time. It would be much less objectionable to hold time to be in all cases of the essence of the contract than to adopt such a rule. In the one case the time mutually fixed by the contracting parties would be deemed conclusive; in the other the time arbitrarily fixed by one of those parties. No such doctrine is to be found anywhere. The rule to be deduced from the authorities is this: that where there has been unreasonable delay, the party injuriously affected by such delay is permitted to give notice that unless the contract is proceeded with within a reasonable time, to be fixed by the notice, the contract will be abandoned and under such circumstances, this Court will consider that such notice has had the effect

of making time of the essence of the contract, and will dismiss a bill filed for the purpose of enforcing specific performance if the contract has not been proceeded with according to such notice. But where a party, instead of pursuing this natural and reasonable course, thinks proper arbitrarily to declare the contract at an end at any particular point of time, or to fix an unreasonably short date within which the contract must be completed, then this Court treats the contract as still subsisting and exercises its jurisdiction."

In *Tyler* v. *Landers*, 15 Grant's Ch. 99, Mowat V.-C. referred to the practice in England as to the time to be given by a decree for paying purchase money, before the vendor was entitled to a rescission of the contract for the default in payment, saying that there appeared to be no fixed period for such cases in England. He referred to the cases of *Foligno* v. *Martin*, 16 Beavan 586, and *Sweet* v. *Meredith*, 6 [illegible] N.S. 569. In the case before him where the decree in a vendor's suit for specific performance directed payment in a [illegible], the Court, on a subsequent application to rescind the contract, gave the defendant, under the circumstances, a further period of four weeks to pay after service of the order and ordered on default a rescission

PART IV.

THE MODE OF EXERCISING THE JURISDICTION.

CHAPTER I.

PROCEEDINGS UP TO AND INCLUDING JUDGMENT.

Its former practice.

§ 1129. At the time when the Judicature Act, 1873, came into operation, the usual mode of proceeding in order to obtain the specific performance of a contract was to institute a suit for the purpose by bill of complaint in the Court of Chancery.

Judicature Act, 1873, s. 34.

§ 1130. By the 34th section of the Judicature Act, 1873, all causes and matters for the specific performance of contracts between vendors and purchasers of real estates, including contracts for leases, are specially assigned (subject to the Rules of the Supreme Court [1]) to the Chancery Division of the High Court of Justice. Causes or matters for the specific performance of other contracts are not expressly assigned to any particular Division of the High Court,[2] and may accordingly, it would seem, be instituted, at the plaintiff's option, in any Division, subject to the powers of transfer exercisable under the Judicature Acts and the Rules of the Supreme Court.[3]

[1] See R. S. C. Ord. XLIX.

[2] *I.e.*, in England. Actions for the specific performance of all classes of contracts in respect of which Courts of Equity enforce such performance are expressly assigned to the Chancery Division of the High Court of Justice in Ireland by the Supreme Court of Judicature Act (Ireland), 1877.

[3] See Jud. Act, 1873, s. 34; Jud. Act, 1875, s. 11; R. S. C. Ord. XLIX.

Form of statement of claim

§ 1131. A form of statement of claim in an action for the specific performance of a contract for the sale of land is given in Appendix C., § ii., No. 12 to the Rules of the Supreme Court.[1]

Transfer of action.

§ 1132. It is provided by the Acts and Rules[2] that any action may be transferred from one Division of the Court to another. Accordingly where, in an action for the recovery of land commenced in the Exchequer Division, the defendant set up a counter-claim for specific performance of a contract for a lease of the land to himself, and it appeared that there was a *prima facie* case for specific performance, the action was transferred, on the defendant's application and against the plaintiff's will, to the Chancery Division.[3] And a similar order was affirmed by the Court of Appeal in the case of *Holloway* v. *York*,[4] where, the liquidation-trustee of a person who had contracted to purchase real estate having commenced an action in the Exchequer Division against the vendor for a return of the deposit, the vendor had delivered a counter-claim for specific performance of the contract.

Action properly commenced in King's Bench Division.

§ 1133. The machinery of the Chancery Division is more adapted to actions for specific performance than that of the King's Bench Division; and hence it seems that where there is an action in the last-mentioned Division for the deposit, and a *bonâ fide* counter-claim for specific performance, the cause ought usually to be transferred to the Chancery Division.[5] But the mere fact that a defendant sued in the King's Bench Division sets up a counter-claim for the specific performance of some contract relating to land between himself and the

[1] The form seems to be open to criticism in that the plaintiff is represented as vendor, and yet asks that the defendant may execute a conveyance to the plaintiff.

[2] Jud. Act, 1873, s. 36; Jud. Act, 1875, s. 11; R. S. C. Ord. XLIX. rr. 1, 3.

[3] *Hillman* v. *Maghee*, 1 Ex. D. 132.

[4] 2 Ex. D. 333.

[5] *London Land Co.* v. *Thomas*, 13 Q. B. D. 540.

plaintiff will not entitle him to get the cause transferred to the Chancery Division.[1] The Court will take notice of an equitable right to specific performance appearing incidentally in the course of an ejectment action, though there be no counter-claim for such performance.[2]

Special case.

§ **1134.** The determination by the Court of questions of law between vendors and purchasers of real or leasehold estate, and judicial declarations as to their respective rights under the contract of sale, may, it is conceived, be obtained upon a special case stated in the action.[3] The Court of Chancery could not enforce specific performance in a proceeding of this nature:[4] but under the present practice, where the answers to the special case dispose of the action, they may be turned into a judgment making declarations to the same effect.[5]

Leave to defend notwithstanding undertaking to the contrary.

§ **1135.** In illustration of the discretionary powers exercisable by the Court in relation to the proceedings in actions for specific performance, reference may be made to *Scott* v. *Moxon*,[6] which was a vendor's action to enforce performance of a contract to purchase some leasehold houses. The defendant had by his solicitor given an undertaking to the plaintiff's solicitors not to deliver any defence; but afterwards, before any judgment had been pronounced, a decision in another case showed that the lease was invalid. Thereupon the Court, on the defendant's application, gave him leave to defend, to the extent of pleading the invalidity of the lease.

[1] *Storey* v. *Waddle*, 1 Q. B. D. 289.

[2] *Williams* v. *Snowden*, W. N. 1880, p. 124 (C. P. Div.); *Furness* v. *Bond*, W. N. 1880, p. 78.

Compare *Sabin* v. *Heape*, 27 Beav. 553, 561 (where the decision was tantamount to a decree for specific performance), and R. S. C. Ord. XXXIV. part 1.

[3] See *Evans* v. *Saunders*, 22 L. T. 43, 51. The procedure by special case under Sir George Turner's Act (13 & 14 Vict. c. 35) was abolished by 46 & 47 Vict. c. 49, but a similar procedure has been substituted by R. S. C. Ord. XXXIV. r. 8.

[4] *Harrison* v. *Cornwall Minerals Railway Co.*, 16 Ch. D. 67, 80.

[5] 81 L. T. 774.

Vendor and Purchaser Act, 1874, s. 9.

§ 1136. A convenient mode of obtaining an authoritative decision of questions arising upon some of the class of contracts discussed in this treatise has been introduced by the Vendor and Purchaser Act, 1874, under which (section 9) a vendor or purchaser of real or leasehold estate or their respective representatives may at any time apply in a summary way to a Judge of the High Court in Chambers in respect of any requisitions or objections or any claim for compensation or any other question[1] arising out of or connected with the contract (not being a question affecting the existence or validity of the contract[2]), and the Judge is to make such order upon the application as to him shall appear just, and to order how and by whom all or any of the costs of and incident to the application are to be borne and paid. The exception of questions affecting the existence or validity of the contract refers to the existence or validity of the contract in its inception, and does not preclude the Court from determining whether a power to rescind contained in the contract has been well exercised.[3] And a specific question arising out of a contract—a question, for instance, as to the form of conveyance—may be determined on summons under the Act, notwithstanding that the evidence may suggest a doubt whether the contract is one which could be specifically enforced by action.[4]

[1] But it is not proper to raise, on a summons under this Act, a question as to the amount of an item of the vendor's solicitor's costs: *Re Webster and Jones' Contract*, [1902] 2 Ch. at p. 555.

[2] See *per* Lord Halsbury L.C. in *Re Sandbach and Edmondson's Contract*, [1891] 1 Ch. at p. 102.

[3] *Re Jackson and Woodburn*, 37 Ch. D. 44.

[4] *Re Hughes and Ashley's Contract*, [1900] 2 Ch. 595, and the references there (at pp. 600, 604) to *Re Leader and Bagley's Contract*, [1892] 3 Ch. 41. See, too, *Re Wallis and Bovard's Contract*, [1899] 2 Ch. 515, 520, where it was held that an isolated question arising on the contract might be decided on summons, although the respondent alleged that he had entered into the contract under a mistake, which would enable him to rescind the contract by means of an action for that purpose.

but a question of fraud cannot be tried on such a summons.[1] In very many of the disputes that arise between vendors and purchasers of realty and leaseholds an application under this section is an advantageous and efficient substitute for an action for specific performance.[2] The parties to such an application are in the same position as they would be under a reference as to title in such an action.[3] It has, however, been judicially questioned whether it is proper, on such an application, to make an order that a vendor has or has not shown a good title, *i.e.*, embracing the whole title, instead of dealing with isolated questions only.[4]

Moreover, where there is upon the title a question of construction involving real difficulty or doubt, a vendor and purchaser summons is not a proper mode of seeking a judicial determination of the question. It ought rather to be made the subject of a construction summons, the decision upon which will bind all persons interested.[5]

Consequential relief.

§ **1137.** The jurisdiction to make such order as shall be just, conferred by this statute, enables the Court to do all that may be just as the natural consequence of the point or points decided. Therefore, when the Court on a summons decided that the vendor had not shown a good title, it ordered the vendor to return the deposit with interest, and to pay the purchaser his

[1] *Re Delany and Dreyer's Contract*, [1905] 1 I. R. 602, 606.

Esp., *Re Waddell's Contract*, 2 C. D. 172; *Re Coleman and Jarvis*, 1 Ch. D. 165 (where, to strengthen the purchaser's title, Jessel M.R. delivered judgment in Court); *Re Popple and Barratt's Contract*, 25 W. R. 218; *Re Keachy and Clayton's Contract*, 7 Ch. 10, 15; *Re Metropolitan District Railway Co. and Cosh*, 13 Ch. D. 607; *Osborne to Rowlett*, 13 Ch. D. 774; *Dreyer's Co.* v. *McCann*, 1 I. R. Ir. 13 (summons may be served out of the jurisdiction); *Re Harris and Rawlings' Contract*, [1891] W. N. 19; *Re Nisbet and Potts' Contract*, [1905] 1 Ch. 391; affirmed [1906] 1 Ch. 386; 75 L. J. Ch. 238 (constructive notice of restrictive covenants affecting the user of land).

[2] *Re Burroughs, Lynn, and Sexton*, 5 Ch. D. 601.

[3] *Re Wallis and Barnard's Contract*, [1899] 2 Ch. at p. 529.

[4] *Re Nichols' and Van der's Contract*, [1910] 1 Ch. 43, 46, 47.

costs of investigating the title.[1] Such an order may be made, at the instance of the purchaser, upon a vendor's summons.[2] Unliquidated damages, however, by way of compensation for a vendor's delay in completing, are not recoverable by a purchaser on a summons of this kind.[3]

Exception of matters affecting the validity of the contract.

§ 1138. Where the purchaser seeks to recover back the deposit on the ground of fraud or of such misdescription as enables the purchaser to rescind, there the matter in controversy affects the validity of the contract, and consequently it cannot be determined under the statute in question.[4]

Action after proceeding under the Act.

§ 1139. A person who has availed himself of the provisions of the Act is not, generally, entitled afterwards to bring an action for the specific performance of the contract which was the subject of the summons.[5] But where a purchaser's summons, seeking a declaration that the title is not such as he ought to be compelled to accept, has failed, and he nevertheless refuses to complete the purchase, it is open to the vendor to sue for specific performance.[6] In such a case, however, if, since the order on the summons, the purchaser

[1] *Re Hargreaves and Thompson*, 32 Ch. D. 454, approving *Re Higgins and Hitchman*, 21 Ch. D. 93; *Re Yielding and Woodbrook*, 31 Ch. D. 344; *Re Priestley and Davidson's Contract*, 31 L. Rep. Ir. 122; and *Re Furneaux and Aird's Contract*, [1906] W. N. 215. See, too, *Re Haedicke and Lipski's Contract*, [1901] 2 Ch. at p. 670; 70 L. J. Ch. 811. Distinguish *Re Scott and Alvarez' Contract, Scott* v. *Alvarez*, [1895] 2 Ch. 603, commented on in *Re Hughes and Ashley's Contract*, [1900] 2 Ch. at p. 602.

[2] *Re Walker and Oakshott's Contract*, 70 L. J. Ch. 666; [1901] 2 Ch. 383 (in C. A., [1902] W. N. 147), following *Re Higgins and Percival*, 59 L. T. 213. The point of law decided in *Re Walker and Oakshott's Contract* was overruled by the C. A. in *Re Judd and Poland and Skelcher's Contract*, [1906] 1 Ch. 684; 75 L. J. Ch. 403; but the statement in the text was not thereby affected.

[3] *Re Wilsons and Stevens' Contract*, [1894] 3 Ch. 546, 552.

[4] *Re Davis and Cavey*, 40 Ch. D. at p. 608.

[5] *Thompson* v. *Ringer*, 29 W. R. 520.

[6] See *e.g.*, *Re Scott and Alvarez' Contract, Scott* v. *Alvarez*, [1895] 1 Ch. at pp. 609, 610 (commented on in *Re Wallis and Barnard's Contract*, [1899] 2 Ch. at p. 520)

has discovered material facts, showing the title to be bad, which facts he could not with reasonable diligence have discovered earlier, he may, at all events with the leave of the Court, put in a counter-claim in the nature of an action of review.[1]

The County Courts Act, 1888.

§ 1140. By the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 67, County Courts have all the powers and authority of the High Court in actions for specific performance of any agreement for the sale, purchase, or lease of any property, where in the case of a sale or purchase the purchase-money, or in the case of a lease the value of the property, does not exceed 500*l.*[2] In the case of a sale the language of the section makes the amount of the actual purchase-money the test of the County Court jurisdiction; and it was accordingly held in *Re* v. *Judge Whitehorne*[3] that the specific enforcement of a contract to sell for 75*l.* the equity of redemption of some leaseholds, worth about 1,500*l.* but subject to a charge of about 1,100*l.*, was within that jurisdiction.

High Court retains concurrent jurisdiction.

But the jurisdiction of the High Court in cases of specific performance has not been ousted by that conferred upon County Courts. Though the matter may be within the jurisdiction of the inferior Court, a plaintiff is at liberty to bring his action in the High Court, subject, of course, to the statutory provisions as to transfer.

Mayor's Court of London.

§ 1141. The Mayor's Court of London has a limited jurisdiction in specific performance; but where, an action for specific performance having been commenced in that Court, it appeared that the whole cause of action did not arise within the City, the proceedings were stopped by means of a writ of prohibition.[4]

[1] Ibid. at pp. 610, 622.

[2] See *Foster* v. *Reeves*, [1892] 2 Q. B. 255; 40 W. R. 695, for a curious result of this limitation of County Court jurisdiction.

[3] [1901] 1 K. B. 827; 73 L. J. K. B. 314.

[4] *Bowler* v. *Barberton Development Syndicate*, [1897] 1 Q. B. 161.

Land Transfer Act, 1875, s. 93.

§ 1142. It may here be mentioned that by the Land Transfer Act, 1875, it was enacted that (s. 93) where a suit is instituted for the specific performance of a contract relating to registered land, or a registered charge, the Court having cognizance of such suit may by summons, or by such other mode as it deems expedient, cause all or any parties who have registered estates or rights in such land or charge, or have entered up notices, cautions or inhibitions against the same, to appear in such suit, and show cause why such contract should not be specifically performed, and the Court may direct that any order made by the Court in such suit shall be binding on such parties or any of them. Further, by the 94th section of the same Act, all costs incurred by any party so appearing in a suit to enforce against a vendor specific performance of his contract to sell registered land or a registered charge are to be taxed as between solicitor and client, and, unless the Court otherwise orders, paid by such vendor.

Irish Land Commission.

§ 1143. It may further be mentioned that under sect. 22 of the Land Law (Ireland) Act, 1887 (50 & 51 Vict. c. 33), the Irish Land Commission has jurisdiction, in certain cases of contracts for sale, to decree specific performance; but that it appears to be doubtful whether that Commission has such jurisdiction in proceedings under the Redemption of Rent (Ireland) Act, 1891.[1]

Companies (Consolidation) Act, 1908, s. 32.

§ 1144. How far the summary jurisdiction conferred by the 32nd section[2] of the Companies (Consolidation) Act, 1908, is properly applicable to the enforcement of contracts for the sale and purchase of shares is a question which has been much discussed, but can hardly be said to be even now satisfactorily settled. That section provides

[1] See *Giles* v. *Hennessy*, [1895] 2 I. R. 326, 337.

[2] This section replaces s. 35 of the Companies Act, 1862, which was repealed by the above-cited Act of 1908.

that if the name of any person is, without sufficient cause, entered in or omitted from the register of members of a company, or if default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member, the person aggrieved, or any member of the company, or the company, may apply to the Court for rectification of the register. The application may be made, as respects companies registered in England or Ireland, by motion in the High Court, or by application to a judge of the High Court sitting in Chambers, or by application to the judge of the Court exercising the summaries jurisdiction in the case of companies subject to that jurisdiction, and, as respects companies registered in Scotland, by summary petition to the Court of Session, or in such other manner as the said Courts respectively may direct; and the Court may either refuse the application, or may order rectification of the register, and payment by the company of any damages sustained by any party aggrieved. On any application under this section the Court may decide any question relating to the title of any person who is a party to the application to have his name entered in or omitted from the register, whether the question arises between members or alleged members, or between members or alleged members on the one hand and the company on the other hand; and generally may decide any question necessary or expedient to be decided for rectification of the register.

Application of the section to cases of specific performance.

This enactment may seem at first sight to offer an attractive and efficient substitute for an action for specific performance in cases arising out of contracts for the sale of shares, but the reported decisions show that its applicability in practice to such cases is by no means universal. The jurisdiction which it confers is clearly discretionary; and it seems that the Court will be slow to exercise this jurisdiction for the purpose of deciding questions between vendors and purchasers of

shares, except where the legal title of the applicant is clear.[1]

Form of judgment.

§ 1145. The form of a judgment for specific performance varies, of course, according to the particular circumstances of the case.[2] "Sometimes it is a vendor's action, sometimes a purchaser's action: sometimes the title is accepted, sometimes it is not."

Where, in the case of a contract for sale of land, the purchaser has accepted the title, and the vendor moves for judgment in default of defence, the judgment ought to provide for the delivery of a proper conveyance of the property to the purchaser, on payment by him of the purchase-money, with interest and costs and damages, if any.[4]

Where judgment for specific performance is granted in favour of a purchaser, there is jurisdiction to direct that, in adjusting the accounts as between vendor and purchaser, the purchaser is to be entitled to bring into the account the amount of the costs which the vendor has been ordered to pay against the purchase-money. That is, in a case where the debt due to, and the debt due from, the defendant are so due to and from the defendant in the same capacity.[5] This jurisdiction, however, was held not to extend to allowing a plaintiff purchaser of leaseholds from an administratrix who was by the judgment ordered to pay the plaintiff's costs, to bring into account all or any part of an unascertained sum to which the defendant might be beneficially entitled in the administration of her intestate's estate, as

[1] *Ward and Henry's case*, L. R. 2 Eq. 226; 2 Ch. 431; *Musgrave and Hart's case*, L. R. 5 Eq. 186; *Ex parte Sargent*, L. R. 17 Eq. 273, 276; *Ex parte Shaw*, 2 Q. B. D. 463. See, too, the notes on the section in Buckley on the Companies and Limited Partnerships Acts.

[2] See Seton (6th ed.), pp. 2206 *et seq.*

[3] *North* v. *Percival*, [1898] 2 Q. B. at p. 135.

[4] *Cooper* v. *Morgan*, [1899] 1 Q. 261; 78 L. J. Ch. 195; annotated Form 6 in Seton, 6th edit. p. 2210.

[5] *Green* v. *Seton*, 13 Ch. D. p. 602.

against the purchase-money due to the defendant in her representative capacity.[1]

Lis pendens.

§ 1146. If the plaintiff in an action for specific performance has registered the action as a *lis pendens*, and at the trial the action is dismissed with costs, an order vacating the registration of the *lis pendens* may be included in the judgment.[2]

Account of rents and profit directed at trial

§ 1147. Where the judgment at the trial directs a simple account—not on the footing of wilful account—of rents and profits received by the vendor, he is chargeable with the rents, and the proceeds of sale of crops, which he has actually received, but not with an occupation rent in respect of land unlet; and, on the other hand, he is entitled to be allowed the necessary expenses of realizing the crops, but not any losses which he may have incurred in farming.[3]

[1] *Phillips* v. *Howell*, [1901] 2 Ch. at p. 778.

[2] *Baxter* v. *Middleton*, [1898] 1 Ch. 31[illegible].

[3] *Bennett* v. *Stone*, [1902] 1 Ch. at pp. 230, 238; affirmed C. A., [1903] 1 Ch. 509.

CHAPTER II.

INJUNCTIONS.

Subject of the chapter.

§ 1148. It has already been in effect stated[1] that executed, as distinguished from executory, contracts are not within the scope of this treatise. The present chapter will accordingly be confined to the consideration of the use of injunctions in connection with contracts of the latter kind.

How injunction is connected with specific performance.

§ 1149. The jurisdiction of the Court[2] in injunction is connected with the specific performance of executory contracts in three ways:—

(i.) Sometimes the injunction is the instrument by which the Court specifically enforces the contract itself or some part of it;

(ii.) Sometimes the injunction is merely incident or ancillary to the performance of the contract; and

(iii.) Sometimes the injunction is used for the purpose of giving effect to rights resulting from the non-performance of the contract.

i. *Injunction the instrument of performance.*

Effect of restraining breach of a term.

§ 1150. It is evident that whenever the Court grants an injunction restraining the breach of any express or implied term of a contract it thereby *pro tanto* specifically enforces the performance of the contract.[3]

[1] *Supra*, § 38; cf. § 812.

[2] As to the jurisdiction of County Courts in injunction, see *Stiles* v. *Cockerton*, [1893] 1 Q. B. 544; 72 L. J. Q. B. 256.

[3] As to injunctions restraining applications to Parliament, see *infra*, Part VI. chap. x.; and as to the discretionary character of the jurisdiction, see *per* Lord Westbury in

Contract containing express negative terms.

§ 1151. Where the contract contains express negative as well as positive terms, and the positive terms are capable of specific performance by the Court, the Court may and naturally will enforce by injunction the observance of the negative terms; for by so doing it promotes the complete performance of the contract as a whole.

Rankin v. *Huskisson.*

Thus where the Commissioners of Woods and Forests contracted with a Committee of the United Service Club for the grant by the Commissioners to the trustees of the club of a lease of a specified piece of ground, and further that a specified plot on the south side of this piece of ground should be laid out as an ornamental garden, and no buildings whatever should be erected thereon, and afterwards the Commissioners began to build stables on the plot; the Court specifically enforced the observance of the negative stipulation by restraining the Commissioners from continuing to build on the plot and also from permitting such part of the stables as had already been built to remain upon it.[1]

Part of contract incapable of performance.

§ 1152. But where part of the contract is of such a nature as to be incapable of specific performance by the Court, a difficulty presents itself with respect to the Court's enforcement of any other part of it by injunction. For, as we have seen,[2] the Court will not, as a general rule, enforce part of an executory contract unless it can perform the whole; and, in the case supposed, the grant of an injunction would obviously be tantamount to a merely partial enforcement of the contract.

Refusal of Court

§ 1153. On the principle referred to in the last

Lee v. *Jones*, 1 De G. J. & S. at p. 299. Cf. *Harris* v. *Boots Cash Chemists (Southern)*, [1904] 2 Ch. 376, 383 (lessee not entitled to enforce by injunction the specific performance by his assignee of negative covenants contained in the lease).

[1] *Rankin* v. *Huskisson*, [illegible] (Shadwell V.C.).

[2] Part III. chap. xvi.

preceding section, one would expect to find the Court always refusing to interfere by injunction to restrain the breach or non-performance of part of an executory contract where the rest of the contract is incapable of, or is not a proper subject for, specific performance: and in fact there are numerous instances of such refusal.[1] Refusal to interfere.

There are, however, cases in which, though the contract as a whole has been such as the Court could not or would not specifically enforce, it has nevertheless granted an injunction restraining the breach of some express or implied term of it. These cases have already been discussed at length in a previous chapter.[2] It may here be added that whenever in such cases, a person is compelled by injunction to observe some negative term of a contract, the whole benefit of the injunction is conditional upon the plaintiff's performing his part of the contract, and the moment he fails to do any of the acts which he has engaged to do, and which were the consideration for the negative term, the injunction will be liable to be dissolved.[3] Breach of express or implied term restrained

§ **1154.** In connection with the cases referred to in the last preceding section, the old case of *Martin* v. *Nutkin*[4] and the recent one of *James Jones & Sons* v. *Tankerville (Earl)*[5] may be referred to. In *Martin* v. *Nutkin*[4] articles had been executed between the plaintiffs, who resided very near the church of Hammersmith, and the parson, churchwardens, overseers, and some of the other inhabitants of the parish, by which the plaintiffs covenanted to erect a new *Martin* v. *Nutkin.*

[1] See *supra*, § 852, and the cases there cited: also *Fothergill* v. *Rowland*, L. R. 17 Eq. 132, cited *supra*, § 859; *per* Lord Cottenham in *Dotchen* v. *Cabburn*, 2 Ph. at p. 57; *Rogers* v. *Wilmot*, W. N. 1880, p. 88. Cf. *Horne* v. *London and North Western Railway Co.*, 10 W. R. 170.

[2] Part III. chap. xvi. § 852 *et seq.*

[3] See *per* Lord Hatherley (then V.C.) in *Stocker* v. *Wedderburn*, 3 K. & J. at p. 405.

[4] 2 P. Wms. 266.

[5] [1909] 2 Ch. 440; 78 L. J. Ch. 674.

cupola, clock, and bell to the church, and the other parties covenanted that a bell which had been daily rung at five o'clock in the morning, to the great annoyance of the plaintiffs, should not be rung during the lives of the plaintiffs or the survivor of them: the plaintiffs performed their part of the contract, but the bell after about two years was rung again: the contract on the part of the parish authorities was specifically enforced against them by means of an injunction: although, as Lord St. Leonards remarked in the course of his judgment in *Lumley* v. *Wagner*,[1] the Court clearly could not have granted any specific performance.

James Jones & Sons v. Tankerville (Earl).

In *James Jones & Sons* v. *Tankerville* (*Earl*) the plaintiffs had contracted with the defendant for the purchase of timber growing on the defendant's estates, and it was part of the contract that the plaintiffs were to have the rights of entering upon the estates and felling, sawing up, and removing the timber. While the plaintiffs were exercising these rights, the defendant repudiated the contracts, and ousted the plaintiffs from his estates. The plaintiffs sued for an injunction restraining the defendant from preventing the due execution of the contract; and the Court granted the injunction, holding that it had jurisdiction thus to give relief by way of specific performance, notwithstanding that it might have been unable to compel the plaintiffs to fell the timber, if they had refused to do so.

ii. *Injunction ancillary to performance.*

Object and effect of injunction in these cases.

§ 1155. The jurisdiction of the Court in injunction is often ancillary to that in specific performance, for the purpose of preventing the defendant making a use of some legal interest or right vested in him in

[1] 1 De G. M. & G. at p. 614.
[2] [1909] 2 Ch. 440; 78 L. J. Ch. 674.

a way inconsistent with the equity claimed by the plaintiff, or embarrassing the plaintiff by dealing with the property during the pendency of the action, or obstructing the performance of some act incidental to the execution of the contract. "The Court will in many cases interfere and preserve property *in statu quo* during the pendency of a suit, in which the rights to it are to be decided, and that without expressing, and and often without having the means of forming, any opinion as to such rights."[1]

Granted on *prima facie* case

§ **1156**. In the class of cases now to be considered the injunction is therefore granted, upon interlocutory application and until the trial, on the plaintiff showing a *primâ facie* case for specific performance.[2] It is not necessary that it should be clear that the plaintiff will succeed at the trial; it is sufficient if there is ground for supposing that relief may be given.[3] For on this application the Court will not decide delicate points,[4] nor allow it to be resisted on points, such as delay, which can only be decided at the trial.[5]

Instances of grant of injunction.

§ **1157**. Accordingly where an intended lessor was sued by an intended lessee for the specific performance of a contract to grant a lease, he was restrained from bringing an ejectment during the suit.[6] In another case, the plaintiff (purchaser) obtained an injunction to restrain the vendor from conveying away the legal estate, which might compel the plaintiff to make some other person a party to the suit.[7] In other cases injunctions to restrain sale and surrender of estates

[1] *Per* Lord Cottenham in *Great Western Railway Co.* v. *Birmingham and Oxford Junction Railway Co.*, 2 Ph. 602. Cf. R. S. C. Ord. L. r. 1—3.

[2] *Powell* v. *Lloyd*, 1 Y. & J. 427. *Hudson* v. *Bertram*, 3 Mad. 440, 447; *Attwood* v. *Barham*, 2 Russ. 186.

[3] *Price* v. *Assheton*, 1 Y. & C. Ex. 82.

Levy v. *Lindo*, 3 Mer. 81.

[4] *Boardman* v. *Mostyn*, 6 Ves. 467; *Buckland* v. *Hall*, 8 Ves. 92; *Attwood* v. *Barham*, 2 Russ. 186. Distinguish *Fox* v. *Parssell*, 3 Sm. & G. 212.

[5] *Eckhoff* v. *Baldwin*, 16 Ves. 267.

as to which specific performance was sought, were granted on certificate of bill filed and affidavit.[1] And in another case, an injunction was granted to restrain a purchaser, who had got into possession, from cutting timber on the estate.[2]

Vendor obstructing valuer.

§ 1158. On the same principle, where the contract was for the sale of a leasehold public house at a fixed price, and of the furniture, fixtures, and other effects on the premises, at a valuation to be made by a valuer named in the contract, and the vendor refused to allow the valuer to enter upon the premises for the purpose of making an inventory of the articles to be valued, Jessel M.R., upon the interlocutory application of the purchaser in a suit instituted by him for the specific performance of the contract, made an order compelling the vendor to allow the valuer to enter.[3] "I have no hesitation," said his Lordship, "in saying that there is no limit to the practice of the Court with regard to interlocutory applications so far as they are necessary and reasonable applications ancillary to the due performance of its functions, namely, the administration of justice at the hearing of the cause."[4]

Lis pendens.

§ 1159. In one case, where the validity of the contract was disputed, Lord Langdale M.R. refused a motion for an injunction to restrain the vendor from letting or selling the estate pending the hearing, on the ground that a lessee or purchaser *pendente lite* would take subject to the plaintiff's rights.[5] And in another case, where, on the plaintiff (purchaser) making his interlocutory application, it was not clear that he would be able at the hearing to establish his right to specific performance, the Court of Appeal refused, on

Balance of convenience.

[1] *Curtis* v. *Marquis of Buckingham*, 3 V. & B. 168; *Spiller* v. *Spiller*, 3 Sw. 556.

[2] *Crockford* v. *Alexander*, 15 Ves. 138. Distinguish *Marshall* v. *Watson*, 25 Beav. 501, 504.

[3] *Smith* v. *Peters*, L. R. 20 Eq. 511. Cf. *infra*, § 1602.

[4] L. R. 20 Eq. at p. 513.

[5] *Turner* v. *Wright*, 4 Beav. 10.

the ground of comparative convenience, to restrain the vendor by injunction until the hearing from selling the property in dispute, it appearing that the grant of the injunction would, if the plaintiff ultimately failed, more injury to the defendant than its refusal would sion to the plaintiff should he ultimately be successto Turner L.J., however, in his judgment in the last cited case, distinctly affirmed the general principle that, if there is a clear valid contract for sale, the Court will not permit the vendor afterwards to transfer the legal estate to a third person, although such third person would be affected by *lis pendens*.[2] If, however, on interlocutory application for an injunction, it appears that the case is one in which it would be wrong to grant specific performance at the trial, it follows that it would be wrong to grant the injunction.[3]

Second purchase.

§ **1160**. It is hardly necessary to remark that the Court will not restrain a person who is under contract to buy an estate from buying another, merely on the ground that the completion of the second purchase may incapacitate him to complete the first.[4]

Injunction against third persons.

§ **1161**. The Court will, in some cases, restrain even third persons, whose rights are independent of the contract, from acting in a manner which would prejudice the plaintiff in respect of the property. For instance, where after a contract for the sale of an advowson the incumbent died, and a bill was filed against the vendor and the bishop, the Court restrained the vendor from presenting, and the bishop from instituting, or, in case

Hadley v. *The London Bank of Scotland*, 3 De G. J. & S. 63. Cf. *Garrett* v. *Banstead and Epsom Downs Railway Co.*, 4 De G. J. & S. 462; *Munro* v. *Wivenhoe and Brightlingsea Railway Co.*, 1 De G. J. & S. 723.

[2] De G. J. & S. at p. 70, where the Lord Justice also suggests a probable explanation of a (seemingly) contrary dictum of Lord Eldon in *Spiller* v. *Spiller*, 3 Sw. at p. 557.

[3] *Lumley* v. *Ravenscroft*, [1895] 1 Q. B. at p. 685.

[4] *Syers* v. *Brighton Brewery Co.*, 13 W. R. 220.

of a lapse taking place pending the suit, from collating to the living any clerk not nominated by the plaintiff.[1]

Acts inconsistent with the contract.

Other cases in which the Court has restrained by injunction acts inconsistent with the due performance of the contract have been discussed in a previous chapter.[2]

Former Chancery practice of restraining actions in other Courts.

§ 1162. The Court of Chancery used to grant injunctions to restrain actions at Law for the deposit upon its being paid into Court;[3] and to restrain actions at Law for damages for delay in completion;[4] or in which the defence was a contract between the parties which the Court of Law could not specifically enforce; and it had jurisdiction to restrain parties from applying for probate or the grant of letters of administration, and would so restrain them if it were necessary for the purpose of enforcing a contract which they had entered into.[5] But whether, in a suit for the specific performance of a contract for a separation deed between husband and wife, it would have been within the province of the Court of Chancery to interfere by injunction to restrain a suit in the Court of Probate for the restitution of conjugal rights, as incident to the main object of the suit in Equity, can hardly be said to have been determined, though it was twice discussed by the House of Lords in the case of *Wilson* v. *Wilson*,[6] opposite opinions having been expressed on the point by the learned Lords by whom that case was decided.

The present practice.

§ 1163. Under the present practice (Judicature Act, 1873, s. 24, sub-s. 5), no cause or proceeding pending

[1] *Nicholson* v. *Knapp*, 9 Sim. 326. See, too, *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.*, [1901] 2 Ch. at p. 51.

[2] Part III. chap. xvi. §§ 853 *et seq.*

[3] *Fordyce* v. *Field*, 1 Bro. C. C. 494.

[4] *Duke of Beaufort* v. *Glyn*, 3 Sim. & G. 213, 229; S. C., 1 Myl. & K. 10.

v. *Chaplin*, 2 De & J. 405 (for purchase-money).

[5] *Waterlow* v. *Bacon*, L. R. 2 Eq. 514.

[6] *Per* Mellish L.J. in *Wilson* v. *Carter*, L. R. 10 Ch. 444.

1 H. L. C. 538; S. C. 5 H. L. C. 40.

before the High Court or the Court of Appeal can be restrained by injunction, but every matter of equity on which an injunction against the prosecution of any such cause or proceeding might, if the Judicature Act, 1873, had not been passed, have been obtained, either unconditionally or on any terms or conditions, may be relied on by way of defence thereto. It is by the same sub-section enacted that nothing in that Act contained shall disable either of the said Courts [the High Court and the Court of Appeal] from directing a stay of proceedings in any cause or matter pending before it if it shall think fit; and that any person, whether a party or not to any such cause or matter, who would have been entitled, if that Act had not been passed, to apply to any Court to restrain the prosecution thereof, shall be at liberty to apply to the said Courts respectively by motion in a summary way for a stay of proceedings in such cause or matter either generally, or so far as may be necessary for the purposes of justice; and that the Court shall thereupon make such order as shall be just. (Judicature Act, 1873, s. 24)

§ **1164**. In other words, the defendant to an action who desires to avail himself of some matter which would formerly have been a ground for asking the Court of Chancery to restrain proceedings in another Court has now two courses only open to him:—he may plead the matter as a defence to the action, or he may make it the ground of an application to the Court in which the action is pending to stay the proceedings in the action.[1] Effect of the section.

It was held in *Hart* v. *Hart*[2] that the statutory provisions above referred to did not debar the Chancery Division of the High Court from granting specific performance of an agreement, one term of which provided for the dismissal of an action which, at the time when

[1] *Garbutt* v. *Fawcus*, 1 Ch. D. [illegible] Ch. D. 44.
Cf.; *Re People's Garden Co.*, 1 [illegible] 18 Ch. D. 670, 680.

the agreement was come to, was pending in the Probate and Divorce Division.

iii. *Enforcement of right resulting from non-performance.*

When the Court will interfere.

§ 1165. The Court will, in a proper case, grant an injunction for the purpose of enforcing a right resulting to the applicant from the non-performance of the contract.

Instance.

§ 1166. Thus, where a decree had been made declaring that a contract between a railway company and the rector of W. for the purchase by the company of certain glebe lands of which the company had taken possession before the institution of the suit ought to be specifically performed, and that the plaintiff was entitled to a vendor's lien, and directing the company to pay the purchase-money by a day named, with liberty for the plaintiff, in case of default, to apply for the purpose of enforcing his lien; and, default having been made by the company, an order had been made for the sale of the lands, but two attempts to sell had proved unsuccessful: Lord Selborne finally ordered that, in default of the company paying the purchase-money with interest and costs into Court within a month after service of the order, an injunction should be awarded to restrain them from continuing in possession of the lands.[1]

Extent of the High Court's jurisdiction in

§ 1167. With regard to the extent of the Court's jurisdiction in injunction, it is to be observed that the Judicature Act, 1873, enacts (s. 25, sub-s. 8) that an

[1] *Williams* v. *Aylesbury and Buckingham Railway Co.*, 21 W. R. 819; 28 L. T. 547; Seton (6th ed.), 2291, 2294; *infra*, § 1180. Distinguish *Pell* v. *Northampton and Banbury Junction Railway Co.*, L. R. 2 Ch. 100; *Latimer* v. *Aylesbury and Buckingham Railway Co.*, 9 Ch. D. 385; and consider *Lord Nelson* v. *Salisbury and Dorset Junction Railway Co.*, 16 W. R. 1074; and *Attorney-General* v. *Merryhent, &c. Railway Co.*, 33 Ch. D. 571.

injunction may be granted by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made, but does not in terms extend this wide power to the grant of injunctions at the trial. The above enactment must be read in connection with the 76th section of the same Act and the Common Law Procedure Act, 1854 (ss. 79, 81, 82). These provisions give the Court a wide if not an unlimited power of granting an injunction at any stage of any case where it would, according to sufficient legal reasons or on settled legal principles, be right or just to do so.[1] Injunction.

[1] *Beddow* v. *Beddow*, 9 Ch. D. 89, 93. Cf. *Thomas* v. *Williams*, 14 Ch. D. at p. 874; and *per* Bacon V.C. in *Dicks* v. *Brooks*, 15 Ch. D. at p. 25. As to the jurisdiction conferred by Lord Cairns' Act, see *infra*, § 1360.

CHAPTER III.

WRIT OF NE EXEAT.

The writ issued by the Court of Chancery.

§ 1168. The Court of Chancery sometimes issued a writ of *ne exeat* in suits of specific performance.[1]

Use of the writ under the present practice.

§ 1169. It is conceived that this writ, though not abolished, will in future probably not be often applied for in actions of the kind with which this treatise is concerned; inasmuch as, under the present practice, it is not likely to be issued except in cases where the party applying for the writ can satisfy the Court on all the points on which proof is required by the provisions of the 6th section of the Debtors Act, 1869;[2] under which, if the plaintiff in any action in the Court in which, before the year 1870, the defendant would have been liable to arrest proves, at any time before final judgment, by evidence on oath to the satisfaction of the Judge, that the plaintiff has good cause of action against the defendant to the amount of 50*l.* or upwards, and that there is probable cause for believing that the defendant is about to quit England unless he be apprehended, and that the absence of the defendant from England will materially prejudice the plaintiff in the prosecution of his action, the Judge may order such defendant to be arrested and imprisoned for a period

Debtors Act, 1869, s. 6.

[1] *Leignes* v. *Wise*, 2 Mer. 172; *Hawkes* v. *Calvert*, 2 J. & W. 211; *Berrow* v. *Wood*, T. & R. 332; *Jenkins* v. *Parker*, 2 My. & K. 5; *Morris* v. *McNeil*, 2 Russ. 604; and see Seton (6th ed.) 515—517, 2257.

[2] See *Drover* v. *Beyer*, 13 Ch. D. 242, 243; *Hands* v. *Hands*, 43 L. T. 750; *Colverson* v. *Bloomfield*, 29 Ch. D. 341.

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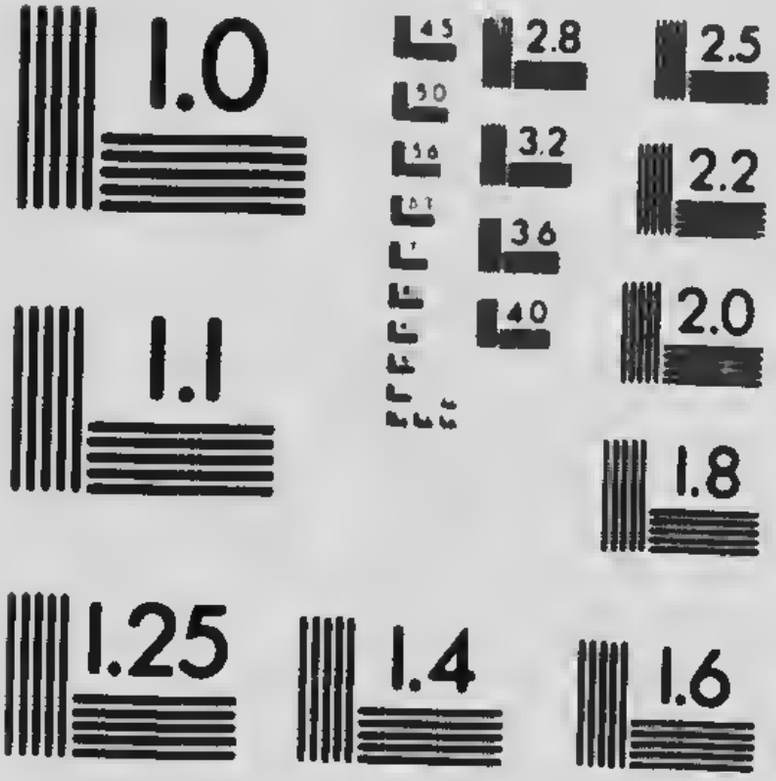

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not exceeding six months, unless and until he gives security (not exceeding the amount claimed in the action) that he will not go out of England without the leave of the Court.[1]

[1] 32 & 33 Vict. c. 63, s. 6; cf. Jud. Act, 1873, s. 76. For the practice under sect. 6 of the Debtors Act, 1869, see R. S. C. Ord. LXIX.

CHAPTER IV.

RELIEF AFTER JUDGMENT.

Such relief often necessary.

§ 1170. It may and not unfrequently does happen that after judgment has been given for the specific performance of a contract, some further relief becomes necessary,[1] in consequence of one or other of the parties making default in the performance of something which ought under the judgment to be performed by him or on his part; as, for instance, where a vendor refuses or is unable to execute a proper conveyance of the property, or a purchaser to pay the purchase-money. The character of the consequential relief appropriate to any particular case will of course vary according to the nature of the subject-matter of the contract and the position which the applicant occupies in the transaction; but in every case the application must, under the present practice, be made only to the Court by which the judgment was pronounced,[2] and the multiplicity of legal proceedings which sometimes[3] occurred before the fusion of the jurisdictions of the Courts of Chancery and Common Law is now practically impossible.[4]

Modes of relief open

§ 1171. There are two kinds of relief after judgment

[1] As to the leave of the Court being necessary to enable a defendant purchaser to repudiate the contract after judgment, see *Halkett* v. *Earl of Dudley*, [1907] 1 Ch. at p. 601.

[2] Jud. Act, 1873 (36 & 37 Vict. c. 66), s. 24 (5); Appell. Juris. Act, 1876 (39 & 40 Vict. c. 59), s. 17.

[3] *Phelps* v. *Prothero*, 7 De G. M. & G. 722; *Ford* v. *Compton*, 1 Cox, 296; *Reynolds* v. *Nelson*, 6 Mad. 290; *Frank* v. *Bassett*, 2 My. & K. 618.

[4] Jud. Act, 1873, s. 24 (7).

to either party.

for specific performance of which either party to the contract may, in a proper case, avail himself.

i. Sequestration or attachment.

§ 1172. (i.) He may obtain (on motion in the action) an order appointing a definite time and place for the completion of the contract by payment of the unpaid purchase-money and delivery over of the executed conveyance and title-deeds,[1] or a period within which the judgment is to be obeyed, and, if the other party fails to obey the order, may thereupon at once issue a writ of sequestration against the defaulting party's estate and effects.[2] Furthermore, if the default was in the payment of money, the plaintiff may issue his *fi. fa.* or *elegit*:[3] if in some act other than or besides the payment of money, he may move, on notice to the defaulter, for a writ of attachment against him.[4] Indeed, in a case where a person who had agreed to accept a lease would not, though ordered by the Court to do so, execute the lease, it was held that an attachment was the only means to which the Court could resort for enforcing such execution.[5]

ii. Motion to rescind.

§ 1173. (ii.) He may apply to the Court (by motion in the action) for an order rescinding the contract. On an application of this kind, if it appears that the party moved against has positively refused to complete the contract, its immediate rescission may be ordered; otherwise, the order will be for rescission in default of completion within a limited time.[6] And where a

[1] *Morley* v. *Clavering*, 30 Beav. 108; *Dorling* v. *Evans*, before Bacon V.C., 18 July, 1878 (cited Seton, 6th ed. 2286); *Morgan* v. *Brisco*, 31 Ch. D. 216; 32 Ch. D. 192, where the forms of an appropriate order on further consideration and four-day order are given. See, too, the forms of orders made against a defaulting purchaser in *Jessop* v. *Smyth*, [1895] 1 I. R. 508; and in *Bell* v. *Denver*, 34 W. R. 638; 54 L. T. 729.

[2] R. S. C. Ord. XLIII. r. 6. Cf. the Debtors Act, 1869, s. 8.

[3] *Robinson* v. *Galland*, 37 W. R. 396; R. S. C. Ord. XLII. rr. 3, 5, 17, 24.

[4] R. S. C. Ord. XLII. r. 7. Ord. XLIV. An alternative mode of proceeding is provided by R. S. C. Ord. XLII. r. 31, stated *infra*, § 1182.

[5] *Grace* v. *Bayton*, 25 W. R. 506.

[6] *Foligno* v. *Martin*, 16 Beav. 586; *Simpson* v. *Terry*, 34 Beav.

deposit has been paid, and there is no condition of the contract determining, expressly or impliedly, what is to be done with it in the event of such a rescission, the Court will decline to order the deposit to be returned to a defaulting purchaser.[1] An order for the defendant to pay the plaintiff's costs, and a stay of further proceedings in the action, except such proceedings as may be necessary for recovery of the costs of the action and the costs of the motion,[2] may also be obtained on this application. A vendor plaintiff is not debarred from moving for an order for rescission by the fact that the judgment at the trial contained a declaration of his vendor's lien, and gave him liberty to apply as to enforcing it.[3]

Damages.

In some cases the order has expressly excepted from the stay of proceedings any application to the Court to award and assess damages sustained by the plaintiffs by reason or in consequence of the breach of the contract.[4] In *Henty* v. *Schröder*,[5] however, Jessel M.R. declined to make this exception, considering that the plaintiffs could not at the same time obtain an order to have the contract rescinded and claim damages for the breach of it. If this be so, it would seem that in many cases the Court must fail to give the plaintiff the full measure of relief requisite for replacing him in the position in which he stood before the contract,—the

423; *Clark* v. *Wallis*, 35 Beav. 460; *Henty* v. *Schröder*, 12 Ch. D. 666.

[1] *Dunn* v. *Vere*, 19 W. R. 151. Cf. *Howe* v. *Smith*, 27 Ch. D. at pp. 97, 101.

[2] *Olde* v. *Olde*, [1901] 1 Ch. 35; 73 L. J. Ch. 81; Seton, 6th edit. p. 2289.

[3] *Baker* v. *Williams*, [1893] W. N. 11; 62 L. J. Ch. 315; 41 W. R. 375.

[4] *Sweet* v. *Meredith*, 4 Giff. 207; *Watson* v. *Cox*, L. R. 15 Eq. 219. See, too, *Corporation of Hythe* v. *East*, L. R. 1 Eq. 620.

[5] 12 Ch. D. 666. See also *Hutchings* v. *Humphrey*, 33 W. R. 563; 54 L. J. Ch. 650; *Jeffery* v. *Stewart*, 80 L. T. 17 (as to which case, see *per* Farwell J. in *Olde* v. *Olde*, [1904] 1 Ch. 35, 36; 73 L. J. Ch. 81); and *Jackson* v. *De Kadich*, [1904] W. N. 168, where, the contract not containing a clause forfeiting the deposit, Farwell J. declined, on a motion for rescission, to make a declaration that the vendor was entitled to the deposit.

repayment, for instance, of expenses incurred by him in showing his title.

Forfeiture of deposit and re-sale by vendor.

§ 1174. Another form of relief after judgment is often open to a vendor of land, where the contract contains a clause forfeiting the deposit to the vendor, and giving him power to proceed to a fresh sale, in the event of default by the purchaser, and providing that any deficiency in price on the re-sale shall be paid by the purchaser to the vendor. In such a case, where judgment for specific performance has been given against the purchaser, and he fails to comply with it, the vendor may, instead of seeking rescission, elect to affirm the contract, and apply, by motion, for an order declaring, in pursuance of the clause, that the deposit has been forfeited to the vendor, and that the vendor is at liberty to proceed to another sale, and ordering the purchaser to pay to the vendor the amount of any deficiency on the re-sale, less the amount of the deposit already received by the vendor.[1]

Vendor's lien.

§ 1175. Still another form of relief open in many cases to a vendor after a judgment for specific performance, is the enforcement of his lien for unpaid purchase-money, with interest, and his costs of the action.

Wherever there is a valid contract for the sale of land, and the time for completion has arrived, and the purchase-money has not been paid, an equitable lien on the land *primâ facie* arises for the benefit of the vendor;[2] but this *primâ facie* right may, of course, be repelled. "Although," said Bacon V.C.,[3] "the rule of law upon which the doctrine of an unpaid vendor's lien depends must be very frequently influenced by the

[1] *Shuttleworth* v. *Clews*, [1910] 1 Ch. 176, following (with a correction as to giving credit for the deposit) *Griffiths* v. *Vezey*, [1906] 1 Ch. 796; 75 L. J. Ch. 462. See, too, *per* Fry L.J. in *Howe* v. *Smith*, 27 Ch. D. at p. 105.

[2] *Kettlewell* v. *Watson*, 26 Ch. D. 501.

[3] In *Re Albert Life Assurance Co.*, L. R. 11 Eq. at p. 178.

particular circumstances of each case in which it is said to arise, there is one plain principle which guides and governs its application in all cases. If it be expressed, or can be safely and properly inferred from documentary or other evidence, or from the nature of the contract, that it was the intention of the parties that the sale or transfer, however absolute in its terms, was subject to the condition that the purchase-money should be paid, or that the thing contracted to be done by the vendee should be performed, the lien will prevail. If, on the other hand, no such inference can be properly drawn—if the performance of the thing contracted to be done by the vendee was not the condition upon which the transfer was made, but the engagement to do the thing was the consideration for the transfer, the vendor, having accepted that engagement, has the very thing he bargained for, and cannot say that the consideration has not passed to him. In such cases the lien cannot prevail. The rule I have mentioned and its application cannot be more pointedly illustrated nor more clearly explained than in the judgment of Lord Cranworth in *Dixon* v. *Gayfere*."[1]

Even though the contract be one of which specific performance is not enforceable, the vendor may, if the intended purchaser has taken and held possession of the subject-matter of the contract, be entitled to enforce a vendor's lien for the unpaid purchase-money.[2]

The principle is applicable to sales of personal property.

Further, the principle entitling a vendor to a lien for unpaid purchase-money is not confined in its application to cases of sale of land. It extends to sales of personal estate, in all cases in which the property sold is of such a nature that the Court will decree specific performance of the contract for the

[1] 1 De G. & J. 655. See further *Mackreth* v. *Symmons*, 15 Ves. 329; 10 R. R. 85, and the notes on that case in 2 W. & T. Lead. C. in Eq. (7th ed.) 926; and cf. *Mycock* v. *Beatson*, 13 Ch. D. 384.

[2] *E.g.*, *Ecclesiastical Commissioners* v. *Pinney*, [1899] 2 Ch. 729; [1900] 2 Ch. 736.

purchase of it; and in those cases, inasmuch as no Statute of Limitations is applicable to a charge on personal estate, the charge created by the lien does not become barred by lapse of time.[1] Accordingly, the principle may be applied where, for instance, the thing sold is a claim to receive a share of the money to arise from the realization of leaseholds,[2] or a reversionary interest in a trust fund.[3]

Modes of enforcing the lien.

§ 1176. Where this lien exists, a vendor obtaining judgment for the specific performance of a contract for the sale of hereditaments of any tenure may have embodied in the judgment a declaration of the lien, and a clause giving him liberty to apply to the Court, in case of need, for its enforcement.[4] Then, if default in payment of the moneys payable under the judgment by the purchaser ensues, the vendor may have further relief in some or all of the following ways as occasion may require, viz.:—

(i.) By sale of the property;

(ii.) By the appointment of a receiver pending the sale;

(iii.) By means of an injunction operating to restore to him the possession of the property.

i. Sale.

§ 1177. (i.) Upon the vendor satisfying the Court that the purchaser has made default in payment of the moneys directed by the judgment to be paid, an order

[1] *Re Stuckley, Stuckley* v. *Kekewich*, [1906] 1 Ch. 67, 79, 83, 84; 75 L. J. Ch. 58.

[2] *Davies* v. *Thomas*, [1900] 2 Ch. at p. 468. See, too, *Dansk Rekylriffel Syndicat Aktieselskab* v. *Snell* (unpaid royalties), [1908] 2 Ch. 127, 136.

[3] *Re Stuckley, Stuckley* v. *Kekewich*, [1906] 1 Ch. 67; 75 L. J. Ch. 58.

[4] *Heath* v. *Metropolitan Railway Co.*, cited Seton (6th ed.), 2290; *Walker* v. *Ware, Hadham and Buntingford Railway Co.*, L. R. 1 Ex. 195; *Tyaer* v. *Hoylake Railway Co.*, 17 W. R. 92; *Wing* v. *Tottenham and Hampstead Junction Railway Co.*, L. R. 3 Ch. 741; *Munns* v. *Isle of Wight Railway Co.*, L. R. 5 Ch. 414; *Bee* v. *Stafford and Uttoxeter Railway Co.*, 23 W. R. 868; *Keane* v. *Athenry and Ennis Junction Railway Co.*, 19 W. R. In *Sedgwick* v. *Watford and Rickmansworth Railway Co.*, 36 L. J. Ch. 379, an immediate sale was directed.

will be made, on motion or petition in the action, for the sale[1] by the Court of the property comprised in the contract, and the vendor may have liberty to bid.[2] The proceeds of the sale will be directed to be paid into Court, and leave will be reserved to the vendor to apply in Chambers for payment.[3]

Railway company.

§ 1178. A vendor of land to a railway company is, with respect to his right to such an order, in no different position from any other vendor, and if the company fail to pay, is entitled to have the land sold, although the railway may have been actually made and may be ready or even opened for traffic.[4]

ii. Receiver.

§ 1179. (ii.) Where profit is capable of being made of the property pending the sale, that profit ought to be made.[5] The Court will accordingly, in a proper case, upon the vendor's application, appoint a receiver of the property and direct the defaulting purchaser to let him immediately into possession.[6]

iii. Injunction restoring possession.

§ 1180. (iii.) In a case that came before Lord Selborne, two attempts to sell the subject-matter of the contract—land of which the purchasers, a railway company, had taken possession and over which they had constructed their railway—having proved abortive, his Lordship, on the application of the vendor, discharged the order for sale and directed the defendants

[1] *Munns* v. *Isle of Wight Railway Co.*, L. R. 5 Ch. 414; *Williams* v. *Aylesbury and Buckingham Railway Co.*, 21 W. R. 819; *Lycett* v. *Stafford and Uttoxeter Railway Co.*, L. R. 13 Eq. 261.

[2] *Lycett* v. *Stafford and Uttoxeter Railway Co.*, L. R. 13 Eq. 261; *Ware* v. *Aylesbury and Buckingham Railway Co.*, 21 W. R. 819; 28 L. T. 893.

Tyner v. *Hoylake Railway Co.*, cited Seton (6th ed.), 2292.

[3] *Wing* v. *Tottenham and Hampstead Junction Railway Co.*, L. R. 3 Ch. 471; *Keane* v. *Athenry and Ennis Junction Railway Co.*, 19 W. R. 43; *Earl of Jersey* v. *South Wales Mineral Railway Co.*, 19 L. T. N. S. 446.

[5] *Per* Gifford L.J. in *Munns* v. *Isle of Wight Railway Co.*, L. R. 5 Ch. at p. 419.

[6] *Munns* v. *Isle of Wight Railway Co.*, L. R. 5 Ch. 414; *Ware* v. *Aylesbury and Buckingham Railway Co.*, 21 W. R. 819; 28 L. T. 893. Distinguish *Latimer* v. *Aylesbury and Buckingham Railway Co.*, 9 Ch. D. 385.

within a month to pay the unpaid purchase-money with interest into Court; and the order went on to direct that, in default of such payment into Court, an injunction should be awarded restraining the defendants from running trains over the land and from continuing in possession of it, and that the vendor should be put in possession of the land.[1]

Writ of assistance

§ 1181. In a previous case Lord Romilly M.R. finally ordered a writ of assistance to issue to put the vendor in possession of the lands comprised in the contract.

R. S. C. Ord. XLII. r. 31.

§ 1182. It is provided by the Rules of the Supreme Court, Ord. XLII. r. 31, that if a judgment for the specific performance of a contract be not complied with, the Court or a judge, besides or instead of proceedings against the disobedient party for contempt, may direct that the act required to be done may be done, so far as practicable, by the party by whom the judgment has been obtained, or some other person appointed by the Court or judge at the cost of the disobedient party, and that, upon the act being done, the expenses incurred may be ascertained in such manner as the Court or a judge may direct, and execution may issue for the amount so ascertained and costs.[2]

Vesting order.

§ 1183. Lastly, a purchaser who has obtained a judgment in his favour for the specific performance of a contract concerning land may, if for any reason he cannot otherwise get a proper and complete conveyance of the purchased property, apply to the Court for an order vesting it in him or appointing some one to convey it to him, with a release, where necessary, of contingent rights.[4]

[1] *Williams* v. *Aylesbury and Buckingham Railway Co.*, 21 W. R. 819; 28 L. T. 547; S. C. (final order) Seton (6th ed.), 2291; *Allgood* v. *Merrybent, &c. Railway Co.*, 33 Ch. D. 571.

[2] *Vyner* v. *Hoylake Railway Co.*, cited Seton (6th ed.), 2292.

[3] See *Mortimer* v. *Wilson*, 33 W. R. 927.

[4] Trustee Act, 1893 (56 & 57 Vict. c. 53), ss. 31, 33; Supreme Court of Judicature Act, 1881 (47 & 48 Vict. c. 61), s. 14; Seton (6th ed.), 2287, 2288.

CANADIAN NOTES.

Cases on Procedure.

In a suit for specific performance, an objection that the bill does not contain an offer by the plaintiff to fulfil an offer on his part is too late when taken for the first time at the hearing, although effect would have been given to such objection if it had been taken by demurrer. *Randell* v. *Tecumseth*, 24 Grant's Ch. 465, 1877.

In *Nelson* v. *Defoe*, 8 P.R. Ont. 332, it was held in 1881, by Proudfoot V.C. that a writ of arrest would not be granted against a purchaser in a suit for specific performance, unless it were shewn by affidavit that the vendor's lien was insufficient. *Per* Proudfoot V.C.: "This is the first application of the kind that has come under my notice. The majority of the cases cited were decided at a time when the English law on the point was different from our present law. The letters set out in the affidavit together with the allegations submitted with them, leave no doubt in my mind as to the intention to quit the jurisdiction, but in suits for specific performance I think it must still be shewn that the lien of a plaintiff upon the land is insufficient for his protection."

In *Ward* v. *Archer*, 21 O.R. 650, it was held that the equitable interest of the assignee from the purchaser under a contract for sale of land was exigible under a writ of *fieri facias* against the lands of such assignee, and the purchaser at a sheriff's sale of such interest was entitled to specific performance of the contract.

The case came up on demurrer and was decided on the strength of the Revised Statutes of Ontario, ch. 64, sec. 25, in 1894.

A contract of sale was made for property the price being paid by instalments, and, there being a mortgage on the property not yet due, the vendor was to give the vendee a bond of indemnity in respect of the mortgage. A decree was made at the suit of the vendor, for specific

performance, on the undertaking of the plaintiff, the vendor, recited in the decree, to procure a release or discharge of the mortgage, and the overdue instalments were ordered to be paid into the bank subject to the further order of the Court. It was held, on a question subsequently arising as to the effect of this undertaking, that the performance of the undertaking was not a condition precedent to the paying in of the money, but was a condition precedent to its being paid out. *Robson v. Wade*, 13 Grant's Ch. 419.

In *Bingham* v. *Warner*, 10 Prac. Rep. Ont. 621, an action was brought in the Chancery Division to obtain specific performance of a covenant to repair or for damages. It was held that the specific performance of such a covenant could not be decreed and that the action was, for that reason, really a common law action, and the defendant was entitled to the benefit of a jury notice.

This case was commented upon in *Fraser* v. *Johnson*, 12 Prac. Rep. 113, in which Boyd Ch. said he did not altogether approve of the practice in *Bingham* v. *Warner*, if it was to be regarded as of universal application. He thought that if the plaintiff was not entitled to the relief he asked for, there should be a direct attack upon the pleadings by demurrer unless in a very clear case, such as that was. In this case, *Fraser* v. *Johnson*, where the plaintiffs claimed specific performance of a contract to supply them with milk for a cheese factory upon certain terms and, in the alternative, damages, and the defendant asked for a rectification of the contract, a jury notice was struck out by the Master. Boyd Ch. said that if the matter had come before him in the first instance he did not know that he should have acted as the Master had done, but he did not clearly see that the Master was wrong, and therefore affirmed his order.

If under R.S.O., ch. 109, the Court adjudicates upon the question of title between vendor and purchaser, and directs the purchaser to carry out his contract, and the purchaser then fails to carry out the contract, it is unnecessary to bring an action for specific performance of the contract, the requisite relief may be had on notice of motion for payment of the purchase money, or on default, a resale, etc. *Re Craig*, 10 P.R. Ont. 33 (1888).

Where a demurrer is raised to a statement of claim for specific performance on the ground of no specific agreement, it is enough if in any aspect of the case the plaintiff may be entitled to some relief. *Young et al. v. Robertson*, 2 O.R. 631.

A testator devised his real estate in trust for sale shortly after his death, a friendly suit was instituted in the Court of Chancery in England for the administration of the estate to which suit the trustee was a defendant. In this suit an order was made for the appointment of a receiver to collect the assets in Canada and sell the lands there. After the death of a receiver appointed under this order, the agents of the trustee in Canada, who had managed the estate for the deceased receiver continued to collect the assets and make sales with the knowledge and concurrence of the trustee and the parties in England. It was held that such sales were not void and would be enforced or not according as to this Court appeared, in view of all the circumstances, to be proper, and a decree was made for the purchaser in respect of the sale in question in this case. *Stuckey v. Tyler*, 13 Grant's Ch. 193.

Where a contract for a sale of an infant's estate had been approved by the Court, it was holden unnecessary, for the purpose of obtaining a decree for specific performance, either to allege or prove that the sale was a proper one under 12th Vict. Ch. 72, Ont. *McDonald v. Garrett*, 8 Grant's Ch. 290.

Form and Contents of Decree.

In a suit by the vendor for specific performance, where the vendor is ordered to execute a deed, and the vendee to execute a mortgage, *semble*, from the case of *McKay v. Reed*, 1 Ch. Ch. 208, that it would be improper to insert a power of sale in such mortgage and, *quære*, if the deed merely contains qualified covenants whether the mortgage should contain any others. Where a mortgage has been settled by a Master, and the party ordered to execute it objects to its form, it is not a proper mode of raising such objections to refuse to execute such mortgage and to execute a mortgage different from the one

Costs.

Where the defendants set up a defence to a bill which if tenable would have formed sufficient grounds for their having taken steps to set aside the transaction which it was now sought to enforce by a suit for specific performance, but had not done so, although twelve years had elapsed since the act was done which they questioned, and which it was shewn they had all the while been aware of, the Court under the circumstances ordered them to pay the costs of the suit. *Miller* v. *Ostrander*, 12 Grant's Ch. 349.

In the case of *Hossop* v. *Trust & Loan Co.*, 11 Grant's Ch. 294, the plaintiff was deprived of costs because of misconduct in concealing from the defendant the fact that he was in possession of the property while claiming compensation from the defendant for not having been let into possession.

In *Barrett* v. *Campbell et al.*, 7 P.R. (Ont.) 150, it was held that in a suit for specific performance by a vendee against his vendor and a person to whom he had sold after agreeing to sell to the plaintiff, the defendants might sever in their defence and employ separate solicitors, and each was entitled, on dismissal of the bill with costs, to tax a separate bill. This was the decision of the Master in Chancery.

In *Church* v. *Fuller et al.*, 3 O.R. 117, it was held that the Court had jurisdiction to make a defendant pay costs in a suit for specific performance though the bill should be dismissed, if the circumstances were such as to warrant doing this, and, where the Judge of first instance had dismissed the action without costs, but gave the subsequent purchaser his costs against his co-defendants, although no issue was raised between the defendants, it was held that he had jurisdiction to make the order in his discretion, with which the Court would not interfere.

In *Iddaman* v. *Stout*, 13 Grant's Ch. 692, a purchaser of real estate, paid a portion of the purchase money during the lifetime of the vendor, and, after his decease, paid the balance to his personal representative. None of the heirs-at-law were infants but they refused to ex-

cute a conveyance to the purchaser who filed a bill against the real and personal representatives fo rspecific performance. The conduct of the personal representatives was shewn to have been correct and the Court, in making the decree asked for, ordered the plaintiff to pay the personal representatives their costs, but gave the plaintiffs their costs of the suit against the heirs-at-law, not against the estate of the vendor.

In *Tisdale* v. *Shortis*, 10 Grant's Ch. 271, where the purchaser filed a bill, alleging that his vendor could not make a good title to the land agreed to be sold, but, after hearing, waived the reference as to title, admitting the same to be good, the Court at the hearing ordered the plaintiff to pay costs. "The only fault that can be imputed to Mr. Shortis, (the defendant), is that he did not before he commenced the action for the purchase money offer to produce an abstract, but the plaintiff should immediately have said, that he was ready to pay the money on a good title being shewn, which would have been immediately done before any costs of any consequence had been incurred."

Where a bill prayed for specific performance of an agreement and also an injunction against waste, with an account of waste committed, and the Court was of opinion that the plaintiff's remedy as to the waste was at law, the decree was made without costs, the objection to the jurisdiction appearing by the bill and not being raised until the hearing of the cause. The objection to the jurisdiction might have been taken by demurrer, and, while the omission to take the objection by demurrer did not necessarily deprive the successful defendant of the costs of the suit, it was nevertheless a circumstance of considerable weight. The case of *Webb* v. *England* was referred to as an express authority that in such a case the decree should be without costs. In the result, therefore, the injunction was continued and no costs given to either party. *Raven* v. *Lorcluss*, 11 Grant's Ch. 135.

In *Healey* v. *Ward*, 8 Grant's Ch. 337, where a purchaser objected to the title offered by his vendor and refused to pay the balance of the purchase money, but remained in possession of the premises, and the vendor

brought ejectment to recover them, falsely denying the payment of part of the purchase money, the purchaser was held entitled to the costs of a suit in equity to restrain the action of ejectment and compel specific performance, notwithstanding the vendor made out a good title when required by the Court.

In *VanWormer* v. *Harding*, 14 Grant's Ch. 167, the vendor of real estate having died before the conveyance of property agreed to be sold, leaving infant heirs, the purchaser, instead of proceeding to enforce the contract, instituted proceedings at law to recover back the purchase money paid partly to the vendor and partly to his administrators, whereupon a bill was filed by the representatives of the vendors, seeking to restrain the action at law and for specific performance. The Court made the decree as asked and ordered the defendant to pay costs up to the hearing.

The rule which authorizes the payment out of the estate of the costs of all parties interested in obtaining the construction of a will does not apply to a case where a purchaser refuses to complete his purchase of lands from a person claiming title under such will. In such a case the purchaser, if the question is decided against him, will, as in ordinary cases, have to pay the costs of the litigation necessary for obtaining the decision of the Court upon the question of title. *Smith* v. *Coleman*, 22 Grant's Ch. 507.

Where a vendor brought ejectment and turned the heirs of the purchaser out of possession, he was held to have disabled himself from coming to the Court for specific performance, and could only do so in order to bind their interest in such manner as to render the property saleable. Under such circumstances, the plaintiff having placed himself in a false position by reason of proceedings at law, the Court deprived him of his costs up to the decree, but gave him his costs subsequent thereto. *Horne* v. *Cushion*, 20 Grant's Ch. 518.

In *Tonate* v. *Walsh*, 24 O.R. 309, costs were withheld from the defendant, because he had misled the plaintiff as to his power to make the exchange of lands to enforce which the action was brought, and declined to per-

form his contract, on grounds some of which were untenable, and also alleged fraud which he failed to prove.

In an action for specific performance by a vendor, whose title was to the knowledge of the purchaser a possessory one of long standing, in conformity with a family arrangement, ample proof thereof having been offered before action, the vendor was held entitled to his costs of action, and of proving his title in the Master's office. *Dame v. Slater et al.*, 21 Ont. R. 355.

In a suit for specific performance, the defendant set up that the reason he had refused to complete the agreement was that he had been induced to enter into it by certain misrepresentations of the plaintiff which he entirely failed in proving, although the Master reported that a good title was first shewn in his office. The decree, on further directions, ordered the costs to be paid by the defendant, notwithstanding that the bill contained certain statements which it was alleged were not true and had not been proved, the Court being of opinion that such statements had not any material bearing upon the case and that a suit would have been necessary without reference to the question of title. *Platt v. Blizzard*, 29 Grant's Ch. 46.

PART V.

INCIDENTAL MATTERS.

CHAPTER I.

CONDITIONS OF SALE AND PARTICULARS.

Conditions part of contract.

§ **1184.** The conditions of sale subject to which property is sold constitute part of the contract. The word conditions thus used, and often as used in connection with contracts, is perhaps unfortunate. It is equivalent to terms, and does not import that the terms so described are true conditions precedent or subsequent at law. Particular conditions of sale are considered in several other parts of this treatise.[1] But the general principles upon which the Court acts in construing conditions will be here briefly stated.

How regarded.

§ **1185.** In the first place, the circumstances connected with the title and character of the property are, of course, in the knowledge of the vendor rather than of the purchaser; secondly, subject to any stipulation to the contrary, the legal right of a purchaser is to have a good title, according to the rules laid down in the Vendor and Purchaser Act, 1874, and an estate free from all incumbrances.[2] It follows that conditions tending to give the purchaser less than this are in

[1] *E.g.* §§ 1045 *et seq.* (rescission), 1076 *et seq.* (time), 1239 and 1287 (compensation), 1323 (title). See also St. Leon. Vend. ch. i. s. 2.

[2] *Phillips* v. *Caldcleugh*, L. R. 4 Q. B. 159; *Gatayes* v. *Flather*, 34 Beav. at p. 388.

restraint of a legal right.[1] It is *primâ facie* the duty of the vendor to disclose all that is necessary to protect himself, and not the duty of the purchaser to make inquiry before entering into a contract, and this is so whether the sale be by public auction or by private contract.[2]

Reasonable clearness requisite.

§ 1186. Proceeding on these principles, the Courts have held that it is incumbent on the vendor to express himself with reasonable clearness, and, in the case of sales by auction, so to state his plans, particulars, and conditions of sale as to convey clear information to the class of persons who ordinarily frequent auctions.[3] If the vendor uses terms reasonably capable of misconstruction or ambiguous words, the purchaser is not bound to take on himself the peril of ascertaining the true meaning of the statement,[4] but may generally construe it in the manner most advantageous to himself:[5] and it may be gathered from the case of *Taylor* v. *Martindale*[6] that, where a condition of sale is so obscurely worded that, taken in connection with the particulars, it is likely to mislead an ordinary person as to the nature of the property, the Court will on that ground alone, and even on the argument of a summons to vary the certificate as to title, discharge a purchaser from his bargain.

[1] As to conditions precluding inquiry as to title, see *Jones* v. *Clifford*, 3 Ch. D. 779; *Waddell* v. *Wolfe*, L. R. 9 Q. B. 515; and *infra*, § 1323 *et seq.*

[2] *Re White and Smith's Contract*, [1896] 1 Ch. at p. 641, a case of a sale of leaseholds subject to onerous covenants. See, too, *Re Haddicke and Lipski's Contract*, [1901] 2 Ch. 695; *Hone* v. *Gakstatter*, 53 Sol. Jo. 286.

[3] *Gibson* v. *d'Este*, 2 Y. & C. C. C. 542, 558—559; *Dykes* v. *Blake*, 4 Bing. N. C. 463, 476. See, too, *per* Lord Westbury in *Cordingley* v. *Cheeseborough*, 4 De G. F. & J. at p. 381.

[4] *Martin* v. *Cotter*, 3 Jon. & L. 496; *Greaves* v. *Wilson*, 25 Beav. 290. Cf. *Torrance* v. *Bolton*, L. R. 8 Ch. 118.

[5] *Seaton* v. *Mapp*, 2 Coll. 556. See, too, *Geoghegan* v. *Connolly*, 3 Ir. Ch. R. 598, 603; *Gardiner* v. *Tate*, I. R. 10 C. L. 460.

[6] 1 Y. & C. C. C. 658. Cf. *Jones* v. *Rimmer*, 14 Ch. D. 588.

§ **1187.** The case of *Torrance* v. *Bolton*[1] affords a notable illustration of this principle. There the advertised particulars described property about to be offered for sale as an absolute immediate reversion of a freehold estate, to fall into possession on the death of a lady in her 70th year, and no conditions of sale were issued, but just before the auction the auctioneer's clerk read out from a manuscript a string of conditions, in one of which the property was stated to be subject to three mortgages, and it was stipulated that the purchaser should take a conveyance subject to them. On the purchaser proving that he bought without distinctly hearing or understanding the effect of this condition, it was held by the Court of Appeal in Chancery that he was entitled to have the contract rescinded, on the ground that the description in the particulars was misleading, and the *onus* was therefore on the vendor to show (which he failed to do) that the purchaser was not actually misled. *Torrance v. Bolton.*

§ **1188.** Again where, on a sale by auction in four lots of leaseholds in Liverpool, it appeared from the particular and conditions that three of the four lots were held under the Corporation, upon whose leases there is usually only a nominal rent reserved; and as to the fourth lot, the particular stated the rents at which the houses comprised in it were underlet, and that it was subject to a mortgage for 500*l.*, but by an accidental slip neither particular nor conditions mentioned the fact that the lot was subject to a ground-rent of 43*l.* 17*s.* 6*d.*; upon the purchaser of this lot applying to be discharged from his purchase, deposing that he had bought under the belief that the property was not subject to any ground-rent, it was held that he was entitled to be discharged with costs.[2] "The real *Jones v. Rimmer.*

[1] L. R. 8 Ch. 119. Cf. *Re Arnold*, 14 Ch. D. 270; and distinguish *Blenkhorn* v. *Keeves*, [1906] 2 Ch. 175, 183; 75 L. J. Ch. 464.

[2] *Jones* v. *Rimmer*, 14 Ch. D. 588.

question, I think," said Jessel M.R., "is, Is this a fair particular; is it one in which a purchaser is told what he has to buy, so as to enable him to form an idea of the value of the thing to be purchased. . . . No doubt the purchaser, if he had been a careful purchaser, would have inquired. But is it for the vendor who sends out such a statement as this of the nature of the property to say that the purchaser only was careless? I think the vendor also was careless. It cannot be said to be a fair mode of drawing a particular of sale of leasehold houses subject to a ground-rent of 43*l.* a year, to say nothing about the rent." [1]

Instances of ambiguity.

§ 1189. So where there was an ambiguity as to which of two leases was referred to, the purchaser's construction was admitted by the Court, and the bill dismissed.[2] So a condition that no title should be called for prior to a lease was not held so explicit as to preclude inquiry into dealings with the contract for the lease which had taken place prior to its being granted.[3] And where a vendor selling a reversionary estate stipulated that a statement in a deed of 1836 that a life annuity had not been paid for eight years, and a declaration by the vendor that no claim had been made on him since 1841, and that he believed the annuity had not been claimed for the last twenty years, should be conclusive evidence that the annuity had determined; and it appeared that the annuity was granted by a person entitled only in reversion, and was granted for the life of the survivor of four persons; it was held that the description of it as a life annuity was likely to lead to the belief that the annuity was for one life only, and that the omission to state the facts disentitled the vendor to specific performance.[4] And so, again, where property sold was

[1] 14 Ch. D. at pp. 591, 592. See *Sheard* v. *Venables*, 15 W. R. 1166.

[2] *Seaton* v. *Mapp*, 2 Coll. 556.

[3] *Rhodes* v. *Ibbetson*, 4 De G. M. & G. 787.

[4] *Drysdale* v. *Mace*, 2 Sm. & Gif. 225, affirmed 5 De G. M. & G. 103; cf. *Geoghegan* v. *Connolly*, 8 Ir. Ch. R. 398.

described as subject to articles of agreement, bearing date 1804, for a lease for four lives and one year, and in fact the terms of the agreement were such that the lives were not named until 1845, this was considered so ambiguous as to amount to an objection to the performance of the contract.[1]

Phillips v. *Caldcleugh.*

§ 1190. In *Phillips* v. *Caldcleugh*[2] the plaintiff contracted to buy a house, described in the particulars as "a freehold residence," subject to conditions, one of which was that the abstract should commence with a conveyance of April, 1860, and no objection should be taken in respect of the prior title, and another provided that if any error should appear to have been made in the particulars it should not annul the sale. The abstract of the deed of April, 1860, showed it to have been a conveyance of the property, subject "so far as the same premises were subject thereto" to the (unspecified) covenants and conditions on the grantee's part contained in an indenture (not abstracted) of March, 1850. It was held that, the property having been sold as freehold,[3] neither of the above conditions protected the vendors from explaining what these covenants and conditions were, and showing that the property was unincumbered by them.

Conditions construed strictly.

§ 1191. The inclination of the Courts to construe conditions of sale strictly is shown by many other cases,[4] but perhaps it is not more strongly illustrated

[1] *Martin* v. *Cotter*, 3 Jon. & L. 496. See, too, *Gardiner* v. *Tate*, I. R. 10 C. L. 160, where an equitable interest was described in language which might naturally be read as importing a legal interest.

[2] L. R. 1 Q. B. 159.

Property is not properly described as "freehold" which is subject to restrictive covenants. *Hone* v. *Oakstatter*, 53 Sol. Jo. 286.

[4] *Southby* v. *Hutt*, 2 My. & Cr. 207; *Symonds* v. *James*, 1 Y. & C. C. C. 487; *Adams* v. *Lambert*, 2 Jur. 1078; *Cruse* v. *Nowell*, 25 L. J. Ch. 709 (Kindersley V.C.); *Brumfit* v. *Morton*, 3 Jur. N. S. 1198 (Stuart V.C.); *Cox* v. *Coventon*, 31 Beav. 378; *Russell* v. *Hayford*, L. R. 2 Eq. 507 (construction of condition as to rights of water and easements); cf. *Brookes* v. *Drysdale*, 3 C. P. D. 52 (construction of the word "covenant" in a contract for sale); and see § 1332.

by any than one at the Rolls, where, on a sale of leaseholds, one of the conditions stipulated that the possession under the lease should be deemed conclusive evidence of the due performance, or sufficient waiver, of any breach of the covenants in the lease up to the completion of the sale: Lord Romilly M.R. held that this condition covered all breaches up to the date of the contract, but not a breach between the contract and completion for which the lessor was entitled to enter, and that notwithstanding the express words "up to the completion of this sale."[1]

Vendor unable to give a good title.

§ 1192. Again, where one of the conditions stipulated that all objections should be delivered within fourteen days from the delivery of the abstract, and another that "if the purchaser shall fail to comply with these conditions his or her deposit shall be thereupon actually forfeited to the vendors;" and after the expiration of the fourteen days the purchaser delivered an objection showing a fatal defect in the title; the ground upon which the majority of the Court proceeded, in holding him entitled to recover his deposit, was that the latter condition did not apply to the case of vendors unable to give a good title.[2]

Outgoings

§ 1193. Where, on a sale of leaseholds, the conditions provided that the purchaser should have possession on the 14th of November, all outgoings up to that day being cleared by the vendors, the purchaser was held to be entitled to insist that an apportioned part of the current rent from the last quarter-day to the 14th of November was an "outgoing" within the meaning of the conditions.[3] And a stipulation that purchasers are to receive "all rents and profits" from the day fixed

Rents and profits

[1] *Howell* v. *Kightley*, 21 Beav. 331. See as to this case, *Lowrie* v. *Lees*, 7 App. Cas. 19, at p. 32.

[2] *Want* v. *Stallibrass*, L. R. 8 Ex. 175. Cf. *Soper* v. *Arnold*, 37 Ch. D. 96, where *Want* v. *Stallibrass* is discussed. Distinguish *Pegge-Burnell* v. *Williams*, [1902] 2 Ch. 517 (objection made out of time and not going to the root of the title).

[3] *Lawes* v. *Gibson*, L. R. 1 Eq. 135.

for completion has been held to entitle them to an occupation rent from the vendors, on the latter remaining in possession after that day.[1]

Sense of condition not extended by implication.

§ 1194. The Court, construing conditions thus strictly, will not by implication extend the terms of one condition so as to enlarge another beyond what it actually expresses. In the case of *Southby* v. *Hutt*,[2] the interpretation of conditions in this respect was fully considered. There by the conditions of sale, the vendor agreed to deliver an abstract and deduce a good title, except as to part of the estate acquired under an inclosure, as to which he was not to be required to go back beyond the award; and by a subsequent condition it was stipulated that the vendor should deliver to the largest purchaser all deeds in his custody, but should not be required to produce any other deeds than those in his possession and set forth in the abstract: and it was held that the latter condition did not so affect the former as to entitle the vendor to insist on verifying his abstract only so far as could be done by deeds in his possession, but that the purchaser was entitled to a general verification. And so a condition that certain specified deeds only should be given up, does not limit the title to be shown to that disclosed by these deeds.[3]

Time for delivery of objections.

§ 1195. On the same principle of strict construction, where (as commonly happens) there is a condition that all objections to the title are to be taken within a specified number of days from the delivery of the abstract, or to be deemed waived, and that time shall, in that respect, be of the essence of the contract, the time will not begin to run against the purchaser until the vendor has delivered a perfect abstract.[4]

[1] *Metropolitan Railway Co.* v. *Defries*, 2 Q. B. D. 189, 387.

[2] 2 Mc. & Cr. 207; *Osborne* v. *Harvey*, 7 Jur. 229. See also *Gabriel* v. *Smith*, 16 Q. B. 847; and cf. Lord Westbury's judgment in *Cordingley* v. *Cheseborough*, 4 De G. F. & J. 384 *et seq.*

[3] *Dick* v. *Donald*, 1 Bli. N. S. 555.

[4] *Hobson* v. *Bell*, 2 Beav. 17;

Good faith.

§ 1196. It is a natural principle of interpretation, that a vendor shall never be allowed to avail himself of the conditions of sale for the purpose of acting fraudulently. The Court requires good faith in conditions of sale.[1] Accordingly a condition for compensation will not apply where there has been misrepresentation;[2] and under a condition giving a vendor a power of rescission in case of any objections to the abstract, he will not be permitted fraudulently to deliver an imperfect abstract to which objections would necessarily be taken, and thereupon avail himself of his fraud to avoid his contract by means of this condition.[3] So it seems that a condition as to objections to title being delivered by a certain time, would not apply where there had been misrepresentation;[4] and a condition not drawn *bonâ fide*, but intended to cover difficulties arising from facts uncommunicated, will not preclude the purchaser from taking the objection which it is designed to guard against.[5]

Conditions limiting title.

§ 1197. So, again, a condition excluding or limiting a purchaser's right to title must, in order to bind the purchaser, be fair and explicit, *i.e.*, must state all facts within the knowledge of the vendor which are material to enable the purchaser to determine whether he will or will not buy: therefore, a stipulation that a title should begin with a deed of 1845, stating the parties, but not stating as the fact was that the deed was a voluntary one except from the consideration to pay the rent and perform the covenants as to certain leaseholds, was held not to bind the purchaser.[6]

[1] *Want* v. *Stallibrass*, L. R. 8 Ex. 175. Cf. *Re Jackson and Oakshott*, 14 Ch. . 851.

[1] *Per* Turner L.J. in *Dimmock* v. *Hallett*, L. R. 2 Ch. at p. 28.

[2] *Stewart* v. *Alliston*, 1 Mer. 26. Cf. *Brownlie* v. *Campbell*, 5 App. Cas. 925, 936; and see *infra*, § 1252.

[3] *Per* Wigram V.C. in *Morley* v. *Cook*, 2 Hare 111; and see *infra*, § 1047 *et seq.*

[4] *Price* v. *Macaulay*, 2 De G. M. & G. 339, 347. Cf. *Boyd* v. *Dickson*, L. R. 10 Eq. 239.

[5] *Jackson* v. *Whitehead*, 28 Beav. at p. 159.

[6] *Re Marsh and Earl Granville*, 24 Ch. D. 11.

Condition as to easement

§ 1198. And so a vendor selling property subject to all easements, but without mentioning any, when his solicitor knew of their rumoured existence, was held to sell under a misleading condition.[1]

Inconvenient requisition

§ 1199. Further, though there may have been neither fraud nor misrepresentation on the vendor's part, the Court will be slow to allow him to get rid of an inconvenient but legitimate requisition by means of a condition giving him a power of rescinding the contract. Thus, where a vendor contracted to sell leasehold property under a *bonâ fide* belief that there was no charge upon it; and the condition of sale provided that, for the purpose of any objection or requisition, the abstract should be deemed to be perfect if it supplied the information suggesting the same: the abstract delivered contained nothing showing or suggesting the existence of any incumbrance, but during the investigation of the title it was discovered that there was in fact a mortgage on the property, which the purchaser thereupon required the vendor to discharge; it was held that, under the circumstances, the vendor was not entitled to rescind the contract under one of the conditions, which in terms empowered him to do so in the event of the purchaser's insisting on any requisition which the vendor should be unable, or on the ground of expense should decline, to remove or comply with.[2]

Misleading condition.

§ 1200. A condition of sale may, of course, without any intentional fraud or misrepresentation, be in fact misleading or erroneous. It will be bad as misleading if it require the purchaser to assume that which the vendor knows not to be true or if it assert that the state of the title is not accurately known to the vendor, when it in fact is known to him.[3]

[1] *Haywood* v. *Mallalieu*, 25 Ch. D. 357.

Re Jacks and Oakshott, 14 Ch. D. 851. Cf. *Greaves* v. *Wilson*, 25 Beav. 290; *Bowman* v. *Hyland*, 8 Ch. D. 588; and see *supra*, § 1017 *et seq.*

[2] *Re Banister*, 12 Ch. D. 131. See

Harnett v. Baker.

§ 1201. On this principle, where, one of the conditions being that the title to the beneficial ownership should commence with the will of A. B., and the purchaser should assume that A. B. was at his death beneficially entitled to the property in fee simple free from incumbrances, the abstract showed that A. B. had only entered into a contract for the purchase of the property with persons whose title to sell was doubtful, and had not paid the purchase-money, it was held that the purchaser was not bound by the condition.[1]

§ 1202. But on the other hand, a condition is not held misleading if it require the purchaser to assume certain facts for the purpose of covering a flaw in the title, provided the vendor believed the facts to be as he asked the purchaser to assume them, though he was not in a position to establish them by legal proof.[2]

Facts stated in conditions.

§ 1203. Where conditions state facts upon which they are grounded, these facts must be proved.[3]

Where the vendor states facts, and then states that the purchaser shall take such interest as the vendor under such state of facts has, the purchaser is, it seems, bound to take the title as it is:[4] but where, after stating facts, the conditions add, as a positive and distinct fact, and not as a conclusion of law from the

per Jessel M.R. in *Cumberwell and South London Building Society* v. *Holloway*, 13 Ch. D. at p. 762; also *Manifold* v. *Johnston* 1902), 1 I. R. 7. 13. See, too, *Re McVickers' Contract*, 25 L. R. Ir. 307 (condition requiring purchaser to assume that vendor derived a good title under a will). Distinguish *Blenkhorn* v. *Penrose*, 29 W. R. 237.

[1] *Harnett* v. *Baker*, L. R. 20 Eq. 50.

[2] *Re Sandbach and Edmondson*, [1891] 1 Ch. 99; *Blaiberg* v. *Keeves*, [1906] 1 Ch. 175. 183; 75 L. J. Ch. 461. See, too, *Re Scott and Alvarez Contract*, [1895] 1 Ch. at pp. 607, 608; S. C. [1895] 2 Ch. 603; as distinguish *Manifold* v. *Johnston* [1902] 1 I. R. 7, 13; *Re McVicker Contract*, 25 L. R. Ir. 307.

[3] *Symonds* v. *James*, 1 Y. & C. C. 487.

[4] Cf. *Smith* v. *Watts*, 1 De 338; *Blenkhorn* v. *Penrose*, 29 W 227 (condition involving neither *pressio veri* nor *suggestio fal*

preceding circumstances, that the vendor can make a good title to the fee: as this title may have arisen from independent sources, the purchaser is not bound by the title resulting from the facts, but may inquire generally whether the vendor can make out a good title.[1]

Conditions in sales by the Court.

§ 1204. With respect to sales by the Court: it would be going too far to say that, in such sales, the conditions are dealt with on different principles from those which obtain in ordinary cases. But the Court is scrupulously careful not to strain the meaning of any condition framed under its authority,[2] nor to allow a purchaser to be prejudiced by any such condition which appears on examination to be misleading or unfair.[3]

Edwards v. Wickwar.

§ 1205. Accordingly where property had been sold under a decree, subject to conditions, one of which provided that no requisition should be made in respect of a certain underlease of 1852, or of any underlease prior to 1864, and it turned out that another underlease (besides that of 1852) had, to the vendors' knowledge, been made prior to 1864, the Court held that it was the duty of the vendors to give the fullest information which they themselves possessed as to the title, and therefore to disclose the underlease in question, and that the purchaser was entitled, notwithstanding the condition, to require it to be produced.[4]

Williams v. Wood.

§ 1206. So, in another case of sale under a decree, where the conditions (settled by one of the conveyancing counsel of the Court) stated the facts correctly, and in a manner which might have led a lawyer to the inference that the vendor had no title, but would

[1] *Johnson* v. *Smiley*, 17 Beav. 223. Cf. *Cox* v. *Coventon*, 31 Beav. 578.

[2] *E.g. Powell* v. *Powell*, L. R. 19 Eq. 422. See, too, *per* Jessel M.R. in *Ex parte Arnold*, 14 Ch. D. at p. 273.

Consider *Hallinell* v. *Seacombe*, [1906] 1 Ch. 426, at p. 431: 75 L. J. Ch. 289; also *Connolly* v. *Keating* (No. 2), [1903] 1 I. R. 356, 361 (compensation after conveyance).

[3] *Edwards* v. *Wickwar*, L. R. 1 Eq. 68, 70.

not lead an ordinary purchaser to that conclusion, Lord Romilly M.R. refused to enforce specific performance against the purchaser, saying that it was of great importance, particularly in sales by the Court, that conditions of sale should distinctly explain any difficulty of title.[1]

Other instances.

§ 1207. In a later case the same Judge relieved a purchaser from a misleading condition on the express ground of the sale having taken place under the authority of the Court; but he at the same time intimated that such a condition would be bad in any sale.[2] On the other hand, a condition precluding the purchaser from objecting to the Court's jurisdiction to order the sale of a reversion in which (as the condition expressly stated) infants were interested was held by the Court of Appeal in Chancery to be fair, reasonable, and binding.[3]

Stipulation as to wording of conveyance.

§ 1208. It may here be noticed that if the conditions of sale clearly stipulate that the property will be conveyed subject to specified liabilities, the vendor may enforce the insertion in the conveyance of apt words for giving effect to the stipulation, even though it be not shown or alleged that the property is in fact subject to any of the specified liabilities.

Thus where, on a sale by auction, one of the conditions provided that "the property is sold and will be conveyed subject to all free rents, quit rents, and incidents of tenure, and to all rights of way, water, and other easements, if any," it was held that the vendors were entitled to have the words "subject to all free rents, &c.," inserted in the conveyance, notwithstanding the purchaser's objection that they were wholly inapplicable to the property.[4]

[1] *Williams* v. *Wood*, 16 W. R. 1005.

[2] *Else* v. *Else*, L. R. 13 Eq. 196, 201.

[3] *Nunn* v. *Hancock*, L. R. 6 Ch. 850.

[4] *Gale* v. *Squier*, 4 Ch. D. 226, affirmed 5 Ch. D. 625. Cf. *Sibley* v. *Clarkson*, 35 Beav. 118.

And so where the contract provided for the conveyance of the property to the purchaser subject to a specified restrictive covenant, the purchaser was held entitled to insist on having the conveyance in strict accordance with the terms of the contract, without any mention of another restrictive covenant, of which, according to the vendor, the purchaser had notice.[1]

[1] *Re Wallis and Barnard's Contract*, [1899] 2 Ch. 515.

CHAPTER II.

COMPENSATION.

Vendor unable to perform the whole of the contract.

§ **1209**. Where a vendor is able to perform the contract in its substance, but unable to perform it literally in all its parts, he may yet sue the purchaser for its specific performance. On the other hand, where a vendor has not substantially all that he has contracted to sell, he cannot sue for specific performance, but the purchaser may generally insist on taking what the vendor has.

Origin of the right to compensation.

§ **1210**. From these principles arises a right in the purchaser to compensation[1] in respect of the difference between the thing which the vendor insists that he shall take, or he himself insists on taking, and the expressed subject-matter of the contract. It will be shown that the subjects of compensation in the two cases are very different, and that many defects for which the purchaser may obtain compensation will not be made the subjects of compensation at the instance of the vendor.[2] The rights of the parties to compensation may be and frequently are qualified by the contract, which in many cases contains a condition on the point.

[1] It is noteworthy that "the remedy of specific performance of part of a contract, with a compensation, which has in many cases been given to a purchaser by English Courts of Equity, is unknown to the law of Scotland." *Per* Lord Watson in *Stewart* v. *Kennedy*, 15 App. Cas. at p. 102.

[2] Compare *Nelthorpe* v. *Holgate*, 1 Coll. 203, with *Collier* v. *Jenkins*, You. 295. See also *Wilson* v. *Williams*, 3 Jur. N. S. 810 (Wood V.C.).

Pleading.

§ 1211. It is conceived that, under the present practice, if either party is aware of any case for compensation, and means to insist on it, he ought distinctly to raise the question on his pleading;[1] but it seems that compensation may be granted for a defect appearing on the investigation of title, though the pleadings and judgment make no reference to compensation.[2]

Division of the subject.

§ 1212. It will be convenient to consider separately (I.) the cases where the vendor is the party insisting on the performance of the contract, sub-dividing these into (A) cases where either the contract contains no condition for compensation, or at any rate no such condition enters into the question, and (B) cases where there is such a condition; and then (II.) to deal in a similar way with the cases in which the purchaser is the party insisting on the contract.

I. A. *Vendor insisting on the contract, there being a condition for compensation.*

Vendor must be able to perform his part substantially.

§ 1213. The description by which a thing is contracted to be sold is a matter for which the vendor is *primâ facie* responsible. Inasmuch, however, as Equity looks to the substance rather than to the mere letter of a contract, if the vendor shows that he can substantially do what he contracted to do, he is entitled to enforce specific performance, although he may be unable to do it *modo et formâ* according to the letter of the contract; the difference between what he contracted to do and what he can actually do becoming the subject of compensation.

The principle stated by Lord Thurlow.

§ 1214. "Lord Thurlow," said Lord Eldon, in a passage already cited, "used to refer this doctrine of specifi performance to this; that it is scarcely possible.

[1] R. S. C. Order XIX. rr. 4, 15; Order XX. r. 6.

[2] *Wilson* v. *Williams*, 3 Jur. N.S. 810 (Wood V.C.).

that there may not be some small mistake or inaccuracy; as that a leasehold interest, represented to be for twenty-one years, may be for twenty years and nine months: some of those little circumstances, that would defeat an action at Law; and yet lie so clearly in compensation, that they ought not to prevent the execution of the contract."[1]

Limitation of the principle.

§ 1215. But "if (to quote Lord Erskine) a Court of Equity can compel a party to perform a contract, that is substantially different from that which he entered into, and proceed upon the principle of compensation, as it has compelled him to execute a contract substantially different, and substantially less than that, for which he stipulated, without some very distinct limitation of such a jurisdiction, having all the precision of law, the rights of mankind under contracts must be extremely uncertain."[2]

Essential and non-essential defects to be distinguished.

§ 1216. It falls then to be considered (i.) what defects or circumstances will be considered by the Court so material or essential as to debar a vendor from enforcing the contract at all, and (ii.) what, on the other hand, will be held so immaterial or non-essential as to allow of the contract being enforced at his instance.

i. Material part wanting.

§ 1217. (i.) The contract will not be enforced against the purchaser with compensation where a material part of the subject-matter is wanting. Formerly the Court went far beyond what it now does in enforcing contracts substantially different from those entered into; as where a wharfinger who contracted for a house and wharf was compelled to take the house without the wharf: but of this mode of proceeding Lord Eldon frequently expressed his disapproval, and it is now abandoned by the Court.[3] "The Court," said Lord

[1] In *Mortlock* v. *Buller*, 10 Ves. at p. 306; *supra*, Part I. chap. ii. § 5[illegible]. See, too, *per* Lord Eldon in *Calcraft* v. *Roebuck*, 1 Ves. Jun. at p. [illegible] 221.

[2] In *Halsey* v. *Grant*, 13 Ves. at p. 76.

[3] *Drewe* v. *Hanson*, 6 Ves. 675; *Halsey* v. *Grant*, 13 Ves. 73; *Stapylton* v. *Scott*, 13 Ves. 425; *Knatchbull*

Eldon on one occasion, "is from time to time approaching nearer to the doctrine that a purchaser shall have that which he contracted for, or not be compelled to take that which he did not mean to have."[1]

Instances.

§ 1218. Accordingly where a wharf and jetty were contracted to be sold, and it turned out that the jetty was liable to be removed by the Corporation of London, specific performance was refused.[2] In the case of the sale of a residence and four acres of land, a slip of ground of about a quarter of an acre between the house and the high road, to which the title was made, was held not to be a subject for compensation.[3] And in one case Lord Eldon thought that a defect in title in respect of eleven out of seventy acres, which do not appear to have been peculiar in their position or character, "would probably be material to the suit."[4]

Nuisance apprehended.

§ 1219. In some cases a part of the estate contracted for may be material because, if any one else were to possess it, it would probably be turned to some purpose prejudicial to the enjoyment of the estate; as where land near a mansion was such that it would be most profitably used for building ground or for a brick kiln. But the nuisance thus apprehended must be probable, and not merely distant, fanciful, and conjectural.[5]

Tenure different.

§ 1220. Again, where the tenure of an estate contracted to be sold is in fact altogether, or to a

v. *Graeber*, 3 Mer. 121. See also *Haviland* v. *Norris*, 1 Cox, 59. The decision in *Shirley* v. *Davis*, to which Lord Eldon frequently alludes, appears to have been in fact the opposite of that which his Lordship stated. *Shirley* v. *Stratton*, 1 Bro. C. C. 440, n. 2).

[1] 3 Mer. 146. See, too, the judgments of the L.J.J. in *Re Arnold*, 14 Ch. D. 270.

[2] *Peers* v. *Lambert*, 7 Beav. 546; see a somewhat similar case of a wharf where the frontage was less by nearly eleven feet than the frontage described, and the difference affected the access of barges: *Re Deptford Creek Bridge Co.* v. *Best*, 28 Sol. J. 327.

[3] *Perkins* v. *Ede*, 16 Beav. 193.

[4] *Oshaldiston* v. *Askew*, 2 J. & W. 539. Cf. *Portman* v. *Mill*, 2 Russ. 570, 574.

[5] See *per* Plumer V.C. in *Knatchbull* v. *Grueber*, 1 Mad. at p. 167 (the case on appeal is reported 3 Mer. 124).

substantial extent, different from that which the vendor has represented himself to be selling, he will not be able to enforce performance, unless indeed the purchaser has waived the objection.

Freehold estate with a leasehold adjoining.

§ **1221.** Thus where, on a sale by auction, the particulars described the property to be sold as a "freehold estate with a leasehold adjoining," and it turned out that, of the seventy acres of which the estate consisted, sixty-two were leasehold and only eight freehold, Lord Alvanley M.R. said that, if the purchaser had objected on that ground, he should have thought the purchase ought not to be carried into execution. As, however, the purchaser had not taken the objection, his Lordship granted an injunction restraining an action for the deposit on the terms of the vendor bringing the money into Court.[1]

Estate sold as tithe free.

§ **1222.** Again, where an estate is sold as tithe free, or subject to a modus, and it is in fact subject to tithe, the Court will not, as a general rule,[2] compel the purchaser to take it with compensation.[3]

Incumbrances.

§ **1223.** Nor, it seems, would the Court compel a person who had contracted for the purchase of an estate free from incumbrances to take, instead of that, an estate subject to an incumbrance amounting to one half of the purchase-money;[4] though if there is only a small incumbrance upon a considerable estate, the decision may, as will be shown, be otherwise.[5]

Indemnity.

§ **1224.** In some cases the compensation to be made for a defect may take the form of an indemnity; which is a species of compensation—inasmuch as something else is given in place of the very thing contracted

[1] *Fordyce* v. *Ford*, 1 Bro. C. C. 494. Cf. *Cox* v. *Cocroton*, 31 Beav. 378: and see *Hughes* v. *Jones*, 3 De G. F. & J. 307.

[2] See, however, *infra*, § 1251.

Ker v. *Cloburg*, St. Leon. Vend. 267; *Binks* v. *Lord Rokeby*, 2 Sw. 222; *Lord Stanhope's case*, cited 6 Ves. 678, is explained by Lord St. Leonards, Vend. 266.

[3] *Per* Lord Eldon in *Wood* v. *Bernal*, 19 Ves. at p. 221.

[4] See *infra*, § 1231 *et seq.*

for—applicable to cases where the defect or loss is not certain but contingent.

Purchaser not compelled to take indemnity.

§ 1225. The Court will not, however, at a vendor's instance, compel the purchaser to take an indemnity, unless such indemnity was part of the contract between the parties.[1] Thus, where the sublessee of a house had contracted to grant a twenty-one years' lease of it to the defendant, but, owing to the house in question being, with five others, subject to the covenants and proviso for re-entry contained in the head lease, could not give the defendant a secure lease for the term of his contract, specific performance was refused, though the plaintiff offered to indemnify the defendant in case of his eviction.[2] Similarly it has been held that a purchaser could not be forced to take an indemnity in respect of a misdescription,[3] or of a possible liability under an ambiguous covenant,[4] or of a small contingent incumbrance.[5]

Iveston v. Stately.

§ 1226. In a case decided by Lord Hatherley (then Wood V.C.) in the year 1858, the contract was that the defendant should procure a lease then vested in his father to be surrendered to the plaintiff, and would thereupon accept a new lease from the plaintiff and pay a premium of 300*l.* for it. The father refused to surrender his lease: whereupon the plaintiff filed her bill for specific performance, praying that, if the defendant could not obtain the surrender, he might be decreed to accept a lease commencing from the expiration of his father's lease, and in other respects in the terms of the contract, and also to make good her loss resulting from the non-performance of the contract. It was held on demurrer that the Court could not

[1] See *per* Lord Eldon in *Balmanno v. Lumley*, 1 V. & B. at p. 225, and the cases cited *infra*, §§ 1284, 1282. See, too, Wood v. *Bernal*, 19 Ves. at p. 221.

[2] *Fibbs* v. *Hooker*, 3 Mad. 193.

Ridgway v. *Gray*, 1 Mac. & G. 109.

[3] *Nouaille* v. *Flight*, 7 Beav. 521.

[4] *Re Weston and Thomas's Contract*, [1907] 1 Ch. 211; 76 L.J. Ch. 179.

interfere to decree specific performance, but would leave the plaintiff to her remedy at Common Law in damages.[1]

Misrepresentation.

§ **1227.** The principle of compensation will not be applied at the instance of a vendor who has been guilty of misrepresentation. This point will be illustrated hereafter.[2]

Conduct inconsistent with contract.

§ **1228.** Even where the circumstances are such that the vendor might originally have enforced the contract with compensation, he may lose his right to do so by subsequent conduct inconsistent with the contract:—as for instance where, one of the terms of the contract being that immediate possession should be given, and the purchaser having taken possession accordingly, the vendor, on a question as to compensation arising, turned him out of possession.[3]

II. Defect not essential.

§ **1229.** (ii.) On the other hand, in each of the following cases the defect was considered a proper subject for compensation, but not so essential as to debar the vendor altogether from enforcing the contract:—where an estate of about 186 acres was described as freehold, and in fact about two acres, part of a park, were held only from year to year;[4] where there was an objection to the title of six acres out of a large estate, and those acres do not appear to have been material to the enjoyment of the rest;[5] where fourteen acres were sold as meadow, and only twelve answered that description;[6] and where, on a purchase by a tenant in possession, property described as forty-six feet in depth proved to be only thirty-three feet.[7]

Profits

§ **1230.** In one case where, on a sale of colliery

[1] *Beeston* v. *Stutely*, 6 W. R. 206; 27 L. J. Ch. 156; see now *infra*, §§ 1300, 1306.

[2] *Infra*, §§ 1252 *et seq.*

Knatchbull v. *Grueber*, 3 Mer. 124, 144, 147.

[3] *Calcraft* v. *Roebuck*, 1 Ves. Jun. 221.

[4] *McQueen* v. *Farquhar*, 11 Ves. 467.

[5] *Scott* v. *Hanson*, 1 R. & My. 128.

[6] *King* v. *Wilson*, 6 Beav. 124.

over stated

works, the vendors had stated the annual profits of the concern at a sum largely in excess of the actual amount, they were nevertheless allowed to enforce the contract, but on the terms of making compensation to the purchasers by submitting to an abatement from the purchase money, bearing the same proportion to the excess as the total purchase-money bore to the capitalised value of the amount of profits stated by the vendors.[1]

Trifling incumbrances.

§ 1231. On the general principle already stated, the mere fact of the existence of some small or (to the purchaser) immaterial incumbrances on the property is not enough to deprive a vendor of his right to insist on the specific performance of the contract.

Instances.

§ 1232. Thus, where tithes contracted to be sold were subject to sundry small annual charges,[2] and where the estate sold was subject to quit-rents (which may be regarded as incidents of tenure),[4] the Court enforced the contracts, in one case with an inquiry whether there ought to be any and what indemnity in respect of the charge,[3] and in the others with compensation to the purchaser by way of abatement from the purchase-money.

Taxes under local Act.

§ 1233. Again, in a case where an estate sold as fen land, and so described in the particulars, was subject, under a local but public Act, to certain embanking and drainage taxes which were not mentioned in the particulars, the Court, on the ground apparently of the Act imposing the charges being a public Act, decreed against the purchaser specific performance of the contract without compensation.[6]

[1] *Powell* v. *Elliot*, L. R. 10 Ch. 424.

[2] *Supra*, § 1213.

[3] *Halsey* v. *Grant*, 13 Ves. 73; *Hornibloue* v. *Shirley*, 13 Ves. 81. Cf. *Drewe* v. *Hanson*, 6 Ves. 675; and compare *In Somerville's Estate*, [1895] 1 I. R. 160, 165 (no compensation in respect of tithe rent-charge), with *Hamilton* v. *Bates*, [1894] 1 I. R. 1 (compensation for tithe rent-charge granted).

[4] *Esdaile* v. *Stephenson*, 1 S. & S. 122, 124.

[5] *Halsey* v. *Grant*, *ubi supra*.

[6] *Barraud* v. *Archer*, 2 Sim. 433; affirmed on appeal, 9 L. J. Ch. 173; see, too, 2 R. & My. 751.

Access of light

And, inasmuch as a contract for the sale of a house with windows looking over the land of a third person implies no representation or warranty that the windows are entitled to the access of light over that property, the vendor of a house so situated was held entitled to enforce the contract without compensation, notwithstanding his non-disclosure of a deed acknowledging that he was not entitled to the light: but the Court gave him no costs, considering that he ought in fairness to have informed the purchaser of the deed before the contract was concluded.[1]

Tithe.

§ **1234**. Further, although, as we have seen,[2] a man who contracts to purchase an estate which is described as tithe-free will not generally be compelled to complete his purchase, if it turn out that the land is subject to tithe,—it being considered that, as a general rule, the right to the tithe is so material to the enjoyment of the land as to have formed the inducement to the purchase,—still, where the circumstances show that the right to the tithe is not thus material, the general rule ceases to apply. For instance, where an estate of about 140 acres was described as subject to tithe except 32 acres and the exemption from tithe of those 32 acres was not proved;[3] and again where the circumstances showed that the question whether the land was to be tithe-free or not was an immaterial one in the view of the purchaser;[4] the Court compelled the purchaser to complete the contract with compensation.

Patent defect

§ **1235**. On the principle that a warranty or a representation is not binding, where in respect of some defect that is perfectly patent,[5] the Court will not give a purchaser compensation for defects of this nature; so

Greenhalgh v. *Brindley*, 1901 2 Ch. 324, 328.

[2] *Supra*, § 1222.

Binks v. *Lord Rokeby*, 2 Sw. 222. In this case there appears to have been a condition that errors of description should not vitiate the sale. See 2 Sw. 223.

[3] *Smith* v. *Tolcher*, 1 Russ. 302.

[4] *See ante*, § 856, 857, 870, 871. Cf. *Horsfall* v. *Thomas*, 31 L. J. Ex 322; 10 W. R. 650.

that a contract was enforced, at a vendor's instance, without any compensation in respect of the misdescription of a farm described as lying within a ring fence, which did not so lie, as the purchaser had himself seen and knew; while in the same case compensation was given for latent defects.[1]

Such defect must be visible.

§ 1236. But in order that this principle shall apply, the defect must be perfectly visible to everybody: therefore, where a representation was made by the vendor as to the dry-rot in a house, which was not a matter so perfectly visible, the Court gave compensation:[2] and where a tenant in possession purchased the property which was represented as 46 feet in depth, but was in fact only 33 feet, he was held entitled to compensation, inasmuch as occupiers are not in the habit of measuring their premises.[3]

Waiver of defect.

§ 1237. Moreover, if the purchaser, after he knows of a defect, acts in a manner implying a waiver of it, the vendor becomes entitled to insist on the completion of the purchase without compensation. Thus, where the abstract delivered in January, showed part of the estate to be subject to a right of sporting, and in the following April the purchaser at his own request was let into possession, and afterwards several letters passed between the parties, and most of the purchase-money was paid without any objection on the score of the right before, in October of the same year, the purchaser claimed compensation; it was held that he had waived the objection, and specific performance without compensation was decreed against him.[4]

Defect immaterial.

§ 1238. In an Irish case specific performance was enforced, at a vendor's instance, without compensation for a deficiency of nearly one-half in acreage of property described in the contract as "about 200 acres of

[1] *Dyer* v. *Hargrave*, 10 Ves. 505.
[2] *Grant* v. *Grant*, Coop. 173.
[3] *King* v. *Hamlet*, 3 Beav. 124.
[4] *Burnell* v. *Brown*, 1 J. & W. 168. Distinguish *Hughes* v. *Jones*, 3 De G. F. & J. 307.

mountain land," the land being a waste of heath of trifling value.[1]

I. E. *Vendor insisting upon the contract, there being a condition for compensation.*

The vendor's position in such cases.

§ **1239**. In the cases now to be considered, while the general principles already stated are applicable, and the rights of the vendor are usually somewhat extended by the language of the particular condition, at the same time, conditions of sale being, as we have seen,[2] construed strictly against the vendor, it is incumbent upon him, if he rely upon the condition to compel the purchaser to carry the contract into execution, taking compensation for some defect, to show that the defect is of such a nature as properly to fall within the condition.

Material misdescription

§ **1240**. Quite apart from any consideration of fraud, where there is in a contract a misdescription "in a material and substantial point, so far affecting the subject-matter of the contract as that it may be reasonably supposed that, but for such misdescription, the purchaser might never have entered into the contract at all, in such case the contract is avoided altogether, and the purchaser is not bound to resort to the clause of compensation."[3] So where there was a condition excluding compensation, and the property which the vendors offered for sale was property a material part of which they had not got, the purchaser's claim for rescission and return of deposit was allowed, and the

[1] *Cadbes* v. *Sparling*, L. R. 9 Eq. 505.

[2] *Supra*, §§ 1186 *et seq.*

[3] *Per* Lord Westbury in *Cordingley* v. *Cheesborough*, 4 De G. F. & J. at p. 381. *Re Terry and Hill*, 32 Ch. D. 14.

[4] *Per* Tindall C.J. in *Flight* v. *Booth*, 1 Bing. N. C. at p. 377. See, too, *Baker* v. *Moss*, 66 J. P. 360, where a purchaser was held entitled to rescind on the ground of serious misdescription of a building site.

vendor's counter-claim for specific performance was dismissed.[1]

Immaterial misdescription

An instance in which the converse of this principle was applied, and a mistake was held not to prevent specific performance, may be found in the case of *In re Fawcett and Holmes*.[2] There there was a contract for the sale of a house and builder's yard, described as containing 1372 square yards, and a clause for compensation in the event of misdescription; in fact, the contents of the property were only 1033 square yards. The error was held not to affect the substance of the thing sold, and the vendor was allowed to enforce specific performance with compensation.

Prohibited trades imperfectly enumerated.

§ 1241. On the other hand, where the particulars of a leasehold house in Covent Garden stated that, by the lease, "no offensive trade was to be carried on, and that the premises could not be let to a coffee-house keeper or working hatter," and there was a condition for compensation in case of error or misstatement, and the original lease, in fact, prohibited a vast variety of other businesses than those described, including the sale of any provisions, the purchaser was held to be entitled to rescind the contract.[3]

Copyhold described as freehold.

§ 1242. Again, where there was a condition for compensation in the case of error in the description of the premises, or of any other error whatsoever in the particulars, and the property which was described as copyhold turned out to be partly freehold, Lord Romilly M.R. refused to compel specific performance by the purchaser: he had contracted to purchase one thing, and he might refuse to accept another.[4]

[1] *Jacobs* v. *Revell*, [1900] 2 Ch. 858, 869, in which case numerous decisions on conditions for compensation were passed in review. See, too, *Re Puckett and Smith's Contract*, [1902] 2 Ch. 258, 261; 71 L. Ch. 666 (where an underground culvert constituted a latent defect); distinguishing *Re Brewer and Hedges' Contract*, 80 L. T. 127.

[2] 42 Ch. D. 150.

[3] *Flight* v. *Booth*, 1 Bing. N. C. 370. Distinguish *Grosvenor* v. *Green*, 7 W. R. 149.

[4] *Agbs* v. *Cox*, 16 Beav. 23. [illegible] *Hick* v. *Phillips*, Prec. in Ch. 575.

Tenancy yearly only.

§ 1243. In another case a yard, which was essential to the enjoyment of the property sold, was held from year to year, instead of for the term of twenty-three years for which the rest of the premises were held, and at a separate rent: this was considered to be a defect which the vendors were not entitled to bring within a condition for compensation for mistake in the description of the property or any other error whatsoever in the particulars.[1]

Madeley v. *Booth*.

§ 1244. In *Madeley* v. *Booth*[2] leasehold property was sold for the residue of a term of ninety-nine years, which commenced on the 24th June, 1838, under conditions which prohibited the purchaser from calling for the lessor's title, and stipulated that any error or misstatement of the property, term of years, or other description, should not vitiate the sale, but that a compensation should be given: the term sold was really not the residue described, but a derivative term less by three days than the original one: Knight Bruce V.C. held that the underlease was not substantially the same thing, the resulting rights being different, and accordingly dismissed with costs a bill by the vendor praying for specific performance with compensation. This decision, disapproved of by Jessel M.R.,[3] has received sanction from the case of *In re Beyfus and Masters*,[4] where, however, the stipulation as to errors which were to be the subject of compensation extended only to the description of the property.

bill by a vendor of an estate, which in the articles was treated as freehold, was refused because about one-sixth in value was copyhold, but nothing is stated as to the peculiar nature of the tenure. Cf. the observations of Romilly M.R. in *Hall* v. *Cook*, L. R. 13 Eq. at p. 120. See, too, *Evans* v. *Robins*, 8 Jur. N. S. 846.

[1] *Dobell* v. *Hutchinson*, 3 A. & E. 355.

[2] 2 D. G. & Sm. 718.

Camberwell and South London Building Society v. *Holloway*, 13 Ch. D. at p. 760, and *infra*, § 1250. See, too, *Darlington* v. *Hamilton*, Kay, at pp. 557, 558; and *Hayford* v. *Criddle*, 22 Beav. 477.

[3] 39 Ch. D. 110; followed in *Broom* v. *Phillips*, 74 L. T. 459.

Rights materially affecting enjoyment.

§ **1245**. The principle under consideration of course applies where, although the whole land is conveyed, it, or a part of it, is subject to rights which materially affect its enjoyment: thus a right of way, which would render useless for building a close advertised as building ground, has been held not to come within a condition for compensation;[1] so grants of rights to the owners of lower lands, to fetch water from a spring on the upper lands, to cut and cleanse drains leading the water to the lower lands, and other similar rights having reference to four and a half acres out of about thirty sold, were held to constitute a material defect in the title to the upper lands, and consequently were not the subject of compensation, notwithstanding a condition that a mistake in the description or an error in the particulars should be the subject of compensation, and not annul the contract.[2]

Compensation reasonably estimable.

§ **1246**. Generally, where there is a proper case for compensation, and the amount can be reasonably estimated, the Court is disposed to grant it.[3]

Reasonable estimate unattainable.

§ **1247**. But where this reasonable estimate is not attainable, the Court refuses to compel the purchaser to take compensation: thus, where a house and grounds were sold by the Court, and, pending the making out of the title, some ornamental timber was cut down, the purchaser was discharged, because the act affected the value of the property to the purchaser, as a residence, in a way which the Court was unable to measure.[4] And where the particulars represented the average size of the timber in the wood, which was the property sold, as approaching 50 feet, but in no way specified the number of the trees; and the witnesses for the plaintiff (the vendor) treated no trees containing less than 10

[1] *Dykes* v. *Blake*, 4 Bing. N. C. 463.

[2] *Shackleton* v. *Sutcliffe*, 1 De G. & Sm. 609. Cf. *Nouaille* v. *Flight*, 7 Beav. 521.

[3] *See infra*, § 1278; *English* v. *Murray*, 32 W. R. 84.

[4] *Magennis* v. *Fallon*, 2 Moll. 561, 584. Cf. *Cox* v. *Coventon*, 31 Beav. 378.

feet as timber trees, and on this basis showed an average of 34 feet 6 inches; whilst the defendant's witnesses, reckoning all trees containing not less than 5 feet as timber trees, showed an average of 22 feet only; it was held by Lord Hatherley (then Wood V.C.) that the subject-matter sold fell short of the description; but, in the absence of any representation as to the number of trees, the Court had no data for calculation, and therefore could not give compensation, but dismissed the bill.[1]

Ridgway v. Gray.

§ **1248**. The same principle seems to have governed another case, in which the premises were described as in the joint occupation of A. and B. as lessees, whereas they were in fact in their joint occupation, but not as lessees, but A. was the assignee from C., the original lessee: it was held that this was not a case for compensating the purchaser, but that he could not be forced to take an indemnity.[2]

Copyhold nearly equivalent to freehold.

§ **1249**. On the other hand, where the conditions provided that any misstatement of the quality, tenure, outgoings, or other particulars of the property, described by an innocent mistake as "valuable freehold estate," should be the subject of compensation; and one lot was in fact of copyhold tenure, but it appeared that under a composition with the lord of the manor the difference in value between copyholds in that manor and freeholds was very slight; it was held that the vendor was entitled to compel the purchaser to take the lot in question with compensation.[3]

Under lease called lease.

§ **1250**. Further, although, where a man sells a lease for a definite term of years, and nothing more is said on either side, he cannot make a good title unless he shows that it is an original lease,[4] yet where the particulars

[1] *Lord Brooke* v. *Rounthwaite*, 5 Ha. 298. Cf. *infra*, § 1294.

Belgrave v. *Gray*, 1 Mac. & G. 109. Distinguish *Farebrother* v. *Gibson*, 1 De G. & J. 602.

[2] *Price* v. *Macaulay*, 2 De G. M. & G. 339.

[3] *Re Beyfus and Masters*, 39 Ch. D. 110.

and conditions of sale in effect tell the purchaser that the lease which is offered for sale is in fact an underlease, the vendor is entitled to enforce completion without compensation, and that notwithstanding a condition for compensation in the event of any error or mistake appearing in the description, or in the nature or quality of the vendor's interest therein, or in the particulars of the sale. For *per se* calling a thing a lease which is a lease is not a misdescription.[1]

Where no compensation.

§ 1251. The cases where a defect is, from its magnitude or importance, not a proper subject for compensation, have been already stated. We may now consider some other cases, where the doctrine will not be applied.

Misrepresentation.

§ 1252. The principle of compensation, whether arising under the general doctrine of the Court, or under a condition for compensation in case of any error or misstatement, will not be applied where there has been misrepresentation,[2] even, it seems, though the difference be of such a character that, if it had arisen from mere error, it would have been subject to compensation, as, for instance, in respect of the difference between copyholds nearly equal in value to freeholds and freeholds.[3]

Price v. *Macaulay.*

§ 1253. Thus where, on a sale by auction, one of the lots was described as to be sold with a reservoir and waterworks yielding a yearly rental of about 60*l.*, and

[1] *Per* Jessel M.R. in *Camberwell and South London Building Society* v. *Holloway*, 13 Ch. D. 754, 761; *Re Beyfus and Masters*, 39 Ch. D. 110; *Broome* v. *Phillips*, 74 L. T. 459. Cf. *Darlington* v. *Hamilton*, Kay, at p. 558; *Hayford* v. *Criddle*, 22 Beav. 477; *Nouaille* v. *Flight*, 7 Beav. 521; *Henderson* v. *Hudson*, 15 W. R. 860; *Flood* v. *Pritchard*, 10 L. T. 873; *Turner* v. *Turner*, [1881] W. N. p. 70; *Re Scott and Eve's Contract*, 86 L. T. 617, 618 (question of conveyance and not of title).

[2] *Per* Plumer M.R. in *Cheesman* v. *Tasburgh*, 1 J. & W. at pp. 119, 120; *Duke of Norfolk* v. *Worthy*, 1 Camp. 337, 340; *Powell* v. *Dunkley*, St. Leon. Vend. 23; *Stewart* v. *Alliston*, 1 Mer. 26; *supra*, § 1196; and distinguish *Powell* v. *Elliot*, L. R. 10 Ch. 424.

[3] *Price* v. *Macaulay*, 2 De G. M. & G. 339, 344.

it turned out that this rental arose from supplying with water from the reservoir some houses between which and the reservoir lay lands of other proprietors, through which the vendor had no right to carry the water except under a license from year to year for which he paid rent; it was held that the description contained such a misrepresentation as to debar the vendor from enforcing specific performance.[1]

As to tenancy.

§ 1254. In another case, where there was a misrepresentation as to the tenancy of a house, the Court refused to hold the purchaser to his contract and make him take compensation for the delay which would have been needed for an ejectment, although the purchaser bought for investment, and not for residence.[2]

Dimmock v. Hallett.

§ 1255. Again, where the particulars of sale described a farm, which formed about one-third of the estate sold, as "lately in the occupation of A. at an annual rent of 290*l.* 15*s.*," and the facts were that A. had occupied the farm for a year and a quarter only, and then at the nominal rent of 3*l.* for the first quarter, and that since his tenancy (which came to an end about sixteen months before the sale) the vendor had been willing to let the farm at 225*l.*, and knew that nothing like 290*l.* a year could be obtained for it, the Court held that such misrepresentation was not a matter for compensation, but entitled the purchaser to be discharged altogether from his purchase.[3]

Flourishing description.

§ 1256. But it seems that a mere flourishing description in particulars, such as that land is fertile and improvable, whereas part of it has in fact been abandoned as useless, cannot, except in extreme cases—as for instance where a considerable part is covered with water, or otherwise irreclaimable—be considered such

[1] S. C. See, too, *Leyland* v. *Illingworth*, 2 De G. F. & J. 248.

[2] *Lachlan* v. *Reynolds*, Kay, 52.

[3] *Dimmock* v. *Hallett*, L. R. 2 Ch. 21. See also *per* Lindley L.J. in *Re Terry and White*, 32 Ch. D. 29.

a misrepresentation as to entitle a purchaser to be discharged.[1]

II. A. *Purchaser insisting on the contract, there being a condition for compensation.*

Purchaser may take all that vendor has.

§ 1257. Although, as a general rule, where the vendor has not substantially the whole interest he has contracted to sell, he, as we have seen, cannot enforce the contract against the purchaser, yet the purchaser can insist on having all that the vendor can convey, with a compensation for the difference.[2]

The principle stated by Lord Eldon

§ 1258. "If," said Lord Eldon,[3] "a man, having partial interests in an estate, chooses to enter into a contract, representing it, and agreeing to sell it, as his own, it is not competent to him afterwards to say, though he has valuable interests, he has not the entirety; and therefore the purchaser shall not have the benefit of his contract. For the purpose of this jurisdiction, the person contracting under these circumstances is bound by the assertion in his contract: and, if the vendee chooses to take as much as he can have, he has a right to that, and to an abatement: and the Court will not hear the objection by the vendor, that the purchaser cannot have the whole."[4]

[1] S. C. at p. 27 (*per* Turner L.J.). See, too, *Johnson* v. *Smart*, 2 Giff. 151 ("substantial and convenient" dwelling-house).

[2] See *e.g. per* Turner L.J. in *Hughes* v. *Jones*, 3 De G. F. & J. at p. 315. The authority of *James* v. *Lichfield*, L. R. 9 Eq. 51, seems at least questionable. Compare *Phillips* v. *Miller*, L. R. 9 C. P. 196; 10 C. P. 420, with *Caballero* v. *Henty*, L. R. 9 Ch. 447. See, however, *Keayes* v. *Carroll*, L. R. 8 Eq. 97.

[3] In *Mortlock* v. *Buller*, 10 Ves. 315. See, too, *Rudd* v. *Lascelles*, [1900] 1 Ch. at p. 818. Desiring as *Hopcraft* v. *Hopcraft*, 70 L. T. 311.

[4] See accordingly *Attorney-General* v. *Day*, 1 Ves. Sen. 221; *Mortlock* v. *Cooke*, 16 Ves. 1; *Dale* v. *Lister*, 16 Ves. 7; *Hill* v. *Buckley*, 17 Ves. 391; *Western* v. *Russell*, 3 V. & B. 187; *Neale* v. *Mackenzie*, 1 Ke. 77; *Bennett* v. *Fowler*, 2 Beav. 302; *Sutherland* v. *Briggs*, 1 Ha. 26 particularly 34; *Wilson* v. *Williams*, 3 Jur. N. S. 81[1] (Wood V.C. and cf. *Dyas* v. *Cruise*, 2 Jon. & Lat. at p. 187.

Clayton v. Gower

§ **1259**. The principle was acted on by Lord Nottingham, in the case of *Clayton* v. *Gower*,[1] where the defendant Gower was tenant for life of certain estates in Shropshire, and he and his late father agreed with the plaintiff that the plaintiff should open and work certain mines, and should enjoy the minerals raised for ten years, if the defendant or his issue male should so long live, at a yearly rent of 25*l*. The plaintiff sought a specific performance of this contract: the defendant objected that he was only tenant for life, and subject to account for waste, and that he could not execute the contract because it was inconsistent with his power: the Court decreed the defendant to execute the contract so far as he was capable of doing it, and likewise to satisfy the plaintiff such damages as he had sustained in not enjoying the premises according to the contract.

Lord Bolingbroke's case

§ **1260**. The principle is also well illustrated by *Lord Bolingbroke's case*,[2] before Lord Thurlow. The incumbent of a living had contracted with a tenant in remainder for the purchase of the advowson, and on the faith of the contract had built a much better house on the glebe than he would otherwise have done: the tenant for life refusing to concur in the sale, Lord Thurlow compelled the tenant in remainder to convey a base fee for levying a fine, with a covenant to suffer a recovery on the death of the tenant for life.

Wheatley v. Slade.

§ **1261**. In *Wheatley* v. *Slade*[3] Shadwell V.C. held the principle under discussion not to apply where a large part of the property could not be conveyed; and consequently, the contract in that case being for the sale of a lace manufactory, and it turning out that

Finch, 164.

[1] Sch. & Lef. 19, n., quoted by Lord Cottenham in *Great Western Railway Co.* v. *Birmingham and Oxford Junction Railway Co.*, 2 Ph. at p. 605.

[2] 1 Sim. 126. See the observations of Lord St. Leonards on this case, Vend. 263; also *Mare* v. *Topham*, 19 Beav. 576, where the vendors were only entitled to three-fourths.

the vendors were only entitled to nine-sixteenths of the whole, and that those parts were subject to a debt which would exhaust nearly the whole of the purchase-money, he refused specific performance. The Vice-Chancellor's decision appears to have been influenced by the circumstance that the vendors entered into the contract under a mistaken impression that they were possessed of the entirety of the property. But the case, even if it can thus or otherwise upon its own particular circumstances be supported, is not, it is submitted, likely now to be followed. For it will be shown that, though the difference between the property contracted to be sold and that which the vendor can actually convey may be great, the Court will generally, notwithstanding this circumstance, enforce the contract where it sees that its intention is the sale of whatever interest the vendor has.

Modern application of the principle.

§ **1262**. Indeed the tendency of the Court in recent years has been to apply the principle liberally. Thus where two vendors contracted to sell two-sixths of certain leaseholds "together with all other their rights and interests therein," and it turned out that they were only entitled to two twenty-first parts each, the purchaser was held entitled to specific performance of the contract to the extent of the vendors interests, with a proportionate abatement of the purchase-money.[1] And where A. had contracted to grant to B. and C. a lease of business premises, and, after they had gone into possession and laid out money in alterations, it was found, on investigation of the title, that A. was entitled to an undivided moiety only of the premises, the other moiety being vested in her son, a minor, the Court granted specific performance of the contract to the extent of A.'s interest, with an abatement of one-half of the rent agreed upon.[2]

[1] *Jones* v. *Evans*, 17 L. J. Ch. 1; 1 R. 2 Eq. 131.

[2] *Barrow* v. *Sammell*, 1903, 1 Ch. 169. See, too, *Leslie* v. *Commelin*, 1903, 1 Ch. 173.

Wife's interest

§ **1263**. Again, where A., who had only an estate *pur autre vie* in property, the remainder in fee belonging to his wife, contracted to sell the fee simple to B. (who was ignorant of the state of the title), and then got his wife to concur with him in conveying it to C. (who knew of B.'s contract), it was held that B. was entitled to have a conveyance from C. of A.'s interest, with compensation in respect of his wife's interest which he was unable to convey or bind without her consent.[1]

Title to moiety only

§ **1264**. So where vendors contracted to sell the entirety of certain freeholds, and it was afterwards discovered that they were entitled to an undivided moiety only, the purchaser obtained a decree for the specific performance of the contract by the vendors to the extent of their moiety, with an abatement from the purchase-money of one-half the amount.[2]

Moiety subject to mortgage

§ **1265**. And so where A. and B. contracted to sell leasehold property to C., and on examining the title it appeared that A. was entitled to a moiety subject to a mortgage for its full value, and that B. had no interest at all,—facts which were not known to C. at the time when he entered into the contract,—C. was held entitled to an assignment of A.'s moiety, on the terms of covenanting to pay the rent and perform the covenants in the lease, and also to pay the mortgage-debt, and to indemnify A. in respect of those liabilities.[3]

Purchaser aware of defect.

§ **1266**. In each of the cases referred to in the last three sections the purchaser was unaware, at the time when he entered into the contract, of the imperfection of the vendor's title.[4] But even if the purchaser has from the first been aware of the state of the title, that

[1] *Barnes* v. *Wood*, L. R. 8 Eq. 424. Cf. *Nelthorpe* v. *Holgate*, 1 Coll. 203.

[2] *Hooper* v. *Smart*, L. R. 18 Eq. 682.

Horrocks v. *Rigby*, 9 Ch. D. 180

[3] *See supra*, § 171 *et seq.*

circumstance will not necessarily exclude him from the benefit of the principle under consideration.

Instance

§ 1267. Thus, in a case decided in the year 1870, real estate stood limited by marriage settlement to such uses as A. and his wife should appoint, and in default of appointment to the use of the trustees of the settlement during the wife's life, in trust for her separate use, with remainder to A. in fee. A. agreed to sell the fee simple to C. by a contract in which the wife's interest was mentioned, but which went on to say that A. would procure a proper assurance to be executed by all proper parties: afterwards the purchaser actually paid over the purchase-money to the trustees, but the wife refused to convey her interest. Bacon V.C. held that C. was entitled to have the purchase completed to the extent of A.'s reversion in fee, with compensation for the life interest of the wife and a lien on the fund in the hands of the trustees.[1] "If," said the Vice-Chancellor, "a man enters into a contract to sell something representing that he has the entire interest in it, or the means of conveying the entire interest, and receives the price of it and does not perform his contract, then the other party to the contract, who has parted with his money or is ready to pay his money, is entitled to be placed in the same position he would be in if the contract had been completed; or, if not, by compensation to be placed in the same position in which he would be entitled to stand."[2]

Limitations of the principle

§ 1268. It is obvious that, in thus proceeding, the Court is executing the contract, *cy près*, or rather perhaps is carrying into execution a new contract, a course in which difficulties sometimes arise which put

[1] *Baker* v. *Cox*, 14 Ch. D. 846 (Oct. S. C. on demurrer, 3 Ch. D. 559. See, too, *Wilson* v. *Williams*, 3 Jur. N. S. 810. Cf. and distinguish *Castle* v. *Wilkinson*, L. R. 8 Ch. [illegible] § 1272.

[2] 14 Ch. D. at p. 668.

See *per* Lord Langdale M.R. in *Thomas* v. *Dering*, 1 Ke. at p. 736.

restrictions on the application of the principle under discussion. These have now to be considered.

§ **1269**. The principle will not be applied so as to exclude a right which the vendor may have reserved to determine the contract rather than complete with compensation. So, where a contract provided that no misdescription should annul the sale or be the subject of compensation, and further, that if the purchaser should insist on any requisition which the vendor should be unable or unwilling to comply with, the vendor should have the power to rescind: and the acreage of the plot sold was by an innocent error misstated, the plaintiff demanded compensation, and the vendor gave notice to rescind the contract and the purchaser insisted on performance, it was held that the vendor was entitled to rescind, and that the purchaser could not claim the right to performance with compensation.[1]

§ **1270**. The principle will not, it seems, be applied where the alienation of the partial interest of the vendor might prejudice the rights of third persons interested in the estate. Thus where a tenant for life without impeachment of waste under a strict settlement had contracted for the sale of the fee, the Court refused to compel him to alienate his life interest, on the ground that a stranger would be likely to use his liberty to commit waste in a manner different from a father, and more prejudicial to the rights of those in remainder.[2]

§ **1271**. If the purchaser is, from the first, aware of the vendor's incapacity to convey the whole of what he contracts for, he cannot, generally, insist on having, at an abated price, what the vendor can convey.[3]

§ **1272**. Thus where, in the year 1863, a husband

[1] *Re Terry and White*, 32 Ch. D. 14. Cf. *supra*, ss 407 *et seq.*

[2] *Thomas v. Dering*, 1 Ke. 729. Cf. *supra*, s 1206.

Wilkinson.

and his wife signed a contract for the sale of the wife's fee simple estate to the plaintiff, who knew from the plain language of the contract the true state of the title, it was held that, as the plaintiff clearly never could have believed for a moment that the husband could sell the fee simple, he was not entitled to have a conveyance of all the husband's interest, *i.e.*, his estate for the joint lives of himself and his wife and his estate by curtesy, with an abatement of the purchase-money; and the bill was accordingly dismissed.[1]

Other instances.

§ 1273. Similarly, where vendors were entitled only to three-fourths of the property, and the purchaser was at the time he filed his bill aware, or had good reason to believe, that no good title could be made to the whole of the premises, Lord Romilly M.R. held that, though he might probably have recovered damages, yet, as he chose to file a bill for specific performance, he was not entitled to any abatement from the purchase-money, but that he might take without abatement, the three-quarters which the vendors could convey.[2] And it has been decided that where a person has dealt with a tenant for life for a certain lease, being at the time aware that it would be in excess of the tenant for life's power, and so endeavouring to put a fraud upon the settlement, he will not afterwards be allowed to call for a lease from the tenant for life to the extent of his interest: the contract was not at the time it was entered into a fair and proper one, and the Court therefore would not interfere.[3]

[1] *Castle* v. *Wilkinson*, L. R. 5 Ch. 535, 536. Cf. and distinguish *Hooper* v. *Smart*, L. R. 18 Eq. 683; *supra*, § 1264; *Barker* v. *Cox*, 4 Ch. D. 464; *supra*, § 1267. See, too, *Keayes* v. *Carroll*, 1. R. 8 Eq. 97; *Fairhead* v. *Southee*, 11 W. R. 739.

[2] *Mare* v. *Topham*, 19 Beav. 576. Lord St. Leonards appears to doubt this decision, Vend. 257; and it certainly seems difficult to reconcile it with some of the more recent cases already cited, *supra*, §§ 1262 *et seq.*

[3] *O'Rourke* v. *Percival*, 2 Ball & B. 58.

Benefice subject to mortgage to Queen Anne's Bounty.

§ 1274. In the case of *Edwards Wood* v. *Marjoribanks*,[1] the purchaser of an advowson discovered, after accepting the title, that the benefice was subject to a mortgage to Queen Anne's Bounty which he might have discovered before: there had been no misrepresentation or wilful concealment on the part of the vendors: on bill filed by the purchaser for specific performance with compensation, Stuart V.C. decreed specific performance, but without compensation, and ordered the purchaser to pay the costs of the suit; and this decision was affirmed by Knight Bruce and Turner L.JJ.

Abatement, how calculated.

§ 1275. Where there is a defect in the quantity of the estate, the principle on which the abatement is calculated is *primâ facie* acreage. But where woodland was sold as so many acres, and the wood as having been valued at so much, the abatement was for so much as the soil covered with wood would be worth without the wood.[2] Where a road was described as "made up" and it was not, compensation was assessed not at the sum it would cost to make up the road, but at the difference between the value of the property as it existed at the sale and the value it would have had if the road had been made up.[3]

Computation impossible.

§ 1276. Where the difference in value of the interest contracted for and the interest that can actually be conveyed is incapable of computation, the Court will not, indeed cannot, enforce specific performance.[4] But having regard to some of the decided cases already

[1] 1 Giff. 384; 3 De G. & J. 329; 7 H. L. C. 806.

Hill v. *Buckley*, 17 Ves. 394. See, too, *McKenzie* v. *Hesketh*, 7 Ch. D. 675, where the rent was reduced proportionately to the deficiency of acreage; *Connor* v. *Potts*, [1897] I. R. 534, 539; and *Powell* v. *Elliot*, L. R. 10 Ch. 424, 430.

Clifford v. *Watson*, 10 Ch. D. 45.

[4] See *supra*, § 1247; *infra*, § 1294; and *Collier* v. *Jenkins*, You. 295, where bill by purchaser's heir for specific performance with compensation for an outstanding lease for life was dismissed by Lord Lyndhurst (then) C.B. Cf. *Thomas* v. *Loring*, 1 Ke. 729; *Graham* v. *Oliver*, 3 Beav. 124.

referred to,[1] it is conceived that the Court will seldom now consider a difficulty of this kind insuperable.[2]

Westmacott v. Robins.

§ 1277. In one case what was contracted to be sold was an absolute and indefeasible estate in fee, and it turned out that the vendors held under a Crown grant, containing various reservations and conditions with a proviso for re-entry on breach of condition. The Court considered that the proper amount of compensation was not estimable, but held that the purchaser was not bound to take the property without compensation, and therefore was entitled to the repayment with interest of a part of the purchase-money that he had paid, and to a lien on the estate for the amount.[3]

Compensation approximately ascertainable.

§ 1278. Although, where there are no data from which the amount of compensation can be ascertained, the Court cannot enforce the contract with compensation,[4] the objection that the compensation is unascertainable is, as has been already in substance observed, one which the Court is unwilling to entertain; and it grants relief with compensation in many cases in which the ascertainment of the amount to be paid cannot be said to be certain or exact, but only the reasonable estimate from the evidence of competent persons; as, for instance, where compensation was granted for the existence in a stranger of a right to dig coals in the land sold.[5]

Enforcement of contract

§ 1279. Again, it may, it is conceived, be laid down generally that, wherever the Court sees that the

[1] See *supra*, §§ 1262 *et seq.*

[2] See, however, *Rudd* v. *Lascelles*, [1900] 1 Ch. 815 (compensation for restrictive covenants incapable of assessment). But the part of the property affected by restrictive covenants may be so small that the Court would, even if the vendor had no title at all to that part, decree specific performance of the contract, with compensation in respect of that part. *Halkett* v. *Earl of Dudley*, [1907] 1 Ch. 590, at p. 593; 76 L. J. Ch. 330.

[3] *Westmacott* v. *Robins*, 4 De G. F. & J. 390.

[4] See *supra*, § 1247.

[5] *Ramsden* v. *Hirst*, 4 Jur. N. S. 200. Cf. *Powell* v. *Elliot*, L. R. 10 Ch. 424.

enforcement of the contract with compensation would be unjust or unfair, or would disappoint the reasonable expectation of the parties, there it refuses to take such a course. Inequitable.

§ **1280**. Thus, where an estate which really contained only 11,814 acres was, by a *bonâ fide* mistake of the vendor's agent, described in the contract as containing 21,750 acres, and it appeared that the vendor had accepted the price on a computation of the rental of the estate, Lord Romilly M.R. considered that to force him to sell the estate for little more than half the price contracted for would be a hardship, and that the case was one of mistake; and he accordingly held that the purchaser might, at his option, either take the actual quantity at the contract price or have the contract rescinded, but that he was not entitled to specific performance with a abatement for the deficiency of acreage.[1] Instances.

In another case, where there was an open contract for sale containing no provision for compensation, and on investigation of the title it appeared that the property was subject to restrictive covenants as to building and user, Farwell J. refused to enforce the purchaser's claim for specific performance with compensation by way of abatement from the purchase-money, on the grounds of the great difficulty of fairly ascertaining compensation for such covenants, and the hardship on the vendor of the altered bargain in effect proposed by the plaintiff. "In my opinion," said his Lordship, "the Court should confine this relief [specific performance with compensation] to cases where the actual subject-matter is substantially the same as that stated

[1] *Earl of Durham* v. *Legard*, 34 Beav. 611. Cf. the remarks of Lord Alvanley C.J. in *Price* v. *North*, 2 Y. & C. Ex. at p. 626; *Colyer* v. *Clay*, 7 Beav. 188; and *Connor* v. *Potts*, [1897] 1 I. R. at p. 539; and distinguish *Hill* v. *Buckley*, 17 Ves. 394 (*supra*, § 1275), and *McKenzie* v. *Hesketh*, 7 Ch. D. 675.

in the contract, and should not extend it to cases where the subject-matter is substantially different."[1]

Indemnity.

§ 1281. A purchaser cannot insist on the vendor performing the contract, giving an indemnity against a defect, unless the indemnity was contracted for.[2]

Bainbridge v. Kinnaird.

§ 1282. In *Bainbridge* v. *Kinnaird*[3] a vendor (since deceased) had contracted to sell to the plaintiff a property which was, in common with other estates, subject to a charge of 15,000*l.* raiseable for the benefit of the vendor's sisters. Lord Romilly M.R. held that the plaintiff might have a simple decree for specific performance against the trust devisees of the vendor, but was not entitled either to compensation in respect of the charge or to an indemnity against it.

When compensation must be claimed.

§ 1283. Within what limit of time after the conclusion of the contract a claim for compensation must, if made at all, be made, is a question that may obviously in many cases be very important.

Claim before completion.

§ 1284. There is, it is conceived, no doubt that the Court will enforce compensation, at any time before the completion of the transaction by the execution of the conveyance and the payment of all the purchase-money, in respect of any matter, the fit subject of compensation, which has arisen before that time, and whether before or after the conclusion of the contract. Thus, where an estate was sold as tithe free, and after a claim had been started by the incumbent of one parish, the conveyance was executed, but a part of the purchase-money was set aside as an indemnity against this claim: the claim came to nothing, but, before the indemnity fund was transferred, it appeared that the land was in another parish, and was subject to tithe to its incumbent: it was held, on a bill filed by the

[1] *Rudd* v. *Luscelles*, [1900] 1 Ch. 815, 819.

[2] *Balmanno* v. *Lumley*, 1 V. & B. 224: *per* Lord Eldon in *Paton* v. *Brebner*, 1 Bli. at p. 66: *Dyett* v. *Ashton*, 1 My. & Cr. 105: cf. *supra*, § 1225.

[3] 32 Beav. 346.

purchaser, that he was entitled to compensation in respect of these tithes out of the fund.[1]

Deterioration.

§ 1285. And on the same principle the Court will allow compensation for deterioration which may have occurred in the value of the estate, between the time when the contract ought to have been completed by the vendor, and the time when he does in fact make out the title,[2] whether it have arisen by the wilful default or merely by the negligence of the vendor or his tenants.[3] Thus, where stone had been subtracted from a quarry pending a suit for the specific performance of a contract to grant a license to work it, compensation was obtained by means of a supplemental bill.[4]

Claim after completion.

§ 1286. Whether, after conveyance has been executed and purchase-money paid, the Court still has jurisdiction to enforce compensation, is a question which has been discussed in numerous reported cases.[5] It appears that rights to compensation under the contract may exist even after the conveyance and payment have been executed and made;[6] and, wherever such rights exist, they may, it would seem, now be asserted in the same action as that in which specific performance is claimed. Where the contract gives no right to compensation the case is, of course, different.[7] Apart from condition, compensation in respect of defect of title cannot be recovered after conveyance.[8]

[1] *Crompton* v. *Lord Melbourne*, 5 Sim. 353. Cf. (under the old practice) *Cator* v. *Earl of Pembroke*, 1 Bro. C. C. 301; 2 Bro. C. C. 282; *Frank* v. *Basnett*, 2 My. & K. 618; *Phelps* v. *Prothero*, 7 De G. M. & G. 722.

[2] *Binks* v. *Lord Rokeby*, 2 Sw. 222. *Foster* v. *Deacon*, 3 Mad. 394. Cf. *per* Lord Eldon in *Binks* v. *Lord Rokeby*, 2 Sw. at p. 226; and *Connolly* v. *Keating* (No. 2). [1903] 1 I. R. 356. Distinguish *Re* [illegible]*eny's Estate*, 25 L. R. Ir. 252, where the vendor was not to blame for the deterioration.

[3] *Nelson* v. *Bridges*, 2 Beav. 239. On the question of deterioration, see further *infra*, Part V. chap. v. §§ 1431 *et seq.*

[4] See, *e.g.*, the cases cited *infra*, in § 1288.

[5] *Perriam* v. *Perriam*, 32 W. R. 369; *Clarke* v. *Ramuz*, [1891] 2 Q. B. 456.

[6] Consider *Brett* v. *Clowser*, 5 C. P. D. 376, 387.

[7] *Debenham* v. *Sawbridge*, [1901]

II. B. *Purchaser insisting on the contract, there being a condition for compensation.*

Effect of the language of the condition.

§ **1287.** The language of the condition must of course have an important effect on the subjects for compensation under any particular contract, and in every case serves at least to indicate the nature of the matters in respect of which, and the circumstances under which, both parties intended that the purchaser should have a right to compensation. For instance, where one of the conditions of a contract provided for compensation "if any error or misstatement shall appear to have been made in the particulars of sale or these conditions," it was held, on the construction of the condition that it did not apply, and was not intended to apply, to the case of a defect of title, but only to error or misstatement in the description of the subject-matter of the sale.[1] But a purchaser claiming compensation before conveyance is not, it is conceived, bound to show that the subject-matter of his claim is of a kind expressly embraced by the words of the condition: except in so far as there may be anything in the contract excluding his claim, or empowering the vendor to defeat it—which are matters to be determined according to the ordinary rules of construction[2]—he is entitled not merely to the right expressly given to him by the condition, but to the full measure of relief applicable to the case according to the general principles already discussed: in other words, his right to compensation under the condition is generally cumulative to a purchaser's ordinary right to it: but he must, of course, submit to the corresponding limitations of the general principles.

2 Ch. 98, at p. 108, referring to *Clayton* v. *Leech*, 41 Ch. D. 103.

[1] *Debenham* v. *Sawbridge*, *ubi supra*. Consider *Re Jackson and Haden's Contract*, [1905] 1 Ch. 603; [1906] 1 Ch. 412.

[2] Consider the observations of Lord Westbury in *Cockburn* v. *Cheeseborough*, 4 De G. F. & J. at p. 384.

Condition enforced notwithstanding execution of conveyance

§ 1288. In accordance with a principle already stated,[1] it has been held, in cases decided before and also since the passing of the Judicature Act, 1873, that a condition for compensation may be enforced notwithstanding that the conveyance has been executed. In *Cann* v. *Cann*,[2] Shadwell V.C. decided that the right of the purchaser to receive compensation, under such a condition, for a misstatement (discovered after possession taken) in the particulars as to the value of the property was not at all affected by the circumstances of his having paid the whole of the purchase-money into Court and taken a conveyance. Subsequently the Court of Exchequer unanimously adopted the same view;[3] and the jurisdiction was reasserted by Jessel M.R., in a case in which his Lordship held a purchaser entitled to the benefit of a condition for compensation, in respect of a deficiency of acreage discovered by measurement after the execution of the conveyance,[4] and again by the Court of Appeal, in a case[5] of error in the particulars of sale.

[1] *Supra*, § 1286; and cf. *per* Hall V.C. in *Jones* v. *Clifford*, 3 Ch. D. 779, 792. As a rule, where a preliminary contract is intended to be and is in fact superseded by one of a superior character, the later contract—the superior one—prevails, and the stipulations contained in the earlier one can no longer be relied upon. *Per* Wills J. in *Gresswolde-Williams* v. *Barneby*, 49 W. R. 203; 83 L. T. 708, referring to *Leggott* v. *Barrett*, 15 Ch. D. 306.

[2] 3 Sim. 447. Cf. *Horner* v. *Williams*, 1 Jones & C. 274; and *Connelly* v. *Keating* (No. 2), [1903] 1 I. R. 356, 360.

[3] In *Bos* v. *Helsham*, L. R. 2 Ex. 72.

[4] *Re Turner and Skelton*, 13 Ch. D. 130; see, too, *Phelps* v. *White*, 5 L. R. Ir. 318, where the purchaser was held entitled to compensation, though he had means of discovering the error before completion; and distinguish *Brett* v. *Clowser*, 5 C. P. D. 376.

[5] *Palmer* v. *Johnson*, 13 Q. B. D. 351, affirming 12 Q. B. D. 32. See, too, *Clayton* v. *Leech*, 41 Ch. D. 103, and particularly the observations in the judgments of the L.JJ. in that case, upon *Manson* v. *Thacker*, 7 Ch. D. 620; *Besley* v. *Besley*, 9 Ch. D. 103; and *Allen* v. *Richardson*, 13 Ch. D. 524. In *Jolliffe* v. *Baker*, 11 Q. B. D. 255, there was no stipulation for compensation: so far as it may be inconsistent with *Palmer* v. *Johnson*, it cannot be considered as law (see 13 Q. B. D. at pp. 356, 359). Cf. *Saunders* v. *Cockrill* (damages after conveyance for breach of collateral contract), 87 L. T. 30, 31.

Construction of conditions for compensation.

§ **1289.** In consonance with the general principles on which the Court deals with conditions of sale,[1] its tendency is to put a liberal and comprehensive construction upon conditions giving compensation to a purchaser, and a strict one upon any which limit his right to it.

Painter v. *Newby.*

Thus, where by an innocent mistake the particular described part of the estate as customary leasehold renewable every twenty-one years, whereas in fact there was no such custom to renew; the fourth condition of sale empowered the vendor to vacate the sale upon objection taken to the title, and another condition stipulated that if, through any mistake, the estate should be improperly described, or any error or misstatement should be inserted in the particular, such error or misstatement should not vitiate the sale, but the vendor or purchaser should pay or allow compensation for it; Lord Hatherley (then Wood V.C.) held that the misstatement fell within the condition for compensation, and further that it was not an objection to title, within the meaning of the fourth condition, enabling the vendor to vacate the sale.[2]

Considerable deficiency of area.

§ **1290.** Again, where land was described in the particulars as containing 753 square yards, whereas it actually contained only 573 square yards, and one of the conditions provided that if any error, misstatement, or omission in the particulars should be discovered, the same should not annul the sale, nor should any compensation be allowed by the vendor or purchaser in respect thereof, it was held by Malins V.C. that such a condition must be construed as intended to cover small unintentional errors and inaccuracies, but not to cover reckless and careless statements, and that so large a deficiency as 180 square yards out of 753

[1] See Part V. chap. i. §§ 1185 *et seq.*; and *per* Lord Westbury in *Cordingley* v. *Cheesborough*, 4 De G. F. & J. 384 *et seq.*

[2] *Painter* v. *Newby*, 11 Ha. 26.

did not come within the condition; and that the purchaser was therefore entitled to compensation.[1]

No allowance for deficiency

§ 1291. Where, however, the conditions stipulated that (*a*) the admeasurements should be presumed to be correct, but if any error were discovered therein, no allowance should be made or required either way; (*b*) if any error of any kind were made in the description of the premises such error should not invalidate the sale, but a fair compensation should be given or taken; and (*c*) if the purchaser should make any objection as to compensation or otherwise which the vendor should be unwilling to remove or comply with the vendor should be at liberty to vacate the sale: and the area of the property, stated in the particulars to be 7683 square yards, was found by the purchaser upon actual admeasurement to be only 4350 square yards: and the vendor before suit offered to vacate the contract, but the purchaser refused the offer and insisted upon the performance of the contract with compensation for the deficiency; Lord Westbury held that the right of the purchaser must be determined by the operation of the conditions read in connection with one another, and that, though the Court probably would not, at the vendor's instance, have enforced the condition as to erroneous admeasurement where the error was so great, the purchaser could not, in the face of that condition, have an allowance for the deficiency of area.[2]

Vendor entitled to rescind.

§ 1292. It has also been decided that where the conditions, while providing that, if any mistake appear to have been made in the description of the property or the vendor's interest therein, it shall not annul the sale, but shall be the subject of compensation, at the same time provide that, if any objection is persisted

[1] *Whitmore* v. *Whitmore*, L. R. 8 Eq. 603. Cf. *Portman* v. *Mill*, 2 Russ. 570, 571.

[2] *Cottingley* v. *Cheesborough*, 1 De G. F. & J. 579 affirming S. C. 3 Giff. 496.

in the vendor may rescind the contract, then, if the purchaser persists in a claim for compensation which really involves an objection to the title, the vendor may rescind the contract, and, if he does, the Court will not afterwards give the purchaser any relief in respect of the condition for compensation.[1]

Right to compensation abrogated by terms of contract.

§ 1293. Another illustration of the principle that a purchaser's right to claim compensation may be abrogated, notwithstanding a condition for compensation, by the operation of another term of the contract, is afforded by the case of *Williams* v. *Edwards*.[2] There A. had contracted to sell to B. certain freehold property, and the contract contained a stipulation that errors in the description of the premises should not vacate the contract, but a reasonable abatement or equivalent should be made or given, but it was also stipulated that, if B.'s Counsel should be of opinion that a marketable title could not be made at the time appointed for the completion of the purchase, the contract should be void and be delivered up to be cancelled; and B's Counsel was of opinion that a good title could be made only to two-thirds, and that one third was held for a life only; the purchaser insisted on specific performance with compensation; but it was refused, because the contract was by its special terms void under the circumstances.

White v. *Cuddon.*

§ 1294. In a case which came before the House of Lords, the particulars stated that the fines in the manor of T., which was the subject-matter of the sale were arbitrary, and also that the clear profits of the manor for the last eight years had averaged 150*l.* a year; and one of the conditions of sale provided for

[1] *Mawson* v. *Fletcher*, L. R. 10 Eq. 212, affirmed L. R. 6 Ch. 91. See, too, *Cordingley* v. *Cheesborough*, 4 De G. F. & J. 379; and *Ashburner* v. *Sewell*, 1891 3 Ch. 405.

[2] 2 Sim. 78. See *per* Lord Westbury in *Cordingley* v. *Cheesborough*, 4 De G. F. & J. at p. 385; and cf. *Hudson* v. *Buck*, 7 Ch. D. 683, 687.

compensation being given for errors and misstatements. It turned out that by the custom of the manor only one class of fines was arbitrary; but that the clear profits of the manor exceeded 200*l.* a year. Their Lordships refused to give the purchaser compensation for the misstatement as to the fines, considering that reading the statements in the particulars as a whole, there had been no substantial misrepresentation; but it was intimated in the speeches of Lord Brougham and Lord Cottenham[1] that, if the misstatement as to the fines had been a substantial one, the impossibility of computing the proper amount of compensation would have prevented its being given.[2]

Omission not affecting value of property.

§ 1295. In a case where there was a condition entitling the purchaser of some cottages to compensation if any "omission in the particulars" should be discovered, it was held by the Court of Appeal that an omission, admittedly not fraudulent, on the part of the vendor to disclose the fact that he had been served by the local authority with notices to pave, &c., the street opposite to the cottages was not such an omission as to entitle the purchaser to compensation under the condition, the Court considering that the omission to disclose had not affected the value of the property.[3]

Misdescription verbally corrected.

§ 1296. In *Re Hare and O'More's Contract*[4] a verbal statement, correcting a material misdescription in the particulars, was made distinctly by the auctioneer at the time of sale. It was not proved that the purchaser heard the statement; but the Court held the circumstances to be such as to render it inequitable to grant the purchaser specific performance with compensation for the misdescription.

[1] *White* v. *Cuddon*, 8 Cl. & F. at pp. 786, 792.

[2] *White* v. *Cuddon*, 8 Cl. & F. 766. See *supra*, §§ 1247, 1276 *et seq.*

[3] *Re Leyland and Taylor's Contract*, [1900] 2 Ch. 625. Cf. *Re Ward and Jordan's Contract*, [1902] 1 I. R. 73; *Carlish* v. *Salt*, [1906] 1 Ch. at p. 340.

[4] [1901] 1 Ch. at p. 96.

Damages.

§ 1297. Damages may be said to be a species of compensation, inasmuch as they are awarded in order to make good to the purchaser some loss or expense which he had suffered or been put to in connection with the contract, but they are so distinct a form of relief that they may most conveniently be discussed in a separate chapter.[1]

[1] See *infra*, Part V. chap. III.

CANADIAN NOTES.

Compensation

The advertisement of a farm described the property as being ninety six acres cleared and cultivated, a good log house and frame barn 60 x 32 on the premises, also driving shed. Upon a survey of the property being made, it appeared that the quantity of cleared land was seventy-four and three-quarter acres under cultivation and legal fence, and twelve and a quarter acres of pasture land, with some girdled trees standing, and a few logs lying upon it which had never been cultivated and could not be until the logs should be removed. The dimensions of the barn were 50 feet by 30 and there was no driving shed upon the property.

It was held, independently of the stipulation in the condition of sale providing for errors in the advertisement, that these differences were such as entitled the purchaser to be compensated therefor. The provision as to error was that if any mistake be made in the description of the premises, or any other error whatsoever shall appear in the particulars, such mistake or error shall not annul the sale, but a compensation or equivalent shall be given or taken as the case may require, such compensation or equivalent to be settled by arbitrators. The bill for specific performance was by the vendor against the purchaser. *Canada Permanent Building, etc., Society* v. *Young*, 18 Grant's Ch. 566.

Where a purchase was made of three hundred acres more or less, and upon a survey being made of the lands they were found to contain only two hundred and forty-four acres, it was held that this was such a difference as entitled the purchaser to compensation, and the fact that the lands were alleged to be of but comparatively small value could not affect the right of the purchaser to an allowance for the deficiency. The purchase was of a mill site and mill. It appeared subsequently that the vendor had previously sold the right to take water for the pur-

pose of floating logs which fact was not communicated to the purchaser when negotiating for such purchase. This, also, was held to be a subject for compensation.

The time for the completion of the contract had not arrived, some of the instalments of the purchase being not yet due. It was held that although, under the circumstances, there could not be a decree for specific performance, the purchaser was entitled to a declaration of his right to specific performance and an enquiry as to title, the overdue instalments of purchase money being paid into Court. *Wardell* v. *Tremouth*, 24 Grant's Ch. 465.

In *Follis* v. *Porter*, 11 Grant's Ch. 442, the plaintiff sold to the defendant a lot of land. The contract did not mention the number of acres conveyed; the conveyance stated the quantity to be 200 acres more or less. The covenants did not warrant the quantity. Part of the purchase money remained as a lien on the land, and many years afterwards, but before the purchase money was fully paid, the vendee discovered that there was a deficiency of twenty-four acres in the contents of the lot. It was held that the vendee was not entitled to compensation from the plaintiff for deficiency as against the unpaid purchase money.

Per Mowat V.-C.: "If, in the present case, there had been no conveyance, resort would have been had to the contract and the contract does not specify any quantity, but, though it had specified the quantity in the same terms as the conveyance employed, I am not prepared to say that the defendant would have been entitled to any relief, even before conveyance. The cases do not define the precise effect of the words "more or less," but it was held in *Winch* v. *Winchester*, that these words in a contract disentitled a purchaser to claim compensation for a deficiency of five acres out of forty-one, there being no intentional misrepresentation."

Where a purchaser died after paying three-fourths of the purchase money, leaving an infant heir, who was entitled to a specific performance of the contract, and the vendor, at the instance of the administratrix, conveyed the property which had greatly increased in value, to a third person, and it afterwards passed into the hands of

persons without notice, it was held that the heir could sue the vendor in equity for compensation. *Forsyth* v. *Johnson*, 11 Grant's Ch. 639.

In *Crain et al.* v. *Rapple*, 20 O.A.R. 291, it was held that where a contract was made by one partner for the sale of partnership lands to which the other partner refused to consent, the purchaser could not insist upon taking the share in the lands of the contracting partner with a proportionate abatement in price. The judgment of the Common Pleas to the contrary was reversed.

Compensation for Improvements not Allowed where Performance can be Decreed.

Semble, from *Davis* v. *Snyder*, 1 Grant's Ch. 134, that this Court in a proper case has jurisdiction to decree compensation for improvements where the vendor is unable to complete the title to the purchaser, but the Court will not make such a decree where specific performance of a contract can be compelled. *Per* Blake Ch.: "Without deciding whether in any case a Court of Equity can decree damages for the non-performance of a contract or payment of the value of improvements, when the vendor is unable to fulfil his contract, and the purchaser, on the faith of the contract has made such improvements, (with respect to which it is possible that if a case should occur to call for the exercise of such a jurisdiction, it would appear that the Court was not destitute of power to afford the required relief), it must be admitted that no occasion exists for the exercise of such a jurisdiction when the specific performance of a contract can be compelled and complete justice can be done in that way; and, as we are of opinion that this is a case of that description, it becomes unnecessary to decide the other question."

Compensation for Dower, etc.

In *Longhead* v. *Stubbs*, 27 Grant's Ch. 387, the case of *VanNorman* v. *Beaupre* was followed and it was held that an owner of real estate who alone enters into an agreement to sell will be required to procure a bar of

his wife's dower or abate the purchase money in the event of her refusal, but, when his wife joins with him in a contract of sale, and the purchaser institutes proceedings to compel specific performance thereof, the wife must be joined as a party defendant, and the fact that the bill alleges that her only interest is that of inchoate doweress forms no ground for dispensing with her being so joined.

Where a party agrees to convey property, he is bound to do so free from dower, or, if the wife will not release her dower, then to convey subject thereto with an abatement in the purchase money. *Kendrew* v. *Sherson*, 1 Grant's Ch. 578.

In *VanNorman* v. *Beaupre*, 5 Grant's Ch. 599, it was held that although at law, the right of dower is during the life of the vendor a nominal encumbrance only, the purchaser has a right in equity to compel its removal, or to have specific performance of the contract with an abatement in the amount of the purchase money in respect of such encumbrance.

In *Skinner* v. *Ainsworth*, 24 Grant's Ch. 148, it was held that where, in a suit for specific performance, the wife of the vendor refuses to join in the conveyance for the purpose of barring her dower, the proper mode of protecting the purchaser is to set aside a certain portion of the purchase money to indemnify him against the claim for dower in the event of the wife subsequently becoming entitled thereto by surviving her husband, the interest during the joint lives of the vendor and his wife to be paid to him and the principal to be paid also on her decease.

Although at law the right of dower is during the life of the vendor a nominal encumbrance only the purchaser has a right in equity to compel its removal, or to have specific performance of the contract with an abatement in the amount of the purchase money in respect of such encumbrance. *VanNorman* v. *Beaupre*, 5 Grant's Ch. 599.

See also the remarks of the Vice-Chancellor in *Graham et al.* v. *Stevens*, 27 Grant 340, where the question of getting rid of an encumbrance was treated as a question of conveyancing and not a question of title.

Application Should be in Court.

An application by a purchaser in a suit for specific performance for an abatement of purchase money on the ground of outstanding dower, should be made in Court and not in Chambers. *Shinners* v. *Graham*, 1 Ch. Ch. 212.

In *Odea* v. *Synott*, 2 Ch. Ch. 446, it was ruled that a motion for compensation for want of possession in a specific performance suit should be made in Court and not in Chambers.

CHAPTER III.

DAMAGES.

Distinction between compensation and damages.

§ 1298. In early times, the Court of Chancery did not entirely disclaim jurisdiction in respect of damages, where they were incident to the subject-matter already in contention before the Court.[1] Subsequently the jurisdiction was disowned, and a broad distinction set up between compensation and damages, the extent and measure of the one being regarded as different from that of the other, so that (to follow the illustration given by Lord Eldon) if A. contracted to sell to B. an estate tithe free, and B. contracted to sell it to C. on the same conditions, and it was found that A. could not convey tithe free, he might be compelled by the Court to make compensation for the difference in the value of the property, but not for the damage sustained by B. from being unable to complete his contract with C.[2]

Protheroe v. Phelps.

§ 1299. However, in a case which came before the Lords Justices in the year 1855, the jurisdiction of the Court of Chancery to award damages for the want of a literal performance of a contract which it had directed to be specifically performed[3] was reasserted. "It is the constant course of the Court," said Turner

[1] *Clinton* v. *Gower*, Finch, 164; *City of London* v. *Nash*, 3 Atk. 512, where Lord Hardwicke refused specific performance, but relieved by way of damages, to be ascertained by an issue of *quantum damnificatus*.

[2] *Per* Lord Eldon in *Todd* v. *Gee*, 17 Ves. 278; *Jenkins* v. *Parkinson*, 2 My. & K. 5.

[3] Of course if, in any particular case, the Court holds that there was no contract, there can be no claim for damages or compensation. *Wild* v. *Woodwich Borough Council*, [1910] 1 Ch. at p. 12.

L.J., "in the case of vendor and purchaser, where a sufficient case is made for the purpose, to make an inquiry as to the deterioration of the estate, and in so doing, the Court is, in truth, giving damages to the purchaser for the loss sustained by the contract not having been literally performed."[1]

Lord Cairns' Act.

§ **1800**. In the year 1858 an express power of awarding damages in cases of specific performance was conferred upon the Court of Chancery by the Chancery Amendment Act of that year[2] (commonly called Lord Cairns' Act), whereby it was enacted (section 2) that, in all cases in which the Court of Chancery then had jurisdiction to entertain an application for an injunction against the breach of any covenant, contract, or agreement, as against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract, or agreement, it should be lawful for the same Court, if it should think fit, to award damages to the party injured either in addition to or in substitution for such injunction or specific performance; and that such damages might be assessed in such manner as the Court should direct.

It is to be noticed that the jurisdiction given by this enactment is a discretionary one, and enables the Court to deprive a suitor of what would otherwise be his right to specific performance.

It is also, however, to be borne in mind that the jurisdiction to award damages conferred by Lord Cairns' Act has not altered the established principles upon which, before the Act, Courts of Equity acted in relation to the grant of an injunction.[3]

[1] In *Prothero* v. *Phelps*, 7 De G. M. & G. at p. 734.

[2] 21 & 22 Vict. c. 27. This statute has been repealed (46 & 47 Vict. c. 49), but without affecting the jurisdiction conferred by it. *Sayers* v. *Collyer*, 28 Ch. D. 103.

[3] *Shelfer* v. *City of London Electric. &c. Co.*, [1895] 1 Ch. 287, at pp. 311, 315. See, too, as to the principles on which the Court gives damages instead of an injunction, *Cowper* v. *Laidler*, [1903] 1 Ch. 337, 339.

Condition precedent to jurisdiction under that Act.

§ 1301. It was—as indeed the language of the second section of Lord Cairns' Act clearly shows—a condition precedent to the Court of Chancery's awarding damages under that Act that the plaintiff should show himself to have been entitled, at the time when he commenced his suit, to some equitable relief of the nature specified in that section.[1] Accordingly where a plaintiff prayed for the performance of an alleged contract by a company to allot shares to him, and also if all the shares had been allotted to other persons, for damages, and it appeared that all the shares had been allotted before the filing of the bill, it was held that, specific performance having from the first been impossible, the claim for damages also failed.[2]

Measure of damages.

§ 1302. It is apprehended that where damages are awarded under this Act in substitution for specific performance, the measure of damages would be the same as in an action at Common Law for breach of the contract.[3] So, where the damages at Common Law would be nominal, they would also, it is submitted, be nominal under the statute.

Middleton v. Mayney.

§ 1303. In a case decided by Lord Hatherley (when Wood V.C.), the contract was that the defendant should grant a lease of a paper-mill to M.; that M. should pay 122*l.* for sundry articles on the premises, and should execute sundry improvements; and that, if the defendant should fail to grant a valid lease, he would repay the 122*l.* and all outlay on improvements. M. paid the 122*l.* and expended about 5,000*l.* on the premises;

[1] *Proctor* v. *Bayly*, 42 Ch. D. 390.

[2] *Ferguson* v. *Wilson*, L. R. 2 Ch. 77; *Lavery* v. *Pursell*, 39 Ch. D. 508, 519. Compare *Howe* v. *Hunt*, 31 Beav. 420, and *Hilton* v. *Tipper*, 16 W. R. 888, with *Franklinski* v. *Ball*, 33 Beav. 560. See also *Lewers* v. *Earl of Shaftesbury*, L. R. 2 Eq. 270; *Scott* v. *Rayment*, L. R. 7 Eq. 112; *Rogers* v. *Challis*, 27 Beav. 175; and *Middleton* v. *Mayney*, 2 H. & M. at p. 236.

[3] *Rock Portland Cement Company* v. *Wilson*, 31 W. R. 193. As to the measure of damages for breach of a contract for the sale of growing timber, see *McNiell* v. *Richards*, [1899] 1 I. R. 79.

but afterwards, on investigation of the title, it appeared that the defendant could not grant a valid lease according to the contract. Upon bill filed by M. for specific performance, or, if the defendant could not grant a valid lease, for repayment of M.'s outlay and damages, it was argued for the defendant that there could be no specific performance of the contract to grant a lease, that the alternative contract to repay outlay was not a subject for specific performance, and that damages would not be given where specific performance was impossible. But these arguments were repelled by the Judge, who said "There is an implied contract in every case between vendor and purchaser, that the purchaser shall have a lien on the property to the extent of the purchase-money he has paid, and here there is an express stipulation that the money expended shall be repaid. This right will sustain a claim for damages just as much as the right to specific performance of the contract to grant a lease which has dropped by reason of the impossibility of performance."[1]

Order for damages subsequent to decree.

§ **1304.** In a case decided in the year 1866, where, after specific performance of a contract had been decreed, certain facts occurred from which it was alleged that damage had arisen to the plaintiffs, Kindersley V.C. held that the Court of Chancery had, under Lord Cairns' Act, no jurisdiction to make after decree, on motion in the cause, an order for assessing damages; inasmuch as such an order would in effect be a supplemental decree founded on what had occurred since the decree was made.[2]

Effect of Judicature Acts as to damages.

§ **1305.** Now, however, the jurisdiction conferred upon the Court of Chancery by Lord Cairns' Act,[3] and also all the powers of granting damages which before

[1] *Middleton* v. *Maguay*, 2 H. & M. at p. 237.

[2] *Corporation of Hythe* v. *East*, L. R. 1 Eq. 620. As to granting damages after judgment, upon defendant's default, see *supra*, Part IV. chap. iv. § 1174.

[3] See *Fritz* v. *Hobson*, 14 Ch. D. 542.

the passing of the Judicature Acts were exercisable by the Common Law Courts, are by virtue of the Judicature Act, 1873 (ss. 16, 76), vested in the High Court of Justice; and by the last-mentioned Act it is expressly enacted (s. 24 (7)) that the High Court and the Court of Appeal, in the exercise of their respective jurisdictions, in every cause or matter pending before them respectively shall grant, either absolutely or on such reasonable terms as to them shall seem just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to, in respect of any and every legal or equitable claim properly brought forward by them respectively in such cause or matter; so that, as far as possible, all matters so in controversy between the parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided.

Present powers of the Court.

§ **1306**. The Court therefore can now give damages in any of the following cases, viz.:—

(i.) In substitution for specific performance where there is a case for specific performance,—under Lord Cairns' Act.

(ii.) Where there is no case for specific performance,—under the Judicature Acts.

(iii.) In addition to specific performance in whole or in part,—under Lord Cairns' Act, and probably also under the Judicature Acts.

Accordingly, a plaintiff may now come to the Court and say, Give me specific performance, and with it give me damages, or in substitution for it give me damages, or if I am not entitled to specific performance give me damages as at Common Law by reason of the breach of the agreement.[1]

[1] *Elmore* v. *Pirrie*, 57 L. T. 333. See *Dominion Coal Co.* v. *Dominion Iron and Steel Co.*, [1909] A. C. 293; 78 L. J. P. C. 115 (not a case for specific performance, but damages given), also *Worthing Corporation* v. *Heather* (specific performance of an option to

Present exercise of jurisdiction under Lord Cairns' Act.

But in order to the exercise of the peculiar jurisdiction under Lord Cairns' Act, the observance of the condition imposed by that statute is, notwithstanding the Judicature Acts, still obligatory upon the Court, and damages in addition to or in substitution for specific performance will be given by virtue of that jurisdiction only when the plaintiff had a case for specific performance at the time when he issued his writ.[1] Furthermore, the plaintiff cannot succeed on a claim for damages in substitution for specific performance when he has even after the action begun disentitled himself to specific performance, as where a vendor after action sold the subject-matter of the contract to a third person.[2]

Utility of the jurisdiction in damages.

§ 1307. The Court's jurisdiction in damages is an apt and flexible instrument for doing exact justice amid the diverse and complicated circumstances of many of the cases upon which the Court has from time to time to adjudicate.

For instance, where the plaintiff contracted with the defendant to take a lease of property belonging to the latter, for the purpose, as he knew, of carrying on a business which the plaintiff intended to carry on there, and, owing to the defendant's wilful refusal to perform his part of the contract, the plaintiff was for fifteen weeks unable to commence his business; the Court, in addition to giving judgment for the specific performance of the contract, awarded 250*l.* to the plaintiff by way of damages, in respect of his loss of profits during the fifteen weeks.[3] And in another case[4] it was held

purchase, which was void for remoteness, unenforceable, but damages for breach of contract given), [1906] 2 Ch. 532.

[1] *White* v. *Bobj*, 26 W. R. 133.

[2] *Hepgrave* v. *Cose*, 28 Ch. D. 356. *Jaques* v. *Millar*, 6 Ch. D. 153; S. C. (No. 2), 26 W. R. 368, overruled on another point in *Marshall* v. *Berridge*, 19 Ch. D. 233, followed as to damages in *Royal Bristol* [illegible] *Building Society* v. *Bomash*, [illegible] 390; *Wesley* v. *Walker*, 2[illegible] 368. Consider *Hyam* v. *T*[illegible] Sol. Jo. 371.

[3] *Jones* v. *Gardiner*, [1902] [illegible] at p. 195.

that damages could be recovered by a purchaser for delay in completing a contract for sale of real estate, where the delay had been caused by default of the vendor, not in consequence of want of, or defect in, title, or in consequence of conveyancing difficulties, but by reason of the vendor not having cared, or troubled, or taken reasonable pains to perform his contract.

Suit brought to hearing for damages.

§ 1308. Where the plaintiff was at the time when he filed his bill entitled to specific performance, and also to damages for injury occasioned to him by the defendants' delay of performance, and before the suit could be brought to a hearing the defendants performed the contract; it was held that the plaintiff was nevertheless justified in bringing his suit to a hearing for the damages.[1]

Partial performance *plus* damages.

§ 1309. Sometimes the Court can best do justice by enforcing the specific performance of one part of the contract and awarding damages for breach of the remainder. Where, for instance, a man contracted to pull down an old house, to rebuild, and to accept a lease of the new building, and then made default in rebuilding, Lord Hatherley (then Wood V.C.) held the intended lessor entitled to have damages for the non-building, and also specific performance of the contract to accept a lease.[2]

Damages in substitution for performance.

§ 1310. Again, it may well happen that, though the Court has jurisdiction to enforce the specific performance of a contract, the justice of the case will be better met by awarding damages in substitution. Thus where a railway company contracted with a landowner to "erect set up and construct a station" on land which they had bought from him, but the contract contained

[1] *Cory* v. *The Thames Ironworks and Shipbuilding Co.*, 11 W. R. 589, C. S. C. (in Q. B.) L. R. 3 Q. B. 181.

Soames v. *Edge*, Johns. 669, followed in *Margetson Corporation of London* v. *Southgate*, 17 W. R. 197. Distinguish *Norris* v. *Jackson*, 1 J. & H. 29; and see *Simada* v. *Lawford*, 4 Giff. 12.

no further description of the station, and no stipulation as to the user of it when erected; and the company afterwards refused to erect a station on the agreed site. The Court of Appeal in Chancery, considering that it could not satisfactorily do justice by means of a decree for specific performance, directed that the damage sustained by the landowner by reason of the non-performance of the contract should be ascertained (by an inquiry in Chambers) and the amount paid to him by the company.[1]

Where vendor has no title.

§ 1311. It may happen that a purchaser finds himself unable to obtain specific performance of a contract owing to some fatal defect in his vendor's title, which was unknown to him (the purchaser) at the time when he entered into the contract. In such a case[2] damages are the only possible form of relief: and the vendor will not be allowed to escape from liability to pay them by purporting to rescind the contract under a condition entitling the vendor to rescind in the event of the purchaser making any objection or requisition in respect of the title which the vendor is unwilling to comply with: for such a condition does not apply to a case where the vendor has not any title at all.[3]

The rule in *Flureau* v. *Thornhill*.

§ 1312. It is to be borne in mind that, according to an exceptional and anomalous rule, established in *Flureau* v. *Thornhill*,[4] if, upon a contract for the purchase of real estate, the vendor is, without fraud, and (as should, it is conceived, be added) without default on his part, incapable of making a good title, the purchaser is not entitled to any compensation in damages for the loss of his bargain, beyond such expenses as he may have incurred under the contract in investigating

[1] *Wilson* v. *Northampton and Banbury Junction Railway Co.*, L. R. 9 Ch. 279.

[2] See, *e.g.*, *Royal Life Assurance Co.* v. *Bottomshaw*, [1893] W. N. 123.

[3] *Bowman* v. *Hyland*, 8 [illegible] 588, 590; cf. *Oakeley* v. [illegible] 27 L. T. 745. See, [illegible] Part III. chap. xxiv. §§ [illegible]

[4] 2 W. Bl. 1078.

the title.[1] However, in a case where there was a contract for the sale of leasehold property, which the vendor could not assign without a license from his lessor, it was held that the rule did not prevent the purchaser from recovering damages which he had sustained by reason of the vendor's wilful omission to do his best to procure the license.[2]

Mistake of defendant.

§ 1313. Where an action is brought for specific performance, and specific performance is refused on the sole ground of a mistake by the defendant, the Court will n[illegible]stion of damages, and give the [illegible]d, under the old practice, ha[illegible] at Law.[3]

Ascertainment of quantum of damages.

[illegible] case for damages, the C[illegible] directed an issue to ascertain [illegible] more usual course was to direct an inquiry [illegible] as to the sum to be awarded or allowed [illegible] all commonly done.[4] In many cases, however, damages have been assessed by the judge himself at the trial, and, where the plaintiff has not been ready with his evidence as to the amount of damages the trial has been adjourned to give time for it to be obtained. It seems clearly desirable that the assessment of damages should, wherever practicable,

Bain v. *Fothergill*, L. R. 7 H. L. 158, 204, 207, 208, 210. See, too, *Wilson and Stevens' Contract*, [1894] 3 Ch. at p. 553, a case of concurrence under the Vendor and Purchaser Act, 1874; and *Morgan* v. *Russell & Sons*, [1909] 1 K. B. 357, 367; 78 L. J. K. B. 187 (contract to sell slag to be severed and removed by the purchaser). Note, however, that the rule in *Bain* v. *Fothergill* has nothing to do with costs in the Court. *Hollicell* v. [illegible], [1899] 1 Ch. at p. 150; 77 L. J. Ch. 289.

Day v. *Singleton*, [1899] 2 Ch. 320, 327, 329. See, too, *Jones* v. *Gardiner*, [1902] 1 Ch. at p. 195.

Per James and Cotton L.JJ. in *Tamplin* v. *James*, 15 Ch. D. at pp. 222, 223.

[1] *E.g.*, *Cory* v. *The Thames Ironworks and Shipbuilding Co.*, 11 W. R. 589; S. C. (in Q. B.) L. R. 5 Q. B. 181. Cf. *Nelson* v. *Bridges*, 2 Beav. 239, and *Ferguson* v. *Tolman*, 1 Sim. 530.

See Seton (6th ed.), 2207, 2227, 2241, 2272. As to the costs of such an inquiry, cf. *Slack* v. *Midland Railway Co.*, 16 Ch. D. 81.

take place at the trial, without any separate inquiry; for otherwise the parties are virtually put to the expense of two trials of the same question.[1]

Damages for breach by vendor of conditions of sale.

§ 1815. It may here be mentioned that a vendor, who offers property for sale by auction on the terms of printed conditions, can be made liable in damages to an intending purchaser, who accepts the offer, if those conditions are violated by the vendor—if, for instance, the vendor declines to allow the highest bidder, duly tendering the prescribed deposit, to sign the prescribed memorandum of contract. And the Statute of Frauds affords no defence to the vendor in such a case.[2]

[1] *Jaques* v. *Millar*, 6 Ch. D. 153; *Wesley* v. *Walker*, 26 W. R. 368; Seton (6th ed.), 2278. See, too, *Cornwall* v. *Henson*, [1900] 2 Ch. 298, 305, where the damages were assessed by the Court of Appeal; but the Court declined to give the plaintiff (purchaser) a lien on the land for the amount of the damages.

[2] *Johnston* v. *Boyes*, [1899] 2 C. at p. 77.

CANADIAN NOTES.

Damages.

In *Barber* v. *Williams*, 16 Man. 161, it was held that when specific performance for any reason cannot be granted, the plaintiff may be awarded damages in lieu thereof as at common law, and no delay in seeking his remedy, short of that imposed by the Statute of Limitations should afford sufficient defence.

Where an infant claimed specific performance of a contract and damages in the alternative, it was held in *Johnson* v. *Gudmunson*, 19 Man. 83, that the fact that specific performance could not be granted did not bar the plaintiff from recovering damages for the breach of the contract, these remedies having been claimed in the alternative. *Hingston* v. *Case*, 28 C.L.J. 356, is distinguished.

In *Smith et al.* v. *Mitchell*, 3 B.C. 150, it was held, among other things, that a party cannot be decreed *nunc pro tunc* both specific performance and rescission, and where he obtains rescission he cannot have damages which are given as in lieu of specific performance.

In *O'Donnell* v. *Black*, 19 Grant's Ch. 620, an intending purchaser attended an auction sale of lands and bid off the property, but no memorandum or agreement was signed evidencing the contract, and, the vendor having refused to complete the sale, the purchaser filed a bill for specific performance.

It was held that this was not a case in which the Court would, on refusing specific performance, direct an enquiry under 28 Vict. ch. 17, Ont. (Sir Hugh Cairn's Act). The learned Chancellor Spragge treats the case of *Soames* v. *Edge* as an exceptional case and one which seems to break through a general rule. He thought that in this case the bill should never have been filed at all and that, therefore, it was not a case in which an enquiry should be made as to damages.

In *Casey* v. *Hanlan*, 22 Grant's Ch. 445, it was held that under section 32 of the Administration of Justice Act, 1873, the Court of Chancery of Ontario has cognizance of all the rights of all the parties arising out of an agreement, and if either was entitled to damages the Court ought to ascertain them. In this view, in a suit for specific performance to which the plaintiff was found not entitled, a reference was directed to enquire as to damages sustained by a purchaser by reason of breach of the contract, and also as to damages sustained by the vendor by reason of breach of covenant in the instrument constituting the agreement.

CHAPTER IV.

REFERENCE OF TITLE.

Purchaser defendant

§ 1316. WHERE the vendor of land sues the purchaser for a specific performance of the contract, the defendant may, in some cases, succeed in having the action dismissed at the trial, on the ground of a defect in the plaintiff's title, provided the defect in title has been prominently put forward in the pleadings:[1] but where this is not the case, the defendant is entitled to have an inquiry[2] directed as to the title of the vendor to the lands in question. This right is derived from the extraordinary nature of the jurisdiction which the vendor seeks to put in action, in consideration of which the purchaser has a right, not only to have such a title as the vendor offers upon the abstract unauthenticated, but the highest assurance upon the nature of his title which can be acquired for him by the production of deeds, the directing of inquiries, and the sifting of the vendor's conscience.[3]

Hence it follows that, though the purchaser may admit that he has only one particular objection,[4] or no objection at all[5] to the title, he is equally entitled to a general reference as to it.

Reference in general terms.

§ 1317. Still whenever, in a judgment decreeing the specific performance of a contract, an inquiry whether

[1] ... v. *James*, 7 Ha. 418, 425. For forms of this inquiry, see Seton (6th ed.), 2226, 2258.

[2] ... v. *Hiles*, 6 Ves. 646, ...

[3] *Esturgeon* v. *Martin*, 3 My. & K. 255.

[4] *Jenkins* v. *Hiles*, 6 Ves. 646; cf. *Fleetwood* v. *Green*, 15 Ves. 594

the vendor can make a good title is directed in general terms, it must be understood to mean a good title according to the terms of the contract: but if the vendor wishes to prevent the renewal, under the inquiry, of objections waived before the action, he should guard himself by establishing such waiver at the trial, and taking care that the judgment expressly recognizes it: for under a general inquiry as to title the Court will not enter into any question of such waiver.[1]

Purchaser's costs disallowed.

§ **1318**. However, where a purchaser allowed the vendor's suit for specific performance to proceed to the point of the inquiry as to title, before bringing forward an objection which was patent on the face of the abstract originally delivered, he was not allowed his costs of the inquiry, though the objection was fatal to the title.[1]

Vendor cannot except.

§ **1319**. The right to the reference is that of the purchaser, and the vendor cannot except to the title, so as to assert his own title to be bad.[2]

Purchaser plaintiff.

§ **1320**. The purchaser is also entitled to a reference of title where he is plaintiff in an action for specific performance; but inasmuch as in this case it is he, and not the vendor, who is calling on the Court to act, he does so at his own risk; and therefore, if he knows of objections and asks for a reference, and then waives the objections, he will have to bear the costs of investigating the title.[3] And it would seem that the same result must follow where the effect of a reference is to show that the vendor had at the due time disclosed to the purchaser a perfect title.[4]

In respect

§ **1321**. The right to this reference is not confined to

[1] *Upperton* v. *Nickolson*, L. R. 6 Ch. 137; *Curling* v. *Austin*, 2 Dr. & Sm. 129; *McMurray* v. *Spicer*, L. R. 5 Eq. 527. Cf. *Corbett* v. *Spalding*, L. R. 8 Eq. 335.

[2] *Bradley* v. *Mantle*, 1 [illegible] 460.

Bennett v. *Fowler*, 2 B. & [illegible]. Cf. *Frome* v. *Wright*, 1 Mad. [illegible].

[4] See *Lyle* v. *Earl of* [illegible] Johns. 70.

sales of real estate, but extends to any species of property with regard to which the Court may entertain an action for specific performance, and the nature of which renders such an inquiry proper. Accordingly, inquiries have been directed into the title of vendors to shares in railway companies,[1] and in mining concerns.[2] The nature of the inquiry, of course, varies according to the nature of the property, and the essentials of a good title to it. of what contracts the right exists.

§ 1322. But there are necessarily many contracts in respect of which no such inquiry is or can be made. Where the contract is not for the sale of any property, such a reference is of course out of the question. And so, too, where a contract is rather in the nature of a compromise of disputed rights than of a contract for sale, the Court will not make the inquiry.[3] In a case where a small piece of land was described as held of certain commissioners of waste lands at a rent of six shillings, it was doubted whether a purchaser could call on a vendor for the title of the commissioners.[4] Where reference will not be directed.

§ 1323. The Court will not direct an inquiry where, though the contract be one of sale, the vendor only sells such interest as he has:[5] such a contract is, of course, perfectly valid, but, being in restraint of the purchaser's implied right to a good title, it must be made clear and unambiguous to the purchaser.[6] A vendor may, of course, stipulate that a purchaser shall take such title as he himself bought with,[7] or such title "as the vendor has."[8] Vendor selling such interest as he has.

[1] *Cox* v. *Fisher*, 2 De G. & Sm. 11.

[2] *Cuthbert* v. *Flight*, 2 Ph. 613.

[3] *Jackson* v. *Turner*, 15 Beav. 16.

[4] *Hilton* v. *Wood*, 3 Jur. N. S. 1051 (Stuart V.C.).

[5] *See supra*, § 876. It has been held that the purchaser under such a purchase may require the vendor to clear the property from any incumbrance which he can discharge: *Gould* v. *Birmingham Bank*, 58 L. T. 560.

[6] *Southby* v. *Hutt*, 2 My. & Cr. 207, 212. See also *Anderson* v. *Higgins*, 1 Jon. & L. 718.

[7] *Moore* v. *Foglee*, 8 Ha. 51, 71.

[8] *Re Burdick and Lepska's Contract*, [1901] 2 Ch. at p. 668. Cf. *Re Duffy and Jesson's Contract*, 16

Instances.

§ **1324**. Of restrictive stipulations there are many cases: thus, where a purchaser agreed to accept the vendor's title without dispute, he was held to be debarred from taking an objection on account of an incumbrance which left the legal estate outstanding.[1] So, again, where conditions of sale of a fee-farm rent stated that no evidence should be required of the receipt, or payment, or existence of the ground-rent, other than that disclosed by a conveyance mentioned, and that no objection should be taken to the title in consequence of the non-payment or non-receipt of the said rent, and the purchaser objected that the rent had not been paid for twenty years, and so was extinguished, and that there was therefore no subject-matter of the contract, and therefore no contract; the Court held that the purchaser had by the contract taken on himself the chance of being able to substantiate his claim to the rent.[2]

Best v. *Hamond*.

§ **1325**. The case of *Best* v. *Hamond*[3] is a remarkable instance of the upholding of such a stipulation. There, the subject-matter of the contract being land which the vendor had bought from a railway company as superfluous land, the contract contained a stipulation that the purchaser should assume and admit that everything (if anything were necessary) was done and performed by the company to enable them to sell and effectually convey the land as surplus land, and should not call for or require production of any evidence to that effect. The vendor all along knew (as appeared

W. R. 300, where the purchaser had agreed "to accept the best title the vendors can give."

[1] *Duke* v. *Barnett*, 2 Coll. 337; *Wilmot* v. *Wilkinson*, 6 B. & C. 500; *Hanks* v. *Pulling*, 6 El. & Bl. 659, *supra*, § 906; cf. *Smith* v. *Harrison*, 26 L. J. Ch. 142; 5 W. R. 108; stated *supra*, § 393. See, too, *Hopkinson* v. *Chamberlain*, [1908] 1 Ch. 853; 77 L. J. Ch. 467, where condition, made in the ve[illegible] that no evidence should be [illegible] of the discharge of any sum of [illegible] charged on the property [illegible] became payable upwards of [illegible] years prior to the day [illegible] held to preclude the purchaser [illegible] requiring the satisfaction [illegible] tional surrender by way of [illegible] made in 1865.

12 Ch. D. 1. See [illegible] v. [illegible], 8 Q. B. D. 1[illegible]

from the abstract and replies to requisitions) that the statutory offer of pre-emption had not been made to the adjoining owners; but the Court of Appeal nevertheless held that the purchaser was bound by the stipulation;—to the extent, at any rate, that his refusal to abide by the stipulation was a breach of the contract which disentitled him to sue for the repayment of his deposit. Unless the decision may be limited in this way, it seems difficult to reconcile it altogether with the principles laid down by the same Court in the almost contemporaneous case of *In re Banister*[1] already referred to.

Contract for assignment of vendor's share.

§ **1326**. Where the vendor was entitled to one undivided third in a leasehold interest in certain collieries, and the purchaser to another undivided third under the same title, and the contract was for an assignment of the vendor's share and interest in the collieries; the contract was held to be for the sale of the vendor's share and not of the land, and the vendor was held not liable to show the lessor's title.[2]

Misleading condition.

§ **1327**. The vendor may generally by express stipulation, as we have seen, entirely exclude any inquiry into his title. But he will not be allowed to fall back upon such a stipulation in support of a misleading condition of a sale;[3] and where, the contract containing such a stipulation, the purchaser at first under a mistake common to both parties accept the title, but on discovering the mistake objected to complete, it was held that his objection was not precluded by the stipulation.[4]

Re Haedicke and Lipski's Contract.

In *Re Haedicke and Lipski's Contract*[5] a contract for sale of leasehold houses contained a stipulation that "the vendor's title is accepted by the purchasers."

12 Ch. D. 131; *supra*, § 1290.

Phipps v. *Child*, 3 Drew. 709.

Re [illegible], 12 Ch. D. 131; *Re* [illegible] *and Granville*, 24 Ch. D. [illegible]; *Hewett* v. *Bates*, L. R. [illegible] Eq. 50. Distinguish *Wenham* v. *Pearce*, 29 W. R. 237.

[1] *Jones* v. *Clifford*, 3 Ch. D. 779.

[2] [1901] 2 Ch. 666.

Upon delivery of the abstract it was discovered that the property was subject to onerous and unusual covenants, which were not disclosed to, or in any way brought to the notice of, the purchasers before they signed the contract; and it was held that, notwithstanding the above stipulation, the purchasers were not bound to take the title.

Inquiry limited

§ 1328. Or the vendor may take a middle course, and, without excluding, may limit the inquiry. He may, for instance, exclude all objections in respect of a particular instrument,[1] or all objections to title earlier than a certain deed,[2] or he may sell merely an equitable and not a legal estate.[3]

The cases fall into two categories

§ 1329. The cases on the question whether and how far the inquiry into title has been limited fall into two categories; first, where the stipulations of the contract preclude the purchaser from making requisitions upon or inquiries from the vendor as to his title, —which relieves the vendor from the necessity of complying with or answering any such requisition or inquiry, but does not prevent the purchaser from showing, by any means in his own power, that the vendor's title is defective; and secondly, cases in which the stipulations preclude the purchaser, not only from making such requisitions upon and inquiries from the vendor, but from making any inquiry or investigation about the title anywhere;—which may quite validly be stipulated, and will generally, provided that the stipulation be clear, altogether preclude inquiry and investigation for every purpose.[4]

[1] *Worrall* v. *Cattell*, 1 M. & W. 734; S. C. 3 Y. & C. Ex. 113. See, too, *Small* v. *Percy*, 25 L. R. Ir. 388, where a condition precluded inquiry in respect of a prior voluntary settlement by the vendor.

Taylor v. *Martindale*, 1 Y. & C. C. C. 658. Cp. *Re* Marcus York, [illegible] at p. 700.

Harnett v. *Baker*, 33 L. R. [illegible] p. 58.

Ashworth v. *Munn*, [illegible] C. *Imperial Mercantile* [illegible] *Waterworks Co.* v. *Pelsant*, [illegible] 70; 3 De G. F. & J. 30.

[4] See *Jones* v. *Gifford*, [illegible] at p. 700.

First category illustrated.

§ 1330. Of the first of these categories an illustration may be found in the case of *Darlington* v. *Hamilton*,[1] where there was a stipulation that the lessor's title should not be produced, and the purchaser discovered that the lessor's title was objectionable by reason of its being involved with the title to other property, so that the purchaser would run the risk of being ousted by reason of a breach of covenant in respect of other property; and the Court accordingly refused specific performance.

Second category.

§ 1331. On the other hand, where the condition provided that the lessor's title should neither be produced nor inquired into,[2] and the purchaser offered Acts of Parliament in evidence that the lessors (a public company) had no power to grant leases, the objection was held to be precluded.[3] And similarly a condition that the title should commence with a specified conveyance, "and the prior title, whether appearing in any abstracted document or not, shall not be required, investigated, or objected to," was held to be binding on the purchaser.[4]

Defect discovered by purchaser with or inquiry of vendor.

§ 1332. But conditions restrictive of a purchaser's Common Law rights are, as we have seen,[5] construed very strictly. Thus in *Waddell* v. *Wolfe*,[6] where on a sale of leaseholds held by underlease there was a condition that no requisition or inquiry should be made

Kay, 550. Cf. *Life Interest, &c. Corporation* v. *Hand-in-Hand Fire, &c. Society*, [1898] 1 Ch. 230 (proof made of improper exercise of power implied). See, too, *Shepherd* v. *Keatley*, 1 Cr. M. & R. 117; *Geoghegan* v. *Connolly*, 8 Ir. Ch. R. 598, 601.

See now the Vendor and Purchaser Act, 1874, s. 2 (1); *infra*, § 1374.

Dare v. *Bathy*, 5 De G. & Sm. 520. *Spratt* v. *Jeffery*, (10 B. & C. 249), which is at variance with the [illegible] above stated, must be considered as overruled.

[2] *Re National Provincial Bank of England and Marsh*, [1895] 1 Ch. 190. See, too, *Re Scott and Alvarez' Contract*, *Scott* v. *Alvarez*, ib. at p. 626; S. C., [1895] 2 Ch. 603; *Re Lyons and Carroll's Contract*, [1899] 1 I. R. 383, 389.

[3] See *supra*, §§ 118[illegible] *sup.*

[4] L. R. 9 Q. B. 515; *Jones* v. *Watts*, 14 Ch. D. 521. *Re Cox and Neve*, [1891] 2 Ch. 109. Cf. *Magrath* v. *Hardiman*, 11 Ir. Ch. R. 196.

respecting the title of the lessor, or his superior landlord, or his right to grant the underlease, and the purchaser, in investigating the title, discovered for himself that the lessor had no power to grant the underlease, it was held that the purchaser was not precluded by the condition from insisting on the objection. The Court appears to have considered that the language of the condition pointed only to requisitions and inquiries between vendor and purchaser; so that the case really fell within the principle of *Darlington* v. *Hamilton*.[1]

Defect disclosed by vendor himself

§ 1333. Again, in *Smith* v. *Robinson*,[2] the defendant having in 1877 agreed to purchase freehold property, subject to a condition that the abstract should commence with a deed dated in 1867, and that no earlier or other title should be required or inquired into by the purchaser, there happened to be, among the muniments handed to the defendant's solicitor for comparison with the abstract, a deed, of the existence of which the vendor was then ignorant, which threw grave doubt on the title; and it was held that, the objection having arisen not from any requisition or inquiry by the purchaser but from the vendor's own disclosure, the condition did not apply.

Refusal to accept answer to requisition

§ 1334. Generally, where an estate is sold subject to conditions of sale as to title, the inquiry is whether a good title is made in accordance with such conditions.[3]

Instances

§ 1335. Accordingly, in the case of *In re Banister*[4] already referred to, although the purchaser was relieved against a misleading condition, still, as the conditions professed on their face to give only a good holding title, the reference was confined to ascertaining whether such a title could be made out. So,

[1] Kay, 550; *supra*, § 330.

[2] 13 Ch. D. 148.

[3] See §§ 1317, 1364; and consider *Upfrich* v. *Lane*, 31 Beav. 58.

[4] 12 Ch. D. 131; *supra*, § 1250.

See, too, *Smith* v. *Robinson*, 13 Ch. D. 148.

again, where at the time of the written contract (an open one) being signed, the purchaser verbally agreed to take a limited title, and negotiations went on for a long time upon that footing, the Court at the hearing limited the inquiry as to title accordingly.[1] And where A. contracted with B. for a lease, B. knowing the purposes for which A. wanted the house, and A. knowing that B.'s title was merely leasehold, a reference was directed having regard to the covenants in the lease, and the purposes for which the premises were taken.[2]

Hardship of conditions not to be then considered

§ 1336. Where a judgment has been given for specific performance and the question is one of title, the Court has to consider only the question whether the title shown is in accordance with the contract, and cannot enter upon the question of the hardship imposed by any of the conditions as to title, or the question whether such conditions would have furnished a defence to the action.[3]

Waiver of the right

§ 1337. Generally, either vendor or purchaser has a right to have the inquiry in question,—the one being entitled to an opportunity of perfecting, and the other of investigating the title. But there may be, on the part of either of them, a waiver of the right.

By vendor.

§ 1338. Thus, if the vendor states his title, and conclusively avers that he can make no other or better title, and the title disclosed is objected to by the purchaser, the Court may decide without a reference;[4] but if in such a case the decision were in favour of the vendor, it seems that the purchaser would then be entitled to call for a reference.

[1] *M'Murray* v. *Spicer*, L. R. 5 Eq. 527.

[2] *Wilbraham* v. *Livesay*, 18 Beav. 466. For form of reference where the vendor has a power of sale with the consent of trustees, see *Graham* v. *Oliver*, 3 Beav. 124.

[3] *Lancey* v. *Lee*, 7 App. Cas. 130.

[4] *Rose* v. *Calland*, 5 Ves. 186; *Omerod* v. *Hardman*, 5 Ves. 722, explained in *Jenkins* v. *Hiles*, 6 Ves. 654, 655. See, too, *Austin* v. *Martin*, 29 Beav. at p. 535.

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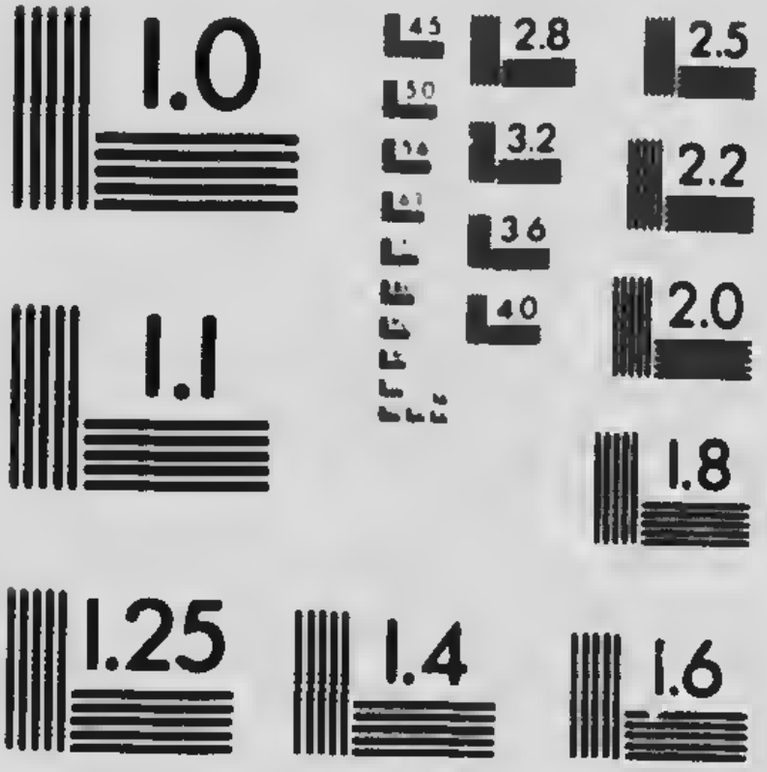

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By purchaser.

§ 1339. But it is with regard to a waiver by the purchaser that this question more often arises: for a purchaser originally entitled to examine the vendor's title may subsequently waive that right, either expressly or by implication; and this waiver may be either as to the whole title or limited to parts:[1] and in case of an express waiver, it may be either absolute or conditional.[2]

Express waiver.

§ 1340. An admission of title by a defendant in his pleading is an express waiver, which excludes the right to a reference of title: for this purpose it is enough if the defendant pleads belief that at the time of the contract the plaintiff had a title;[3] or even if, the plaintiff having pleaded the facts constituting his title, they are not denied (specifically or by necessary implication), or stated to be not admitted, in the pleading of the defendant.[4]

Implied waiver.

§ 1341. But this waiver, where not express, must be clearly implied from the acts of the purchaser. "The Court," said Lord Eldon, "will at least take care that, where it is contended that the defendant has waived his right to a reference, it shall be clear that there was no surprise upon him, and that there has been a full and fair representation as to the title on the part of the plaintiff;"[5] and so where the vendor relies on any dealings in respect of the abstract as a waiver of objections to title, the contents of the abstract must raise the objection in question clearly and explicitly, and not merely by inference or notice.[6]

Particular objections.

§ 1342. It is often the case that there is only a particular objection to the title that is of moment, and it

[1] *E.g.*, *Corbett* v. *Sparling*, 1 R. 8 Eq. 335.

[2] *Townley* v. *Bond*, 2 Dr. & War. 240, 261.

[3] *Phipps* v. *Child*, 3 Drew. 709.

[4] R. S. C. Ord. XIX. r. 13.

[5] In *Jenkins* v. *Hiles*, 6 Ves. 655; *Haydon* v. *Bell*, 1 Beav. 337; cf. *Re Hardicke and Lipski's Contract*, [1901] 2 Ch. at pp. 669, 670.

[6] *Blacklow* v. *Laws*, 2 Ha. 40.

is then frequently a question whether the purchaser has not waived all right to object to it.

Classification of the cases.

§ 1343. The cases thus fall into three classes: (i.) those of acts done by the purchaser after the objection is known to him, the objection being in its nature curable; (ii.) those of similar acts where the defect is incurable; and (iii.) those of acts before the objection is known to the purchaser. It is evident that under the last we may treat of the question of a general waiver of title.

i. Where the objection is known and curable.

§ 1344. (i.) Where the defect, though known, is yet one which it is, or may be, in the power of the vendor to remedy, acts which indicate an intention to complete may yet not amount to a waiver, because they may be done in the faith and expectation that the remedy will be applied. And a negotiation about the objection between the parties after the acts is, on this principle, an evidence that it was not waived.[1]

ii. Where known and incurable.

§ 1345. (ii.) But where the defect is known to the purchaser, and is in its nature incurable, there no such expectation can arise, and much slighter acts will operate as indications of an intention to waive the objection.[2] So where an estate, sold as freehold and leaseholds attached, turned out to be nearly all leasehold, and this clearly appeared as a defect which could not be cured, and the purchaser continued to treat, up to and long after the day for concluding the purchase, on points of title irrespective of this objection; he was held to have waived it.[3] So where an estate was subject as to part to a reservation of rights of sporting, which appeared on the abstract, and which the vendor could not cure, and after the delivery of the abstract the purchaser took possession; he was held to have waived his right to object to the reservation in question.[4] And

[1] *Calcraft* v. *Roebuck*, 1 Ves. Jun. 221.

Ellis v. *Rogers*, 29 Ch. D. 661.

[3] *Fordyce* v. *Ford*, 4 Bro. C. C. 494; S. C. 6 Ves. 679.

[4] *Burnell* v. *Brown*, 1 J. & W. 168.

where the invalidity of a fiat on which the title depended was known to the purchaser, his granting a lease of the property was held a waiver.[1] Again, where the defect alleged was an erroneous and misleading description of the situation of a house, but the purchaser had proceeded to investigate the title after this was known, he was held to have waived all objection on the score of misdescription.[2]

Contract treated as subsisting.

§ **1346**. So with regard to the contract itself—if the defendant contends that it is a nullity, and, after having become aware of the facts on which he relies for this contention, has gone on acting as though there were a subsisting contract, he will be estopped from subsequently taking the objection.[3]

Where an agreement for possession.

§ **1347**. Where, either by the terms of the original contract, or by a subsequent arrangement, it is agreed that the purchaser shall take possession and shall be entitled to a good title, no waiver is worked by the possession, or by any acts which do not go beyond the acts of a person entrusted with the possession and bound to take care of the estate. So where a person purchased a share in some ironworks to which a good title was to be made in about a year, and it appeared to be the intention of both parties that the purchaser should previously take possession and act as partner, his doing so was no waiver of his right to a good title.[4]

Possession taken with vendor's consent.

§ **1348**. In *Barroughs* v. *Oakley*[5] the original contract was silent as to possession, but possession having been taken by the purchaser, and both parties having for more than a year subsequently continued negotiating as to title, Plumer M.R. concluded that possession was prematurely taken with the consent of both parties, but

[1] *Ex parte Sidebotham*, 1 Mont. & Ayr. 655; *Ex parte Barrington*, 2 Mont. & Ayr. 245.

[2] *Stanton* v. *Tattersall*, 1 Sm. & G. 529. The contract was, however, rescinded on another ground.

[3] *Flint* v. *Woodin*, 9 Ha. 618; *Campbell* v. *Fleming*, 1 A. & E. 40.

[4] *Stevens* v. *Guppy*, 3 Russ. 171; *Margravin of Anspach* v. *Noel*, 1 Mad. 310, 315.

[5] 3 Sw. 159.

without an intention of waiving the investigation of title: and so where a purchaser took possession, with the vendor's leave, pending an answer to a requisition as to the tenure of the property, he was held to have not thereby waived the requisition.[1]

iii. Acts of ownership.

§ 1349. (iii.) Acts of ownership on the part of a purchaser may amount in the contemplation of the Court, to a declaration that he considers himself as the owner of the property, and then they work an acceptance of title and a waiver of all objections; or secondly, such acts, though falling short of this, may yet, by changing the property which is subject to the vendor's lien, affect that security, and therefore furnish a motive to the Court to order the payment into Court of the purchase-money.[2]

Such acts must be strong and distinct.

§ 1350. It is obvious that, for acts to amount to the waiver of an objection before it is known, they must be very strong and distinct,[3]—such acts, in short, as are equivalent to a declaration by the purchaser that he has taken the estate at all possible risks, and considers himself as the absolute and unconditional owner of it, and so preclude any investigation of title at all. Therefore in a case where the objections were not known, the stubbing-up of an osier-bed and filling up a pond, though held to justify an order for payment of the purchase-money into Court, and for a receiver, were not held to amount to a waiver of title.[4] If when possession is taken the purchaser knows of the objection and that it cannot be remedied by the vendor, such possession, will generally at least be a waiver. But the same will not necessarily result when the defect is one which the purchaser can cure.[5]

Acts

§ 1351. Leaving the abstract unobjected to for two

[1] *Turquand* v. *Rhodes*, 16 W. R. 1074.

[2] *Cutler* v. *Simons*, 2 Mer. 103.

[3] *Byron* v. *Astley*, 1 Mer. 133.

[4] *Osborne* v. *Harvey*, 1 Y. & C. C. C. 116; *Small* v. *Attwood*, You. 506.

[5] *Re Gloag and Miller*, 23 Ch. D. 320.

amounting to waiver

years, altering the property, letting it, and apologizing for not paying the purchase-money, which was of course only payable if the title was accepted, have been considered strong acts of waiver.[1] And where the purchaser was in possession twenty years, and, after making frivolous objections and refusing any further explanation of them, still continued in possession, the right to investigate title was held to have been waived.[2] The like was held in a case where a purchaser continued twenty-six years in possession after his requisitions of title were sent in, and had paid a considerable part of his purchase-money, and made alterations.[3] In another case, Lord Romilly M.R. expressed an opinion that the purchaser, having retained the abstract for five months and made no objections to the title, but simply got the vendor to verify the abstract with the title-deeds, had thereby waived all objections as to title.[4] And where the purchasers of a leasehold interest, after investigating and accepting the vendor's title, delayed completion on the ground that they had since discovered an ancient lease, which they suggested (but did not attempt to prove) would override the vendor's interest; they were held to have lost the right to make any inquiry on the subject.[5]

Waiver by silence of subsequent contract.

§ **1352.** The right of investigation may sometimes be waived by the silence of a subsequent contract concerning it. Thus where, by a contract for the sale of an estate, the purchaser was entitled to evidence that the buildings were not on the copyhold part of the property, which, except to that extent, the vendor was not to be called on to distinguish from the freehold: the purchaser asked for evidence of the identity of the

[1] *Margravine of Anspach* v. *Noel*, 1 Mad. 310.

[2] *Hall* v. *Laver*, 3 Y. & C. Ex. 191.

[3] *Wallis* v. *Woodyear*, 2 Jur. N. S. 179 (Wood V.C.). See, too, *Beaumont* v. *Stenson*, 24 Beav. 631.

[4] *Pegg* v. *Wisden*, 16 Beav. 230.

[5] *Corbett* v. *The Commissioners of Her Majesty's Works, &c.*, 16 W. R. 889.

parcels in the abstract with the estate sold: subsequently, by a supplemental contract, the purchaser accepted the title, subject to the production of a declaration of the identity of the parcels in the deeds and the lands sold,—which was produced and approved on the purchaser's behalf: and he subsequently objected that the buildings were on the copyhold part of the estate: it was held that this term of the original contract had been waived by the silence on that head of the supplemental one.[1]

Acts not a waiver.

§ 1353. On the other hand, the mere acquiescence of both parties in not enforcing the completion of the contract,[2] the continuing a treaty and at the same time insisting on the objection,[3] and the approval of the title by the purchaser's counsel,[4] have all been held insufficient to waive the purchaser's right to investigate the title of the vendor.

Waiver of lessor's title.

§ 1354. By the Vendor and Purchaser Act, 1874, s. 2 (1), it is enacted that (subject to any stipulation to the contrary in the contract) under a contract to grant or assign a term of years, whether derived or to be derived out of a freehold or leasehold estate, the intended lessee or assign shall not be entitled to call for the title to the freehold.[5] This provision does not preclude the purchaser from showing *aliunde* that the title is bad.[6] But in cases where the purchaser of a lease still has a right to inquire into the title of the lessor, conduct may waive that right which does not waive the right as to the title of the lessee.

Instances.

§ 1355. So where B. contracted with A. to take an

[1] *Dawson* v. *Brinckman*, 3 De G. & Sm. 376; S. C. 3 Mac. & G. 53.

[2] *Blachford* v. *Kirkpatrick*, 6 Beav. 232.

[3] *Knatchbull* v. *Grueber*, 1 Mad. 153.

[4] *Deverell* v. *Lord Bolton*, 18 Ves. 505. Distinguish *Corbett* v. *The Commissioners of Her Majesty's Works, &c.*, 16 W. R. 889.

[5] See also the Conveyancing, &c. Act, 1881, s. 3 (1) and s. 13; and see *Patman* v. *Harland*, 17 Ch. D. 353 (position of lessee with regard to constructive notice of lessor's title).

[6] *Jones* v. *Watts*, 43 Ch. D. 574.

assignment of a lease when executed, and inspected the lease and the assignment of it to A., and subsequently directed A. to cause an assignment to himself to be endorsed *totidem verbis*, he was held to be precluded from calling for the lessor's title.[1] Again, where a purchaser, after transmission to him of the original lease, prepared a draft assignment, and made various objections as to repairs and other matters, but did not require the production of the lessor's title, it seems that he would have been held to have waived the right, but the point was not decided.[2] And in a case which came before Lord Cranworth, he, affirming a decision of Stuart V.C., held that joining in a valuation, advertising the property to be disposed of, and other like acts on the part of the lessee, which implied that nothing remained to be done but the execution of the lease, amounted to a waiver of his right to call for the lessor's title.[3]

Contract not enforced, notwithstanding waiver.

§ 1356. In analogy with the distinction established by the above cases on conditions of sale as to the lessor's title, it is established that acts may amount to a waiver of a right to investigate the title, and yet not compel the purchaser to take it, if it come out collaterally that the vendor has no title. Thus, in *Warren* v. *Richardson*[4] the purchaser of a leasehold interest had done acts which the Court, at the hearing, held to be a waiver of the right to investigate the title; but it appearing on the report of the Master, to whom it was referred to settle the lease and to state any special circumstances, that the vendor held this together with other leasehold property under one lease, and subject to one proviso for re-entry, so that the vendor,

[1] *Smith* v. *Capron*, 7 Ha. 185, 189.

[2] *Olive* v. *Beaumont*, 1 De G. & Sm. 397.

[3] *Simpson* v. *Sadd*, 4 De G. M. & G. 665, which see for the form of a declaration that the right to call for the lessor's title has been waived. See also *Ogilvie* v. *Foljambe*, 3 Mer. 66.

[4] Vol. I.

who was plaintiff, could not make a good title; the Court refused to enforce the completion of the contract on the defendant.

Defect cured by purchaser's own act.

§ 1357. Where the purchaser, having discovered a material defect in the title in the course of his investigation of it, gave notice to determine the contract, and immediately afterwards brought up the interest which had constituted his objection, it was held that, having thus by his own voluntary act cured the defect, he could not avail himself of this purchase for the purpose of destroying the original contract; and specific performance was decreed against him.[1]

Pleading waiver.

§ 1358. With regard to the proper mode of pleading that the right to investigate the title has been waived, it was decided by Knight Bruce (then V.C.) in *Clive* v. *Beaumont*,[2] that it was not enough for the party relying on such waiver to allege facts from which it is a legal inference; but that he must allege the facts and that there had thereby been such waiver. And this seems to be the proper course under the present practice of the High Court.[3]

Practice of the Court of Chancery.

§ 1359. According to the practice of the Court of Chancery, an inquiry as to title might have been directed according to circumstances:—

(i.) At the hearing: or

(ii.) On motion before the hearing but after answer: or

(iii.) On motion before answer.

The present practice is regulated by the Rules of the Supreme Court, and it does not therefore appear necessary to state in detail the former practice of the Court of Chancery as to the time of directing this inquiry.

[1] *Murrell* v. *Goodyear*, 1 De G. F. & J. 132.

[2] 1 De G. & Sm. 397. See, too, *Gaston* v. *Frankum*, 2 De G. & Sm. 561. Cf. *Hughes* v. *Jones*, 3 De G. F. & J. at pp. 316, 317.

[3] R. S. C. Order XIX. r. 15.

The present practice.

§ 1360. The inquiry as to title is now, it is conceived, obtainable either under Order XXXIII. rule 2, which provides that the Court or a Judge may, at any stage of the proceedings in a cause or matter, direct any necessary inquiries to be made,[1] notwithstanding that it may appear that there is some special or further relief sought for, or some special issue to be tried, as to which it may be proper that the cause or matter should proceed in the ordinary manner; or, in an appropriate case, under the sixth rule of Order XXXII., providing that any party may, at any stage of a cause or matter where admissions of fact have been made either on the pleadings or otherwise, apply to the Court or a Judge for such order as, upon such admissions,[2] he may be entitled to, without waiting for the determination of any other question between the parties. . . . And the Court or a Judge may, upon such application, make such order as the Court or Judge may think just.[3]

§ 1361. The vendor should be alert to get the inquiry as to title directed as early as possible. "In almost every case," said James L.J.,[4] "it is the duty of a vendor, where there is no question but that of title between him and the purchaser, to avail himself of the opportunity of having an immediate reference as to title and so saving the multiplication of unnecessary costs."

Inquiries as to matters connected with title. When

§ 1362. The order for reference is not necessarily confined to an inquiry whether a good title can be made, but may extend to everything that appears to be connected with the title.[5] It should therefore

[1] For form of judgment where the inquiry is directed, see Seton (6th ed.), 2226, 2258.

[2] See *Symonds* v. *Jenkins*, 21 W. R. 512.

The Judge has a discretion as to making or refusing an order under this rule. *Mellor* v. *Sidebottom*, 5 Ch. D. 343 (C. A.).

[4] *Phillipson* v. *Gibbon*, L. R. 5 C. P. 428, 435.

[5] *Jennings* v. *Hopton*, 1 Mad. 211. *Bennett* v. *Rees*, 1 Ke. at p. 108; *Enraght* v. *Fitzgerald*, 2 Dr. & War. 43. See, too, *Gedye* v. *Commissioners of Public Works*, 16 W. R. 1106.

include an inquiry as to the time at which a good title was shown,[1] unless for some reason stated at the time, —*e.g.*, that the contract itself,[2] or the plaintiff's right to specific performance,[3] has been disputed—and by the express direction of the Court, this inquiry is omitted.[4] As this inquiry, if it be made at all, should be directed at the original reference, the Court has refused to direct it subsequently on a second motion.[5] good title shown.

§ **1363.** On the same principle, the inquiry may extend to whether it appeared by the abstract that a good title could be made:[6] and on the like ground, an inquiry was in one case added whether the defendant objected at any time to the want of evidence as to the identity of the premises; but an inquiry whether the abstract was perfect, and if deficient, in what respects, and whether it was ever perfected, was considered to be not so connected with the title as to be added to the reference.[7] Other matters.

§ **1364.** The inquiry may be limited in any manner appropriate to the circumstances of the particular case, as, for instance, by directing that regard is to be had to, or that the inquiry is to be made subject to, specified requisitions or declarations.[8] Inquiry limited.

§ **1365.** In *Harnett* v. *Baker*,[9] the Court (Malins V.C.), having come to the conclusion that a condition of sale restrictive of the title was not binding on the purchaser, on the ground that it was founded on an *Harnett* v. *Baker*.

[1] Seton (6th ed.), 2226–2228. See *Fenlowe* v. *Ameoats*, 3 Beav. 496.

[2] *Gibbins* v. *North Eastern Metropolitan Asylum District*, 11 Beav. 1; *Morris* v. *Wilson*, 5 Jur. N. S. 168.

[3] *Potter* v. *Crossley*, 5 W. R. 35.

[4] *Bennett* v. *Rees*, 1 Ke. at p. 409. The old practice on this point was somewhat variable. *Moss* v. *Matthews*, 3 Ves. 279; *Gibson* v. *Clarke*, 2 V. & B. 103.

Hyde v. *Wroughton*, 3 Mad. 279.

[5] *Wright* v. *Bond*, 11 Ves. 39; *Hornblow* v. *Shirley*, Seton (6th ed.), 2228; *Jennings* v. *Hopton*, 1 Mad. 211.

[6] *Bennett* v. *Rees*, 1 Ke. 405, 408, 409.

[7] *Saul* v. *Bolton*, Seton (6th ed.), 2227; *Remnant* v. *Holt*, ib. 2228; *Hume* v. *Pocock*, L. R. 1 Eq. 423, 431; 1 Ch. 379; and *supra*, §§ 1334, 1335.

[8] L. R. 20 Eq. 50, 58.

erroneous statement of facts which the vendor was bound to know was erroneous, held that the vendor (plaintiff) must either take an open reference of title (which the Vice Chancellor refused), or have his bill dismissed with costs.

When the title may be made out

§ 1366. The inquiry is whether the vendor can make a good title, not whether he could do so at the date of the contract; and therefore, when once the inquiry has been directed,[1] he may make out his title at any time before the certificate, and if he can do so he will be entitled to a judgment or order in his favour,[2] at least where there has been no unreasonable delay, and time is not material.[3]

Time allowed for completion of title.

§ 1367. The Court of Chancery often allowed time for the completion of the title: in an old case it more than once allowed the vendor time to get an Act of Parliament;[4] and where upon the face of the contract it appeared that there was a difficulty in the plaintiff's title, Lord Hatherley (then Wood V.C.) refused on demurrer to stop a suit for specific performance, on the ground that the Act of Parliament contemplated had not been obtained.[5] So, in another case, the Court allowed the vendor time to procure a small part of the estate;[6] and, in another case, allowed a limited time to procure the concurrence of an assignee in insolvency.[7]

Where vendor plaintiff.

§ 1368. The Court grants indulgence in point of

[1] Questions as to time and delay may, it is conceived, be properly raised on the application for the inquiry.

[2] *Brasenose College* v. *Carey*, 3 Bro. C. C. 390; *per* Lord Eldon in *Jenkins* v. *Hiles*, 6 Ves. at p. 655, and in *Seton* v. *Slade*, 7 Ves. at p. 279; *Wynn* v. *Morgan*, 7 Ves. 202; *Mortlock* v. *Buller*, 10 Ves. 292, 315; *Vancouver* v. *Bliss*, 11 Ves. 458.

Longford v. *Pitt*, 2 P. Wms. 629.

[3] *Lord Stourton* v. *Mores*, cited 2 P. Wms. 630. See also *Lord Brooke* v. *Inskip*, 8 Ves. 417, 429; *Coffin* v. *Cooper*, 14 Ves. 205.

[4] *Dornish* v. *Brown*, 2 Ch. Ca. 23.

[5] *Chamberlain* v. *Lee*, 10 Sim. 444.

[6] *Sidebotham* v. *Barrington*, 4 Beav. 110. See, too, on this point *Re Banister*, 12 Ch. D. at p. 147.

time for getting over any difficulties in matters of conveyance, as much where the vendor is the plaintiff, as where the proceedings are instituted by the purchaser.[1]

Time not allowed

§ 1369. But this indulgence will not be granted where the defect to be remedied was known to the vendor or his agent, and was concealed from the purchaser;[2] nor where there has been great delay, and there is no probable chance of the difficulty being got over in a short time;[3] so that a purchaser under the Court would be discharged if it appeared requisite to his title that an account should first be taken in an action to be instituted,[4] or that an action should be instituted to try whether certain devisees were trustees for the seller or not.[5] It must be borne in mind too that a purchaser discovering that a vendor has no title or power to convey the estate, or require it to be conveyed, may, at his election, refuse to have anything more to do with the contract.[6]

Old title cured, or new title

§ 1370. Nor will the Court grant additional time where the vendor proposes, not to cure a defect in the title which he had at the sale, or to produce fresh evidence in support of it, but to get an entirely new title: for the Court will not force a buyer to take an estate from a vendor who is neither owner of it, nor possessed of the power by the ordinary course of legal proceedings to make himself so;[7] for it is not the purpose of the Court to enable one man to sell another man's estate.[8] As to this point, it was in one case decided that a title from possession defeasible by the

[1] *Duke of Beaufort* v. *Glynn*, 3 Sim. & G. 213.

[2] *Dalby* v. *Pullen*, 3 Sim. 29; S. C. 1 R. & My. 296.

Fraser v. *Wood*, 8 Beav. 339.

[3] *Magennis* v. *Fallon*, 2 Moll. 561.

Noel v. *Hoy*, St. Leon. Vend. 293.

[4] *Forrer* v. *Nash*, 35 Beav. 171; *Brewer* v. *Broadwood*, 22 Ch. D. 105.

[5] *Tendring* v. *London*, 2 Eq. Cas. Abr. 680, pl. 9; *Magennis* v. *Fallon*, 2 Moll. 561.

[6] *Chamberlain* v. *Lee*, 10 Sim. 444.

Crown on account of the alienage of the original owner, cured by a grant from the Crown whilst the question was in the Master's office, was the same title, and the purchaser was compelled to take it.[1] And the fact that the vendor may have had no title to a small part of the estate at the time of sale, and subsequently purchases it, will not make the title a new one within this rule.[2]

Acquiescence of purchaser.

§ 1371. But even where the vendor has no title at all at the time of sale, so that the purchaser may, if he choose, before a decree for specific performance has been made, repudiate the contract, yet, if he acquiesce in steps taken by the vendor to get in the estate, he will thereby have waived the want of mutuality, and be bound to accept the title, if made out at the trial or other necessary time.[3]

Repudiation after decree and motion for discharge.

Moreover, after a decree for specific performance has been made, a defendant purchaser cannot repudiate the title, or the contract, without the leave of the Court. The proper course for the purchaser, on discovery of a defect of title such as might, but for the decree, give rise to a right of repudiation, is to move to be discharged from the contract. Such a discharge, however, is not a matter of course.[4]

Inquiry, how made.

§ 1372. The inquiry as to title takes place in the Chambers of the Judge, and the result is embodied in a Master's certificate.[5]

Evidence.

§ 1373. Evidence by affidavit of matters of fact material to the title is admissible under a reference of title.[6] Accordingly where, under such a reference, after

[1] *Eyston* v. *Simmons*, 1 Y. & C. C. C. 608.

[2] *Chamberlain* v. *Lee*, 10 Sim. 444.

[3] *Hoggart* v. *Scott*, 1 R. & My. 293; *Salisbury* v. *Hatcher*, 2 Y. & C. C. C. 54. See *supra*, §§ 468, 469, and *Murrell* v. *Goodyear*, 1 De G. F. & J. 432.

[4] *Halkett* v. *Earl of Dudley*, [1907] 1 Ch. 590, 601; 76 L. J. Ch. 330.

[5] Dart, Vend. (7th ed.), 1109, 1110; R. S. C. Order LV. r. 65 *et seq.* As to objecting to the certificate before it is signed by the Judge, see *Parr* v. *Lovegrove*, 4 Drew. at p. 176.

[6] *Re Burroughs, Lynn, and Sexton*, 5 Ch. D. at p. 603.

the conveyancing counsel had given his opinion in favour of the title, but before the certificate had been actually signed, a very serious defect of title, not in any way disclosed or raised by the abstract, was discovered by the purchaser inspecting the property, evidence of the matters so discovered was admitted.[1]

Vendor and Purchaser Act, 1874, s. 9.

§ 1374. Whatever can be done in Chambers upon a reference as to title under a judgment where the contract is established, can be done upon proceedings under the ninth section of the Vendor and Purchaser Act, 1874, already referred to.[2] That Act enables the parties in such cases to dispense with the formal pleadings of an action, and at once to put themselves in Chambers in exactly the same position in which they would have been, and with all the rights which they would have had, under the old form of decree.[3]

Form of certificate.

§ 1375. The certificate should, it seems, be on the fact of title aye or no: and accordingly it is improper to certify that a defendant with the concurrence of a third party could make a good title,[4] or that he could do so subject to the performance of certain conditions;[5] but where the certificate is against the title, it should state the precise points in which it is defective.[6]

Certificate, how objected to.

§ 1376. If any party is dissatisfied with the certificate as filed, he must apply by summons to discharge or vary it within eight clear days from the filing; otherwise, at the expiration of that time it becomes binding on all the parties to the proceedings, and will not afterwards be opened except upon special grounds.[7]

Certificate in favour of the title.

§ 1377. If the certificate is in favour of the title, and either no application to discharge or vary it is

[1] *Phillipson* v. *Gibbon*, L. R. 6 Ch. 428.

[2] *Supra*, § 1136.

[3] *Re Burroughs, Lynn, and Sexton*, 5 Ch. D. at p. 604.

[4] *Lewis* v. *Loxam*, 1 Mer. 179.

[5] *Magennis* v. *Fallon*, 2 Moll. 561, 575, 583. See, too, *Esdaile* v. *Stephenson*, 6 Mad. 366.

[6] *Green* v. *Monks*, 2 Moll. 325.

[7] *Howell* v. *Kightley*, 8 De G. M. & G. 325; R. S. C. Order LV. rr. 70, 71.

made, or such application fails, specific performance will generally be ordered at the hearing (original or on further consideration, according to the stage at which the reference was directed,) of the action.[1] After such an application has failed, it seems that no other objection to the title can be made.[2]

Under the old practice, where the report was in favour of the title, but the Court thought it too doubtful to force on a purchaser, the Court might dismiss the bill without allowing the exceptions,[3] and either with[4] or without[5] costs, as the Court might think right.

Certificate referred back.

§ **1378.** Where the Court varies a certificate in favour of the title,[6] or refuses to vary one against it,[7] and the vendor desires to have an opportunity of making out a better title, the certificate is generally, upon the hearing of the application to vary, referred back to Chambers for review;[8] and the vendor will be allowed a reasonable time within which to remove the objection.[9] On the other hand, when the matter has gone back to Chambers, and a new abstract of title has been delivered, further objections may be brought in.[10]

Reference back under the old practice.

§ **1379.** The Court of Chancery referred back the question of title where the Master was satisfied with evidence of a fact with which the Court was not satisfied, the vendor offering to produce further evidence;[11] also

[1] See Dart, Vend. (7th ed.), 1114. Consider *Jenkwine* v. *Alcock*, 1 Mad. 597.

[2] *Brooke* v. *Anon.*, 4 Mad. 212. As to the effect of a direction that the vendor shall convey, see *Minton* v. *Kirwood*, L. R. 3 Ch. at p. 617.

[3] *Bickner* v. *Milner*, 1 Ha. 578, n.

[4] S. C.

[5] *Wilson* v. *Bellairs*, T. & R. 491.

[6] *Egerton* v. *Jones*, 1 B. & My. 624.

[7] Consider *Browster* v. *Woodall* (Hall V.C. 22nd July, 1878, cited Seton (6th ed.), 2229.

[8] *Curling* v. *Flight*, 2 Ph. at pp. 616, 619. Cf. *Rhodes* v. *Bate*, 4 De G. M. & G. 787.

[9] *Portman* v. *Mill*, 1 R. & My. 696.

[10] See *Brooke* v. *Anon.*, 4 Mad. 212.

[11] *Andrew* v. *Andrew*, 3 Sim. 3[illegible].

where, by expressing an opinion in favour of some part of the title, the Master had prevented the vendor from showing that the title was good, even supposing that part not to be so.[1]

Where the report (now the certificate) was against the title, and the defect was cured at the hearing on further directions, the Court of Chancery compelled specific performance,[2] without giving time for further proceedings: but if there was a question whether the defect was in part cured, the Court would refer it back to the Master to review his report with the additional circumstances.[3]

Hume v. Pocock.

§ **1380.** In a case where the certificate was against the title, but it appeared that, since the contract, the purchaser had by his own act acquired the means of curing the defect, the Court refused to dismiss the vendor's bill.[4]

Certificate against the title.

§ **1381.** But, generally, if the certificate is against the title, and either no application is made to discharge or vary it, or such application fails, the action will be dismissed.[5]

Turner v. Marriott.

§ **1382.** In one case, where the vendor was plaintiff and a deposit had been paid, the vendor was ordered to repay it with interest at 4 per cent., and it was declared that the purchaser was entitled to a lien on the estate for the deposit and interest, and also for his costs of the action, with liberty to apply at Chambers to give effect to the lien, and thereupon the bill was dismissed with costs.[6]

Costs.

§ **1383.** As an ordinary rule, costs are given, not

[1] *Egerton* v. *Jones*, 3 Sim. 392: S. C. 1 R. & My. 694: *Portman* v. *Mill*, 1 R. & My. 696; *Fildes* v. *Hooker*, 2 Mer. 424. See also *Jondein* v. *Alcock*, 1 Mad. 597.

[2] *Paton* v. *Rogers*, 6 Mad. 256.

[3] *Esdaile* v. *Stephenson*, 6 Mad. 366.

[4] *Hume* v. *Pocock*, L. R. 1 Eq. 662: cf. *Murrell* v. *Goodyear*, 1 De G. F. & J. 432.

[5] See Dart, Vend. (7th ed.), 1111: *Pretty* v. *Solly*, 26 Beav. at p. 613. Distinguish *Gedye* v. *Commissioners of Public Works*, 16 W. R. 1106.

[6] *Turner* v. *Marriott*, L. R. 3 Eq. 744.

to, but against, a vendor up to the time at which he has first shown a good title.[1] But there is also another general rule, that if a purchaser has taken certain objections to the title of the vendor, and those objections which have been the cause of the litigation are overruled, the vendor will be entitled to his costs, and the purchaser will not escape paying them by reason of some evidence, the want of which was never the subject-matter of dispute between them, not having been supplied until the title was investigated in Chambers.[2]

And where a defendant prevented the plaintiffs (vendors) from obtaining the usual reference as to title on interlocutory motion by setting up defences which, at the hearing, he failed to establish, he was ordered to pay the plaintiffs' costs up to and inclusive of the hearing.[3]

What is a good title.

§ 1384. In the inquiry as to the time when a good title was shown is involved the question, what is showing a good title.[4] In relation to this, two distinctions are to be borne in mind, the one between questions of title and of conveyance, the other between questions of title and of evidence.

Distinction between questions of title and of conveyance.

§ 1385. As to the first, the rule was thus stated by Lord Eldon in *Lord Braybroke* v. *Inskip*,[5]—"As to the question whether the abstract was complete, the abstract is complete whenever it appears that, upon certain acts done, the legal and equitable estates will be in the purchaser. That may be long before the title can be completed." So that a good title is shown when it appears from the abstract that the vendor has the whole equity, and in what persons the outstanding

[1] *Phillipson* v. *Gibbon*, L. R. 6 Ch. at p. 434. The rules stated in this section are, however, subject to the general discretion with respect to costs exercisable by the Court or Judge by virtue of R. S. C. Order LXX. See, too, *per* Cotton L.J. in *Games* v. *Bonnor*, 54 L. J. Ch. 547; 33 W. R. 64, at p. 66.

[2] S. C. p. 434. Cf. *Bridges* v. *Longman*, 24 Beav. 27.

[3] *Hyde* v. *Dallaway*, 4 Beav. 606.

[4] See §§ 1317, 1389.

[5] 8 Ves. 436.

portion of the legal estate is vested.[1] The acts to be done, of which Lord Eldon speaks, must be confined to acts the performance of which the vendor can enforce in a Court of justice, as, for instance, by calling on a trustee to convey the estate vested in him. Therefore where an estate tail was outstanding in a person who had consented to bar it, but was not in any way a trustee for the vendor, the Court held that the title was not made out till the recovery had been fully perfected.[2]

§ 1386. In *Esdaile* v. *Stephenson*[3] Leach V.C., after consultation with Lord Eldon, laid down the rule, "that where a necessary party to the title was neither in Law nor Equity under the control of the vendor but had an independent interest, unless there was produced to the Master a legal or equitable obligation on the part of the stranger to join in the sale, the Master ought to report against the title; otherwise, where a necessary party to the title was under the legal or equitable control of the vendor, as a mortgagee, where the Master might well report that upon payment of the mortgage a good title could be made." Rule laid down in *Esdaile* v. *Stephenson*.

§ 1387. The rule is further illustrated by other cases. In one, it was held to be no objection to title, that a satisfied term was outstanding in a luuatic against whom no commission had issued, so that there was then no person competent to make the assignment;[4] and in another case, the legal estate of a moiety of the property was outstanding in a married woman or those claiming under her, but she being under the order of the Court to convey was bound by it, and became absolutely a trustee for the purchaser under the Illustrations of the rule.

[1] *Aburne* v. *Brown*, 14 Sim. 303; *Camberwell and South London Building Society* v. *Holloway*, 13 Ch. D. 754, 763.

[2] *Lowin* v. *Guest*, 1 Russ. 325.

[3] 6 Mad. 366. Cf. *Halkett* v. *Earl of Dudley*, [1907] 1 Ch. 590, 601: 76 L. J. Ch. 330.

[4] *Berkeley* v. *Dash*, 16 Ves. 350.

order of the Court: the title was therefore held good, but without prejudice as to the question of conveyance.

Avarne v. Brown.

§ 1388. It appears to have been considered by Shadwell V.C. to be sufficient if the abstract showed that the outstanding legal estate had been formerly vested in a trustee for the vendor, and that the abstract was then complete, though a supplemental abstract was necessary to trace the legal estate.[2] But this decision seems at variance with the rule enunciated by him in the same case, of which one condition is that the abstract must disclose in whom the legal estate is vested, not in whom it was formerly vested. And accordingly Lord Gifford M.R. held that where an abstract only showed that the legal estate had long since been vested in persons who would be trustees for the vendor, but did not show in whom the legal estate was then vested, the defect was one of title and not of conveyance.[3] In a recent case it has been held that the objection that in proceedings under the Settled Land Act trustees for the purposes of that Act had not been appointed was an objection of conveyance and not of title.[4]

Distinction between *showing* and *making* title.

§ 1389. A distinction has also been taken between *showing* and *making* a good title. A good title is *shown* when all the matters essential to the title are stated in the abstract: it is *made*, when those matters are proved.[5]

Distinction between evidence and title.

§ 1390. It is evident, further, that there is a distinction to be drawn between matters of title and of the evidence whereby that title is supported. The verification of the abstract may be either the one or

[1] *Jampson* v. *Pitcher*, 1 Coll. 13.

[2] *Avarne* v. *Brown*, 14 Sim. 303.

[3] *Wynne* v. *Griffith*, 1 Russ. 283. See further, as to what is a perfect abstract, *per* Wigram V.C. in *Morley* v. *Cook*, 2 Ha. 111; *Ward* v. *Ghrimes*, 11 W. R. 791; and *per* Kindersley V.C. in *Oakden* v. *Pike*, 13 W. R. at p. 674; 11 Jur. N. S. 666.

[4] *Hatton* v. *Russell*, 38 Ch. D. 334.

[5] *Parr* v. *Lovegrove*, 4 Drew. 170, 181; *Games* v. *Bonnor*, 33 W. R. 64; 54 L. J. Ch. 517.

the other: thus the verification of the deeds stated in the abstract is matter of evidence; whilst, on the other hand, the proof of a fact essential to the title, which can only be proved by evidence documentary or oral,—as, for example, the identity of a person, or of parcels apparently different on the deeds,—is a matter of title.[1]

[1] *Sherwin* v. *Shakspear*, 17 Beav. 267, 275, varied on appeal, 5 De G M. & G. 517.

CANADIAN NOTES.

Want of Title.

A purchaser of land may, on discovering that the vendor has no title, repudiate on that ground, but attempted repudiation on another ground does not keep this right alive if the vendor at the proper time can make a good title. Where a purchaser who, in an action by the vendor to compel specific performance, had set up in his defence that the contract was void because of fraudulent misrepresentations as to value, attempted at the trial to repudiate also on the ground of want of title in the vendor, he having known of this want of title for some time and having because of it obtained an order for security for costs, it was held that there could not then be repudiation on this ground, and that it would be sufficient for the vendor to shew title on the reference. The judgment of the Common Pleas Division, 19 O.R. 303, affirmed. *Paisley* v. *Hill*, 18 O.A.R. 240.

It was held in *London & Canadian Loan Co.* v. *Graham*, 12 Ont. Pr. Rep. 651, by Boyd Ch., in an action for specific performance, that shewing title is the manifestation on the abstract of all matters essential to a good title, and that, as the defendant had demanded no abstract before action, he could not complain that title was first shewn thereafter, and he was ordered to pay the costs.

In *McDougall* v. *Miller*, 15 Grant's Ch. 505, a party after making a contract for the sale of land, mortgaged it and then filed a bill for specific performance. The mortgage not being due, the Court, on the hearing, directed an enquiry whether the plaintiff could make a good title free from encumbrance and reserved further directions and costs in case the Master should find that the plaintiff could not clear up the title.

In *Gray* v. *Reesor*, 15 Grant's Ch. 205, the plaintiff and defendant agreed to an exchange of land, the plain-

tiff conveying a hundred acres in Brock upon which there was a mortgage for $1,300, and the defendant agreeing to convey to the plaintiff whichever of two lots one in Tiny, the other in Sydenham, the plaintiff should elect to have. In the event of his selecting the latter, it was to be assigned to him, subject to the payment of $150 in four equal annual instalments with interest at seven per cent. The plaintiff selected the latter, but it appeared that the defendant had not yet obtained a title thereto, although he was in a position to call for a patent from the Crown on making certain payments, and which he procured the day the cause was heard. As the defendant had all along had a title to the lot, and was at the time in a position to carry out his part of the agreement and submitted to do so, the Court directed that the contract should be completed by conveyance of the lot in Sydenham and that the time for payment of the $150 should date from the hearing, from which time also the interest should be computed.

In *Canada Permanent Building Society* v. *Wallis*, 8 Grant's Ch. 368, it was held that a clause in the conditions of sale that the vendors should only produce certain title deeds and an abstract of the registry and that the purchaser should not be entitled to call for any other proof of title, did not exempt the vendors from shewing otherwise a good title. Esten V. C. construed the condition to be that, as the plaintiffs had only certain deeds in their possession, they stipulated that they should not be bound to produce other deeds and should not be bound to furnish other than an extract from the registry, but if upon this evidence, taken according to its fair meaning to be correct, the title should appear defective, the plaintiffs would be bound to remedy the defects.

In *Gamble* v. *Gammerson*, 9 Grant's Ch. 193, the Court refused to enforce a contract for the sale of land, which was subject to an outstanding claim for dower, until the title to dower was removed.

In *Thompson* v. *Hillikin*, 9 Grant's Ch. 359, on an enquiry as to title the vendor was unable to produce one of the title deeds, or to shew that a receipt was endorsed thereon for the purchase money. This was held no ob-

jection to the completion of the contract, nor was it an objection to the title that there was no production of a certificate that no taxes were in arrear. The deed in question, which could not be produced was over sixty years old, and, although it could not be produced, it seemed that its loss was sufficiently established to let in secondary evidence of its contents.

In *Worts* v. *Wilkinson*, 2 Grant's Ch. 157, where a purchaser executed a bond for payment of purchase money of land which he had contracted to purchase, and was thereupon let into possession in pursuance of the contract, the purchaser having afterwards made default in payment and having refused to accept the title produced by the vendor, an action at law was commenced upon the bond, whereupon the purchaser filed his bill in equity praying for the specific performance of the contract if a good title could be shewn, or in the event of the vendor being unable to shew a good title, then for an injunction restraining the action and that the bond might be delivered up to be cancelled. Upon a reference the vendor failed to shew a good title, and the Court granted the injunction.

In *Francis* v. *St. Germain*, 6 Grant's Ch. 636, it was held that before the Court would compel the purchaser to accept a title it must be shewn that the title was reasonably clear and marketable, without doubt as to the evidence of it. Where, therefore, the deed to the vendor was executed on the 14th of February, 1854, and in December of that year a commission of lunacy was issued against the grantor in that deed, under which it was found that he was insane, and had been so from the month of February or March previous, the Court refused to enforce the contract. Where the lunacy of the previous owner of the estate was relied on as an objection to the title, and the vendor alleged that if such were the fact, it was shewn that he had purchased fairly and without notice of the lunacy, as a ground for enforcing the contract, yet as the fact that the vendor had purchased without such notice was one which from its nature was incapable of proof, and notice on some future occasion might be fairly shewn, the Court allowed the objection and dismissed the vendor's bill with costs.

Where a bill by a purchaser seeking specific performance of a contract for the sale of land is dismissed because a good title cannot be shewn, the Court will order a sum paid on account of the purchase money to be returned to the purchaser, and in default give him a lien therefor on the estate agreed to be sold. *Hurd v. Robertson*, 7 Grant's Ch. 112.

In *Brandon Steam Laundry v. Hanna*, 19 Man. S. an action was brought for specific performance of a contract for the purchase of property for $40,000 payable $10,000 in cash and six equal notes with interest for the balance. The agreement did not state for what period the notes were to run, but the parties understood that they were to be for six equal yearly payments. There were encumbrances on the property due at various times within four years and some of the holders were unwilling to accept payment. It was held that the parties contemplated the purchase being completed at once and the vendor could not force the title on a purchaser as there were encumbrances which he could not clear.

In *Hogg v. Shepherd*, 18 Man. 501, the land which the defendant agreed to purchase from the plaintiff for $5,000 was subject to mortgages and registered judgments for amounts exceeding the purchase price and the plaintiff had no means of paying them off except out of the purchase money. He undertook to get releases from the judgment creditors for less than the sums due them, but had not been able to get the arrangements concluded. By the agreement defendant was to pay the purchase money as soon as a loan could be obtained and the title found satisfactory. The agreement was silent as to when the purchaser was to have possession, and the plaintiff remained in possession during the negotiations for completion, which lasted about nine months.

It was held that specific performance should be refused, the plaintiff having failed to shew a clear title or his ability to give such a title; also, that such failure caused delay to the defendant which made it a hardship upon him to enforce the contract and, as the remedy was discretionary, it should be refused for this reason.

It was further held that the provision for the purchase money being paid as soon as a loan could be

arranged was so indefinite, obscure and uncertain as to render the contract incapable of specific performance.

In *Foote & Carter* v. *Hanson & Nichol*, 3 B.C. 377, it was held that the purchasers of land were not entitled to call for the title until after the payment of the purchase money, and *semble* that it is not necessary in an action for specific performance of a contract for the sale of land that the vendor should be the holder of the title if he can obtain a grant in fee from the holder to the purchasers.

Equity Unenforceable Because of Delay no Objection to Title.

A supposed equity in a person who died in 1808, where the possession of the property since that time had been enjoyed by another claiming it as his own and having a perfect legal title to it, is no ground for refusing to enforce an agreement in which the condition precedent was that a party should shew, make and complete a perfect legal title, as, even in the event of such equity existing, a Court of Equity would not enforce it after such a lapse of time and under such circumstances. *De Witt* v. *Thomas*, 11 Grant's Ch. 21.

Waiver of Inquiry as to Title.

In the case of *Darby* v. *Greenalees*, 11 Grant's Ch. 351, where the contract provided for immediate possession, and it was contended that the purchaser had waived his right to examine the title by the erection of workshops on the lot, and otherwise, the Court, in a suit against the purchasers for specific performance, refused, under the circumstances of the case, to order the purchase money paid into Court pending a reference as to title, though the defendants were in possession of the property. The circumstances referred to other than those mentioned were that the property had previously been unoccupied and unproductive, the defendants had exercised no acts of ownership that operated prejudicially to the vendors, they had paid up all interest and a considerable portion of the principal, and there was no evidence of their ever

having objected to pay the balance. Moreover, the present suit had arisen from no default of the defendants, but because of the infancy of one of the vendor's heirs.

In the case just mentioned, 11 Grant's Ch. 351, it was held that where a contract for sale of building lots provided for immediate possession and for the payment of the purchase money in eight annual instalments, the erection of two workshops on the lots by the vendee was no waiver of their right to examine the title, nor was the division of the property between them, when they dissolved their partnership nor the acceptance of a conveyance at another time of another lot said to depend on the same title.

In *Crooks* v. *Glen*, 8 Grant's Ch. 239, it was held that possession and user of the premises do not deprive the vendee of his right to have a good title shewn, but where unreasonable delay has occurred in requiring title to be adduced, the Court will order the purchase money to be paid into Court, pending the investigation of the title. Where promissory notes had been given, in payment of the purchase money of land and, several years afterwards, a bill was filed by a vendee of the original proprietor against the heirs-at-law of the original purchaser, it was held that the promissory notes must be produced or satisfactorily accounted for before the purchase money would be ordered to be paid, even although a good title were shewn.

The case of *O'Keefe* v. *Taylor*, 2 Grant 95, was said to be not distinguishable from the case before the Court. In that case there was possession in pursuance of the contract and user of the premises in accordance with the intention and purpose of the purchaser, and it was held that nothing had occurred whereby the right to investigation of the title was waived. Yet, the purchaser was ordered to pay the purchase money into Court on the ground of the unreasonable delay in the payment of the purchase money.

In May, 1860, a purchase was made by parol of a lot of land, in addition to three other lots previously bought by the same purchaser from the same vendor. The purchaser went into possession and erected thereon a coach house and stable, and the other portion of it was used

as a lawn to the house which he had erected on the other lots which had been duly conveyed to him. In the year 1860, and again in 1863, the purchaser repeatedly asked for the deed, offering to give the vendor his promissory note for the purchase money, which he refused to accept. A bill for specific performance was subsequently filed by the vendor. It was held that the purchaser by his conduct had waived his right to compel the vendor to make out a good title, but that he was at liberty to shew that the vendor had no title, in which case he would be entitled to get rid of his contract, the onus of proof under such circumstances being shifted from the vendor to the purchaser. *Denison* v. *Fuller*, 10 Grant's Ch. 498.

In *Leslie* v. *Preston*, 7 Grant's Ch. 434, it was held that where the vendor sells only such title as he has, the purchaser cannot require a good title to be shewn but will be compelled to complete his purchase although the vendor does not shew a good title, or although the title appear to be not good, but where a vendor by the terms of the agreement bound himself to convey only as good a title as he should obtain from his vendor, and it was shewn that neither of these parties had any title whatever to the property agreed to be sold, and that the vendor had misrepresented the state of the title and had induced the purchaser to give the full value of the land the Court refused to enforce the agreement.

The headnote in *Curren* v. *Little*, 8 Grant's Ch. 250, is as follows:

A. is the owner of fifty acres of land, the title to one acre of which is defective. B. with knowledge of the defect agrees to purchase the whole for a certain sum. B. with others, has, at the same time an independent interest in the one acre and obtains a decree ordering A. to convey it to him and the others. A. then files a bill for specific performance of the contract with B. *Held*, that B. must pay the whole of the purchase money upon receiving a clear title to the remaining forty-nine acres.

The judgment seems to be put upon the ground that the title was accepted by Little and the objection to the title to the one acre waived, and that the defendant was bound to complete his purchase on receiving such a conveyance as the plaintiff could give him.

Possession May or May Not be Waiver of Title.

In *Mitchelltree* v. *Irwin*, 13 Grant's Ch. 537, a purchaser, before the time appointed for the completion of a contract for sale of land and while the investigation was in progress, went upon and cleared a portion, about two or three acres of the land sold, and sowed the same with turnip seed, which it was necessary to do at that time or lose the whole season. He did not, however, harvest the crop but abandoned the possession entirely in consequence of objections to the title not being removed. This was held to be no waiver of the purchaser's right of enquiry as to title. *Per* Spragge V.-C.: "The mere taking possession by a purchaser is not necessarily a waiver of the right to an enquiry as to title. The Court will not hold it to be so unless satisfied that it was the intention of the purchaser to take the land without such enquiry, or, without its being made to appear that the conduct of the purchaser had been such that it would be unjust to the vendor under the circumstances to put him to prove his title. Now, there is not a single point in the circumstances under which possession was taken in this case to lead me to think that it was the intention of the purchaser, or that the vendor thought it was, to waive the enquiry as to title. I am satisfied that neither party had any such idea."

In *Commercial Bank* v. *McConnell*, 7 Grant's Ch. 323, the purchaser of real estate on which was erected a grist mill, in pursuance of the agreement for purchase, took possession and, while in occupation, made several alterations on the property, took the mill gearing and machinery from the premises, and removed the partitions in the mill, intending to convert the mill into a planing factory, and the expense of restoring the property to the condition in which it was, when he entered into possession, was variously estimated at from £100 to £500. It was held that by these acts the purchaser had waived his right to call for a good title.

Semble, from *Hoeen* v. *Wilkinson*, 2 Grant's Ch. 157, that from the peculiar mode of dealing with landed estates in this country the Court would not introduce the strict English rule with respect to waiver of title by acceptance of possession.

Raising Further Objections to Title.

Where on a sale of lands, the contract provided that the purchaser should be allowed ten days to make requisitions on title, and time was made of the essence of the contract, and the purchaser made certain objections within the ten days and refused to complete, the answers not being satisfactory, whereupon the vendor sued for specific performance and obtained the usual judgment, it was held that the purchaser could not raise in the Master's office fresh objections not raised within the ten days mentioned in the contract. *Imperial Bank of Canada* v. *Metcalfe*, 11 O.R. 467.

In *Clarke* v. *Langley*, 10 P.R. Ont. 208, by an agreement for the sale of certain land, the vendor was to give a good marketable title, of which the purchaser was to satisfy himself at his own expense and was not to call for any abstract of title, deeds, or evidences of title, other than those in the vendor's possession. Subsequently, on a reference in a suit by the vendor for specific performance, the defendant filed three objections to the title, having reference to a small portion of the land, which were answered by the plaintiff, and the reference was proceeding, when the defendant applied for and obtained from the Master, leave to file other objections. It was held that the Master had no jurisdiction to grant such leave, but, upon a subsequent application to the Court, the leave required was given on terms.

CHAPTER V.

INTEREST, RENTS, DETERIORATION, AND PAYMENT INTO COURT.

The passing of the property in subject-matter of contract.

§ 1391. In the case of every contract of sale, the question arises—At what time does the property in the thing sold pass from the vendor to the purchaser?

In the case of a contract for the sale of real or chattel real property in this country, the answer to this question involves important consequences, some of which it is proposed to discuss in the present chapter. It will be convenient, therefore, briefly to consider the effect of such a contract as between the parties to it.

Difference between the legal and equitable estates.

§ 1392. Where such a contract is entered into, the legal estate in the property passes, not by the contract, but only upon and by virtue of the execution of a subsequent formal deed of conveyance.[1] The equitable estate or beneficial ownership, however, passes, as between the contracting parties, by the contract itself,[2] but only *sub modo*, or, in other words, conditionally upon the contract being one of which the Court would decree specific performance,[3] and also being ultimately completed by the fulfilment by vendor and purchaser respectively of the mutual obligations imposed on them by the contract.

It follows (it is conceived) that upon the completion

[1] See Austin's Jurisp. (Student's Edition, 1904), 181, 182; and *per* Grant M.R. in *Fludyer* v. *Cocker*, 12 Ves. at p. 27.

[2] *Per* Lord Westbury in *Rose* v. *Watson*, 10 H. L. C. at p. 678; *per* Romer J. in *Raffety* v. *Schofield*, [1897] 1 Ch. at p. 943. Cf. *Edwards* v. *West*, 7 Ch. D. at p. 862; and *supra*, § 911.

[3] *Per* Cozens-Hardy J. in *Cornwall* v. *Henson*, [1899] 2 Ch. at p. 714.

of the contract the condition is satisfied, and the vesting of the equitable as well as of the legal estate becomes absolute; but that upon the contract coming to an end in any other way than by completion the equitable estate revests in the vendor.[1]

Mutual obligations of the contractors.

§ 1393. It is, then, important to inquire what are the mutual obligations of the parties to a contract of the kind under discussion. It is submitted that, in the absence of express stipulation, they are shortly as follows:—

Vendor's obligations.

§ 1394. The vendor is bound—

1. To show a good title to the property contracted to be sold.

2. (*a*) To take reasonable care of the property, and
(*b*) to pay the outgoings,[2]

until the purchaser takes, or ought to take, possession of it.

3. Upon being paid the purchase-money, and any interest on it that may have become payable,
(*c*) to execute and procure[3] the execution by all other necessary parties (if any) of a proper deed of conveyance vesting the legal estate in the purchaser, and
(*d*) to put him in possession of the property.

Vendor a constructive trustee.

§ 1395. It is in regard of these or some of these obligations that the vendor has been said to be a constructive trustee, or a trustee *sub modo*, of the estate for the purchaser from the time when the contract is constituted.[4]

[1] See *per* Plumer M.R. in *Wall* v. *Bright*, 1 J. & W. at p. 501.

[2] As to outgoings, see *infra*, § 1430 and the cases cited there.

[3] As to the expense of procuring mortgagees' concurrence, see *Re Sander and Walford's Contract*, 81 L. T. 316; W. N. 1900, 138.

[4] See *per* Plumer M.R. in *Wall* v. *Bright*, 1 J. & W. 500–503; *Shaw* v. *Foster*, L. R. 5 H. L. at pp. 335, 349, 356; *per* Lord Westbury in *Knox* v. *Gye*, L. R. 5 H. L. at p. 675; *per* Jessel M.R. in *Lysaght* v. *Edwards*, 2 Ch. D. 506–510; *per* James L.J. in *Raymer* v. *Preston*, 18 Ch. D. 1, 12.

§ **1396.** On the other hand, the purchaser is bound— Purchaser's obligations.

1. As soon as either the vendor has shown a good title, or he (the purchaser) has accepted such title as the vendor shows or has,

(*a*) to pay the purchase-money, and any interest on it that may have become payable, and

(*b*) to take possession of the property (that the vendor may be relieved from all future liabilities incident to the ownership).

2. To bear the loss resulting from any accidental injury to the property happening after the contract has been constituted.[1]

In regard of the first of these obligations the purchaser has been said to be constructively a trustee of the purchase-money for the vendor.[2] Purchaser construc-tive trus-tee.

§ **1397.** In addition to the above obligations, the contract gives or may give rise to certain liens;—of the vendor for unpaid purchase-money, and of the purchaser for the deposit or other portion of the purchase-money paid before completion: but these really result from the non-performance, in some respect, of the contract, rather than from the contract itself. Liens.

§ **1398.** If the foregoing statement of the obligations of the parties to a contract of the kind under discussion be correct, it follows that, where the contract contains no express stipulation on the point, the transfer of the possession of the estate from vendor to purchaser ought to be contemporaneous with the completion of the contract. Transfer of posses-sion.

In practice, however, possession is often taken by the

[1] See *Lysaght* v. *Edwards*, 2 Ch. at p. 507; and cf. Inst. iii. 23, 3. Distinguish *Counter* v. *Macpherson*, 5 Moo. P. C. C. 83, *supra*, § 912.

[2] See the cases cited at the foot of § 1395, *supra*.

purchaser at an earlier date, in pursuance either of an express term of the contract, or of some extrinsic act of, or arrangement between, the parties.

Estate and price, rent and interest, mutually exclusive.

§ 1399. Now it is obviously inequitable, in the absence of express and distinct stipulation, that either party to the contract should at one and the same time enjoy the benefits flowing from possession of the property and those flowing from possession of the purchase-money. The estate and the purchase-money are things mutually exclusive. "You cannot," said Knight Bruce (then) V.C., in a case arising out of the sale of some slob lands in Chichester harbour, "have both money and mud." And so neither party can at the same time be entitled both to interest and to rents.

Application of the above principles.

§ 1400. The general principles laid down in the preceding section of this chapter are of primary importance in determining

(1) the respective rights and liabilities of vendor and purchaser in regard of interest on the purchase-money and the rents and profits and outgoings of the estate:

(2) their respective rights and liabilities in regard of the deterioration of the estate after the constitution of the contract:

(3) the right of the vendor to have unpaid purchase-money paid into Court.

The application of these principles to any particular case of contract may, however, be, and in practice usually is, modified by express stipulations embodied in the contract.

Division of the subject.

§ 1401. With these preliminary observations it is proposed to consider the rather complicated questions which arise between vendor and purchaser in respect of rents, interest, outgoings, deterioration, and payment into Court, under the following heads; viz.:—

[1] As to manorial fines, see *Garrick* v. *Earl Camden*, 2 Cox, 231; *Cowlam* v. *Tilt*, 1 Giff. 395.

I. Where the vendor is in possession of the estate, either by receipt of the rents or by personal occupation.

II. Where the purchaser is similarly in possession of the estate.

I. *Where the vendor is in possession.*

No time fixed for completion

§ 1402. Where the contract fixes no time for the completion of the purchase, and is silent as to the rents and interest, there *primâ facie* the vendor, it is conceived, is entitled to the produce of the purchase-money, in the shape of interest, and the purchaser has a corresponding right to the produce of the estate, in the shape of tenant's rents or occupation rent, as from the time when the contract ought to have been completed and the transfer of possession to have taken place as a part of such completion.[1]

Time fixed for completion

§ 1403. Where, as is usually the case, the contract fixes a time for completion, there *prima facie*, and in the absence of stipulation, the time so fixed is the time from which the purchaser is liable to the payment of interest and is entitled to the rents.[2] But this rule must be taken subject to several exceptions.

Interest more than rents, delay vendor's.

§ 1404. First, where the interest is much more in amount than the rents, and the delay in completion is clearly made out to have been occasioned by the vendor, the Court, to prevent the vendor from gaining an advantage by his own wrong, gives him no interest, but leaves him in possession of the interim rents.[3] In

[1] Consider *Binks* v. *Lord Rokeby*, 2 Sw. at pp. 225, 226; *Carruthers* v. *Sharp*, 20 Beav. at p. 58; *Wells* v. *Maxwell* (No. 2), 32 Beav. 550; *Re Keble Flatton Brick Co.*, 78 L. T. 383; and see *supra*, §§ 1396, 1398.

[2] In *Pleves* v. *Samuel*, [1904] 1 Ch. 464; 73 L. J. Ch. 279, without any fault on either side the vendors remained in possession after the date for completion, and received rents and it was held that, in view of their fiduciary position (*supra*, § 1395 towards the purchaser, they could not, as against him, retain out of those rents arrears of rent accrued due at the date of the contract, or between that date and the date for completion.

[3] *Esdaile* v. *Stephenson*, 1 S. & S. 122.

such cases, the day at which the interchange of properties is treated as taking place is removed from the time fixed for completion to the time at which a good title is first shown.[1]

Burton v. Todd

§ 1405. In one case, where a vendor had retained possession of the whole of the estate and of one-third of the purchase-money for fifteen years, and the delay was wholly due to his wrongful conduct, Plumer M.R. not feeling himself justified in removing the time for the interchange of properties from the time fixed for completion, endeavoured to meet the equity of the case by giving the purchaser the whole of the rents and interest on one-third of the rents in each year from the time of their accruing.[2]

Title made out in Chambers.

§ 1406. Secondly, where the title is made out in Chambers, the date when the master certifies that a good title was first shown[3] is the date at which the purchaser comes under an obligation to complete. Hence, up to that date, the vendor is entitled to the rents, and the purchaser to interest on the deposit paid to the vendor; and from that date the purchaser takes the rents and pays the vendor interest on the unpaid balance of the purchase-money.[4]

Carrodus v. Sharp

§ 1407. Accordingly where a suit was instituted for the specific performance of a contract to buy a mill, and the decree was made in February, 1854, but a good title was not shown till December of that year, and a question arose as to who was to bear the expenses and outgoings belonging to the mill, and to the repairs and sustentation of the premises and the machinery, Lord Romilly M.R. decided that these must be borne

[1] *Jones* v. *Mudd*, 1 Russ. 118; *Paton* v. *Rogers*, 6 Mad. 256. It seems previously to have been held that interest necessarily ran from the date for completion. *See Wilson* v. *Clapham*, 1 J. & W. 36; *per* Plumer M.R. in *Burton* v. *Todd*, 1 Sw. 260.

[2] *Burton* v. *Todd*, 1 Sw. 255.

[3] *Halkett* v. *Earl of Dudley*, [1907] 1 Ch. 590, 606; 76 L. J. Ch. 330.

[4] *Pincke* v. *Curteis*, 1 Bro. C. C. 333. Cf. *Enright* v. *Fitzgerald* (sale of a reversion), 2 Dr. & War. 43.

by the vendor up to the time at which a purchaser could prudently take possession, which is the time at which a good title is shown, and after that by the purchaser.[1]

Action necessitated by purchaser

§ **1408**. Where, however, the title has not been made out till after action brought, but the delay has arisen from the purchaser's raising other points which made the action necessary, then, the delay not being the fault of the vendor, interest will run from the day fixed for completion.[2]

Purchase-money to be ascertained after contract.

§ **1409**. Thirdly, where the contract leaves the amount of the purchase-money to be subsequently ascertained, interest will not begin to run until the purchase-money is actually ascertained, notwithstanding that the time fixed by the contract for completion may have arrived before this is done. Thus in a case where the contract provided that the price should be determined by the award of a surveyor, the Court of Appeal in Chancery held that the vendor must pay the outgoings up to the date of the award, and was entitled to interest only as from that date, although the contract also contained a clause providing that the purchase should be completed and the purchase-money paid at a time which, in the events which happened, arrived more than fourteen months before the award was made.[3]

Purchase money appropriated and notice given to vendor

§ **1410**. Fourthly, the purchaser is discharged from his *primâ facie* obligation to pay interest on the unpaid purchase-money where the purchase-money has been appropriated by him and has been unproductive,[4] and

Carradus v. *Sharp*, 20 Beav. 56. See, too, *Barsht* v. *Tagg*, [1900] 1 Ch. at p. 235.

Munro v. *Taylor*, 3 Mac. & G. 715.

Catling v. *Great Northern Railway Co.*, 18 W. R. 121; 21 L. T. N. S. 15. In this case the possession appears to have been vacant during the period in dispute. Cf. *Re Eyre-shill Local Board*, 13 Ch. D. 365, disapproved of in *Re Pigott and Great Western Railway Co.*, 18 Ch. D. 486.

[1] In *Re Riley to Streatfield*, 31 Ch. D. 386. As to the result where the purchaser makes any profit on the appropriated money, see *infra*, § 1451.

notice to this effect has been given by the purchaser to the vendor.[1] "Where nothing appears to occasion the delay," said Lord Cottenham, "the rule no doubt is, that if the purchaser, who on the face of the contract is under the necessity of paying on a certain day sets apart his money, and gives notice that it is ready, interest stops from that time, provided it be shown that he must no interest of it."[2] And even in contracts by railway companies taking land under their compulsory powers, where the owner makes default in completing the sale, interest will cease upon appropriation of the purchase-money, with notice that it is unemployed.[3]

Rents expressly reserved to vendor

§ 1411. The general rule which we have been discussing may, of course, be excluded by express stipulation, as where conditions of sale reserved the rents to the vendor, which was held to exonerate the purchaser from the payment of interest on the unpaid purchase-money.[4]

Delay from any cause whatever

§ 1412. There are many reported cases in which the contract has contained a condition to the effect that the purchaser shall pay interest from the day appointed for completion from whatever cause the delay may arise. In a case decided in the year 1822 Leach V.C. held that the mere fact of the delay having arisen on the part of the vendor did not release the purchaser from the obligation of such a condition, and that accordingly he was bound to pay interest: and in a case where the conditions of a sale under the

[1] *Powell* v. *Martyr*, 8 Ves. 146; *Roberts* v. *Massey*, 13 Ves. 561; *Dyson* v. *Hornby*, 1 De G. & Sm. 481; *Haviland* v. *Norris*, 1 Cox, 59; *Regent's Canal Co.* v. *Ware*, 23 Beav. 575. Cf. *Kershaw* v. *Kershaw* (purchaser in possession), L. R. 2 Eq. 56.

[2] In *De Visme* v. *De Visme*, 1 Mac. & G. 352.

[3] *Regent's Canal Co.* v. *Ware*, 23 Beav. 575.

[4] *Brooke* v. *Champernowne*, 1 Y. & Jer. 589, 611.

[5] *Esdaile* v. *Stephenson*, 1 Sim. 122. See Lord St. Leonards' observations on this point, St. on Vend. 529 *et seq.*

Court stipulated for payment of the purchase-money on a certain day, and that, if from any cause whatever it should not then be paid, interest should be paid at 5*l.* per cent.; and there was great difficulty and delay on the vendor's part; Lord Langdale M.R. ordered the payment of interest according to the contract, but without prejudice to any application for compensation.[1]

Where, however, the condition provided that, if from any cause whatever the completion of the purchase should be delayed beyond a specified date, "the purchaser in default" should pay interest, and delay occurred which was entirely owing to default on the part of the vendor, it was held that the purchaser was not liable to pay any interest.[2]

§ **1413.** In a case where there was a stipulation that if, by reason of any unforeseen or unavoidable obstacles, the purchase should not be completed by the day fixed, the purchaser should from that day pay interest at 5*l.* per cent. on his purchase-money and be entitled to the rents, and the vendor did not show a good title till long after the specified day, Leach V.C. held that the stipulation would not make interest run before the time when a good title was shown, but would only affect its rate.[3]

§ **1414.** In the case of *De Visme* v. *De Visme*,[4] the effect of such conditions was very elaborately considered by Lord Cottenham, and his Lordship held that a condition for the payment, in case of delay, of interest from the day appointed for completion, from

[1] *Greenwood* v. *Churchill*, 8 Beav. 403. In this case the purchaser had taken possession, but the only question that arose was as to interest.

Jones v. *Gardiner*, [1902] 1 Ch., at p. 191; 71 L. J. Ch. 93, referring to *Dennison* v. *Henderson*, 1 De G. & Sm. 689; 17 L. J. Ch. 8.

Monk v. *Huskisson*, 4 Russ. 121, n. This case seems irreconcilable with the same V.C.'s decision in *Esdaile* v. *Stephenson* (1 S. & S. 122), *supra*, § 1112, and Lord St. Leonards thought it wrong. St. Leon. ed. 521.

[2] Mac. & G. 556, reversing the decision of Wigram V.C., 13 Jur. 205.

whatever cause the delay might have arisen, did not apply to a case of the vendor's own default, but that in that case interest ran only from the time when a good title was shown. "There are two ways," said his Lordship, "in which this case may be met in argument and upon principle. It may either be considered that that which has happened is not within the contract, that is, that the party never did mean to contract that he would pay interest, although he might be prevented from having the benefit of his purchase by the default of the vendor, and in this view it is the ordinary case of doing justice between the parties, an event having arisen which was not expressly provided for by the contract; or it may be considered that interest must be paid upon the purchase-money, according to the terms of the contract, although the vendor has not performed his part of the contract, and the purchaser has been thereby exposed to damage (the damage being the difference between the interest and the annual value of the property), and then, although this is a departure from the terms of the previous contract, which the Court would not regard as a bar to decreeing a specific performance, yet that the Court will in this case regard it, by giving to the purchaser compensation for the loss he has sustained by the non-performance of the whole contract by the vendor."[1] "My opinion," said his Lordship, in conclusion,[2] "is that the vendors being in default, the delay having been occasioned by their not performing their part of the contract, are not to exact from the purchaser the payment of interest until the time they showed a good title on their abstract: the effect of that is to postpone the day agreed on for the completion of the contract, until the time when the vendors put themselves right, and showed their title to be good on the abstract. The result therefore is, that until that time there

[1] 1 Mac. & G. at p. 318. [2] 1 Mac. & G. at p. 355.

would be no demand to be made by the vendors for the payment, and therefore the interest, which was to stand in the place of that payment, had not commenced to run: it did run when they showed a good title, and not before."

Analogies with Lord Cottenham's decision.

§ **1415**. The cases at Common Law, deciding that the exception in a charter-party as to pirates will not be held to except the owners from liability, where the ship has fallen into the hands of pirates by the master's negligence,[1] and that a stipulation in a bill of lading exempting the carrier from liability in respect of leakage and breakage will yet not comprise leakage and breakage caused by his negligence or that of his servants,[2] seem to furnish close analogies with the decision in *De Visme* v. *De Visme*.[3] It is in fact an instance of the general principle, that no man shall take advantage of his own wrong.

Such stipulations construed literally.

§ **1416**. Still, the decision in *De Visme* v. *De Visme* was an innovation, and the principles which it applied to conditions of the kind now under consideration have not been accepted by co-ordinate authority[4] as supplanting the former rule of the Court—which was and, it is conceived, now is, that such conditions are to have effect given to them according to the natural and literal meaning of their words, except only where there is bad faith, vexatious conduct, or gross negligence on the part of the vendor, disentitling him, in the view of the Court, to the benefit of the stipulation.[5]

[1] Abbott's Law of Merchant Ships and Seamen (14th ed.), 610, 629; *De Rothschild* v. *Royal Mail Steam Packet Co.*, 7 Ex. 736; 21 L. J. Ex. 273.

[2] *Phillips* v. *Clark*, 26 L. J. C. P. 168.

[3] 1 Mac. & G. 336.

[4] *Sherwin* v. *Shakspear*, 5 De G. M. & G. 517 (varying S. C. 17 Beav. 267); *Williams* v. *Allenton*, L. R. 1 Ch. 200 (S. C. 31 Beav. 528). Consider *Birch* v. *Podmore*, St. Leon. Vend. 521, 523, and *Oxenden* v. *Lord Falmouth*, id. 523. In *Robertson* v. *Skelton* (12 Beav. 363), Lord Langdale M.R. simply obeyed Lord Cottenham's decision in *De Visme* v. *De Visme*, *ubi supra*.

[5] St. Leon. Vend. 523. See, too, *Herbert* v. *Salisbury and Yeovil Railway Co.*, L. R. 2 Eq. 221; *infra*, § 1418.

What delay will not exempt purchaser.

Therefore delay arising from mere accident, or from something which the vendor could not have guarded against, or from difficulties occasioned by the state of the title, is not enough to exempt the purchaser from the payment of interest in such cases, even though the difficulties may be such as to justify the purchaser in refusing to complete till they are removed.[1] Indeed, it may fairly be said that the insertion of such a condition in a contract shows that the possibility of delay arising on the vendor's, no less than on the purchaser's, part is from the first contemplated by both parties, and that there can therefore be no hardship on the purchaser in holding him, subject only to the admitted exceptions already mentioned, to the literal performance of the condition.

Instances.

§ **1417**. In accordance with the rule stated in the last section, it has been held that the fact that a sufficient abstract is not delivered in time will not deprive the vendor of the interest which he has stipulated for:[2] so again in a case where there was a condition of the kind now under discussion, and delay arose from circumstances under which the Court's approbation (which was necessary to the sale) was to be obtained, and neither party was to blame, the vendors were held to be entitled to interest by force of the condition, although the interest greatly exceeded the amount of the rents of the land:[3] and so where, there being a similar condition in the contract, it became necessary, in order to make a good title, that a suit should be instituted to procure the rectification of the power under which the vendors sold, the purchaser was held bound to pay interest from the day named for completion.[4]

[1] *Sherwin* v. *Shakspear*, *Williams* v. *Glenton*, *ubi supra*.

[2] *Rowley* v. *Adams*, 12 Beav. 476. See also *Coupe* v. *Bakewell*, 13 Beav. 121; *Dyson* v. *Hornby*, 1 De G. & Sm. 181; *Vickers* v. *Hand*, 26 Beav. 670.

[3] *Tewart* v. *Lawson*, 3 Sm. & Gif. 307.

[4] *Lord Palmerston* v. *Turner*, 27 Beav. 524.

Delay from act of God or untenable objection.

§ 1418. The condition operates even where the delay arises from the act of God, as the death of the vendor,[1] and it applies, of course, where the delay arises from an untenable objection taken on the part of the purchaser.[2]

In *In re Bayley-Worthington and Cohen's Contract*[3] the conditions of sale specified certain circumstances under which the purchaser was to be exempted from payment, by way of interest, of anything beyond bank deposit interest, one of the circumstances being "if the delay of completion should arise from any cause other than the neglect or default of the purchaser." The purchaser took an objection which was ultimately decided to be untenable; and it was held that, where the Court decides that an objection is untenable, it in effect decides that it ought not to have been insisted on, and consequently that the purchaser was in default in refusing (as he had) to complete till it was complied with or removed.

Exemption by appropriation of purchase-money.

§ 1419. Whether, where there is a condition of this kind, a purchaser can nevertheless exempt himself from the payment of interest by specially investing the purchase-money, and giving the vendor notice that it has been thus appropriated to the purposes of the contract, seems to be at least doubtful.[4] On principle there seems no reason why a contract by A. to pay interest to B. should be satisfied by A.'s placing the money at interest with C., and giving notice of the

[1] *Bannerman* v. *Clarke*, 3 Drew. 632.

[2] *Storry* v. *Walsh*, 18 Beav. 559.

[3] *Re Bayley-Worthington and Cohen's Contract*, [1909] 1 Ch. 648; 78 L. J. Ch. 351.

[4] Compare *De Visme* v. *De Visme*, 1 Mac. & G. 336, and *Vickers* v. *Hand*, 26 Beav. 630, with *Williams* v. *Glenton*, L. R. 1 Ch., foot of p. 206, and *Denning* v. *Henderson*, 1 De G. & Sm. 689; 17 L. J. Ch. 8; and *In re Gobbs and Norton*, 33 W. R. 333. See, too, *Re Bayley-Worthington and Cohen's Contract*, [1909] 1 Ch. 648; 78 L. J. Ch. 351, where there was an express stipulation in the contract with respect to the deposit of purchase money at any bank upon a deposit account bearing interest.

fact to B. In *Re Riley to Streatfield*,[1] North J. held that the purchaser's obligation to pay interest was not satisfied by having the money standing ready at his bankers, and giving notice of this fact to the vendor. In another case, however, Bacon V.C. declared that a purchaser could not, under circumstances of undue delay in consequence of the vendor's acts, be required to pay higher interest than that allowed by the bank at which she had deposited the purchase-money.[2]

Wilful default.

§ 1420. A very common—perhaps nowadays the commonest—form of the condition relative to the payment of interest provides that it shall be paid by the purchaser "if from any cause whatever *other than wilful default on the part of the vendor*" the completion of the purchase is delayed beyond a specified date; and the authorities as to what is wilful default within the meaning of such a condition are very numerous. "The result of the authorities," said Buckley J., in *Bennett v. Stone*,[3] "I think is this: that by the word 'wilful' is meant that the vendor, being a free agent and in a position to do either one of two acts, chooses to do the one and not to do the other; and that 'default' includes the case where the vendor, owing to the purchaser the duty to act reasonably in all matters relating to completion, does an act in breach of that duty. The vendor owes to the purchaser, among other things, the duty of acquainting himself with all the material facts; and it will be a breach of his duty if, knowing the facts, he elects to do an act which is not reasonable, or if he neglects to acquaint himself with the facts, and consequently does an act which is not reasonable. It

[1] 34 Ch. D. 386. Note that in this case the condition was for payment of interest in case of delay "from any cause whatever except the wilful default or neglect of the vendors."

[2] *Re Monckton and Gilzean*, 27 Ch. D. 555.

[3] [1902] 1 Ch. at p. 232; 71 L. J. Ch. 60; affirmed by Stirling and Cozens-Hardy L.JJ. (Vaughan Williams L.J. dissenting), [1903] 1 Ch. 509.

is not necessary to show intentional delay or wilful obstruction; but it is necessary to show that the vendor has committed an act of default. This is not satisfied by showing that by mistake or oversight he has done something which he ought not, or has omitted to do something which he ought, to have done." His Lordship went on to illustrate the foregoing propositions by referring to the following cases, in the first three of which the vendor was, while, in the last three he was not, held to have been guilty of wilful default. There was wilful default in *Re Young and Harston's Contract*,[1] where the vendor went abroad two days before the date fixed for completion, with the result that he could not execute the conveyance because he was not there to execute it; *Re Hetling and Merton's Contract*,[2] where the vendor, knowing that he had to complete, relied upon a power of attorney, which was insufficient to enable another person to sign his name for him; and in *Re Wilsons and Stevens' Contract*,[3] where the vendor did not obtain admittances to certain copyholds, so as to be in a position to complete at the specified date. There was no wilful default in *Re London Corporation and Tubbs' Contract*,[4] where the vendor erroneously described his title to a portion of the property; in *Re Woods and Lewis' Contract*,[5] a case of an unknown defect of title; or in *North* v. *Percival*,[6]

[1] 31 Ch. D. 168. The words "doing what is reasonable under the circumstances," used by Bowen L.J. in this case (at p. 174), mean doing what a person ought to do having regard to his relations to others, and do not suggest any standard based on what a prudent man would do for his own protection. Either a vendor or a purchaser may, though acting reasonably for his own protection, be guilty of a breach of duty, and consequently of default, towards the other party to the contract. *Re Bayley-Worthington and Cohen's Contract*, [1909] 1 Ch. 648, 656–658.

[2] [1893] 3 Ch. 269; followed *Re Earl of Strafford and Maples*, [1896] 1 Ch. 235; *Re Postmaster-General and Colgan's Contract*, [1906] 1 I. R. 287, 296; affirmed, ib. 477. See, too, *Re Pelly and Jacob's Contract*, 80 L. T. 45.

[3] [1894] 3 Ch. 546.

[4] [1891] 2 Ch. 524.

[5] [1898] 1 Ch. 433; [1898] 2 Ch. 211.

[6] [1898] 2 Ch. 128.

where, the question being whether the contract included 36 or 42 acres, the vendor unsuccessfully resisted the purchaser's claim to specific performance. What has to be looked to in such cases is not necessarily solely, was there wilful default, but was the wilful default the *causa causans* of the delay.[1]

Condition as to interest dependent on condition as to abstract.

§ 1421. The Court will construe a condition fixing the time from which interest is to run in connection with another fixing the time for the delivery of the abstract; so that where there is a condition that the abstract shall be delivered by a certain day, and interest shall begin to run from another and subsequent day, and a perfect abstract is in fact not delivered till after the time fixed for that purpose, interest will not run from the day specified in that behalf, but from a day so long after the actual delivery of a perfect abstract, as the day stipulated for the commencement of interest was after the day stipulated for the delivery of the abstract.[2]

Interest, on what amount payable.

§ 1422. The amount on which the purchaser pays interest is the purchase-money less the deposit: and this applies even where the action may have been made necessary by the purchaser's conduct.[3]

Interest on deposit.

§ 1423. The vendor is not, it seems, generally liable to pay interest on the deposit, if the contract proceed.[4]

Rate.

§ 1424. The rate of interest usually allowed is 4 per cent.[5] But this, of course, may be varied by contract.[6]

Burnell v. *Brown.*

In one case interest at the rate of 5 per cent. was given, where the circumstances did not justify the delay in paying the money, the then Lord Chi

[1] *Bennett* v. *Stone*, [1902] 1 Ch. at p. 236; 71 L. J. Ch. 60; [1903] 1 Ch. 509.

[2] *Sherwin* v. *Shakspear*, 5 De G. M. & G. 517, particularly p. 536.

[3] *Bridges* v. *Robinson*, 3 Mer. 694.

[4] St. Leon. Vend. 524.

[5] *Calcraft* v. *Roebuck*, 1 Ves. J. 221.

[6] *E.g. Firth* v. *Midland Railway Co.*, L. R. 20 Eq. 100, 114.

Baron (sitting for Plumer M.R.) observing, "that he had always been of opinion, that a party withholding money from a person entitled to it, ought to pay to the person thus injured the interest which he might have made of it, if it had been paid before."[1] But this does not appear to be the rule of the Court.[2]

Profit made by purchaser.

§ **1425**. The fact that a purchaser has been making profit by his money whilst it is at his risk and he is liable to interest, is no ground for increasing the rate of interest payable to the vendor.[3]

Income tax.

§ **1426**. Whenever a purchaser has to pay interest to the vendor, he is entitled, on making the payment, to deduct the income tax on the amount of the interest.[4]

What rents the vendor is charged with.

§ **1427**. The vendor in receipt of tenant's rents is generally charged only with the rents he has received, but he may, under certain circumstances, be charged with those which without his wilful neglect or default he might have received.[5]

Vendor charged on footing of wilful default.

§ **1428**. In a case before Plumer M.R. the vendor was so charged, where the circumstances which justified this charge appear to have been the facts that the rents had been allowed to run in arrear, and that it was through the vendor's fault that the purchaser was not able safely to take possession.[6] But in a case where the vendor was similarly charged by Lord Romilly M.R., the judgment was reversed, on appeal, by Knight Bruce and Turner L.JJ., who decided that, in the absence of special circumstances, the vendor will not be charged with the rents which he might have received without wilful default, and that he will not be subjected to any inquiry unless there be

[1] *Burnell* v. *Brown*, 1 J. & W. at p. 175.

[2] St. Leon. Vend. 528.

[3] *Acland* v. *Gaisford*, 2 Mad. 28.

[4] See *per* Malins V.C. in *Crane* v. *Kilpin*, L. R. 6 Eq. at p. 335. See, too, *Bebb* v. *Bunny*, 1 K. & J. 216, cited *infra*, § 1473.

[5] *Acland* v. *Gaisford*, 2 Mad. 28; *Phillips* v. *Silvester*, L. R. 8 Ch. 173; *Malone* v. *Henshaw*, 29 L. R. Ir. 352; Seton (6th ed.), 2247.

[6] *Wilson* v. *Clapham*, 1 J. & W. 36.

evidence that he has in some way acted otherwise than a prudent owner would have done.[1]

Vendor not bailiff to purchaser.

§ **1429**. The vendor in possession is therefore not, as has sometimes been said, in the position of a bailiff at Common Law to the purchaser; for such a bailiff is answerable not only for his actual receipts, but for what he might have made of the lands without his wilful default.[2]

Outgoings.

§ **1430**. Inasmuch as the outgoings of an estate virtually represent the (or part of the) difference between the gross and the net rents, and may accordingly be regarded as included in the former, the liability to discharge them is, it is conceived, in the absence of stipulation, incident to and conterminous with the right to receive the rents. In a case where the conditions of sale of leaseholds stipulated that all outgoings up to the day of completion should be cleared by the vendors, it was held that an apportioned part, from the quarter-day last preceding to the day for completion, of the current ground-rent was an outgoing within the meaning of the condition, and must be paid or allowed to the purchaser by the vendors.[3]

Deterioration. Where borne by vendor.

§ **1431**. If, after the contract, and before the purchaser takes, or ought to take, possession, any deterioration take place by the conduct of the vendor or his tenants, he will be accountable for it to the purchaser.[4] "He is not entitled to treat the estate

[1] *Shewin* v. *Shakspear*, 17 Beav. 267; S. C. 5 De G. M. & G. 517. See also *Howell* v. *Howell*, 2 My. & Cr. 478, and compare St. Leon. Vend. 519.

[2] Co. Litt. 172, a; *Wheeler* v. *Horne*, Willes, 208.

[3] *Lawes* v. *Gibson*, L. R. 1 Eq. 135. Cf. *Williams* v. *East London Railway Co.*, 18 W. R. 159; and see further, as to outgoings, *Currodus* v. *Sharp* (20 Beav. 56, 58), cited *supra*, § 1407; *Midgley* v. *Coppock*, 4 Ex. D. 309; 40 L. T. 870 (charge for improvement of street); *Tubbs* v. *Wynne*, [1897] 1 Q. B. 71 (expenses of demolition); *Barsht* v. *Fry*, [1900] 1 Ch. 231 (cost of abating nuisance); *Re Highett and Bird's Contract*, [1902] 2 Ch. at p. 217, 71 L. J. Ch. 508; affirmed, C. A., [1903] 1 Ch. 287; 72 L. J. Ch. 220.

[4] *Foster* v. *Deacon*, 3 Mad. 390. See, too, *Counter* v. *Macpherson*, 5 Moo. P. C. C. 83; *supra*, § 912.

as his own. If he wilfully damages or injures it, he is liable to the purchaser; and more than that, he is liable if he does not take reasonable care of it."[1] And this liability may be enforced by action, even after a conveyance made in ignorance of the facts.[2]

Ferguson v. Tadman.

§ **1432**. Where a purchaser had paid his money into Court under an order, and was held entitled to compensation for deterioration, which had taken place while the vendors retained possession, he was allowed the amount out of his purchase-money, with interest at 4 per cent., and the costs of an issue to ascertain the amount of damage.[3]

Set off against interest.

§ **1433**. Again, where vendors insisted on continuing in possession pending certain disputes, and allowed the property to fall into a state of dilapidation, Lord Selborne allowed the purchaser to set off against the interest payable by him the amount of rent which the vendors might, but for their wilful neglect and default, have received, and also the amount of the deterioration.[4]

Deterioration by vendors' tenants.

§ **1434.** In another case, where the purchaser (plaintiff) alleged that the vendors (defendants) had since the date of the contract let the property (an oil mill, with plant and machinery) to third parties, and that the plant was daily being deteriorated and worn out by the improper user thereof by the defendants' tenants, it was held that the plaintiff was entitled to discovery from the defendants of the names of the persons to whom, and the term for which, the property had been let.[5]

Duty of vendor to relet farm.

§ **1435**. The vendor's accountability for deterioration arises out of his constructive trusteeship[6] for the purchaser. Therefore, if the vendor of a farm subject to

[1] *Per* Jessel M.R. in *Lysaght* v. *Edwards*, 2 Ch. D. at p. 507.

[2] *Clarke* v. *Ramuz*, [1891] 2 Q. B. 456. Cf. *Connolly* v. *Keating* (No. 2), [1903] 1 I. R. 356.

[3] *Ferguson* v. *Tadman*, 1 Sim. 530.

[4] *Phillips* v. *Silvester*, L. R. 8 Ch. 173.

[5] *Dixon* v. *Fraser*, L. R. 2 Eq. 497.

[6] See *supra*, § 1395.

a yearly tenancy finds and knows, before the day for completion arrives, that it will be impossible to complete on that day, and that the tenancy will determine before actual completion, then, inasmuch as it is his duty, as a trustee for the purchaser, to keep the property in a proper state of cultivation, he ought to relet it on a yearly tenancy unless the purchaser, being asked what he wishes to be done, is willing to run the risk of it being unlet, and will guarantee the vendor against any loss that may arise to him in case the purchase goes off.[1]

On the same principle, if at the date of a contract for sale of real estate the property is in occupation of a tenant, the purchaser is, generally speaking, entitled to have the property preserved pending completion in its existing state, and the vendor not only would not be entitled, against the purchaser's wish, to determine the tenancy, but also, if he did so determine it, would be liable to the purchaser for any resulting loss. In fact, as between vendor and purchaser, the powers of the vendor to act as owner of the property, and (*inter alia*) to change tenants or holdings, are suspended generally pending completion of the purchase.[2]

Vendor working mine.

§ 1436. In a case that came before the Privy Council, the vendor of a coal mine, having, during delay of completion, worked the mine for his own benefit, was held bound to pay to the purchaser the value *in situ naturali* of the coal taken, *i.e.*, its market value at the place where it was to be sold, less the costs of severing it and taking it from the mine to that place.[3]

Deterioration borne by purchaser.

§ 1437. On the other hand, the purchaser will have to bear the loss from deterioration in the following

[1] *Earl of Egmont* v. *Smith*, 6 Ch. D. 469, 475. See, too, *Malone* v. *Hoshaw*, 29 L. R. Ir. 352.

[2] *Raffety* v. *Schofield*, [1897] 1 Ch. at pp. 944, 945.

[3] *Brown* v. *Dibbs*, 25 W. R. 779, following the principle of *Jegon* v. *Vivian*, L. R. 6 Ch. 742.

cases; First, where it occurs after the time at which he ought to have taken possession.[1]

Vendor in possession, but not to blame

§ 1438. Secondly, where it occurs during the period in which the vendor is in possession, but is the result of accident, without the fault of the vendor: so that where during this period the vendor was, in consequence of such an accident, compelled to expend money on or in respect of the property, as in shoring it up, or removing rubbish which had fallen on a neighbour's property, the vendor was held entitled to have this repaid by the purchaser: but the Court refused to make the purchaser pay the expenses of a reference to the Master in relation to the repairs, though that had been proper for the protection of the trustees of the estate.[2] So, too, in an Irish case, where, in the interval between contract and conveyance, deterioration was caused by malicious injuries committed by persons unknown, the Court declined to allow any compensation to the purchaser.[3]

Purchaser the cause of the mischief.

§ 1439. Thirdly, where the deterioration is due to the purchaser himself, the loss must fall on him, though not in possession. Thus, where a purchaser agreed with a tenant of the estate that he should give up possession if the purchaser had a conveyance by a certain time, and the tenant, misconstruing the agreement, gave up possession though the purchaser had not the conveyance; the purchaser was held to be the innocent cause of the mischief, and so responsible for the deterioration which resulted.[4]

Vendor personal occupation.

§ 1440. The cases which arise where the vendor is himself in personal occupation of the estate correspond with those where he is in receipt of the rents, except that, instead of having to pay over the rents received

[1] *Blake* v. *Lord Rokeby*, 2 Sw. 122; *Mauchin* v. *Nunn*, 4 Beav. 339.

[2] *Robertson* v. *Skelton*, 12 Beav. 260.

[3] *Re Sweeney's Estate*, 25 L. R. Ir. 252.

[4] *Ilurford* v. *Purrier*, 1 Mad. 532.

from others, he will have to pay to the purchaser an occupation rent to be set upon the estate, himself receiving interest in return.[1]

Metropolitan Railway Co. v. Defries

§ **1441**. In *Metropolitan Railway Co.* v. *Defries*, the contract having stipulated that, from the day named for completion, the purchaser should receive "all rents and profits," the vendors, remaining in occupation of the property after that day, were held bound to pay a fair occupation rent for the interval which elapsed before the purchase was completed.[2]

Purchaser to default

§ **1442**. No such occupation rent, however, will be allowed where the purchaser ought under the contract to have taken possession, and the vendor has continued in possession only by reason of the purchaser's wrong-doing.

Instance.

§ **1443**. Thus, where the property (a tavern) was occupied by the vendor, a licensed victualler for the purposes of his business, and the purchasers, a railway company, having made default in payment of the purchase-money on the day named for completion, the vendor continued the business on his own behalf, but under great inconvenience, all his arrangements having necessarily to be made subject to determination on payment of the purchase-money, it was held that the purchasers were not entitled to any allowance by way of occupation rent.[4]

Income tax a just allowance.

§ **1444**. Where the Court fixes an occupation rent to be paid by the vendor, he will, it seems, be allowed to deduct the income tax on it as a "just allowance;" but the Court will not insert any express provision on the point in the judgment.[5]

[1] *Dyer* v. *Hargrave*, 10 Ves. 505.

[2] 2 Q. B. D. 189; affirmed, ib. 3-7.

[3] *Dakin* v. *Cope*, 2 Russ. 179, 181.

[4] *Leggott* v. *Metropolitan Railway Co.*, L. R. 5 Ch. 716.

[5] *Sherwin* v. *Shakspear*, 5 De G. M. & G. 517, 532.

II. *Where the purchaser is in possession.*

Purchaser in possession must pay interest

§ 1445. It follows from the principles already stated and discussed in this chapter that generally, in the absence of stipulation, a purchaser in possession of the estate which is the subject matter of the contract must pay interest on the unpaid purchase money from the time when his possession under the contract commenced until completion.[1]

Though delay of completion owing to vendor

§ 1446. The rule that the purchaser in possession shall pay interest on the unpaid part of the purchase-money will be applied even in cases where the delay arises from the neglect of the vendor, and the purchaser makes no actual profit out of the land.[2] "The act of taking possession," said Grant M.R., "is an implied agreement to pay interest: for so absurd an agreement as that a purchaser is to receive the rents and profits to which he has no legal title, and the vendor is not to have interest, as he has no legal title to the money, can never be implied."[3]

Election between interest and rents.

§ 1447. Accordingly where a purchase was to be completed by a given day, when the purchaser was to have possession, and it was provided that, if from any cause whatever the purchase-money should not be then paid, the purchaser should pay interest, and a delay of six months was occasioned, but innocently, by the vendor in not delivering proper abstracts, he was put to his election to pay interest or give up the rents, though notice had been given by the purchaser that the money was lying idle.[4]

[1] See *supra*, § 1399; and *Fludyer* v. *Cocker*, 12 Ves. at p. 27; *Binks* v. *Lord Rokeby*, 2 Sw. at p. 226; *North* v. *New Gas Co.* v. *Gwyn*, W. N. 1874, 209; *Ballard* v. *Shutt*, 15 Ch. D. 122.

[2] *Fludyer* v. *Cocker*, 12 Ves. 25; *Ballard* v. *Shutt*, 15 Ch. D. 122; *Beresford* v. *Clarke*, [1908] 2 I. R. 317, 319.

[3] *Fludyer* v. *Cocker*, 12 Ves. at pp. 27, 28.

[4] *Cooper* v. *Bakewell*, 13 Beav. 421.

Stipulation for increasing interest.

§ **1448.** In a case decided by Lord Romilly M.R.[1] the contract provided that the purchasers should pay interest on the purchase-money at 4 per cent. from the time of their taking possession until the 1st of July, 1858 (the day for completion), at 5 per cent. from the last-mentioned date until the 1st of January, 1859, and afterwards at 8 per cent. until payment, with a proviso that the purchasers should not be entitled to withhold payment of the purchase-money upon paying interest at the higher rates. The purchasers took possession before the end of 1857, but, without any misconduct on the vendor's part, completion did not take place until 1865. His Lordship held that the stipulation for the payment of interest at the rate of 8 per cent. was a separate and distinct contract which the purchasers were bound to perform, and not, as they contended, in the nature of a penalty to secure the completion of the purchase within a reasonable time. The case well illustrates the principle that stipulations of this kind will have effect given to them according to their natural meaning.[2]

Possession returned.

§ **1449.** Again where a purchaser under a decree accepted possession, and on a report of an objection returned possession, he was ordered to pay interest from the time at which he took possession, or at which a title was shown under which he might safely have done so, and even for the time during which he returned the possession.[3]

Purchase-money appropriated and notice given.

§ **1450.** But where a purchaser had been let into possession at the intended time for completion, and afterwards, difficulties having without any fault on his part arisen to delay completion, paid the purchase-money into a separate account at a bank, and gave notice to the vendors that the money was appropriated

[1] *Herbert* v. *Salisbury and Yeovil Railway Co.*, L. R. 2 Eq. 221.

[2] See *supra*, § 1416.

[3] *Binks* v. *Lord Rokeby*, 2 Sw. 222. See also *Att.-Gen.* v. *Christchurch*, 13 Sim. 214.

to the purposes of the contract, and that he was ready to complete; Lord Romilly M.R. held that he was not chargeable with interest after the date of his notice, but must pay to the vendors any interest he had received from the bank in respect of the sum paid in.[1]

Profit made on appropriated purchase-money.

§ 1451. For where the purchaser in possession makes any profit on any part of the appropriated purchase-money, he is discharged from the payment of interest only in respect of the purchase-money on which he has made no interest. Thus where a purchaser, on entering into possession, paid the money into his bankers, and gave the vendor notice that he was ready to invest in such manner as the vendor should require; and during the investigation of the title kept a balance at his banker's equal to the purchase-money, except on four days, when it was a little less; Leech V.C. said it was clear that the purchaser had made some profit with the money, "first, because his balance was in a small degree and for a few days reduced below the amount of the purchase-money, but principally because the purchase-money supplied the place of that balance which he must otherwise have maintained at his banker's:" he therefore directed an inquiry as to the average balance which the purchaser had maintained at his banker's for the three years preceding the purchase, and the average balance during the period of the investigation of the title, and declared that in respect of the difference between those balances he was not chargeable with interest on his purchase-money.[2]

Contract exempting purchaser from interest.

§ 1452. So strongly does the Court hold to this principle, that a purchaser in possession shall pay interest on the unpaid purchase-money, that it will look at any contract which appears to prevent the

[1] *Kershaw* v. *Kershaw*, L. R. 9 Eq. 56. Distinguish *Dickenson* v. *Heron*, St. Leon. Vend. 516.

[2] *Winter* v. *Blades*, 2 S. & S. 393. Lord St. Leonards doubted the correctness of this decision. St. Leon. Vend. 514.

application of this rule by the light of this general principle of justice, and, it seems, refuse execution of it where it grossly violates this principle: for "a Court of Equity interposes only according to conscience."[1]

Exemption not enforced.

§ 1453. So that where a contract stipulated that the interest on the remainder of the purchase-money should not commence till Lady-day next, in case the title should be perfected and the assurances executed at that time; and if not, then should commence on the execution of such assurances; and the purchaser was let into possession under a stipulation in the contract to that effect, but the assurances were not executed for forty years; the House of Lords held that the purchaser's exemption from interest, though permissible if the contract had been speedily executed, would not, under such circumstances and with such length of time, be enforced by a Court of Equity.[2]

Purchaser dispossessed.

§ 1454. In an Irish case, the purchaser, who had been allowed to go into possession without paying the purchase-money, and had afterwards been forcibly dispossessed, sued for specific performance and damages. He was charged with interest for the period during which he was in possession, and, as from the time when the vendor retook possession, interest was not charged against the purchaser nor the rents against the vendor; and no damages were given.[3]

Possession under statutory power.

§ 1455. Where a corporation, acting under some special Act of Parliament incorporating the Lands Clauses Act, 1845, takes possession of land by virtue of its statutory powers before the price has been ascertained, the vendor is generally entitled to interest on the purchase or compensation moneys from the date of the taking possession.[4]

[1] *Per* Lord St. Leonards in *Birch* v. *Joy*, 3 H. L. C. at p. 598.

[2] *Birch* v. *Joy*, 3 H. L. C. 565.

[3] *Johnston* v. *Johnston*, I. R. 3 Eq. 328.

[4] *Rhys* v. *Dare Valley Railway Co.*, L. R. 19 Eq. 93; *Firth* v. *Midland Railway Co.*, L. R. 20 Eq. 100. In *Re Piggott and Great Western Railway Co.*, 18 Ch. D. 146. See

Price ascertained by verdict of jury.

§ 1456. But in a case where a local Board compulsorily purchased lands which were subject to tenancies, and the price of the landlords' [vendors'] interest was ascertained by the verdict of a jury, the Court held that interest was payable by the purchasers from the date of the verdict, notwithstanding that they could not and did not obtain actual possession of the property for some time afterwards; but it was at the same time held that, if the vendors had received any rents since the verdict, the amount of those rents would be deducted from the interest.[1] This case was doubted by Jessel M.R.,[2] and certainly seems to require reconsideration.

Occupation rent.

§ 1457. In one case, where the purchaser had been let into possession under the contract, and objected to the title, he was allowed to remain in possession on payment of an occupation rent: but the case seems to have been one of arrangement, not of strict right.[3]

In sales of reversionary estates.

§ 1458. In sales of reversionary estates, the purchaser cannot, of course, be let into actual possession or receipt of the profits of the estate purchased. It becomes, therefore, necessary to inquire from what period he is to be treated as if he were in possession, so as to render him liable to the payment of interest on his unpaid purchase-money: for the wearing away of the lives, or of the time after which the reversion will vest in possession, is justly considered equivalent to possession, and as creating in the purchaser a liability to pay interest.[4]

also *Re Shaw and Corporation of Birmingham*, 27 Ch. D. 614; and cf. *Fletcher* v. *Lancashire and Yorkshire Railway*, [1902] 1 Ch. at p. 908; 71 L. J. Ch. 590.

[1] *Re Eccleshill Local Board*, 13 Ch. D. 365.

[2] In *Re Piggott and Great Western Railway Co.*, 18 Ch. D. at p. 154; and see *Catling* v. *Great Northern Railway Co.*, 18 W. R. 121; 21 L. T. N. S. 17.

[3] *Smith* v. *Lloyd*, 1 Mad. 83; S. C. *s.n. Smith* v. *Jackson and Lloyd*, 1 Mad. 618.

[4] See, in addition to the subsequent cases, *Davy* v. *Barber*, 2 Atk. 489; *Robertshaw* v. *Bray*, 14 L. T. 101; 12 Jur. 224.

From what time interest runs.

§ 1459. The purchaser of such an estate pays interest from the time at which he became by law entitled to receive the rents,[1] which is *primâ facie* the time fixed for completion of the contract;[2] or, where the contract specifies no time for completion, the time at which a good title was first shown or the title was accepted.[3] This may of course be modified by contract: so where the contract stipulated that the rents should belong to the purchaser only from the time the contract was completed, the vendor was held not entitled to claim interest on the unpaid part of the purchase-money.[4]

Sale of reversion by the Court.

§ 1460. In cases of sales of reversions under the Court, interest will, it seems, run from the time when the Master's certificate of the result of the sale becomes binding.[5] But where a time is specified at which the money ought to be paid into Court, that, and not the confirmation of the sale, will, it appears, be the time from which interest will run; as in the case of an estate in possession that would be the time at which a purchaser would be entitled to enter into the receipts of the rents. So where the 25th December, 1849, was appointed for the payment of the money into Court, but the abstract was delivered in September, 1851, and a good title was not made out till March, 1852, interest was directed to be paid from the 25th December, 1849.[6]

Payment of purchase-

§ 1461. Possession of the estate and of the purchase-money being, as we have seen,[7] mutually exclusive, the

[1] *Champernowne* v. *Brooke*, 3 Cl. & Fin. 1 (overruling *Blount* v. *Blount*, 3 Atk. 636).

[2] *Bailey* v. *Collett*, 18 Beav. 179; *Wallis* v. *Sarel*, 5 De G. & Sm. 429; *Dacy* v. *Barber*, 2 Atk. 489; *Owen* v. *Davies*, 3 Atk. 637.

[3] *Enraght* v. *Fitzgerald*, 2 Dr. & War. 43, reversing Lord Plunkett's decision S. C. 2 Ir. Eq. R. 87, that interest should run from the date of the report of good title; and see *supra*, § 1402.

[4] *Brooke* v. *Champernowne*, 1 Cl. & Fin. 589; and see *Weddall* v. *Nixon*, 17 Beav. 160.

[5] *Ex parte Manning*, 2 P. Wms. 410. Cf. Seton, 1397, 1398; Dart, Vend. (5th ed.), 1200. See also *Child* v. *Lord Abingdon*, 1 Ves. Jun. 94; *Trefusis* v. *Lord Clinton*, 2 Sim. 359.

[6] *Wallis* v. *Sarel*, 5 De G. & Sm. 429.

[7] *Supra*, § 1399.

vendor is generally entitled to call on a purchaser in possession to pay the purchase-money into Court. money into Court.

§ **1462**. Where the purchaser is in possession, and the vendor has disclosed such a title as the purchaser ought to accept, the vendor's right thus to proceed is clear. And the Court will pursue this course where the purchaser in possession admits a good title, though he may claim the right to object, it not having been approved by counsel.[1] Title made out.

§ **1463**. On the other hand, it is a general rule, that where it is through the laches of the vendor that the title remains incomplete, the Court will refuse an application for the payment of the purchase-money into Court.[2] Title not made out.

§ **1464**. But where the want of a good title being shown is not from the default of the vendor, and the purchaser has not prejudiced the value of the property by his dealings with it when in possession, the Court will, it seems, put the purchaser to his election, either to pay in his purchase-money or to give up possession. Purchaser put to election.

§ **1465**. Thus, in a case before Lord Eldon, where the purchaser was let into possession, both parties acting in the confidence that the title would soon be made out, and that confidence was "not (to use his Lordship's words) made good, and that was a surprise upon both," his Lordship expressed the opinion that the purchaser should be put to his election, either to give up possession or to pay the money into Court: but on a subsequent day his Lordship said only that the purchaser ought, at least, to pay interest on his purchase-money; and the point was ultimately settled by agreement between the parties.[3] And notwithstanding some doubts cast upon the wisdom of this judgment in a subsequent case by Plumer V.C., who considered it to be "[illegible] imprudence of the vendor in letting the Instances.

[1] *Crutchley* v. *Jerningham*, 2 Mer. 502.

[2] *Fox* v. *Birch*, 1 Mer. 105.

[3] *Gibson* v. *Clarke*, 1 V. & B. 500.

vendee into possession before the questions upon the title were disposed of,"[1] the Court will generally put a purchaser in possession, where the title has not been made out, to his election, either to pay in the purchase-money or to give up possession;[2] and the Court did so in one case where it was part of the contract that 5,000*l.*, part of the purchase-money (6,300*l.*), should be secured by a mortgage of the estate.[3] In some cases[4] two months, and in another[5] one month, have been allowed the purchaser to elect whether of the alternatives to accept.

Possession according to contract.

§ 1466. Where the contract allows possession to be taken before the completion of the title, the Court will not generally order the payment of the purchase-money into Court on the score of possession.[6]

Pryse v. *Cambrian Railway Co.*

§ 1467. Thus, where by the contract the purchasers, a railway company, were to be at liberty to take possession on depositing a specified sum of money in a bank, and they duly made the deposit and entered into possession of the land and made their railway over it, though they afterwards for a long time neglected to complete, the Court of Appeal in Chancery held that the vendor was not entitled, on interlocutory motion, to have the purchase-money paid into Court.[7]

[1] *Clarke* v. *Elliott*, 1 Mad. at p. 607.

[2] *Clarke* v. *Wilson*, 15 Ves. 317; *Smith* v. *Lloyd*, 1 Mad. 83; *Wickham* v. *Evered*, 4 Mad. 53; *Tindal* v. *Cobham*, 2 My. & K. 385. See also *King* v. *King*, 1 My. & K. 442; and *Curling* v. *Austin*, 2 Dr. & Sm. 129, 139 (in which case the purchaser had been in possession without receipt of the rents); *Greenwood* v. *Turner*, [1891] 2 Ch. 144.

[3] *Younge* v. *Duncombe*, You. 275.

[4] *Younge* v. *Duncombe*. *Tindal* v. *Cobham*, *Curling* v. *Austin*, *ubi supra*.

[5] *Wickham* v. *Evered*, *ubi supra*.

[6] *Morgan* v. *Shaw*, 2 Mer. 138; *Gibson* v. *Clarke*, 1 V. & B. 500; *Gell* v. *Watson*, 3 Mad. 225.

[7] *Pryse* v. *Cambrian Railway Co.*, L. R. 2 Ch. 444. Consider *Tomlinson* v. *Manchester and Birmingham Railway Co.*, 2 Rail. C. 104 (where the acts relied on were done under a mistake); *Pell* v. *Northampton and Banbury Junction Railway Co.*, L. R. 2 Ch. 100, 102; *Capps* v. *Norwich and Spalding Railway Co.*, 2 N. R. 51 (where Kindersley V.C. seems to have considered that the company had bought the right to possession by paying part of the price).

Cooper v. L. C. and D. Railway Co.

§ 1468. But in another railway case, where the purchasing company were by the contract allowed to take possession, but the contract also contained a clause providing that the vendors should nevertheless retain their lien for the unpaid purchase-money, and all rights and remedies incident to such lien, Kindersley V.C. held that the fact of the company having been let into possession did not prevent the vendors from applying to have either payment into Court of the unpaid balance of the purchase-money or delivery up of possession, and he ordered such payment or delivery to be made within a month, on the terms, however, that if possession were delivered up, the vendors should, within a fortnight after such delivery, pay into Court the instalment of the purchase-money which they had already received.[1]

Possession under other title.

§ 1469. If the purchaser happens to be in possession under some other title than the contract, this is a circumstance against calling for the payment of the purchase-money into Court; as where the purchaser was in possession not under the contract for sale, but as tenant to the vendor at the time of the purchase;[2] and where the purchaser was a tenant in common with the vendor, and had with his consent been in receipt of the rents of the whole.[3]

Faulkner v. Llewellin.

§ 1470. In a case where the contract of which the plaintiff sought specific performance was that, when a house of the plaintiff should be completed, he would grant to the defendant and the defendant would accept a lease of it for twenty-one years, and the defendant took possession of the house before it was completed, and occupied it for a year, but refused to pay rent; a motion by the plaintiff that the defendant should be

[1] *Cooper* v. *London, Chatham, and Dover Railway Co.*, 14 W. R. 985.

[2] *Bonner* v. *Johnston*, 1 Mer. 366.

[3] *Freebody* v. *Parry*, Coop. 91; cf. *Walters* v. *Upton*, Coop. 92, n., which appears to depend on the circumstances stated by Sir Samuel Romilly, *arguendo*, in the case to which it is a note.

ordered to pay the year's rent into Court was refused, on the ground that the money asked for was no part of the contract, nor was the defendant in possession under it.[1]

Acts of ownership.

§ 1471. Where the mere taking possession of the property does not furnish any ground for ordering the payment of the money into Court, the order will yet be made, and without giving the option of delivering up possession, where the purchaser in possession commits acts of ownership, particularly acts occasioning the deterioration of the property;[2] and this, even though the title may not have been made out,[3] or the purchaser may be in possession according to the terms of his contract.[4] The ground of this proceeding is that by such acts the purchaser is altering the property which constitutes the security of the vendor for his purchase-money, and diminishing the value of the vendor's lien on the estate.[5]

Instances.

§ 1472. Hence, acts of ownership which are clearly an improvement to the estate will not support such an application to the Court:[6] and hence, also, acts which may not show that the occupier considers himself the owner, and so will not justify a decree of specific performance against him without further investigation of the title, may yet be a ground for an order to pay the money into Court, and the appointment of a receiver; so that in one case stubbing up an osier-bed, levelling the land and filling up a pond, were held to justify an order for payment and the appointment of a receiver, but a reference of title was at the same

[1] *Faulkner* v. *Llewellin*, 31 L. J. Ch. 549.

[2] *Pope* v. *Great Eastern Railway Co.*, L. R. 3 Eq. 171.

[3] *Bonnor* v. *Johnston*, 1 Mer. 366.

[4] *Dyson* v. *Astley*, 19 Ves. 564; S. C. 1 Mer. 133, 378, n.

[5] *Cutler* v. *Simons*, 2 Mer. 106, where a list of acts upon which such orders had been made is given. See also *Pope* v. *Great Eastern Railway Co.*, L. R. 3 Eq. 171; *Ballard* v. *Snutt*, 15 Ch. D. 122; *Lewis* v. *James*, 32 Ch. D. 326; *Greenwood* v. *Turner*, [1891] 2 Ch. 144.

[6] *Bramley* v. *Teal*, 3 Mad. 219.

time made.[1] In another case, Lord Eldon took into consideration the unreasonable delay which had been caused by the purchaser in possession as well as his acts of ownership.[2]

Income tax where purchase-money paid into Court

§ 1473. Although, as we have seen, where delay occurs in the completion of a contract and the purchase-money bears interest, the purchaser paying such interest to the vendor is entitled to deduct the income tax on the amount of the interest,[3] where the purchase-money is paid into Court, this deduction is not allowed: because payment into Court is not payment to the party as against whom the purchaser is entitled to deduct the tax. However the purchaser may, it seems, apply for the deduction when the money is paid out of Court.[4]

Procedure

§ 1474. The order for payment into Court may be made on motion,[5] and, if circumstances justify it, before the delivery of the defence.[6] In the Court of Chancery the order might be made before answer,[7] even though the defendant had filed no affidavit so as to bring the merits before the Court,[8] and though the acts of ownership relied on were not stated in the bill;[9] and the facts necessary to support such an application might be supplied by affidavit, whether stated in the bill and not admitted by the answer,[10] or not stated in the bill.[11]

[1] *Osborne* v. *Harvey*, 1 Y. & C. C. C. 116.

[2] *Burroughs* v. *Oakley*, 1 Mer. 52, 376, n.

Crane v. *Kilpin*, L. R. 6 Eq. at p. 335, *supra*, § 1426; *Bebb* v. *Bunny*, 1 K. & J. 216.

[3] *Bebb* v. *Bunny*, 1 K. & J. 216.

[4] *Tindal* v. *Cobham*, 2 My. & K. 385; *Wickham* v. *Evered*, 4 Mad. 53; *Greenwood* v. *Turner*, [1891] 2 Ch. 144; Seton (8th ed.), 2292. See also *Buck* v. *Lodge*, 18 Ves. 450; and R. S. C. Ord. XXXII. r. 6.

[6] *Bonner* v. *Johnston*, 1 Mer. 366; *Dixon* v. *Astley*, 1 Mer. 133.

[7] E.g. *Cooper* v. *London, Chatham and Dover Railway Co.*, 14 W. R. 985.

[8] *Blackburn* v. *Stace*, 6 Mad. 69.

[9] *Cutler* v. *Simons*, 2 Mer. 103. See now R. S. C. Ord. XIX. r. 4.

[10] *Boothby* v. *Walker*, 1 Mad. 197.

[11] *Crutchley* v. *Jerningham*, 2 Mer. 502.

Purchase-money in hands of stakeholder.

§ 1475. Where an order for payment into Court has been opposed, and the money is in the hands of a stakeholder who afterwards absconds, the loss has been held to fall on the party who opposed the order.[1]

When interest becomes due within Statute of Limitations.

§ 1476. It has been decided that, when interest is payable by a purchaser in possession, the time at which it first becomes due within the meaning of the 42nd section of the Statute of Limitations (3 & 4 Will. IV. c. 27) is the time when the purchase-money becomes actually payable, though it (the interest) may have to be calculated from a much earlier date. In the case referred to the contract, made in March, 1811, stipulated that the purchase-money should be paid on the following 13th of May, but the transaction remained uncompleted for upwards of forty years under circumstances which kept alive the vendor's right to the purchase-money: it was held that all the arrears of interest from the 13th of May, 1811, were recoverable by the persons representing the vendor.[2]

[1] *Fenton* v. *Browne*, 14 Ves. 144; *Burroughs* v. *Oakley*, 1 Mer. 52.

[2] *Toft* v. *Stevenson*, 5 De G. M. & G. 735. Cf. S. C. *s. n. Toft* v. *Stephenson*, 7 Ha. 1; 1 De G. M. & G. 28.

CANADIAN NOTES.

Interest, etc.

In a suit for specific performance, even where the purchaser has taken possession of the premises, it was held in *Tracy* v. *Mitchell*, 21 Grant's Ch. 349, that, as a general rule, he is only liable for arrears of interest for a period of six years prior to the filing of the bill. It was also held that, where the purchaser dies, the rights of encumbrancers intervening, the vendor is entitled to a charge on the land, in the hands of the heirs, for a period beyond the six years in order to prevent circuity of action. The statute applicable to the matter was at the date of this decision as follows. "No arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent or in respect of any legacy, or any damage in respect of such arrears of rent or interest, shall be recovered by any distress, action or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given, etc."

Under a contract for purchase of real estate providing that if from any cause whatever the purchase money was not paid at a specified time interest should be paid from the date of the contract the vendee is relieved from the payment of such interest while the delay in payment is caused by the wilful default of the vendor in performing the obligations imposed upon him.

A contract containing such a provision also provided for the payment of the purchase money on delivery of the conveyance to be prepared by the vendor. A conveyance was tendered which the vendee would not accept, whereupon the vendor brought suit for rescission of the contract which the Court refused on the ground that the conveyance tendered was defective. He then refused to accept the purchase money unless interest from the date

of the contract was paid. In an action by the vendee for specific performance it was held, affirming the decision of the Court of Appeal of Ontario, that the vendee was not obliged to pay interest from the time the suit for rescission was begun, as, until it was decided, the vendor was asserting the failure of the contract and insisting that he had ceased to be bound by it, and after the decision in that suit he was claiming interest to which he was not entitled, and in both cases the vendee was relieved from obligation to tender the purchase money.

By the terms of the contract the vendor was to remain in possession until the purchase money was paid and to receive the rents and profits. It was held that up to the time the vendor became in default the vendee, by his agreement, was precluded from claiming rents and profits, and was not entitled to them after that time as he had been relieved from payment of interest and the purchase money had not been paid. *Hamps* v. *Elmsley*, 23 S.C.R. 623.

It was held in *Stevenson* v. *Davis*, 23 S.C.R. 629, that a person in possession of land under a contract for purchase by which he agrees to pay the purchase money as soon as the conveyances are ready for delivery and interest thereon from the date of the contract is not relieved from liability for such interest unless the vendor is in wilful default in carrying out his part of the agreement and the purchase money is deposited by the vendee in a bank or other place of deposit in an account separate from his general current account.

It was also held that the vendor is not in wilful default where delay is caused by the necessity to perfect the title owing to some of the vendors being infants nor by tendering a conveyance to which the vendee took exception but which was altered to his satisfaction while still in the hands of the vendor's agents as an escrow and before it was delivered.

Where a suit was brought to compel the acceptance of a mortgage for part of the purchase money, without interest, and the defendant in his answer thereto swore "I have always said that I was ready and willing and have offered to complete the sale of the said property to the plaintiff, provided interest on the unpaid purchas-

money was included in the mortgage;" and also, "I submit and insist that, unless the plaintiff will consent to pay interest on the unpaid purchase money aforesaid, he is not entitled to any relief in this Court;" the Court treated these statements as submitting to a decree for specific performance with interest reserved by the mortgage and made the decree accordingly. The agreement, on which the suit was based omitted to say that the mortgage which was to be given for part of the price should be made payable with interest, but parol evidence was admitted to shew that the real understanding of the parties was that interest should be made payable by the mortgage. *Gould* v. *Hamilton*, 5 Grant's Ch. 192.

In *Gray* v. *Rowat*, 16 Grant's Ch. 611, the plaintiff contracted to convey to the defendant a lot of land, receiving in exchange a lot from the defendant, and paying one hundred and fifty dollars with interest in annual instalments as the difference in value. The plaintiff conveyed his lot to the defendant, but defendant was unable for some time to convey to the plaintiff, not having received his patent for his land from the Crown. Ultimately, however, after a delay of several years, defendant obtained his patent. It was held that the plaintiff's remedy was conveyance of the defendant's lot, paying one hundred and fifty dollars according to the contract, but the time for paying said sum should count from the hearing, and that interest should be payable only from that time.

Compound Interest.

Where by the terms of contract for a sale of land it was stipulated that in the event of interest on the unpaid purchase money being unpaid at the end of each year, the same should be added to the principal, and the purchaser filed a bill praying for a conveyance upon payment of the amount of the principal and simple interest only, the Court refused to decree specific performance, except upon the terms of the payment of the interest according to the stipulation in the agreement, and *semble* that the purchaser would in like manner have been bound to pay this amount if the bill had been filed by the ven-

dor seeking to enforce the sale. *Per* Spragge V.-C.: "The rule which prevailed in this Court that a mortgagor, where the mortgage was tainted with usury, was relieved in equity upon payment of legal interest only does not apply. The mortgage was absolutely void by statute, and the Court might have been considered as doing rather a strong thing to refuse to restore the legal estate except upon payment of debt and legal interest. To require payment of the usurious interest would have been practically to contravene the statute and be at variance with the principle of the Court to protect the mortgagor from oppressive bargains. I think, therefore, that the purchaser, coming for specific performance can only obtain it by paying to the vendor all that he contracted to pay. Were the position of the parties in this Court reversed and the vendor the plaintiff, I am not clear that he could not enforce payment according to the terms of the contract. The stipulation objected to is not void, and the rule against it goes, I think, no further than this, that the Court will not enforce it when it has been made upon a loan of money. *Henderson* v. *Dickson*, 9 Grant's Ch. 379.

Claim for Interest, etc., as Affected by Conduct of Parties.

In *Hayes* v. *Ainsley*, 23 S.C.R. 623, the head-note is as follows: "Under a contract of purchase of real estate, providing that if from any cause whatever the purchase money was not paid at the certified time, interest should be paid from the date of the contract, the vendee is relieved from payment of such interest while the delay in payment is caused by the wilful default of the vendor in performing the obligations imposed upon him. A contract containing such provision also provided for the payment of the purchase money on delivery of the conveyance to be prepared by the vendor. A conveyance was tendered which the vendee would not accept, whereupon the vendor brought suit for rescission of the contract which the Court refused on the ground that the conveyance tendered was defective. He then refused to accept the purchase money unless interest from the date of the

contract was paid. In an action by the vendee for specific performance, it was held, affirming the decision of the Court of Appeal, that the vendee was not obliged to pay interest from the time the suit for rescission was begun, as, until it was decided the vendor was asserting the failure of the contract and insisting that he had ceased to be bound by it, and after the decision in that suit, he was claiming interest to which he was not entitled; and in both cases the vendee was relieved from obligation to tender the purchase money.

"By the terms of the contract the vendor was to remain in possession until the purchase money was paid, and receive the rents and profits. It was held that up to the time the vendor became in default the vendee by his agreement was precluded from claiming rent and profits and was not entitled to them after that time as he had been relieved from payment of interest and the purchase money had not been paid."

Repairs, Etc.

On taking an account of what was due to a plaintiff in possession, who claimed under a vendor of real estate in a specific performance suit, the Master allowed certain repairs and improvements, some of which were made after the commencement of the suit. On further directions the Court expressed the opinion that the only repairs made after suit commenced that could be allowed were such as it was the plaintiff's duty to make in order to save the premises from deterioration.

In taking an account of what was due to a plaintiff, in possession, who claimed under a vendor of real estate in a suit for specific performance, the Master allowed certain repairs and improvements, some of which were made after the commencement of the suit. On further directions the Court expressed the opinion that the only repairs made after suit commenced that could be allowed, were such as it was the plaintiff's duty to make in order to save the premises from deterioration. *Hawn v. Cashion*, 20 Grant's Ch. 518.

A vendor who contracts for a sale of property of which he has not taken possession, is accountable to the

purchaser for dilapidation by parties in possession before the vendor takes possession from them. A vendor in possession is, generally speaking, accountable for dilapidation that takes place before he shews a good title, where the dilapidations are such as a prudent owner or his tenants might have prevented. Where buildings are torn down, after the contract for sale and before the purchaser takes, or is bound to take possession, the vendor is *prima facie* accountable for the loss. *Fisken* v. *Wride*, 11 Grant's Ch. 245.

CHAPTER VI.

THE DEPOSIT.

Part payments.

§ 1477. It is common on sales of real estate for the purchaser to pay to the vendor at the time of the contract a portion of the purchase-money by way of part payment. This is very generally the practice in cases of sales by auction:[1] it is the exception in cases of sales by private contract. In many other cases payments are made to the vendor by way of instalment or part payment.

At an auction sale, the common condition is that the purchaser shall, immediately after the sale, pay a deposit of a specified percentage of the purchase-money. That means a payment in cash, and the vendor is not bound to accept the cheque even of a person in good credit, though it is usual, and generally reasonable, to do so.[2] Further, where the condition is in the above-mentioned form, and cash is not immediately forthcoming for the deposit, the vendor is not bound to wait even until the next day for the cash, and may proceed at once to sell to another purchaser.[3]

Deposit.

§ 1478. The deposit, unless paid on any special terms, is not merely part payment but is an earnest: so

[1] Note that where, on a sale by auction, there is a condition for the forfeiture of the deposit if the purchase be not completed within a certain time, the Court will generally relieve against the lapse of time. See *per* Lord Redesdale in *Lennon* v. *Napper*, 2 Sch. & Lef. at p. 684.

[2] *Johnston* v. *Boyes*, [1899] 2 Ch. 73, 78; *Farrar* v. *Lacy Hartland & Co.*, 25 Ch. D. at p. 642; 31 Ch. D. at pp. 46, 48.

[3] *Johnston* v. *Boyes*, *ubi supra*.

that on the one hand if the contract be performed, it is brought into account as part payment: on the other hand, if the purchaser make default, it may be retained by the vendor. The deposit is therefore a security for the performance of the purchaser's part of the contract. The authorities have not been uniform on this question, but the weight of authority is in favour of the statement above made.[1] Where without any default on the part of the purchaser the contract fails, the deposit and all other part payments ought to be repaid.[2] And upon a summons under the Vendor and Purchaser Act, 1874, the Court has power to order the repayment of the deposit with interest where the ground for making the order does not affect the validity of the contract:[3] but by reason of the language of the 9th section of that statute it has no power to make such an order where such ground does affect the existence or validity of the contract.[4]

Purchaser's lien.

§ 1479. The payment of the deposit or part payment to the vendor or his agent creates a lien for the amount paid on the vendor's interest in the land, or other property the subject-matter of the contract.

[1] *Palmer* v. *Temple*, 9 A. & E. 588; *Ockenden* v. *Henly*, E. B. & E. 492; *Collins* v. *Stimson*, 11 Q. B. D. 142; *Howe* v. *Smith*, 27 Ch. D. 89, where the earlier cases were considered. See, too, *per* Lord Macnaghten in *Soper* v. *Arnold*, 14 App. Cas. at p. 435, "The deposit serves two purposes: if the purchase is carried out it goes against the purchase-money; but its primary purpose is this—it is a guarantee that the purchaser means business."

[2] See, *e.g.*, *Day* v. *Singleton*, [1899] 2 Ch. 320, where the purchaser was held entitled to damages, as well as to the return of his deposit with interest. See, too, *Powell* v. *Marshall Parkes & Co.*, [1899] 1 Q. B. 710; *Smith* v. *Wallace*, [1895] 1 Ch. 385, where the purchaser had become entitled to treat the contract as rescinded; and *Whitbread & Co., Ltd.* v. *Watt*, [1901] 1 Ch. 911; [1902] 1 Ch. 835; 71 L. J. Ch. 424. Distinguish *Sprague* v. *Booth*, [1909] A. C. 576, 580, 581.

[3] *Re Hargreaves and Thompson*, 32 Ch. D. 454. See, too, *Re Walker and Oakshott's Contract*, [1901] 2 Ch. 383 (order made upon vendor's summons); and *Re Judd and Poland and Skelcher's Contract*, [1906] 1 Ch. 684; 75 L. J. Ch. 403, where the point of law decided in the last-cited case was overruled by the C. A.

[4] *Re Davis and Carey*, 40 Ch. D. 601.

"There can be no doubt, I apprehend," said Lord Cranworth, addressing the House of Lords, "that when a purchaser has paid his purchase-money, though he has got no conveyance, the vendor becomes a trustee for him of the legal estate, and he is, in Equity, considered as the owner of the estate. When, instead of paying the whole of his purchase-money, he pays a part of it, it would seem to follow, as a necessary corollary, that, to the extent to which he has paid his purchase-money, to that extent the vendor is a trustee for him: in other words, that he acquires a lien, exactly in the same way as if upon the payment of part of the purchase-money the vendor had executed a mortgage to him of the estate to that extent."[1]

Rose v. *Watson*.

§ 1480. In *Rose* v. *Watson*,[2] W., having successfully resisted a vendor's suit for the specific performance of a contract to purchase a building estate on the ground of the vendor's representations not having been fulfilled, filed a bill to enforce his lien on the estate for deposit and instalments of purchase-money with interest. The House of Lords, affirming the decision of Kindersley V.C., held the plaintiff entitled to such lien and interest in priority to persons to whom, after the contract, the vendor had mortgaged the property; and that although some of the plaintiff's payments were made after he had notice of the mortgage.

On the same principle the purchaser has a lien for his deposit, not only when the contract goes off for want of title, but also when it is rescinded under a condition entitling the purchaser, or the vendor, to rescind.[3]

In cases of lease,

§ 1481. The lien is not strictly confined to a case of

[1] *Rose* v. *Watson*, 10 H. L. C. at pp. 683, 684. See, too, *per* Lord Westbury in S. C. at p. 678.

[2] 10 H. L. C. 672. See also *Wythes* v. *Lee*, 3 Drew. 396, where the earlier cases are considered.

[3] *Whitbread & Co., Limited* v. *Watt*, [1901] 1 Ch. at p. 913 (Farwell J. dissenting from a dictum of Kay L.J. in *Rodger* v. *Harrison*, [1893] 1 Q. B. at p. 174); affirmed, [1902] 1 Ch. 835, 840.

simple purchase: it extends to the case of a lease, and entitles an intended lessee who has entered under the contract and expended money to a lien on the lessor's interest:[1] it extends, too, to a sub-purchaser: so that where A. sold to B. and received part payment from him, and B. sold to C. and received part payment from him, C. was held entitled to a lien on B.'s interest in A.'s estate.[2]

and sub-purchase.

Extent of lien.

§ **1482**. This lien in the case of a purchaser extends to (i) all instalments of the purchase-money;[3] (ii) interest thereon at 4 per cent. per annum;[4] (iii) sums paid under the contract as interest on the unpaid purchase-money; (iv) interest thereon;[5] (v) the costs of an unsuccessful action by the vendor against the purchaser;[6] and (vi) the purchaser's costs of investigating the title as well as his costs of action.[7]

Under Lands Clauses Act.

§ **1483**. It may be observed in passing that a vendor under the Lands Clauses Consolidation Act, 1845, has no corresponding lien on the land sold for the costs of an arbitration payable to him by the company.[8]

Mode of enforcing lien.

§ **1484**. The lien can, no doubt, be enforced in precisely the same way as a vendor's lien for unpaid purchase-money; and under the present practice[9] there

[1] *Middleton* v. *Magnay*, 2 H. & M. 233.

[2] *Aberaman Ironworks* v. *Wickens*, L. R. 4 Ch. 101.

[3] *Bryant* v. *Busk*, 4 Russ. 5; *Hick* v. *Phillips*, Prec. in Ch. 575. See, too, *Graves* v. *Wright*, 2 Dr. & War. at p. 79; and cf. *Mycock* v. *Beatson*, 13 Ch. D. at p. 386.

[4] *Lord Anson* v. *Hodges*, 5 Sim. 227; *Webb* v. *Kirby*, 7 De G. M. & G. 376; *Wythes* v. *Lee*, 3 Drew. 396.

[5] *Rose* v. *Watson*, 10 H. L. C. 672.

[6] *Middleton* v. *Magnay*, 2 H. & M. 233; *Turner* v. *Marriott*, L. R. 3 Eq. 741.

[7] *Pearl Life Assurance Co.* v. *Buttenshaw*, [1893] W. N. 127 (purchaser's action); *Kitton* v. *Howell*, [1904] W. N. 21 (vendor's action); *Carlish* v. *Salt* (purchaser's action), [1906] 1 Ch. 335, 341; 75 L. J. Ch. 175; *Re Furneaux and Aird's Contract*, (purchaser's summons—vendor not appearing), [1906] W. N. 215.

[8] *Earl Ferrers* v. *Stafford and Uttoxeter Railway Co.*, L. R. 13 Eq. 524; *Walker* v. *Ware, Hadham, and Buntingford Railway Co.*, L. R. 1 Eq. 195; *Gould* v. *Staffordshire Potteries Waterworks Co.*, 5 Ex. 214.

[9] See especially Jud. Act, 1873, s. 24, sub-s. 7.

can, it is conceived, be no difficulty in giving full effect to the purchaser's rights. For—

i. Vendor plaintiff.

(i.) If the vendor be plaintiff, the purchaser (defendant) resisting specific performance may deliver a counter-claim, asking for a personal order for repayment of the amount paid and interest, and for a declaration of his lien on the plaintiff's interest for those sums and costs; and on the plaintiff's action failing such relief would clearly be granted to the defendant.

ii. Purchaser plaintiff.

(ii.) If the purchaser be plaintiff, he will frame his claim in the alternative, asking for specific performance or the repayment of the amount paid and the enforcement of his lien, and obtain relief accordingly.[1]

Deposit in hands of auctioneer.

§ **1485**. Where the deposit which the purchaser seeks to recover by action is in the hands of the auctioneer at the time when the action is commenced, and is a large sum, the purchaser may properly make the auctioneer a party to the action. If the sum is small, the auctioneer ought not to be made a party unless and until he has refused to pay it into Court.[2]

Weston v. *Savage*.

§ **1486**. In a case where the contract was for the sale of a term of twelve and a half years in a public-house (a going concern), and the abstract showed that the lessors had a right to determine the lease at the end of five years, it was held that the purchaser was entitled to rescind the contract, and sue for the repayment of the deposit and interest, without waiting even until the day fixed by the contract for the transfer of possession.[3]

Forfeiture of deposit

§ **1487**. On the other hand, where the purchaser,

[1] *Tucon* v. *National Standard Investment Co.*, 56 L. J. Ch. 529.

[2] *Earl of Egmont* v. *Smith*, 6 Ch. D. 469. Cf. *Yates* v. *Farebrother*, 4 Mad. 239.

[3] *Weston* v. *Savage*, 10 Ch. D. 736; *Re Head's Trustees and McDonald*, 45 Ch. D. 310. Distinguish *Smith* v. *Butler*, [1900] 1 Q. B. 694, where the purchaser was held to be not entitled to recover the deposit.

after making a payment by way of deposit, unjustifiably repudiates the contract, or it in any other way goes off through his default, the vendor is, in the absence of stipulation on the point, entitled to retain the money, treating it as having been paid to him as a guarantee for the purchaser's performance of the contract.[1]

But, in order to enable the vendor so to act, there must be acts on the part of the purchaser which not only amount to delay sufficient to deprive him of the equitable remedy of specific performance, but which would make his conduct amount to a repudiation on his part of the contract. Accordingly, where a purchaser of a reversion had, by delay, lost his right to enforce specific performance, but had not done anything amounting to a repudiation of the contract, he was held entitled to enforce the usual lien for a deposit which he had paid.[2]

Vendor unable to make title.

§ 1488. But conditions for forfeiture of the deposit to the vendor,[3] or its repayment without interest or costs,[4] cannot be enforced by a vendor who is unable to make a good title, unless the vendor's title has been accepted.

The practice of the Court of Chancery.

§ 1489. It may be convenient briefly to advert to the jurisdiction in respect of part payment of the purchase-money and the lien for it under the practice of the Court of Chancery.

[1] *Ex parte Barrell*, L. R. 10 Ch. 512, referred to in *Hart* v. *Porthgain Harbour Co.*, [1903] 1 Ch. 690, at p. 696; *Sprague* v. *Booth*, [1909] A. C. 576, 581; *Depree* v. *Bellborough*, 4 Giff. 479; *Kell* v. *Nokes*, 14 W. R. 908; *Collins* v. *Stimson*, 11 Q. B. D. 142; *Smith* v. *Butler*, [1900] 1 Q. B. 694; cf. *Mosser* v. *Wisker*, L. R. 6 C. P. 120, and distinguish *Casson* v. *Roberts*, 31 Beav. 613. See, too, *Essex* v. *Daniell*, L. R. 10 C. P. 538 (where there was a condition for forfeiture of the deposit); and, as to relief against forfeiture of the deposit, see *Lennon* v. *Napper*, 2 Sch. & Lef. at p. 684; *Moss* v. *Matthews*, 3 Ves. 279.

[2] *Levy* v. *Stogdon*, [1898] 1 Ch. at p. 186; [1899] 1 Ch. 5.

[3] *Want* v. *Stallibrass*, L. R. 8 Ex. 175.

[4] *McCulloch* v. *Gregory*, 1 K. & J. 286, 295.

Where vendor was plaintiff.

§ 1490. Where the vendor was the plaintiff, and failed in his suit for specific performance, the Court might dismiss the bill, and order the plaintiff to return the deposit with interest at 4 per cent.;[1] or it might declare the defendant entitled to a lien for these amounts and the costs of suit, and dismiss the bill subject to this declaration.[2]

The practice discretionary.

§ 1491. But the proceeding of the Court in this respect was discretionary, and depended on circumstances: for the Court, by dismissing the bill, sometimes meant to leave the parties to their remedies at Common Law, in which case it did not order the return of the deposit.[3]

Even since the passing of the Judicature Acts a case has occurred in which the Court of Appeal, though affirming the dismissal of a vendor's action for specific performance on the ground of the badness of the title, at the same time dismissed the purchaser's counter-claim for return of the deposit, on the ground that he could not have recovered it by means of an action at Law.[4] "I confess," said Lindley L.J., "such a result is not satisfactory. It arises from the double jurisdiction in Courts of Law and Equity, and the extraordinary jurisdiction which is exercised by Courts of Equity." If a similar case should come before a higher tribunal, it may be worthy of consideration whether a result more favourable to the purchaser might not, under the present practice,[5] be arrived at.

Where the purchaser was plaintiff.

§ 1492. With regard to the power of the Court of Chancery to give the purchaser relief in respect of his

[1] *Lord Anson* v. *Hodges*, 5 Sim. 227; *Webb* v. *Kirby*, 7 De G. M. & G. 376; *Sheard* v. *Venables*, 15 W. R. 1166.

[2] *Turner* v. *Marriott*, L. R. 3 Eq. 744.

[3] *Southcomb* v. *Bishop of Exeter*, 6 Ha. 225; *Rede* v. *Oakes*, 2 De G. J. & S. 518.

[4] *Re Scott and Alvarez' Contract*, *Scott* v. *Alvarez*, [1895] 2 Ch. 603, 614; referred to in *Re Hughes and Ashley's Contract*, [1900] 2 Ch. at p. 632.

[5] See Jud. Act, 1873, s. 24, and s. 25 (11).

deposit where he was the plaintiff, and specific performance was refused, considerable variation took place. But in *Todd* v. *Gee*[2] Lord Eldon, after fully considering the earlier cases, held that, except in very special cases, a bill could not be filed asking the performance of a contract, or in the alternative, an issue or an inquiry with a view to damages. This decision was followed in many subsequent cases.[1]

Where lien claimed.

§ 1493. But if the plaintiff prayed not the mere repayment of money but a lien upon the land, he was seeking for equitable and not merely legal relief, and he could maintain his bill for specific performance, or in the alternative, for a lien on the vendor's interest and the sale of it accordingly;[4] or he might enforce his lien by means of a supplemental bill.[5]

Where contract rescinded.

§ 1494. Where a contract was rescinded on the ground of fraud, surprise, or misrepresentation, and a deposit had been paid, it was within the jurisdiction of the Court, when decreeing rescission, also to order the deposit to be returned.[6]

Where defect of title is discovered after rescission.

§ 1495. But where the purchaser has accepted the vendor's title, has made default in completion, and the contract has been rescinded by the vendor by reason of such default, the purchaser cannot recover the deposit upon the subsequent discovery of the infirmity of the vendor's title.[7]

[1] *Denton* v. *Stewart*, 1 Cox, 258; S. C. 1 Ves. 276, n.; *Greenaway* v. *Adams*, 12 Ves. 395; *Cuillim* v. *Stone*, 14 Ves. 128. See also *Blore* v. *Sutton*, 3 Mer. 237, 248.

[2] 17 Ves. 273.

[3] *Kendall* v. *Beckett*, 2 R. & My. 88; *Jenkins* v. *Parkinson*, 2 My. & K. 5; *Van* v. *Corpe*, 3 My. & K. 269; *Sainsbury* v. *Jones*, 2 Beav. 462; S. C. 5 My. & Cr. 1; *Withers* v. *Edwards*, 2 Sim. 78.

[4] *Withes* v. *Lee*, 3 Drew. 396, compromised on appeal, 25 L. J. Ch. 389. Cf. *Blore* v. *Sutton*, 3 Mer. 237.

[5] *Westmacott* v. *Robins*, 1 De G. F. & J. 390.

[6] *Torrance* v. *Bolton*, L. R. 14 Eq. 121, 135; affirmed L. R. 8 Ch. 118. See, too, *Nottingham, &c. Brick Co.* v. *Butler*, 15 Q. B. D. 261; 16 Q. B. D. 778.

[7] *Soper* v. *Arnold*, 37 Ch. D. affirmed 14 App. Cas. 429.

PART VI.

SOME CONTRACTS IN PARTICULAR.

CHAPTER I.

CONTRACTS FOR THE SALE OF SHARES.

Subject of the chapter.

§ 1496. The subject-matter of this chapter is contracts for the sale of shares[1] between an existing and an intending shareholder, not contracts for the taking of shares from a company by an applicant. Contracts of the latter kind have been referred to in a previous part of this treatise.[2]

Nature of the relief.

§ 1497. The vendor or purchaser of shares may generally, as we have already seen,[3] maintain an action for the specific performance of the contract:[4] he will be entitled to a direction that the defendant execute a proper deed of transfer and concur in all steps necessary to procure its registration, and also, in the case of the vendor being plaintiff, to a declaration of his right to indemnity in respect of calls on the shares accruing after the purchaser has become the owner in Equity:[5]

[1] The shares mentioned in this chapter are, of course, shares in companies. As to the nature of such shares, see *per* Farwell J., in *Borland's Trustee* v. *Steel Brothers & Co.*, [1901] 1 Ch. at p. 288.

[2] *Supra*, § 76.

[3] *Supra*, § 77.

[4] As to proceedings under the Companies (Consolidation) Act, 1908, s. 32, see *supra*, § 1141.

[5] As to the form of the judgment in such a case, see *Evans* v. *Wood*, L. R. 5 Eq. 9; *Paine* v. *Hutchinson*, L. R. 3 Ch. 388. See also *Sheppard* v. *Murphy*, I. R. 1 Eq. 490; 2 Eq. 511; 16 W. R. 948; approved in Cam. Scac., *Grissell* v. *Bristowe*, L. R. 4 C. P. 36, 51.

and where the circumstances of the case do not demand the whole of this relief, the plaintiff may receive so much as suits the necessities of the case: so, for example, the decree or judgment has in some cases been merely one for indemnity.

Relief at Common Law

§ 1498. The Courts of Common Law having recognized the liability of the purchaser to indemnify the vendor, actions were, before the Judicature Act came into operation, maintained on this liability in those Courts.[1]

Contracts where made

§ 1499. Contracts of this description are, for the most part, made on the Stock Exchange, and it has been long established that, in such cases, the contract must be held to be made with reference to the customs of that body, or such of them as are not unreasonable or otherwise illegal;[2] the customs being partly written and partly unwritten, and liable to change from time to time, and to be proved afresh, and possibly differently, in each succeeding case.

But contracts for the sale of shares are sometimes made off the Stock Exchange, and then they are not regulated by any special customs, though they are naturally construed with reference to the constitution of the company, as established by its special Act, charter of incorporation, or other constituent instrument.

Contracts on the Stock Exchange.

§ 1500. In order to comprehend the nature of contracts on the Stock Exchange, it must be observed that the members of the Stock Exchange consist of two classes, brokers and jobbers: that a broker is an agent of a vendor or purchaser of shares or stock: that a jobber is a dealer on his own account in the like commodities, who buys them for the purposes of re-sale at a profit: that on the Stock Exchange there are

[1] *Walker* v. *Bartlett*, 18 C. B. 845, which must be taken to overrule *Humble* v. *Langston* (7 M. & W. 517) on the point of indemnity. See, too, *Kellock* v. *Enthoven*, L. R. 8 Q. B. 458, affirmed 9 ibid. 241.

[2] *Nickalls* v. *Merry*, L. R. 7 H. L. 530.

two classes of contract, those for cash and immediate execution, and those for the "account:" and that, as regards the dealings for the account, there are three successive days or times which, according to the customs of the Exchange, govern the execution of such contracts: viz., 1st, the name day, when a purchasing broker or jobber has to give the name of the original or of a substituted purchaser to the vendor's broker; 2ndly, the account or settling day, which is [illegible] day after the name day:—on this day the price has to be paid to the vendor's broker; and 3rdly, a period [illegible] account day, allowed for the completion of the transfers of the shares, [illegible] required.

The practice of the Stock Exchange stated

[illegible] these facts in mind, the reader will [illegible] the practice on the Stock Exchange, [illegible] stated in the evidence of Mr. De Zoete [illegible] Lord Cairns in addressing the House of Lords in [illegible] *Nickalls* v. *Merry*,[1] "In the case supposed, where the jobber would stand as purchaser, he would on the day preceding such account day (which was usually called the 'name day') be bound to pass to the broker a ticket containing the name of a person, or of several persons, as the purchaser or purchasers of the said shares; or he might, if he pleased, pass his own name as such purchaser, in which latter case only would he have been bound himself to take to the shares. If the jobber had failed to pass to the broker such a name or names by the name day, the selling broker could have sold on the shares against him, and have compelled him to pay any loss thereon. Until the name day it was not seen who might stand ultimately either as purchasers or sellers, or, in other words, who might be the persons to transfer or to take transfers of shares, and until then a jobber might have

[1] L. R. 7 H. L. at pp. 530–531. See, too, *Ex parte Grant*, 2 Ch. D. 667.

had a great many transactions both of buying and selling with the same brokers or jobbers, or with various brokers or jobbers. On the name day in the case supposed, if the jobber having purchased had sold again, a ticket, containing the name of the person to whom the shares were to be transferred, would have been issued by and passed on from the ultimate purchasing broker to his seller, and so on through the hands of the other intermediate sellers and buyers in succession, who, whether acting as jobbers or as brokers, had dealt in the shares, until it reached the hands of the original selling broker. Every member passing a ticket was required to write on the back of it the name of the member to whom it was passed; such ticket would also have contained the amount of purchase-money agreed to be given for the shares by the ultimate purchasing broker, and also a note that he would pay the same. So many transactions of this kind took place during the account, that on the name day the ticket of necessity only remained in the possession of an intermediate jobber or broker for the time required to take the particulars of it. It sometimes happened that the same ticket passed through the same member's hands several times in fulfilment of bargains made with other members, and, as a matter of fact he had neither the opportunity, time, nor the means for making inquiries respecting the name so passed. The original selling broker would not have been bound to deliver a transfer of the shares to the ultimate purchasing broker until the expiration of ten days after the account day, and during these ten days the said purchasing broker could not have bought in the shares against the seller. During this time it was open to the original selling broker to object to the name passed by his buyer, in which case such buyer would of course have passed on the objection to the person from whom he received the name as hereinbefore mentioned, and practically such

buyer would have had no liability or interest in the question, as whatever grounds there might have been for objecting to the name would have had to be met by the person from whom it emanated, and who had originally issued the ticket, and the committee of the said Stock Exchange would, if appealed to by the selling broker, have decided as to the validity of any such objection, and would have required another name to be given in case they had considered it right to do so. But after the lapse of these ten days the selling broker was required to deliver the certificates and transfer of the shares to the said ultimate purchasing broker, or in default thereof, the latter could have bought in the shares against the seller. The usual course of business was for the selling broker to deliver the transfer, together with the corresponding ticket, to the said ultimate purchasing broker from whom he received the purchase-money. The said ultimate purchasing broker did not know to whom his ticket had been ultimately passed until the delivery of the transfer. According to the long-recognized and well-established rules and usages of the said Exchange, if the original selling broker did not deliver his transfer and certificates and obtain payment of the purchase-money within fifteen clear days from the name day, his immediate buyer was released from all loss caused by the default of the ultimate purchasing broker to pay for the shares, and the latter would alone remain responsible; in like manner if the member who issued the ticket containing the name of the intended transferee of the shares did not buy in, or attempt to buy in, the same shares within fifteen days from the account day, his immediate seller was released from all loss caused by the failure of any member through whose default the shares were not delivered to, and the purchase-money paid by the ultimate purchasing broker: the jobber had fulfilled all the obligations required of

him by the rules and usages of the said Stock Exchange in respect of his contract."

Positions of jobber and purchaser the same.

§ 1502. In this passage, and in several of the cases which have occurred, the jobber is spoken of as if his rights and liabilities were distinct from those of a broker. But the broker of a purchaser, and through him as principal the purchaser, appear to be in precisely the same position as a jobber.[1]

Contract with first purchaser.

§ 1503. Such being the practice, the contract of sale to a jobber has been determined to be to the effect that, at the settling day, he will either take the shares himself, in which case he must accept and register a transfer and indemnify the vendor, or he will give, as purchaser or purchasers, the name or names of one or more persons capable of contracting, and who have authorized him to contract for them, and to whom no reasonable objection can be made: and that when the vendor has, by executing a transfer to the nominees, accepted them as purchasers, and the nominees have accepted the shares, through the delivery to their brokers, on a payment by their brokers, of the transfers and certificates of shares, then two things follow, viz., (i.) a new contract arises between the original vendor and the nominees of the original purchaser; and (ii.) as a consequence the original purchaser is released and no action can be maintained against him in respect of the contract.[2] So that he is not in any sense a

[1] See *Mastel* v. *Paine* (2nd action), L. R. 6 Ex. 132, 170. Consider *Street* v. *Morgan*, 21 L. T. N. S. 432.

[2] *Coles* v. *Bristowe*, L. R. 4 Ch. 3, reversing S. C. L. R. 6 Eq. 149; *Grissell* v. *Bristowe*, L. R. 4 C. P. 36, reversing S. C. L. R. 3 C. P. 112; *Loring* v. *Davis*, 32 Ch. D. 625. In *Mastel* v. *Paine* (2nd action), L. R. 6 Ex. 132, Lord (then Mr. Justice) Blackburn subjected the whole matter to a very elaborate examination, and held that it was no part of the contract of a purchaser of shares to give in either his own name or that of his real principal: that he contracts to accept a transfer into the name which he furnishes, and to indemnify the vendor against all calls after the transfer is executed and delivered to him: that the vendor has no right to object to execute a transfer to any one named by the purchaser and does not, by executing a

guarantor of the performance of the new contracts by his sub-vendees.

Peculiarity of the contract.

§ 1504. The peculiarity of this transaction does not consist in the extinction of the original contract by the new one: that occurs in many cases: but in the right reserved by the original contract to the purchaser to compel the vendor to accept a new contract in lieu of the old one. In short, the original contract with the purchaser is one for sale and purchase, with a right reserved to the purchaser, under certain circumstances, to call on the vendor to enter into a new and substitutionary contract, and an obligation on the part of the vendor to do so. It is an effective contract to contract, in the sense that it is a contract for a future novation in certain events.

When is the original purchaser discharged?

§ 1505. Of the original liability of the first purchaser to be sued in specific performance and for indemnity there is no doubt. Let us now inquire a little more exactly what such original purchaser must have done to relieve himself from his original liability.

1st. He must give as purchaser the name of a person capable of contracting. Accordingly it has been decided that the passing on the name of an infant is no satisfaction of the jobber's liability.[1]

2ndly. He must give as purchaser the name of a

transfer, release the purchaser from his liability to indemnify. His Lordship held, as a consequence, that *Coles* v. *Bristowe* and *Grissell* v. *Bristowe* (*ubi supra*) were rightly decided, but on wrong grounds, and that *Maxted* v. *Paine* [1st action] (L. R. 4 Ex. 81) was wrongly decided. See, as to this judgment, *per* James L.J. in *Merry* v. *Nickalls*, L. R. 7 Ch. at p. 750. Lord Blackburn's views seem to be practically overruled by the decision of the House of Lords in the last-named case (L. R. 7 H. L. 530).

[1] *Merry* v. *Nickalls*, L. R. 7 Ch. 733; S. C. *sub nom.* *Nickalls* v. *Merry*, L. R. 7 H. L. 530 (reversing the decision of Bacon V.C. in S. C. L. R. 7 Ch. at p. 710, and overruling *Rennie* v. *Morris*, L. R. 13 Eq. 203); *Dent* v. *Nickalls*, 22 W. N. 218; *Watson* v. *Miller*, W. N. 1876, 18 (Hall V.C.); *Heritage* v. *Paine*, 2 Ch. D. 594. Cf. *Nickalls* v. *Farnham*, W. N. 1869, 118 (James, V.C.), and *Maynard* v. *Eaton*, L. R. 9 Ch. 414. See also *Brown* v. *Black*, L. R. 15 Eq. 363; 8 Ch. 939.

person who has authorized the original purchaser to bind him to a contract of purchase: so that passing on the name of a person who gave no authority is no satisfaction of the first purchaser's liability.[1] As regards these two points, it has been urged that if no objection was taken to the name within ten days after the settling-day, that being the period allowed for the approval or rejection of the name of the ultimate purchaser, the original objector lost his right to object: but the contrary has been held; the personal responsibility, and not the personal capacity or authority, being the only point left for inquiry and determination within the ten days.

3rdly. The original purchaser must give a name to which no reasonable objection can be taken. It seems that residence in Smyrna would be a reasonable objection.[2] This objection, if not taken within the ten days, would come too late.

Nominee need not be sub-vendee.

§ 1506. The nominee of the original purchaser, whether jobber or purchasing broker, is in most cases a sub-vendee. But this is not necessary. The exigency of the contract is satisfied if the name given as that of a purchaser be that of a person capable of contracting and who has contracted to take the shares. Thus, where the person named was a man of straw, who for a gratuity accepted the shares in a broken company, and the vendor's brokers did not object to the name given or require a better name, the original purchaser was held to have performed his contract, and so was no longer bound.[3]

Whether the original purchaser is bound to do anything more than produce a new contracting party, *i.e.* whether he is liable till the new purchaser has actually

[1] *Mastel* v. *Paine* (1st action), L. R. 4 Ex. 81.

[2] *Allen* v. *Graves*, L. R. 5 Q. B. 478, which case, however, was on a special contract.

[3] *Mastel* v. *Paine* (2nd action), L. R. 4 Ex. 203, affirmed L. R. 5 Ex. 132.

accepted the transfer of the shares, is a point which is hereafter considered.[1]

The new contract.

§ 1507. Where the nominee's name has been given, with his authority, by the jobber or purchasing broker, and such name has been accepted by the vendor by his executing the transfer to the nominee, and the nominee has through his broker paid for the shares and accepted the transfer and certificates, a new contract, as we have seen, arises between the vendor and the nominee.[2] This new contract may be enforced by an action for indemnity,[3] or by an action for specific performance and indemnity.[4]

When it arises.

§ 1508. In accordance with some of the authorities the new contract has, in the foregoing sections, been stated as arising when the nominee has paid for his shares and accepted the transfer and certificates, or, to put it in other terms, the original purchaser is only discharged when he produces a nominee who himself pays for the shares and accepts the transfer (and does not merely contract so to do).[5] But there are not wanting authorities which would place the constitution of the new contract at a possibly earlier stage, viz., when by the ticket the new purchaser has been signified to the original vendor, and the vendor has signified his acceptance to the new purchaser.[6] The point has never been precisely determined: and as the only notification that the original vendor accepts the new purchaser

[1] See *infra*, § 1508.

See *per* Cockburn C.J. in *Grissell* v. *Bristowe*, L. R. 4 C. P. at p. 51.

Davis v. *Haycock*, L. R. 1 Ex. 331; *Bowring* v. *Shepherd*, L. R. 6 Q. B. 309.

[2] *Sheppard* v. *Murphy*, 16 W. R. 948; L. R. 2 Eq. 544 (reversing S. C. L. R. 1 Eq. 490), approved in Cam. Scac. in *Grissell* v. *Bristowe*, L. R. 4 C. P. 36, 51; *Hawkins* v. *Maltby*, L. R. 1 Eq. 572; 3 Ch. 188; 6 Eq. 505; 4 Ch. 200; *Hodgkinson* v. *Kelly*, 6 Eq. 496.

[3] See *per* Cockburn C.J. in *Grissell* v. *Bristowe*, L. R. 4 C. P. at p. 51; *per* James L.J. in *Merry* v. *Nickalls*, L. R. 7 Ch. at p. 754.

[4] See *per* Brett J. in *Bowring* v. *Shepherd*, L. R. 6 Q. B. at p. 328; *per* Kelly C.B. in *Davis* v. *Haycock*, L. R. 1 Ex. at p. 381.

appears to be by delivery of the transfer on payment of the price, the point does not seem to be one of much practical importance.

No contract with intermediate purchasers.

§ 1509. The new contract is, as we have seen, between the original vendor and the ultimate purchaser or nominee. Between the original vendor and any of the intermediate parties there is no contract.[1]

Castellan v. Hobson.

§ 1510. In one case, however, it has been held that there is a right to indemnity in Equity on the ground of trust. The case alluded to is *Castellan* v. *Hobson*. There A. through his broker sold to a jobber, B. B. sold to C. through his broker. C.'s broker gave the name of D., who was a man of straw and was held to be a trustee for C. A. executed a transfer to D. and received the money: D. did not execute the transfer, and before registration the company was wound up. C. was held liable to indemnify A., on the grounds that A. was a mere legal owner of the shares and entitled to indemnity from the real equitable owner, and that C. was such owner. It may be doubted how far the case can be considered as an authority since the decisions in *Coles* v. *Bristowe*[3] and *Moxted* v. *Paine* (second action)[4] for it would appear that A.'s original contract of sale was liable to be extinguished by a new contract which he agreed to enter into with a nominee, and that by executing the transfer to D. he accepted him as purchaser, and it would seem to follow that he could look to him and to no one else for indemnity. The non-registration of the transfer, too, seems immaterial according to the more recent cases.

Viscount Torrington v. Lowe.

§ 1511. In *Viscount Torrington* v. *Lowe*,[5] the Court of Common Pleas held that no action could be maintained

[1] *Viscount Torrington* v. *Lowe*, L. R. 4 C. P. 26.

[2] L. R. 10 Eq. 47 (James V.C.). The case of *Viscount Torrington* v. *Lowe* does not appear to have been cited to the V.C. in this case. Cf. *Nickalls* v. *Farmers*, W. N. 1870, 118 (James V.C.)

[3] L. R. 4 Ch. 3.

[4] L. R. 1 Ex. 203; 6 H. & N. 486.

[5] L. R. 4 C. P. 26.

against the sub-vendee whose nominee had been accepted by the original vendor, and they expressed the further opinion that there was no equitable right against him.

Contract with registration guaranteed.

§ 1512. In some cases the ordinary form of contract is departed from, and a contract is made by the jobber or purchasing broker with registration guaranteed. This superadds an important obligation on the original purchaser, so that he has not completed his contract until he has either himself paid for the shares and registered the transfer, or has procured some nominee to do both these things. Therefore where the jobber procured a nominee to accept or pay for the shares, but the transfer was not registered, the jobber or original purchaser was still liable to a suit for specific performance and indemnity.[1]

Third person adopting the contract

§ 1513. Cases may, of course, often occur where, independently of the customs of the Stock Exchange, a third person may so adopt the purchaser's contract as to place himself in the shoes of the purchaser, and give to the vendor a direct right against himself. The practice of passing on shares before transfer executed gives great facilities for such a result to arise.

Shepherd v. Gillespie.

§ 1514. In one case W. directed his broker to buy shares in a discount company: the broker bought them from the plaintiff, and, on W.'s instructions, gave the name of G. (a director of the company) as purchaser. G. received the transfers made out in his name, retained them, and deposited them as security for the purchase-money, which was paid out of the company's funds and debited to G.'s firm. G. denied that he had assented to the shares being bought in his name; but Stuart V.C. held that G. had assented to the new contract, and accordingly made against him a decree for specific performance.[2]

[1] *Case* v. *Paine*, L. R. 6 Eq. 611.

[2] *Shepherd* v. *Gillespie*, L. R. 5 Eq. 293.

Shaw v. Fisher

§ 1515. A somewhat similar state of facts arose in an earlier suit. There A. sold to B., and B. sold to C. A. executed a transfer to C., which C. did not register. A. then sued B., and obtained a decree directing an inquiry as to A.'s title: the Master certified in effect that A., by executing the transfer to C., had precluded himself from making a title to B., and on this ground the bill was dismissed on further consideration.[1]

Morton's case.

§ 1516. So again, in the case of a contract between A. and a company to take shares and make certain payments, the registration by the company of a transfer by A. to B., before A. had made the payments entitling him to be registered as a shareholder, was held by Lord Selborne (sitting as a Judge of first instance) to be a new contract between B. and the company which extinguished the earlier contract between A. and the company.[2]

Plaintiff only equitably entitled

§ 1517. The following circumstances require consideration in actions of this description.

The plaintiff in some cases has been only equitably entitled to the shares, which have been registered in the name of some third person. This has been held no objection to a decree for specific performance or for indemnity to the plaintiff.[3]

Making a call before the contract

§ 1518. Whether the fact that, before the contract was made, a call was made on the shares of which the purchaser was ignorant, was a defence to a suit for the performance of a contract to buy the shares, was a point much considered in the successive stages of the litigation in *Hawkins* v. *Maltby*,[4] but can hardly be said to have been there decided. In fact there the call was made on the same day as the contract, but whether before or after did not appear. In the absence

[1] *Shaw* v. *Fisher*, 5 De G. M. & G. 596.

[2] *Morton's case*, L. R. 10 Eq. 101; *Lowe* v. *Hutchinson*, L. R. 3 Eq. 257; 3 Ch. 388; *Loring* v. *Davis*, 32 Ch. D. 625.

[3] L. R. 4 Eq. 572; 3 Ch. 188; Ex. 305; 4 Ch. 200.

of fraud or misrepresentation, it does not seem clear why the fact that a call, which the purchaser must have known could at any time be made, has been made should avoid the contract or prevent either party from enforcing it.

Power of directors to refuse transfer

§ 1519. Where the constitution of the company gives the directors a power to refuse to register transfers, the question arises whether the refusal on the part of the directors to register the purchaser, relieves him from the obligation of performing the contract.

This question must be answered differently according to circumstances.

i. Where vendor bound to effectuate transfer.

§ 1520. (i.) Where the contract is not made on the Stock Exchange, but is made with reference to the constitution of the company, or subject to its rules, and the constitution of the company requires the vendor to do all that is essential to the transfer, the vendor is under an obligation to procure the assent of the directors, and if he fail to do so, the purchaser is relieved from the contract, and if he have already paid his purchase-money in ignorance of this refusal, he may recover it back.[1]

ii. Where contract made on Stock Exchange.

§ 1521. (ii.) Where the contract is made on the Stock Exchange and subject to its rules, it is clear that the refusal of the directors to register the transfer is immaterial; for, according to the construction put upon such a contract, it is performed on the vendor's part by the delivery of the transfer and certificates, and the vendee is entitled to the right which he thereby acquires to procure himself to be registered, if the directors so choose: he is not entitled to an absolute and unconditional right to registration.[2] In a sale on the Stock Exchange it is no part of the vendor's duty, irrespective of express contract, to procure the

[1] *Wilkinson* v. *Lloyd*, 7 Q. B. 27; cf. *per* Lord Campbell C.J. in *Stray* v. *Russell*, 1 El. & El. at p. 900.

[2] *Rowley* v. *Bulby*, El. B. & E. 887; *Stray* v. *Russell*, 1 El. & El. 888.

registration of the transfer.[1] But he is under an implied obligation or duty not to do anything to prevent or interfere with the transferee's being put on the register so as to acquire the full benefit derivable from the transfer; and for a breach of this obligation or duty a transferor may be made liable to pay damages.[2]

(iii.) Where contract falls under neither i nor ii.

§ 1522. (iii.) There are numerous contracts for the sale of shares which fall under neither of the two classes just adverted to: and with regard to these it is more difficult to say what is the effect of the power of the directors to refuse registration, or of their actual refusal.

Opposing views of Lord Romilly M.R. and Lord Chelmsford

Opposite views have been expressed. On the one hand, Lord Romilly M.R. in one case expressed the view that every contract for the sale of shares is conditional on the company accepting the purchaser as a shareholder:[3] on the other hand, Lord Chelmsford intimated an opinion that in no ordinary case will the discretionary power in the directors furnish a defence. "The directors," he said, "may decline to register, but the transaction is complete as between transferor and transferee."[4]

The opinion expressed by Lord Romilly M.R. in the case referred to[5] can probably not now be sustained.

[1] *Stray* v. *Russell*, 1 E. & B. 883; *Skinner* v. *City of London, &c. Corporation*, 11 Q. B. D. 882; *London Founders' Association* v. *Clarke*, 20 Q. B. D. 576; *Casey* v. *Bentley*, [1892] 1 I. R. 376, 386, 387. As to purchases with registration guaranteed, see *supra*, § 1512.

[2] *Hooper* v. *Herts*, [1896] 1 Ch. 549, 559, 563. As to the measure of damages in such a case, see S. C. at pp. 560–562 and 564. Generally, in the case of a contract for the sale of shares, the measure of damages is the difference between the contract price of the shares and the market price at the time when they ought to have been delivered, and consequently damages for breach will not be given to a purchaser of shares where the contract price exceeded their value at the time for completion. *Re Schoenbacher, Stern* v. *Schoenbacher*, 98 L. T. 127, 129.

[3] *Birmingham* v. *Sheridan*, 3 Beav. 560.

[4] *Hawkins* v. *Maltby*, L. R. 6 Eq. at p. 194. See *per* Lord Romilly M.R. in *Hodgkinson* v. *Kelly*, L. R. 6 Eq. 496.

[5] *Birmingham* v. *Sheridan*, 3 Beav. 560.

Poole v. Middleton.

§ 1523. In a subsequent case before the last named Judge, the deed of settlement of the company provided that no shareholder should transfer his shares except in such a manner as the Board should approve: a shareholder contracted to sell his shares: the Board refused its consent to his making the transfer: and the vendor then refused to complete: the purchaser filed his bill, and obtained a decree on the ground that the deed of settlement did not prevent the sale of shares or give the directors an arbitrary will on such an occasion: in case the parties differed the conveyance was to be settled in Chambers.[1]

The duty of procuring registration.

§ 1524. Whether, independently of the rules of the Stock Exchange or of other special contract, the duty of procuring the transfer to be registered rests on the vendor or purchaser, has not been the subject of any conclusive decision. It is a point of great moment for the determination of the question now under our consideration: for, if it rests on the purchaser, his non-performance of his obligation can never prejudice the vendor. There are in the cases arising upon Stock Exchange contracts[2] numerous *dicta* which imply that, generally, the duty is upon the purchaser, and it is apprehended that this will be the decision of the question when it shall arise.[3]

Transfer not presented owing to default of defendant

§ 1525. It is settled, and indeed could hardly be doubted, that when through the fault or default of the defendant the transfer had not been presented for registration, and then a winding up had intervened, and there was no evidence to show that, if the transfer had been duly presented by the defendant, he would

[1] *Poole* v. *Middleton*, 29 Beav. 646.

[2] *Sheppard* v. *Murphy*, L. R. 2 Eq. 544; 16 W. R. 918; *Stray* v. *Russell*, 1 El. & El. 888; *Evans* v. *Wood*, L. R. 5 Eq. 9. *Hodgkinson* v. *Kelly*, L. R. 6 Eq. 496.

[3] See the observations of Lord Esher (then Brett M.R.) in *Skinner* v. *City of London, &c. Corporation*, 11 Q. B. D. at p. 887.

not have been accepted as transferee, the objection based on the refusal to transfer must fail.[1]

The winding up of the company.

§ 1526. The winding up of the company has in many of these cases been urged as an objection to the relief sought: here we must distinguish between cases in which the presentation of a petition was before and those in which it was after the making of the contract.

i. Petition presented before contract.

§ 1527. (i.) Where the petition has first been presented, then the contract has been made by both parties in ignorance of that fact, and then the petition has resulted in a winding up, there has been common mistake or common ignorance: and in such a case it appears that the Court could not compel the specific performance of the contract.[2]

ii. Petition presented after contract.

§ 1528. (ii.) But where the petition has been presented after the making of the contract the defence does not appear admissible: for the general rule, that the destruction or failure of the subject-matter of a contract after it is entered into is no defence, must prevail,[3] and if the contract cannot be performed *modo et formâ*, the Court can still give relief by way of indemnity.[4]

The defence in the latter case untenable.

§ 1529. The point has been urged in various forms. It has been said that the substitution of the one name for the other on the register of the company is part of the contract, and that by the winding up of the company this has become impossible: and further, as regards companies under the Companies (Consolidation) Act, 1908, that the effect of the 205th section of that Act is to render transfers after the commencement of the

[1] *Evans* v. *Wood*, L. R. 5 Eq. 9; *Paine* v. *Hutchinson*, L. R. 3 Ch. 388.

[2] *Emmerson's case*, L. R. 1 Ch. 433.

[3] *Coles* v. *Bristowe*, L. R. 6 Eq. 149; *Taylor* v. *Stray*, 2 C. B. N. S. 175.

[4] *Cruse* v. *Paine*, L. R. 6 Eq. 641, 653. *Bermingham* v. *Sheridan*, 33 Beav. 660, probably cannot be supported. Distinguish *Holmes* v. *Symons*, L. R. 13 Eq. 66.

winding up absolutely illegal and mere waste paper.[1] But neither of these arguments seems valid. As to the first, it may be replied that, unless by special contract, the vendor is not bound to procure the registration, but that duty rests on the purchaser,[2] and that in cases of contracts on the Stock Exchange the registration of the transfer is no part of the bargain: as to the second point, it is clear that the effect of the statute is not to make the transfer illegal or necessarily void, but to give a discretion to the liquidator, or the Court, or allow them to operate or not to operate as transfers.[3] In short, the question who is on the register is one between the company and the shareholder; the question who is to bear the calls and take the profits is one between the buyer and seller, with which the company is not concerned.[4]

[1] *Chapman* v. *Shepherd* and *Whitehead* v. *Izod*, L. R. 2 C. P. 228; *Sheppard* v. *Murphy*, I. R. 2 Eq. 514; 16 W. R. 948.

[2] See *supra*, § 1524.

[3] *Chapman* v. *Shepherd* and *Whitehead* v. *Izod*, *ubi supra*; *Emmerson's case*, L. R. 4 Ch. 433; *Sheppard* v. *Murphy*, I. R. 2 Eq. 544; 16 W. R. 948.

[4] See *per* Lord Romilly M.R. in *Hodgkinson* v. *Kelly*, L. R. 6 Eq. 496.

CHAPTER II.

CONTRACTS RELATING TO CONTINGENT INTERESTS AND EXPECTANCIES.

Such contracts void at Common Law.

§ **1530**. At Common Law it has been laid down that the possibility of succession is not an object of disposition, and that if the heir were to dispose of the succession during the life of the ancestor, such disposition would be void, though the inheritance should afterwards have devolved on him.[1] However, in a case before the Queen's Bench, the Court supported as valid a contract to sell an estate if it should be devised to the vendor by a person then living.[2]

Secus in Equity.

§ **1531**. In Courts of Equity contracts relating to expectancies have been long upheld,[3] and that although they may in some sort seem to have defeated the intentions of testators, or been in fraud of parental authority.

Instances.

§ **1532**. One of the earliest cases on the subject is *Wiseman* v. *Roper*,[4] where a covenant to settle an estate, to which the covenantor had only an expectancy as

[1] *Per* Lord Kenyon M.R. in *Jones* v. *Roe*, 3 T. R. 93. The Roman Law likewise prohibited such contracts. Pothier, Tr. des Oblig. Part I. chap. 1, sect. 4, § 2.

[2] *Cook* v. *Field*, 15 Q. B. 460.

[3] Cf. *Alexander* v. *Duke of Wellington*, 2 R. & My. 35. But a volunteer cannot enforce an agreement made by a purely voluntary deed to dispose of a mere expectancy. *Re Ellenborough*, [1903] 1 Ch. 697, 700. The statement attributed to Lord Eldon in *Carleton* v. *Leighton* (3 Mer. at p. 671), that the expectancy of an heir could not be made the subject of contract, seems an error of the reporter. Apparently the word *contract* is written for *conveyance*.

[4] 1 Rep. in Ch. 154.

heir, was after the descent of the lands specifically enforced against him.

Beckley v Newland.

§ 1533. In *Beckley* v. *Newland*,[1] the plaintiff and the defendant had married two sisters, who were the presumptive heiresses of Mr. Turgis, a very rich man, who had made and revoked several wills, and ultimately made one leaving a great estate to the defendant, and only a small one to the plaintiff. Previously to the execution of the will, the plaintiff and the defendant had entered into a contract for the equal division between them of what should be left to each of them; and this contract was upheld and specifically enforced by Lord Macclesfield, who said that the contract was "not disappointing the intent of the testator, for he did not design to put it out of either of the devisees' power to dispose of the estate after it should come to him; but, on the contrary, when the testator gave it to either of them, he by implication gave that person a power to dispose of the said estate when it should come to him." The same principle was pursued by his Lordship in another like case,[2] and was followed by Lord Hardwicke, in upholding the validity of the conveyance of a contingency or possibility on the death of a sister unmarried.[3]

Harwood v. Tooke.

§ 1534. In *Harwood* v. *Tooke*,[4] the plaintiff and the defendant, the celebrated John Horne Tooke, had made a parol contract to divide what should come to them from a testator: in satisfaction of this the plaintiff had given to the defendant Tooke a note for 4,000*l.*, which he had indorsed over to the other defendant, Sir Francis Burdett, for valuable consideration. All that Lord Eldon ultimately decided in the case may have been that the plaintiff had no equity to follow the note into

[1] 2 P. Wms. 182.

[2] *Hobson* v. *Trevor*, 2 P. Wms. 191.

[3] *Wright* v. *Wright*, 1 Ves. Sen. 409.

[4] 2 Sim. 192, from Mr. Maddock's MS. n.; 1 My. & K. 685.

the hands of this purchaser for value; and it appears from one of the reports that he expressed doubts whether the transaction between the plaintiff and the defendant Tooke was not a fraud on the testator, and whether the Court would at any rate assist in specifically performing such a contract. But the case has usually been treated as an authority for the validity of contracts relating to expectancies.[1]

Contract by sons to divide what they might receive from their father.

§ **1535**. In another case the contract seemed, at first sight, in fraud of the parental authority, but was upheld on a like ground to that taken by Lord Macclesfield. A contract had been entered into by two sons to divide equally between them whatever they might receive from their father in his lifetime or after his decease, by will or otherwise. It was very strongly argued that this was a scheme on the part of the sons to protect themselves from the consequences of misconduct, and to bid defiance to parental authority. But Shadwell V.C. held that, as the testator had the power of giving an estate to his sons, so that they should have only the personal enjoyment without power of alienation, and did not choose so to give it, but gave it absolutely, he had allowed it to become liable to all their antecedent contracts, and therefore to the contract in question of which specific performance was accordingly granted.[2]

Covenant to charge annuity on expectancy.

§ **1536**. Similar in principle is the case of *Lyde* v. *Mynn*,[3] where a husband granted an annuity for his life, and by way of further security covenanted to charge it on all the property he should, in the event of his wife's decease, become entitled to by her will or otherwise; and it was held that no objection could be

[1] See *per* Shadwell V.C. in *Wethered* v. *Wethered*, 2 Sim. 191; *Hyde* v. *White*, 5 Sim. 524; and *per* Lord Brougham in *Lyde* v. *Mynn*, 1 My. & K. 693.

[2] *Wethered* v. *Wethered*, 2 Sim. 183. See accordingly *Hyde* v. *White*, 5 Sim. 524; *Houghton* v. *Lees*, 1 Jur. N. S. 862; 3 W. R. 135 (Stuart V.C.).

[3] 1 My. & K. 683.

taken on the ground of its relating to a mere expectancy; and the Court accordingly specifically performed the covenant. And so, again, contracts respecting the costs of proceedings in lunacy, or the ultimate division of a lunatic's property, are not void.[1]

Flower v. *Buller.*

§ 1537. In a case decided by Denman J., a husband and his wife had assigned to one of the plaintiffs (who was held by the Judge to be a trustee for the other plaintiffs) all the interest to which the wife or the husband might become entitled under the will of C. (who had at the time, to the wife's knowledge, made his will leaving his residuary estate to her for her separate use), to secure 4,000*l.* borrowed by the husband for the payment of his debts: and C. had died without altering his will. It was held that the wife had power to charge, and had by the contract effectually charged, her expectancy.[2]

Circumstances under which such contracts not enforceable.

§ 1538. The circumstances attending such contracts as those now under discussion are oftentimes of such a kind as to prevent the Court from enforcing them. Such were the circumstances in *Morse* v. *Faulkner*[3] in the Exchequer, and in the more recent case of *Ryan* v. *Daniel*.[4] In the latter case each of two young officers in the army signed and gave to the other a document, by which each charged his estate with 1,000*l.* in favour of the other, in case the other should survive him, the consideration of each of these documents being the other of them: many years subsequently a correspondence passed between these officers with a view to a rescission of the transaction, but that intention was never carried into effect. The Court held that, looking at the circumstances of the transaction, the age and condition of the parties, and their subsequent correspondence, there was no equitable

[1] *Persse* v. *Persse*, 7 Cl. & Fin. 279.

[2] *Flower* v. *Buller*, 15 Ch. D. 665.

[3] 3 Sw. 429, n.

[4] 1 Y. & C. C. C. 60.

claim which the Court would enforce, but it retained the bill for twelve months, with liberty to bring an action to establish, if the plaintiff could, a legal debt.

Whether such contracts only personal.

§ **1539**. It has been judicially suggested that contracts made by a person before the devolution of the estate or other realization of his expectancy are purely personal, and only capable of being enforced against the contractor personally during his lifetime. In *Morse* v. *Faulkner*,[1] in 1792, Eyre C.B. speaking of such a case, said, "The surrenderor not having any title whatever to the premises, at the time of the surrender, his agreement would not raise a lien upon the land; and although the present plaintiffs might have been relieved if they had filed their bill against him in his lifetime, that is after his title had accrued, yet it does not follow that therefore they can be relieved against his heirs. Neither the land itself or the conscience of the present defendants is bound by this act of William the surrenderor." It is, however, believed that this view has not received any subsequent confirmation.

[1] 3 Sw. 429, n.; shortly reported, 1 Anstr. 11.

CHAPTER III.

CONTRACTS FOR PARTNERSHIP.

Such contracts generally not enforced

Partnership at will

§ 1540. As a general rule, the Court will not enforce specific performance of a contract to form and carry on a partnership.[1] And notwithstanding some early authorities more or less to the contrary,[2] it is clear that the Court would in no case compel performance of a contract to enter into a partnership not for a definite term:[3] for it might be dissolved as soon as entered upon, and the interference of the Court would thus become simply nugatory.

Where term defined and part performance

§ 1541. Where, however, the contract defines the term of the partnership, and there has been part performance of the contract, the Court may specifically execute it by decreeing the parties to execute a proper deed, and, if necessary, by restraining any partner from carrying on business under the partnership style with other persons, and from publishing notices of dissolution.[4]

Contracts to enter into partnership

§ 1542. Whether the Court would specifically enforce a contract not in terms to enter into a partnership, but to execute a deed of partnership to contain

[1] *Scott* v. *Rayment*, L. R. 7 Eq. 112; *Sichel* v. *Mosenthal*, 30 Beav. 371; and see *supra*, §§ 95, 843. Cf. *Lisle* v. *Reece*, [1902] 1 Ch. 53, 72 (agreement for purchase of an option to enter into partnership), affirmed, [1902] A. C. 461, *s. n. Reece* v. *Lisle*.

[2] See *per* Lord Hardwicke in *Buxton* v. *Lister*, 3 Atk. at p. 385; *Anon.*, 2 Ves. Sen. 629; *Anon.*, 1 Mad. Ch. 525, n.; *Hibbert* v. *Hibbert*, Collyer, Partn. 133.

[3] *Hercy* v. *Birch*, 9 Ves. 357; *Sheffield Gas Consumers Co.* (*Registered*) v. *Harrison*, 17 Beav. 294, *per* Kindersley V.C. in *New Brunswick, &c. Co.* v. *Muggeridge*, 4 Drew. at p. 698.

[4] *England* v. *Curling*, 8 Beav. 129; *Hibbert* v. *Hibbert*, Collyer, Partn. 133. Cf. the pleadings in *Black* v. *Capstick*, 12 Ch. D. 863; and see *Crowley* v. *O'Sullivan* (part performance), [1900] 2 I. R. 478, 487.

terms defined or ascertainable, has never, it is believed, been decided. The argument that such a judgment should be pronounced in order to give the plaintiff legal rights, seems of much less weight now that the Courts of Common Law and Equity are united.

Where contract illegal.

§ 1543. Contracts for partnership may in some cases be illegal, as amounting to sales of office, as contravening the laws regulating trade, or otherwise.[1] It is hardly necessary to observe that the Court will not in any way interfere for the benefit of parties claiming under such contracts, or in favour of contracts for partnership tainted with fraud, hardship, or improper conduct.[2]

Performance unenforceable.

Again, where the contract had reference to the manufacture and sale of a patent medicine, Lord Eldon considered that the Court could not decree specific performance, because, if the recipe were a secret, the Court had no means of enforcing its own orders.[3]

Relief on partnership articles.

§ 1544. There are of course a great many cases[4] in which Courts of Equity give specific relief on partnership articles: but these are not cases of specific performance of executory contracts.

Sale of share in partnership.

§ 1545. It may here be noticed that a contract for the sale and purchase of a share in a partnership may be specifically enforced; and in such a case the deed of assignment will contain an express covenant by the purchaser to indemnify the vendor against the liabilities of the business.[5]

[1] See *Hughes* v. *Statham*, 4 B. & C. 187; *Knowles* v. *Haughton*, 11 Ves. 168.

[2] *Vivers* v. *Tuck*, 1 Moo. P. C. (N. S.) 516; *Maxwell* v. *Port Talbot, &c. Coal Co.*, 21 Beav. 495.

[3] *Newbery* v. *James*, 2 Mer. 446. See also, as to secret medicines, *Williams* v. *Williams*, 3 Mer. 157; *Green* v. *Folgham*, 1 S. & S. 398; *Yovatt* v. *Winyard*, 1 J. & W. 394. See also *Lingen* v. *Simpson*, 1 S. & S. 600.

[4] *E.g.*, *Homfray* v. *Fothergill*, L. R. 1 Eq. 567. As to equitable relief in the event of partners refusing to admit a partner duly nominated as a partner, see *Barnes* v. *Reid*, [1902] 2 Ch. 735, 743; 51 W. R. 52.

[5] *Dodson* v. *Downey*, [1901] 2 Ch. 620, 623.

CHAPTER IV.

CONTRACTS FOR THE SALE OF SHIPS.

§ 1546. CONTRACTS for the sale of ships,[1] or of shares in ships, have long been affected by legislation. The present position of legislation is shortly this. By the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), it is enacted (s. 24) that a registered ship, or a share therein (when disposed of to a person qualified to own a British ship) shall be transferred by bill of sale, containing such description of the ship as is contained in the surveyor's certificate, or some other description sufficient to identify the ship to the satisfaction of the registrar, and which shall be in a form given by the statute, or as near thereto as circumstances permit, and executed by the transferor before and attested by a witness or witnesses: the transferee is not entitled to be registered as owner until he, or, in the case of a corporation, the person authorized by the statute to make declarations on behalf of the corporation, has made a certain declaration (s. 25): and (s. 26) every bill of sale with the required declaration is to be produced to the registrar, who is to enter the name of the transferee as owner in the register book.[2]

Present state of legislation on the subject. Merchant Shipping Act, 1894 ss. 24–26.

§ 1547. By the 56th section of the above Act of

Merchant Shipping

[1] It may be mentioned that in *Claringbould* v. *Curtis* (21 L. J. Ch. 541) a contract to sell a barge was specifically enforced.

[2] It has been held that the registration of a bill of sale, which is in fact invalid, gives no title to the person thereby registered. *Orr* v. *Dickinson*, Johns. 1; cf. *Hubbersty* v. *Lamport*, 9 W. R. 327; 30 L. J. Ch. 489.

Act, 1894, ss. 56, 57.

1894 it is provided that, subject to any rights and powers appearing by the register book to be vested in any other person, the registered owner of a ship or of a share therein shall have power absolutely to dispose, in the manner in the Act provided, of the ship or share, and to give effectual receipts for any money paid or advanced by way of consideration. And by the 57th section of the same Act it is declared to be the intention of that Act that, without prejudice to the provisions of that Act for preventing notice of trusts from being entered in the register book or received by the registrar, and without prejudice to the powers of disposition and of giving receipts conferred by that Act on registered owners and mortgagees, and without prejudice to the provisions of that Act relating to the exclusion of unqualified persons from the ownership of British ships, interests arising under contract or other equitable interests may be enforced by or against owners and mortgagees of ships in respect of their interest therein, in the same manner as in respect of any other personal property.[1]

Persons qualified to be owners of British ships.

§ 1548. The definition of persons qualified to be owners of British ships is to be found in the 1st section of the Merchant Shipping Act, 1894.

Result of the legislation.

§ 1549. The result of this legislation appears to be clear: that any person qualified to be the owner of a British ship may sue on any contract for the sale of a ship or share in a ship, and that on obtaining judgment he will be entitled to be registered: but that, pending entry of his name as owner on the register, no notice of his equity can appear on the register, or be noticed by the registrar: that the registered owner or mortgagee can make a good transfer and give good receipts to purchasers for value without notice of the

[1] See *Stapleton* v. *Haymen*, 12 W. R. 317; *Hughes* v. *Sutherland*, 7 Q. B. D. 160; also *Black* v. *Williams*, [1895] 1 Ch. 408, 421; *Watson* v. *Duncan* (1879), Court of Session Cas., 4th ser., vol. 6, pp. 1247, 1251.

equity under the contract:[1] and lastly, as regards unqualified persons, that they cannot maintain an action for the sale of a ship or share in a ship to them.

History of the legislation.

§ 1550. It may be convenient very briefly to advert to the history of the legislation on this topic.[2] The Act 26 Geo. III. c. 60 required (sect. 17) the bill of sale on every transfer to recite the certificate of registry, and declared that otherwise such bill of sale should be utterly null and void. The Act being silent as to contracts, doubts arose which were ended by the Act 34 Geo. III. c. 68, which (sect. 14) made void both at Law and in Equity all contracts unless made in the manner prescribed by the former Act. Under these Acts a contract for the sale of a ship not reciting the certificate, but having a copy of the certificate annexed, was void.[3]

The Act 26 Geo. III. c. 60.

The Act 1 Geo. IV. c. 41, s. 29.

Enactment as to mode of transfer.

§ 1551. These Acts were repealed: and the enactment which then came into force was 4 Geo. IV. c. 41, which provided (sect. 29) that when and so often as the property in any ship, or any part thereof, belonging to any of His Majesty's subjects, should, after registry thereof, be sold to any other or others of His Majesty's subjects, the same should be transferred by bill of sale or other instrument in writing, containing a recital of the certificate of registry of such ship or vessel, or the principal contents thereof, otherwise such transfer should not be valid or effectual for any purpose whatever, either in Law or in Equity: to which was added a proviso limiting the effect of an error in such recital.

Re-enacted

§ 1552. This clause, which departed from the language

[1] See *Barclay & Co.* v. *Poole*, [1907] 2 Ch. 284, where, a managing owner of a ship having contracted to sell to other part-owners some shares in it of which he was the registered owner, and it being part of the contract that they should apply a competent portion of the purchase-money in discharge of a debt owed by the vendor to the ship, it was held that the purchasers' contractual right to make such application took precedence over a prior, but unregistered, mortgage of the shares.

[2] See *Liverpool Borough Bank* v. *Turner*, 1 J. & H. at p. 166.

[3] *Brewster* v. *Clarke*, 2 Mer. 75.

by subsequent statutes.

of the older statutes, was re-enacted by the 6 Geo. IV. c. 110, s. 31, the 3 & 4 Will. IV. c. 55, s. 31, and the 8 & 9 Vict. c. 89, s. 34: and the 37th section of the last-mentioned Act further provided that no bill of sale or other instrument in writing should be valid or effectual to pass the property in any ship, or in any share thereof, or for any other purpose, until the same was entered on the register.

Contracts avoided by non-compliance.

§ 1553. The change of language gave rise to a question: but it was determined, under the last cited Act, that executory contracts to transfer not complying with the terms of the Act were avoided by them.[1]

The Merchant Shipping Act, 1854.

§ 1554. Then came the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), which omitted all express reference to executory contracts, and omitted also any such words as are contained in the 37th section of the previous statute (8 & 9 Vict. c. 89); and thereupon the question arose whether executory interests might be enforced under contracts not complying with the formalities of the Act; and this question was determined, as to an equitable mortgage in the negative.[2] It was, however, decided (in the year 1881) that an executory contract to transfer a ship to a purchaser need not be registered, and might be enforced by the registered owner notwithstanding the non-registration.[3]

The Amendment Act of 1862.

The Act of 1854 was amended by the Merchant Shipping Act Amendment Act, 1862 (25 & 26 Vict. c. 63), which permitted the enforcement, under certain conditions, of equities, clearly including the equity resulting from a contract for sale not satisfying the statutory requisites for the legal transfer.

The Merchant

§ 1555. In the year 1894 the above-mentioned Acts

[1] *Hughes* v. *Morris*, 2 De G. M. & G. 349; S. C. 9 Ha. 636; *McCalmont* v. *Rankin*, 2 De G. M. & G. 403, 418; *Coombes* v. *Mansfield*, 3 Drew. 193; *Duncan* v. *Tindall*, 13 C. B. 258.

[2] *Liverpool Borough Bank* v. *Turner*, 1 J. & H. 159; 2 De G. F. & J. 502. See also *Chapman* v. *Callis*, 9 C. B. N. S. 769.

[3] *Batthyany* v. *Bouch*, 50 L. J. Q. B. 421; 44 L. T. 177.

of 1854 and 1862 were repealed, but in substance re-enacted, by the Merchant Shipping Act, 1894, which is intituled "An Act to consolidate enactments relating to Merchant Shipping." Shipping Act, 1894.

§ 1556. Independently of the Act of 1862, it was determined that the Merchant Shipping Acts did not apply to a contract relative to the produce of the sale of a ship. A. was the registered owner of certain shares for his father's representatives: he was captain of the ship, and entered into a contract with his father's administrators that he should navigate the ship for twelve months and account for the profits, and at the end of the twelve months sell the shares and account for their proceeds. He sold the ship: and on bill filed to enforce the contract, the objection from the Merchant Shipping Acts was overruled.[1] This case seems to have been thought by other judges open to doubt.[2] Contracts as to money accruing from sale of ship.

§ 1557. It is needless to remark that foreign ships are entirely outside the observations hitherto made. As regards contracts for the sale of such ships, or shares in them, the case of *Hart* v. *Herwig*[3] may usefully be consulted. Foreign ships.

[1] *Armstrong* v. *Armstrong*, 21 Beav. 71, 78.

[2] *Parr* v. *Applebee*, 7 De G. M. & G. 585; *Coombes* v. *Mansfield*, 3 Drew. 193.

[3] L. R. 8 Ch. 860; and see observations on this case, *supra*, § 130.

CHAPTER V.

CONTRACTS BY MARRIED WOMEN.

Common law in capacity.

§ 1558. By the common law of England a married woman has no capacity to bind herself by contract.[1] This was first modified by certain doctrines of Equity and has been further modified by statute law.

Present state of the law.

§ 1559. A married woman may now create a contractual obligation in the following ways:—

(1.) By contract relating to her realty under the Act for the abolition of Fines and Recoveries.

(2.) By means of the exercise of a power.

(3.) By compromise of an actual suit pending between her husband and herself.

(4.) By contract under the Married Women's Property Acts, 1882, 1893, and 1907.

But with these exceptions she is still—with one other doubtful exception[2]—incapable of binding herself by contract.

Such is, it is believed, the present position of the law.

As to real estate.

§ 1560. (i.) As regards the real estate of a married woman not settled to her separate use or subject to her power she may, under the Act for the abolition of Fines and Recoveries, not only dispose of the land but contract respecting it, if not so as to render herself liable to damages, yet so as to bind her estate of

[1] As to the power of a married woman to contract with respect to land in the Transvaal, see *Bank of Africa* v. *Cohen*, [1909] 2 Ch. 129, 141, 143.

[2] See *infra*, §§ 1562, 1570.

inheritance.[1] This is the only power of control or alienation which a married woman possesses over such real estate.[2] We are not here concerned with questions arising from the fraud or election of a married woman: but it is certain that the compromise of a matrimonial suit between herself and her husband will not enable her to bind her realty not settled to her separate use.[3]

Contract under power informally exercised.

§ 1561. (ii.) As regards the exercise of a power, if a married woman have a power to be exercised subject to certain formalities required for her protection, and she affect to contract by an exercise of the power, but without these formalities, there will be no judgment against her; for, except under these formalities, she has no power to contract, and the paper signed by her is void.[4] But where the formalities omitted are immaterial for the protection of the married woman, her estate may be bound by the exercise of the power, and the contract constituted by such exercise may be specifically enforced.[5]

Compromise of suits between husband and wife.

§ 1562. (iii.) As regards agreements to compromise matrimonial suits between husband and wife, Lord Hatherley, when a Vice-Chancellor, in more than one case intimated his opinion that the power of a wife to contract with her husband is not confined to her separate property, but that "under any circumstances, when the wife is put in such a position that she can be regarded for the purposes of the contract as a *femme sole*," she may so contract.[6] The learned Judge

[1] 3 & 4 Will. IV. c. 74. See *Toler* v. *Slater*, L. R. 3 Q. B. 42; *Crofts* v. *Middleton*, 8 De G. M. & G. 192, particularly 212, 219, overruling S. C. 2 K. & J. 194; and cf. *Pride* v. *Bubb*, L. R. 7 Ch. 64, 70; *Carter* v. *Carter*, [1896] 1 Ch. 62, 68.

[2] *Cahill* v. *Cahill*, 8 App. Cas. 420, 428.

[3] Ibid.; *Williams* v. *Walker*, 9 Q. B. D. 576; and cf. *Nicholl* v. *Jones*, L. R. 3 Eq. 696.

[4] *Martin* v. *Mitchell*, 2 J. & W. 413, 434.

[5] *Hopkins* v. *Myall*, 2 R. & M. 86; *Dowell* v. *Dew*, 1 Y. & C. C. C. 345; *Thackwell* v. *Gardiner*, 5 De G. & Sm. 58; *Phillips* v. *Edwards*, 33 Beav. 440.

[6] *Vansittart* v. *Vansittart*, 4 K. & J. 62, 70 (S. C. on appeal, 2 De G. & J. 249); *Nicholl* v. *Jones*, L. R.

considered that the case of *Bateman* v. *Countess of Ross*,[1] supports this proposition. The last-mentioned case is not very fully reported. In the case of *Besant* v. *Wood*,[2] Jessel M.R. adopted the same view, holding that a married woman must take as incident to her undoubted right to sue (whether by next friend or even alone) for divorce or restitution of conjugal rights, the right to contract, *i.e.*, to compromise her suit: that as a necessary corollary to the right to sue, she must have the right to contract not to sue; and that, therefore, she can enter into a valid and enforceable contract to live separate and apart from her husband. Notwithstanding the case of *Cahill* v. *Cahill*,[3] in the House of Lords, which seemed to make it doubtful whether the latter case is right, and whether the competency of the wife to contract with her husband must not be confined to the cases of actual suits between them, the Court of Appeal subsequently accepted the doctrine of *Besant* v. *Wood*, and applied it to a case in which a husband and wife were in litigation only by means of cross-summonses for assault; Lord Justice Lindley observing that the wife's capacity appeared to extend to all proceedings which husband and wife are by law capable of taking against each other.[4]

Married Women's Property Acts, 1882, 1893, 1907.

§ 1563. (iv.) By the Married Women's Property Act, 1882 (amended by the Married Women's Property Acts of 1893 and 1907), new contractual powers were conferred on married women. The following are the relevant provisions of the Acts of 1882 and 1907.

3 Eq. 696; *Gibbs* v. *Harding*, L. R. 5 Ch. 336; affirming S. C. L. R. 8 Eq. 490.

[1] 1 Dow, 235.

[2] L. R. 12 Ch. D. 622; cf. *Marshall* v. *Marshall*, 5 P. D. 19; *Aldridge* v. *Aldridge*, 13 P. D. 210; *Smith* v. *Lucas*, 18 Ch. D. 531.

[3] 8 App. Cas. 420, and particularly pp. 428–432. See *Buller* v. *Buller*, 14 Q. B. D. 831, and in C. A. 16 Q. B. D. 374, where this class of cases was much considered. See also *per* Bowen L.J. in *Clark* v. *Clark*, 10 P. D. 195.

[4] *McGregor* v. *McGregor*, 21 Q. B. D. 424 (*Cahill* v. *Cahill* does not appear to have been cited).

Act of 1882, sect. 1, sub-s. 2.

"A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort or otherwise, in all respects as if she were a *femme sole*, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise."

Act of 1882, sect. 18.

"A married woman who is an executrix or administratrix alone or jointly with any other person or persons of the estate of any deceased person, or a trustee alone or jointly as aforesaid, of property subject to any trust, may sue or be sued[1] . . . without her husband, as if she were a *femme sole*."

Act of 1907, sect. 1, sub-s. 1.

"(1) A married woman is able, without her husband, to dispose of, or to join in disposing of, real or personal property, held by her solely or jointly with any other person as trustee or personal representative in like manner as if she were a *femme sole*."[2]

[1] *Sc.* in respect of the trust property, whatever the nature of that property may be. (*Re Harkness and Allsopp's Contract*, [1896] 2 Ch. at p. 363.) It was held in the last-mentioned case that a woman, married in the year 1889, who was one of three trustees for sale of real estate, could not effectually convey it, in pursuance of the trustees' contract for sale, to the purchaser, except with the concurrence of her husband, and by a deed acknowledged by her. See, however, s. 1 (1) of the Act of 1907 quoted in the text. Distinguish *Re Brooke and Fremlin's Contract*, [1898] 1 Ch. 647 (where the married woman was a mortgagee); followed in *Re West and Hardy's Contract*, [1904] 1 Ch. 145.

[2] Sub-section (2) of this section validates and confirms all such dispositions made after the 31st December, 1882, but so that where any title or right has been acquired through or with the concurrence of the husband before the 1st January, 1908, that title or right is to prevail over any title or right which would otherwise be rendered valid by this section.

"Nothing in this Act contained shall interfere with or affect any settlement or agreement for a settlement made or to be made, whether before or after marriage, respecting the property of any married woman, or shall interfere with or render inoperative any restriction against anticipation at present attached to or to be hereafter attached to the enjoyment of any property or income by a woman under any settlement, agreement for a settlement, will, or other instrument; but no restriction against anticipation contained in any settlement or agreement for a settlement of a woman's own property to be made or entered into by herself shall have any validity against debts contracted by her before marriage, and no settlement or agreement for a settlement shall have any greater force or validity against creditors of such woman than a like settlement or agreement for a settlement made or entered into by a man would have against his creditors." Act of 1882, sect. 19.

"(1) Notwithstanding section 19 of the Married Women's Property Act, 1882, a settlement or agreement for a settlement made after the commencement of this Act by the husband or intended husband, whether before or after marriage, respecting the property of any woman he may marry or have married, shall not be valid unless it is executed by her if she is of full age, or confirmed by her after she attains full age. Act of 1907, sect. 2.

"(2) But if she dies an infant, any consent or disposition by her husband contained in the settlement or agreement shall bind or pass any interest in any property of hers to which he may become entitled on her death, and which he could have bound or disposed of if this Act had not been passed.

"(3) Nothing in this section shall render invalid any settlement or agreement for a settlement made or to be made under the provisions of the Infants' Settlement Act, 1855."

Section 23 of the Act of 1882 places the legal Act of

1882, sect. 23.

personal representative of a wife in her place in respect of her separate estate as to rights and liabilities.

Married Women's Property Act, 1893.

§ 1564. By the Married Women's Property Act, 1893, sub-sections 3 and 4 of the first section of the Act of 1882—which sub-sections related to the effect of contracts entered into by married women—were repealed, and replaced by the following enactment:

Sect. 1.

"Every contract hereafter entered into by a married woman, otherwise than as an agent,

"(*a*) Shall be deemed to be a contract entered into by her with respect to and to bind her separate property, whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract;

"(*b*) Shall bind all separate property which she may at that time or thereafter be entitled to; and

"(*c*) Shall also be enforceable by process of law against all property which she may thereafter while discovert be possessed of or entitled to;

"Provided that nothing in this section contained shall render available to satisfy any liability arising out of such contract any separate property which at that time or thereafter she is restrained from anticipating."

Sect. 2.

It was also provided that, "In any action or proceeding[1] now or hereafter instituted by a woman or by her next friend on her behalf, the Court before which such action or proceeding is pending shall have jurisdiction by judgment or order from time to time to order payment of the costs of the opposite party out of property which is subject to a restraint on anticipation, and may enforce such payment by the appointment of a receiver and the sale of the property or otherwise as may be just."

[1] A counterclaim by a married woman is a "proceeding instituted" by her (*Hood-Barrs* v. *Cathcart*, [1895] 1 Q. B. 873); but an appeal by her, in an action in which she is a defendant, is not. (*Hood-Barrs* v. *Heriot*, [1897] A. C. 177.)

§ 1565. On the foregoing provisions of the Acts of 1882, 1893, and 1907 the following observations may be presented to the reader's consideration, as possibly relevant to any action for specific performance on a married woman's contract:

The statutes a code

(1.) It is presumed that the Acts may be taken as a code of law relative to the contracts of married women, and that as such they supersede the previously existing equitable doctrines with regard to such contracts—doctrines which, with considerable modifications and alterations, are adopted by the Acts. This seems to render a discussion of the old equitable doctrines no longer of practical importance in this work.

Apply to all married women.

(2.) The sections relative to contract appear to apply to all married women, without reference to the time of their marriage or of the acquisition of the property with which they are dealing.

Implied contracts.

(3.) The words "or otherwise" in the Act of 1882 (section 9 (2)) will probably be found largely to extend the liability of married women, and may at least render them liable on implied contracts on which they could not before the statute have been sued.[1]

Contract is only in respect of separate property.

(4.) The married woman is only capable of entering into any contract in respect of and to the extent of her separate property, free from restraint on anticipation: she can render herself liable only in respect of and to the extent of this separate property. These words introduce new conceptions into the law of contract, and have created great peculiarities in the relief granted against married women. From them flow important consequences:—

Consequences.

(*a*) The separate property which can be treated as bound by a contract by a married woman must, it would appear from section 19 of the Act of 1882, be property free from the restraint on anticipation.

(*b*) It follows from the restrictive words of the Acts

[1] *Whittaker* v. *Kershaw*, 45 Ch. D. 320.

that, subject to any exercise of the jurisdiction as to costs conferred by the second section[1] of the Act of 1893, execution under a judgment against a married woman is limited to the separate property of the married woman not subject to any restriction against anticipation, unless, by reason of section 19 of the Act of 1882 the property shall be liable to execution, notwithstanding such restriction.[2]

(c) It further follows from the words of sub-section (2) of the first section of the Act of 1882 that no attachment for debt can be issued against the person of a married woman under the Debtors Act.[3]

Restricts as regards specific performance

§ 1566. It is obvious that these peculiarities of the contracts of a married woman under the Act may lead to considerable difficulties in the enforcement of a judgment for specific performance against a married woman. This question does not appear yet to have received any elucidation from judicial decision. But it seems probable that the matter may stand thus. If the judgment or order be for payment of a debt, the woman cannot be imprisoned by reason of the Debtors Act, 1869.[4] On the contrary, if the judgment or order direct her to do something other than the payment of money, disobedience would be a contempt not within the Debtors Act, 1869, and the old law would apply under which an attachment might issue against the married woman.[5] It is possible that, in the event of an order for payment of money by a married

[1] For a form of order under this section, see *Davies* v. *Treharris Brewery Co.*, [1894] W. N. 198; 13 R. 249; Seton (6th ed.), 886, where a married woman's action for specific performance was dismissed with costs.

[2] *Scott* v. *Morley*, 20 Q. B. D. 120, 132. Distinguish *Robinson, King & Co.* v. *Lynes*, [1891] 2 Q. B. 577; *Re Turnbull*, [1900] 1 Ch. 189, 194.

[3] *Sc.* in cases of judgments covered against married women under the Act of 1882, s. 1 (2). *Scott* v. *Morley*, 20 Q. B. D. 120. *Hope* v. *Carnegie*, L. R. 7 Eq. 254.

[4] *Scott* v. *Morley*, 20 Q. B. D. 1

[5] *Ottaway* v. *Wing*, 12 Sim. *Taylor* v. *Taylor*, 12 Beav. 271.

woman being disobeyed by her, some relief might be obtained by proceedings against her trustees, if any.

Removal of restraint on anticipation

§ 1567. The fetter imposed on a married woman's power of contracting by the common restriction on anticipation may, in a proper case, be removed by means of an order under section 39 of the Conveyancing and Law of Property Act, 1881, which provides that, notwithstanding that a married woman is restrained from anticipation, the Court may, if it thinks fit, where it appears to the Court to be for her benefit, by judgment or order, with her consent, bind her interest in any property. Thus, where two of the plaintiffs in a vendor's action for specific performance of a contract for sale of real estate were married women entitled to undivided shares of the property for their separate use but without power of anticipation, the Court, under the above 39th section, removed the restraint on anticipation, for the purpose of enabling the sale to be completed.[1]

[1] *Baker* v. *Keighley*, [1896] 1 Ch. 159, 165.

CHAPTER VI.

CONTRACTS FOR SEPARATION DEEDS.

Contracts for future separation not enforced.

§ 1568. It seems clear that, as a general rule,[1] a contract providing for the separation of husband and wife at a future time is against public policy, and will not be enforced by the Court; and further that any instrument which provides for a present separation, but also prospectively looks forward to the parties living together again, and then to a future separation, is, so far as it provides for that future separation, equally unenforceable.[2]

Extent of jurisdiction.

§ 1569. The jurisdiction of Courts of Equity to enforce the specific performance of contracts for present separation, by the execution of proper deeds of separation, was established in the House of Lords, after a learned argument against it, in the case of *Wilson* v. *Wilson*,[3] where Lord Cottenham showed that the law does not now consider a contract for present separation so contrary to public policy as to make void all arrangements of property arising out of it.

There must be a binding contract.

§ 1570. In order to enable the Court thus to interfere, there must of course be a valid contract. It is

[1] See *Harrison* v. *Harrison*, [1910] 1 K. B. 35, 40, where a covenant by a husband to pay a sum of money to his wife in the event of his being guilty of future conduct entitling her to a separation order, was enforced.

[2] See *per* Lord Eldon in *Westmeath* v. *Salisbury*, 5 Bli. N. S. at pp. 366, 367; *Earl of Westmeath* v. *Countess of Westmeath*, Jac. at p. 142. Cf. *Woolgate* v. *Watson*, in C. A. 16th November, 1880.

[3] 1 H. L. C. 538, affirming S. C. 14 Sim. 405; *Fletcher* v. *Fletcher*, 2 Cox, 99; *Gibbs* v. *Harding*, L. R. 8 Eq. 490; 5 Ch. 336; *Bucknell* v. *Bucknell*, 7 Ir. Ch. R. 130; *Hart* v. *Hart*, 18 Ch. D. 670.

essential to this that the contract be between persons capable of contracting, and therefore, on the ground of a husband's general inability[1] to contract with his wife without the intervention of some third person, it has been supposed that a simple contract between them to live separate will not be enforced by the Court.[2] And a husband and wife in actual litigation on matrimonial matters may, it seems, contract with one another for a separation.[3] But it is doubtful whether they can so contract under any other circumstances.[4]

Good consideration.

§ 1571. There must also be a good consideration: and as in contracts for separation this is sometimes peculiar, it will be well very briefly to allude to a few of the cases.

Instances.

§ 1572. In a case already referred to it was decided that the staying a suit in the Ecclesiastical Court for nullity of marriage, on the ground of impotency of the husband, is a sufficient consideration as against him:[5] and where the husband had so behaved as that the wife might have obtained a divorce *a mensâ et thoro*, and she agreed, instead of prosecuting her right, to accept maintenance from the husband, this was held a good consideration.[6] A good consideration is also afforded by an engagement by the trustees to indemnify the husband against the wife's debts;[7] or even by a covenant to that effect conditional on an annuity, which was agreed to be paid, being secured;[8] or, as it

[1] *Sc.*, as distinguished from his statutory ability, under the Married Women's Property Acts, to contract with his wife in respect of her separate property; as for instance in the case of the purchase-agreement in *Ramsay* v. *Margrett*, [1894] 2 Q. B. 18, 25, 26, 27.

[2] *Hope* v. *Hope*, 22 Beav. 351; s. De G. M. & G. 731, 739, *Wilkes* v. *Wilkes*, 2 Dick. 791; *Walrond* v. *Walrond*, John. 18.

[3] *Macgregor* v. *Macgregor*, 21 Q. B. D. 424.

[4] See *ante*, § 1562.

[5] *Wilson* v. *Wilson*, 1 H. L. C. 538; S. C. 14 Sim. 405.

[6] *Hobbs* v. *Hull*, 1 Cox, 445.

[7] *Stephens* v. *Olive*, 2 Bro. C. C. 90; *Earl of Westmeath* v. *Countess of Westmeath*, Jac. 126, 141; *Elsworthy* v. *Bird*, 2 S. & S. 372.

[8] *Wellesley* v. *Wellesley*, 10 Sim. 256.

seems, by a covenant of a third party to pay the husband's debts.[1] So, in a contract which provided for the execution of a separation deed to contain all proper and usual clauses, and also a stipulation that the costs of the deed should be paid by the husband and wife's father in moieties, the Court found consideration not only, it appears, in the contract as to the costs, but also in the covenant by the father to indemnify the husband, which seems to have been held to be a usual clause.[2]

Care of children.

§ 1573. In many contracts for separation there have been contained provisions as to the care of the children which have been held to be at variance with the law, and so have formed a bar to the performance of the contract. For the law of England gives to the father the custody and control of his children, and casts on him the duty of caring for them and seeing to their education; and this duty he can neither renounce nor delegate.[3]

Contract held incapable of performance.

§ 1574. On this ground the following contracts were, before the passing of the Act mentioned in the next section, held incapable of performance:—a contract by the father to allow an infant son to remain under the care of his mother:[4] a contract that the mother should have the children above seven years of age:[5] and a contract to allow an infant daughter to remain under the control of and to be educated and supported by her mother.[6] But a stipulation in a deed that her children should remain at such schools in England as the husband, or such schools elsewhere as the husband with the consent of the wife, should from time to time direct, and that the holidays of the children should be

[1] *Wilson* v. *Wilson*, 1 H. L. C. 538.

[2] *Gibbs* v. *Harding*, L. R. 8 Eq. 490; 5 Ch. 336.

[3] *Lord St. John* v. *Lady St. John*, 11 Ves. 525; *Lord Westmeath's case*, Jac. 251, n.

[4] *Hope* v. *Hope*, 8 De G. M. & G. 731.

[5] *Vansittart* v. *Vansittart*, 4 K. & J. 62.

[6] *Walrond* v. *Walrond*, John. 18.

passed by them at such places and in such manner as the trustees should from time to time direct, having regard as far as practicable to the wishes of each of them, the husband and wife, was held by Lord Hatherley, reversing the decision of Lord Romilly M.R., to be reasonable.[1]

Act to amend the law as to custody of infants.

§ 1575. An alteration in this branch of the law was effected by the Custody of Infants Act, 1873 (36 & 37 Vict. c. 12). The 2nd section of that Act enacts that no agreement contained in any separation deed made between the father and mother of an infant or infants shall be held to be invalid by reason only of its providing that the father of such infant or infants shall give up the custody or control[2] thereof to the mother; provided always that no Court shall enforce any such agreement if the Court shall be of opinion that it will not be for the benefit of the infant or infants to give effect thereto.[3]

Effect of this Act.

§ 1576. It will be observed that this enactment applies in terms only to agreements contained in deeds, and not to contracts to execute separation deeds. But as the invalidity of the deed itself is removed, the whole objection to the specific performance of the contract falls also.[4]

Specific relief.

§ 1577. The questions which arise on specific relief with respect to the stipulations contained in deeds of separation do not, of course, fall within the purview of this treatise, which relates to executory contracts only.

[1] *Hamilton* v. *Hector*, L. R. 13 Eq. 511; 6 Ch. 701.

[2] These words "custody and control" are large enough to comprise all the rights which a father has over his children, including that of directing their religious education. *Per* Chitty J. in *Condon* v. *Vallum*, 57 L. T. at p. 155.

[3] See *Re Besant*, 11 Ch. D. 508, 518.

[4] *Hart* v. *Hart*, 18 Ch. D. 670.

CANADIAN NOTES.

Agreement for Separation.

Where a married woman brought an action against her husband which was compromised, the parties to it agreeing that the plaintiff should execute a proper deed of separation containing certain covenants by her in return for which the defendant should convey to the plaintiff certain lands and pay certain monies, it was held that the plaintiff was entitled to specific performance of the agreement, that it was not the separation which was being enforced, but the performance by the defendant of his contract. The case was governed by *Wilson* v. *Wilson*, 1 H.L. Cas. 538. *Vardon* v. *Vardon*, 6 O.R. 719.

CHAPTER VII.

CONTRACTS TO COMPROMISE.

Private compromises.

§ 1578. The Court will specifically enforce private compromises of rights in the way in which it will any other contracts;[1] and, inasmuch as the compromise of a *bonâ fide* claim to which a person believes himself to be liable, and of the nature of which he is aware, is a good consideration for a contract, the Court, in enforcing the compromise, will not inquire into the validity of the claim on which it is founded.[2]

Mistake, how affecting compromises.

§ 1579. A mistake, therefore, of one of the parties to a compromise as to his rights would probably be unavailing as a defence to an action; but the compromise may be made under such mistakes as regards other matters of fact as may induce the Court to refuse performance.[3]

Jurisdiction of the Court of Chancery.

§ 1580. Where the compromise sought to be enforced related to proceedings in another Court, it was manifest that the Court of Chancery could only entertain jurisdiction on a bill filed.[4] But where the primary litigation was also in the Court of Chancery, the question arose whether the compromise could be enforced in the original suit, by an interlocutory proceeding in it, or only by a fresh suit, based on the compromise.

Where immediate interference necessary.

§ 1581. It seems that where the immediate interference of the Court was necessary to give effect to the contract, as where a party to the contract was, but for it, liable to an immediate attachment, there the Court

[1] *E.g.*, *Turner* v. *Green*, [1895] 2 Ch. 205.

[2] *Attwood* v. *Anon.*, 1 Russ. 353; *Miles* v. *New Zealand, &c. Co.*, 32 Ch. D. 266.

[3] *The Monarch*, L. R. 12 P. D. 5.

[4] See, for example, *Nicholl* v. *Jones*, L. R. 3 Eq. 696.

would to that extent interfere to execute the contract in the original suit.

Where all parties before the Court and the matter simple.

§ 1582. Further, there is authority to show that, where all the parties to the compromise were parties to the original suit, and the equity arising out of the compromise was of the same nature as the original equity, as where an account was to be taken alike under the original suit and under the compromise,—where the whole matter was before the Court, and the acts to be done were simple,—there the Court might enforce the compromise by interlocutory proceeding in the original suit.[1]

In other cases a fresh suit requisite.

§ 1583. But, before the Judicature Acts, if not in all other cases, at least in all cases where the contract to compromise went beyond the ordinary range of the Court in the existing suit, or the equity sought to be enforced was different from that on the record, or the contract was disputed, or the right to have it enforced in the suit was disputed, or the parties were not identical, there the proper course of proceeding was by bill for the specific performance of the contract to compromise.[2]

Swinfen v. Swinfen.

§ 1584. In the litigation which arose out of the will of Mr. Samuel Swinfen, the mode of enforcing a compromise entered into by counsel was much discussed, as well as the authority of counsel to bind his client to compromise.[3] The original proceeding was

[1] *Dawson* v. *Newsome*, 2 Giff. 272. The Court of Chancery would not enforce a contract for compromise between an infant and an adult, there being no mutuality: *per* Lord Langdale M.R. in *Hargrave* v. *Hargrave*, 12 Beav. at p. 411.

[2] *Forsyth* v. *Manton*, 5 Mad. 78; *Wood* v. *Rowe*, 2 Bli. 595, 617; *Askew* v. *Millington*, 9 Ha. 65; *Richardson* v. *Eyton*, 2 De G. M. & G. 79; *Pryer* v. *Gribble*, L. R. 10 Ch. 534; which seem to overrule the dictum of Lord Eldon in *Rose* v. *Wood*, 1 J. & W. 337, and the case of *Tebbutt* v. *Potter*, 4 Ha. 161. See also *King* v. *Pinsoneault*, L. R. 6 P. C. 245.

[3] As to the authority of counsel, see *Neale* v. *Lady Gordon Lennox*, [1902] 1 K. B. 838, reversed in D. P. [1902] A. C. 465; 71 L. J. K. B. 536, 939; 51 W. R. 110.

a suit in Chancery by the heir of one of the next of kin, for the purpose of securing the testator's real and personal estates whilst proceedings were being taken to set aside the will on the ground of the want of testamentary capacity. The will gave the property to Mrs. Swinfen, the widow of the testator's son. Lord Romilly M.R. directed an issue *devisavit vel non*, in which Mrs. Swinfen was plaintiff and the heir was defendant. During the trial at Stafford the leading counsel for the plaintiff and for the defendant signed a memorandum of compromise, including a stipulation for a conveyance of the land by the plaintiff at Law to the defendant, and the payment by the defendant to the plaintiff of an annuity. The memorandum of compromise was embodied in an order at Nisi Prius, and afterwards made a rule of the Court of Common Pleas. Mrs. Swinfen declined to perform the contract, as made without her authority and against her wishes. Thereupon a rule *nisi* for an attachment against her was obtained, but discharged on the ground of want of evidence of demand of performance and refusal.[1] A second application for an attachment was refused because one of the Judges of the Court of Common Pleas doubted the authority of counsel to bind the plaintiff at Law.[2] Thereupon the defendant at Law and original plaintiff in Equity filed a supplemental bill for the specific performance of the contract, or in the alternative that another issue *devisavit vel non* might be directed. This bill was dismissed by Lord Romilly M.R. without costs on the ground of want of authority of counsel;[3] and this decision was affirmed by Knight Bruce and Turner L.JJ.,[4] on the ground that, even if the plaintiff at Law was bound at Law, the contract

[1] *Swinfen* v. *Swinfen*, 18 C. B. 549.

[2] S. C. 1 C. B. N. S. 364.

[3] *Swinfen* v. *Swinfen*, 24 Beav. 585.

[4] S. C. 2 De G. & J. 381. Cf *Holt* v. *Jesse*, 3 Ch. D. 177; *Davis* v. *Davis*, 13 Ch. D. 861.

was not one of which, under the circumstances, specific performance should be decreed. Mrs. Swinfen subsequently brought an action against her leading counsel (then Lord Chelmsford) for damages, but failed.[1]

The Judicature Act, 1873.

§ 1585. The Judicature Act, 1873, introduced a great improvement in this practice. By section 24, sub-section 7, the Court has in every cause power to grant all such remedies whatsoever as any of the parties may appear to be entitled to in respect of any claim properly brought forward by them in such cause; so that as far as possible all matters so in controversy between the parties may be completely and finally determined. Accordingly it has been decided that the Court has jurisdiction to stay all further proceedings in the action compromised, in cases in which an independent suit would probably have previously been necessary.[2]

[1] *Swinfen* v. *Lord Chelmsford*, 5 H. & N. 890. As to the authority of a solicitor to compromise an action so as to bind his client, see *Little* v. *Spreadbury*, 26 T. L. R. [illegible]

[2] Compare *Eden* v. *Naish*, 7 Ch. D. 781, and *Scully* v. *Lord Dundonald*, 8 Ch. D. 658, with *Pryer* v. *Gribble*, L. R. 10 Ch. at p. 540. See, too, *Re Gaudet Frères Steamship Co.*, 12 Ch. D. 882; *Smythe* v. *Smythe*, 18 Q. B. D. at p. 546. Distinguish *Gilbert* v. *Endean*, 9 Ch. D. 259; *Emeris* v. *Woodward*, 43 Ch. D. 185; and cf. *Davis* v. *Davis*, 13 Ch. D. 861.

CHAPTER VIII.

AWARDS.

Extent of the jurisdiction.

§ **1586**. The Court of Chancery, in many cases, decreed the specific performance of awards, though not made rules or orders of the Court,[1] for the performance of some specific thing, as to convey an estate, assign securities, or the like;[2] but not, it would seem, awards simply to pay money.[3] The Court thus decreed their performance "because," to use Lord Eldon's language, "the award supposes an agreement between the parties, and contains no more than the terms of that agreement ascertained by a third person."[4]

Lord Hardwicke's doctrine.

§ **1587**. Lord Hardwicke[5] seems to have laid it down that a bill to carry an award into execution, where there was no acquiescence in it by the parties to the submission, or contract by them afterwards to have it executed, would not lie. But, as we have seen, subsequent cases established that the jurisdiction was not subject to these restrictions.

When submission made rule of Common Law Court.

§ **1588**. The fact that the submission had been made a rule of a Common Law Court created no impediment to its specific performance by the Court of

[1] See now sects. 1 and 12 of the Arbitration Act, 1889; and, as to the enforcement of awards, The Laws of England, vol. i. pp. 473–475.

Norton v. *Mascall*, 2 Vern. 24; *Hall* v. *Hardy*, 3 P. Wms. 187; *Walters* v. *Morgan*, 2 Cox, 369.

[3] Note of reporter, 3 P. Wms. 190.

[4] In *Wood* v. *Griffith*, 1 Sw. at p. 54: see also *per* Turner L.J. in *Nickels* v. *Hancock*, 7 De G. M. & G. 300.

Thompson v. *Neal*, 1 Atk. 60.

Chancery,[1] though it would have been otherwise in a suit to set it aside.[2]

Where award not binding at Law

§ 1589. There is an old case in which the Court of Chancery specifically enforced an award not binding by form of law.[3] But, in *Blundell* v. *Brettargh*, Lord Eldon said he had met with no authority for the specific performance of an award by arbitrators appointed for the valuation of interests, where their acts, for the purpose of carrying into effect the contract for an award, were not valid at Law, as to the time, manner, or other circumstances, unless in the cases of acquiescence or part performance: and accordingly in the case before him he refused specific performance of a contract to sell at a valuation, which, on the construction of the contract, the Court held was to be made during the lives of the parties, one of them having died before the award was made.

Abandonment of a term of the submission.

§ 1590. It is, however, plain that by mutual abandonment of some provision of the submission, as, *e.g.*, that limiting the time for the award, the defendant may be precluded from raising in a Court of Equity an objection which might otherwise prevail.[5]

Award unreasonable.

§ 1591. The objection arising from unreasonableness, not of the submission but of the award itself, the Court is not willing to entertain; for the arbitrators being judges of the parties' own choosing, it has been held that the award cannot be objected to by either of the parties, on the ground of its being unreasonable.[6] This principle was stated and acted on by Lord Eldon in *Wood* v. *Griffith*,[7] where his Lordship

[1] *Wood* v. *Griffith*, 1 Sw. 43; *Hawksworth* v. *Brammall*, 5 My. & Cr. 281; *Blackett* v. *Bates*, 2 H. & M. 250, 610; reversed, on a different point, L. R. 1 Ch. 117; 35 L. J. Ch. 324.

[2] *Agar* v. *Smith*, T. & R. 124.

[3] *Norton* v. *Mascall*, 2 Vern. 24.

[4] 17 Ves. 232, 241. This case was not strictly one of arbitration and award, but rather of contract to act at a valuation. See *Kinnaird* v. *Trollope*, 7 Ir. Ch. R. 438.

[5] *Hawksworth* v. *Brammall*, 5 My. & Cr. 281.

[6] *Per* Lord Hardwicke in *Jones* v. *Metcalfe*, 1 Atk. 64.

[7] 1 Sw. 43. See *supra*, § 420.

enforced the specific performance of an award which ordered the sale of an estate under circumstances which greatly depreciated its value.

Award in excess of authority.

§ 1592. Where, on the other hand, the award is more than unreasonable, where the award is in excess of the authority given to the arbitrator, the Court, of course, refuses to enforce it. In a case that came before Knight Bruce and Turner L.JJ., the award was objected to as unreasonable, but it was contended on the other side that the Court could not entertain the objection. Turner L.J., after expressing his dissent from the observations of Lord Eldon in *Wood* v. *Griffith*,[1] said, "If it be a fair subject of discussion and consideration, whether one course or another course be the right one to be taken by parties who have submitted their differences to arbitration, and have said that they will abide by the decision of the arbitrator, I might agree that the judgment of the arbitrator upon that question must decide the point. But here the judgment of the arbitrator goes to the length of destroying the right of one of the parties to the agreement, though the parties never authorized Mr. Carpmael to decide that any one of them had no right, and should acquire no interest in the subject in dispute, but only agreed that he should determine the mode in which their rights and interests should be regulated. It seems to me, therefore, that, if it was necessary to decide this question upon the point of unreasonableness, that point alone would be sufficient to decide it."[2]

Grounds of defence.

§ 1593. The interference of the Court in these cases being in exercise not of any jurisdiction peculiar to awards, but of it ordinary jurisdiction as applied to the specific performance of contracts, it follows that

[1] 1 Sw. 43.

[2] *Nickels* v. *Hancock*, 7 De G. M. & G. at p. 325.

many, if not all, the principles applicable to ordinary actions of that nature must apply.[1]

Submission unreasonable.

§ 1594. Where therefore the contract contained in the submission is such in its character as whether from its unreasonableness, unfairness, or [illegible] the Court would not specifically enforce, this will prevent its interference in respect of the [illegible] founded on it.[2]

Award excessive or defective.

§ 1595. Nor can the Court interfere where the award is excessive or defective: not if it be excessive, for so far the arbitrator has gone beyond his authority, and there is no binding contract between the parties: not if it be defective, because the parties had contracted to be bound by his decision on the whole, and not on part of the matters submitted to him.[3]

Defect owing to defendant.

§ 1596. In a case where the submission was of all matters in difference, and the defendant omitted to submit questions which he alleged ought to have been decided, he was naturally held to be precluded from so doing by the course which he himself had pursued.[4]

Award uncertain.

§ 1597. Where the award is uncertain on its face, and that uncertainty is not removed by the arbitrator's evidence, the Court refuses specific performance of the contract, though the plaintiff may waive all claims beyond the award as construed against him.[5]

Blackett v. *Bates.*

§ 1598. Where the plaintiff has first sought to set the award aside, it is doubtful whether he can afterwards turn round and maintain an action for the specific performance of it, especially where there has been a considerable lapse of time.[6]

[1] *Nickels* v. *Hancock*, 7 De G. M. & G. 300.

[2] S. C. See *supra*, § 420.

[3] *Nickels* v. *Hancock*, 7 De G. M. & G. 300; *Wakefield* v. *Llanelly Railway and Dock Co.*, 3 De G. J. & S. 11. Consider, however, sect. 10 of the Arbitration Act, 1889.

[4] *Hawksworth* v. *Brammall*, 5 My. & Cr. 281.

[5] *Wakefield* v. *Llanelly Railway and Dock Co.*, 3 De G. J. & S. 11.

[6] *Blackett* v. *Bates*, L. R. 1 Ch. 117; 35 L. J. Ch. 321; reversing S. C. 2 H. & M. 270, 610. As to setting aside an award, see sect. 11 (2) of the Arbitration Act, 1889.

§ **1599**. The cases which have arisen of misconduct or impropriety of conduct on the part of persons appointed to value a rent, or the amount of purchase-money, throw light on the way in which the Court would regard like misconduct on the part of persons more accurately described as arbitrators.[1] Misconduct of valuer.

[1] See *Emery* v. *Wase*, 8 Ves. 505; *Chichester* v. *McIntire*, 1 Bli. N. S. 78; *Parker* v. *Whitby*, T. & R. 366; *Ormes* v. *Beadel*, 2 Giff. 166; 2 De G. F. & J. 333. Note that, under sect. 11 (1) of the Arbitration Act, 1889, where an arbitrator or umpire has misconducted himself, the Court may remove him.

CANADIAN NOTES.

Specific Performance of Award.

In *Norrall* v. *The Canada Southern Railway Co.*, 5 O.A.R. 13, it was held that the plaintiff was entitled to specific performance of an award giving him damages for his land taken by the defendant, and it was questioned whether, even if the sum awarded was so excessive as to shew fraudulent or improper conduct on the part of the arbitrator, it would be a defence in such a proceeding. *Per* Moss C.J.A.: "The general rule in equity was that a bill would lie to enforce specific performance of an award where the thing awarded to be done was such that a Court of Equity would have compelled its performance *in specie*, if agreed to by the parties themselves. The parties having agreed to act according to the arbitrator's direction, his decision is tantamount to an agreement upon the terms he lays down, but it does not follow that the Court extends to an award the same liberal jurisdiction which it exercises in the case of an ordinary agreement of refusing to compel specific performance on the ground of the harshness or unreasonableness of the terms. In *Wood* v. *Griffith*, 1st Swanston 43, Lord Eldon held that the objection of unreasonableness could not be sustained, but he seems to have proceeded upon the ground that the parties must abide by the decision of the domestic tribunal that they had themselves chosen. . . . That decision was commented upon by Lord Justice Turner in *Nichols* v. *Hancock*, 7 D.M. & G. 300. While that learned Judge was perhaps prepared to agree that the arbitrator's judgment should be final, when it was a fair subject of discussion and consideration whether one course or another was the right one, he intimated an opinion that the objection of unreasonableness ought to prevail where the judgment of the arbitrator went the length of destroying the right of one of the

parties, though the parties had never authorized him to decide that any one of them had no right, but only agreed that he should determine the mode in which their right and interests would be regulated. The general doctrine I take to be established by the cases is, that the Court will not refuse specific performance on the ground that the price fixed is unreasonable."

CHAPTER IX.

CONTRACTS TO REFER TO ARBITRATION.

Court will not enforce them affirmatively.

§ **1600.** With regard to contracts to refer to arbitration, it is clear that the Court will not entertain actions for their specific performance,—a principle in the first place, it seems, acted upon by Lord Thurlow in a case of *Price* v. *Williams*,[1] and which has been since well established.[2] In one case Knight Bruce and Turner L.JJ., upon this amongst other grounds, refused to compel the specific execution of a bond to refer to arbitration.[3]

Contract to buy at price to be fixed.

§ **1601.** In like manner we have seen that, where there is a contract to buy at a price to be fixed by persons to be named, the Court can neither compel a defendant to name a valuer, nor compel a valuer to value, nor compel the defendant to sell at any other value.[4]

Morse v. *Merest.*

§ **1602.** There is, however, a case before Leach V.C., somewhat briefly reported as to its circumstances, in which, the vendor refusing to permit the referees to come upon the land, the Court compelled him to permit the valuation.[5]

[1] Referred to in 6 Ves. at p. 818. On the subject of arbitration, see The Laws of England, vol. 1, pp. 437 *et seq.*

[2] *Street* v. *Rigby*, 6 Ves. 815; *per* Grant M.R. in *Gourlay* v. *Duke of Somerset*, 19 Ves. 429; *Agar* v. *Macklew*, 2 S. & S. 418; *Gervais* v. *Edwards*, 2 Dr. & War. 80.

[3] *South Wales Railway Co.* v. *Wythes*, 5 De G. M. & G. 880.

[4] *Wilks* v. *Davis*, 3 Mer. 507; *Darbey* v. *Whitaker*, 4 Drew. 134; *Vickers* v. *Vickers*, L. R. 4 Eq. 529; *supra*, §§ 357 *et seq.*

[5] *Morse* v. *Merest*, 6 Mad. 26. See, too, *supra*, § 1158.

Inequitable refusal of plaintiff to refer.

§ **1603.** Though the Court will thus refuse specifically to enforce references to arbitration, an inequitable refusal of a plaintiff to make such a reference may disentitle him to the aid of the Court, on the principle that he who seeks equity must do equity. Thus, where a deed was executed which created a lien for the amount of a solicitor's bills and advances, the amount of which was to be settled by arbitration, and the arbitrator died before the award was made; in a suit seeking the reconveyance of the property, Alderson B. held that the contract between the parties was composed of two distinct parts,—the first admitting that some balance was due to the solicitor, and the second, a contract for a specific mode of ascertaining that balance; that the latter part alone had failed; that the former part remained entire, and that the Court would not decree a reconveyance without the plaintiff's consenting to do equity by having the accounts taken by the Master.[1]

Arbitration Act, 1889.

§ **1604.** By the 4th section of the Arbitration Act, 1889, every Court has power under certain circumstances to stay proceedings in actions in respect of any matters agreed to be referred to arbitration. A similar power had been given by the Common Law Procedure Act, 1854, s. 11. Under this enactment orders have been made which have indirectly the effect of compelling the plaintiff specifically to perform the contract to refer to arbitration.[2]

[1] *Cheslyn* v. *Dalby*, 2 Y. & C. Ex. 179.

[2] For cases under this section in the Court of Chancery and in the Chancery Division, see *Willesford* v. *Watson*, L. R. 14 Eq. 572; 8 Ch. 473; *Plews* v. *Baker*, L. R. 16 Eq. 564; *Gillatt* v. *Thurston*, L. R. 19 Eq. 599; *Newton* v. *Taylor*, L. R. 19 Eq. 14; *Law* v. *Garrett*, 8 Ch. D. 26; also *Lyon* v. *Johnson*, 40 Ch. D. 579, and *Re Carlisle*, 41 Ch. D. 200 (discretion of the Court); *Pini* v. *Roncoroni*, [1892] 1 Ch. 633 (receiver and stay of proceedings); *Barnes* v. *Youngs*, [1898] 1 Ch. 444. See, too, *Kitts* v. *Moore* (injunction restraining arbitration), [1895] 1 Q. B. 253; and *Foster* v. *Hastings* (injunction in aid of arbitration), 87 L. T. 736.

CHAPTER X.

CONTRACTS NOT TO APPLY TO PARLIAMENT.

Mode of enforcement.

§ 1605. The Court has not infrequently been asked to enforce the specific performance of a contract not to apply to Parliament, by means of an injunction restraining such application.

Court has jurisdiction in a proper case.

§ 1606. It is perfectly clear that a Court of Equity has power, upon a proper case being made out, to enjoin a person from petitioning Parliament; for the Court merely acts *in personam*, and does not therefore in any way interfere with the proceedings of Parliament:[1] but what is a proper case for this interference of the Court is a question of considerable difficulty. It has even been said that it is difficult to conceive or define what are the cases in which it would be proper for the Court to exercise its undoubted power of restraining any person from making an improper application to Parliament.[2]

Where Court will not interfere.

§ 1607. The mere fact that the intended application to Parliament will abrogate existing rights and create new ones can give no right to such an injunction; for that would be to restrain Parliamentary interference in all such cases.[3] Nor will the Court

[1] *Ware* v. *Grand Junction Waterworks Co.*, 2 R. & My. 470, 483; *Heathcote* v. *North Staffordshire Railway Co.*, 2 Mac. & G. 100; *Lancaster and Carlisle Railway Co.* v. *North Western Railway Co.*, 2 K. & J. 293. See also *Att.-Gen.* v. *Manchester and Leeds Railway Co.*, 1 Rail. C. 436.

[2] *Re London, Chatham and Dover Railway Arrangement Act*, L. R. 5 Ch. 671, 679. See, too, *Steele* v. *North Metropolitan Railway Co.*, L. R. 2 Ch. 237.

[3] *Heathcote* v. *North Staffordshire Railway Co.*, 2 Mac. & G. 100.

interfere, even where for the protection of private interests a contract not to apply to Parliament has been entered into, provided the party making the application to the legislature may urge it upon grounds of public policy, of which Parliament can judge, but a Court of Equity cannot.[1] This seems to apply to all cases in which the application is in soliciting a Bill; for in all such cases grounds of a public nature may be urged.

Lancaster &c. Railway Co. v. *North Western Railway Co.*

§ **1608**. Accordingly, in a case where the defendant company contracted with the plaintiff company not to make any line connecting their respective railways except one which had been already applied for by the defendants, and in consideration of this the plaintiffs agreed to support, instead of opposing (as they had previously done), the application of the defendants for the last-mentioned line, and the plaintiffs performed their part of the contract, and the defendants' application was successful; the Court nevertheless refused to restrain the defendants from applying to Parliament in contravention of their contract, considering that such an application, if successful, would be so on public grounds, of which the Court could not judge, and that, if it were rejected, the breach of the contract, if a legal one, might be compensated for in damages.[2]

Where applicant acting on private grounds only.

§ **1609**. The only case, therefore, in which the Court would interfere appears to be when the applicant is acting on private grounds only. "It might well be conceived," said Lord Hatherley (then Wood V.C.) in one case, "that where a tenant for life had stipulated that he would not apply for a private Act, he might be

[1] *Lancaster and Carlisle Railway Co.* v. *North Western Railway Co.*, 2 K. & J. 293. See, too, *per* Bacon V.C. in *Telford* v. *Metropolitan Board of Works*, L. R. 13 Eq. at p. 594.

[2] *Lancaster and Carlisle Railway Co.* v. *North Western Railway Co.*, 2 K. & J. 293.

restrained from so doing. . . . . If a man had made an agreement to buy a house or field, and afterwards found the agreement inconvenient, and wished to apply to Parliament to set it aside, that possibly might be a case in which the Court would interfere, and say that this not being a matter of public policy, the man should not make the application."[1]

[1] *Steele* v. *North Metropolitan Tramway Co.*, L. R. 2 Ch. 238, n.

CHAPTER XI.

CONTRACTS TO INDEMNIFY.

The jurisdiction

§ 1610. AGREEMENTS for indemnity, whether taking the form of a covenant or of an executory contract, appear equally to attract the jurisdiction of the Court by way of specific relief.[1] All or most of the reported cases are on executed contracts.

When exercised by the Court of Chancery

§ 1611. A contract by A. to indemnify B. against a payment is not broken till the payment has been made: and when made by B., he might, before the Judicature Acts, have recovered the amount paid by an action at Law, and have obtained in that way all that he needed.

But where the contract by A. is to indemnify B. against all claims and demands of C., there is a breach so soon as C. makes the claim,[2] and B. may here usefully invoke the aid of a Court of Equity to compel A. to satisfy his demand to the relief of B., and thus specifically to perform the contract: and accordingly, in such cases, the Court of Chancery entertained jurisdiction.

Ramlaugh v. *Hayes*.

§ 1612. In the case of *Ramlaugh* v. *Hayes*[3] the plaintiff assigned certain shares to the defendant, and the defendant covenanted with the plaintiff to indemnify him against (amongst other things) all demands in respect of the shares: the plaintiff was prosecuted for a demand by the Crown, and accordingly prayed specific performance, which was granted.

[1] See *per* Kindersley V.C. in *London and South Western Railway Co.* v. *Humphrey*, 6 W. R. 784.

[2] *Warwick* v. *Richardson*, 10 M. & W. 284; *Corr* v. *Roberts*, 5 L. & Ad. 78; *Taylor* v. *Young*, 3 B. & Al. 521; *Penny* v. *Fox*, 8 B. & C. 11.

[3] 1 Vern. 189.

The decree extended not only to the claim then advanced, but to future demands, and directed the Master, *toties quoties* any breach should happen, to report it to the Court. It is conceived that such a judgment could not now be pronounced as regards future and repeated acts.[1]

Anglo-Australian Insurance Co. v. British Provident Life Insurance Co.

§ 1613. In a much more modern case Company A assigned its business to Company B., and Company B covenanted with Company A. that the shareholders of Company A. should out of the funds of Company B. be indemnified against all liabilities in respect of Company A. Actions and suits were instituted by various persons against Company A. in respect of claims against which the indemnity had been given, and these were not paid by Company B. Company A. thereupon sued for and obtained a declaration of the liability of Company B. to perform their indemnity.[2]

[1] *See Lloyd* v. *Dimmack*, 7 Ch. D. 398; *Hughes-Hallett* v. *Indian Mammoth Gold Mines Co.*, 22 Ch. D. 561.

[2] *Anglo-Australian, &c. Co.* v. *British Provident, &c. Society*, 3 Giff. 521; 1 De G. F. & J. 311. See also Story, Eq. Jur. § 850.

CANADIAN NOTES

Miscellaneous Cases

The digests include a number of cases under the head of specific performance which deal with the substantive law of contract or questions as to the evidence by which the contract may be proved. It has been found impossible to classify all of these under the author's various chapters, although these also cover questions of substantive law and not merely questions relating to the remedy. Such cases as could not be brought within the scope of any of the author's chapters and may nevertheless be looked for by practitioners, will be found under this heading.

In *McFarlane* v. *Dickson*, 13 Grant's Ch. 263, a contract was entered into for a lease, and the intended lessee on the faith thereof entered into possession, paid rent and made improvements. Both parties died without executing any writing stating the bargain and before any dispute as to the sale arose. On a bill by the representatives of the intended lessee for specific performance, the parol evidence was not alone sufficient to establish clearly the terms of the transaction, but, there being found among the papers of the intended lessor, a County Court Judge, an unexecuted lease in his own handwriting, the Court was satisfied that this paper contained the terms of the lease bargained for and a specific performance having been decreed in Chancery, the decree was affirmed on appeal.

In *McKenzie* v. *Yielding*, 13 Grant's Ch. 259, the plaintiff was the lessee of some ordnance land and assigned his interest therein to the defendant in 1847, the latter agreeing in consideration of such assignment to pay off an execution against the plaintiff [illegible] in the sheriff's hands, and if the Ordnance Department [illegible] would give the defendant a deed in fee of the lot, or a lease

renewable in perpetuity at the then rent, to release a mortgage he had against the plaintiff on other lands. The Department refused to do either, but eleven years afterwards sold the land to the defendant at a price greatly exceeding the sum of which the rent would be interest at six per cent. The bill was for the discharge of the mortgage, but was dismissed and the decree of the Court below, dismissing the bill was affirmed on appeal. "It never could be held that the defendant was to release the mortgage, however large the sum he might pay for the land."

The owner of lands over which the Grand Trunk Railway would pass, offered to convey a portion thereof for a station house, upon certain conditions, which offer was rejected. Afterwards, an agreement was made with the solicitor of the contractors which was reduced to writing and signed by the owner agreeing to convey a quantity of land not to exceed ten acres upon condition that the station should be placed upon it. The owner afterwards refused to convey unless the contractors would secure to him three crossings over the railroad track, and brought an action of ejectment to turn the parties out of possession of the land so agreed to be conveyed.

Upon a bill filed for that purpose, the Court decreed specific performance of the agreement to convey and an injunction to stay the ejectment, notwithstanding that the defendant swore that the condition upon which he agreed to convey was that the crossings should be secured to him. *Jackson* v. *Jessup*, 5 Grant's Ch. 524.

An action having been instituted by a legatee against the executors and residuary devisees of a testator alleging an express agreement by all to pay interest upon a legacy which by the law was not recoverable, to which the executors pleaded and judgment was given in their favour, but judgment was recovered by the residuary legatees by default, who afterwards fyled a bill against the executors, claiming the specific performance of a covenant by the executors to indemnify against the claim of such legatee, it was held in *Crooks* v. *Torrance*, 8 Grant. 220, that, their own default having been

the cause of judgment passing against them formed no ground for the residuary devisees coming into equity for indemnity.

It was held in *Casey* v. *Jordan*, 5 Grant's Ch. 467, in 1866, that the Registry Acts did not apply to instruments executed previously to the grant from the Crown. Where, therefore, a locatee of land executed a bond to convey and, after the issuing of the papers, sold and conveyed the property to a third party, who again sold and executed a conveyance to a purchaser for value, but before either had paid the purchase money, the holder of the bond having registered the same, filed and served a bill for specific performance, it was held, that neither vendee was in a position to plead a purchase for value without notice, and that the plaintiff was entitled to a specific performance with costs. The plaintiff's right to relief was resisted on two grounds, first, because the plaintiff's unregistered contract was fraudulent and void under the registry laws, as to the defendant, who claimed under deeds duly registered without any actual notice of the plaintiff's equitable title; secondly, because the Court would not take any steps against the defendants who had acquired the legal estate and were purchasers for value without notice.

In *Holland* v. *Hoare*, 12 Grant's Ch. 296, it was held that the only instruments executed before patent which can be registered in the county registry office are such as create a mortgage, lien or encumbrance on the land. In this case A. bargained with B., the locatee of the Crown, for the purchase of an unpatented lot, free from encumbrances, and obtained a bond for a deed, and paid B. the full consideration. B. afterwards borrowed money on the security of the lot from C., who took out the patent and conveyed the lot to B., and received from him the mortgage without notice of A.'s claim. After the loan had been agreed to, but before it was carried out, A. registered his bond in the registry office of the county, where the land was situate. A bill by A. against C. for specific performance of the contract was dismissed with costs. This case was decided in 1866 and Mowat V.-C., in delivering judgment, said: "The legislature has seen fit to allow registration in the county where the

land lies of any instrument affecting the land in law or equity when executed after the granting of the patent, and to give effect to such registered instruments as against subsequent transactions, though the parties claiming under the subsequent transactions had no notice of the registered instruments and dealt in ignorance of them. But in regard to instruments executed before patent, Parliament has expressly confined registration in the county registry office to mortgages, encumbrances and liens, and I have no power to extend the effect of such registration to other cases."

In *McCrumin* v. *Crawford*, 9 Grant's Ch. 337, a parol contract was entered into for the sale of one acre of land the consideration for which was paid and the purchaser let into possession of the property which he occupied, improved and built upon. Afterwards, in the same year, the vendor executed by way of security a life lease to another person of fifty acres including the acre so sold. This occurred in 1858. In 1860, a bond was executed by the vendor to the wife of the purchaser for the conveyance of the acre to her. In 1862, the lessee for life purchased the 50 acres in fee and the conveyance to him was duly registered, the bond for the conveyance of the acre never having been registered. The purchaser of the acre having filed a bill for specific performance of the parol contract, the Court refused this relief, the parol contract having become merged in the written contract or bond, but offered the plaintiff, at the risk of costs, permission to amend by alleging the written contract and to give further evidence to establish direct notice of the bond.

ADDITIONAL NOTE A.[1]

(BY THE AUTHOR.)

The Case of Bolton Partners *v.* Lambert.

This case, reported 31 Ch. D. 295 (followed by the Court of Appeal in *In re Portuguese Copper Mines, Limited, Ex parte Badman*, 45 Ch. D. 161), seems so important and so worthy of further consideration by any Court not bound by it, that I venture to offer a few respectful criticisms upon it. In the case in question an offer was made by the defendant to one Scratchley, as the managing director of the plaintiff company: Scratchley had no authority to accept the offer, but nevertheless accepted the offer; the defendant then withdrew his offer; and after the withdrawal the plaintiffs ratified Scratchley's acceptance. It was held that the withdrawal by the defendant was inoperative. The decision seems to raise some difficulties, both practical and legal. It seems to follow from it that the intervention of a mere stranger may prevent a person who has made an offer from withdrawing that offer until it be seen whether the person to whom it is made will ratify it or not, and consequently places that person in the difficult position of neither having a contract nor a right to withdraw an offer. An offer made to a principal may be withdrawn: an offer made to a person who professes to be an agent, but is not, cannot be withdrawn; so that the person making the offer is worse off in the latter than the former case. At the time the defendant, in the case under discussion, withdrew his offer, there was nothing

[1] See an article by Professor Floyd R. Mechem, intituled "A Question of Ratification," in the 24th volume of the American Law Review (1890), at p. 580. This article appears to have been written in ignorance of the *Bolton Partners' case*, but agrees in its conclusions with Note A. See, too, the observations of Chitty J. in *Dibbins* v. *Dibbins*, [1896] 2 Ch. at p. 351.

but the action of a stranger, and it seems difficult to suppose that that could deprive the defendant of his common law right to withdraw an offer before acceptance. At the time the plaintiffs ratified the action of the stranger, an act had been done by the defendant in exercise of that right, and it seems difficult to suppose that subsequent ratification could destroy the operation of an act otherwise valid. In a case in which it was unsuccessfully contended that subsequent ratification of a notice to determine a lease could make it good, Lawrence J. said, "The rule of law that *omnis ratihabitio retrotrahitur*, &c., seems only applicable to cases where the conduct of the parties on whom it is to operate, not being referable to any agreement, cannot in the meantime depend on whether there be a subsequent ratification. But here the intermediate acts of the tenant referable to the term of his lease are to be affected by relation."[1] And it is apprehended that in a general way ratification is not permitted to avoid and defeat prior acts validly done or rights previously vested.

The effect of the act of the stranger on the offer of the defendant is thus explained by the Court. "I think," said Cotton L.J., "the proper view is that the acceptance by Scratchley did constitute a contract, subject to its being shown that Scratchley had authority to bind the company." "Directly Scratchley, on behalf and in the name of the plaintiffs," said Lopes L.J., "accepted the defendant's offer, I think there was a contract made by Scratchley assuming to act for the plaintiffs, subject to proof by the plaintiffs that Scratchley had that authority."

These passages seem to suggest a new view of the constitution of a contract. For at the moment of Scratchley's act (his so-called acceptance), it is said that a contract was constituted, subject, indeed, to something, but still a contract. Now, at that moment, the plaintiffs, to whom the offer was made, had exercised no will, and given no consent to the proposal; so that if a contract was then made it was constituted without the will of one of the contracting parties, and at the will of a stranger.

But the contract so constituted was subject to its being shown that Scratchley had authority to bind the plaintiffs: *i.e.*, as I understand, that the contract was subject to a condition: the condition cannot be the proof that Scratchley was authorized at the moment of his so-called acceptance; for in the case before

[1] *Right* d. *Fisher* v. *Cuthell*, 5 East, 499.

the Court that was not the case, and therefore never could be proved. The condition cannot be a condition precedent, for then there would have been no contract; it must therefore be a condition subsequent, and a condition subsequent cannot make good that to which it is appended, but may avoid it. It is apprehended, therefore, that the real meaning of the learned Judges was that the contract would be avoided if it were not shown within a reasonable time that Scratchley's act had been ratified. So that the contract was contingent upon a subsequent expression of will of one of the contracting parties, and existed as a contract before that will was exercised or expressed.

If the principle of this case should ever come before a Court not bound by it, it may be worthy of consideration whether it should not receive further discussion.

ADDITIONAL NOTE B.[1]

(BY THE AUTHOR.)

French Law of Specific Performance.

The peculiarly English character of the jurisdiction in specific performance has been adverted to above (§ 5). The following further information with regard to the French law may not be uninteresting.

The following clauses of the Code Civil bear upon the point :—

"1142. Toute obligation de faire ou de ne pas faire se résout en dommages et intérêts, en cas d'inexécution de la part du débiteur."

"1143. Néanmoins le créancier a le droit de demander, que ce qui aurait été fait par contravention à l'engagement soit détruit; et il peut se faire autoriser à le détruire aux dépens du débiteur, sans préjudice des dommages et intérêts, s'il y a lieu.

"1144. Le créancier peut aussi, en cas d'inexécution, être autorisé à faire exécuter lui-même l'obligation aux dépens du débiteur."

Through the kindness of Professor Holland, of Oxford, I have received the following note explanatory of the subject from M. Renault, Advocate and Professor of Law at Paris :—

"Le débiteur peut-il être tenu à une exécution en nature (specific performance), ou peut-il être seulement condamné à des dommages-intérêts ?

"Les principes sont posés dans les articles 1143, 1143, et 1144, du Code Civil. Ces trois articles doivent être combinés,

[1] In connection with the subject-matter of this note, see an article by Mr. M. Sheldon Amos on "Specific Performance in French Law," in 17 Law Quarterly Review, 372, and the observations of "E. S." in 8 Law Quarterly Review, 252. W. D. R.

et il en résulte une doctrine qui peut être résumée de la manie suivante :—

"La formule de l'art. 1142 est trop générale : ce n'est toute obligation de faire ou de ne pas faire qui se rés nécessairement en dommages-intérêts, c'est celle dont l'exécuti effective est impossible par voie de contrainte, parce que ce exécution forcée ne pourrait être obtenue sans porter atteint la liberté individuelle du débiteur, sans exercer une pressi matérielle sur sa personne. Ainsi un acteur a promis à directeur de chanter sur son théâtre, ou, au contraire, de ne paraître sur une scène rivale ; s'il refuse de tenir ses engagemen le créancier ne pourrait obtenir l'exécution effective sans ê autorisé à exercer sur la personne de son débiteur des violen physiques pour l'amener de force sur son théâtre, ou p l'écarter du théâtre rival. Ces violences, cette contrainte physi dont les résultats ne pourraient être que fort imparfaits, s contraires à l'esprit et au texte de toute notre législation, et c dans ces cas-là que l'obligation se résout nécessairement dommages-intérêts.

"Un propriétaire a promis à son voisin d'abattre des arb qu'il a sur son propre terrain, et qui font obstacle à la vue de voisin. Si, se repentant de cette promesse, et disposé à faire grands sacrifices d'argent pour conserver ses arbres, le débit refuse d'exécuter son obligation, le créancier pourra ne pas contenter des dommages-intérêts ; il obtiendra l'autorisat d'entrer sur le fond de son débiteur, et de faire abattre arbres.

"Pour les détails, voir le Répertoire de Dalloz, 33me volu au mot *Obligation*, § 702 et suivant. Pothier, Traité Obligations, N° 146 et suivant."

Sir Frederick Pollock has favoured me with a note on t subject, in which he expresses his belief that M. Renault not dealt with the entire subject, and has confined his attent to the obligation "de faire ou de ne pas faire," and omitted consider the obligation "de donner," which would in p correspond to our doctrine of specific performance.

Professor Holland has also reconsidered the subject in a r to the 5th edition of his work on Jurisprudence,[1] and

[1] See pp. 322, 323 of the 11th edition of the work (Holland's Elemen Jurisprudence).

conclusions tend to emphasize the distinction in this respect between the laws of the two countries.

It is beyond my object and my knowledge to attempt an exact comparison of the English law with that of Rome or of France, or to ascertain how far the latter may have approximated to the principles of our Equity jurisdiction in specific performance. But it would appear as if the French law was still limited by that tenderness for the liberty of the subject which the old Common Law judges urged as an objection to the Chancery jurisdiction which might end in imprisonment. (See the case of *Bromage* v. *Gennings*, referred to in the next additional note.)

ADDITIONAL NOTE C.

(BY THE AUTHOR.)

Cases Illustrative of the Early Jurisdiction of Chancery in Specific Performance.

(i) Richard II.—*Wheler* v. *Hachynden* (2 Calendar of Proceedings in Chancery, 2). The plaintiff averred an agreement between the plaintiff and defendant that the defendant should grant to the plaintiff the reversion of certain lands; that the defendant lent to the plaintiff the deeds to enable him to obtain advice as to the conveyance; that the plaintiff came to London for such advice and incurred expenses, and then the defendant refused to convey, and the plaintiff accordingly sought the Chancellor's aid, alleging that as he had no specialty or writing of the covenant he could not sue at Common Law. He asked for judgment according to that which loyalty, good faith, and conscience demanded in all parts for the love of God and in the work of Charity. It has been suggested[1] that the relief sought was not specific performance of the covenant or contract, but repayment of the plaintiff's expenses. But it may be doubted whether the plaintiff did not seek a wider relief. Whether he obtained any or what relief does not appear.

(ii) Henry VI. (no year).—*John Jonesse* v. *John Peneley and Wm. Peneley* (2 Calendar, 35) is a suit on a contract entered into between Wm. Peneley and the plaintiff for the sale of a house and garden at Berkhampstead, of which John Peneley was feoffee to the use of Wm. Peneley, in which the plaintiff alleged that the purchase-money had been partly paid.

(iii) Henry VI. (no year).—*Furby* v. *Martin and Bamme*

[1] By Prof. Ames in "The Green Bag," Vol. I. No. 1, p. 26, published at Boston, Mass.

(2 Calendar, 40). A very similar case to *Jonesse* v. *Pendley*, but in this case the sale was of a manor, and the time for completion at the place fixed, viz., the parish church, had passed, and no deed had been executed.

(iv) 27th Henry VI. —*Lord Scales* v. *Dame Katherine Filbert and John Dame* (2 Calendar, 26) was a suit brought to compel the defendants to make an estate to the plaintiff in reversion in accordance with a purchase on which the plaintiff alleged that he had paid the purchase-money. A decree was made.

(v) Year Book, 8th Edw. IV. 11, pl. 4 B. The defendant had promised the plaintiff *per fidem* to indemnify him in his occupation of the defendant's benefice, as proctor for the defendant; the defendant made default, and thereupon the plaintiff sued out a subpœna in Chancery. Genney, who appeared for the defendant, raised various objections, as that by reason of the pledge of faith the proceeding ought to have been in the Court Christian, and not in Chancery, and that it was the plaintiff's own folly that the promise was not in a deed on which an action at law might have been maintained. But the Chancellor overruled all these objections, and said that the plaintiff should have relief in Chancery. Genney, in the course of the argument, admitted that if I promise you to build you a house or to make over a house to you (*de faire a vous un meason*), and break the promise, you shall have remedy by subpœna.[1] The case is interesting as showing the connection of the jurisdiction in specific performance with the old jurisdiction of the Ecclesiastical Courts in cases of *Laesio fidei*.

(vi) Year Book, 21st Henry VII. 41, pl. 66. In this case Fineux C.J., in discussing the extent of the action on the case, observed, that if one bargains with me that I shall have his land to me and my heirs for 20*l*., and that he will make the estate over to me, and I pay the 20*l*., but he will not make over the estate to me according to the covenant, I may have an action on the case and am not bound to sue out a subpœna.

(vii) 1 Edw. VI. *Carrington* v. *Humphrey*, Tothill, 14.

(viii) 11 & 12 Eliz. *Pope* v. *Mason*, Tothill, 3.

(ix) 12 Eliz. *Hungerford* v. *Hutton*, Tothill, 62.

(x) 25 Eliz. *Benther* v. *Denton*, Tothill, 3.

(xi) 29 Eliz. *King* v. *Royden* (the Practice of the High Court of Chancery, 1672, p. 42 b).

[1] This is, I believe, a fair statement of the case, but in points I feel some uncertainty.

(xii) 41 Eliz.—*Beeston* v. *Longford*, Tothill, 14.

(xiii) 7th James I. *Throckmorton* v. *Throckmorton*, Tothill, 4. This case is interesting, as the decree is said to have been made by the judges' advice.

(xiv) 11th James I. *Bates* v. *Heard*, Tothill, 4.

xv, (undated). *Foster* v. *Eltonhead*, Tothill, 4.

(xvi) 14th James I. *Bromage* v. *Gennings*, Rolle, 354, 368. Bromage sued Gennings in the Court of the Marches of Wales for not executing a lease according to his bargain, and from the statement of the plaintiff's counsel it appears to have been a suit for specific performance, and not to recover damages, and this, he added, is usually done in Chancery. Thereupon the defendant moved for a prohibition and obtained it, Coke, Doddridge, and Haughton saying that Chancery ought not to do so, for then to what purpose are the actions on the case and covenant? and Coke added that this would subvert the interest of the covenantor, who understands that it is at his election either to lose the damages or to make the lease. Doddridge observed that if a decree was made for the execution of the lease, and he did not chose to execute it, there would be no other remedy than imprisonment. So complete was the unanimity of feeling in the Court, that Serjeant Harris, the plaintiff's counsel, said that the part he took in the matter was against his conscience.

It may be added that the 10th volume of the publications of the Selden Society, intituled, "Select Cases in Chancery," contains (see especially pp. xxxv—xxxvi) particulars of several interesting cases illustrative of the early jurisdiction in specific performance. Some of these appear to be mixed cases of specific performance and trust, or specific performance and fraud. They are worthy of attention.

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