NEW JERSEY EQUITY REPORTS.

VOLUME XX.

C. E. GREEN, V.

REPORTS OF CASES

ARGUED AND DETERMINED IN

THE COURT OF CHANCERY,

THE PREROGATIVE COURT,

AND, ON APPEAL, IN

THE COURT OF ERRORS AND APPEALS

OF THE

STATE OF NEW JERSEY.

CHARLES EWING GREEN, REPORTER.

VOLUME V.

SECOND EDITION.

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1878.

CHANCELLOR,

DURING THE PERIOD OF THESE REPORTS.

HON. ABRAHAM O. ZABRISKIE.

CLERK IN CHANCERY,

BARKER GUMMERE, ESQ.

JUDGES OF THE COURT OF ERRORS AND APPEALS.

EX-OFFICIO JUDGES.

HON. ABRAHAM O. ZABRISKIE, CHANCELLOR.
" MERCER BEASLEY, CHIEF JUSTICE.

Associate Justices Supreme Court.

" JOSEPH D. BEDLE,
" VANCLEVE DALRIMPLE,
" GEORGE S. WOODHULL,
" DAVID A. DEPUE,
" BENNET VAN SYCKEL, (*vice* Elmer, term expired,) from March 15th, 1869.
" EDWARD W. SCUDDER, (*vice* Vredenburgh, term expired,) from March 23d, 1869.

JUDGES SPECIALLY APPOINTED.

HON. ROBERT S. KENNEDY,
" EDMUND L. B. WALES,
" JOHN CLEMENT,
" GEORGE VAIL,
" JAMES L. OGDEN,
" CHARLES S. OLDEN.

This volume contains the opinions delivered in the Court of Chancery from May Term, 1869, to February Term, 1870, and including part of that term; in the Prerogative Court during the year 1869; and part of the opinions in equity cases in the Court of Appeals, delivered at March Term, 1869.

References show where the cases herein reported have been cited, affirmed, reversed, or modified, down to Vol. 39, N. J. Law Reports (10 Vroom), and Vol. 28, N. J. Equity Reports (1 Stewart), inclusive.

Where Nixon's Digest is cited in the opinions, reference is also made to the Revision.

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CASES

REPORTED IN THIS VOLUME.

CASES

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A.

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CASES

ADJUDGED IN

THE COURT OF CHANCERY

OF THE

STATE OF NEW JERSEY.

MAY TERM, 1869.

ABRAHAM O. ZABRISKIE, ESQ., CHANCELLOR

THE NATIONAL BANK OF THE METROPOLIS *vs.* SPRAGUE and others.*

MITCHELL & ALLEN, Trustees, *vs.* Same.

KLOUS & HILLBURN *vs.* Same.

1. Although a husband may give to the wife her services and earnings as against his creditors, when she carries on a separate business, without his assistance, with her own means and on her own account, yet in all cases where a business is carried on by a husband and wife in co-operation, and the labor and skill of the husband are contributed and united with those of the wife, the business will be considered as that of the husband and not that of the wife, and the proceeds will not be protected for her as against his creditors.

2. The fruits of the wife's labor and skill, under such circumstances, are not her separate property within the terms or intention of the act for the better securing the property of married women.

3. Even if that act gave a wife the capacity to accept a gift of property from her husband, she could not be allowed to retain such gift as against

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* CITED *in Strong* v. *Van Deursen*, 8 *C. E. Gr.* 371; *Huber* v. *Diebold*, 10 *C. E. Gr.* 173; *Macintosh* v. *Thurston*, *Id.* 246; *Heinselt* v. *Smith*, 5 *Vr.* 217; *Lamb* v. *Cannon*, 9 *Vr.* 363.

his creditors, when made under circumstances which would prevent it from being sustained in favor of a stranger.

4. A conveyance taken in the name of the wife, of property purchased with means of her husband when in embarrassed circumstances, in order to screen it from his creditors, will be set aside as against future creditors.

5. A married woman who had no separate property, and had never carried on any separate business, made a power of attorney to her husband to carry on, in her name, a hotel. The husband was, at the time, extensively engaged in similar enterprises, and had become embarrassed. The husband negotiated and executed, in the name of his wife, acting as her attorney, articles of co-partnership with S., for conducting the hotel intended. Land and buildings for such hotel were subsequently purchased, and the deed for them was taken in the individual names of the wife and of S., her partner. A part of the first installment of the purchase money was paid from money alleged to have been borrowed by the wife for the purpose, and a part was paid by the husband from his own means. The complainants advanced money to the husband, to be used in fitting up the hotel, upon the faith of his representations to them that he was the purchaser of a half interest in it. They now file a bill, praying that the wife may be decreed to hold the title to said property as trustee for her husband, and to convey it so as to be held subject to their remedy at law. *Held*— That the circumstances proved an intent on the part of the husband and wife to take the title in her name for the purpose of delaying and defrauding his creditors, and that the complainants were therefore entitled to the relief prayed.

6. Where one who has purchased lands upon an agreement that a part of the price shall be secured by a mortgage to be given upon the delivery of the deed, commences, without the written consent of the vendor, to erect buildings upon the land before the actual delivery of the deed and mortgage, the mortgage, if afterwards given pursuant to the agreement, and duly registered, has preference over any lien claim which may have been filed for labor or materials furnished towards the buildings, although furnished before the execution of the mortgage.

7. A contract to convey land, although in writing, does not amount to a consent in writing to erect buildings, so as to make the estate of the vendor subject to a lien for a building erected by a tenant or other person. Hence, in this case, the estate of the vendor is not affected by the lien, but only the equitable estate of the purchaser.

8. In order to preserve the lien of a chattel mortgage beyond the first year, the re-filing a copy required by law must be done during the thirty days immediately preceding the expiration of the year. A re-filing before the commencement of the thirty days is unavailing. Such a mortgage must be postponed to the claims of subsequent creditors, purchasers, and mortgagees; but as against the mortgagors themselves, it is valid.

9. The mortgagees in a chattel mortgage upon hotel furniture, which

contained a provision that the mortgagors should retain the possession until default in payment, or until the chattels should be seized by execution or attachment, upon learning that a levy had been made, attended, by their attorney, at the hotel wherein the property was, and demanded possession. The mortgagors gave the attorney the keys, went with him through the hotel, opened the doors of the various rooms, and exhibited the furniture. It was then arranged that the property covered by the mortgage should be considered as stored for the mortgagees, and the attorney took away a napkin as a symbol of the delivery of the whole. *Held*— That this transaction could not aid the claim of the mortgagees; it was not an actual and continued change of possession.

10. Although, for want of due filing or actual change of possession, a mortgage given by partners upon partnership property has been postponed to the claims of subsequent creditors of the firm, yet equity will give it priority over claims of creditors of individual partners. As against the mortgagors themselves, omission to file, or to change the possession, does not impair the mortgage; hence any surplus which remains after discharging valid liens for firm debts must be applied to discharge the demand of the mortgagees, that being a partnership debt, in preference to individual debts of either partner.

11. The law of this state does not forbid debtors, though insolvent, to prefer creditors by making payments of money or transfers of property, or by giving mortgages or confessing judgments. And, although a preference thus created may operate to delay and hinder other creditors, yet, if not created for that purpose, but to secure or pay *bona fide* debts, it is lawful.

12. A mortgage executed by the partners of an insolvent firm, upon property of the firm, to a trustee for the holders of bonds to a large amount, issued by the firm to secure such creditors as were willing to accept the bonds as payment of or security for their debts, is not void by reason of the provisions of the assignment act, but is valid to the extent of protecting all holders of such bonds who appear to be *bona fide* creditors for value. The bonds given to creditors for sums larger than their true debts, can be enforced only for the amounts really due. So far as these bonds are voluntary gifts, they are not good as against creditors.

13. The rule of courts of equity and bankruptcy, when partnership assets are to be administered there, that they must be applied to the partnership debts before any part can be appropriated for the partners, or to pay their individual debts, does not operate to defeat a lien fairly and lawfully created by the partners upon partnership assets in favor of individual creditors, before proceedings for a judicial administration were commenced.

14. Partners have the power, while the partnership assets remain under their control, to appropriate any portion of them to pay or secure their individual debts. A mortgage given by them to secure individual debts fairly due, is not rendered void by the mere fact that it operates to give

individual debts a preference over demands against the firm; nor will such mortgage be set aside for that reason, by a court of equity, unless, perhaps, when created in contemplation of insolvency to give an improper preference.

15. If, in any case, one who has loaned money upon the credit of an individual partner, could have established a demand therefor against the firm, by proof that the money was borrowed and used for the benefit of the firm, the right to do so is lost by proceeding, with knowledge of the facts, to the recovery of judgment and the issuing of execution against the individual partner.

16. The only interest in property of the firm which can be reached by virtue of a creditor's bill, founded upon such a judgment and execution, is the share of the individual partner against whom the judgment is rendered, in the assets, after payment of all partnership debts.

17. An execution on a judgment against partners for a partnership debt may be levied upon the individual property of either partner, although the partnership property is sufficient to make the debt.

18. Real property, purchased with partnership funds, for the uses of the partnership business, must be regarded as partnership assets, within the rules of equity governing the application of assets to debts in controversies relative to the priority of creditors of a firm over those of individual partners.

The defendant, Christopher C. Sprague, in September, 1865, was proprietor of the Kirkwood House, a large hotel in the city of Washington. He had kept it for some time before, and continued to keep it for some time afterwards. He was also engaged in other enterprises, and was largely indebted. His wife, Lydia J. Sprague, had no separate property, and had not since her marriage been engaged in any separate business on her own account. On the 29th day of September, 1865, she executed, under her hand and seal, a power of attorney to her husband, to carry on, in her name, the hotel business at Long Branch, in this state, with full power to purchase, mortgage, sell, and demise, real and personal estate.

On the 1st of October, 1865, articles of partnership between her and Howard A. Stokes were executed in her name, signed by her husband as her attorney. The term of the partnership was five years; the business was to be hotel keeping at Long Branch; each party was to contribute

$15,000 of the capital; each to give personal attention to the business; profits were to be shared equally; and the name of the firm was Sprague & Stokes.

On the 7th day of September, 1865, C. C. Sprague and Howard A. Stokes had, by a written contract, agreed to purchase of Woolman Stokes the property at Long Branch, since known as the Continental Hotel property, for $75,000. Of this, Howard A. Stokes was to pay $15,000 November 1st, 1865; Sprague was to pay $6000 by November 16th, 1865, $4000 by January 1st, 1866, and $5000 April 1st, 1866, when the deed was to be delivered; $15,500 was to be paid by assuming mortgages to that amount then on the property, and the remaining $29,500 was to be secured by a mortgage on the property. This agreement was signed by Sprague and H. A. Stokes, but not by W. Stokes; $200 was paid by Sprague at the signing of the agreement. On the 15th of November, H. A. Stokes, who is the son of W. Stokes, gave his father his note for $15,000, which was accepted for his payment, and Sprague paid $3000 in cash. Sprague further paid to W. Stokes, in cash, $1800 on November 25th, 1865; $1000 December 29th, 1865; $2000 January 12th, 1866; $2000 more, some time in January, 1866, and gave him the note of Sprague & Stokes for $5000, some time before March 27th, 1866. On the day last mentioned, W. Stokes gave a deed for the property to Lydia J. Sprague and Howard A. Stokes, and they, with C. C. Sprague, executed a bond and mortgage to W. Stokes for $29,500, the residue of the purchase money; this mortgage was duly registered within three days. W. Stokes did not know that the purchase was made for Lydia J. Sprague, or that she was a partner in the firm of Sprague & Stokes, until about January 1st, 1866. The $200 paid by Sprague at the signing of the agreement was his own money. The residue of the cash paid to W. Stokes, by him, he and his wife allege and testify was her money, which was borrowed by her on her own notes, of Seman Klous, of the firm of Klous & Hillburn; Alpheus J. Hillburn, of that firm, being her brother.

After the contract of sale, C. C. Sprague and H. Stokes took possession of the premises, and commenced erecting new buildings, and making extensive alterations and repairs in and about the two hotels then on the premises, which they connected by a new building, and they furnished anew the whole establishment, and expended for these purposes near $200,000.

The complainants (by which term is meant the National Bank of the Metropolis), in the winter of 1865 and 1866, and in the spring of that year, loaned to C. C. Sprague, by discounting drafts drawn by him upon A. M. White and others, about $65,000. These drafts were drawn payable to, and were endorsed by Sprague & Co., a name which represented C. C. Sprague only, and in which he carried on the business of the Kirkwood House. He told the cashier of the complainants, and A. M. White and Louis Stow, who were the acceptors of the drafts, that he had purchased half of a hotel establishment at Long Branch, and that he wanted the money to pay for that property, and fit it up. These parties all knew that he was engaged in the Kirkwood House, in a speculation called the Bolt machine, and in purchasing lots.

Besides $10,000 or $12,000 advanced by Klous to Mrs. Sprague to pay the purchase money, Klous & Hillburn claim to have advanced to the firm of Sprague & Stokes about $54,000 for expenses in re-building and furnishing the Continental Hotel. Of this, between $29,000 and $30,000 was paid by them to manufacturers of furniture, near Boston, to whom they introduced Mrs. Sprague, and who filled her orders for furniture on the credit of Klous & Hillburn. The residue of these advances was made upon drafts of Sprague & Stokes, principally upon a credit obtained by mortgages given by Sprague & Stokes to them for that purpose.

Woolman Stokes advanced money to Sprague & Stokes for finishing, furnishing, and carrying on the hotel, and was security for money obtained by them for the same purpose,

and claims that the firm owe him $95,703, including $42,478, for which he is security for them.

On the 18th of May, 1866, C. C. Sprague and wife, and H. A. Stokes, gave to Klous & Hillburn a mortgage on the real estate for $35,000, which was duly registered May 21st, 1866; and on the 24th of May, 1866, they gave Klous & Hillburn a chattel mortgage on the furniture and goods at the hotel, in the schedule annexed, to secure the payment of $80,000 in one year, in installments, according to the promissory notes of Sprague & Stokes to Klous & Hillburn. This mortgage provided that Sprague & Stokes should retain possession of the chattels until default should be made in payment, or until seized by execution or attachment. The chattel mortgage was filed in the office of the county clerk July 20th, 1866, and a copy was re-filed May 12th, 1867, and not at any other time. The possession of the chattels remained with the mortgagors. About the 1st day of April, 1867, the attorney of Klous & Hillburn, having learned that this personal property had been levied upon, and was advertised for sale by the sheriff, went to the premises with a copy of the chattel mortgage, and demanded possession of the chattels of Mrs. Sprague. Mr. and Mrs. Sprague gave him the keys, and went with him through the house. He opened the doors of the different rooms, saw the furniture, and relocked each door, and Mrs. Sprague consented to his storing them there. He took away, and produces as an exhibit, a napkin, which he has since retained in the name, and as symbol of possession of the whole. The residue was left in the house with Sprague & Stokes as before, and none but the select few who witnessed the ceremony knew that a change of possession had taken place. On the 26th of April, 1867, an agreement was entered into between Sprague & Stokes and Klous & Hillburn, by which the latter were to furnish the money to carry on the hotel that year, and to manage it by an agent to be furnished by them; Mr. and Mrs. Sprague, and H. A. Stokes, were to be employed in the management of the house, at a salary of $1000 each, to Mrs. Sprague and

H. A. Stokes. The house and furniture were to be put in the possession of Klous & Hillburn during the season, and the agreement was to be terminated at the end of the season for boarding. Under this agreement the buisness was carried on for that season, Mr. and Mrs. Sprague, and H. A. Stokes, being apparently in possession, and managing the house, except the finances. It was agreed between Sprague & Stokes, and Klous & Hillburn, when the mortgages were given, that if Klous & Hillburn should not advance the full amount of both, the deficiency should be taken from the chattel mortgage.

On the 8th of October, 1866, C. C. Sprague and Lydia his wife, and H. A. Stokes, executed a mortgage upon the real estate and furniture, dated September 1st, 1866, to C. H. Mitchell and R. Allen, jun., as trustees, to secure one hundred bonds for $1000 each, payable to bearer in three years from date, with coupons attached for interest half yearly, at seven per cent. This mortgage was acknowledged on the 8th and recorded on the 10th of October, in the office of the clerk of Monmouth county, and a copy filed on the 15th of that month, in the same office, and again on the 9th of October, 1867.

On the 2d of November, 1866, C. C. Sprague and Lydia his wife, and H. A. Stokes, executed to W. Stokes a chattel mortgage on certain chattels in it specified, some of which were included in the two previous chattel mortgages, and some were not included in them. This mortgage was filed November 7th, 1866, and re-filed October 25th, 1867, and was given to secure the payment of $12,000 of the debt due from Sprague & Stokes to W. Stokes.

On the 22d day of October, 1866, the complainants sued out of the Supreme Court a writ of attachment for their debt against C. C. Sprague as a non resident debtor, and attached the real and personal property at the Continental Hotel. On the 5th of November, they filed their original bill in this court to have the conveyance of the real and personal estate there to Lydia J. Sprague, declared a fraud against them and the

other creditors of C. C. Sprague, alleging that they had been bought with the money of C. C. Sprague, and were held by her to protect them from his creditors, and praying that the same might, as to him, be decreed to be held by her in trust for him, and be conveyed so as to be held subject to the attachment, and for the payment of the debt of the complainants and such other creditors as should apply.

On this bill an injuction, tested November 7th, 1866, was issued, restraining Sprague and wife from conveying or encumbering the property, Klous & Hillburn from taking possession of or removing it, and the trustees and Sprague & Stokes from issuing any further bonds on the trust mortgage. This injunction was, some time within thirty days from its teste, served on Mr. and Mrs. Sprague, H. A. Stokes, and R. Allen, jun., but when does not appear.

On the 2d of November, 1866, C. C. and L. J. Sprague and H. A. Stokes made a mortgage on the real estate to A. V. Conover, for $1020.10, a debt due from Sprague & Stokes; this was registered November 10th, 1866.

On the 30th of November, 1866, a judgment was entered in the Supreme Court against C. C. Sprague in favor of the complainants, for $65,000, by confession on bond and warrant; and on the same day, but after the entry of the judgment, the attachment was discontinued, and the discontinuance entered on the record.

On the 20th of March, 1867, the complainants filed a supplemental bill, setting forth the discontinuance of the attachment on which the original bill was founded, and the entry of the judgment in the Supreme Court by confession, and that an execution had been issued thereon, and that, on the 1st day of December, 1866, the sheriff of the county of Monmouth levied on the interest of said C. C. Sprague in said real and personal property. This judgment and levy were set forth as the foundation of the relief prayed by it; that relief being the same as in the first bill, with the addition of a prayer that bonds issued by the trustees since the attachment to Woolman Stokes might be set aside as void.

After this, seventeen judgments were obtained against C. C. Sprague, L. J. Sprague, and H. A. Stokes, as the firm of Sprague & Stokes; the first was entered December 29th, 1866; the last, March 19th, 1868. The amount of the whole was $66,989.30. Five of these, amounting to $13,590.20, were on lien claims for work and materials in the hotel; the other twelve, for $53,468.40, were general judgments only.

On the 2d of April, 1867, Mitchell & Allen, trustees, filed a bill to foreclose their trust mortgage, and W. Stokes was joined as complainant in the bill, which also prayed for the foreclosure of his purchase money mortgage, for $29,500. Stokes also held fifty-six of the bonds issued by the trustees.

On the 29th of March, 1867, Klous & Hillburn filed a bill to foreclose their mortgage for $35,000 on the real estate; and on the 13th of September, 1867, they filed another bill, to foreclose their chattel mortgage.

On the 10th of March, 1868, an order was made on an application, on all four of these suits, that the three bills of foreclosure be taken and considered as cross-bills to the bill filed by the complainants, the National Bank of the Metropolis, and that all the defendants in those suits should be taken as parties to the suit of those complainants, and that the suits should proceed together and be heard as one suit.

Besides the judgment of the complainants, Benjamin Butterworth obtained a judgment in the Supreme Court against C. C. Sprague, on the 4th of December, 1867, for $1152.29.

S. Klous holds ten of the trustee bonds as security for the $10,000 or $12,000 advanced by him to L. J. Sprague; W. Stokes holds fifteen of them for the $15,000 due to him from his son, H. A. Stokes, for the original purchase; R. Allen holds one, and C. H. Mitchell holds two, which were handed to them as security in part for past and future services as counsel and as trustees, without any definite amount being agreed upon.

The other sixty-seven bonds are held by creditors of the firm; by some of them as security for debts of less amount

than the face of the bonds. All appear to have been delivered before the mortgage to Conover, and before any judgments against the firm, or at least before the persons who received them knew of such encumbrance.

Answers have been filed in all the suits, and evidence taken, to be used in all on the hearing; and upon these the argument was had.

Mr. McCarter, for complainants.

Mr. McLean and *Mr. B. Williamson,* for Klous & Hillburn.

Mr. W. H. Vredenburgh, for the lien creditors and judgment creditors, and for A. V. Conover.

Mr. R. Allen, jun., for trustees.

Mr. H. S. Little, for W. Stokes.

THE CHANCELLOR.

The first question presented is that raised by the bill and supplemental bill of the complainants in the original suit. They claim that the title to this property, both real and personal, was put in the name of Mrs. Sprague to delay and hinder the creditors of her husband, and that as against them she must be held to hold the title in trust to pay his debts. Mrs. Sprague claims that the property was bought by her with money furnished to her by her friends, that none was furnished by her husband or his creditors, and that it is her separate property.

The contract for purchase was made by Sprague in his own name, and the first payment was out of his own money. It was made three weeks before the power of attorney, and longer still before the articles of partnership, and I have no doubt at the time of the purchase, it was intended that C. C. Sprague and H. A. Stokes should be the partners. Woolman Stokes, the vendor, did not know of the intention to change until the last of December. Sprague made the change, and he avowed to A. M. White that the object was to

put it beyond the reach of his creditors; and if his admissions to White are not competent evidence as against other defendants, or White's testimony is not to be relied upon, the whole history of the transaction shows that such was the object. Mrs. Sprague had no separate estate, had been married over sixteen years, and had never done any business on her own account. Sprague was involved in other large transactions, and was considerably in debt. Hotel keeping was his business; he had been engaged largely in it. He was expected, as Mrs. Sprague testifies, to keep this house. She had at an early day given him a power of attorney to carry it on and do everything connected with it in her name, showing that she expected that he and not herself should keep the hotel and carry it on. She had no distrust of him; there is no assignable reason for the title being in her name except to avoid his creditors. The lame attempt on her part to assign a reason, when pressed, shows that there was no other. She says that she wanted this large hotel, capable of accommodating nine hundred guests, for *a home* for herself and her sick child.

The fact that Sprague devoted his time to re-building, fitting up, and keeping this hotel, and in a measure abandoned all other business for it, shows that it was intended as *his* business, not hers, and that it was in her name to prevent his creditors from reaching it. She had no property in it. For the money borrowed of Klous, and of Klous & Hillburn, even if on her own notes only, he was liable. The act of March 24th, 1862, (*Nix. Dig.* 548, § 7,*) makes the husband and his property liable for all debts contracted by his wife, in business done or purchases made by her. Besides, the earnings and labor of a married woman belong to her husband; and although he may no doubt give them to her as against his creditors, when she carries on a separate business without his assistance, with her own means, on her

* By the act of March 27th, 1874, liability of husband for debts thereafter contracted by the wife in her own name, ceased. *Rev. Stat.* (1874–5) *p.* 471. See *Rev., p.* 638, *sec.* 10.

own account, yet in all cases where the business is carried on by both, and the labor and skill of the husband are contributed and mixed up with hers, the business will be considered as that of the husband, and not that of the wife, and the proceeds will not be protected for her as against his creditors. These earnings, even of the wife, are not within the terms or intention of the act for the better securing the property of married women; and did that act give her capacity to accept a gift of his property from her husband, she could not retain such gift any more than a stranger could as against his creditors; it would be a fraud on them. This doctrine was declared and applied in this court in the cases of *Crane* v. *Reford*, 2 *C. E. Green* 383, and *Quidort's Administrators* v. *Pergeaux*, 3 *C. E. Green* 472.

It does not appear when the complainants loaned their money to Sprague; some of it was certainly before the conveyance to her, but if it was all advanced afterwards, yet it is settled that a conveyance to defraud or delay future creditors will be set aside. *Beeckman* v. *Montgomery*, 1 *McCarter* 106; *Crane* v. *Reford, supra; Case* v. *Phelps*, 39 *N. Y. R.* 164.

On both these grounds, Mrs. Sprague must be decreed to hold this property subject to the claims of the creditors of her husband, in the same manner as if the conveyance had been made to him, and he had been the partner in the firm of Sprague & Stokes. This must be so held in justice to H. A. Stokes, who, for aught that appears, entered into partnership with Mrs. Sprague, and bought the property jointly with her, in good faith, supposing that she was the real partner, and that she was competent to enter into the contract of partnership, and in justice to the creditors of the firm.

The next question is, whether the purchase money mortgage to W. Stokes, for $29,500, has preference over lien claims. The claim of the lienholders is based upon the eleventh section of the mechanics' lien law, which declares the lien to be upon the estate which the owner had at or after the commencement of the building, subject to all prior

encumbrances, and free from all encumbrances created afterwards. But this, even if it admits of the construction claimed by the counsel for the lienholders, must be considered in connection with the fourth section, which declares that the estate of any owner shall not be subject to a lien for a building erected by a tenant, or other person, unless it be done by the consent of the owner, in writing. And in *The Associates* v. *Davison*, 5 *Dutcher* 415, it was held that a written contract to convey, did not amount to a consent in writing to erect buildings so as to satisfy this requirement. The estate of W. Stokes was not affected by the liens; the equitable estate of Sprague & Stokes was subject to them; and when W. Stokes conveyed to them, the mortgage given at the delivery of the deed prevented the legal estate from vesting in them even for an instant, his estate continued, and even the *words* of the eleventh section would not affect his title, because it is no part of the estate which Sprague & Stokes had *at* or *after* the commencement of the building. The object of the lien law, and every possible right of the lienholders, as well as the rights of the vendors, will be protected by this construction. And otherwise, no vendor could suffer a building to be commenced before the conveyance. The purchase money mortgage of W. Stokes must be held the first encumbrance on this property, in these suits. Of course it is subject to the mortgages upon it before he conveyed, to which it was made subject by his deed, which are not in question here.

The lien claims, on which judgments have been obtained, are the next encumbrances on the real property, and they must be paid *pro rata*, according to the amounts really due upon them.

The mortgage to Klous & Hillburn for $35,000 is the next encumbrance upon the real estate. Some question was made at the hearing as to the amount due on this mortgage, but in their responsive answer to the bill, they state that the whole $35,000 was paid by them, and they state the times and sums in which nearly the whole was paid. They state

in their testimony that the full amount was paid; both swear to this; though they do not produce the vouchers, and show how it was paid, and although there is some confusion in their testimony, there is not sufficient to overcome their respousive answer, and their positive evidence. Besides, they are contradicted by no one, so far as this $35,000 is concerned. Mr. and Mrs. Sprague both testify that they advanced on the two mortgages about $55,000, and as it is proved that the deficiency of advances, if any, must be taken from the chattel mortgage, there can be no room to doubt that the full amount of the $35,000, for which this mortgage was given, has been advanced, and is due upon it.

The chattel mortgage to Klous & Hillburn would be a lien upon the chattels, if it were not for the omission to file a copy of it within the time required by law. The act says it shall cease to be a lien, unless a copy is re-filed within thirty days before the expiration of the year. The words are plain and positive; there is no room for construction. The object indicated is a sensible one. The first filing might have been declared sufficient. But the object is to have a repeated declaration that the mortgage is kept alive, and how much is due on it. If this was not confined to the last month, or some definite time, at any time just before the mortgage was about being paid such copy and statement might be filed, and the mortgage would remain an apparent encumbrance for nearly a year after being paid. But it is not for the courts to find a good reason for every enactment; it is enough for them that it is so, clearly, enacted. The Supreme Court of New York, in *Newell* v. *Warner*, 44 *Barb.* 258, held that under their act, in precisely the same words, the filing before the thirty days was a nullity.

The possession taken by the attorney of Klous & Hillburn cannot aid them; such possession does not satisfy the object, or comply with the words of the act; they require an *actual* and *continued* change of possession; these words would seem to be inserted expressly to provide against such a sham as this. This mortgage must, therefore, be postponed to the

creditors of Sprague & Stokes, and to all subsequent purchasers and mortgagors, but as against Sprague & Stokes, it is good for the amount due on it. If any surplus remains after the judgments against, and mortgages given by the firm are paid, they will be entitled to receive the amount due on it before either partner, or the individual creditors of either. It is given for a firm debt, and the mortgage making it a valid lien against the mortgagors, and every one but the creditors of the firm who have acquired liens before the sale, they will be entitled to such surplus. *Swift* v. *Hart*, 12 *Barb.* 530; *Thompson* v. *Van Vechten*, 27 *N. Y. R.* 582; *Herrick* v. *King*, 4 *C. E. Green* 82.

It is next contended by the complainants and the judgment creditors, that the mortgage to the trustees is void, for two reasons: First, because it operates to delay and hinder creditors; and secondly, because being a mortgage of all or nearly all of the property of the firm to the trustees, and not being for the equal benefit of all the creditors, it is against the express provision of the assignment act. It is settled by a series of decisions had for years in this state, that a debtor, although insolvent, has the right to prefer creditors by payments of money, transfers of property, giving mortgages, and confessing judgments. This was so held by the Supreme Court in *Garretson* v. *Brown*, 2 *Dutcher* 425, affirmed in the Court of Errors, 3 *Dutcher* 644; and although such preference may delay and hinder other creditors, if not done for that purpose, but to secure or pay *bona fide* debts, it is lawful.

This mortgage was made to secure such creditors as were willing to accept the bonds as payment of, or security for their debts. It was optional with them to accept or not; it did not dispose of or assign all their property, but left the equity of redemption of the whole in the debtors, so that any creditor who did not choose to accept of the bonds could bring suit and levy on the equity of redemption. The sale was not delayed by the mortgage; only such creditors as should take bonds would have the prior lien. Such is the case wherever a mortgage is given to any creditor; he is

preferred by priority of security, but deferred in time of payment. In this respect, a mortgage is entirely different from an assignment. If a series of mortgages had been given to the twenty bondholders, either making them liens successive to each other, according to the time when given, or making them all concurrent liens, no one would have disputed their legality. There is no difference in the operation of the security or in principle, because the mortgage is executed to trustees, so that all the bonds may come in equally. This is simply a mortgage to twenty creditors, to secure $100,000 due to them. If the debt to the complainants had been due from the firm, a mortgage on the same property to them for $65,000 would have been valid. This is not less valid because to twenty creditors, and for a somewhat greater sum. The mortgage is a valid lien in the hands of the trustees, so far as it secures debts due by the firm. The mortgage does not include all the property; no debts due to the firm are included, and there certainly must have been debts due at the close of the season for board and on other accounts; and much personal property included in other mortgages is not included in this.

So far as these bonds are voluntary gifts, they are not good as against creditors. At the time this mortgage was given, the firm was no doubt insolvent; it could not have paid its debts if it had been called upon so to do, and been compelled to dispose of its property for that purpose. Another season, if it should prove prosperous, might enable it to pay its pressing debts, and to secure the others, and insure eventual success. The hope of this, no doubt, led to the effort by the mortgage. But, in this situation, the firm had no right to give away its property, or to give a mortgage or bond to any one without consideration. All bonds given without sufficient legal consideration, are, as against creditors, invalid. The bonds given to creditors for amounts larger than their debts are only good for the amount of the debts really due by the firm; and those given to Mitchell

& Allen are good only for the amount legally due to them respectively, at the time.

The question also arises, whether the ten bonds given to Klous to secure the advances made by him to Mrs. Sprague, which is her individual debt, and the fifteen bonds given to W. Stokes to secure the note of H. A. Stokes to him, which is his individual debt, are valid as against the creditors of the firm. As between the partners, the transaction is just and right; each would have his whole contribution to the partnership paid out of the partnership effects, and the amount paid for each would be equal. But as against creditors of the firm, this would seem unjust; they are entitled to have the whole partnership assets, including the amount contributed by each partner, appropriated to pay the debts of the firm. The rule in equity and in bankruptcy, when the partnership assets are administered there, is, that the partnership debts must first be paid out of the partnership assets before any part can be appropriated for the partners, or to pay their individual debts. But in this case the property is not being administered under the direction of this court. The partners have created liens upon the property before it came into the court, and my only power is to settle the validity and priority of the liens so placed upon the property. The partners, while the partnership property is still under their control, have the power to appropriate it to pay or secure their individual debts; as against them, the mortgage is good. These claims are for debts fairly due by them individually, and I do not think that the mere preference of individual debts over partnership debts is such a fraud upon partnership creditors that after it has been done it will be set aside by a court of equity. It certainly will not be set aside, unless in case of insolvency, or when done in contemplation of insolvency, to give an improper preference. And it is by no means clear to me that the firm, in October, 1868, was insolvent, unless forced to pay all debts immediately; on the contrary, I suppose that by the operation of this mortgage, they expected to be relieved from their

embarrassments, and to retrieve their fortunes by a successful season the next year. It was not done in contemplation of insolvency.

There is no room in this case for the doctrine contended for by the complainants' counsel, that as the money of complainants was used for the benefit of the firm, their claim may be made a debt of the partnership and recovered out of its property. The complainants, if the facts were as contended for, might, on that doctrine, have recovered a judgment against the partners at law; but where the advance is made on his credit to one partner in money, as it was in this case, the decided weight of authority is against the position. *Collyer on Part.*, §§ 477 and 504, and note; *Story on Part.*, §§ 134 and 140; 3 *Kent's Com.* 41 and 42, and authorities there cited.

But they have not sued the firm; they have elected, after they knew all the facts, to enter a judgment for this debt against Sprague, as his individual debt. The debt is merged in that judgment, and cannot now be recovered against the firm as a partnership debt, either at law or in equity, and for this case it must be considered an individual debt. The execution, which is the foundation of the complainants' standing in this court, is against C. C. Sprague, and the levy is upon his interest in the firm and the partnership; and, in such case, the interest affected by the levy, and which will pass by the sale, is the interest of the partner in the firm, that is, his one-half of the assets, after all the debts of the partnership are paid. This is the settled doctrine in equity, and the principle upon which relief is granted there, although there may still be some question at law, whether the levy and sale does not make the purchaser a tenant in common with the other partner in the property and goods sold. *Story on Part.*, §§ 260 and 264; *Collyer on Part.*, §§ 822 to 832, and notes.

On the other hand, an execution on a judgment against the partners, for a partnership debt, may be levied upon the individual property of either partner, without regard to the

partnership property being sufficient to make the debt. The real estate, in this case, must be treated as partnership property, although the title was in the partners, as tenants in common. It was purchased with the funds put in by the two partners, as their share of the capital, and it was purchased for the business for which the partnership was formed, which was to keep a hotel upon it; and the greater part of the money for which the firm is in debt was expended upon it.

The only interest, then, which the complainants can take in the property, by virtue of their judgment and execution, is the interest of Sprague, which is one-half of the property after the partnership debts are paid.

The amount due on the mortgage to A. V. Conover must be paid out of the proceeds of the real estate, after the amount due on the purchase money mortgage to W. Stokes, and the amount due on the lien judgments, and the amount due on the trustee bonds have been paid; and next, the amount due for debt and costs on the several general judgments against the firm, in the order of their priority of record.

The mortgage to the trustees has priority over the chattel mortgage to W. Stokes upon the chattels included in both, and both have priority over the chattel mortgage to Klous & Hillburn.

The amount due on the chattel mortgage to Klous & Hillburn being for a partnership debt, and the mortgage being valid, as against the partners, must be preferred to the judgments of the complainants and of Butterworth.

The general judgment creditors of the firm must be preferred, in the proceeds of the chattels, to the chattel mortgage of Klous & Hillburn, and must be preferred, in this fund, according to the priority of the time of delivering the executions to the sheriff.

It must be referred to a master, to compute the amounts due on the mortgage to Woolman Stokes for $29,500, and on the mortgage to Klous & Hillburn for $35,000, and on the mort-

gage to A. V. Conover, and on the several judgments against the firm, whether for liens or otherwise, and upon the judgments of the complainants, and of Butterworth against C. C. Sprague; and to ascertain the amount due upon the chattel mortgage to Klous & Hillburn, and upon the bonds issued under the mortgage to the trustees.

And, in taking such account, the master must ascertain the amount received by Woolman Stokes, and Klous & Hillburn, or either of them, as the net proceeds of the business done at the hotel in the years 1867 and 1868, and must credit the same on the securities held by them, respectively, either as individuals or partners, unless they shall have paid the same upon other debts of Sprague & Stokes, hereby declared to be valid, and which shall be entitled to be paid according to the order of priority established.*

DeVeney *vs.* Gallagher.†

1. Courts of equity do not ordinarily restrain, by injunction, the commission of a mere trespass; there must be some great vexation from continued trespasses, or some irreparable mischief, which cannot easily be measured by damages, to authorize such interference.

2. Courts of equity have jurisdiction, in cases of confusion of boundaries, to establish lines; and although they never entertain a simple suit to fix boundaries between individuals where courts of law have jurisdiction, yet when the question is connected with matters that require the interference of equity, as where a defendant has threatened, and has served a formal written notice that he intends to remove ten inches of the end wall of the complainant's dwelling, which the defendant alleges is upon his land, a court of equity will, to prevent multiplicity of suits, entertain jurisdiction, and settle the boundary, in order to determine whether the complainant is entitled to the continuance of its protection by injunction.

3. Where a deed calls for the line of a street, as a monument, the line of the street, as it is opened and built upon, will be held to be the line intended.

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* Decree reversed, giving the Klous & Hillburn chattel mortgage the place it originally occupied in order of priority. 6 *C. E. Gr.* 530.

† Cited *in Johnston* v. *Hyde*, 10 *C. E. Gr.* 457.

This cause was heard on bill, answer, and proofs.

Mr. L. Zabriskie, for complainant.

Mr. Garrick, for defendant.

The Chancellor.

This bill was to restrain the defendant from taking down or removing ten inches of the west end of the dwelling-house of the complainant, which the defendant alleged was upon his land.

Courts of equity do not ordinarily restrain, by injunction, the commission of a mere trespass; there must be some great vexation from continued trespasses, or some irreparable mischief, which cannot be easily measured by money damages, to authorize the interference by injunction. In this case the defendant has threatened, and served a formal written notice that he intends to remove that part of the complainant's house, which, he alleges, projects over upon his lot. This, though a mere trespass, is an injury of that kind which equity will restrain. A man shall not be disturbed by force in his dwelling-house until the title is settled, which can be done, and the possession recovered by ejectment. This court will grant the relief, provided it is made to appear that the complainant has the right. Under the general prayer for relief, the complainant is entitled to such relief as his case may require. Courts of equity have long entertained jurisdiction, in cases of confusion of boundaries, to establish lines; and although they never entertain a simple suit to fix boundaries between individuals, where courts of law have jurisdiction, yet when the question is, as here, connected with matters that require the interference of equity, they will, to prevent multiplicity of suits, entertain jurisdiction, and settle the boundary. 1 *Story's Eq. Jur.*, §§ 609, 621. The court, in this case, will ascertain the boundary to settle whether the complainant is entitled to the continuance of its protection by injunction.

The complainant and defendant own lots adjoining each other on the north side of South Sixth street, in Jersey City, between Monmouth street on the west, and Coles street on the east. Both derive title from Bentley and Smith. The complainant's lot is east of the lot of the defendant. Each lot is twenty-one feet seven and one-half inches wide, and ninety-five feet deep. The deed to defendant was given August 1st, 1866; that to complainant July 1st, 1867.

The beginning point in complainant's deed is sixty-five feet seven and a half inches east of the northeast corner of South Sixth and Monmouth streets; that in the deed to the defendant is forty-three feet nine inches east of that corner; the difference being exactly the width of defendant's lot. There were small houses on the rear of the lots, before these conveyances, and a fence between them. The complainant, before he erected the three story frame dwelling-house in question on his lot, procured an experienced city surveyor to locate his lot according to the calls of his deed. This survey placed his west line ten inches west of the fence between the lots, and he proceeded to erect his building on that line. The defendant did not interfere, or give any notice not to erect the building on that line, until it was nearly finished; he then had a survey made by another city surveyor, who located the line between the lots about where the fence had stood, and by which the front of complainant's house was ten inches over that line, and the rear nine and a half inches. The whole question is upon the correctness of these surveys. The measurements of both are, no doubt, correct, for they coincide. The discrepancy arises from a difference in locating the east line of Monmouth street, which is called for as the starting monument in both deeds.

There does not appear in the evidence to be any fixed monument to locate the lines of Monmouth street, nor does it appear how it was laid out or dedicated. It is one of the public streets of Jersey City, subject to the municipal government, which has, by charter, the power "to ascertain

and establish the boundaries of all streets in the city, and to prevent and remove all encroachments upon them."

The city does not appear to have done anything to ascertain the boundaries of Monmouth street. It has been opened, graded, and paved as a public street by the city, and for twelve years or more, substantial and large brick houses have been built upon both sides, thus practically locating the street and its boundaries. These buildings have been permitted by the city government, who have not removed them as encroachments, and, so far as appears, are the only monuments which fix the sides of the street. They were built long before the conveyances to these parties, and were, at that time, the actual boundaries of the street.

The surveyor of the complainant was an experienced city surveyor, who had frequently surveyed and located the lines of Monmouth street, and fixed them by taking these buildings as the true line of the street. On this survey, as before, he located the street by buildings which had been standing for years on the east side of it. He took a large brick building on the southeast corner of Monmouth and South Eighth streets as his guide; it had stood there for twelve years; this building was five hundred and eighty feet south of the front line of these lots. He took several other buildings on the east side of Monmouth street, and north of South Sixth street; and he also measured from a building on the west side of Monmouth street, one or two blocks north of South Sixth street; this gave the west line of Monmouth street sixty feet, the correct width, distant from the east line, as fixed by him. That this location is correct, according to the location of these buildings, is not disputed by any evidence on the part of the defendant. The complainant's surveyor also proves that the length of the block from the line so fixed by him to the west line of Coles street, as opened and built upon, is four hundred and one feet, instead of four hundred feet, which was supposed to be the length of these blocks, making a foot surplus in this block.

The surveyor of the defendant, in locating the east line of Monmouth street, took for a guide the same brick building, at the southeast corner of Monmouth and South Eighth streets, which the complainant's surveyor had taken. He then took a brick building on the northeast corner of Coles and South Fifth streets as his other monument, and he measured four hundred feet westwardly from that, to ascertain his second point on the east side of Monmouth street, and located the east side of Monmouth street by running a straight line between these two points. Why he selected a building on Coles street, instead of those on Monmouth street, to locate the lines of the latter street, does not appear. It does not appear that he observed the position of this line as to the buildings on Monmouth street, north of South Sixth street, that had stood for years. Nor does it appear that this surveyor had ever before located the lines of Monmouth street, or knew by experience anything about them. Nor does it appear that these streets were laid out by any proper authority four hundred feet apart. Yet this assumption is the whole foundation of his survey, and is the cause of the difference between him and the complainant's surveyor. Complainant's surveyor testifies that his line is four hundred and one feet from the actual line of Coles street. The defendant's surveyor takes his south point four hundred and one feet from Coles street, and his north point four hundred feet from Coles street, and then runs a line, necessarily obliquely, to both streets ; between these two points the distance is eight hundred and forty feet. The foot would diminish to nine inches in the two hundred feet to complainant's house.

The assumption of four hundred feet as the correct width of the block, is without authority in the evidence. Were it otherwise, there is no warrant for assuming that the location of one house in Coles street is more correct than that of several in Monmouth street. The question is the correct location of the street, and how it is as to Monmouth street.

The only location is the actual one by buildings erected by the abutters, and acquiesced in by the city government, who alone have authority to ascertain the boundaries, and remove the buildings. The line located by the complainant's surveyor, parallel to the west side of Monmouth street, and not the diagonal line fixed by the surveyor of the defendant, must be taken to be the true line of Monmouth street, as actually located. This is the only monument called for by either deed. Neither deed mentions the fence or the houses standing on the lots, or the row of eight houses. Bentley and Smith owned both lots, and had the right to make the division line in their sale where they pleased. They may, and probably did, intend to convey to each a house and lot, as they were built and fenced off. But they have expressed no such intention, but have chosen to make, and the grantees to accept, conveyances calling for the street as a monument. And it has been held by the Supreme Court, that when a deed calls for the line of a street as a monument, it shall be held to mean the line of the street as opened and built upon, and not the line as laid out, when not ascertained or acted upon. *Smith* v. *The State*, 3 *Zab.* 130; *Den d. Haring* v. *Van Houten*, 2 *Zab.* 61.

Were this a suit to reform and correct the deed according to the intention of the parties, and there was evidence, as there is not here, that the intention was to convey to the defendant his lot as built upon and fenced in, the result might be different; but the question here is simply upon the effect of the deed as made and delivered. According to the plain effect of it, the complainant proceeded, in good faith, to put up his house, and the defendant permitted him to go on without objection, until it was almost finished.

The line upon which the complainant's house is erected must be held to be the true line between the lot of the complainant and that of the defendant; and the defendant must be perpetually enjoined from disturbing or interfering with the house.

The Freeholders of Middlesex *vs.* Thomas & Martin.

1. Money deposited by a debtor, voluntarily, with a third person, or in a bank, for the benefit of his creditor, without authority of the creditor, is not payment of a debt. The creditor is not bound to send or draw for it, unless he accepts it as payment.

2. A mortgagor borrowed money and gave a second mortgage, agreeing with the lender to use part of the money to pay off a first mortgage, which was held by the board of chosen freeholders. His attorney notified the county collector, who had the custody of the first mortgage, that he had deposited the money in bank, and the collector receipted the bond, and canceled the mortgage of record. In ten days afterwards the bank stopped payment; and the money not having been drawn, the officer canceled the receipt, and appended a memorandum to the record that the cancellation was entered by mistake. *Held*—That the transaction was not a payment. The first mortgage remained a valid security, and might be enforced in a suit for foreclosure.

3. A check or promissory note, either of the debtor or a third person, received for a debt, is not payment, if not itself paid, except in cases where it is positively agreed to be received as payment.

4. Accepting a check or draft implies an undertaking of due diligence in presenting it for payment, and if the drawer sustains loss by want of such diligence, it will be held to operate as payment.

5. A written receipt is not conclusive; but proof is admissible that the payment for which it was given was not actually received.

6. A county collector has power to receive payment of any debt due to the board of chosen freeholders, but has no power to give away a security, or cancel it without payment. He has not the right to deposit their funds in any bank he may select, without their approval.

The complainants seek to foreclose a mortgage on lands at Perth Amboy, against Thomas, the mortgagor, and Martin, who holds a second mortgage on the premises; they are the only defendants, and both, in their answers, set up that complainants' mortgage is paid. The facts on which they place this defence are these: On the 31st of December, 1864, Martin loaned to Thomas $500 on the mortgage given to him on that day; part of this sum was given to W. P., the attorney who drew the mortgage, for the purpose of paying off the complainants' mortgage, which was for $300, so that

the mortgage to Martin should be the first encumbrance. W. P. was entrusted, both by Thomas and Martin, to make this payment. The complainants' mortgage was in possession of N. Booraem, the county collector. On the 2d of January, 1865, W. P. wrote to Booraem that Thomas had paid the money to him, and that he had deposited it in the City Bank of Perth Amboy, subject to Booraem's draft, and requested him to have the mortgage canceled, and enclosed the proper fees for canceling, and requested him to retain the papers until Thomas called for them. Booraem received this letter on January 3d, and on the same day wrote a receipt on the bond, and had the mortgage canceled of record, and a minute of the canceling endorsed on the mortgage, and signed by the clerk of the county. W. P. was president of the bank, and handed the money, on the 3d of January, to the cashier, either in the bank or at his own house, with directions to pay it as Booraem should direct. It does not appear that it was credited either to the complainants or Booraem, or that any entry was made in the books of the bank respecting it. Booraem had once an account in the bank, but had no dealings with it in several years before this. He had not, in any way, authorized the payment of this mortgage to W. P. or to the bank, and had recognized the payment in no way, except by canceling the mortgage and endorsing the receipt. He did not draw or send for the money. On the 13th of January, 1865, the bank stopped payment, and, a few days after that, Booraem sent word to W. P. that he would not consider the mortgage as paid. Booraem erased the minute of cancellation from the mortgage, and the receipt from the bond, and tacked a note to the registry of the mortgage that it was canceled by mistake. Thomas never called for the mortgage, and things remained in this state until April, 1866, when Booraem wrote to Thomas to pay the interest. Thomas, who had thought the mortgage was paid, called on Booraem, and, not knowing that the mortgage had been canceled on the registry, promised to pay. Afterwards, upon consideration, he refused,

and this suit was brought. The complainants had not given to Booraem any power as regarded receiving payments or canceling mortgages, other than such as he possessed by virtue of his office as county collector.

Mr. H. V. Speer, for complainant.

Mr. Patterson and *Mr. Adrain*, for defendants.

The Chancellor.

Money deposited by a debtor with a third person, or in a bank, for the benefit of his creditor, without the authority of the creditor, is not payment of a debt, nor can the neglect of the creditor in not calling or drawing for it in a reasonable time, make it payment. This is clear upon principle, but if it needed authority, it is settled as law in this state by the decision of the Court of Errors in *King* v. *The Paterson and Hudson River R. Co.*, 5 *Dutcher* 504.

The only question is, whether the acts of Booraem were such an acceptance as bound the complainants. It is settled that a written receipt is not conclusive, but that it may be shown that the payment for which it was given was not actually received. And a check or promissory note, either of the debtor or a third person, received for a debt, is not payment if not itself paid, except in cases where it is positively agreed to be received as payment. Accepting a check or draft implies an undertaking of due diligence in presenting it for payment, and if the drawer sustains loss by want of such diligence, it will be held as payment. But no such undertaking is implied when the debtor volunteers to leave the money with a third party. No creditor is bound to send or draw for it, unless he accepts it as payment. In this case there was no communication of any kind from Booraem to Thomas, or Martin, or W. P., except the message sent after the bank stopped—nothing that could be construed as an agreement to accept the money left with the cashier, as pay-

ment. It appears that not one of the three knew of the canceling or receipt endorsed until after suit brought.

The question then that remains, is as to the effect of the canceling upon the registry. The statute (*Nix. Dig.* 611, § 11,*) says that it "shall be an absolute bar to, and discharge of the said entry, registry, and mortgage." But it is well settled, and rightly settled, by a series of decisions of the highest authority upon this statute, that if such cancellation is made without actual payment, or by fraud or mistake, or without authority from the real owner of the mortgage, it is inoperative, and the mortgage remains a valid security, and will be enforced on a suit for foreclosure in this court. *Miller* v. *Wack*, *Saxt.* 204.

In this case, Chancellor Vroom says: "The simple cancellation is not an absolute bar unless there has been actual satisfaction; it is not conclusive evidence;" but he holds that it is evidence of a very high character of payment, and throws the burthen of proof on the other side to show that it was not paid. Chancellor Pennington, in *Lilly* v. *Quick*, 1 *Green's C. R.* 97, and *Trenton Banking Company* v. *Woodruff*, *Ib.* 117, approved and acted upon this doctrine. In the last case, a mortgage given to a married woman for her separate use by the will of her father, was canceled by her husband, who was executor of the will, without her consent, and without payment; and the court held that such cancellation, made without authority and without payment, as between the parties themselves, was too palpably void to admit of any question. In *Banta* v. *Vreeland*, 2 *McCarter* 103, Chancellor Green held that such canceling of record by the mortgagee himself, done under misapprehension as to the fact of payment, when it appeared that the mortgage was not in fact paid, did not bar a recovery upon it, and a decree of foreclosure was ordered.

In *Harrison's Administratrix* v. *The N. J. R. R. & T. Co.*, 4 *C. E. Green* 488, the Court of Errors held, that a cancellation on the registry made by a person without au-

* *Rev.*, *p.* 707, *sec.* 23.

thority, and without actual payment, did not bar the mortgage in a suit for foreclosure.

On the doctrine established in *Miller* v. *Wack*, that cancellation is not a bar without actual satisfaction, as it appears clearly in this case that there was no actual payment, or any thing that would, by law, be held to be payment, except for the entry on the papers and record, it must be held that this mortgage was not paid or extinguished, but is a subsisting encumbrance, and a decree must be made for the foreclosure and sale of the mortgaged premises.

I have arrived at this conclusion without taking into consideration the position urged with much force by the counsel of the complainants, that the county collector had no power to cancel the mortgage, or to surrender it without actual payment; and that had he accepted a check, promissory note, or bill of exchange expressly in payment of the mortgage, the complainants would not have been bound thereby. Booraem, as county collector, had power to receive payment of any debt due to the complainants, but like the executor and husband, in *Trenton Banking Company* v. *Woodruff*, he had no power to give away the security, or to cancel it without payment. Nor had he the right to deposit the funds of the complainants in any bank that he might select without their approval. I am much inclined to think that the deposit made by W. P., if it had been made by Booraem's consent, would not be payment to the complainants.

Ely *vs.* Ely's Executors.*

1. After making a bequest to his wife, the testator added these words: "In case she should lose any part of her property before mentioned, and need more than she has of her own to support and maintain her comfortably, then, and in that case, so much of this money deposited and accumulated as she shall need for her comfortable support, I order my executors to draw and pay to her, yearly or half yearly." The widow needing more

* Cited *in Zabriskie* v. *Wood*, 8 *C. E. Gr.* 548.

than she had of her own to support herself comfortably, though she had lost none of her property, filed a bill for the construction of this clause. *Held*—That having lost none of her own property, she was not entitled to any part of the bequest.

2. "And" will be construed "or," only to effect the evident intent of the testator, never to gratify the wishes or desires of a legatee, or to effect what might, in itself, seem more just or reasonable.

3. There is no power to change the words in a will, unless such change is necessary to effect the intent of the testator, apparent on the face of the will or from surrounding circumstances.

4. The legatee seeking a construction of the will to gratify her own wishes, and against the obvious intent of the testator, bill dismissed; legatee to pay her own costs.

This case was submitted on bill and answer, and the briefs of counsel.

Mr. J. W. Taylor, for complainant.

This bill is filed by the widow of Caleb H. Ely, deceased, against the executors and residuary legatees under his will, for a judicial construction of the following clause in said will, *viz.:*

"And I do order that my executors do deposit, as soon as practicable after my decease, the sum of $1000 in the Newark Savings Institution, the interest of which is to be added to the principal, during the natural life of my said wife Selina, or as long as she remains my widow, for her use, *in case she should lose any part of her property before mentioned,* AND *need more than she has of her own to support and maintain herself comfortably;* then, and in that case, so much of this money so deposited and accumulated as she shall need for her support, I order my executors to draw and pay to her, yearly or half yearly," &c.

The complainant admits that she has not lost any part of her property, but alleges that she needs more than she has of her own to support and maintain herself comfortably; and insists that this circumstance, irrespective of loss, entitles her to the benefit of the provision in question.

It is to be assumed for the purpose of this argument, that her allegation of insufficient means of her own is true, and that in case a construction favorable to her is given, the other matter shall be the subject of inquiry before a master.

I. It is evident that the *general* and *predominating* intent of the testator was to provide a comfortable support for his widow, in case her own means should prove inadequate *from any cause.* This is apparent from the following considerations, *viz.:*

(1.) The relation which she sustained towards him—being his wife—and therefore presumptively the object of his care.

(2.) Her condition—being *advanced in life* and *without children of her own to support her.*

(3.) The testator had received and enjoyed a good portion of her small income during their joint lives as man and wife.

(4.) The language, "and need more than she HAS of her own," &c., denoting her pecuniary condition, or rather the amount of her property or income, at *the death of the testator;* from which time the will speaks.

The only thing in the way of this construction, is the use of the word "and" instead of "or;" but.

II. The word "and" will be construed to mean "or," and *vice versa,* in order to effectuate the intent of the testator. See 1 *Jarman on Wills,* (*4th Am. ed.,*) *ch.* 17, and the authorities there commented on and cited in relation to *supplying, transposing,* and *changing words. Ib.* 455; 1 *Redfield on Wills* 488; *Ram on Wills* 55, 242; 2 *Williams on Ex'rs* 978; 2 *Roper on Legacies* 1410; *Burrill's Law Dict.* "AND;" *Holcomb* v. *Lake,* 1 *Dutcher* 605; *Jackson* v. *Blanshan,* 6 *Johns.* 54; *Maberly* v. *Strode,* 3 *Ves., jun.,* 450; *Bell* v. *Phyn,* 7 *Ves.* 454; *Wilson* v. *Bailey,* 3 *Brown's P. C.* 195; *Hepworth* v. *Taylor,* 1 *Cox* 112; *Stubbs* v. *Sargon,* 2 *Keen* 255.

III. The costs, even in case of a decision adverse to the

complainant, should come out of the estate. 1 *Redfield on Wills* 493, § 4.

"The general rule undoubtedly is, that whenever the testator raises a doubt in regard to the meaning of his will, his general property must pay for settling it." *Ibid.* 495.

Mr. Titsworth, for defendants.

The complainant seeks to have the provision in the will of testator, which reads as follows: "And I do order that my executors do deposit, as soon as practicable after my decease, the sum of $1000 in the Newark Savings Institution, the interest of which is to be added to the principal during the natural life of my said wife Selina, or as long as she remains my widow, for her use, in case she should lose any part of her property before mentioned, and need more than she has of her own to support and maintain herself comfortably; then, and in that case, so much of this money so deposited and accumulated as she shall need for her support, I order my executors to draw and pay to her, yearly or half yearly, and at her decease I order the remainder of said money to be equally divided among my children and their heirs, or their legal representatives;" construed to mean, that if the widow, Selina Ely, does not receive sufficient yearly income from her own estate, without touching the principal thereof, that in that case she is entitled to call on the executors, and they are bound, under that provision, to pay her out of this $1000, such a part of it, yearly, as will be sufficient for her support.

Such was not the intention of the testator, and if not, the court will not so order. The intention of the testator manifestly was, to provide for her to the extent of $1000, out of his estate, if she lost her own, or if her own was consumed.

The testator believed she had enough of her own for her support during her lifetime. She had no children to provide for on her death; he had. His estate was small. Some of his children were unmarried daughters, with nothing to depend on but their share of his estate.

His widow has an estate worth at least $8000, part of it improved real estate, and $3700 in bonds and mortgages and money in bank. She is sixty-five years of age, in feeble health, according to the bill.

Why should she not draw upon her principal, if her income is not sufficient? For what purpose is her principal to be left untouched, while she claims a portion of the $1000, consuming that, and leaving her own money intact? The testator did not mean her to have any part of this $1000, unless she needed it after her own was exhausted. It was to be deposited in a savings bank, and interest added to it to provide for the contingency of her losing or consuming her own. He intended it as a reserve fund for such contingency.

The will cannot mean anything else. It does not direct executors to pay, if *her income* from her own is not sufficient for her support, but only in case she loses "any part of her *property before mentioned*," that is, her *principal*, and needs, for that reason, a part of this $1000 for her support.

She has received more than she admits, as appears by the answer; but how much income she has received, or whether the testator lived in her house during his lifetime, and used any part of her income, has nothing to do with the construction of this will.

The construction is governed wholly by the "intention of the testator." The "plain and unambiguous words of the will must prevail." 1 *Redfield on Wills, pp.* 430, 433, 435, 442; see language of Lord Chancellor, *p.* 491; *Holcomb* v. *Lake*, 4 *Zab.* 686.

Nor does it make any material difference whether "and" is construed to mean "or" in some wills. It cannot in this will. "Lose" and "need" are to be construed together in this will. The testator considered she had sufficient, and would not need, if she did not lose or consume; but while she had enough of her own for her support, she was not to call for, and she had no right to receive any portion of this reserve fund.

As to the costs of this proceeding: the defendants have not raised any doubt as to the construction of this will; they think it clear. The testator could not have made his intention more apparent, by the use of words. This doubt is raised by complainant without reasonable cause, and therefore she should pay the costs. I submit the bill should be dismissed with costs.

THE CHANCELLOR.

The only question is the construction of the will of Caleb H. Ely. It arises upon a direction in the will in these words: "And I do order that my executors do deposit, as soon as practicable after my decease, the sum of $1000 in the Newark Savings Institution, the interest of which is to be added to the principal during the natural life of my said wife Selina, or as long as she remains my widow, for her use, in case she should lose any part of her property before mentioned, *and* need more than she has of her own to support and maintain her comfortably; then, and in that case, so much of this money deposited and accumulated as she shall need for her comfortable support, I order my executors to draw and pay to her, yearly or half yearly."

The complainant has lost none of her property, but needs more than she has of her own to support herself comfortably. It is contended on her part that the word "and" should here be construed "or," to effect the intent of the testator. As the will is written, it is clear that she can only have this fund in case she both loses part of her own property and needs this.

There is no power to change the words in a will, unless such change is necessary to effect the intent of the testator apparent on the face of the will, or from surrounding circumstances. There is nothing here on the face of the will, or in the facts to which the direction applies, to indicate that the testator did not intend what he has said. He thought his wife's property sufficient for what he judged a comfort-

able support for her, and only intended to add to it in case of a loss. What he meant by a comfortable support was the support which that property might give her, not what she might imagine, after his death, was required for her comfort. He has clearly expressed this intention. The words of a will are rarely changed, not even "and" for "or," and then only to effect the evident intent of the testator; never, to gratify the desires or wishes of a legatee, or to effect what might in itself seem more just or reasonable. A bequest of ten shares of bank stock, *or* $1000, to a son, would never be construed to give both, because, on the whole, it was right and reasonable that the testator should have given both. The only advantage in the use of these words is, that one or both bequests may be included, as the intention may be. No testator could safely express any intention if the courts, at their pleasure, could substitute words which would change his directions.

The intent is so obvious in this case, that I cannot take out of the estate the costs of the complainant in bringing this suit.

Let the bill be dismissed, and each party pay their own costs.

Jacobus' Executor *vs.* Jacobus.*

1. Where, by a will, the executor is to provide "a good and sufficient support" out of the testator's estate for his son, his son's wife and children, and for the education of the latter, under the direction of their father, and the relations of the family change by the separation of the son and his living apart from his family, it is the duty of the Court of Chancery to decide for whom the executor is bound to provide, whom he is authorized to aid, and the circumstances under which he may render such aid, and to intimate limits for the exercise of his discretion.

2. A testator, by his will, gave the residue of his estate, in fee simple, to his two grandchildren, and such other children as his son Henry might afterwards have, to be divided among them when the youngest should

* Cited *in Babbitt* v. *Babbitt*, 11 *C. E. Gr.* 54.

arrive at the age of twenty-one years, subject to the provisions that his son Henry should be furnished, out of the rents and income, with a good and sufficient support during his life, to be paid him by the executor; also, that a good and sufficient support should be furnished to the wife of his son Henry, during her life. He also charged his estate with the comfortable support and education of his grandchildren, under the direction of his son Henry, and directed that if either of them should desire, or his son Henry should think proper, ample means should be furnished to educate one or more for the learned professions. Henry left his wife and family, and resided apart and distant from them, and ceased to pay any attention to them. The executor then filed a bill for directions as to his duty, and to settle the rights of the respective devisees under the will. *Held*—

1. That the direction to furnish the son with a liberal support must have a far different interpretation from that which would be given to it if he were performing his duty of taking care of his family and educating his children.

2. That the support and education of the grandchildren should be out of the income. The amount to be furnished must rest largely in the judgment and discretion of the executor, upon consultation with the mother; but he is not bound to contribute the whole income, if less will answer.

3. That the discretion confided by the will to the son must be exercised by the executor.

3. The court suggested, subject to the judgment of the executor, and to the discretion confided in him, (but not to be entered in the decree,) that it would be a proper exercise of his judgment to allow the wife to occupy the farm, (she to keep it in repair and provide a home where the minor children might be supported, and to which those of age might resort,) and to receive one-third of the net income of the estate; to allow the husband one third of the net income; to allow one sixth for the minor children, to be expended under the direction of the mother, and one sixth for the liberal education of any that might desire it; these two sixths to be expended under the direction of the father if he would, in good faith, undertake it.

4. A "good and sufficient support," to be furnished to the wife of testator's son, must be construed to mean such as is proper for a mother and head of a family, having the fortune and station held by her husband and his children.

5. Where an executor files a bill for directions as to his duties under a will, and no factious or unnecessary opposition or costs are occasioned by any defendant, costs and proper counsel fees for both parties will be allowed out of the estate.

The argument was had upon bill, answer, and proofs.

Mr. W. S. Whitehead, for complainant.

Mr. McCarter, for defendant, H. V. B. Jacobus.

THE CHANCELLOR.

The bill is filed by the executor of a will, for directions in discharge of his duty as executor under the directions in the will. The testator, Anthony A. Jacobus, died in February, 1849. He left a will, executed nearly a year before his death, which was admitted to probate, and of which the complainant is the executor. By it he gave all the residue of his estate, after certain specific dispositions, to his grandchildren, Anthony Jacobus and Peter Jacobus, and such other children as his son, Henry V. B. Jacobus, might afterwards have, in fee simple, to be divided among them, when the youngest should arrive at the age of twenty-one. This was made subject to the provision that his son Henry V. B. Jacobus should be furnished, out of the rents and income, with a good and sufficient support during his life. This was directed to be paid to him by the executors of the will, and to be liberally furnished in such time and manner as his son might suggest, at any and at all times.

He also directed a good and sufficient support to be furnished to the wife of his son, during her life. He also charged the estate with the comfortable support and education of his grandchildren, under the direction of his son Henry; and directed that if either of his grandchildren should desire, or if his son Henry should think proper to educate one or more of his children for one of the learned professions, that ample means should be furnished for that purpose.

Henry V. B. Jacobus has left his wife and family, who continued to reside on the homestead of the testator in Essex county, and has been, and still is, living apart from them, in Trenton. The separation and estrangement, whatever may be its cause, seems permanent. Peter B. Jacobus, one of the sons of Henry, who is of age, remained with his

mother and took the management of the farm. Mary Ann Jacobus, the wife of Henry, remained at the homestead, kept it up as a home for herself and children, and took charge of and supported those who are under age; their father has paid no attention to their support or education, and does not bestow any care or assume any responsibility concerning them, or give any directions to the complainant about these matters. The education of these minors is, in the mean time, being neglected.

The complainant applies to this court to settle the respective rights of the son, his wife, and his minor children, and his own duty as to each.

The testator, by his will, has absolutely given the residue of all his property to these grandchildren. For the purpose before us it must be considered as vested in them, although in certain contingencies the estate may open or be divested. This estate is not to be divided or come to the possession of these grandchildren, until the youngest shall be twenty-one years of age, and until then and afterwards, it is burthened with the support of their father and mother, during their lives respectively, and with the maintenance and education of such of these grandchildren as may be minors. The support to Henry is expressly directed to be furnished by the executor; that to the grandchildren and the wife of Henry is also to be furnished by him, by plain implication.

The support directed to be furnished to the grandchildren, as well as their education, is directed to be furnished *under the direction* of Henry, but the direction *to furnish* is positive, as well as the direction to provide a liberal education for any minor grandchild who should desire it. I am of opinion also that all are to be furnished out of the income of the estate. The amount to be furnished to each is, to a large extent, in the judgment and discretion of the executor; nor do I think that he is bound to contribute the whole income, if less than the whole will answer the purpose for which it is to be distributed.

The condition of the family is changed from what it was

at the making of this will, and from what the testator could have contemplated. The three objects of his bounty, his son, his son's wife, and his grandchildren, were one family, under the control and management of their natural head, who was by law, and by natural duty, bound to provide for and support the whole. But he has deserted his family, and neglects to perform these duties, so far as appears, without any cause or excuse.

Under these changed circumstances, the direction to furnish the son with a liberal support must have a far different interpretation in apportioning to each of the objects of the testator's bounty the proper relative share, from that which would be given to it if the son was performing his duty of taking care of his family and educating his children. The discretion confided to him must be left with and exercised by the executor; but it is the duty of the court to decide for whom the executor is bound to provide, and whom he is authorized to aid, and the circumstances under which he may render such aid; and to intimate certain limits within which the exercise of his discretion should be exercised.

First, with regard to testator's son. Although he has deserted his family, and may have done it wrongfully, he is still entitled to a *good and sufficient* support; but under existing circumstances, that means a very different proportion of the income from that to be furnished if he were supporting his wife and family.

Next, the infant grandchildren are entitled to a comfortable support and proper education out of the income, and any one of them who desires it is entitled to a liberal education. This is the absolute right of these grandchildren; if their father is willing to direct it, it must be done under his direction; but if he refuses to perform the duty of directing, these infants are not, therefore, to lose their support and education, but the executor must provide for it upon consultation with their mother, so long as she retains her position as head of the family, and provides a home for, and takes care of her children.

Mary Ann Jacobus, the wife of the son, is also clearly entitled to a good and sufficient support; and these words, good and sufficient, must be construed to mean such as is proper for a mother and head of a family, with the fortune and rank of her husband and his children. As to the proportion, the court can give no directions, except subject to the judgment of the executor and the discretion confided to him by the will.

If Mrs. Jacobus chooses to reside on the farm, and provide a home for her children, at which the minor children may be supported, and the children of full age may resort as the home of the family, it seems to me that it would be a proper exercise of the discretion of the executor to allow her the occupation of the farm, she keeping it in repair, and one third of the net income of the estate. I think that one third of the net income would be sufficient to allow to Henry V. B. Jacobus, so long as he remains from his family, and does not contribute to their support. One sixth of the income might be appropriated for the support of the minor children, and expended for them under the direction of their mother; and one sixth for the liberal education of any that desire it; these two sixth parts should be expended under the direction of their father, if he will, in good faith, undertake the control and direction of these expenditures committed to him by the will. With that control the court has no right to interfere, unless, perhaps, in case he should be living in such way as to render it improper for him to direct these matters. But, after all, the amount to be expended for each of these purposes must be mainly left to the discretion of the executor; and the intimation contained in this opinion as to the relative appropriation for each object cannot be inserted in the decree.

It is a proper case for an executor to ask the direction of the court. The difficulty grew from the want of definite directions in the will, and no factious or unnecessary opposition has been made, or costs occasioned by any defendant. I shall, therefore, direct the costs and proper counsel fees for both parties to be paid out of the estate.

POTTS *vs.* WHITEHEAD.*

1. A paper signed by A, by which he agrees that B, in consideration of $1 paid, shall have, for thirty days, the refusal of certain land therein designated, and that he will convey the same in consideration of $20 per acre, $500 to be paid on the execution of the deed, and the balance in a mortgage on the land, with interest at six per cent., no time being named for delivering the deed, nor any time for which the mortgage shall run, is not a contract, but only a refusal or offer of the lands to B at a certain price, and cannot be converted into a contract unless accepted within the thirty days.

2. An acceptance of an offer in writing to convey land within a certain time, in consideration of a price named, may be communicated by mail, but it must be actually placed in the post-office, directed to the proper place; if directed to a place where the party to be bound by it only sometimes resorts, it must be proved to have been received.

3. An offer in writing to convey land within a certain time, must be accepted within the time fixed.

4. A contract, any material part of which remains to be settled by negotiation between the parties, will not be enforced in equity on a bill for specific performance.

5. Where there was a written offer to convey land within a time fixed, at a price named, of which a portion named was to be paid on the execution of the deed, and the balance in a mortgage on the land, with interest at six per cent., *Held*—That the want of designation of any time when the great bulk of the consideration (that to be secured by mortgage,) was to be paid, left a material part of the contract to be settled by negotiation; and hence, even if such offer had been accepted, a decree for specific performance would not be made.

The hearing was upon bill, answer, replication, and proofs.

Mr. G. D. W. Vroom and *Mr. P. D. Vroom*, for complainant.

Mr. Leupp, for defendant.

THE CHANCELLOR.

On the 7th of December, 1865, the defendant signed a paper drawn by the complainant, by which, for $1 recited to be paid, he agreed that the complainant should have, for thirty

*CITED *in Green* v. *Richards*, 8 *C. E. Gr.* 34; *Cutting* v. *Dana*, 10 *C. E. Gr.* 274; *Scott* v. *Shiner*, 12 *C. E. Gr.* 187.

days, *the refusal* of certain lands therein designated, and agreed that he would convey the lands embraced in the refusal, by a good and substantial deed, in consideration of $20 per acre; the terms to be $500 on the execution of the deed, and the balance in mortgage upon the land, with interest at six per cent. The defendant resided in the city of New York, and boarded with a Mrs. Libbey, at the corner of Jane and Hudson streets, but was frequently away, and when absent was much of the time with his sons, at South River, in this state. Many of his letters were directed to him there, through the post-office, and were received by him when there personally, and by his sons for him in his absence. Before the contract, he informed the complainant of his residence in New York, and also that a letter left for him at No. 14 West street, New York, would reach him; this information was given for some other business between them, and not in relation to this offer to sell these lands.

The complainant, on the 1st of January, 1866, having forgotten the street and number of defendant's residence, if it had ever been mentioned to him, made inquiries for his residence at several places where he thought the information could be had, and called at some house where he was directed, in Hudson street, but it was not the defendant's residence, and so he failed to find him. On the 3d of January, 1866, he wrote to the defendant this letter:

"58 Broadway, New York, January 3, 1866.

My Dear Sir:—Have twice attempted the tender of the first payment of $500 upon the agreement made between us on the 7th of December last. I will meet you at any place you will name in the city of New York, at any hour after three o'clock of Friday, the 5th instant, or will be found at No. 9 Broad street, room No. 12, at three o'clock on Saturday, the 6th, when I shall be ready to make tender of the money and execute the proper agreements thereupon.

Very truly,

Benj. C. Potts.

Address me in care of Lewis P. Brown, 58 Broadway, by return mail."

Of this letter, he sent one copy addressed to the defendant at South River, New Jersey, and one directed to him at Northport, Long Island, which, he alleges, were the only other places of business of the defendant known to him. The complainant, in his own testimony, shows that he mailed these letters so directed, but does not say whether he mailed them by putting them in the post-office, or by putting them in the letter-box of his own office, or by handing them to the office messenger; and no other proof is offered of these letters being sent. In his bill he says that the agreements referred to in this letter, are the agreements necessary to be made as to the time of payment of the bond and mortgage to be given for the purchase money. This letter the defendant, in his answer and by his testimony, denies ever having received, and it is shown by other evidence that such letter was not received by defendant's sons, or at their place of business at South River, and the complainant testifies that it was never returned to him from the dead letter office. From this proof, the inference is strong that the letters were not placed in the post-office; and in the absence of any positive proof on that point, the case must be considered as if there was no proof of that fact.

The defendant, in his answer, which, in this respect, is responsive to the bill, and also in his testimony, states that he told the complainant, both before and at the time of signing this refusal, the number and street of the house where he lived in the city of New York; and both he and Mrs. Libbey testify that that was his residence, and that for more than a week before January 6th, 1866, when the time of the refusal expired, he was at home, and expected to hear from the complainant.

The paper signed by the defendant is not a contract, but on its face, and by its very terms, only a refusal or offer of the lands to the complainant at a certain price; this is not disputed by the counsel of the complainant. This, like all such offers, was not binding, and could not be converted into a contract, unless accepted within the thirty days. Whether

when such offer is made for a mere nominal consideration, the person offering can withdraw it within the time specified, it is not necessary to consider, as it was not withdrawn, and like all such offers it would be binding if accepted within the time, and before it was withdrawn.

The first question then is, whether the complainant's letter of January 3d, if it had been delivered or properly sent, is an acceptance of the offer so as to make it a contract. No other acceptance is relied on or proved. It is not, in terms, an acceptance. It is simply an offer to meet the complainant, and notice that he will then be ready to make the tender, and execute the proper agreements. If this refers, as is stated in the bill, to executing an agreement yet necessary to be made, as to the time of payment of the bond and mortgage for the balance of the purchase money, it shows that an important part of the essence of the agreement, the time for the payment of that balance, was not yet agreed upon, and as this *might be* upon demand, or postpone both principal and interest for one hundred years, the offer is to meet to agree upon this part of the contract. If the defendant had insisted upon a mortgage on demand, the complainant perhaps would not have paid the $500, and signed an acceptance of the refusal; if the complainant had asked that principal and interest be not payable for fifty years, defendant might not have assented; and above all there is no agreement in this letter to pay the money, and execute an acceptance of the refusal as it stood, but it only says I shall be *ready* to make *tender*, and execute the *proper* agreement. It doubtless might fairly be inferred from this letter, that the complainant intended to accept the offer in some way, and expected to enter into an agreement for the purchase of this property, at the price fixed; but he did not bind himself so to do. This letter comes within the decision of Vice Chancellor Kindersly, in a similar case, in which he held that such proposals to meet for the purpose of examining the lease which the complainant was preparing, was not an acceptance. *Warner* v. *Willington*, 3 *Drewry* 523.

The next question is, if this letter had been a sufficient acceptance of the offer or refusal, so as to bind the complainant to purchase at the price, whether this acceptance was communicated to the defendant within the thirty days. There can be no question but that when an offer is made for a time limited in the offer itself, no acceptance afterwards will make it binding. Any offer without consideration, may be withdrawn at any time before acceptance; and an offer which, in its terms, limits the time of acceptance is withdrawn by the expiration of the time. There is no authority, precedent, or principle, by which the time can be extended without consent of the person making it. The question whether an offer is accepted so as to make a legal contract, is a question of law. Courts of equity, on the question whether there is a contract, are governed by the same rules as courts of law. A contract which is legal, is so in both courts; if not binding, is not so in both. The remedy is different. The acceptance of an offer must be communicated to the person making it, or it is of no avail. It need not be communicated personally; an acceptance transmitted by mail is sufficient. But, in such case, it must be actually placed in the post office directed to the proper place, within the time limited or before the offer is withdrawn. 1 *Parsons on Con.* 406; *Adams* v. *Lindsell*, 1 *B. & Ald.* 681; *Stocken* v. *Collin*, 7 *M. & W.* 515; *Dunlop* v. *Higgins*, 1 *H. L. C.* 381; *Hallock* v. *Ins. Co*, 2 *Dutcher* 268; *S. C.* in error, 3 *Dutcher* 645.

But in the present case there is no proof that the letter was ever placed in any post office. If the complainant had left notice of acceptance at the house of Libbey, or if, after he had been directed to leave any communication for defendant at No. 14 West street, he had left such notice there, it would have been a sufficient acceptance, although it had never reached the defendant. Were this a question of due diligence, which it is not, the complainant has hardly used it. He ought to have known and remembered the residence or address of a man with whom he made a contract, which depended upon notice of acceptance within a given time.

If the contract is once made so as to be legally binding, then a court of equity, which in certain cases holds that time is not of the essence of the contract, will often enforce it, although the complainant through mistake or accident or mere remissness, when not accompanied by fraud, has omitted to comply with it on his part within the time limited. The authorities referred to on the part of the complainant clearly establish that, but do not give the slightest support to the doctrine that the time of accepting an offer, fixed in the offer, can ever be extended.

On these two grounds, that the letter was not an acceptance of the contract, and that it was not sent in such manner as to be at law a notice of the acceptance, relief must be refused.

I am not satisfied that a notice sent to South River, in proper form and properly mailed, would be sufficient. A notice of acceptance, when mailed and not received, must have been sent to the proper post-office. A notice to a resident of New York, while he was at his own home, would not be sufficient if mailed to London, although he had been there a month previous; or to Newport or Saratoga, although he had spent the summer there, and had received his letters there.

The question arising from the want of designation of any time when the great bulk of the consideration was to be paid, was not raised on the argument, but is too prominent to be passed without notice. It is a substantial and material part of the contract. The value of the purchase money will be less by more than $5000, if the payment of it and the interest upon it were both deferred for ten years, than if it was paid in cash or secured by mortgage, with interest payable half yearly. This was not fixed by the written contract, had it been accepted; it was open for negotiation; and it is a settled principle that courts of equity will not enforce a contract of which any material part has to be settled by negotiation between the parties. *Fry on Spec. Perf.*, § 203. The bill must be dismissed.*

* Decree affirmed, 8 *C. E. Gr.* 513.

The Jersey City and Bergen Railroad Company *vs.* The Jersey City and Hoboken Horse Railroad Company.*

1. A condition in a city ordinance granting permission to a street car company to lay rails in the streets, that another street car company named should be permitted to use the track on terms to be settled by the city council, is not a contract with such other company, but only between the first company and the city.

2. The municipal government has power to discharge the company to whom such permission was granted from the condition contained in the contract, and when once discharged, cannot again make such company subject to the condition.

3. An ordinance fixing the terms on which such track is to be used by the second company, made on their application to adjudge such terms, is not in the nature of an award, but the exercise of a power reserved by the city in granting the permission, and may be executed by ordinance without hearing or notice.

4. Where such ordinance fixes the terms, and declares that if the second company does not comply with them within a time prescribed, the first company should be released from the conditions and obligation of the ordinance of consent, those conditions and the contract to comply with them are discharged by the refusal of the second company to perform the terms prescribed, and the city cannot revive the contract.

5. The power reserved by such a contract in an ordinance is determined by its exercise; having been once performed, it is at an end.

6. The cars on a horse railroad have, when in motion, the right of way upon their own track, both as against those whom they meet and those who go in the same direction at a speed that would delay the cars.

7. The legislature, or the municipal government where the power is delegated to it, have the right to set apart a proper portion of a street for a street railroad, if such a road will accommodate the public travel for which the street was designed; and it makes no difference that the road is constructed and operated by an incorporated company for its own gain. The fare charged is, as in turnpike and plank roads built upon a public highway by legislative authority, only another way of keeping up and maintaining the highway.

8. The iron rails laid by a railroad company in a public street are the property of the company, and the use by another railroad company (au-

*Cited *in Camden Horse R. Co.* v. *Citizens' Coach Co.*, 1 *Stew.* 147; *Angle* v. *Runyon*, 9 *Vr.* 407.

thorized to lay a railroad of like character in the same direction for part of the route) of such rails, constantly or at regular intervals, is clearly an appropriation of such property, and unlawful.

9. A railroad track is clearly private property, and cannot fairly be considered, in any just sense, devoted by the makers to public uses. No person, therefore, natural or corporate, can, at his mere will, appropriate the track of a horse railroad company to his own private use and convenience, by adapting his carriage to such use for that purpose.

10. A provision in an ordinance authorizing a railroad company to lay a track in the streets of a city, requiring, as a condition of such authority, that another railroad company should have the joint use of such track, upon compensation to be agreed on, was within the power of the common council; they had the right to require such condition. *Query.*—Whether the common council could have imposed, as a condition of their consent, that such joint use should be allowed without compensation.

11. Fraud or misrepresentation is not sufficient to avoid the act of a legislative body.

12. This court will not permit the property of one person or corporation to be taken by another, without compensation first paid. In almost every like case, compensation could be made in damages, yet equity always interferes by injunction, and does not permit the property to be taken and the party put to his action.

The argument was upon a rule to show cause why an injunction should not be granted to restrain the defendants from running their cars upon the tracks laid by the complainants in the streets of Jersey City.

Mr. L. Zabriskie and *Mr. I. W. Scudder*, for complainants.

Mr. Dixon and *Mr. Gilchrist*, for defendants.

THE CHANCELLOR.

The complainants and the defendant corporation, whom I shall call the defendants, are both authorized by their charters, granted by the legislature, to lay rails in the streets of Jersey City, upon obtaining the consent of the common council of the city; both had the right to build a horse railroad to the Jersey City ferry, at the foot of Montgomery street in that city, and both had the right, by consent of the common council, to lay their railroad tracks in the streets that lead to that ferry. These charters were both granted

in March, 1859, and each granted the right or franchise of running cars and carrying passengers over their road when two miles of it should be completed.

The mayor and common council of Jersey City, by an ordinance approved December 20th, 1859, gave their consent to the complainants to lay a single track in certain streets in Jersey City, including Montgomery street, from Hudson street to Newark avenue, Newark avenue to Grove street, thence through Grove street, Montgomery street, Gregory street, York street, and Hudson street, to the foot of Montgomery street. And in the third section of this ordinance it was enacted that the consent to lay said track in Montgomery street to Newark avenue, and in Grove, Gregory, and York streets, was upon condition that the Jersey City and Hoboken Horse Railroad Company should have the joint use of any tracks that should be laid in said streets by virtue of said consent; and that if any disagreement should arise between the said two companies as to the expense or manner of laying said tracks, or the use thereof, such disagreement should be finally adjudicated and settled by the common council of said city. Other sections of this ordinance directed with what kind of rail, and of what width, the track should be laid, and required the company to pave with Belgian pavement the space between the rails and for two feet outside of them, and to keep this pavement in repair. It also provided that the city might at any time remove the tracks to lay down or repair water-pipes, sewers, or gas pipes, or alter the grade of the streets, and that the company should replace the track and pavement at their own cost, and might, in the meantime, lay temporary rails in such street as the city should designate. It also provided that the company should pay city taxes, although exempt by their charter, and should only charge five cents fare within the city. The ninth section provided that the ordinance should go into effect as soon as the company should, under their seal, agree that they would apply at the next session of the legislature and obtain, if possible, an amendment to their charter, so

that in obtaining the consent of the common council to lay their rails, they should be subject to such conditions as the common council may have, by ordinance, imposed upon them. This agreement was executed by the complainants on the day after the approval of the ordinance.

The legislature, by an act approved March 17th, 1860, provided that the complainants, "*in laying, repairing, and maintaining their rails, and in constructing their roads* in the streets of Jersey City, shall be subject to such conditions as the common council of said city, in the ordinance granting consent to lay such rails and construct said road, shall have imposed, or shall impose upon them."

The common council also, by an ordinance approved January 18th, 1860, gave consent for the Hoboken company to lay a single track of rails in certain streets in Jersey City, including Grove street and Jersey avenue, north of, and until their respective intersections with Newark avenue, but not including any street in which their consent had been given to the complainants for laying rails. The third section of this ordinance provided "that the Jersey City and Hoboken Horse Railroad Company shall have the joint use of the tracks of the Jersey City and Bergen Railroad Company to and from their tracks in Jersey avenue and Grove street to Hudson street, upon their agreement with said Jersey City and Bergen Railroad Company, in accordance with section three of the ordinance to authorize said company to lay their rails, approved December 20th, 1859."

The complainants, by virtue of the ordinance granting them consent, laid their tracks in Newark avenue, from Jersey avenue, crossing Grove street to Montgomery street, and along that street to Hudson street, also in Grove, Montgomery, Gregory, York, and Hudson streets to the foot of Montgomery street. These tracks were laid by them at their own expense, without any aid from the defendants. The defendants laid their tracks in Pavonia avenue and Grove street to Newark avenue, and then by virtue of a verbal agreement between them and the complainants, ran

their cars on the complainants' tracks to the foot of Montgomery street. The terms of this agreement were that the complainants might use the track of the defendants for an equal distance as compensation, and that either party could put an end to the agreement by one month's notice. The complainants, on the 23d day of March, 1868, gave a notice to the defendants by which this agreement was terminated on the 1st day of May, 1868.

The defendants, by a written application made shortly after the receipt of the notice, formally applied to the common council of Jersey City, to give them the use of the necessary tracks to enable them to run their cars to the Jersey City ferry, under the provision of the third section of the ordinance of December 20th, 1859, for a nominal consideration.

Upon this application a committee was appointed, and upon their report, the common council, by an ordinance, approved September 21st, 1868, directed that the defendants should pay to the complainants, for the use of their tracks, the sum of $300 a year for each car run upon such tracks; that said sum should be computed from the 1st of May then last past, and that payment should be made at that rate on the first of every month, and that the money due for the use of the track from the 1st of May to the 1st of September, should be paid immediately. The second section of the ordinance provided, if the defendants upon demand made, should refuse to pay to the complainants the compensation so provided, at the times and in the manner provided, that the defendants should thenceforth cease to use the tracks of the complainants, and the complainants should thenceforth be released from all conditions and obligations on account of the provisions of the third section of the ordinance, approved December 20th, 1859. The complainants on the 23d of September, 1868, demanded the money due of the defendants, who refused to pay it, and answered that they would relinquish the use of the complainants' tracks.

After this the defendants discontinued running their cars

on the tracks of the complainants, until February 5th, 1869. The common council, by an ordinance, approved January 15th, 1869, amended the first section of the ordinance of September 21st, 1868, so that the rate required to be paid for each car should be $100 a year, and the payment should commence from January 1st, 1869, and be payable on the first of each month, and the amount from January 1st, 1869, be payable immediately. After this ordinance went into effect, the defendants commenced running their cars over the tracks of the complainants, from Jersey avenue and Grove street, to the foot of Montgomery street. It is this use that complainants seek to enjoin.

The defendants claim the right to run their cars upon the rails of the complainants, first, on the ground that these rails are laid in a public street, and that they, as part of the public, have a perfect right to travel and run cars any where in that street. It has been settled in this state, in the case of *Hinchman* v. *The Paterson Horse R. Co.*, 2 *C. E. Green* 75, that the laying a horse railroad track in a public street, is not taking the property of the owner of the soil for public use so as to entitle him to compensation anew; that when the laying of such rails is authorized by the legislature, "it is a legitimate use of the highway, and an exercise of the public right of travel, and not a taking of private property for public use within the provision of the constitution." This principle has been adopted and sanctioned in other states. *Brooklyn City R. Co.* v. *Coney Island R. Co.*, 35 *Barb.* 364; *Elliott* v. *Fairhaven & West. R. Co.*, 32 *Conn.* 579; *Cincinnati R. Co.* v. *Cumminsville*, 14 *Ohio State R.* 523. And the reasoning of Emott, J., in his opinion in *The People* v. *Kerr*, 27 *N. Y. R.* 207, and of Sutherland, J., in his opinion in *Wager* v. *The Troy Union R. Co.*, 25 *N. Y. R.* 537, support this doctrine, and distinguish between horse or street railroads and those operated by steam. Nor does the decision in this last case, which is upon a steam railroad, contravene it; although in that state, a contrary doctrine was held at the Monroe General Term, in *Craig* v.

Rochester City R. Co., 39 *Barb.* 494. The defendants contend that this is so held, on the ground that the use of the street is in no degree taken from the public by a horse railroad track, and therefore they are entitled to use the rails or track laid down in the street, as the only way of exercising their right to use that part of the street.

In this state, it has been held that the land occupied by a public street cannot be taken even by authority of the legislature for a railroad operated by steam. *Starr* v. *Camden & Atl. R. Co.*, 4 *Zab.* 592; *Hetfield* v. *The Central R. Co. of N. J.*, in the Supreme Court, 5 *Dutcher* 206, and in the Court of Errors, *Ib.* 571. The right of the owner of the fee in a public street to compensation, was assumed by the judges in both courts. The courts of New York have recognized and established this as the law of that state. *Williams* v. *N. Y. Central R. Co.*, 16 *N. Y. R.* 97; *Mahan* v. *N. Y. Central R. Co.*, 24 *N. Y. R.* 658. Beside the authority of these cases, I think that the grounds upon which they are decided, and upon which the distinction is made between street railroads and those operated by steam, are sound and founded on well established legal principles.

When the land is taken and appropriated for an ordinary public highway, compensation must be paid to the owner, unless he consents that it shall be taken without compensation; such consent is generally given because he thinks that he will be recompensed by having the advantage of a highway along his land. In this state, such consent, in the rural districts, is shown by his signing an application for laying out the highway; and the estimate of his injury, and the compensation for his property when he does not consent, is made with regard to the benefit he may receive from the road. The like principle is observed in a different form, in laying out streets in most of the incorporated towns and cities; it is most equitable and just; and in all cases the whole or part of the compensation which the owner receives for his land is the advantage of a public street or highway along them. The great advantage of this is, the free access

it gives to his property for himself and all others who may do business with him, or desire to go to his premises. And in cities especially, the most valuable part of this access is that for persons in the same city, and from and to other establishments in the same city. Persons passing through from all parts of the state or of the country have the right of free passage over the street or road which is opened, but this is of little if any benefit to the person whose land is taken; he has perhaps an equivalent in the like right to pass over all public roads in the state or country where he may travel. But the important compensation is free access of all to his premises, and free passage from them to the vicinity. Where lands are taken for a railroad operated by steam, the owner in front of whose house or premises the road passes, is not benefited by it, that is, by its passing in front of his lands; he may be, and in some instances is benefited by a depot in his vicinity, but that benefit is not by a road passing in front; he would receive the same benefit, and would be as near the depot if the road was located over his neighbor's land a hundred yards in the rear. The common highway for which his land was taken would not benefit him, if laid in his rear; the only advantage to be gained by it is by having it along the front of his premises. When the road laid out in front is occupied by a steam railroad, so much of it as is taken for that purpose is of no use for the object for which the road was laid out; it cannot be used at all for access to his premises; and the part not occupied by the track, is by the passage of trains rendered useless to a great extent for travel with horses or ordinary carriages, and for children or persons not of careful habits to cross or travel upon. It is apparent that the main value of such a highway for the purpose for which it was opened, and the land taken or given, is destroyed by a steam railroad being constructed and operated upon it. These roads do, or should in all cases, by fences or otherwise, prevent every one except their own trains from traveling on their tracks. In all these respects a street railroad differs from one operated by

steam. As observed by the Chancellor, in *Hinchman* v. *The Paterson Horse Railroad Company*, the operation of such a road "is a legitimate use of the highway, and an exercise of the public right of travel." In general the cars will stop in front of every door, and convey persons from any one point on their line to any other to which they may desire to go; and the great use and advantage of them is to those whose property was taken for the street, and whose lands adjoin it. The courts must notice the fact that these street railroads have become an important and valuable institution in all our cities and towns, especially valuable to persons of small or moderate means. They are now almost indispensable; and their chief value to the many consists in their being in the public streets, and along the shops and places of business; if placed in the rear or at any distance from these streets, their value would be comparatively small. They are but a means of using the public streets to greater advantage for the very purposes for which they were laid out, free and quick transit from one part to another; they are the best and cheapest mode yet devised; and they do not hinder the use of the rest of the street for public travel, and hardly, and in a very small degree, obstruct the travel on the part occupied by the tracks, except the few inches covered by the iron rails. The cars exclude other vehicles from the space occupied by them when in motion—so do omnibuses and drays; they have when in motion, the right of way upon their own track, both as against those whom they meet, and those who go in the same direction; a little more extended than the exclusive right of other vehicles, which have only the exclusive right to one side of the road as against those whom they meet, but it is in principle the same. For it must be taken for granted that the right to lay a track for horse cars, and to run them in a public street, gives the right of way as against all vehicles met, and against all traveling in the same direction at a speed that would delay the cars, without any special legislation for the purpose. It is implied from the grant which would

be useless without it. And it was so held by the Supreme Court in New York, in *Wilbrand* v. *The Eighth Ave. R. Co.*, 2 *Bosw.* 314.

The legislature have the right, which is generally delegated to the municipal government, to regulate the manner in which a road or street shall be formed and used. They can, and constantly do, appropriate a part for sidewalks, prohibit carriages from passing over them, and construct them so that carriages cannot be driven upon them. Foot passengers are, in all cases, an important part of those who travel over the streets; and no government would discharge its duty that did not appropriate and secure to their use a sufficient part of the street; and if any citizen should be so wealthy and luxurious that he never used the street except in his carriage, he would have no right to complain that he was excluded from the sidewalk, or forbidden to drive upon it with his carriage, to the danger and annoyance of those on foot. In the same manner, the state, or those to whom it has delegated the authority, has the right to set apart a proper portion of the street for a street railroad, if that road is to accommodate the public travel for which the street was designed. The class to whom the roads are a convenience, and who can afford to ride in them, are as much entitled to protection and provision for their accommodation as those who walk, or who ride in carriages, or who carry merchandise. What portion each shall have depends upon circumstances, to be considered and judged of by the municipal authorities to whom the regulation of the streets is committed. And it makes no difference that the road is constructed and operated by an incorporated company for their own gain. The road is built for the use of the public, and the price charged is, or should be, limited to a compensation for the work done in transportation, and the cost of constructing and maintaining the road, and not for the right of way. It is fair that to save the public from the expense of laying and maintaining this road, and expensive means of travel, that others should be allowed to construct it and

charge the expense to those who use it; nothing can be more equitable. As has been held in the case of turnpike roads and plank roads, built upon a public highway by legislative authority, it is but another way of keeping up and maintaining the highway. *Wright* v. *Carter*, 3 *Dutcher* 76.

The question of the right to lay the rails for a horse railroad in the streets, is not directly raised in this case. But it is necessary to settle the principle upon which that right is maintained, for upon this must depend the right of others to use such rails in common with the owners of the railroad.

From this view it follows that the right of the legislature to authorize a street railroad to be laid in a highway, without further compensation to the owners of the soil, is not based upon the fact that the part of the street occupied by the rails is still open for general use, and that all can travel upon it as before, but upon the ground that such use of the street, like the use of a designated part for sidewalks, is the use of a part for the purposes for which the street was laid out, and for which the land was given or taken.

The iron rails laid by the complainants in the street are their property; although laid in the street, the property in them is not abandoned or given to the public, the city, or to the defendants, any more than stone steps, iron railing, posts, vault covers, or flagging, placed within the limits of the street by proper authority, are abandoned or given to the public. In most cases they could be removed by the owner, and in all cases he could maintain an action against any one injuring or appropriating them. No doubt the incidental crossing over those rails by any one using the street, or even in the use of the street driving occasionally upon or along them, might be justified by an implied permission from their being placed in the street without any regulation to prohibit such use. But no one would be allowed to have a carriage constructed especially to pass over this track, and adapted to no other part of the street, and by it to appropriate the complainants' property to his own use.

In the case of a company authorized to lay a railroad of

like character, in the same direction, for part of its route, and in some respects a competing road (as that of the defendants is in this case,) the use of the track of the complainants for their cars constantly, or at regular intervals, for their whole business, is clearly a taking or appropriation of the property to their own use. No reasoning can make this clearer than the mere statement, of itself. This view has been adopted by the courts of New York in a number of cases. *The Brooklyn Central R. Co.* v. *The Brooklyn City R. Co.*, 32 *Barb.* 358; *In re Kerr*, 42 *Barb.* 119; *The Sixth Avenue R. Co.* v. *Kerr*, 45 *Barb.* 138. It was also, after consideration, approved and adopted by Judge Redfield, in his late treatise on the *Law of Railways, Vol.* 1, *p.* 541, § 6. He also adopted it in a report made by him in January, 1865, to the legislature of Massachusetts, by whom he had been appointed a commissioner to report to them his views of the law. 1 *Redfield on Railways* 321, § 13, and 646, § 2. And, again, in a report made in the case of *The Broadway Railroad Company* v. *The Metropolitan Railroad Company*, referred to him by the Supreme Court of Massachusetts. 1 *Redfield on Railways* 638. That reports says: "We had no doubt the company building the track must be regarded as having a property in it; and although it may not be a matter altogether free from embarrassment to give a satisfactory definition of the precise nature of the rights and interests of such company in their track in all respects, it is nevertheless clear to the minds of the commissioners, from the decisions already made in this commonwealth, and in other states, that such track must be regarded in the nature of private property, and that it cannot be fairly considered in any just sense devoted by the makers to public uses. Hence we do not understand that it is competent for any person, natural or corporate, at his mere will, to appropriate the track of a horse railway company to his own private use and convenience, by adapting his carriage to such use for that purpose." In this view of the law I entirely acquiesce, and am willing to adopt it as the law of this state. No railroad company could put

down a track, if any other company or individual had a right to place cars on it and use it for a competing traffic with the company who laid it. The principle would be destructive to all street railroads, and to the defendants themselves. In fact, the position was with great frankness abandoned by the counsel who closed the argument for the defendants. But its importance, and the fact that it has been frequently set up in such cases, seemed to me to require the consideration which I have given to it.

The defendants further place their rights to run their cars upon the tracks of the complainants, upon the provisions in the ordinance of December 20th, 1859, and of the act of March 17th, 1860. The third section of the ordinance provides for the joint use by the defendants as a condition of the consent. The common council may not have had the right, in granting consent, to impose conditions affecting franchises granted to the complainants by their charter; as to prescribe their rates of fare, their manner of running their cars, or to require that the taxes, which the charter reserved to the state, should be paid to the city. The only thing for which their consent was required was the laying of the rails in any particular street, and the only condition which they could impose was as to the manner of laying and maintaining the rails, and to protect the street from unnecessary tracks. This they were authorized to do. It was their duty, as the guardians of the streets of the city, to provide that they should be kept in good and proper condition, so that others could travel in safety; to provide that the parts which would be disturbed by laying the track should be re-laid and kept in order by the company, so that the tax-payers should be put to no expense. As two companies were applying for consent to lay a track from Pavonia avenue to the ferry, which must be in the same street, if the common council were of opinion that consent for two tracks could not be granted with due regard to public convenience, and that both lines were needed, they had a perfect right to require that both should have but one track. I consider this condi-

tion in the third section, as well as the regulation of the width of track, the kind of rail, and the manner of laying the track, to be such as the common council had the right to require. The acceptance of the ordinance by the complainants, the obligation to procure an amendment to the charter, and the amendment itself, confirm this view, and give validity to the conditions imposed upon the complainants.

But this ordinance, its acceptance, the obligation, and the supplement to the charter, are matters between the city and the complainants; as between them, they amount to contracts. But the defendants have no right under them; they constitute no contract either of the complainants or the common council, with the defendants. The city could repeal the ordinance, and the legislature the supplement, without regard to the defendants. The only contract with them, or matter approaching to a contract, was that contained in the third section of the ordinance of January 18th, 1860, granting them consent to lay rails. This authorizes them to have the joint use of the tracks of the complainants in question here, "upon their agreement" with the complainants, in accordance with the third section of this ordinance. That agreement was not made; and if made was only temporary, and was annulled, and is admitted not to exist. There is, therefore, no agreement, and the defendants have no right under that ordinance.

The only right being that given by the ordinance consenting to complainants' track, it could be extinguished by a repeal of that ordinance, or by a release of the right by the common council; and when the ordinance should be repealed, or the complainants released from the obligation, it could not be revived without their consent. It is doubtful whether the common council could have imposed, as a condition to their consent, that the defendants should be allowed to use the complainants' track without compensation; that would have been a mere boon to the defendants, and not aimed at preserving the streets from unnecessary encumbrance. But they did not do this; they provided for the joint use upon

the defendants paying their share of the expense. This is the fair construction of the ordinance. They further provided that in case of disagreement as to the expense or use, it should be finally determined by the common council. The defendants and complainants did not agree, and the defendants appealed to the common council to allow them to use the complainants' tracks, upon a nominal compensation. This compensation the common council, by their ordinance of September 21st, 1868, fixed at the rate of $300 a year for each car, and provided that if the defendants should refuse to pay it on demand, the complainants should be released from the obligation to permit the joint use of their tracks.

It is objected that this determination was in the nature of an arbitration between the parties, and that it is void, because the defendants did not appear and were not heard; because it was the act of the mayor and common council and not of the common council only; and because the common council had no power to declare a forfeiture of the rights of the defendants.

But this was not an arbitration, or in the nature of it. The defendants had no right of franchise or property, no right by contract. The common council, as between themselves and the complainants, had reserved the right of joint use by the defendants; and had reserved to themselves, as against the complainants, the right to settle the amount of the expense. They could have settled it by fixing a gross sum; they chose to do it by directing it to be paid in a manner more equitable, if rightly adjusted, in proportion to the use. It could hardly be maintained even if this were an arbitration, that the defendants did not appear; the proceedings were begun at their request, and continued from time to time in the usual way of continuances in such a body. And were this an arbitration, it would not avoid it that the mayor, after the determination, approved of it by signing the ordinance. Had he, or any one in such case, interfered with or participated in the deliberations of the arbitrators, it might have affected the determination. But

an approval after the matter was finally and conclusively decided by the common council, cannot avoid their determination.

It is alleged that the determination of the common council was procured by fraud and misrepresentation. Fraud or misrepresentation is not sufficient to avoid the act of a legislative body, even if proved. This was clearly intimated by Chief Justice Marshall, in the Supreme Court of the United States, in the case of *Fletcher* v. *Peck*, 6 *Cranch* 87. And many acts of municipal or state legislation would be invalid if any material misrepresentation or fraud in procuring them would invalidate them. Even an award could not be set aside when drawn in question collaterally, for misrepresentation or fraud in procuring it, but only in proceedings for the purpose of setting it aside. The fraud alleged in this case is in representations made on part of complainants to the committee of the common council, that the cost of their tracks used by the defendants was $40,000, when in fact they only cost $27,000. The fact of the representation is proved; and that the original cost of these tracks was only $27,000, is shown by the contractor. But that cost was in 1860, or 1861; and it no where appears that no additional expense beyond repairs, and properly constituting the cost of the road, has not been incurred. Such expense may have been incurred in many ways. If the grade of any of the streets had since been changed, it would have caused great expense. The ordinance provides for the removal of the track at the expense of the company, in case a sewer or water pipes are constructed or laid, and for the laying of a new track for a temporary purpose. For aught that appears such work may have been since done along the greater part of the line of these tracks, and may have occasioned large expense. It no where sufficiently appears that the representation was false.

This was a valid ordinance, and its effect was, as it was expressly declared on its face, to release the complainants from the burden of a joint use of their track by the defendants. The whole subject matter was within the power of

the common council, and they could and did release the complainants. Having done this, it was beyond the power of the common council to retract and avoid the effect of this release, by the ordinance of January 15th, 1869. The defendants had refused to abide by the determination and pay the sum directed, had elected to abandon the use of the tracks, and had in fact abandoned it for months. In this situation it was beyond the power of the common council to revive the right. They could not do it by a new ordinance, nor by the awkwardly executed device of amending the former ordinance. It was not like the requirement in the first ordinance, a condition of granting the consent; it was not authorized by the act of 1860, which only gave validity to conditions imposed in the ordinance granting consent.

It is contended on part of the defendants, that the act of 1860, which gave validity to the conditions in the ordinance, by its operation fastened these conditions to the complainants as part of their charter, and that the common council have no power to release them. There is a serious doubt whether the second section of the act of 1860, applies to the joint use of the tracks by the defendants. The words are, that the Jersey City and Bergen Railroad Company *in laying, repairing, and maintaining their rails and constructing* their roads, shall be subject to such conditions as may be imposed by the common council. This section only applies to the laying of the rails, and constructing the road, and repairing and maintaining them. The act expressly limits the restriction to these enumerated particulars. There are provisions in the ordinance as to laying, repairing, and maintaining the rails, and constructing the road, to which these terms most appropriately apply, and it would be unnecessarily straining the words beyond their natural meaning, to make them apply to the use of the tracks by others, or the rate of fares, or the payment of taxes, which are also provided for in the ordinance. These provisions derive their force from the acceptance of the ordinance, and the obligation required and entered into; and there is no reason

for giving these words any meaning here beyond their usual and natural meaning.

But if the act is held to include the joint use of the track, its only effect is to give validity to the ordinance as an ordinance, and to give to the common council authority to exact the conditions imposed by it. It was for the relief of the common council, not to take away or limit their power, and having given this effect to the ordinance it left it like all other ordinances subject to repeal or modification by the common council; and when they, by the ordinance of 1868, released the complainants from, and in effect repealed the third section of the ordinance of 1859, the act was of no efficacy to give validity to the conditions so repealed—the conditions were no longer conditions imposed by the ordinance.

The determination of the common council as to the expense, when once made, is final and cannot be reconsidered or changed; having performed the duty or power which devolved upon them, like commissioners to assess damages, surveyors of highways, arbitrators, and similar tribunals for a special purpose, they are *functi officio*, and their power is extinct. The defendants refused to pay, and have not paid the expense or compensation required, and are not entitled to use the complainants' property without compensation.

This is a proper case for this court to interfere by injunction. It is the settled doctrine of the court, to prevent the property of one person or corporation from being taken by another, for public or any use, without compensation first paid. In almost every case of this kind, compensation could be made in damages recoverable in an action at law, and experience shows that juries do not generally give inadequate damages; yet this court always interferes by injunction, and does not permit property to be taken and the party put to his action. For these reasons, the injunction applied for must be granted.*

*Held, on appeal, that between Grove street and Jersey avenue, in Newark avenue, the Hoboken company show no right to the joint use of the tracks of the J. C. & B. R. Co. To that extent injunction retained; in all other respects, decree reversed. 6 *C. E. Gr.* 550.

Shotwell's Administratrix *vs.* Smith.

Same *vs.* Oliver Struble and wife.

Same *vs.* Canfield Struble and wife.

1. Courts of equity will always compel discovery in aid of prosecuting or defending suits at law; and in order to make such discovery of use on the trial at law, will restrain that suit from proceeding until the discovery is had. This jurisdiction is not taken away by the fact that courts of law have been clothed with powers to compel discovery in such cases by the oath of the complainant.

2. A motion to dissolve an injunction restraining a suit at law will not be granted before answer filed, on the ground that the bill on the face of it shows no equity, where a discovery is sought, or where the bill alleges that the obligations sued on at law were given without consideration, and were fraudulently obtained, and the affidavits annexed to the bill are sufficient *prima facie* proof that fraud was used in obtaining them.

On motions to dissolve injunctions, issued in each of the three suits.

Mr. Linn and *Mr. McCarter*, for motions.

Mr. R. Hamilton, contra.

In regard to the notes being given, as is charged in the bill of complaint, without consideration, and being negotiable in form, the complainant is entitled, according to the ruling of this court, not only to have them enjoined, but to have them delivered up to be canceled. *Metler's Admin'rs* v. *Metler*, 3 *C. E. Green* 270.

A note as a mere gift, cannot be enforced between the parties thereto, or their representatives. 1 *Parsons on Bills and Notes* 175 *to* 179. Nor can it be the subject of a *donatio causa mortis*. *Ib.* 179.

As to the sealed bills; as their consideration cannot be inquired into in a court of law, the only remedy is in this court.

This court, adhering to the rule adopted by our law courts, that fraud in the consideration of a sealed bill, or that fraudulent misrepresentations cannot be shown at law, holds that equity is the appropriate tribunal. *Leigh* v. *Clark*, 3 *Stockt.* 110.

It is charged in these cases before the court, that James Shotwell was a very infirm, aged man, greatly affected in body and mind by palsy, and that the sealed bills were obtained from him by practice, deception, and artifice, without any consideration.

The bill is filed for discovery, as well as relief, and the complainant should be allowed to hold the injunction until the discovery is made; until the defendants fully answer.

As to the point that the injunction was irregularly issued, on the ground that the material facts charged in the bill were not verified by affidavits: Without conceding this assumption, if any such irregularity existed, the defendants have waived it by motion to dissolve the injunction for want of equity in the bill. This amounts to a sort of demurrer to the bill. The motion and notice are based upon the alleged insufficiency of the bill of complaint, and the supposed irregularity is waived. 1 *Eden on Injunctions*, (*Waterman*, 3*d ed.*) 115.

The Chancellor.

The applications to dissolve the injunctions in these cases are made before answers filed, on the ground that the bills on the face of them show no equity on which the complainant is entitled to relief.

The bills seek to enjoin suits at law brought by the defendants, upon notes and bonds given to them by the complainant's intestate, and which the complainant alleges were obtained by fraud, and without consideration; also a discovery of the circumstances under which they were executed by the intestate, and what consideration was given; and to have them delivered up and canceled.

Courts of equity will always compel discovery in aid of prosecuting or defending suits at law, and to make such dis-

covery of use on the trial at law, will restrain the suit from proceeding until the discovery is had. And this ancient and well settled jurisdiction is not taken away by the fact that courts of law have been clothed with powers to compel discovery in such cases by the oath of the complainant. Besides, the power given to courts of law is not so complete and ample as the power to compel discovery in chancery. At law, the plaintiff cannot be compelled actually to answer; the only penalty is that the court may stop his proceeding in the suit. On this ground the complainant is entitled to maintain the injunctions until answers are put in.

The bills also seek to have the notes and bonds delivered up, because given without consideration, and fraudulently obtained. It is not necessary here to determine whether a sealed obligation can in any case be declared void in equity for mere want of consideration, without fraud. In this case the affidavits at the foot of the bill are sufficient *prima facie* proof to satisfy me that fraud was used in obtaining the execution of these bonds. Notes and bonds were obtained from the intestate by the defendants, his daughters and grandson, to the amount of $15,000, more than half the amount of his whole personal estate. They were executed by him after his physical and mental faculties had been impaired by an attack of paralysis; two of them a few days after, and all of them before he had fully recovered. They were obtained without consideration, in the absence and without the knowledge of the complainant, who was his wife, and had his confidence in all business matters, and who was at home taking care of him in his sickness. The defendants did not reside with the intestate, but came to the house on visits to him. Obligations given under such circumstances are at least suspicious, and the progress of the suits at law should be stayed until the defendants make full answer and discovery; after which, it will be determined whether the suits at law shall proceed, or this court will retain jurisdiction, to the end that it may cause the papers to be canceled if it should appear that justice requires it.

The motions must be denied.

Lane and others *vs.* Schomp and others.

1. The words of a statute, authorizing the issue of township bonds when "the consent of a majority of the tax payers appearing upon the last assessment roll as shall represent a majority of the landed property of the township" shall be obtained, require the consent of a majority of all the tax payers, and a majority that will also represent a majority of the real estate.

2. In the construction of a statute, words should never be supplied or changed, unless to effect a meaning clearly shown by the other parts of the statute, to carry out an intent somewhere expressed.

3. An *ex parte* affidavit of a ministerial officer, as to certain facts required by statute to be sworn to, is not an adjudication of such facts, but simply evidence.

4. A ministerial officer on whom power is conferred by a special statute, to be exercised only upon certain conditions, when he acts contrary to authority, and his acts would inflict great injury for which there is no other remedy, will be enjoined. His case is not like that of a municipal corporation, exercising legislative functions or discretionary powers.

5. It seems settled that if township bonds are once issued, with the *prima facie* proof required by the statute authorizing their issue that the statute has been complied with, and get into the hands of innocent holders for value, the township will be compelled to pay them.

On rule to show cause why an injunction should not issue.

Mr. Gaston and *Mr. Shipman*, for complainants.

Mr. Keasbey and *Mr. C. Parker*, for defendants.

The Chancellor.

This bill is exhibited by one hundred and twenty tax payers and owners of lands in the township of Bedminster, in the county of Somerset, against the township in its corporate capacity, and against the defendants, Schomp, Crater, and Van Nest, as commissioners. The object of it is to restrain the issuing of bonds by these commissioners to aid the con-

struction of the road of the Passaic Valley and Peapack Railroad Company, for the payment of which the township and the lands in it will be liable.

By an act approved April 9th, 1868, the townships along the route of the railroad above mentioned, of which the township of Bedminster is one, were authorized, through commissioners to be appointed for the purpose, to issue bonds to a certain amount, to be exchanged for the stock of the company. The defendants, Schomp, Crater, and Van Nest, were appointed the commissioners for the township of Bedminster. The second section of the act provides that it shall be lawful for said commissioners to borrow, *on the credit of their township*, such sum of money, not exceeding ten per cent. of the value of the real estate and landed property of said township, to be ascertained by the assessment roll thereof for the year 1867, and to execute bonds therefor, under their hands and seals; but no debt shall be contracted, or bonds issued by said commissioners, until the written consent shall have been obtained of the majority of the tax payers of such township, or their legal representatives, appearing upon the last assessment roll, as shall represent a majority of the landed property of such township appearing upon the last assessment roll of such township. Such consent shall state the amount of money authorized to be raised in such township, and that the same is to be invested in the stock of said railroad company; and the signatures shall be proved by one or more of the commissioners. The fact that the persons signing such consent are a majority of the tax payers of such township, and represent a majority of the real property of such township, shall be proved by the affidavit of the assessor of such township, endorsed upon or annexed to such written consent, and the assessor of such township is thereby required to perform such service. Such consent and affidavit shall be filed in the office of the clerk of the county in which such township is situated, and a certified copy thereof in the town clerk's office of such township; and the same or a certified copy

thereof shall be evidence of the facts therein contained, and received in evidence in any court in this state.

The act, by its fourth section, further provides that the commissioners shall every year report to the township committee the amount required to pay the principal and interest on these bonds, payable during the next ensuing year; and the excess of such sum over any dividends that may be received on the stock of the company, the town committee are required to assess, levy, and collect, of the real and landed property of the township, as other taxes are assessed and collected; and by the seventh section, at the end of the twenty-five years, the board of assessors are authorized and required to assess upon and collect from the lands in the township, the principal and unpaid interest of said bonds.

On the 17th day of December, 1868, there were filed in the office of the clerk of Somerset county, four written consents in the form required by the statute, signed by one hundred and thirty-eight names, the signatures to each of which were proved as required by the statute, by the affidavit of one of the commissioners annexed to it. To these consents was annexed the affidavit of the assessor of the township, who deposed that the persons signing such written consent are a majority of the tax payers of said township, and represent a majority of the real property of said township; and also, that they are a majority of the tax payers of the township appearing upon the assessment roll for the year 1867, or their legal representatives, and that they represent a majority of the landed property of the township upon the assessment roll for that year. Afterwards, and after the filing of the bill in this cause, on the 13th day of February, 1869, the written consent of five other persons, properly verified, was filed in the office of the county clerk, making one hundred and forty-three names in all, with the oath of the assessor annexed, that these, with the persons who had signed the four consents first filed, were a majority of the tax payers of the township appearing on the assessment roll for 1867, or their legal

representatives, and that they represent a majority of the landed property of the township appearing on that assessment roll.

The complainants, in their bill, allege that the persons signing such consents were not a majority of the tax payers of the township or their legal representatives appearing on the assessment roll, and that they do not represent a majority of the landed property of the township. The defendants, in their answer, say that the persons signing said consents were a majority of the tax payers of the township or their legal representatives appearing upon the assessment roll, and that they represent a majority of the landed property of said township.

The defendants contend that the consent required is not the consent of a majority of all the tax payers of the township, but only of such tax payers as represent, or are taxed for real estate. On the part of the complainants it is contended that the consent of all the tax payers is required. This involves the construction of the second section of the act recited above. The words are "the consent of a majority of the tax payers appearing upon the last assessment roll, as shall represent a majority of the landed property of the township." The words would seem clearly to require the majority of the tax payers; all the tax payers, and a majority that would represent a majority of the real estate. The only difficulty that is or can be suggested, is from the awkward and ungrammatical construction of the sentence in using the word "as" without any proper antecedent. The draftsman was evidently a bad grammarian, or lacked clearness of conception sufficient to enable him to carry out the idea with which he began a sentence, until he got to the end of it. In the next preceding sentence the phrase "*such* sum of money" is used without anything to which *such* refers, but the sentence is intelligible and explicit, and its meaning cannot be changed by interlarding at conjecture some words to amend the grammar or construction. The sentence in question, as suggested by the counsel for the de-

fendants, could have words changed or inserted, to amend the grammar and make the meaning clear; but the danger is that it might defeat the intention of the legislature. If, as suggested by one of the counsel, the words "such of" were interpolated, so that it should read "obtained of the majority of such of the tax payers" as shall represent a majority of the lands, it would follow that any excess over one fourth of the land owners could authorize the bonds. If inserted, as suggested by the other counsel, so that it should read "obtained of such of the majority of the tax payers as represent a majority of the land," it would make the words "majority of" either useless or enigmatical; it might as well read "such of the minority;" because if only a majority of the land owners are required, they might consist (as the defendants contend they do in this case) of a minority of the tax payers. If any amendment or alteration of words was permitted, the most simple would be to change "the" before majority to "such;" this, besides, involves no absurdity or obscurity; it would then be, "obtained of such majority of the tax payers as will represent a majority of the land." The same effect would follow if "such" was inserted before "as." This exhibition shows the danger of interpolating words in a statute ad libitum; the operator can generally make it mean whatever he desires. Words should never be supplied or changed unless to effect a meaning clearly shown by the other parts of the statute, to carry out an intent somewhere expressed. The succeeding part of this section clearly shows what the intent on this point was. It provides "that the fact that the persons signing such consent are a majority of the tax payers of such township *and* represent a majority of the real property, *shall* be proved." If then we were at liberty to supply any words, it must be done in one of the two modes last suggested, for no other would be consistent with the express requirement of this provision. The counsel who prepared the answer, and the president of the railroad company, as well as the three commissioners who verified it, must, if they gave any attention to the statute, have so un-

derstood it. It expressly alleges that the persons signing the consent were a majority of the tax payers *and* a majority of the land owners; so also do both the affidavits of the assessor filed with the county clerk, and annexed to the bill. The counsel who prepared the form printed for these affidavits of the assessors, must so have understood the act. In fact, few would or could understand it otherwise until the words shall be changed.

There is no reason for altering the words so as to exclude inhabitants not owning real estate, for although this act provides for no assessment except upon real estate, it makes the debt that of the township, and provision could at any time be made for assessing it upon all. Besides, in many cases the people, jealous of their prerogative, insist upon having a voice in public improvements, whether assessed to pay for them or not; as in building school-houses, repairing and cleaning streets. In such case, legislators would hardly venture to exclude from a right to vote those who only pay a poll tax, and to whom the cost will be no burden. Whatever motive governed them, courts have no right to change the enactments of legislators, for the reason that the change would render them more just or proper. The legislature who passed this statute, knew well what words were proper and necessary to require the consent of a majority of land owners only; as in an act for the same object relating to the Montclair railroad, approved on the same day, they inserted a provision by clear words to effect that object; and in this act, words appropriate to require consent of all tax payers. This act must, therefore, be held to require both the consent of a majority of all the tax payers on the roll of 1867, and that such majority shall represent a majority of the real estate on that roll.

It appears by the deposition of John Rodman, annexed to the bill, that he has counted the tax payers on the township assessment roll of 1867, and that their number is four hundred and fifty-five. Of this number, one hundred and forty-three, the total of all who have signed the old and new con-

sents, is not a majority, or even one third. No witness on part of the defendants contradicts or varies the statement of Rodman. It is true that the two affidavits of John G. Schomp, the assessor, filed in the county clerk's office, state expressly that they are a majority of the tax payers on the roll. Certified copies of these are annexed to the answer, and such copies are made evidence. But it appears from a list of all the tax payers who were assessed for real estate, annexed to the answer, carefully copied from the roll of 1867, that there were two hundred and seventy-one persons assessed as land owners in that year; and it is hardly credible that there were not in the township, tax payers not land owners to make the number more than double of those consenting. The whole mass of affidavits on both sides, shows that the only contest between the parties was as to the majority of land owners.

The defendants contend that the affidavit of the assessor is in the nature of an adjudication, and estops the complainants from inquiring into its truth. It is in no sense an adjudication, but simply evidence; it is made so expressly by the statute, which omits to make it *conclusive*, even as evidence. The whole spirit of the common law, and of the law and constitution of free states, is adverse to making an *ex parte* affidavit conclusive on any who have had no opportunity of being confronted with the witness, or of cross-examining him; and courts will not gratuitously add a provision to a statute, that contravenes this principle. All courts and experienced practitioners of law, know that an *ex parte* affidavit is of little value in the inquiry after truth, beyond the conscience of the man who prepares it. Men of character will often swear to the most palpable untruths, if presented to them by one in whom they have confidence. And this case affords a strong illustration of the position. These commissioners, who are beyond question men of character and respectability, have each separately sworn that he saw scores of persons sign *and seal* papers which have not a single seal to either of them, and that he, the affiant, signed

his name to each paper respectively at the same time, as an attesting witness. The six papers so proved are exhibited, and not one of them has an attesting clause, or the signature of any attesting witness, or of either of the affiants, upon it. And the assessor deposes that one hundred and forty-five are a majority of four hundred and fifty-five tax payers. These affidavits, especially the truth of them, cannot be reviewed or corrected by any process known to the law or in equity, and the provisions of a statute to make them conclusive, should be very explicit and clear. Like the acknowledgment and proof of deeds and the proof of wills, which by statute are made evidence by much the same words, they are *prima facie* evidence, and may be rebutted by any lawful proof.

This conclusion makes it unnecessary to consider several other important questions of law and of fact raised and fully discussed by counsel on the argument.

The defendants admit that they intend to issue these bonds to the amount of $115,000. They have no authority to do this; and the complainants are entitled to an injunction to restrain them. This is their only remedy; as it seems settled by repeated decisions both in the federal and state courts, that if bonds are once issued with such *prima facie* proof that the statute has been complied with, and get in the hands of innocent holders for value, the township will be compelled to pay them. These commissioners are not a municipal corporation exercising legislative functions or discretionary powers. But they are ministerial officers, on whom power is conferred by a special statute, to be exercised only upon certain conditions; and the cases regarding municipal corporations with legislative powers, which counsel with so much learning and research have cited on the argument, have no application to the case under consideration.

I am of opinion that the injunction applied for must issue.

Fitzgerald *vs.* Christl.

1. A mere separation of partnership property, and a taking into possession by each of the partners of the portion which it was agreed should be his upon the execution of an agreement between them, does not divide it, or vest the title in the individual partners until the agreement is executed.

2. Where one of the partners refuses to execute such agreement, and he is enjoined from disposing of the partnership property, the mere separation of the property, and his having it in his possession, will not relieve him from an attachment for contempt, in selling it and taking the proceeds to his own use.

3. Nor does it relieve him that counsel, without the papers necessary to form an opinion, or time to deliberate upon the question, and hearing only such partner's version of the affair, expressed an opinion that the injunction did not restrain him from disposing of the property.

The argument was upon a rule to show cause why an attachment for contempt should not issue against the defendant. The alleged contempt was the violation of an injunction issued in this cause, and served upon the defendant, Christl, forbidding him to sell or dispose of partnership property belonging to him and the complainant; and also a refusal to comply with an order made in this cause directing him to deliver partnership property in his hand to a receiver, and to pay to the receiver debts due to the partnership collected by him.

Depositions taken under an order for that purpose by both parties, were read and relied on in the argument.

Mr. A. P. Condit, for complainant.

Mr. W. B. Guild, for defendant.

The Chancellor.

The complainant and defendant were partners in the manufacture of jewelry. The article of partnership provided that either party could dissolve the partnership upon sixty

days notice in writing. On the 15th day of June, 1868, Christl gave notice to the complainant for a dissolution in sixty days. On the 1st day of September, 1868, the parties agreed upon the terms of dissolution, and the division of the property. By the proposed division Christl was in debt to the complainant $2600, which, by the agreement, was to be secured to the complainant by mortgage. This agreement was to be reduced to writing, and signed by both parties. When it was reduced to writing, the defendant refused to sign it, and he refused to give the mortgage required by the agreement. The property which, by the agreement, was to belong to each partner, was put in separate drawers of the safe, and each had the key of the drawer in which the part that was to be his was placed. The defendant refusing to execute the agreement and to give the required security, the agreement was of course not obligatory on the complainant, and had not efficacy to divide the partnership property.

In October, the complainant filed a bill for relief, and an injunction was issued restraining the defendant from collecting or receiving the debts due to the firm, and from using or disposing of the property of the firm. This injunction was duly served on the defendant. On the 5th of January, 1869, an order was made in the cause that the bill be taken as confessed against the defendant; also, another order appointing B. B. Douglas receiver, and directing each party respectively to deliver to the receiver the goods of the partnership under his control, or to account to the receiver for the value thereof.

The defendant, after the service of the injunction, sold and disposed of a large part of the partnership effects; and after the service of the order, although he delivered part of those effects which he had not sold, he did not pay over to the receiver the value of those which he had sold.

The defendant contends that he is not guilty of a breach of the injunction, because the articles which he disposed of were those which had been divided and given over to him, and were his separate property; and that he was advised by

his counsel, to whom he showed the injunction, that he might dispose of them; so that if he did violate the injunction, it was done ignorantly, without any intention to disobey or contemn the commands of the court.

The agreement to divide was only inchoate; it was never executed. This, when it is intended by the parties as part of the arrangement, is necessary to give effect to the agreement. A mere separation of partnership property, for the purpose of a division proposed to be executed, does not divide it, or vest the title in the individual partners, until the agreement is complete and executed.

The defendant knew that the complainant insisted on the execution of the agreement of dissolution, and of the mortgage, as necessary to give effect to the division, and to give to each his title to the property. In this situation, a bill was filed setting out the whole case and the insistments of the complainant, and the injunction was served upon the defendant, restraining the sale of the partnership property. It seems to me that it was impossible for him to misunderstand the object of this under the facts known to him. He could not have supposed that it was for the purpose of restraining his selling the part set off for the complainant, or any part not claimed to be his own. The consultation with his counsel was for this purpose a farce. He called him to the door of the court-room in which he was engaged in trying a cause, showed him the injunction without the bill or the unexecuted agreement, and told him his version of the facts of the division; and his counsel, without the papers necessary to form an opinion, or time to deliberate upon the question, in this hasty manner gave, no doubt honestly, his impression as to the effect of the injuction. The opinion was satisfactory to him, and relying upon it to save him from the consequences, without further consultation he proceeded to violate what he must have known was both the spirit and letter of the injunction. The injunctions of this court would be of little avail to suitors if they could be disregarded in this way with impunity. The defendant must be adjudged in contempt.

Lindsley *vs.* Williams.

1. Where an act of the legislature authorized the managers of a meadow draining scheme to purchase property known as "Dennis" mill property, consisting of fourteen acres of land and the water-power, mills and other buildings thereon, and it appeared by answer and affidavits annexed that there was no "Dennis" mill property in the vicinity, but that "Dunn's" mill property answered the description in, and was intended by the act, an injunction granted on filing a bill to restrain the purchase of the "Dunn's" mill property was dissolved.

2. The maxim "*Falsa demonstratio non nocet cum de corpore constat,*" applies to statutes as well as to deeds and wills.

On motion to dissolve an injunction issued against the defendants.

The motion was made upon the bill and answer, and the affidavits annexed. The injunction was to restrain the defendants, who were the managers of a meadow drainage scheme, from purchasing mills known as Dunn's mills, out of the funds or at the expense of the meadow owners. The complainants are a majority of the owners of the meadows to be drained. The grounds on which the injunction was ordered were: First, that the statute upon which the power of the commissioners depends does not authorize them to purchase "Dunn's" mills; the only authority is to purchase the property known as "Dennis" mill property, consisting of about fourteen acres of land and the water-power, mills, and other buildings thereon. Secondly, because the purchase of the property, and destruction of the dam, was not necessary to the work authorized. The answer contends that although in the statute the printed words are "Dennis mill property," yet in the statute, as enrolled, the words are "Dunn's mill property," and that if on inspection this is doubtful, yet that the word "Dennis" is a mistake for "Dunn's" in engrossing the statute. That this appears by the fact that there are no mills in the vicinity of the meadows to be drained known as Dennis' mills; that the first mills below the tract to be drained, on the Passaic river, which passes through them, are Dunn's mills; the quantity

of land attached to these, and the buildings correspond with the description in the act; that the destruction or lowering of the dam belonging to these mills would aid in the object for which the act was passed, and also in (a duty imposed on the commissioners,) "the removal of the obstructions, either natural or artificial, which exist on the Passaic river between Osborn's mill and the Davison bridge," which part, although above Dunn's mills, it is alleged is obstructed by the water penned back by this dam.

Mr. Pitney, for the motion.

If the act, by inspection, can not be read as Dunn's mills, yet those mills are clearly intended; this is shown by the object of the act as declared upon its face, and by the facts alleged and proven and not disputed, which show that Dunn's dam only can be meant.

The maxim, "*Falsa demonstratio non nocet cum de corpore constat,*" is applied to statutes, as well as to wills and deeds.

He cited *The Watervliet Turnpike Co.* v. *McKean*, 6 *Hill* 616; *Shrewsbury* v. *Boylston*, 1 *Pick.* 105; *Dwarris on Stat.* 688; 1 *Minnesota R.* 401; *Sedgwick on Stat.* 416; *Smith on Stat.*, §§ 491, 506; *State* v. *Morris Canal Co.*, 2 *Green* 412; *London Railway* v. *Freeman*, 2 *Man. & Gr.* 636; *Co. Litt.* 3 *a;* 6 *Ves.* 42; 2 *P. W.* 140; 6 *Madd.* 192; 2 *Vern.* 593; 4 *Ves.* 680; 3 *Ves., jun.*, 306; 9 *Beav.* 364; 1 *Ves., sen.*, 255; 2 *J. & W.* 307; 1 *Ad. & Ell.* 57; 2 *Ves., jun.*, 589; 1 *P. W.* 286; 8 *Bing.* 248; 1 *M. & S.* 299; *Wigram on Wills, part V*, §§ 61, 64, 67, 96.

Mr. Keasbey, contra.

A statute must be construed by its words only. The name Dennis mill is a material part of the description, and without it there is nothing in the act to identify the property, even with the aid of the surrounding facts. Admitting that this was a mistake in engrossing the bill, it can not be cured by extrinsic evidence.

He cited *Purdy* v. *The People*, 4 *Hill* 384; *Waller* v. *Har-*

ris, 20 *Wend.* 561; *McCluskey* v. *Cromwell*, 1 *Kern.* 593; *Newell* v. *The People*, 3 *Seld.* 97; *People* v. *N. Y. Central R. R. Co.*, 3 *Kern.* 78; 1 *Greenl. Ev.*, §§ 301, 302, *and note*; *Broom's Legal Maxims* 269.

THE CHANCELLOR.

Upon inspecting the original act, in the office of the secretary of state, as engrossed and signed by the Governor and the presiding officers of the two branches of the legislature, I am of opinion, on the whole, that the word is "Dennis," and not "Dunn's;" although the matter is not entirely clear of doubt. But the facts set forth in the answer show that there are no mills that could be intended, called "Dennis' mills;" that "Dunn's mills" correspond with other parts of the description in the statute, of the premises authorized to be purchased; that the dam upon those premises affects the height of the water in the Passaic, in the part where the defendants are required to clear out the obstructions; and that this is the only mill property the purchase of which could be of any use for the object of the act.

I think, on the whole, these facts sufficiently show what property was intended by the act, and that the name "Dennis' mills," cannot apply. If this conclusion is correct, then the maxim, "*Falsa demonstratio non nocet*" will apply. That maxim is applied to statutes, as well as to wills and deeds. *Chancellor of Oxford's Case*, 10 *Rep.* 57; *Shrewsbury* v. *Boylston*, 1 *Pick.* 105.

The injunction must be dissolved; and according to a stipulation entered into by counsel in presence of the court, an order must be made to restrain the defendants from taking down the dam or destroying the property, or any part of it, until it shall have been ascertained upon a reference under the direction of the court, that it is proper to attain the object of the statute.

JONES, trustee, *vs.* WINANS.

A creditor holding no judgment or other lien upon property, a mortgage whereon is sought to be foreclosed, but whose only claim is upon an award by which the mortgagor was adjudged to owe him several thousand dollars, is not a necessary party to the bill to foreclose, and can not be admitted to defend the suit, upon petition. He could not properly be made a defendant. It does not affect the case, that the submission provided that unless the mortgagor should pay the amount which should be awarded within a time limited, or give a mortgage to secure its payment, that the submission might be made a rule of court. Case distinguished from *Melick* v. *Melick's Ex'rs*, 2 *C. E. Gr.* 156.

On petition of Michael M. Williams to be permitted to defend the suit, and to be made a defendant thereto.

Mr. F. B. Chetwood, for petitioner.

Mr. C. Parker, contra.

THE CHANCELLOR.

The petitioner does not appear by the facts set forth in the petition, to have any interest in the property which the bill in this case seeks to foreclose, on behalf of the complainant, who holds a mortgage upon it. He has no judgment or other lien upon the property. His only claim is upon an award, by which the mortgagor, John T. Winans, was adjudged to owe him several thousand dollars. The submission provided that unless Winans should pay the amount which should be awarded within a time limited, or give a mortgage on a certain parcel of land to secure the payment, the submission might be made a rule of court. There was no other agreement to give a mortgage. The petitioner has no judgment or other lien on the land; his whole claim is upon this submission. The petitioner has clearly no lien or claim on the land; he is in the position in which any creditor at large of Winans stands. No such creditor is a necessary

party to a bill to foreclose; nor could he be properly made a defendant.

There is no authority or precedent for such order as is asked for in this case, and it is against the settled principles on which the practice of the court is founded. There is no precedent for allowing any one not a party to the suit to intervene by petition, and on his own motion to be made a party, except in such case as that in *Melick* v. *Melick's Ex'r*, 2 *C. E. Green* 156, where a *cestui que trust* was permitted to litigate in the name of his trustee, who was a defendant, but was in a position to have more interest or leaning in favor of the complainant than of his *cestui que trust.*

THOMAS *vs.* THOMAS.*

1. Actual personal violence, not very great, nor such as standing alone would warrant a decree of separation, when accompanied by inhuman, coarse, and brutal treatment towards the wife, rendering it unjustifiable that she should be compelled to live with her husband, will entitle her to a decree of divorce *a mensa et thoro*, and to alimony.

2. Custody of the children adjudged to the mother.

The bill in this case was for a divorce *a mensa et thoro*, on account of extreme cruelty, and for alimony. The cause was heard upon bill, answer, replication, and proofs, on part of the complainant. No proofs were offered on part of the defendant, except by cross-examination of the complainant's witnesses.

Mr. J. B. Vredenburgh, for complainant.

Mr. Dixon, for the defendant.

THE CHANCELLOR.

The parties were married in 1862, and lived together as man and wife until February, 1869, when the defendant

* CITED *in Close* v. *Close*, 10 *C. E. Gr.* 527.

deserted his wife and lived separate from her. At first he furnished her with sufficient support for her and her two children; but he was making arrangements to leave the state without providing for her support, and she filed a bill for alimony and procured him to be arrested upon a writ of *ne exeat.* After this he professed to be reconciled to her, and consented to live with her again, if she would discontinue her suit, and leave the house of her parents where they had been boarding, and go to the house where he was boarding. She was anxious to be reconciled, and without consulting her friends or her counsel accepted his terms, discontinued her suit, and went to live with him. In a few weeks he told her that he had laid this trap for her, that he now had her where he wanted her, and that no matter what his conduct toward her might be, she would have to live with him and endure it. Before he deserted her, he had used personal violence to her, and struck her. After this he repeatedly used personal violence to her, once or twice by blows, several times by spitting in her face. He refused to occupy the same room or bed with her, and habitually addressed her as "dirty slut," and used other opprobrious epithets. He told her and her friends repeatedly that he did not love her, and did not want to live with her; that she was too ignorant and uncultivated for him, and was not fit to go into society. He accused her of want of chastity, both before and after marriage. He told her that the child with which she was pregnant was not his. He procured one Campbell to make an affidavit that he had had intercourse with her before marriage; and again procured him to swear to it in this state that she might, if she dared, have him indicted for perjury. When the grand jury had Campbell indicted for libel the defendant intervened; Campbell pleaded *non vult contendere,* was fined $1.00, and the defendant paid the fine, costs, and expenses of the whole matter. Before his desertion, and before the pretended reconciliation, he gave out that he was about to get a divorce, and *some one* caused a notice to be inserted in a newspaper of Jersey City, that he had a divorce.

He afterwards gave out that he was obtaining a divorce for the matter in Campbell's affidavit. He proposed to her to let him get a divorce from her. She received anonymous letters charging him with adultery, and advising her to obtain a divorce; the writer called at her mother's house, and gave the same advice; he refused to give his name, but gave an address in the New York post-office. When he went away he was followed, and was seen to join the defendant, who was waiting on a corner for him, and walked off arm and arm with him.

The actual violence in this case is not very great, not such as, if repeated, would cause danger to life or limb. And in cases where it was committed in a sudden outbreak of passion, such violence or even greater, would not be sufficient to require a separation, unless the circumstances lead to the belief that it would be repeated and continued. But the violence in this case is not alone; nor is it even the worst part of the treatment of the defendant. He has been deliberately guilty of a series of acts of inhuman, coarse and brutal treatment of his wife, of far greater enormity than the blows inflicted upon her. She may be ignorant, unrefined, and passionate (though there is no proof of either), but still she is his wedded wife, and the mother of his children. He is bound to support her, and live with her; but she cannot claim support from him unless she is willing to live with him, or has support adjudged to her on a judicial separation.

Surely, no woman should be compelled to live with a husband and endure such treatment as this defendant has inflicted on his wife. And if it was the established doctrine that there must be actual personal violence, and reason to apprehend it in future, to justify a divorce for extreme cruelty, both exist in this case. There must be a decree of divorce *a mensa et thoro*, the custody of the children must remain with the mother, and it must be referred to a master to ascertain and report what is the proper alimony to be made to the complainant for her support, and that of her two children.

Larrison *vs.* Larrison.

1. On a bill for divorce, proof that the parties charged were together in a place where, and at a time when, it was possible for them to have been guilty of adultery, is not sufficient to warrant a decree; nor will this defect of proof be supplied by evidence that defendant had many years before lived in concubinage with a married man.

2. The testimony of a witness as to facts which, if true, would establish adultery, will not avail to support a bill for divorce in the face of the explicit denial of the charge by the defendant and her alleged paramour under oath, when the cross-examination of the witness shows that no reliance can be placed upon his testimony, and his character for veracity is seriously impaired.

This case was heard upon the pleadings and proofs.

Complainant, *pro se.*

Mr. Keasbey, for defendant.

The Chancellor.

The complainant asks for a divorce from his wife on the ground of adultery, alleged to have been committed with four different persons named in the bill. The question is, whether there is sufficient evidence to prove the adultery in either case. Proof that the parties were together in a place and at a time where and when it was possible for them to have been guilty, is not sufficient. This defect of proof will not be supplied by proof that the defendant, many years before, had for a period lived in concubinage with a married man. This is about the amount of the proof so far as three of the charges are concerned. In the case of DeHart, the evidence goes much farther, and if the evidence of Medler, on his direct-examination, could be believed, it would be sufficient to convince any court that the defendant was guilty of adultery. In his direct examination, he says that in passing the window of the room, he saw a man and woman on the floor,

the man was raising up, and the woman lay with her legs and linen exposed; and that when he knocked at the door of the room, the defendant opened it and told him that her husband was not at home. But in his cross-examination, he states that he did not see the defendant's face, or recognize her in any way, and that what he saw might have been the defendant or her child of five years old, lying on the floor or on a chair. His answers on cross-examination show that no reliance can be placed upon his testimony as a ground of divorce. Besides this, his character for veracity and his credibility are seriously impaired, and the defendant and her alleged paramour explicitly deny it under oath. And although it may not be physically impossible that a person could see what this witness describes through a window opening to the west, at three o'clock in the afternoon in summer, with the glass down, and the outside blinds shut, as he was walking past it, yet the improbability of it is very great.

From the whole evidence, I am not convinced that the defendant committed adultery with DeHart. In fact, the evidence is not such as to raise any cloud over his character.

In the other three cases, both the defendant and each of the alleged participants have fully denied the charge under oath, though without this there was not in either case, as I have above stated, sufficient evidence to sustain the charge if not contradicted.

The bill must be dismissed with costs, and the complainant must be directed to pay a counsel fee of one hundred dollars, to the defendant or her counsel.

Hanford *vs.* Bockee.

1. Where a mortgagee releases from his mortgage a term in the mortgaged premises created by a life tenant, and the term is afterwards surrendered by a deed for that purpose, executed by the mortgagee, the tenant for life, and the grantee for years, and the release is extinguished, and the

mortgage restored to its former situation, this leaves the relation of the parties as it stood before that term was created, and released from the mortgage.

2. When money is raised by mortgage or other pledge of a wife's property, for the benefit of her husband, the wife will be deemed a mere security for the husband, and she or her heir will be a creditor of the husband or his estate, in place of the mortgagee, to the amount of the debt discharged out of her estate.

3. If a husband borrows money on the security of the wife's estate, as the money is under his power, it is presumed, in law, to be taken by him, unless the contrary is shown; but parol evidence is admissible to show for whose benefit the money was raised.

4. Where money is borrowed by a husband on the security of the wife's estate, and she intends to give the amount raised to him, or discharges him from it, his estate will not be charged (as between her estate and him). And this intention may be proved by parol, or inferred from the attending circumstances. So the husband will be discharged when he lays out the borrowed money in improvements on the wife's lands, with her approval.

5. But where a husband had advanced money which had been laid out in improvements upon the wife's lands, with her approval, and his wife told him to sell the property to repay himself, and he borrowed money, and, to secure it, joined with his wife in mortgaging other lands owned by her—*Held*,

1. That so much of the mortgaged premises must be sold as would be sufficient to pay the principal of the sum borrowed.

2. That, as the husband, being life tenant (by curtesy) in possession, was bound to keep down the interest, that charge, if not paid by him, must be made out of his life estate in the residue of the premises not sold, before any land of the heir of his deceased wife could be sold for that purpose.

6. On the foreclosure of a mortgage given by a husband and wife since deceased, in her lifetime, to secure money borrowed to repay the former for advances by him to improve lands of the wife, as between the husband, he being in possession as tenant by the curtesy, and the infant heir of the wife, the principal will be made by a sale of so much of the mortgaged premises as may be required to pay it; the interest and a proper share of the costs will be made by a sale of the life estate of the tenant by the curtesy; and if that should not sell for sufficient to pay the interest and such costs, the estate of the infant must be sold. Hence, in such a case, the life estate of the husband in the residue was directed to be sold, and if it was not bid up to the amount of the interest and a proper share of the costs, it was ordered to be bid in and purchased by the guardian, in the name and for the benefit of the infant; and, in that case, so much of the estate in fee, of the infant, in the land not sold to pay the principal, was ordered to be sold, including the life estate, as might be required to pay the interest and a proper share of the costs. After such sale, the infant will, by subroga-

tion, be entitled to receive the moneys so raised out of his property for the debt of his father, out of the life estate of his father, and will be entitled to receive the deed for such life estate bought in for him, without any other consideration than the sale of his property.

The hearing of this case was had upon the bill and answer of the defendant, Lewis L. R. Bockee, and upon the proofs taken. The defendant, Abraham W. Bockee, suffered a decree *pro confesso* to be entered against him by the complainant, but appeared before the master in taking the testimony, and on the hearing by counsel as regards the equities between him and the infant defendant.

Mr. S. Tuttle, for complainant.

Mr. L. Zabriskie, for infant defendant.

1. Mortgagee cannot release part of mortgaged premises, and hold residue liable for whole mortgage debt. *Johnson* v. *Johnson,* 4 *Halst. C. R.* 561; *Stevens* v. *Cooper,* 1 *Johns. C. R.* 425.

2. As against remainderman, tenant for life is bound to keep down interest of mortgage. 4 *Kent's Com.* 75; *Coote on Mort.* 438; 1 *Story's Eq. J.,* § 488; 3 *Powell on Mort.* 322, 324, *note; Ib.* 921, *and note.*

3. Inasmuch as the mortgage in this case was made by the wife on her estate, as security for the debt of her husband, the estate of the husband should be first applied for its payment before resort is had to estate of the wife's heir in the mortgaged land. The estate of the wife stands simply as surety for the husband's debt. *Cruise on Real Property, title* 15, *ch.* 4, § 43; *Vartie* v. *Underwood,* 18 *Barb.* 561; *Loomer* v. *Wheelwright,* 3 *Sandf. C. R.* 135; *Neimcewicz* v. *Gahn,* 3 *Paige* 614; Lord Thurlow, in *Clinton* v. *Hooper,* 1 *Vesey, jun.,* 186.

The case of *Dickinson* v. *Codwise,* 1 *Sandf. C. R.* 214, is distinguishable from the present case, because there the money borrowed was expended by the husband for the purpose of improving the lands of the wife.

Mr. G. N. Abeel, for defendant, A. W. Bockee.

In equity, husband and wife may make contracts with each other as to their several estates. *Kennoul* v. *Money*, 3 *Swanst.* 203; *Clinton* v. *Hooper*, 1 *Vesey, jun.*, 173, Sumner's note; *Livingston* v. *Livingston*, 2 *Johns. C. R.* 537–539; 2 *Story's Eq. Jur.*, § 1372. Therefore Bockee had a right to put improvements on his wife's estate, at his own expense, with the understanding that she was to raise money to reimburse him.

Parol evidence is admissible to prove how the money raised by Bockee and wife on her property, was expended. *Coote on Mortgages* 485–6.

It is in evidence in this case, that Bockee expended more on this property than the principal and interest of the mortgage will amount to, with the understanding that he was to be reimbursed. Therefore the sum necessary to liquidate the mortgage and interest should be raised from a sale of the infant's estate, and not of Bockee's curtesy. The estate descended *cum onere*. He cited also *Greenl. on Ev.*, § 296.

The Chancellor.

There is no serious question made as to the right of the complainant to his debt, interest, and costs. Before the suit he had released from his mortgage a term in the mortgaged premises, created by A. W. Bockee the life tenant, for ten years. But this release has been extinguished, and the term surrendered by a deed for that purpose, executed by the complainant, A. W. Bockee, and the grantee of the term, and the mortgage restored to its former situation. This leaves the relation of the parties as it stood before that term was created, and released from the mortgage.

The mortgage of the complainant was given by Abraham W. Bockee and Maria Louisa his wife, to T. W. Marsh, dated April 21st, 1862. It was assigned by Marsh to the complainant, who now holds it. It was given for $6000, to secure the bond of A. W. Bockee for that amount, payable in three years from date, the interest payable semi-annually.

The mortgaged premises were the estate of Maria Louisa Bockee, the wife. She died intestate, seized of the premises, in December, 1864, leaving the infant defendant, Louis L. R. Bockee, her only issue and heir-at-law. She was married to Bockee in 1853.

It is admitted that the complainant is entitled to the whole principal secured by his mortgage, with interest from July 1st, 1864, up to which time the interest was paid by A. W. Bockee. The only contest is between A. W. Bockee and the infant, Louis L. R. Bockee, his son, as to which estate is primarily liable for the debt. On the part of the infant, it is contended that the curtesy of A. W. Bockee must first be appropriated to payment of the debt, and the deficiency only, if any, made of the remainder in fee, vested in the infant.

It appears by the evidence taken, that Mrs. Bockee was seized of a large tract of land at Ramapo, in Bergen county, at her marriage with Bockee; that she had not much money with which to improve it; that her husband, with her concurrence, and at her request, in the years 1855 and 1856, expended large sums of money in improving the estate; he states, in his testimony, that the amount thus expended was about $8000. The money borrowed of Marsh upon this mortgage, in 1862, was taken by A. W. Bockee, with the consent of his wife, and used by him in his own business. As he testifies, she gave it to him freely. He had received of her besides this loan, money to about the amount of $2000. He also testifies that she had verbally given him the whole property, and authorized him to sell it. But this, if clearly proved, could have no effect in the case. No parol gift of that kind by any one could have any effect in law or in equity.

When money is raised by mortgage or other pledge of a wife's property for the benefit of her husband, the wife will be deemed a mere security for the husband, and she or her heir will be a creditor of the husband or his estate, in place

of the mortgagee, to the amount of the debt discharged out of her estate.

And if a husband borrows money on the security of his wife's estate, as the money is under his power, it is presumed in law to be taken by him, unless it is shown to the contrary. And parol evidence is admitted to show for whose benefit the money was raised. These principles, applicable to this case, have for a long time been established in courts of equity. *Huntingdon* v. *Huntingdon*, 1 *Bro. P. C.* 1; *Pocock* v. *Lee*, 2 *Vern.* 604; *Tate* v. *Austin*, 2 *Vern.* 689; and 1 *P. W.* 264; *Kennoul* v. *Money*, 3 *Swanst.* 203, *note; Clinton* v. *Hooper* 3 *Bro. C. C.* 201, and 1 *Ves., jun.*, 173; *Parteriche* v. *Powlet*, 2 *Atk.* 380; *Aguilar* v. *Aguilar*, 5 *Madd.* 252; *Neimcewicz* v. *Gahn*, 3 *Paige* 619; *Loomer* v. *Wheelwright*, 3 *Sandf. C. R.* 135; *Vartie* v. *Underwood*, 18 *Barb.* 564; *Coote on Mortgages* 485; 2 *St. Eq. Jur.*, § 1373; 1 *Cruise, tit. XV, ch.* 4, §§ 43 to 50.

But when the wife intends to give the amount raised to her husband, or discharges him from it, his estate will not be charged; and this may be proved by parol, or inferred from the attending circumstances. *Clinton* v. *Hooper*, 3 *Bro. C. C.* 201, and 1 *Ves., jun.*, 173. And he will be discharged when he lays out the money borrowed in improvements on the wife's lands, with her approval. *Dickinson* v. *Codwise*, 1 *Sandf. C. R.* 214.

In this case the husband had, with his wife's assent, and at her request, expended about $8000 in improvements upon her property, and had never received of her more than $2000 in money. These improvements were not put on the mortgaged property, but upon the homestead, where they resided, adjoining the mortgaged premises, and which at his wife's death came to the husband for his life, as his curtesy. They were made six years before the mortgage, during which time the husband had the benefit and enjoyment of them with his wife. The wife had told the husband to sell the property, and repay himself. He negotiated this mortgage, and she assented to his taking the money for his own

purposes. He gave her money afterwards, from $1000 to $2000 in amount, but it does not appear that it was asked for, or given as part of this loan as her own money; but it was given from time to time for her own purposes.

Under these circumstances, I think it must be inferred that the wife intended to relinquish this loan to her husband as his own, either as a gift, or to reimburse him for the money before expended by him for the improvement of her estate. This seems more probable as the amount of the loan was about the excess of that expenditure over the amount before received from her. The mortgage, therefore, so far as the principal is concerned, must be considered her debt, not to be reimbursed by her husband; and the property descended at her death to her son, subject to his father's curtesy, and both estates burdened by this debt. The principal sum of $6000, therefore, must be made by selling such part of the property as will be sufficient for that purpose.

But the interest on this debt it was the duty of the life tenant to discharge; such is the settled rule of law. 4 *Kent Com.* 74; *Coote on Mort.* 438; 1 *Story's Eq. Jur.*, § 488; 3 *Powell on Mort.* 921; *Hungerford* v. *Hungerford, Gilb. Eq. Rom.* 69; *Lewis* v. *Nangle, Amb.* 150; *Ld. Penrhyn* v. *Hughes,* 5 *Ves.* 106; *Kennoul* v. *Money,* 3 *Swanst* 203, *note; Faulkner* v. *Daniel,* 3 *Hare* 206.

And although the general rule in equity is that interest is taken as accruing from day to day, yet as the husband was in the enjoyment of the property on which the improvements were made, and also that included in the mortgage, and by the terms of the mortgage the next half year's interest did not become due until after Mrs. Bockee's death, he must be held liable to the whole of the interest in arrear. This is his debt, and must be paid by him, and if not paid must be made out of his life estate in the residue of the premises not sold to raise the principal, if sufficient, before any of the estate of the infant heir is sold for that purpose.

But a judicial sale of a life estate in property like this, cannot in general be made without great sacrifice, and as

such sacrifice may require some of the infant's property to make up the deficiency, it is the duty of the court to protect the infant from loss, so far as possible. The rights of the parties are fixed. A. W. Bockee and his estate are bound to pay all arrears of interest, and the infant or his estate is liable to the complainant for it, in case the father or his estate does not satisfy it. And this court has the power of subrogating the infant to the rights of the mortgagee, as against A. W. Bockee, if the interest should be paid by the infant, or by a sale of his estate.

Let it therefore be referred to a master to ascertain and report the amount due to the complainant for interest, and to report what part of the mortgaged premises sufficient to make the principal and complainant's costs, can be sold with the least injury to the estate; and to inquire and report whether the life estate of A. W. Bockee in the remainder, can be sold so as to raise sufficient to pay the interest due to the complainant, and a proper share of the complainant's costs; and if it cannot be sold for that amount, or if it is *doubtful* whether it will produce sufficient for that purpose, to report what other part of the mortgaged premises can be sold sufficient to raise such interest and costs, with the least injury to the remainder of said estate.

And if A. W. Bockee shall not pay the amount due for interest, and such proper share of the costs, within thirty days from the confirmation of the master's report, then the property shall be advertised for sale, and at the sale the part reported as proper to be sold for the principal and costs shall be first sold. Next, the life estate of A. W. Bockee, as tenant by curtesy of the residue, shall be sold. And if the same is not bid up to the amount required to pay the interest and a proper share of the costs, it must be bid in and purchased by the guardian, in the name and for the benefit of the infant. And in such case, such part of the lands as the master shall have reported for that purpose, must be sold to make the interest and its share of the costs; such sale to be of the fee, including the life estate and remainder. After

this sale, the infant will, by subrogation, be entitled to receive the moneys so raised out of his property for the debt of his father out of the life estate of his father, and will be entitled to receive the deed for the life estate of his father, bought in for him, without any further payment than that made by the sale of his property.

If A. W. Bockee does not pay the interest and his share of the costs, he may be at liberty to release his life estate to the infant before the sale, in which case the interest and costs will be raised out of the infant's lands, without a sale of the life estate. The proportion of the costs of the complainant and of the sale, to be raised and paid out of the life estate, will be the proportion which the interest, calculated up to the sale, bears to the principal sum.

ARMSTRONG *vs.* ROSS.*

1. The debts of a married woman holding an estate secured to her separate use by the act of 1852, when contracted by her for the benefit of her separate estate, or for her own use on the credit of that estate, will be charged by a court of equity upon the separate estate, and payment enforced out of it.

2. But such debts are not a lien upon her separate estate until made a lien by a decree of a court of equity; and the lien arises by virtue of the decree.

3. A married woman cannot charge her separate estate, held under the act of 1852, by an appointment, in writing, as she could formerly charge estates held by trustees for her, subject to her appointment; but can only convey or charge it by deed executed with her husband, and duly acknowledged upon a separate examination, except in cases where her husband is insane or in state prison, or living separate from her by judicial decree.

4. The deed or mortgage of a married woman for lands in this state, though duly acknowledged, if made without her husband, is void.

5. Independent of the statutory provisions, an estate can be devised or given to a married woman for her separate use, directly, without the intervention of trustees; and in that case the husband will, in equity, be con-

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* CITED *in Peake* v. *La Baw*, 6 *C. E. Gr.* 283; *Perkins* v. *Eliott*, 7 *C. E. Gr.* 128; *Phelps* v. *Morrison*, 9 *C. E. Gr.* 199; *Marsh* v. *Mitchell*, 11 *C. E. Gr.* 499; *Ferry* v. *Laible*, 12 *C. E. Gr.* 151; *Ledos* v. *Kupfrian*, 1 *Stew.* 164.

sidered a trustee for the wife as to any estate which might by law vest in him. But in such case the wife cannot convey lands so devised to her separate use, without her husband joining in the deed, or without the acknowledgment required by a married woman.

6. A mortgage, by a wife upon her separate property, to secure a debt contracted for the benefit of that property, though void by reason of her husband not joining with her in its execution, and for want of a separate acknowledgment, will authorize a court of equity to charge that debt upon her separate estate generally. The giving of the mortgage shows the intention to charge her separate estate with it.

7. Where a mortgage on lands purchased by a married woman was given (and this was so stated in it), by her and her husband, to secure part of the consideration money, and was registered; but the mortgage as to the wife was void, because she had not been examined apart from her husband, *Held*—

1. That the recording was proper to give the debt priority upon the estate which might vest in the husband at the death of his wife.

2. That such recorded mortgage might be sufficient notice to a subsequent mortgagee, of the lien for unpaid purchase money on the estate of the wife. (In this case, actual notice was proved.)

8. The vendor of land has a lien for unpaid purchase money; and this lien is good as against subsequent purchasers for valuable consideration, with knowledge that it is unpaid.

9. The taking of a note, or bond, or mortgage, will not be held evidence of a waiver by vendor, of a lien on the premises conveyed, for purchase money.

10. Where a bill to foreclose contained no allegation that the complainant's mortgage was given for unpaid purchase money, or that subsequent mortgagees, made defendants, had notice of it before the mortgage to them, and the priority of the complainant's mortgage depended on these facts, and they appeared clearly in proof—*Held*, that the bill was defective, and no decree or relief founded on the facts above stated could be given unless they were set forth in the bill; but that the bill might be amended.

The hearing of this case was had upon bill, answer, and proofs.

Mr. J. W. Taylor, for complainant.

Mr. John Chetwood, for Clark, Dodge & Co.

The Chancellor.

The suit is for the foreclosure of two mortgages held by the complainant, on lands in Union county. The first is for $3500: this, or its priority, is not disputed by any one. The

second mortgage is one given by Elizabeth C. Vernam, with her husband, Remington Vernam, to Sally E. Libby, for $1571, and is dated June 14th, 1864, and was registered on the same day in the proper office.

The defendant, William Ross, holds a mortgage given by Elizabeth C. Vernam, without her husband, to Thomas Newton, to secure $5431, on the 16th day of June, 1864, two days after the mortgage to Sally E. Libby was given and registered; this mortgage was registered on the 20th of the same month.

The defendants, Clark, Maxwell, and Crawford, partners by the name of Clark, Dodge & Co., hold a mortgage given to them in the name of their firm, by R. Vernam, and Elizabeth his wife, for a debt of $1000, due to them by R. Vernam; this mortgage is dated October 12th, 1865, and was registered on the 25th of the same month.

Vernam and wife conveyed the mortgaged premises to Reuben Ross, junior, on the 1st of August, 1866. Reuben Ross has not answered; as against him and his wife, the bill is taken as confessed.

The acknowledgment of Mrs. Vernam of the mortgage to S. E. Libby, was taken without any private examination apart from her husband. The master before whom it was made supposing, as the property was her own, that it was not necessary.

The mortgage to Newton, although both parties resided in New Jersey, was acknowledged before a commissioner in New York by Mrs. Vernam, and the certificate shows that it was upon a private examination apart from her husband.

The mortgage to Clark, Dodge & Co., was properly acknowledged by both Mrs. Vernam and her husband.

Clark, Dodge & Co. and William Ross, contest the validity of the mortgage to Sally E. Libby, on the ground that it was not properly acknowledged. The statute requiring the private examination of a *feme covert*, is imperative. It enacts expressly (*Nix. Dig.* 145, § 4,*) that no estate of a *feme covert* in any lands, shall pass by her deed or conveyance, without a previous acknowledgment, on a private ex-

*Rev., p. 154, sec. 9.

amination apart from her husband. This statute is as binding in courts of equity as at law, and this instrument, as a conveyance of lands by way of mortgage, is void.

But it is insisted on the part of the complainant, that it is a valid lien or charge, because made by Mrs. Vernam to secure a debt contracted by her for her own benefit, and that of her separate property, and because the mortgage was a declaration of an intent to charge her property, and this specific part of her property, with this debt; and because the debt is due for part of the purchase money of this property, conveyed to her by the mortgagee, and it is so stated in the mortgage of which the other defendants had notice.

The property was conveyed to Mrs. Vernam since the married women's act of 1852, and by the provision of that act is her separate estate. Long before the recent legislation with regard to married women, their separate estates have been recognized, and their rights, powers and liabilities regarding the same been considered and regulated. Estates were conveyed to trustees for the use of married women, and for a long time trustees were considered necessary for the existence of a separate estate; but it has been held, and may be considered settled, that independent of the statutory provisions, an estate could be devised or given to a married woman for her separate use directly, without the intervention of trustees, and that in such case the husband would, in equity, be considered a trustee for the use of the wife, as to any estate, which, by law, might vest in him; but it has never been held, that in such case, the wife could convey lands so devised to her separate use, without her husband joining in the deed, or without the acknowledgment required for married women.

The Court of King's Bench in England, once held that a debt incurred by a married woman for her separate estate, could be recovered at law. But this doctrine was long since overruled; and it is well settled that no such recovery can be had at law. But courts of equity, both in England and in this country, have determined that if a married woman having a separate estate, contracts debts for the benefit of

her separate estate, or for her own benefit on the credit of her separate estate, although she will not be held liable, or any decree made against her personally, these debts will be declared a charge upon her separate estate, and payment enforced out of it.

Lord Thurlow, in *Hulme* v. *Tenant*, 1 *Bro. C. C.* 16, laid the foundation of the doctrine, and its application was carried the farthest by Lord Brougham, in *Murray* v. *Barlee*, 3 *Myl. & Keene* 209, in which he holds that the separate estate of a married woman is liable to an attorney for his costs in a suit for her, at her personal engagement, without any writing or agreement that it should be paid out of her separate estate. Lord Cottenham, in *Owens* v. *Dickenson, Cr. & Ph.* 48, doubting the doctrine to the extent to which it was carried in *Murray* v. *Barlee*, holds that these debts of a married woman are not charged upon her estate because they are in the nature of an appointment, but because equity lays hold of her separate property, and compels the payment out of it, of such debts as she may have the right to contract by virtue of her separate estate.

Chancellor Kent, in *Jaques* v. *The Methodist Church*, 3 *Johns. C. R.* 77, held that a married woman having separate property, could charge it as a *feme sole*, but if a settlement prescribed a mode of appointment, it must be in that mode. The Court of Errors, in the same case on appeal, held that she could charge it in any other way, provided she was not by the terms of the settlement restricted to the way prescribed. *S. C.*, 17 *Johns.* 548. Chancellor Walworth, in *The North American Coal Co.* v. *Dyett*, 7 *Paige* 14, held that Mrs. Dyett could charge her separate estate by debts contracted for its benefit, by simply contracting the debt. He says: "A *feme covert* is as to her separate estate considered as a *feme sole*, and may bind it for the payment of debts contracted for the benefit of that estate, or for her own benefit, upon the credit of her separate estate." The same Chancellor, in *Gardner* v. *Gardner*, *Ib.* 112, says: A married woman "may have a separate estate of her own, which

estate is chargeable, in equity, for any debt she may contract on the credit of, or for the use of such estate;" and again, "if the money was received by her, and applied to the use of her separate estate, then such separate estate was holden to pay the debt."

And Vice Chancellor Sandford, in the case of *Curtis* v. *Engel*, 2 *Sandf. C. R.* 287, says: "To sustain their suit, the plaintiffs must show that the debt was contracted either for the benefit of the separate estate of the wife, or for her own benefit, on the credit of the separate estate."

In this state, the same doctrine was held in *Leaycraft* v. *Hedden*, 3 *Green's C. R.* 512. A bond given by Mrs. Hedden, or by her authority, for money for the use of her separate estate, was held to create a debt chargeable upon her separate estate; and the Chancellor, in his opinion, says, that a *feme covert* as to her separate estate, may be held to be a *feme sole*, so far as to dispose of it in any way not inconsistent with the terms of the instrument by which she holds. He, like the others, limits the liability to debts contracted for the benefit of her separate estate, or for herself on the credit of that estate.

Since the passage of the statutes relating to married women, in New York and this state, the courts of both states have held that debts contracted by a married woman holding separate estates by virtue of these acts, may in equity be made a charge upon her separate estate. They hold that to make these debts a lien upon any specific part of the separate estate, there must be a mortgage executed as required by the statutes and law relating to deeds of married women, and that a writing intended to be a mortgage, executed without regard to these requisitions, would not be valid as a mortgage or specific lien, but would show that the debt was contracted on the credit of her separate estate, and that she intended it to be chargeable thereon; and a court of equity would be authorized by such mortgage to make the debt a charge upon her separate estate. But they do not hold that either the contracting the debt, or the void mortgage declaring it an intent to make it a charge upon a specific

part of the separate property, creates a charge or lien. To do so would repeal the law concerning the acknowledgments of married women, and in fact the statute of frauds; for a promissory note, with a verbal statement that it should be a lien on her homestead, would answer instead of a mortgage; it would create a charge, and not being a mortgage need not be recorded to have a priority over subsequent conveyances. Lord Cotténham, in *Owens* v. *Dickenson*, shows the impossibility of holding such debts to be emcumbrances, and demonstrates that these debts are not a lien by any power of appointment, but by the decree of a court of equity making them such.

In *Wheaton* v. *Phillips*, 1 *Beas.* 221, Chancellor Williamson held that a debt contracted by a married woman having separate property, and by permission of her husband carrying on business for her own account, should be decreed a lien upon her separate estate. In that case the debt was contracted by her for the business she carried on. He gave no written opinion, aud did not place his judgment on the ground of an appointment of her separate estate, but rather on the ground that remedies should adapt themselves to the times, and to new customs and manners as they arise.

In *Wilson* v. *Brown*, 2 *Beas.* 277, Chancellor Green held that a mortgage given by a married woman on her separate estate, without her husband joining, was void as a mortgage. In that case, the mortgage was for the purchase money of the land when conveyed to her, and of course the debt was contracted both for her benefit and for that of her estate; and the Chancellor held that the money advanced for the sole use of the wife, was a valid lien in equity upon the property of the wife, and that the mortgage was an appointment of her separate property for the payment of that debt. He does not declare that there was a valid lien on the specific lot, created by the bond or mortgage, but only that it was a lien upon, and an appointment of her separate property generally. And though from some expressions in his opinion it might be inferred that he regarded the void mortgage as a lien on the property, yet the clear

statement of the grounds of his decision shows, that it was based solely on the facts that the money was advanced to the wife for her own use, on the credit of her property, and that the mortgage showed her intention to charge her separate property. He likewise places some reliance on the fact that the mortgage was for the consideration money.

In the case of *Harrison* v. *Stewart*, 3 *C. E. Green*, 451, the question again arose upon a mortgage given by a married woman on her separate property, executed without her husband, and without a separate examination. The mortgage was held to be void; but as the debt was contracted for the benefit of her separate estate, it was held that she had power to charge her separate estate with it, and that equity would enforce the charge; and her giving the mortgage was held to show her intention to charge her separate property.

The "act for the better securing the property of married women," passed in this state in 1852, is almost a literal transcript of the act of the state of New York of 1848. The decisions in that state upon its application and construction, are entitled to very great weight and respect. But in looking at them, we must keep in mind that by a supplement passed in that state in 1849, a married woman was enabled to convey and devise her separate property as if she were a *feme sole*. So far as regards the questions involved in the case in hand, the construction of these acts was settled in that state in the case of *Yale* v. *Dederer*, which was twice decided in the Court of Errors. In that case, Mrs. Dederer was owner of three farms, acquired after the acts of 1848 and 1849. She signed, jointly with her husband, a note given by him for farming stock. The plaintiff refused to take the husband's note without security, and she signed it with him, saying that if he was not able to pay she was; there were other circumstances showing that she intended to charge her separate estate. And in the finding of the facts of the case on the last appeal, it was stated "that she intended to charge and did expressly charge her separate estate for the payment of the note." The reputation and learning of the judges who delivered the opinions and controlled the decisions in

these cases, still further entitle their conclusions to our respect. They hold that the doctrine of the common law adopted in this country, by which a married woman was entitled to dispose of separate estates held in trust for her, was "a pure creation of the courts of equity." "That the right of disposition must be referred to the right of property enjoyed independent of the husband, and not to the theory of appointment pursuant to a power conferred by the author of the trust." "That the separate estate upon which courts of equity engrafted these peculiar doctrines, included only such rights and interests of the wife as would belong to the husband, but for the limitation of her particular use. That her own reversion (after her husband's curtesy) in lands which she owned at the time of her marriage, was a legal estate, descendible to her heirs, to which courts of equity did not and could not apply the doctrines which have been stated." "In case of an estate in fee conveyed directly to a woman after marriage for her sole and separate use, equity would convert the husband into a trustee for her, of the rents and profits during the coverture, which would otherwise belong to her, but in respect to the *corpus* of the estate, she could not dispose of it except in the manner prescribed by law for the disposition of estates in land by married women." In these doctrines I entirely concur, and they are supported by the ablest commentators. 2 *Story's Eq. Jur.*, §§ 1391 and 1392; 2 *Roper on Husband and Wife* 182; *Clancy on Rights of Married Women* 287. And the courts hold that while the *jus disponendi*, clearly given to a married woman by the act of 1849, would make any written declaration of intent a charge upon her real estate, yet that the contracting of a debt, either by parol or in writing, could not charge that debt on her separate estate, unless it was contracted for the benefit of that estate. The Supreme Court of Massachusetts, in the case of *Willard* v. *Eastham*, 15 *Gray* 328, have adopted this doctrine; and the opinion of Judge Hoar in that case, is an able and lucid exposition of it.

In New Jersey, the legislature have never given to a mar-

ried woman the power of disposing of her estate as a *feme sole*, except in two cases—one where her husband is insane, or in the state prison, and the other where they are living separate by the decree of some competent court. In all other cases it has been carefully withheld, and the courts of the state cannot ignore the fact that the proposed acts to confer such power have more than once been rejected by the legislature. By the law of the state, the legal title to a married woman's separate estate is vested in her, as was the title to all her real estate before the acts for its protection. A way is provided in which she may legally convey and mortgage her real property by deed, upon separate examination and acknowledgment. It has been adopted, and adhered to since 1746. *Allinson's Laws* 132. It would be a great usurpation for the courts, by judicial legislation, to repeal this statutory provision. It still stands in the fourth section of the "act respecting conveyances," in the words in which it was enacted in 1799, "that no estate of a *feme covert*, in lands within this state, shall hereafter pass by any deed or conveyance made by her, without a previous acknowledgment, on a private examination apart from her husband." This act applies, in its terms, to the conveyance of lands held by a married woman as a *feme sole*, under the act of 1852, as well as to the legal estates held by her before that act. In New York, it was considered that the act of 1849 was necessary to enable her to convey and devise as a *feme sole*. And the reasons for the safe guards placed around married women, for their protection against the influence of their husbands, by the deliberation, delay, and form of a separate examination, are at least as great now as they formerly were.

There is no reason in the state of the law, for the courts to dispense, either with the joining of the husband or the separate examination. Every married woman can charge her property with her own or her husband's debts in this manner; and no debt should be held to be a specific lien upon any part of her lands, unless she has made it such in the manner provided by law, or unless this court should, upon

the principles adopted in the cases above mentioned, declare the debt a lien upon her separate estate generally, because contracted for the benefit of that estate, or for her own benefit on the credit of it. These decrees, like judgments at law on her ante-nuptial contracts or for torts, become liens on her real estate. And the characteristic remark of Lord Mansfield, quoted by the Chancellor as the basis of his decision in *Wheaton* v. *Phillips*, "that remedies must adapt themselves to the times, and to new customs and manners as they arise," does not require the courts to hold that rights newly created, which are as a class provided for by, and comprised in existing statutes, both by the words used and because they are within the object and intent of those statutes, are beyond their provisions, because newly created or recently enlarged. To hold that a married woman could by parol, or otherwise than by writing duly acknowledged, create a lien on her lands, or any specific part, would raise the question of conflicting priorities, which startled Lord Cottenham in *Owens* v. *Dickenson*, and so far as the separate estates of married women are concerned, overthrow our well digested and beautifully arranged system of record priorities, and place the title of all such estates in a miserable uncertainty.

It is settled, that in this state the deed of a married woman, although duly acknowledged, if made without her husband, is void. *Den d. Rake* v. *Lawshee*, 4 *Zab.* 613; *Moore* v. *Rake*, 2 *Dutcher* 574.

For the decision of this case, these propositions then will be assumed as settled rules of law:

1. That the debts of a married woman, holding estates secured to her separate use by the act of 1852, when contracted by her for the benefit of her separate estate, or for her own use on the credit of that estate, will be charged by a court of equity upon that separate estate, and payment enforced out of it.

2. That such debts are not a lien upon her separate estate

until made a lien by a decree of a court of equity, and that the lien is by virtue of the decree.

3. That a married woman cannot charge such separate estates by an appointment in writing, as she could charge estates held by trustees for her, subject to her appointment; but can only convey or charge them by deed executed with her husband, and duly acknowledged upon a separate examination, except in the case where her husband is insane, or in state prison, or living separate from her by judicial decree.

The mortgage given by Mrs. Vernam to Mrs. Libby, and now held by the complainant, not having been acknowledged on a separate examination, is void as a mortgage. But the debt for which it was given, being for part of the purchase money of the lands constituting the separate estate of Mrs. Vernam, was for the benefit of her separate estate, and was also for her benefit; and the mortgage showing that it was contracted on the credit of that estate, and intended to be charged upon it, it will be made a charge upon her separate estate. But as this will only become a lien by virtue of the decree, it would be subject to the mortgage subsequently given to Clark, Dodge & Co., and executed according to law.

But the mortgage to Mrs. Libby is for the consideration money for which the land was conveyed by Mrs. Libby to Mrs. Vernam, and it so appears on the face of the mortgage; and it is proved that Clark, Dodge & Co. had express notice of the mortgage to Mrs. Libby, before and at the time of taking their own mortgage. Legal notice might be perhaps inferred from the registry, as the mortgage was properly recorded; the acknowledgment of the husband was legal, and the recording was proper to give priority upon the estate by curtesy, which might vest in him at the death of his wife. Such notice, or any notice sufficient to put them on inquiry, will be held as notice of the contents of that mortgage, in the same manner as if they had inquired for it, and had been shown it. They must, therefore, be held to have had knowledge that the debt was for part of the purchase money of the land, still unpaid. The vendor of land has a lien for unpaid

purchase money, and this lien is good as against subsequent purchasers for valuable consideration, with knowledge that it is unpaid. It was so held in this court, pursuant to the well settled doctrine in equity, in the case of *Brinkerhoff* v. *Vansciver*, 3 *Green's C. R.* 251. The taking of a note or bond will not be held evidence of a waiver of the lien; and taking this mortgage which, though void, shows an intention to preserve the lien, surely will not be held a waiver of it. The complainant is entitled to have the amount due on the Libby mortgage declared a lien upon the premises, prior to the mortgage to Clark, Dodge & Co., as unpaid purchase money.

But there is no allegation in the bill that the Libby mortgage recited that it was given for unpaid purchase money, or that the defendants, Clark, Dodge & Co., had notice of it before the mortgage to them; and although these facts appear clearly on proof, no decree or relief founded on them can be given unless they are set forth in the bill. The complainant must be allowed to amend her bill in this respect, it being a mere formal defect.

Upon the principles laid down, it must be held that the mortgage given to Thomas Newton, now held by the defendant, William Ross, is void. It was executed by Mrs. Vernam alone, without her husband. And as it is no lien on the lands, it cannot be made so in this suit, even if it had been shown that the debt had been contracted for the benefit of Mrs Vernam's separate estate, or for her own benefit. A defendant in a suit in equity can have no positive relief that requires the action of the court in his favor, as by declaring a debt a lien that was not such before. Upon filing a bill for that purpose, this debt might be declared a lien upon her separate estate, but that cannot be done in this suit.

The complainant is entitled to a decree for the foreclosure and sale of the mortgaged premises, and to be paid out of the proceeds of sale, first, the amount due on the first mortgage for $3500; secondly, the amount of the unpaid consideration money intended to be secured by the mortgage to Mrs. Libby, with the interest thereon; and thirdly, her costs

of suit. Out of the residue, Clark, Dodge & Co., are entitled to be paid the amount due on the mortgage to them; and the residue, if any, must be paid to Reuben Ross, junior.

Owen *vs.* Whitaker.

1. The Court of Chancery has no jurisdiction to determine as to the validity of an election of the directors of a private corporation, and whether certain persons claiming to be, and acting as directors, are such. It can, therefore, grant no relief that is merely incident to that power.

2. The only adequate remedy is in the courts of law, which have power to adjudge the office vacant, and to compel the admission of a person properly elected. The statute (*Nix. Dig.* 171, § 19,) fully confers this power.

3. The summary and efficient proceeding under that statute, removes all difficulty arising from any doubt as to the application of the remedies of *quo warranto* and *mandamus*, to corporations merely civil.

This cause was argued on bill, answer, and proofs.

Mr. R. Hamilton, for complainants.

Hon. D. Haines, for defendants.

The Chancellor.

The bill is filed by fifteen persons claiming to be stockholders in the Sussex Valley Railroad Company, against sixteen defendants, nine of whom claim to have been elected directors of that company, and others were stockholders, or persons claiming to be such, by whose votes the nine claim to have been elected. Ten of the complainants and four of the defendants constitute fourteen of the sixteen persons incorporated by the charter, and who were appointed commissioners, and authorized to receive the subscriptions to the capital stock, and to conduct the first election of directors as

inspectors. Nine of the complainants claim that they were elected as directors at the election held for that purpose.

Besides the general prayer for relief, the bill contains eight prayers for specific relief. First, that the defendant, John A. Whitaker, who was the treasurer of the commissioners, should be restrained from paying over to the nine defendants who claim to be elected directors, the money paid to him as the five per cent. on the stock at the time of subscription. Second, to restrain these nine directors from acting as such, and from making calls on the stock. Third, to declare the election of these nine defendants void. Fourth, to declare the nine complainants to have been duly elected directors. Fifth, to declare the election illegal, and to order a new election to be held. Sixth, to direct that the commissioners at the new election shall receive such votes only as shall be determined legal. Seventh, to direct the moneys received to be paid to the nine complainants claiming to be elected, or to such directors as shall be chosen at such election as shall be ordered; and Eighth, that the defendants account for all moneys received or expended by them.

The whole merits of the suit, and all the relief sought, depends upon the validity of the election of the nine defendants as directors. That is the main question in the cause; the court is called upon directly to decide it, and upon the decision of that, every other question in the cause depends; and if the court has no cognizance of that question, it has not of any other. There is no prayer to adjudge upon the distribution of the stock, or who is entitled to it, except so far as it may be necessary to settle who shall be entitled to vote at a new election if ordered. This cannot be ordered until the election now had is declared void.

The first question in the cause is whether this court has jurisdiction to determine whether an election of the directors of a private corporation has been legally held, and whether certain persons claiming to be, and acting as directors, are such.

The general rule is, that the Court of Chancery has only

jurisdiction when there is no adequate relief at law. 1 *Story's Eq. Jur.*, § 80; *Story's Eq. Pl.*, § 473; *Cooper's Eq. Pl.* 129; 1 *Dan. Ch. Pr.* 574; 1 *Barb. Ch. Pr.* 39.

There are certain well established exceptions to this rule, as in trusts, fraud, accident, mistake, partition, dower, account, waste, and several other cases in which this court has concurrent jurisdiction with the courts of law. For many years, the courts of law have exercised jurisdiction as to officers of corporations, by writ of *quo warranto*, or information in the nature of *quo warranto*, and by *mandamus;* and if there is any doubt as to the application of these remedies to corporations merely civil, the difficulty is obviated and supplied by the summary and efficient proceeding under the statute passed for this very purpose. (*Nix. Dig.* 171, § 19.*) The only adequate remedy is in the courts of law, who have power to adjudge the office vacant, and to compel the admission of a person properly elected. This power is fully conferred by the statute referred to. The judgment of this court would not oust the directors, or cause a vacancy, if the office is *de facto* filled.

This is not only not one of the settled exceptions in which the Court of Chancery will exercise jurisdiction concurrently with courts of law, but so far as I am aware, there is not a single case reported which has directly decided upon the validity of such election, and declared the office void, or ordered a new election. The case of *Van Dyke* v. *Hart*, 4 *Halst. C. R.* 344, goes perhaps further than any other. In that case, the court restrained directors who appeared to be illegally elected, from proceeding to erect the works of the company, a most important matter, which would affect its future success; but it did not adjudge their offices vacant, or give any relief as to that matter. And in the case of *Mickles* v. *The Rochester City Bank*, 11 *Paige* 124, Chancellor Walworth says: "The question as to the validity of the election of G. W. and S., as trustees, does not appear to be a proper subject of equitable cognizance. The legislature has provided a summary remedy, by an application to the

* *Rev., p.* 184, *sec.* 44.

Supreme Court to set aside the election of these directors, if it is illegal. (1 *R. S.* 666, § 5.) That court, therefore, is the proper tribunal to set aside the election, if it has not been made in conformity to law." This court has no jurisdiction to determine the validity of this election, or the right of the directors elected to hold and exercise the office of directors; and therefore can grant no relief that is merely incident to that power, such as to restrain the defendants from acting as such.

This company are not in the situation of the Camden and Amboy Railroad Company, as mentioned by Chancellor Vroom in *The Attorney-General* v. *Stevens, Saxt.* 376. The charter of that company only gave a corporate existence to it when the stock was duly subscribed. In this case, the sixteen persons named were incorporated from the approval of the act; and upon the principles laid down by the Chancellor in that case, this court would have no jurisdiction. Besides, here ten of the complainants are corporators and commissioners named in the charter. They were a majority of the sixteen commissioners. It was their duty to receive subscriptions to the stock. They had control of receiving subscriptions, and deciding who were subscribers. They appointed the time and place of election, and the election was to be held and conducted by them, or by any three of them. Of course, if all were there, a majority must control. The commissioners, of whom these complainants are a majority, allege that they have omitted and neglected to perform the duties imposed upon them by the act, and call upon this court for relief. So far as these ten complainants are concerned, they are hardly in a position to ask relief through the extraordinary power of a court of equity.

The bill must be dismissed, with costs.

Stevens *vs.* The Paterson and Newark Railroad Company.

1. An injunction will not issue where the right of the complainant, which it is designed to protect, depends upon a disputed question of law about which there may be a doubt which has not been settled by the courts of law of this state.

2. So far at least as incorporeal rights are concerned, it has been determined in this state, that an injunction cannot issue to prevent the lands in which these rights exist from being taken by a corporation, for public use, without compensation being first made.

3. Whether the owner of land along the shore on tide waters has any right in the shore or the lands under water, by reason of adjacency, or by the provisions of the wharf act, is a disputed question, not settled by the courts of law in this state, and an injunction will not be granted to protect the shore owners in such rights.*

On rule to show cause why an injunction should not issue to restrain the defendants from building their road on the shore of the Passaic river, where the tide ebbs and flows in front of the complainant's lands, until compensation has been made in the manner provided by law.

Mr. G. N. Abeel (with whom was *Mr. McCarter*,) for complainant.

Riparian owners on navigable streams have vested rights in their adjoining waters, of which they cannot be deprived without compensation. These rights are towing, landing, lading, and unlading, right of way to shore, to draw nets, erecting fishing huts, fishery, ferry. *Gough* v. *Bell*, 3 *Zab.* 624.

These rights are recognized by a court of law, and are consequently ascertained at law. These rights are also ascertained by the "wharf act," which is simply declaratory of the common law. *State* v. *Brown*, 3 *Dutcher* 33. These rights are recognized by the Chancellor, in *Stockham* v. *Browning*, 3 *C. E. Green* 390, and will be protected in equity.

The case of *Prudden* v. *The Morris and Essex R. Co.*, (Court of Errors, February Term, 1869,) does not militate

*See *Stevens* v. *Paterson & New. R. Co.*, 5 *Vr.* 532; where Court of Errors held that the shore owner had no such right, which could not be taken without compensation.

against this position. In that case, the right of complainant was entirely in doubt; in this case, not at all. Legislative acts throw no doubt upon principles recognized by the courts.

The Paterson and Newark Railroad Company have a rule laid down in their charter for acquiring right of way, and especially as to the rights of shore owners, which are recognized by section two of supplement to their charter, approved February 22d, 1866.

The railroad company cannot claim to take any of the rights of the state in the shore, without grant set out in express terms.

The charter must be construed in favor of the state. *Keyport Steamboat Co.* v. *Farmers Transportation Co.*, 3 *C. E. Green* 13.

The riparian act of 1869, applies only to Hudson river and Kill von Kull, and is no precedent in collateral questions for courts, as it has not been adjudicated, and may be unconstitutional.

This case comes within the injunction power of the Court of Chancery. *Bonaparte* v. *C. & A. R. Co.*, 1 *Bald.* 205. The defendants admit that they propose to build a structure of piles several feet above the level of the surface, on the shore along Stevens' entire front, and to lay railroad tracks thereon. This will entirely cut off Stevens from the use of his water front, which use is a most valuable privilege. The injury is continuing and irreparable; there is no adequate remedy at law; the act of the railroad company is a wanton attack on private rights, and should be enjoined.

Mr. Keasbey and *Mr. Parker*, for defendants.

The Chancellor.

The defendants, by their charter and its supplements, are authorized "to lay out and construct and run their railroad along the Passaic river, from the village of Belleville to any point in the city of Newark, at or near Governeur street,

and to acquire the rights of the shore owners in the manner prescribed in the charter in other cases." The complainant owned a lot of land fronting on the Passaic river between Belleville and Newark, being a part of the river where the tide ebbs and flows. The defendants laid out their road on the shore, or space between high and low water, in front of complainant's lands; and they intend to construct their road over that part of the shore, without making any compensation for it.

There are two questions: One whether the complainant has any settled definite right in this shore, such as entitles him to protection; and the other, whether the injury is of such irreparable character as to entitle him to the interference of this court by injunction.

The complainant, as shore owner, is by the wharf act, entitled to reclaim the shore in front of his lands; and when reclaimed, to appropriate it to his own use. This right is vested in him absolutely, and without condition. It does not, like the right to reclaim beyond ordinary low water, require a license for its exercise. This right, so granted by law to every shore owner, is, in my opinion, property; it is an easement in the land of another, an incorporeal hereditament like the right of way or of common, or the right to back water, or to dig turf, or to dig ore; and if such, it is under the protection of the constitution, so that it cannot be taken by any one but the state, without being first paid for. The title of the land is, by this act, left in the state until reclaimed, and then by force of the words "it shall be lawful to appropriate the same to his own exclusive use," it becomes vested in the shore owner. The object of this act was to settle the questions which had arisen as to the right of owners of lands upon tide waters, to the shore in front of them. The courts, in the case of *Gough* v. *Bell*, then in litigation, determined that, by a local, settled common law, such shore owner might reclaim the shore and lands under water in front of his lands, if he did not obstruct navigation, and was not interfered with or prevented by the state while doing it;

and that the shore and land under water when so filled in belonged to the shore owner; and that the state could grant no title in them. This was the point of the case; the defendant justified under a grant from the state, of lands so filled in previous to the grant, and the courts held the grant void. But it was also determined, that until such filling in or reclaiming, the title to the shore and lands under water was in the state. This part of the decision was contrary to the general impression among lawyers, conveyancers, and land owners; the common opinion was, that the shore owner held the title to low water. The act went further than the decision of the courts in two respects: First. It gave to the shore owner the absolute, unqualified right to fill in to low water line without the condition, if the state did not interfere to prevent him. Second. It gave to him the same right below low water line, on condition that it did not interfere with navigation, which was first to be ascertained by the chosen freeholders of the county, whose license was necessary to the exercise of this right; subject, also, to the right reserved by the act, for the state to appropriate for public use the lands under water, as distinguished from the shore, at any time before they were actually reclaimed.

By the practice of courts of equity, as well in England as in this and other states, railroad companies and corporations of like character have been restrained from taking the lands or property of individuals until they had first acquired title or paid compensation, when that was required either by the charter or by constitutional provision. This doctrine was first introduced in New Jersey in the case of *Bonaparte* v. *The Camden and Amboy R. Co.*, in the Circuit Court of the United States. *Baldwin's R.* 205. The court there said: "that the complainant may recover damages at law, is no answer to the application for an injunction against the permanent appropriation of his property for the road under a claim of right; this is deemed an irreparable injury for which the law can give no adequate remedy, or none equal to that which is given in equity, and is an acknowledged ground for

its interference." The position is taken, that the law does not leave the owner to seek his remedy for property already appropriated and seized, but has prescribed the terms on which alone it can be taken. Upon this doctrine, the practice has been to require no other irreparable injury to be shown as the ground of an injunction. In most cases of this nature the injury is not irreparable in any other sense. Taking or removing an old homestead may be, in many cases, an irreparable injury in fact. But this the law gives authority to do, and equity can give no protection against an act authorized by law. Taking the land thus authorized to be taken, without compensation first made, is not literally an irreparable injury. The only wrong is the want of payment. If the value or damage is $10,000, that amount can be recovered at law, and the injury will be repaired. If courts proceed on the ground that taking property without compensation, and compelling the owner to pursue the wrong doer and litigate with him for the value, is a wrong of the kind which equity will prevent by injunction; then, in such cases, the small value of the property taken, or the small amount of the injury done, is of no consequence. In fact, when the amount is so small as not to equal the expense above taxable costs incurred in recovering it, the evil is greater and would more require protection. It is on this principle that the right to injunction in such cases was supposed to exist, and the injury put upon the same footing as those which were actually irreparable. So in cases of waste or clear nuisance, as in flowing back water, an injunction is the proper remedy, although in almost every case there is a remedy at law to recover for each injury as it occurs—damages easily measured in money.

But it is urged on part of the defendants, that principles by which this court must be governed in the granting of injunctions, have been established by the Court of Appeals in the decision in the recent cases of *The Morris and Essex R. Co.* v. *The Attorney-General*, and *Prudden*,* (March Term, 1869); which, if they do not abrogate the rules so acted

*Reported *post p.* 530.

on, greatly qualify them, and will take this case out of their operation. As the decisions of that court necessarily settle the law, and the practice of this court must be corrected when wrong, and be entirely controlled by that; and as in those cases questions involved in this were discussed and decided; they must receive careful attention.

The first of those cases was an information and bill combined. The relators and complainants were the owners of lots on a street in which the defendants were laying a second track of their road, which is a railroad operated by steam. The relators derived their title from the owner of a large tract, who had laid it out in blocks and streets on maps, and also by staking out and opening the street in question, on the ground. After this, he conveyed these lots of the relators, by deeds which bounded them on the street so mapped and opened. This street had been opened and used for more than thirty years, except so far as occupied by a single track of the defendant's road, which had been there for twenty years of the time. After the dedication a public highway had been laid out by an act of the legislature, one portion of which was upon a part of this street, being the part in front of the lots of the complainants; which highway, except in that part, was a different road from the street, and was a main thoroughfare for distant trade. This highway, including the part which coincided with the street, was vacated some years after the dedication and opening of the street and the conveyance of the lots. After this vacation the street, except the part occupied by the defendant's track, had been used by the public as a highway for over twenty years. The Chancellor held, that such laying out and opening of streets, and sale of lots bounded on them, dedicated them to the purchaser and public, as streets. This had been decided and settled by the courts of the state, and was not an open question. He further held, that if a road laid out for one object passed over and along another road, previously laid out or dedicated for another object, for part of its course, and the road secondly laid out was vacated, that such vacation did

not vacate the first road in the part where the two coincided, but that such part remained a public highway, as necessary to constitute the whole road first laid out, which was not intended as a whole to be vacated. This question had never been settled and decided by the courts of law in New Jersey, and was debatable. He also held, that the purchaser of lots on a street so laid out, had a right of way over the street so laid out, on which his lot was bounded in the deed, for its whole width at least to the next adjoining street on each side; and that if the public had accepted the dedication by laying out a highway over it, and then vacated that highway, still the right of the purchaser to a way over the street so dedicated remained as a right of property. This was an unsettled question never decided by the courts of New Jersey, and was one of the grounds on which the injunction was based.

The Court of Appeals held, that wherever the right or title upon which an injunction was based depended upon a principle of law not settled or determined in this state, and which was proper to be settled by the courts of law, an injunction ought not to issue until the question was so settled and determined; and that it would not on appeal, pause to consider whether such question had been correctly determined by this court, but would reverse the order because made on principles before undecided, without regard to their soundness. They declare that "it is unnecessary to express any opinion upon those questions," and the order was reversed without any examination of the principles on which the right was based. This determines that a court of equity must not grant an injunction in cases when the principle of law on which it depends is disputed, and has not been settled in this state. This, perhaps, is no new rule, but a more definite and strict application of the rule long established in courts of equity, that where the right of the complainant is doubtful, an injunction should not be granted until that right was established at law. The error into which the Chancellor had fallen in that case, was in assuming that when the facts were

not disputed, and the law seemed clear to *him*, the right was not doubtful, although the legal question had never been settled and decided in the courts of law, and might admit of doubt. I think that it is right to assume that the decision was on this ground alone; for although something was said about the power of courts of equity to grant injunctions on information where an indictment will lie, and the circumstance that no very great or important inconvenience to the public was averred or proved, and it was remarked that the bill was defective in joining complainants whose interests were distinct, and that the injury to the public, by delaying the construction of works important to travel, should prevent interference without strong reasons for it; yet the former decisions in that court will prevent an implication that it was upon these grounds, where it is not so expressly declared, and those decisions are not adverted to and overruled.

In the case of the *Attorney-General* v. *The Paterson and Hudson River R. Co.*, 1 *Stockt.* 526, on an information filed at the relation of two persons who were also complainants in the bill, and whose interests were separate, to stop the construction of a bridge, part of one of the oldest and most important railroads in the state, the Court of Appeals, reversing the decision of the Chancellor, ordered an injunction to stay the building of the bridge, which, if unauthorized, was an indictable nuisance, until it was determined whether it was being built in the position authorized by the charter. And in the case of *The Attorney-General* v. *The Newark Plank Road and Ferry Co.*, 1 *Stockt.* 754, upon an information in which several persons with distinct interests were joined as complainants, and the injury complained of was projecting piers into the Passaic further than authorized by the charter, clearly an indictable nuisance: and when the question was the meaning of the charter, and no great or serious injury to the public by the extension was alleged or proved, the Court of Appeals unanimously affirmed the decree of Chancellor Halsted granting an injunction, which had been approved and acted upon by Chief Justice Green,

sitting for Chancellor Williamson. From these considerations, I think that I cannot be mistaken in my conclusion as to the ground on which the decision of the Court of Appeals was founded.

In one of these two Morris and Essex Railroad appeals before mentioned, the information was for the obstruction of a public street as a public nuisance; and in the other, the bill complained of taking and occupying, without compensation, lands over which the complainant claimed he had a right of way by the dedication, distinct from the right of the public, and also because the obstruction in the highway would inflict upon him an injury different from that suffered by the rest of the public. The opinion of the court, as delivered by Justice Depue, applies to these cases the rule, "that an injunction ought not to be granted when the benefit secured by it to one party is but of little importance, while it will operate oppressively, and to the great annoyance and injury of the other party, unless the wrong complained of is so wanton and unprovoked as to deprive the wrong-doer of the benefit of any consideration as to its injurious consequences;" and, also, declares "that the complainant, for the contingent and consequential damages which he may suffer from any interference with his property, has the remedy by action at law whenever, and so often as loss or damage accrues, and if the use of the railroad in front of his house becomes a nuisance, or the aggression proves to be a permanent injury, without an adequate remedy at law, then the court will be competent to administer equitable relief by injunction to prevent its continuance, or for its removal." So far, therefore, at least, as incorporeal property, or rights, or easements, are concerned, it determines that an injunction cannot issue to prevent the land on which these rights exist from being taken and the rights themselves destroyed, without compensation first made, but the party aggrieved must first resort to his remedy at law.

The ruling of the court in *Drake* v. *The Hudson River R. Co.*, 7 *Barb.* 508, that "a strong case must be pre-

sented, and the impending damage must be imminent and impressive to justify the issuing of an injunction as a precautionary and a preventive remedy," is quoted with approbation, and applies to these cases.

These rules, so established as the law of this court, as regards the rights infringed, and the nature and extent of the injury requisite to authorize an injunction, if either of them apply to this case, as contended by the counsel of the defendants, must control it, and prohibit the issuing of any injunction.

I am of opinion that they do apply. In the first place, the title of the complainant depends upon his right as shore owner by reason of adjacency, and his right under the wharf act. Neither of these have been settled or adjudicated by the courts of law in this state, and both are to a certain extent disputed and doubted; for I do not infer that the Court of Appeals intended to hold that a right depending upon a question of law not actually decided in the courts, if there was no real doubt or dispute about it, could not be protected by injunction.

These questions are both considered as doubtful by many in such manner that this court must notice it, and neither has been adjudicated by the courts of law in this state.

As to the right of adjacency. Although in the noted case of *Bell* v. *Gough*, 3 *Zab.* 624, several of the judges, in their opinions, held such right to exist, yet a majority of those whose voice decided the cause expressed no opinion on the subject, and as the question was not necessary to the decision, these opinions, though not dissented from, do not alter the law. And the opinion delivered in this court, in the case of *The Keyport Steamboat Co.* v. *The Farmers Transportation Co.*, 3 *C. E. Green* 13, in reviewing those opinions for another purpose, expressly declares that the decision in that case does not determine the question; and the Chief Justice in this last case, in the Court of Appeals, *Ibid.* 516, avoids expressing any opinion upon it. In *Gould* v. *The Hudson River R. Co.*, 2 *Selden* 522, the Court of Errors held that

the shore owner had no such right. I think that this may be fairly considered a doubtful question of law not settled in this state.

The right of the complainant in the shore, by virtue of the wharf act, although by many it may be considered beyond question upon established principles of law, and although it seems so to me, yet is doubted by some, and depends upon a question that has not yet been settled or passed upon by the courts of law in this state. The recent act of the legislature concerning riparian rights in the bay of New York, approved March 30th, 1869, was produced and relied on by the defendant to show that this right was questioned by the legislature, and it sustains the position. For although the thirteenth section provides a way in which the shore owner may have compensation for his rights in the shore, it is qualified by the addition of the words "if any he have," to these rights wherever mentioned; showing plainly that the legislature considered it doubtful if there were any such rights. The third section repeals the wharf act as to the tide waters on the Hudson and bay of New York, and declares that no person shall fill in the lands under water there, without a grant from the commissioners. Had the legislature considered that any right had, by virtue of the wharf act, become vested in the shore owners, they would not have attempted thus to divest it; for it would be beyond their power, as much as the rights to the minerals below the surface of his land, and to occupy exclusively the space above it *usque ad cœlum*, are beyond legislative control, being vested in the owner as incidents and appurtenances of the soil; and the exclusive right to fill in and appropriate the shore if once vested in the shore owner by general law, whether customary or statutory, would be, like these, beyond the control of any general law limiting or taking away the right.

The eighth section goes still farther, and directs the shore to be conveyed absolutely to a stranger, if the shore owner refuses to purchase it of the state; and this, not for any public use or purpose, so as to bring it within the power of eminent

domain, but the conveyance is authorized for private purposes solely. The provisions of the thirteenth section only show that the legislature had some doubt as to the right to exclude the shore owner from the shore and lands under water in front of him. The provision in the defendants' charter, giving to the defendants power to acquire the rights of the shore owner, does not, as contended by the complainant, recognize this right, but provides for extinguishing it, if it shall be found necessary; it gives the power by way of precaution.

When it thus appears that the law making power of the state consider this right doubtful and unsettled, it must be held so by this court; and although I may be clear in my own convictions of the right, I am not at liberty to grant an injunction on that conviction, until the question of law has been settled by the courts to which it positively belongs.

With regard to the injury, it is in no sense 'a strong case of danger, imminent and impressive." The only irreparable injury is taking from the complainant a right of property, without compensation *first* made. His land is not taken, but only an incorporeal right; and for this injury to the enjoyment of his property, he "has his remedy by action at law as often as loss or damage occurs." Were the right clear, the injury is not such as would entitle the complainant to the preventive remedy by injunction, according to the rule above laid down.

The case of *Stockham* v. *Browning*, 3 *C. E. Green* 390, is urged on part of the complainant, as establishing that the right and injury in this case are sufficient to entitle him to an injunction. But in that case the defendant did not enter on the shore and lands in front of the complainant, by authority of the state, the owner of the fee; but he claimed the part so entered upon as within his own right under the wharf act, and without authority was preventing the complainant from using the shore and water in front of his lands. This right he had by virtue of the wharf act beyond dispute; and the only question there was, whether the particular par-

cel of land under water was in front of the complainant or the defendant. In this case, if the grant of the right to run the railroad *along* the river means upon the shore, or within the boundaries of the river, which was not disputed on the argument, the state have, by this grant, taken to that extent from the shore owner the right granted by the wharf act, unless that act confers a vested right of property. The only object of the defendant in *Stockham* v. *Browning*, was to claim his right to the line on which he drove his piles, and no public or even private improvement or enterprise was delayed by the injunction. And if the decision in that case contravenes the present, it is because it was made under the same views which governed this court in the Morris and Essex railroad cases, and which have been determined to be erroneous.

In the present case, for anything that is alleged or proved, the complainant may have sufficient access to his lands by a road in the rear, or on the side, as in Prudden's case; it does not appear that he is cut off from such access. And if his claim to the shore is vested, and it is reclaimed and filled in by the defendants, he may recover it in ejectment, certainly not diminished in value by being filled in to the width of the track; and then the defendants will be compelled to take the land by condemnation, and pay the value and the damages. And when his title is settled at law, this court will have power to protect him, if his legal remedy is not sufficient.

On both grounds, the injunction applied for must be refused, but without costs. The application was no doubt made in good faith; the complainant may have been misled by the decision of this court in Stockham's case, the late judgment of the Court of Appeals not being promulgated. Besides, in the cases last referred to, it is intimated that if a person having rights encourages another by acquiescence, although only passive (that is by not attempting to interfere), to expend money, on the assumption that such rights will not be asserted, he will not be permitted to assert them

in a court of equity to defeat the expectation of those who have expended money on the faith that such rights will not be exercised; and further, that such acquiescence, even for less than twenty years, will extinguish such rights by estoppel, not only to the extent to which they have been infringed, but to the full extent claimed and intended. It was not safe for the complainant to trust to anything to rebut such acquiescence, short of a suit in some court where the record might remain as enduring evidence that he did not acquiesce. And the only suit which could be brought before the actual expenditure of money, is the application for injunction.

Roberts *vs.* Birgess and wife.*

1. Where a replication is filed, matter not responsive to the bill, but pleaded by way of confession and avoidance, must be proved.
2. Decree will not be opened for that purpose.

The bill in this cause was filed to foreclose a mortgage given to the complainant by the defendants upon lands in the county of Cumberland. An answer was filed in behalf of the defendant, Thomas K. Birgess, admitting the execution of the bond and mortgage, but alleging that they were usurious and praying that the complainant might be decreed to recover only the amount actually loaned by him, without interest or costs of suit. The complainant filed a replication. No testimony was taken on either side. The cause was set down for hearing on bill, answer, and replication. No one appeared at the hearing on behalf of the defendants, and a decree was made in favor of the complainant for the full amount of his mortgage, principal and interest, with costs. Execution was issued on the decree, and at this term application was made to the court to open the decree as

*Cited *in Van Dyke* v. *Van Dyke*, 11 *C. E. Gr.* 182.

having been improvidently made, and to set aside the execution.

Mr. A. W. Cutler, in support of the motion.

Mr. F. F. Westcott, contra.

An answer is evidence for a defendant, only of matters responsive to the bill. When any thing is set up in an answer by way of confession and avoidance, and a replication is filed, the defendant is bound to prove it by testimony. This answer confesses the execution of the bond and mortgage, but endeavors to avoid it upon the ground of usury. Under the rule, therefore, the defendant must prove the usury, and he having failed to do so, the complainant was entitled to his decree. *Miller* v. *Wack*, *Saxt.* 204; *Fisler* v. *Porch*, 2 *Stockt.* 243; *Basset* v. *Nosworthy*, 2 *Lead. Eq. Cas.* 125; *Townly* v. *Sherborne*, 3 *Lead. Eq. Cas.* 471; 3 *Greenl. on Ev.*, § 290; 2 *Daniell's Ch. Pr.* (ed. of 1865), 841, *note.* Although, under our new law respecting usury, the defendant does not seek to avoid the complainant's claim totally, but only partially, to the extent of interest and costs; yet what he asks for is a substantial avoidance of the complainant's claim, and in the nature of a penalty, and the old rules respecting proof of usury apply.

The Chancellor.

The complainant having filed a replication, the defendant was bound to prove the usury. Matter not responsive to a bill, but pleaded by way of confession and avoidance, must be established by testimony. The motion to open the decree must, therefore, be denied with costs.

BLAUVELT *vs.* ACKERMAN and others.*

1. Though a bill may be dismissed for want of equity, the court will not make such an order without argument and examination, though the master may, from his view of the evidence, recommend in his report that course to be taken.

2. A trustee cannot, either directly or indirectly, become the purchaser of property held by himself in trust, at or by means of his own sale. The property after such sale remains, as before, vested in the trustee.

3. If a trustee exchanges trust property for other real estate, and takes the title thereto in his own name, such property so acquired will be considered trust property to the extent of the value of the trust property exchanged therefor. And if no deed has been made by the trustee, and the trust property is afterwards forfeited and given back for breach of conditions, to the trustee, that will enure to the benefit of the trust fund, not of the trustee.

4. If a trustee deals with trust property as his own, he takes upon himself all the risk and responsibility, without the right or prospect of personal benefit, for he must be liable for the value of the trust property and all that is gained by it.

5. Where the master's report is in a great measure based on erroneous views with regard to some important matters referred to him, it will be referred anew, so that the report may be in conformity with the views of the court.

Mr. Ransom, for complainant.

Mr. Gilchrist, for defendants.

This cause was argued before the Hon. J. F. Randolph, one of the masters of the court, sitting for the Chancellor.

THE MASTER. The complainant in this case, finding himself somewhat embarrassed with debts and law suits against him, on the 28th of September, A. D. 1848, made a special assignment for the benefit of his creditors, under the laws of the state of New York, where he then resided, to John Ackerman, jun., then of Bergen county, in this state. The whole of his debts named in the assignment and schedule amounted to a little over $2000, the largest being $993.83 due the assignee; and the debts due complainant are set down in the schedule

* CITED *in McKnight's Ex'rs* v. *Walsh*, 9 *C. E. Gr.* 509.

at $1975 (including a claim of $1750 against Joseph Swift); also half the interest in a certain tract of land in James City county, Virginia, known as the Russell tract. The debts and assets, though seemingly of rather a small amount, appear to have given rise to much litigation. The present suit was commenced in 1867 by the complainant, against the legal representatives of John Ackerman, jun., deceased, he having previously departed this life. A large amount of evidence having been taken, and this court, without considering the same or any question thereon, being of opinion that the complainant was entitled to have an account of the moneys which came to the hands of the said defendants from the estate of the said John Ackerman, jun., deceased, and of the property of which he died seized, both real and personal, and also to have an account taken of all moneys justly and equitably due the complainant from the estate of the said John Ackerman, jun., deceased, and from the defendants, at the term of July, 1864, by a decretal order referred the same to one of the masters of this court to take an account of the moneys, property, real and personal, and other assets of the said John Ackerman, jun., deceased, which had come to the defendants, or either of them, or any other person for them; and also an account of all moneys legally or equitably due complainant from the estate of said Ackerman; and also of the rents, issues, and profits of the houses and lots described in complainant's bill, situate in Tenth avenue, New York city, received by said Ackerman in his life time, and by the defendants since his death; and also to inquire and state to the court the value of said houses and lots; and also to take an account of all the property, real and personal, located in James City county, in the state of Virginia, described and named in the bill, which came to the possession of said Ackerman and said defendants, by sale of any portion thereof, and the amount and value of the rents, issues, and profits thereof, that accrued or came to the said Ackerman or the said defendants; and also of all moneys received from said property, by sale or otherwise, by said defendants; and also to inquire

and state to the court the value of said real estate situate in James City county aforesaid, and the amount of money received by the defendants for the same; and also an account of the posts, rails, wood, timber, coal, and other property, cut and taken from said James City property by said Ackerman and the defendants; the master to make all just allowances for moneys legally and properly paid by said Ackerman and said defendants. A large additional amount of evidence was taken before the master, and on the coming in of the report, in June, 1868, the complainant filed a number of exceptions to the same, and the case comes now before the court on the hearing of those exceptions.

A preliminary question was raised by defendants' counsel, that inasmuch as the order of reference did not decree the complainant was entitled to relief, but simply that he was entitled to an account, and that as the master had reported generally against the claim of the complainant, and that the bill should be dismissed for want of equity, the case was brought back to this court in the same position it would have been in had the question been originally argued on bill, answer, and evidence, and the court were of the opinion that the equity of the bill was not sustained, and that the bill should be dismissed accordingly. No doubt but the court may, on such hearing, dismiss the bill for want of equity sustained by proof, as was done after argument in the case of *Campbell* v. *Zabriskie*, 4 *Halst. C. R.* 356, which was sustained by the Court of Appeals, *Ibid.* 738. But in the cause before us, no argument was had prior to the interlocutory decree, the clause of being entitled to relief was merely struck out, and the order made was a simple reference for account, thus reserving the whole equity until the coming in of the report. And although the master reports his conclusion upon the evidence generally as adverse to the complainant, and recommends that the bill be dismissed for want of equity, yet as neither of these subjects appears to have been referred to the master, or constituted a proper subject of reference, the court must be governed by its own opinion, from the evidence.

The principal difficulties have grown out of two items in the credit side of complainant's schedule, *viz.:* Joseph Swift is set down as a debtor for $1750, and there is also stated as assets "half interest in a certain tract of land in James City county, Virginia, known as Russell's tract, and now worked by Joseph Swift, above named." This tract was purchased by the complainant of Peter Relyea, in January, 1846, for about $3000, in real estate situated in New Jersey.

In 1842, it had been sold by order of the court in James City county, Virginia, at vendue, for $700, to Henry P. Banks, and by him transferred to Relyea for $1200, of which $950 had been paid by him when complainant purchased. By the terms of sale under the order of the court, the deed was not to be made to the purchaser or his assigns until the purchase money was paid, and the last payment, being the balance of the purchase money, was not paid by complainant, as assignee of Relyea, till December 12th, 1848, about three months after his assignment; prior to which, complainant had sold, but not transferred, one half of his interest to Joseph Swift, who formed a sort of partnership with him; and it is for this half that complainant puts down his claim against Swift at $1750, as the consideration therefor, no part of it having been then paid.

In the winter of 1848, Swift's claims were bought out by Ackerman for $550, and a boat load of coal. Swift had expended some money on the property whilst he was in connection with Blauvelt, but as the latter had paid for the whole property, and Swift had never paid for any portion of his half to Blauvelt, or had any right assigned to him, the money paid him by Ackerman was rather to reimburse him for his expenditures, and to get clear of him and his claim, than for his interest in the property, which never, in fact, passed from Blauvelt to Swift. This being the case, Ackerman, as assignee of Blauvelt, had no right to pay Swift as a debt $550 in cash, when he (Swift) owed to Ackerman, as assignee of Blauvelt, $1750 for the very half of the property he was selling to Ackerman for cash, unless by way of com-

promise. An assignee would have no right so to deal with the rights of the assignor and his creditors. I consider then that after Swift was paid, and abandoned whatever interest he had in the property, it obliterated Blauvelt's debt of $1750, and Swift's prior right in one half the property became vested as part of Blauvelt's assets, in his assignee, for the benefit of the creditors. The amount paid to Swift by way of compromise will of course be a proper credit for the assignee.

Swift was in the first place secured his $550 by a note and agreement for that amount signed by Blauvelt and John Ackerman, jun., assignee, dated December 14th, 1848, which note was afterwards paid by Ackerman. On the 29th of December, 1849, a deed for the Russell property was made pursuant to the decree of the court of James City county, by Barlow and Hankins, commissioners, to John Ackerman, jun., reciting the various assignments by Banks to Relyea and by him to Blauvelt and by him to Ackerman, and that the consideration for the same had been fully paid in each case. Prior to this deed, *viz.* on the 16th day of June, 1849, the property had been sold by Ackerman pursuant to advertisement, at the hotel of Peter Archdeacon, in Paterson. Only three or four persons being present, there was but one bid, and that by Archdeacon, for $1650, and the property was sold to him according to prior understanding, and the property or bid was by him, on the same day, assigned or transferred to Ackerman, for $25 paid him by Ackerman; and this sale the master reports as having extinguished the trust in Ackerman, and vested the property in him free from any trust or encumbrance. The object of this sale was manifest. No deed had as yet been obtained from the Virginia court and commissioners, and the only title which Blauvelt and his assignee had was a mere assignment of the bid and the striking off the property to Banks, assigned by him to Relyea, and by him to Blauvelt. And as a question might arise in the Virginia court whether that and the assignment of Blauvelt as an insolvent debtor to Ackerman

would be considered sufficient to enable either Blauvelt or his assignee to claim a deed from the commissioners, or to make a title without it, Mr. Wadsworth, the counsel for Blauvelt and his assignee, advised the sale, and stated that it was for the benefit of Blauvelt and his creditors; and the affidavit of Blauvelt, made in New York before a Virginia commissioner, and his testimony, as well as the fact that Ackerman never charged himself with $1650, go to show that both Blauvelt and Ackerman took the same view of the sale.

It can hardly be supposed that Mr. Ackerman intended in this way to have the property fraudulently conveyed to him for his individual benefit, or that such a conveyance for such a purpose could be sanctioned by any court, either of law or equity. It is of no consequence whether Mr. Ackerman or any other persons may or may not have had views looking to Ackerman's becoming the owner of this property for himself, for the purpose of speculation or otherwise; the sale was illegal, fraudulent and void. A trustee cannot, either directly or indirectly, become the purchaser of property held by himself in trust, at or by means of his own sale. Executors, administrators, guardians, or trustees, can never sell real estate to themselves either directly and openly, or secretly and covertly, through another person employed for the purpose. Every such sale is void. *Den d. Obert* v. *Hammell*, 3 *Harr.* 73; *Winter* v. *Geroe*, 1 *Halst. C. R.* 319; *Hill on Trustees* 158–9 and 535; *Scott* v. *Gamble*, 1 *Stockt.* 218; *Ib.* 797.

The property, after the sale, remained as before, vested in Ackerman as assignee of Blauvelt for the benefit of his creditors, and could only be used or sold for that purpose.

It appears by the evidence that on the 28th of December, 1849, Ackerman entered into a written agreement with Philip Schuyler of New York city, to sell him the Russell tract of land, with the stock and utensils thereon, for the sum of $3200, of which sum $2239.17 "being now paid by conveyance of certain property in the city of New York, as

stated in said agreement," the balance of $968.31 to be secured by Schuyler by bond and mortgage, payable before or at the expiration of three years, with six per cent. interest; the conveyance of the Virginia property to be made to Schuyler on or before August 11th, 1850. On the day of the agreement, December 28th, 1849, Schuyler and wife conveyed by warranty deed to Ackerman, "in consideration of $4000, the lot of land and premises on the east side of Tenth avenue, New York, and about twenty-five feet southerly from the southeast corner of Tenth avenue and Twenty-seventh street," subject to a mortgage for $2000 to Peter P. Ramsey, and another mortgage for $400 to H. A. Lenox, both of which were assumed by Ackerman as part of the consideration for the property. This deed is dated December 27th, 1849, but as the agreement bears date December 28th, and both instruments were executed before the same subscribing witness, who also, as a commissioner, took the acknowledgment of the deed on the 28th of December, it is but reasonable to conclude that the deed was executed on that day. Shortly after this date Schuyler went to Virginia and took possession of Russell's tract, with the stock and utensils thereon, according to the agreement. Difficulties afterwards arose as to the New York property, and judgments were found open against it; these were adjusted; and on the 26th of March, 1850, Schuyler endorsed on the original agreement, an agreement that $200.32 were to be added to the sum of $960.83, making it equal to $1161.15, for which Schuyler was to give a mortgage. Both parties being in possession, respectively, of the exchanged properties, and Schuyler not complying with the terms of his agreement, either by giving the mortgage or paying the interest, and Ackerman having paid off the $2000 mortgage on the New York property, in the fall of 1853, (nothing further appearing to be proved in regard to the $400 mortgage,) Schuyler came to New York and agreed to give up the Virginia property. The witness says: "Schuyler did not comply with his agreement, and Mr. Ackerman had to take the place back;"

but he also retained the property conveyed to him in New York. As Ackerman got the New York property by an exchange of the Virginia property which he held in trust for Blauvelt and his creditors, so far as the trust property contributed to the purchase of the New York property, the latter must be considered as held in trust by Ackerman and his successors for Blauvelt and his creditors, to the amount of that contribution. And it must be so, notwithstanding that ultimately no part of the Virginia property, except the use of it from 1849 to 1853, actually contributed as part of the consideration or price to the purchase, in consequence of Schuyler's non-fulfillment of his agreement, and his giving up and abandoning the Virginia property, which was afterwards sold and conveyed by Ackerman to Whitaker for $2100. Schuyler never had a deed, and he did not abandon his interest in that trust property to Ackerman as an individual but as a trustee; otherwise Ackerman would stand in the position of a trustee, dealing and speculating with trust property, and making individual profit therefrom. This cannot be done. When a trustee deals with trust property as his own, he takes upon himself all the risk and responsibility, without the right or prospect of personal benefit; for he must be liable for the value of the trust property, and all that is gained by it. If a trustee exchanges trust property for other property of alleged equal value, and on the receipt thereof he sells it for, say $1000 more than the estimated value of either property, the $1000 does not go to the trustee but to the trust fund, and if on the receipt he sold it for $1000 less than the value, he must contribute the $1000 to the trust fund. A trustee has no right to deal with trust property as his own, and if he does, and profit arises therefrom, it goes to the fund and not to the trustee. *Hill on Trustees* 534–5. Trustees and their representatives are chargeable in equity, for a breach of trust, whether they derive benefit from it or not. Trustees are not entitled to benefit themselves from the use of trust property. *Green* v. *Winter*, 1 *Johns. C. R.* 27; *Parkist* v. *Alexander*, *Ib.* 394;

Schieffelin v. *Stewart*, *Ib.* 620; *Brown* v. *Rickets*, 4 *Johns. C. R.* 303; *Everson* v. *Tappen*, 5 *Ib.* 497; *Hawley* v. *Mancius*, 7 *Ib.* 174; *Holridge* v. *Gillespie*, 2 *Ib.* 30; *Mathews* v. *Dragaud*, 3 *Dess.* 25; *Trenton Bank* v. *Woodruff*, 1 *Green's C. R.* 117.

The Virginia property was agreed to be sold to Schuyler for $3200, and the consideration in the deed for the New York property was $4000, for which sum it was afterwards sold by the son and successor of Ackerman. Ackerman assumed and paid the $2000 and the interest and a judgment, amounting in all to $2105, and also some large amounts for repairs; whether the $400 mortgage had been previously paid off, or was subsequently paid off by Ackerman, does not appear. He also and his successor received some $3000 or more for rents of the New York property. The aggregate payments by Mr. Ackerman from his own funds, on the purchase money and on the encumbrances thereon, must be Mr. Ackerman's proportion of the $4000, for which the property was sold, and the residue of the said sum after deducting such payments must belong to the trust fund; and the net aggregate amount of the annual rents of the New York property included in the exchange, after deducting all necessary and proper expenses paid for putting and keeping said property in repair, payments for taxes, and ground rents if any, and any other proper and necessary expenses paid in respect to said property, should be the amount to be divided between the personal representatives of Ackerman, and the trust fund for Blauvelt and his creditors in the same proportions as the $4000 is directed to be divided. The amount for which the property was sold to Whitaker is also to be included in the trust fund; and also there should be added thereto any moneys which may be found due to the assignee from the sale of any wood, lumber, rails, charcoal, or other personal property, on the Russell property at the time of the assignment, or which was afterwards cut or manufactured thereon; and also the proceeds of any debts due to Blauvelt or his assignee, that came to the hands of

the said assignee, or which might, with proper diligence, have come to his hands. Interest to be calculated on either side or not, as the master shall consider equitable and just.

Without particularly examining the numerous exceptions taken to the master's report, which report is in a great measure based on the master's views in regard to the Virginia and New York properties; and as there is no account whatever of the wood, timber, rails, charcoal, cattle, utensils and other personal property on the Russell tract at the time of the assignment, or of which the assignee became possessed, I see no way of rectifying the matter but by again referring the same to a master to state an account in accordance with the views herein expressed, which is hereby accordingly recommended.

Atwood *vs.* Impson.

1. Where a bill of sale for the machinery, tools and stock of a brick yard, for the nominal consideration of $2500 not paid, a lease of the brick yard for one year, for the nominal consideration of $100, and an agreement, under seal, by which the grantee in the bill of sale and lessee agreed to carry on the brick yard, to furnish, besides the stock specified in the bill of sale, $2000, and if necessary $2500; to furnish all labor necessary to carry on the business, and to employ the grantors at daily wages, fixed; and by which the grantee and lessee was to receive a salary of $2000 per annum and interest on moneys advanced by him, and when he should have received the money due on a mortgage on the property held by him, the cash he should have advanced in the business with interest, and his said salary, or if one of the grantors should pay him those amounts, he was to convey to the grantor the chattels in the bill of sale, and surrender the lease and brick yard; were all executed at the same time;
Held—1. That they must be construed together as forming one agreement. 2. That they did not constitute a mere chattel mortgage, because there was no debt which they were intended to secure. Hence omission to file them, or make a change of possession, did not impair the right of the grantee.

2. Although a bill of sale of chattels to one who agrees to advance capital and the chattels, and carry on business with the capital and chattels, and employ the grantors at fixed wages, may have been intended by the latter

to defraud their creditors, yet if their object was unknown to the grantee, their fraudulent intent will not affect him; nor is it sufficient to make such transfer void, that it does actually hinder and delay creditors, if such was not the object and intent of it.

3. Knowledge by the purchaser that the seller is embarrassed and largely in debt, and that, if no one would buy his goods, his creditors would get their debts out of them, will not affect the validity of the sale, provided the object in purchasing was not to delay or hinder creditors, but only to make a good bargain, or to procure something of which the purchaser was in want.

4. A sale, in making which the object of the debtor is to hinder, delay, or in any way put off his creditors, is void if made to any one having knowledge of such intent; and this knowledge need not be by actual positive information or notice, but will be inferred from the knowledge by the purchaser, of facts and circumstances sufficient to raise such suspicions as should put him on inquiry.

5. A levy by execution on partnership property for the individual debt of a partner, only binds the partner's share of the assets after partnership debts are paid. The proceeds of a sale of chattels of a partnership, levied on under such execution, were therefore applied to pay advances made by one holding a bill of sale which formed part of an agreement that he would carry on the business, made between him and the partners after the levy, in preference to the judgment.

6. The general reputation in the community where a witness is known, as to his habits in respect to telling the truth, is the only test which the law allows as to character. If he is a common liar, he is not to be believed when under oath.

7. Testimony by persons that they have heard charges against a witness, mostly as to his character for other matters beside truth and veracity, and where it appears that such charges were from persons who referred to particular transactions, is not evidence which the law permits to affect the credibility of the witness.

Argued upon bill, answer, replication, and proofs.

Mr. Mitchell and *Mr. Carpenter*, for complainant.

Mr. F. F. Westcott and *Mr. J. T. Nixon*, for defendants.

The bill was filed by the complainant to restrain the sheriff of Cumberland county from selling certain personal property levied on by him by virtue of executions issued against the Impsons, two of the defendants, at the suit of

the other defendants, who were the creditors of the Impsons. The complainant claims to hold the property under a bill of sale, contract, and lease, all bearing even date, executed to him by the Impsons.

1. Although the Impsons are parties defendant, the real and substantial issue is between the complainant, and the creditors of the Impsons. These creditors aver that the conveyances, under color of which the complainant claims, were void, as having been made by and between the complainant and the Impsons, with the intent and purpose to defraud them.

Eli H. Impson, upon being called as a witness, testifies to this, and the circumstances corroborate his testimony. If the evidence is satisfactory, the law is of course clear.

2. The complainant, in his bill, claims that "the bill of sale, lease, and agreement, all bearing even date, are to be taken and considered as one instrument." We accept the case as stated by him, and, interpreting the bill of sale by the agreement, maintain that it was only intended to operate as a pledge to secure the complainant the repayment of moneys, by him to be advanced to the Impsons, and hence simply amounted to a chattel mortgage. None of these papers were ever filed in the clerk's office of the county, and the property remained in the possession of the Impsons after their execution the same as before; they were therefore void, as against these creditors, under the act respecting chattel mortgages. *Nix. Dig.* 528.

3. Two months prior to the time of the execution of the bill of sale, executions against Eli H. Impson, at the suit of Shreve and De Hart, two of these creditors, had been placed in the hands of the sheriff of Cumberland county, who immediately levied upon almost all of the goods mentioned in the bill of sale. Although the property so levied on was the partnership property of Eli and John Impson, yet the interest of Eli was bound by the levy, and he was incapable of transferring it to the complainant by the bill of sale. 1

Parsons on Con. 176–179; *Nix. Dig., title Execution,* 248, § 3; *Cole* v. *Davis,* 1 *Lord Raym.* 724; *Lloyd* v. *Wyckoff,* 6 *Halst.* 218; *Caldwell* v. *Fifield,* 4 *Zab.* 150.

The Chancellor.

The complainant's bill is to foreclose a mortgage, and also to restrain the sheriff of Cumberland from selling as the property of the Impsons, personal property claimed by the complainant, but which the sheriff had levied on, upon five executions in his hands in favor of five other defendants. The mortgage has been paid off and satisfied since the suit was commenced, and the only controversy is now between the complainant and the plaintiffs in the five executions. The complainant claims the property by virtue of a bill of sale from Eli H. Impson and John Impson, to whom it belonged, as partners under the name of E. H. and J. Impson; this bill of sale was executed, and deed dated, February 22d, 1867, and is a sealed instrument. Two of the defendants claim upon judgments against Eli H. Impson, on which executions were issued and levied upon partnership property, in December, 1866. Two claim under judgments in June, 1867, against both partners, and one under a judgment entered about the same time against Eli H. Impson.

The creditors contest the validity of the bill of sale, on two grounds—First. That it is merely a mortgage, and that possession was not delivered immediately and the mortgage was not filed, and therefore is void against creditors. Second. That the sale was made for the purpose of delaying the creditors of the Impsons, and therefore as against them is void.

E. H. and J. Impson were brick manufacturers, at Vineland, in Cumberland county. On the 22d of February, 1867, they executed a bill of sale of all their machinery, tools, and stock to the complainant, for the nominal consideration of $2500, which was not paid. On the same day, they, with the wife of E. H. Impson who owned the land, made a lease of the brick yard to complainant for one year, from March

4th, 1867, for the nominal consideration of $100. On the same day, a written agreement under seal was made between the complainant and E. H. and J. Impson, reciting the lease and bill of sale, by which the complainant agreed to carry on the brick making, and run the yard in his own name, and to advance besides the chattels in the bill of sale, $2000, and if necessary $2500 to carry it on, and to furnish all labor and materials necessary for the successful prosecution of the business, to employ E. H. Impson as foreman, at the wages of $2.25 per day, and John Impson as workman, at $2 per day; that complainant should receive $2000 per annum, salary, and lawful interest on all money advanced by him. And when complainant should have received from said business the amount due on a mortgage held by him on the property, (which is the mortgage above mentioned as paid off,) the cash he should advance in said business with lawful interest, and his salary at the rate stated, or if Eli H. Impson should at any time pay him those amounts, the complainant was to convey to E. H. Impson, the chattels in the bill of sale, and surrender the lease and brick yard to him.

These three documents were drawn to carry out an agreement made between the parties, and were executed at the same time, and therefore must be together construed as forming one agreement. It is clear that they do not constitute a mere chattel mortgage. There was no debt or obligation to pay any amount on part of the Impsons; some debt is necessary to constitute a mortgage, even if there is no legal obligation to pay it. The money to be advanced here was not to be advanced to the Impsons, but to carry on the business to which the complainant had bound himself; and although a mortgage may be made to secure future advances, yet these advances must be made to the mortgagee, or in such manner that he or some one would be liable to repay it; else there is no debt to secure. A unilateral contract to re-convey lands or goods upon payment of a sum of money is converted into a mortgage, where the transaction

is merely a loan. But here the contract is not only that he shall advance money for the business, but shall personally carry it on, and provide all materials and labor, and have a salary. The intent was to have not only his money but his care and financial skill, and the credit of his name; a large part of the goods were to be used up and consumed in carrying on the business. The transaction is very different from a mere loan of money, as the complainant not only contributed his labor and skill, but risked his capital in a business in which success was very uncertain, and in which he might have become involved in liabilities far beyond the amount stipulated; liabilities not only for debts, which perhaps he could control, but for negligence or torts by himself and his agents, which in the present state of the law, with the leaning of courts and jurors, is no small matter. Few men would risk their capital and credit in this way, without having personal control as principal or partner. The whole agreement differs entirely from a mortgage or dead unproductive pledge given to a creditor as security for ultimate payment.

The next question is whether this agreement was entered into for the purpose of defrauding creditors, with the knowledge of the complainant. If that was clearly the object of the Impsons, and it was unknown to the complainant, it will not affect him. Nor is it sufficient to make the transfer void, that it does actually hinder and delay creditors, if such was not the object and intent of it. The statute of frauds declares that all grants and conveyances devised and contrived of malice, fraud, covin, collusion, or guile, *to the end, purpose, and intent* to delay, hinder, or defraud creditors, shall be void. Many sales of merchandise, manufactured goods, or farming produce, made in the ordinary course of business, may, and do delay and hinder creditors who could have levied on them if retained a few months longer, yet these are not void. Nor would a knowledge by the purchaser, that the seller is embarrassed and largely in debt, and that if no one would buy his goods, his creditors would get their debts out of them, affect the

validity of the sale, provided the object in purchasing was not to delay or hinder creditors, but only to make a good bargain, or to procure what the purchaser was in want of.

But any sale in which the object of the debtor that prompts and determines him to make it, is to hinder, delay, or in any way put off his creditors, is void, if made to any one having knowledge of such intent; and this knowledge need not be by actual positive information or notice, but will be inferred from the knowledge, by the purchaser, of facts and circumstances sufficient to raise such suspicions as to put him upon inquiry.

The main dispute in this cause is, as to the fact whether such was the object of the conveyance to the complainant, or whether he had knowledge of that object, or of such facts and circumstances from which the law will infer notice of it. On this the testimony is directly contradictory. Eli H. Impson testifies directly that the conveyance was talked over, contrived and devised for that special purpose, between him and the complainant. The complainant distinctly and positively denies it. Both are parties to the suit, and interested in the result; the complainant to secure his money, Impson to pay his debts with it. Complainant's interest is more direct and positive. Both are parties to the alleged fraud. The complainant has both interest and reputation at stake, impelling him to deny it. Impson, by testifying to it, fixes himself with infamy, and impairs his credit as a witness. It would be dangerous to allow a solemn written instrument to be overthrown for fraud, by the unsupported evidence of a participator in that fraud. Criminal courts seldom permit a defendant to be convicted by the unsupported evidence of a participator in the crime If the complainant, when competent, had not been sworn to contradict him, that fact would have supported the evidence strongly. He has not that support; his evidence stands alone, unsupported by any one, and contradicted by the complainant. The papers under his hand and seal are to be overcome, and the burden of proof is upon the defendants. In such case, even if the credibility of the complainant had been destroyed

by legal and convincing proof, as to his general character for truth and veracity, it would be difficult to found a decree on such evidence. It would not be difficult, if corroborated by surrounding circumstances, but here it is not.

But the proof of character is both meagre and not such as the law requires. No one witness swears that he knows his general character for truth and veracity. They have heard something against him, mostly as to his character for other matters, beside truth and veracity, and evidently have heard them from persons who referred to particular transactions. This is not the evidence which the law permits, or should permit, to affect the credibility of a witness. With many, telling the truth is a habit and a principle which they adhere to always, though they may indulge in drinking, swearing, gambling, roystering, or making close bargains. With others, lying is the habit or principle, and if elevated to be senators or legislators, or made church members or deacons, it does not always reform them. The object of the law is to show the character of the witness as to telling the truth; general reputation in the community where he is known, is the test and the only test which the law allows as to character. If he is a common liar, he is not to be believed when under oath.

The story of Atwood about the first loan is an improbable one. He gave up good government securities yielding 7.30 per cent. interest for a six per cent. loan, secured by a second mortgage on doubtful property, with unreliable collaterals; it would impair my confidence in his veracity, if he was not supported by a respectable witness who contradicts Impson, and by the fact that the defence to the mortgage was abandoned.

If Atwood's character is not affected, then as the burden of proof is upon the defendants, the fraud is not sufficiently proved. But E. M. Turner, the conveyancer, who drew the papers, and in whose office the fraud was concocted, according to Impson, supports Atwood. His office is a room fourteen feet square, and the parties were talking in an ordinary

tone of voice, and Turner was present at the time, and joined in some parts of the conversation. He did not give his constant attention and many things may have escaped him, but it is hardly credible that he would not have heard and recollected, a deliberately devised plan to baffle creditors, discussed in the manner that this was, according to Impson. But this is not all. Turner swears positively, that the complainant inquired of Impson as to their debts, and whether if he went into the business with them, there would be creditors to interfere, and Impson answered that their debts were small, within $300 or $400, small matters. This accords with Atwood's testimony, and if true is entirely inconsistent with the story of Impson, upon which alone the design to defraud creditors rests.

The sale to the complainant must then be held valid against the subsequent creditors of the firm. But the creditors who had obtained judgments against E. H. Impson before the sale, had levied upon some of the property. At the sheriff's sale, the whole amount of sales above the price of the brick which the complainant had manufactured, was $468.66. If this had all been proceeds of the property in the bill of sale which had been levied on, as Eli only owned one seventh, the share for his creditors would only be $66.66. But a levy on partnership property for the individual debt of a partner, only binds his share of the profits after partnership debts are paid, and partnership debts for double the amount of these proceeds are shown by judgments. Besides it does not appear what property was sold, at the sheriff's sale; some of that included in the levies was not sold. The levies are very imperfect, and are not sufficient to bind anything but the five articles enumerated in the inventory. Even did not the partnership debts, to which this property must be appropriated, swallow it up, there is no sufficient proof on which any part of this money can be decreed to be paid to the plaintiffs in these two judgments of 1866.

The money in the sheriff's hands is less than the sum advanced by the complainant, and must be paid to him.

CASES

ADJUDGED IN

THE COURT OF CHANCERY

OF THE

STATE OF NEW JERSEY.

OCTOBER TERM, 1869.

The National Bank of the Metropolis *vs.* Sprague and others.

1. A sheriff or master charged with the conduct of a judicial sale, has a considerable latitude of discretion in prescribing such terms of sale as will exclude puffers and fraudulent bidders, and secure the confidence of real purchasers in offering their bids.

2. The sale by a master of an extensive hotel at a summer watering place, of large value, will not be set aside, because a bidder was required, before his bid was accepted, to deposit $5000, that being less than the ten per cent. required to be paid by the purchaser—the property being so situate as to attract bidders from a distance, whose character and solvency would be unknown, and the requirement being justified by the fact that a sale of the property on a previous day was prevented by the inability and refusal of the bidder to whom it was struck off to comply with the conditions; nor because, at the adjourned sale, the price realized was $97,500, the bid at the first sale at which it was struck off having been $150,000, it appearing that some of the bidders at the first sale, including the one to whom the property was struck off, were puffers, and unable to pay the ten per cent. to be paid down, and that one, who, if he was a *bona fide* bidder at $130,000 at the first sale, and could have complied, did not bid at the second sale.

3. The employment of puffers by an owner of property offered for sale at auction; or, in the case of a judicial sale, by creditors, in whose behalf property is offered, for the purpose of increasing the price by fictitious bids,

is a fraud upon honest bidders; and a buyer at such a sale may be relieved from his purchase.

4. It seems that the fact of a puffer having bid at the sale will not avoid the sale, if, after the bid of the puffer, there is a bid by a real purchaser before the bid at which the property is knocked down; but that in all cases where the bid next preceding is that of a puffer, the sale is voidable by the purchaser. *Query.* Whether it would not be more just, in all cases where sham bidders are employed by those interested to enhance the price, to hold that this is a fraud upon purchasers, and that the sale is void.

5. When a bidder, at a master's sale, declares to the master that he is not prepared to comply with the terms of sale, it is not improper for the master to refuse his application for leave to withdraw his bid, and to direct the property to be struck off to him, and thereby to compel him to announce openly that he cannot comply.

6. It is not unlawful for persons who wish to make a joint purchase of property about to be offered at auction, to agree together that they will authorize one person to bid for it upon their joint account.

7. It is illegal for persons intending to purchase at auction, to combine not to bid against each other; but the rule is confined to cases where there is an agreement not to bid, and does not extend to cases where several persons join to make a purchase for their common benefit, without an agreement not to compete, or to a case where several creditors, no one of whom would be willing to purchase a property of very large value, unite to purchase.

8. The fact that an agreement to make a joint purchase may indirectly operate to prevent the parties from competing, is not enough to render the transaction unlawful; to have that effect it must appear that the object of making the agreement was to avoid competition.

9. When personal property, such as the furniture of a hotel, is to be sold by a receiver, under a decree of this court, the question whether it shall be sold in bulk or by parcels, is within the discretion of the officer. If his discretion was fairly exercised, the sale will not be set aside because the court may think that a better price would have been realized by a different mode.

10. At a judicial sale, where the value of the articles, or a considerable part of it, does not consist in their constituting one establishment, and where there would be purchasers to bid on them separately, the general rule is to sell them separately. But where their value, as constituting a whole establishment, is greater than when separated, and where the articles, when separated, would not excite competition, it is more advantageous to sell as a whole.

11. A sale by a receiver, of the furniture of a hotel, immediately after a sale of the land and hotel thereon, made in the fair exercise of the receiver's discretion, ought not to be set aside because the furniture was not on view at the time of the sale, but was locked in the rooms of the hotel, it

not appearing that any one who desired to inspect it before the sale was refused leave; nor because a printed catalogue was not furnished to bidders; nor because a brief time was set for the removal of the property by the buyer, it appearing that a necessity existed for a prompt delivery of possession of the building to the purchaser of that.

This matter came up on petition of the complainant to set aside the sale of the real estate sold by the master, by virtue of a *fieri facias* directed to him on a decree of foreclosure, and also to set aside the sale of the personal property of the defendants, Sprague and Stokes, sold by the receiver in this cause, pursuant to an order of this court. A rule to show cause was granted, and depositions were taken on both sides, in pursuance of the directions in the rule.

Mr. T. N. McCarter, for complainant.

Mr. F. T. Frelinghuysen, for defendants and purchaser.

The Chancellor.

The complainant was a judgment creditor of C. C. Sprague, by the decree in this cause adjudged to be of the firm of Sprague & Stokes, who were the owners of the Continental Hotel, at Long Branch, and the furniture in it. Other suits brought to foreclose mortgages given by Sprague & Stokes, some upon the real estate and others on the furniture, which were pending in this court, were, by order of the court, consolidated with the suit of the complainant.

On the hearing of the consolidated suits, the mortgages on the real and personal estate, and the judgments on lien claims, and other judgments, were adjudged to have priority in the order specified in the decree, over the judgment of the complainant; that was held to bind only the interest of Sprague in the partnership property, which is only one half the surplus after the debts of the partnership should be paid and the other debts being debts of the firm, were adjudged to have precedence.

The master, who was also the receiver in the suit, advertised the sale of the real and personal property to be held on the premises on the 18th day of May, 1869, and then offered the real estate for sale. It was bid up to $150,000, by T. M. Davis, a counselor-at-law, of the state of New York, who had acted as the counsel of the complainant, and was attending the sale as the agent of the complainant. The real estate was started at a did of $100,000, and run up by bids to $150,000. After $125,000 the bids were an increase of $5000 at each bid; S. Laird bid $130,000; some one not known bid $135,000; Davis then bid $140,000; some one not known then bid $145,000, and then Davis bid $150,000. Finding that the party against whom he had been bidding did not intend to bid more, Davis, before the property was struck off, told the master that he was not prepared to comply with the terms of sale, and requested to have his bid withdrawn. This the master, upon consultation with such of the creditors as were present, refused to permit him to do. The crier struck off the property to Davis at his bid, and he refused to comply with the terms of sale, or to acknowledge the purchase. The master then again put up the property for sale, but added to the conditions a requisition that each bidder should deposit with him $5000 in cash, before his bid would be received, which at the close of the sale would be taken as part of the ten per cent. required in cash if the property should be sold to him, and if not, would be returned to him. Alexander M. White bid $91,000, and offered his check on some bank for $5000 as the deposit. This the master, not knowing the responsibility of White, refused to receive. Upon his remonstrating, one of the creditors remarked as evidence of his pecuniary responsibility, that he had not paid up his board bill for the previous summer. Harsh words and blows ensued between White and this creditor, and a general confusion arose, which induced the master to adjourn the sale to May 26th; this he did with a notice that he would require the same deposit for receiving a bid as he had exacted. On the 26th of

May the property was put up for sale, and struck off and sold for $97,500, to Andrew Kirkpatrick, as the agent for a large number of the creditors who had agreed to bid for it. Two persons were there who testify that they came to bid for the property, and would have bid a larger amount, if their bids would have been received without the deposit of the $5000. Neither of them had with them any money to make that deposit, or to pay the ten per cent. required to be paid upon the property being struck off. One testifies that he was authorized to draw for the amount upon his principal, but refuses to disclose the name of the principal, or whether he was present at the sale. The other says he was prepared to pay the amount at the close of the sale, by having blank checks in his pocket upon a bank in Philadelphia, in which he had no funds and never had an account, but in which he expected the funds would be by the time the master could get the check there.

The grounds on which the application to set aside this sale was placed, were first, that the unusual terms imposed by the master in exacting the $5000 deposit, deterred bidders, and caused a sacrifice of the property; and second, that the combination of the creditors to purchase it together, was against the policy of the law, as preventing the competition which would have ensued from bidding separately.

The personal property, which consisted of the furniture of the hotel, was sold in bulk for $33,000. The grounds for setting aside that sale were first, because it was sold in bulk and not in parcels, or by the single article; second, because the articles were not at the sale exposed to view so that purchasers could examine them, but were kept in the rooms where they belonged, and no printed catalogue was furnished to purchasers; and third, because the ten days allowed for removal was too short a time to accomplish the removal.

First, as to the sale of the lands: a sheriff or master may adopt such stringent or unusual terms of sale, as may injure

the sale and prevent the fair competition necessary to an auction sale. But within these limits he must exercise his own discretion as to the terms; these must necessarily vary according to the circumstances of the case. In this case, the hardship complained of was the exacting of a deposit of $5000 from each purchaser as a condition of his bid. This is no doubt an unusual condition; it should not be exacted, unless in the opinion of the officer it is necessary or expedient to secure a fair sale, and the confidence of real purchasers in offering their bids.

This was a large property worth from $100,000 to $200,000, which all agree was required to be sold in one parcel. It was a large hotel at a summer resort, which is of no value except for two or three months in the year, and of hazardous value for any one not qualified to manage it by keeping a hotel. The amount required for the purchase was beyond the means of any one except the most wealthy, and of almost every one who would be inclined to invest in such property as this; scarcely any person or combination of persons in the immediate neighborhood or known to the master, could be expected to purchase. The purchasers would naturally be capitalists from the large cities, or hotel keepers by occupation, attracted by the advertisement and situation of the property. In such case the officer is necessarily bound to take greater precaution to insure the performance of the conditions, than in the sale of small farms or tracts which many are able to purchase, and where the purchasers are for the most part well known residents. The first terms of the sale on the 18th of May, were not unusual, except that the time given for the completion of the payment was very properly extended to an unusual period. The property at the first sale would probably have brought a much larger price than it eventually sold for, if it had not been for the improper and fraudulent interference of Mr. Davis, the agent of the complainant. I say *probably*, for it is not clear, but that his interference induced Laird, as well as the other bidders, (if there were any besides the creditors represented by

Kirkpatrick,) to bid higher than they would at a fair auction.

Davis, beyond question, had a right to retract his bid at any time before the property was struck off to him. But I am not prepared to say that the master acted improperly in not assenting to the withdrawal, and in directing the crier to knock the property down to him at his bid, and requiring him publicly to refuse to comply with the conditions of sale. Davis had at no time been a *bona fide* bidder; he did not come prepared to comply with the terms of sale, and would, at no stage of the sale, have complied with them. He represented the complainant, who, by the terms of the decree, could only realize anything on the sale by a price beyond that which he was willing to give. In such a sale the officer has no interest; he is not the owner of the property; but the creditors as well as the debtor, are the real owners, for whose benefit the sale is had, and the sale is affected by their fraudulent conduct. At a sale by auction, puffers employed by the owner are a fraud upon the buyers, and they will be relieved from any purchase affected by these false bids. How far the rules of law will extend this avoidance, is not settled by the decisions and authorities. I am much inclined to adopt as the result of the authorities, the view taken by Mr. W. W. Story, in his treatise on Sales, § 482; that the fact of a puffer having bid at a sale, will not avoid the sale, if, after the bid of the puffer, there is a bid by a real purchaser before the bid at which the property is knocked down; but that in all cases where the bid next preceding is that of a puffer, who is bidding to run up the price without any intention to pay, the sale is void. It would, perhaps, have been more just to hold in all cases where sham bidders are employed by those interested, to enhance the price, that it is a fraud upon purchasers, and that such sale is void. The proper plan to save the sacrifice of the property in sales not judicial, is, that the owner should reserve the right to make one bid, or should put it up at the lowest price at which he is willing to sell; then it is a fair

auction, though perhaps few would be willing to bid. But if the owner or those interested in the sale should announce that puffers for them would bid in the guise of real bidders, no one at all would bid.

If what was done in this case by Davis stealthily and in disguise had been announced or known, that is if he had proclaimed that he was bidding on the property to run up the price only, not a bid would have been offered in competition with him. Every one would have denounced the fraud, and retired. Whether it is regarded by law as a fraud or not, it is a moral fraud, and a deception upon *all* who bid at an auction sale in the belief that it is what it pretends to be, a sale by competition among real purchasers. And in this case the master could not with due regard to principle, after Davis disclosed to him that he was a mere puffer, and his bids a sham, allow the sale to proceed on the bids already given without exposing the fraud of Davis to the other bidders; and it seems to me that this was best done by refusing to accede to the private request made by him to allow his bid to be withdrawn, and by compelling Davis openly to refuse to comply with the terms of sale. It was his duty not to conceal from the purchasers the fraud practised to the full extent to which it had come to his knowledge. Davis' conduct is not palliated in my view, by the fact that he had learned on a conference with the creditors, who concluded to purchase, to which he was admitted, that they were willing to bid $175,000 for this property and the furniture, or for this property alone, as he mistook their determination to do. Every purchaser limits himself in the price to which he will bid at a fair auction, but may not therefore be compelled to bid that price by fraudulent and sham bidding. In the city of New York, these mock auctions have become as notorious as shop-lifting and pocket picking and other practices of the kind, and the way in which the unwary are robbed, is the simple device of false bidders or puffers of the kind we find at this sale.

The master had reason after this avowal of Davis, to

adopt some means to prevent sham bidding, and to assure purchasers who were willing to bid at a fair auction, but not otherwise. He adopted the plan of requiring each bidder to deposit $5000 as a guaranty of the good faith of his bid, and I am not prepared to say that it was an improper exercise of his discretion. I am satisfied that it was necessary to do something to give confidence, and to enable the sale to go on; and it is not easy to suggest a better plan. It could not prevent any one from bidding on account of not having the funds. No one could have bid unless prepared within a few minutes to put up a larger sum, that is ten per cent. on the sale, and this was to be taken as part of that sum, and was not in addition to it. It was a true test of the *bona fides* of a bid. One who was not able to carry out his bid, could not, and one who was not willing would not comply with it; all others both could and would. And the idea that a purchaser would be deterred by the apprehension that the master might not return the money at the close of the sale, seems to me to be too far strained to be entertained; the like reason, to a greater extent, would hold against the payment of the ten per cent. I do not think the condition as uncalled for under the circumstances of this case; and besides it does not appear or seem probable that the condition in any way injured the sale. No one was deterred or prevented from bidding, who would have bid without it. White, who offered to bid on the 11th of May, does not appear to have been able or willing to purchase; there is no evidence to that effect. He was in the same interest as the complainant who was represented there by Davis. It appears by the evidence in the cause, that he is the endorser on the notes for Sprague, for which the complainant obtained judgment, and has an interest in the payment of them by Sprague. He either could have put up the $5000 deposit, or could not have paid the ten per cent. His declining to put up the deposit is persuasive proof that he could not pay even that; and his offering his own check on a distant bank, to an officer who was a stranger to him and his

credit, with nothing to assure the officer of the availability of the check or its drawer, except his own affirmation that it was good, and his subsequent conduct, does not weaken the impression with regard to him.

I think no one, after reading their depositions, can for a moment suppose that either Hall or Borneau were in any way *bona fide* bidders or purchasers. If they had intended to purchase, they were not prepared to pay the ten per cent., and could not have purchased; so that they could not have been prevented from purchasing, but only from bidding, by the requisition complained of.

There is besides no proof whatever in the case that any purchaser, able to pay, would have given more for the property. S. Laird is the only name of a bidder given who bid more for it. If he was a *bona fide* bidder he was prepared to pay $13,000, and was not deterred by the requisition of $5000. He could have bid at the second sale, but did not. If a *bona fide* bidder, he would seem to have been driven off by the exposure of the conduct of Davis, and not by the requirement of the master. I, therefore, see nothing in this condition required by the master, that should invalidate the sale.

The other objection is, that the creditors who purchased, by combining to bid together and to purchase for their joint account, contravened thereby the policy of the law, which holds any contract to prevent competition at auction sales illegal, and as such to avoid all purchases made under it.

There is no doubt that it is illegal for two purchasers, or intended purchasers at an auction sale, to combine not to bid against each other, and to divide in any way the profits of purchases made under such an agreement. But all the authorities and decisions in this matter which have been brought to my notice are confined to cases in which there is an agreement between the parties not to bid or enter into competition to bid against each other, and where this agreement is the foundation of the combination to purchase for their common benefit. And the principle upon which the

rule is based would apply only to such cases, and not to cases where parties joined to make a purchase for their common benefit without an agreement not to compete, although the effect of such joint purchase might be to prevent competition. The members of a firm may unquestionably agree, that in a purchase to be made at auction for the firm, only one shall bid, and the others shall abstain, though present at the sale. So if two country merchants, in the same village, should agree that one should attend an auction sale of flour in a distant city, and should purchase two hundred barrels to be divided between them, it would not be illegal, though the effect might be that instead of each bidding in competition with the other for one hundred barrels, the purchase would be made with less competition and at a lower price. Or if at an auction sale of sugars by the hogshead, two persons, neither of whom wanted to purchase or would purchase a whole cask, were to agree that one should purchase for the common benefit, such arrangement is not against public policy, for, instead of preventing competition, it brings in a bidder who would not otherwise be one. To make such agreement illegal, it is necessary that there should be an agreement not to compete, and that the object of making the agreement should be to avoid competition; it is not sufficient that such is the effect of the agreement.

In this case it does not appear that any one of the creditors who agreed to purchase for their common benefit, would have been willing or was able to purchase on his own account. It is not probable that any creditor whose debt was only a few thousand dollars, would involve himself in the purchase of this property, at any price approaching its value, for the purpose of securing his debt. Had they, or any other persons who had contemplated purchasing the property, combined to purchase it on joint account for the purpose of avoiding the consequences of competition, the case would have been within the rule. And it seems to me that creditors in a case like this, should be permitted to unite, because it is calculated to enhance the price, and not

to injure the sale. It brings to the sale a powerful bidder, who is interested in the price being raised to all other bidders. There is no decision that extends the rule to such a case as this, and, in my opinion, it is not within the principle on which the rule is founded, and there is no reason to disturb the sale on this ground.

As to the personal property, it is a matter to be left to the discretion of the receiver whether the sale should be made in bulk or by parcels; in some cases and under some circumstances one way would be most advisable, which in others would be ruinous. In this case, the discretion entrusted to the receiver has been in good faith exercised by him, and the sale ought not to be set aside because this court might differ from him in opinion as to which was, in this particular case, the best mode of selling. Few large sales take place in which there is not room for a difference of opinion as to some part of the proceedings; and it would have a disastrous effect upon judicial sales, if their validity was made to depend upon every tribunal which has the power of review, agreeing with the officer in the exercise of that discretion. There is no rule of law which requires that each article of personal property should in all cases be sold separately; where the value of the articles, or a considerable part of it, does not consist in their constituting one establishment, and where there would be purchasers to bid on them separately, the general rule is to sell them separately; but where their value, as constituting a whole establishment, is greater than when separated, and where the articles, when separated, would not excite competition, it is more advantageous to sell as a whole. I am inclined to think, both from the evidence and the result of the sale, that the course taken by the receiver in this case was wisest. I do not think that there would have been at that place sufficient competition for the articles separately to have insured a good sale. The competition between the actual purchasers and other bidders who bid with a view to disposing of the articles at a profit, I have no doubt was a better guar-

anty of a fair price. The depositions of several persons present, that in their *opinion* the sale would have been better if by parcels, is no proof that it would be so. It would be strange if a number of witnesses could not be found who, on a nice question like this, did not differ from the receiver. But there is nothing in the facts or reasons given by these witnesses to incline me to coincide with them.

As to the furniture being in the house, and not in view at the time of the actual sale, it is of no consequence. It would have been folly to have torn up the furniture and put it in one heap upon the lawn, which is the only way in which it could have been all placed in view at once. In cases of a sale like this, all real purchasers will examine the stock of furniture before the sale, or day of sale. No one could do it at that time, and any one alleging that he wanted to examine it for that purpose, would have been permitted to inspect it. The doors were properly closed at and just before the time of sale to prevent the crowd from going everywhere through an establishment so large that guards could not have been stationed in each part. And it does not appear that any one who asked for permission to inspect with a view to purchase was excluded.

A printed inventory or catalogue might, and perhaps would have been an advantage in such a sale; but a sale fairly made to a *bona fide* purchaser, who has paid the purchase money, will not be set aside, because it appears that something could have been done that was not done, which would probably have aided the sale. Under such rule no judicial sale would stand.

As to the objection that ten days was not sufficient time to remove the property from the premises, I do not think it true. It would, no doubt, have been inconvenient, and would have required great activity to remove the property in that time. But it was necessary that the hotel should be delivered to the purchaser in a short time; any considerable delay would have greatly injured the sale. And the receiver had no power to keep from the purchaser of the hotel at the

master's sale, the possession of the building for the purpose of storing these goods, unless the right was reserved at the master's sale; this it was not advisable to do.

I do not see, in the sale by the receiver, any violation of any rule or requirement of law. Nor is there anything in the proof to satisfy me that if he had pursued a different course, the sale would have produced larger prices; much less is there any clear or gross mistake in the exercise of his discretion, such as would be sufficient to set aside the sale of the personal property. Both applications are denied.

SIEGHORTNER *vs.* WEISSENBORN.

1. In suits between partners to dissolve a partnership, when the facts established are such as would, upon the final hearing, entitle the complainant to a decree of dissolution, a receiver will in general be appointed, and the defendant enjoined from disposing of or meddling with the partnership property. The injunction follows the appointment of a receiver, almost as a matter of course.

2. Courts of equity will, for sufficient cause, dissolve a partnership before the expiration of the term for which it was entered into; and it is a sufficient cause for dissolution, that it clearly appears that the business for which the partnership was formed is impracticable, or cannot be carried on except at a loss. The object of all commercial partnership is *profit*, and when that cannot be obtained, the object fails, and the partnership should be terminated.

3. The partnership will also be dissolved when all confidence between the partners has been destroyed, so that they cannot proceed together in prosecuting the business for which it was formed. And this result follows, not only when such want of confidence is occasioned by the misconduct or gross mismanagement of the partner against whom the dissolution is sought, but when such want of confidence and distrust has arisen from other circumstances, provided it has become such as cannot probably be overcome, and was not occasioned by the willful misconduct of the complainant.

4. Where one partner has advanced to the firm, by way of loan, moneys beyond the capital which he agreed to contribute, he is a creditor of the firm to the amount so advanced; and as he has no remedy at law, he is entitled to come into equity for relief, and to have his loan repaid, and if

the firm is insolvent or in failing circumstances, to have a receiver appointed.

The bill, in this case, was filed for a dissolution of the partnership existing between the complainant and the defendant, and prayed for an account, and for an injunction to restrain the defendant from intermeddling with or disposing of the partnership property, and that the effects of the partnership be disposed of, and administered under the direction of the court.

The partnership was entered into for the purpose of manufacturing lead pencils, on the 9th of June, 1868, and was for the term of twenty-five years. The dissolution is sought for on the ground that the business has been unsuccessful, and is not likely to prove successful, but has been carried on at a great loss; that the complainant has advanced $200,000 or $300,000 over the amount of capital required by the articles of partnership, which was $4000; that more capital is needed to proceed with the business, and that the complainant is not willing to furnish more; that the defendant has furnished no capital whatever, except the $4000 stipulated by the articles of a former partnership, which was furnished on certain patents, agreed to be received at that value; that he is now in debt to the firm, and unable to furnish any funds, and that the complainant is not willing to continue the moneys advanced by him any longer in the business.

And on the further ground that the defendant had misconducted himself by removing a large amount of goods from the factory at Hudson City, at night, without the knowledge or consent of the complainant, and storing them in a place in New York, unknown to the complainant; and also by contracting a debt of $5000, for black lead purchased by him without the knowledge of the complainant, at a time when it was not needed for the business, and when he knew that the firm had no funds to pay for it; that a suit was brought for this black lead, which was never delivered at the factory,

or at the place of business of the firm in New York; the process was served on the defendant, who resided at Hudson City, when he was in New York, and not served on the complainant, who resided in New York, and who did not know of the purchase or suit until an execution was levied upon the property of the firm in New York; and that the purchase, suit, and levy was by a collusion between the plaintiff in it and the defendant, to injure the complainant.

And on the further ground, that in consequence of a difficulty and disagreement between the complainant and the defendant, arising from the above transaction, and the fact that the complainant caused the defendant to be arrested on a charge of larceny, for the removing of the stock of pencils from the factory at night, the personal relations between them are such that it is impossible to continue the business with success.

The complainant moved for the appointment of a receiver; and the defendant moved to dissolve the injunction, which had been issued according to the prayer of the bill. By agreement of counsel, both motions were argued together. The argument was upon the bill, answer, and depositions taken.

Mr. C. Parker and *Mr. A. Zabriskie,* for the complainant, contended—

1. That in all cases where, if the facts were established, a dissolution would be decreed at the final hearing, the court will grant an injunction, and appoint a receiver. *Birdsall* v. *Colie,* 2 *Stockt.* 63; *Renton* v. *Chaplain,* 1 *Stockt.* 62; *Cox* v. *Peters,* 2 *Beas.* 40; *Goodman* v. *Whitcomb,* 1 *Jac. & W.* 569; *Smith* v. *Jeyes,* 4 *Beav.* 403; *Collyer on Part.,* § 353, and cases in note; *Edwards on Receivers* 307.

2. That courts of equity will dissolve partnerships before the expiration of the term for sufficient reasons; and that one reason is, that the undertaking is impracticable, and cannot be carried on except at a loss. That *profit* is the sole object of such partnership, and when that cannot be realized, the undertaking fails. *Baring* v. *Dix,* 1 *Cox* 213; *Collyer*

on Part., § 291 ; *Pearce* v. *Piper*, 17 *Ves.* 1 ; *Reeves* v. *Parkins*, 2 *Jac. & W.* 390 ; *Story on Part.*, § 290 ; *Parsons on Part.* 467 ; *Jennings* v. *Baddeley*, 3 *Kay & Johns.* 78 ; *Bailey* v. *Ford*, 13 *Sim.* 495. That the facts proved show that the business has not been, and cannot be carried on with profit, and that the loss in the business has been $214,000.

3. That complainant, who has advanced so largely beyond his capital, has a right to say, I want my money back, and will advance no more. And the defendant, who has advanced nothing, but drawn $2500 a year for his support, besides living with his family, rent free, on the partnership premises, has no right to a continuance of this advance at the sole risk of the complainant.

4. That where the mutual confidence between partners is destroyed, and their personal relations are such that they cannot go on with the business together, a dissolution will be decreed. *Baxter* v. *West*, 1 *De G. & Sm.* 173 ; *Harrison* v. *Tennant*, 21 *Beav.* 482 ; *Bishop* v. *Breckles*, *Hoffm. C. R.* 534.

In this case, confidence has been destroyed by the taking away the stock of pencils by night ; by the purchase of the plumbago, and the suit, judgment, and execution all kept from complainant ; and by the arrest and incarceration of the defendant, by the mistaken proceedings of the complainant, not perhaps warranted by the facts.

Mr. Gilchrist, attorney general, and *Mr. A. P. Whitehead*, for the defendant, contended—

1. That this proceeding was a contrivance on part of the complainant to oust the defendant, who is a skillful mechanic and inventor, out of the partnership, at the sacrifice of his patents and secrets of skill, that complainant may purchase the whole at a sacrifice, and continue the business with others. That for this he had threatened, as stated in the answer, that the concern would be sold out in a day or two by the sheriff ; had procured his arrest for larceny ; had set

on foot in the name of one Rickrattes, as stated in the answer and affidavits, a groundless proceeding in bankruptcy in New York; and lastly, had instituted this suit.

2. That a receiver will not be appointed, unless upon such state of facts as would, on final hearing, be ground for dissolution. *Parsons on Part.* 312, 470; *Story on Part.*, §§ 22, 231; *Collyer on Part.*, §§ 344, 353; *Edwards on Receivers* 308; *Egberts* v. *Wood*, 3 *Paige* 517.

3. That there is no misconduct of the defendant to authorize dissolution. Complainant assented to defendant selling or pledging the stock of pencils to raise money, and thus authorized the removal. The purchase of the black lead was for the business, and was required; and the service of process on one defendant is sufficient, by the New York code, section 136, and is the usual practice there; and it was the act of the plaintiff in that suit, or his attorney; and to the suit there was no defence.

4. The disagreement between the parties was, as stated in the bill, caused by the unwarranted arrest of the defendant, and where it is caused by the fault of the complainant, he cannot claim to have the partnership dissolved for it. *Lindley on Part.* 186; *Story on Part.*, § 399, note, § 413; *Collyer on Part.*, § 297; *Edwards on Receivers* 238; *Littlewood* v. *Caldwell*, 11 *Price* 97.

5. That from the case it does not appear that the undertaking is a failure, and no profits made; that it appears that the amount of the sales of pencils, and the value of the property on hand, exceed the whole amount expended, and that the property now on hand exceeds the whole debts of the concern.

6. That the complainant advanced the money which he now claims as a debt as capital, and cannot call for its return. *Lindley on Part.* 464; *Wood* v. *Scoles*, 1 *Ch. Appeals* (*E. L. R.*) 378.

7. The complainant has suppressed in his bill material facts. He did not state that the principal losses were by the globe and card business of the first partnership; and when-

ever an injunction is procured by a suppression of facts, it will be dissolved for that cause. *Drewry on Inj.* 372, and *Supp.* 85; *Endicott* v. *Mathis*, 1 *Stockt.* 110; *Hilton* v. *Granville*, 4 *Beav.* 130; *Sturgeon* v. *Hooker*, 1 *DeGex & Sm.* 484; *Dalglish* v. *Jarvie*, 2 *McN. & Gor.* 231; *Att'y Gen.* v. *Mayor, &c.*, 1 *M. & Cr.* 171.

THE CHANCELLOR.

The principles of law by which the present applications must be determined are settled, and are in the main assented to by the counsel of both parties, and are established by the authorities and cases cited by them.

In suits between partners to dissolve a partnership, a receiver will not be appointed, or an injunction granted or continued to restrain a partner from acting, unless the facts shown are such as would, upon the final hearing, entitle the complainant to a decree of dissolution; and when such facts are established, in general a receiver will be appointed, and the defendant enjoined from disposing of or meddling with the partnership property. The injunction follows the appointment of a receiver, almost as a matter of course. *Birdsall* v. *Colie*, 2 *Stockt.* 63; *Cox* v. *Peters*, 2 *Beas.* 40; *Goodman* v. *Whitcomb*, 1 *Jac. & W.* 569; *Smith* v. *Jeyes*, 4 *Beav.* 503.

Courts of equity will, for sufficient cause, dissolve a partnership before the expiration of the term for which it was entered into. And it is a sufficient cause for dissolution, that it clearly appears that the business for which the partnership was formed is impracticable, or cannot be carried on except at a loss. The object of all commercial partnerships is *profit*, and when that cannot be obtained, the object fails, and the partnership should be terminated. *Baring* v. *Dix*, 1 *Cox* 213; *Jennings* v. *Baddeley*, 3 *Kay & Johns.* 78; *Bailey* v. *Ford*, 13 *Sim.* 495. And this doctrine is adopted and approved by elementary writers of learning. *Collyer on Part.*, § 291; *Story on Part.*, § 290.

The partnership will also be dissolved where all confidence

between the parties has been destroyed, so that they cannot proceed together in prosecuting the business for which it was formed. And this result follows not only when such want of confidence is occasioned by the misconduct or gross mismanagement of the partner against whom the dissolution is sought, but when such want of confidence and distrust has arisen from other circumstances, provided it has become such as cannot probably be overcome. But a partner who, by his own wilful misconduct, has caused such want of confidence, will not be allowed to take advantage of it to procure a dissolution. *Harrison* v. *Tennant*, 21 *Beav.* 482; *Baxter* v. *Welsh*, 1 *DeG. & Sm.* 173; *Lindley on Part.* 185, 186; *Collyer on Part.*, § 297.

In this case a partnership had been entered into on the 9th of February, 1864, between Seighortner, Weissenborn, and Joseph Schedler, for the manufacture of lead pencils and globes. The partnership was for twenty-five years; each partner was to advance $4000 capital; and Seighortner was to receive interest, at the rate of six per cent., for all moneys advanced by him for the business of the firm, beyond the sum of $4000.

On the 9th of April, 1868, the partnership was dissolved by the withdrawal of Schedler, and new articles were entered into by Seighortner and Weissenborn, for the term of twenty-five years from that date. By these they assumed the assets and debts of Schedler, and all the assets and liabilities of the old firm.

They declare that they are indebted to Mrs. Seighortner, the wife of Seighortner, for the total amount of the loans advanced by her as a chattel mortgage on and in the business, and that they will pay her interest thereon at the rate of six per cent.

The articles do not declare what should be the business of the new firm, but it was understood by the partners that it should be the manufacture and sale of lead pencils, exclusively; Schedler, who was a manufacturer of globes and playing cards, which were manufactured by the former firm,

having taken with him as his part of the assets, the tools and materials for making globes and cards.

It satisfactorily appears that the debts to Mrs. Sieghortner, for loans by her, mentioned in the new articles of partnership, were intended to represent the debts of the old firm for the advances made by Sieghortner beyond his $4000 of capital, provided for in the old articles of partnership. Sieghortner had made a will, giving all his property to his wife. He was ignorant both of the rules of law and of all business transactions, and supposed that the effect of this will was to transfer all these debts to his wife.

Sieghortner had advanced to the old firm a large amount of money beyond the $4000 put in as capital, and had withdrawn a very trifling sum. That his advances were large, is not denied by Weissenborn, but the amount is disputed. He claims that his advances amount to $325,000; Weissenborn does not state any amount. I think it satisfactorily appears that on the 1st of October, 1865, they amounted to $109,700, and that they were largely increased before June 9th, 1868.

F. X. Schedler, a partner of Sieghortner in the restaurant business, the firm by which the money was advanced for Sieghortner, testifies that he kept the account both of the advances and receipts, and that on May 1st, 1868, the balance of the advances by Seighortner was $261,999.57, and that from May to November, 1868, they advanced the further sum of $17,723.30, making in all $279,722.87. This seems to me extravagant and improbable, yet it professes to be taken from an accurate account kept at the time.

Yet the account exhibited by Weissenborn, in *Schedule A*, in the evidence, and the items evidently omitted in it, show that the advances of Sieghortner must have been large, on the assumption that he advanced all the capital needed.

The expenditures there stated are $325,911.11. This account does not include advertising, store and office charges, salaries, interest, or the general factory account, which items the complainant's evidence states amounted to $127,950. These are all charges of a kind that must no doubt have

been incurred. Weissenborn estimates the general office charges at $35,000; but this does not include the other charges above mentioned. This, added to the $325,911.11, will make $423,661.11. From this, if we deduct the value of the pencils sent to the store, as estimated in *Schedule A*, $283,933 69, it leaves about $140,000; or if we deduct the actual amount of sales, $205,000, as ascertained from the books of internal revenue, it would leave about $218,000, which must have been advanced by some one. I cannot avoid coming to the conclusion that there has been advanced by Sieghortner, or through him in a way to make him individually responsible for it, at least $200,000 for the use of the firm, which is a debt to him.

In this situation he was unwilling to go on further, on the idea that the firm was losing, and getting further in debt, and that it could not go on without more capital, which he was unwilling, and Weissenborn was unable, to advance. In the early part of December, he told Weissenborn that he was not willing that the concern should go on. Weissenborn says he threatened to put the establishment in the hands of the sheriff, and put them all out; but this threat Sieghortner denies, and there is no witness to turn the scale between them; but it is plain that Sieghortner was dissatisfied, and expressed his dissatisfaction.

In this situation of affairs, Weissenborn, without the knowledge of Sieghortner, purchased of one Patrick Murray, in New York, a quantity of black lead at $5000, on the credit of the firm. This lead was not immediately needed, but was for supply for some time ahead. It was not delivered at the factory at Hudson City, or at the office of the firm in New York. Murray swears he delivered it to Weissenborn, but at what place does not appear; it never came to the possession of Sieghortner. This purchase was on the 5th of December. About the 20th of December, a suit for the price was brought in New York, the summons was served on Weissenborn when he was in the city, of which he gave no notice to Seighortner, who was not served, though a

resident of the city, and who did not know of the purchase or suit until execution was levied upon the property of the firm in New York. Murray offered to take back the lead in satisfaction of the judgment, but to this Weissenborn would not consent unless Sieghortner would convey the whole concern to a stock company, in which they would each have an equal number of shares, as the price of it.

On the 14th of December, 1868, about five o'clock in the evening, Weissenborn went to the factory with Murray, and a truck belonging to Murray, and removed from the factory pencils and unfinished pencils of the value of $10,000, which were taken to Murray's store, in New York, and stored there. This was done without the knowledge or consent of Sieghortner, and no account was left or entered on the books of the factory. Sieghortner, upon hearing this, complained to a justice of the peace, that Weissenborn had stolen the goods, and had him arrested. He further stated, on his sworn complaint, that he had cause to suspect that Weissenborn would return to destroy his property by fire or otherwise.

Weissenborn alleges that he applied to Sieghortner, through Gustavus Weissenborn, his brother, for consent to go on if he could raise $7000 by selling or pledging pencils, and that Sieghortner consented. Gustavus swears to the consent, and Sieghortner denies it, under oath. Weissenborn shows that he went with Patrick Murray to respectable counsel to ask whether he, as partner, had a right to sell the goods of the firm, for the purposes of the partnership, and he was advised that he had such right, and alleges that he removed the goods by virtue of this consent, and under this advice.

Whether the undertaking was a failure, and profit impracticable, is a mere question of fact; and while it is the established doctrine of this court to put an end to the partnership, where it is evident that no profit can be realized from the undertaking, yet the evidence must be clear, and there must be no doubt as to the fact. In this case, there is a conflict in the testimony; the evidence and accounts, on part of

the defendant, seem to show that, as far as the mere manufacture of pencils is concerned, it may be carried on at a profit. These estimates, it is true, omit several branches of expenses that are unavoidable, and so far as the past is concerned, fail to convince me that any profit has been realized out of the manufacture of pencils. On the other hand, the accounts and evidence on the part of the complainant, show a considerable loss in this branch of the business; but the books from which these accounts are taken so far as exhibited, do not seem to be kept in a regular manner, and are not to me satisfactory; yet in some of the principal items, the accounts of the complainant and defendant do not differ very greatly. The defendant alleges that 78,000 gross of pencils were sent to the store, at New York, for sale; the complainant's accounts state that 75,000 gross were sent. The defendant states that $122,000 was expended for labor; the complainant's accounts charge $127,000 wages. The chief discrepancy is in the price of the pencils, and in the amounts charged by complainant for salaries, office, and store charges, taxes, interest, advertising, &c., which are altogether omitted in the defendant's statements. But while by collating these accounts and correcting them by each other, I can with confidence arrive at the conclusion that no profit has as yet been realized from the manufacture of pencils, I am not convinced that no profit could be made if the partners had sufficient capital, and could unite to carry on the manufacture and sale harmoniously, and with economy and energy.

But capital is needed to carry it on, and Weissenborn is unable to advance any, and Sieghortner is unwilling, if not unable, to advance more; and is unwilling to continue the amount which he has advanced, beyond his share of the capital, any longer in the business. If the allegations of the defendant are true, the firm has already lost more than its original capital, and is really insolvent. The original capital was $12,000, of which $4000 was in cash, $4000 in patents of Weissenborn, and $4000 in patterns and ma-

terials for globes furnished by Joseph Schedler. Schedler took his patterns and materials with him when he retired; and the defendant alleges in his answer that $35,000 was lost in the attempt to manufacture globes and cards, and that $30,000 more was lost by the attempt of Sieghortner to hurry the manufacture of pencils, in the absence of Weissenborn, in Europe. Neither of these losses was taken into consideration in my arriving at the conclusion that the manufacture of pencils hitherto, had not realized any profit; and either of these losses by itself is sufficient to sink the whole capital several times over. The real estate of the firm may have increased in value, but it would be contrary to the usual result in such cases if the building and machinery erected or altered to adapt them to this business, could be disposed of without loss, and this would probably, at least, equal any increase in the value of the land.

If these views are correct, and Sieghortner is unwilling to advance more funds, and insists upon being paid the moneys loaned, it is utterly impracticable to go on with the business, whether pencils can be manufactured at a profit or not. Sieghortner has rights as a creditor, besides his rights as a partner; like any other creditor loaning money without any agreement as to time, he has a right at any time to demand payment; he is not bound further to risk his loan in a losing business. This demand being against a firm of which he is a member, cannot be enforced at law, and his only relief is in equity; and a court of equity cannot refuse to give relief, where so clear a right exists, without any remedy at law. I think that for either of these reasons: first, that in the present situation of affairs, the business cannot be carried on, and is therefore impracticable; and, secondly, that the complainant as a creditor is entitled to have his loans to the firm repaid through the interference of this court; a receiver should be appointed.

The other ground urged for the dissolution of the partnership seems to me to be sustained. The confidence between these partners is destroyed in such a manner that

they can never carry on and prosecute the business jointly and harmoniously. This difficulty and want of harmony exists; in point of fact, it was admitted by the counsel of Weissenborn on the argument, and the facts out of which it arises are established by the pleadings and proofs on both sides. And in my opinion, Sieghortner is not wholly or even chiefly in fault in the matters from which this state of affairs arises.

Weissenborn was guilty of gross misconduct and mismanagement in the purchase of the lead in December, 1868. He knew that the concern had met large losses, that the business was not prosperous, that all or almost all the money had been furnished by Sieghortner, and that Sieghortner was uneasy and wanted to get out of the business; yet in this situation of affairs, he involved the firm in a debt of $5000 for an article of which there was no immediate need, which was not delivered to them, and for which there were no funds to pay. He had the legal right to purchase, and make the firm liable. But this purchase, under these circumstances, was a wrong to his partner; and the manner in which it was made and in which the judgment was obtained, must inevitably destroy the confidence of Sieghortner in him; his excuses for his conduct may in the eyes of others palliate it, but can hardly be expected to pacify Sieghortner. And after a full consideration of the evidence on both sides, I cannot entirely free myself from the conviction that the whole affair was got up between Weissenborn and Murray, for a purpose not consistent with his duty to Sieghortner.

In the next place, the removal of the finished and unfinished pencils on the evening of December 14th, and the manner in which it was done, was a wrong, and was gross misconduct. This, again, was done with the aid and in the presence of Murray, in whose store and possession the pencils were left. The excuse is that Sieghortner had told the brother of Weissenborn that he might go on with the business if he could raise $7000 by a pledge or sale of pencils. If we take this as proved, (though there is only the oath of

the brother against the denial of Sieghortner), yet this would not excuse the removal of a mass of pencils finished and unfinished, by night, without the knowledge of Sieghortner, without any memorandum or account left at the factory, or entered on the books, and storing them in some place unknown to Seighortner, when no arrangement had yet been made for sale or advancement on them as a pledge. It is difficult for me to believe that these goods were removed for sale or pledge for the object alleged; and the fact that he and Murray went to counsel for advice as to the legality of the strange movement they were about to make, is no proof of its good faith. These goods were returned to the factory, but not until after this suit was begun. This transaction was sufficient to destroy all confidence by his partner in him.

The arrest of Weissenborn, on the complaint of larceny, of course would destroy all confidence; but this was the act of Sieghortner. The complaint was no doubt wrong, as the transaction has been explained; yet the circumstances under which it was made will go far to excuse, though they may not justify Seighortner. The removal was at night, if not stealthily, at least secretly, and without the knowledge of one of the real owners, and of the one who had the greatest if not the sole interest in the goods; and to a place and for a purpose which were concealed from him. It is not surprising that Seighortner should infer that the object was to appropriate the goods unlawfully, or that he or a justice of the peace, or even the recorder of Hudson city, should conceive that the offence was larceny. If such had been the object, it was larceny morally if not legally. And I am not satisfied that a partner may not be guilty of larceny of the property of his firm, as if he should himself take from the safe of the firm a large amount of money or securities, when he is in debt to the firm, and without consent or knowledge of his partner, stealthily appropriate them to his own use in such way that it could not be known by whom they were taken. To me, the taking of these goods in the manner in which it

was done, appears a greater wrong than the charge of larceny.

I think that a want of confidence exists which is sufficient to dissolve this partnership, and that it is chiefly owing to the improper conduct of the defendant.

A receiver must be appointed, and the injunction continued.*

Campbell *vs.* Dewick and Howland.

1. The provisions of the various statutes governing the collection of taxes in the city of Elizabeth, stated and explained.

2. The act of March 4th, 1863, (*Pamph. L.* 109,) relative to the city of Elizabeth, was an amendment of the charter of March 13th, 1855, (*Pamph. L.* 217,) and did not repeal it except so far as its provisions were inconsistent with it; and a tax sale by virtue of the provisions of the act of 1855, for taxes levied in 1862, and in accordance with those provisions, is not inconsistent with the provisions of the act of 1863, providing for sales of taxes to be levied under it. Such tax was a lien, a right acquired, and the provision for sale was a remedy given, and expressly saved by the reservation clause, section 124, of the act of 1863.

3. An assessed tax in the city of Elizabeth is prior to a mortgage. A tax sale and a conveyance pursuant thereto, under the statutes governing the collection of taxes in that city, made subsequent to a mortgage upon the premises, where six months' notice is not given to the mortgagee, is liable to redemption by him.

4. Upon a foreclosure of the mortgage, the amount paid at a tax sale by one claiming under the tax sale, and interest, will form a lien prior to that of the mortgage. The land will be decreed to be sold free from the lien for taxes, and the purchaser at the tax sale will be paid first.

5. It is not necessary, in order to establish title to lands purchased at a tax sale, conducted by a constable as authorized by statute, to prove that the constable who conducted the sale was properly elected and sworn, and gave bond. The court will take judicial notice of the officers of the state.

6. The statute (*Nix. Dig.* 864,) and supplement (*Pamph. L.* 1869, *p.* 1238,) directing that recitals in a deed given by a public officer shall be *prima facie* evidence of the truth of the facts recited, do not at all affect the title

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* Decree reversed so far as related to appointment of receiver; injunction continued until final hearing upon terms, 6 *C. E. Gr.* 483.

under the deed, but only change the rule of evidence as to the manner of proving the facts required to constitute a valid sale; and it applies where a deed given before the passage of the act is offered in evidence.

This suit was to foreclose a mortgage held by Campbell on lands in the city of Elizabeth, owned by Dewick. Howland was made a defendant as claiming title by tax sales, made for taxes assessed after the giving of the mortgage. Dewick did not answer. Howland answered, setting up two deeds under tax sales, by virtue of which he claimed to hold a title for a term of five hundred years, which was superior to the mortgage of the complainant, and could not be sold to satisfy it. The cause was heard upon bill, answer, and proofs.

Mr. F. B. Chetwood, for complainant.

Mr. Magie, for defendants.

The Chancellor.

The validity of the tax sale depends upon the construction of three acts relating to taxes in Elizabeth, and the effect that each of these acts has upon the other. The act of February 11th, 1847, (*Pamph. L.* 52) made taxes on lands in Elizabeth township a lien upon them, and authorized a sale, by warrant of the town committee to any constable of the township, for the stated term of years bid. It provided that the purchaser should enjoy the same for the term bid as against the owner, and all claiming under him; and that the assessment should be valid as against the lands, notwithstanding any omission or mistake of the name of the real owner in assessing the tax. The first city charter, approved March 13th, 1855, (*Pamph. L.* 217) provided that the act of 1847 should remain in force, substituting the words "mayor, treasurer, and clerk," for "town committee," and the word "city." for "township," and providing that the lands sold might be redeemed within two years by the owner, *mort-*

gagee, or claimant, by payment of the purchase money, and fifteen per cent. interest. The amendment of the charter, of March 4th, 1863, (*Pamph. L.* 109) in section 124, enacted that all acts and parts of acts inconsistent with that act, should be thereby repealed, but that nothing therein contained should be construed so as to destroy, impair, or take away any right or remedy acquired or given by any act thereby repealed, and that all proceedings commenced under such former act should be carried out and completed as though that act had not passed. Section 83 provided that no mortgagee should be divested of his rights in said property, unless six months' notice, in writing, of such sale should have been given to him by the purchaser, but that nothing therein should impair the *lien* created by such sale. By this act it is provided that sales of lands for taxes shall be made by the city treasurer.

The taxes for which these sales were made, were levied in 1862, under the charter of 1855, but the sales were made in 1864, after the charter of 1863 was in force. The charter of 1863 was an amendment to that of 1855, and did not repeal it, except so far as its provisions were inconsistent with it. And a sale by virtue of the provisions of the act of 1855, and in accordance with them, is not inconsistent with the provisions of the act of 1863, providing for sales for taxes *to be* levied under it. Besides, the lien of this tax was a *right acquired*, and the provision for sale under it and the act of 1847 was a *remedy given* by those acts, and therefore are expressly saved by the reservation in the repealing clause. It was lawful for the officers chosen under the amended charter to issue the warrant, and the constable to execute it, as the remedy under the old charter. If there was any doubt that the act of 1847 authorized the sale of the title of the mortgagee, when not named in the assessment, the provision of the act of 1855, that the mortgagee may redeem, puts that doubt at rest. Acts *in pari materia*, or upon the same subject matter, must be construed together as if parts of one act. And there could be no doubt as to

whose estate was intended to be sold by an act which provided that a mortgagee might redeem.

The provisions of the amended charter, requiring six months' notice to a mortgagee, apply to all sales, as well those before the passage of that act as those after it. The words would require that construction, and the justice and equity of these provisions will not allow a court to give any construction that shall restrict or narrow the plain natural meaning of the words. The sale does not take away the rights of the mortgagee, but the lien of the tax on the land is preserved. And this lien is, according to the view above taken, prior to the mortgage. But when the notice has not been given, and there is no proof that it has in this case, the mortgagee has still the right to redeem by paying the purchase money and interest. In equity, in a foreclosure suit like this, the title of a purchaser at a tax sale, when the right of redemption is not cut off, will be considered only as a lien to be discharged out of the proceeds of sale. And when the tax lien is subsequent in time, although prior in right, it will be more consistent with the principles of equity in such proceedings to order the lands to be sold free from the lien for taxes, and that the purchaser at the tax sale be first paid.

It is not necessary, in such case, to prove that the constable who conducted the sale was properly elected and sworn, and gave bond. It is never required in case of a deed by a sheriff. The courts will take notice of the officers of the state.

If it is necessary to prove the existence of the ordinance authorizing the taxes for which this assessment and sale were made, and I am inclined to hold that it is necessary, the recital in the deed is sufficient proof. It recites that "in and by an assessment of taxes, made according to law, to raise the moneys *ordered to be raised* by the city council of said city, in the year 1862, the sum of $7.70 was assessed against Sarah Dewick."

The act for the better security of titles to lands sold by

sheriffs, (*Nix. Dig.* 864,*) and the supplement to it, of April 2d, 1869, (*Pamph. L.* 1238) provides that the recitals in conveyances by sheriffs, or by authority of any public or *municipal* authority, shall be *prima facie* evidence of the truth of the recital. And although these acts are since the sale, they do not at all affect the title itself, but only change the rule of evidence as to the manner of proving the facts required to make a valid sale.

The result arrived at is, that the tax title of the defendant, Howland, as shown by the answer and evidence, is good, but subject to redemption by the complainant; and that the complainant is entitled to have the lands sold, free from the lien, upon paying the purchase money, interest, and costs of Howland, out of the proceeds of sale.

McLaughlin *vs.* McLaughlin and others.

1. The consent by the heirs-at-law, that a widow should take charge of the real estate of her deceased husband and collect the rents, taking such charge, and the appropriation by her of one third of the whole rents to her own use, operate as an equitable assignment of dower to the widow.

2. Where, in such a case, the widow occupied the mansion-house of her deceased husband, upon a bill filed by the heirs for an account of the rents and profits, and a reference to state an account, she was properly charged with the value of the mansion-house from the death of her husband. She was not entitled to occupy the mansion-house until dower was actually assigned, without rent: a virtual assignment had already been made.

3. A widow who claims one third of the rents of the lands of her deceased husband, other than the mansion-house and messuage, must account for the value of the part occupied by her.

4. At law, damages could not be recovered for wrongful detention of dower, if the widow died before dower was assigned, or if she accepted the dower assigned by the heir, or by proceedings in chancery; but the value of the dower, in such cases, is recoverable in equity.

5. But when a widow occupies the whole mansion-house and messuage, the only land out of which dower is claimed, from the death of the husband, she is not entitled to one third of the value, in addition, as damages.

**Rev., p.* 1045, *secs.* 14, 15.

6. Where a widow comes into equity to claim the value of her dower, in a case where such value could not be recovered at law, she will be required to do equity, and will be allowed only to recover the value of the dower detained; that is the value of one third of the whole estate, deducting the value of the part occupied by her.

7. When the estate is ordered to be sold, and the widow agrees to accept a gross sum in lieu of dower, and dies while a part of the estate is still unsold, her estate in that portion is determined by her death.

8. If a widow dies after her election to accept a gross sum in lieu of her dower, and before a report as to the amount to be allowed in gross, the fact of her death does not limit the probable duration of her life to the time of her death, but it may be taken into consideration in estimating the probable duration of her life, especially when her death was from a disease she had previously had, and there is reason to believe that she had never been wholly free from it. Evidence coming to light after such election, which shows that at the time of *election* the life was of *less* value, must be regarded; but not of an injury suffered or disease contracted after the election, which might affect the value.

On exceptions to reports of master as to the account of Abby Ann McLaughlin, deceased, and as to the value of her dower.

Mr. W. A. Lewis, for exceptions filed by complainant.

Mr. Dixon, for exceptions filed by Samuel C. McLaughlin, one of the defendants.

THE CHANCELLOR.

John G. McLaughlin died intestate, May 2d, 1861, seized of a number of houses and lots in Jersey City, in one of which he resided at his death. He left his widow, Abby Ann McLaughlin, and six children, his heirs-at-law. Two of these children were minors at his death. Some of these children were children of his widow, the others were children of his first wife. The widow remained in possession of the mansion-house until her death, on the 20th of August, 1868. Dower was never formally assigned to her. The administration of the personal estate of her husband was granted to her. By tacit consent of all the heirs who were

of age, she assumed the management of the real estate, collected the rents, paid the taxes and repairs, and rented out such parts as it was necessary to rent.

The bill in this case was filed in her lifetime for a partition, and for an account by her of the rents of the estate.

The master reported that a partition could not be made without great injury, and that the property should be sold, and that the dower of the widow should be sold with the lands. The lands were all sold in the life of the widow, and all conveyed except one lot in Green street, which, upon refusal of the purchaser to comply with his contract, was ordered to be re sold, and was re-sold after her death. On the 28th of June, 1868, the widow filed her petition electing to accept a gross sum in lieu of her dower, and an order was made on July 7th, 1868, to refer it to the master to ascertain and compute the value of her dower. She had, in compliance with the prayer of the bill, rendered her account of the rents and profits of the estate, in which she charged five per cent. for collecting them, and claimed one third as due to her in her right as dowress, but did not charge herself with the rent of the mansion-house, and the office on the adjoining lot, which had been occupied as such by her husband, in his lifetime. It was also referred to the master to examine and state her account.

The master made a separate report upon each order of reference to him. In the report upon the order to state the accounts, he charged her with the value of the mansion-house from the death of her husband, or rather from May 1st, the day before his death. To this the complainant, as executrix of her mother, the widow, excepts, claiming that as dower was never assigned, the widow was entitled by virtue of the statute, to remain in possession of the mansion-house and messuage attached, without rent, until dower was assigned.

The master admits the right under the statute, and bases his action on the ground that dower was virtually and equitably assigned to the widow in the whole property by

her taking possession of the whole, with the assent of the heirs, and appropriating one third of the rents of the whole to her own use; and that the provision of the statute which was intended to protect the widow in her estate as dowress, an estate favored at law, against the injustice or delay of the heirs, was not intended to secure to her more than one third of the rents, and more than her due in a case like this, where the heirs left in her hands the whole estate to retain, by her own action, the amount due to her; that assignment of dower requires no particular form, and may, in some cases, be of one third of the tolls of a mill or of the produce of lands, which, if assigned and accepted as dower, should be equivalent to an assignment at law or in equity. To this conclusion of the master I assent. And even without such equitable assignment, I am of opinion that a widow who claims one third of the rents of the lands other than the mansion-house and messuage, must be willing to account for the value of the part occupied by her.

Damages for the detention of dower were not recovered at common law, but only by the statute of Merton; and after that statute the rule was settled by the courts of common law, that if the widow died before the damages for detention were assessed, they could not be recovered. 2 *Bac. Abr.* 395, *title Dower, I; Park on Dower* 309. Nor could damages be recovered, if the widow died before dower was assigned; nor if she accepted the dower assigned by the heir, or by proceedings in chancery. *Park* 310; *Co. Litt.* 33 *a*. But, in such cases, the value of the dower for the time it was wrongfully detained, may be recovered in equity. *Curtis* v. *Curtis*, 2 *Bro. C. C.* 629, 632; *Dormer* v. *Fortescue*, 3 *Atk.* 130; *Park on Dower* 332; *Johnson* v. *Thomas*, 3 *Paige* 377; 2 *Bac. Abr.* 396, *Dower, I; Viner's Abr., Dower S a*, § 20; *Hamilton* v. *Ld. Mohun*, 1 *P. W.* 118.

The courts of law in assessing damages for the detention, allow, as reprises, for the occupation by the widow. In *Walker* v. *Nevil, Leon.* 56, quoted in 2 *Bac. Abr., Dower I, p.* 394, the court reversed the judgment, because the damages

were for eight years, and the widow had occupied for part of the eight years. And in *Woodruff* v. *Brown*, 2 *Harr.* 246, three of the judges in their opinions say, that what had been received by the widow might be deducted from the value. This was approved in *Keeler* v. *Tatnell*, 3 *Zab.* 62. And in the case of *Hopper* v. *Hopper*, 2 *Zab.* 715, although the Court of Errors refused to order the judgment of a previous term to be altered, so as to allow a plea to be added that the defendant had satisfied the demandant for the value of her dower, yet at the inquisition which was taken under the direction of Chief Justice Green, at the Bergen Circuit, the defendant was allowed to prove, as part satisfaction of the value, or in mitigation of the damages, that the demandant had occupied one half the mansion-house from the death of her husband. And it could never be permitted, where the only land out of which dower is claimed is the mansion-house and messuage, that a widow, who had occupied the whole as quarantine from the death of her husband, should recover in addition one third of the value as damages; and yet this would be the result, if the value assessed must be one third of the whole value without regard to occupation by the widow.

And a court of equity, in such case, will not give damages beyond the amount established by law, especially when such damages are inequitable. But, on the other hand, where a widow comes into this court to claim the value of her dower, in a case where such value could not be recovered at law, she will be required to do equity, and will be allowed only to recover the value of the dower detained, that is the value of one third of the whole estate, deducting the value of the part occupied by her. This may be done by allowing her to occupy the mansion-house free of rent, and by giving her out of the residue of the estate so much as will make her part one third of the value of the whole, if anything be required for that end. On both grounds the report of the master must be sustained, and this exception overuled. The claim of the widow is unjust and inequitable. The ex-

cess of one day's rent charged by the master by mere inadvertence, may be corrected without a re-stating of the account.

The next exception to the account is that of Samuel C. McLaughlin and wife; it is to the charge of $150, and interest on it for one year's rent of No. 147, and the upper part of No. 149, Green street. The only evidence as to this is that of Samuel C. McLaughlin himself; he testifies that he had rented of his father both premises for the year ending May 1st, 1861, at the rent of $300; that he continued to occupy them the next year without any new bargain. This usually would be a continuance of the former tenancy at the same rent, and I see nothing in this case to prevent the application of this rule. I am of opinion that this exception must be sustained.

The next exception is by the complainant as executrix and legatee of the widow, to the master's report on the value of her dower.

The report finds that she is not entitled to have a gross sum in lieu of her dower in the Green street lot, which was not sold until after her death. The report is founded on the decision of Chancellor Green, in *Mulford* v. *Hiers*, 2 *Beasley* 13, and is fully sustained by that decision; and I concur entirely with the late Chancellor in the principles upon which that conclusion is based.

Another exception to that report is, to the principle upon which the master estimated the value of the life of the widow, and the gross value of her dower. It was held in the case of *Mulford* v. *Hiers*, above referred to, that when a dowress had, in a partition case, consented to take a gross sum in lieu of her dower, the right to have such sum estimated in proportion to the value of her life at the time of consent, became a vested right, and was not lost by her death before the value was ascertained and settled. That principle is admitted by the master, and is not disputed by the counsel for the heirs. But as she died two months after the election, and before the making of the report, the master

has assumed that the value of her life is settled by its actual duration. This assumption is strictly, and in fact, correct. The actual value of her life was at that election only two months. But this is not the manner in which the value of such a life is, in practice, ascertained in judicial proceedings. Where one is in a state of ordinary good health, and has an average expectancy of life, the value of the life is ascertained by calculation from tables prepared for annuities and life insurances, which give, with great reliability, the gross value of an annuity for a person in ordinary good health, at any given age. In such computation, death by accident, or by disease subsequently contracted, are, on principle, disregarded. It is a risk that forms part of the basis of the computation. But these tables are not a safe guide where a person is not in ordinary good health, and more especially when afflicted with a disease incurable in its nature, and so advanced as to render it probable that death will soon ensue from it. In such case the rule here applied by the master, that the actual duration of the life is the best measure of its probability, is perhaps the correct rule. But this is not such a case. Mrs. McLaughlin had some time before been afflicted, in a mild form, with the disease of which she died, but at the time of her election it had left her, and she was apparently free from it, and had the value of her life been ascertained within a month after her election, with all the evidence that could then have been produced, it might have been adjudged of an average value at her age. But although the fact of her subsequent death, within two months, ought not, in this case, to be taken as the test of the value of her life, yet the fact of a recurrence of the same disease which had previously attacked her in a milder form, and that from its virulence and rapid progress she soon died, is a most important element in judging of the value of the life. It may be with probability inferred, that the tendency to that disease had not been eradicated from her system, and that its lurking seeds only awaited development to make it fatal. Her subsequent fever, and the great and almost unnatural

appetite to which the complainant testifies, may have been and probably were the effect and the indication of the continuance of the malady. Its development may have been started and continued by accidental causes, and its termination caused or hastened by want of skill in medical or surgical treatment; and therefore, even assuming that she was not a healthy person at the time of her election, it does not follow that her actual life is the true legal measure of its value. I am satisfied, from the evidence, that her health was not what may be called ordinary good health, and that her life was not of the average value, at the time of the election. But it is impossible to lay down, with any accuracy, or any approach to accuracy, from the testimony, what ratio her life bore to the average value of life at her age; and I do not think that the opinions or speculations of physicians in this case, would take away much from the uncertainty. In such cases, the life insurance offices generally decline to insure at all; but this court cannot decline to act, and allow only the annual value. The statute requires that some estimate shall be made. I do not feel willing to apply the rule adopted by the master, or to estimate her life at the average value at her age. In this situation, I must adopt some mean; the adoption must be arbitrary, and without any reason that can be assigned with certainty why it should not be a little greater or a little less. Under these circumstances I shall adopt the exact mean between the value of her dower as calculated by the master, and that calculated upon the value of a life of a person at her age in ordinary health.

The errors pointed out in the seventh exception of the complainant to the master's account being mere mistakes in carrying forward figures in the computation, and being admitted by the defendants, will of course be corrected.

The matters contained in both reports must be referred back to the master to be corrected on the principles above stated.*

*Decree reversed, 7 *C. E. Gr.* 505.

PETRICK *vs.* ASHCROFT.

1. In a suit upon a parol agreement, void by the statute of frauds, the complainant is bound by the agreement as stated in the answer.

2. Where, in such a case, it is referred to a master to state an account, the account should be made pursuant to the statement of the answer.

This cause came up on exceptions by the defendant to the report of the master, to whom it was referred to state an account of the amount expended by the complainant for building on the premises mentioned in the bill, and of the amount loaned and advanced to him by the defendant, with interest.

Mr. Ransom, for exceptant.

Mr. J. B. Vredenburgh, for complainant.

THE CHANCELLOR.

For the reasons stated by the master in his report, I concur with him as to the allowance and disallowance of all the items in the accounts of the parties, except in the disallowance of the item of $81.51, paid by the defendant for assessments, which he claimed as advanced by him for the complainant. The master was not satisfied with the evidence produced before him that such assessments were to be paid by the complainant. But the decree to account in this case is founded on the admission in the answer, of a parol agreement for building on these lots, void by the statute of frauds unless admitted by the answer. The answer states as part of that agreement, that the complainant was to pay such assessments, and the complainant is bound by the agreement, as stated in the answer. This item, with interest from the day of payment to the date of the master's report, must be deducted from the balance stated in it to be due to the complainant; with this modification the report is confirmed. All other exceptions are overruled.

Bent *vs.* Smith and Reid.

The direct responsive answer of a defendant as to a fact within his own knowledge, must prevail, unless overcome by more evidence than the oath of one witness.

The hearing of this cause was upon bill, answer, and proofs.

Mr. Gilchrist, attorney-general, for complainants.

Mr. I. W. Scudder, for defendants.

The Chancellor.

The object of the suit is to have the defendant, Smith, declared a trustee for the complainants, of certain property at Fort Lee, in Bergen county, and to compel him to convey to them. The complainants are the heirs-at-law of Richard Bent, deceased. P. Westervelt, in 1848, agreed in writing with Richard Bent, to convey the property to him for $3500, at or before the end of seven years, and that Bent, in the mean time, should occupy it for the annual rent of $232.80, payable half yearly. This contract, and all his interest in the land, Bent, in August, 1849, assigned to the defendant, Smith, who was the son-in-law of Mrs. Bent; the consideration of the assignment was $5. At the same time, Smith leased the property to Bent for one year, at the rent of $240, Bent had, in the mean time, erected an addition to the house, at a cost of about $700.

The complainants allege that at the time of the execution of this assignment, Smith executed and delivered to Bent a writing which is now lost, declaring that the assignment was given in trust for Bent and his family, and agreeing to reassign to him, his heirs or representatives, upon request. Bent died in January, 1851. Smith paid Westervelt $3500, and received a conveyance for the property, in 1852. Smith, in

his answer, denies that the assignment to him was in trust in any way whatever, and denies that he ever executed any writing declaring such trust, and denies that the contract at that time was of any value, or that the property was worth more than the price to be paid for it, and the rent stipulated.

The whole question between the parties is as to the fact of the trust, or rather, the existence of the writing by which it was declared. For, by the statute of frauds, no trust can arise unless it be declared by writing, signed by the party. The execution or existence of such writing is fully and directly denied by Smith, in his answer responsive to the bill, which charges it, and founds the title to relief upon it.

The complainants produce but one witness who testifies as to the execution or existence of that paper; he deposes that he drew it, saw it executed, and signed it as a subscribing witness, and that he made the copy which he produces, from the original, shortly after it was made. The loss of the original, if it ever existed, is sufficiently shown; but no other evidence is given to show that such paper was ever executed, or in any way to support the testimony of this witness. All the complainants claim from the other evidence offered is, that it makes it probable there was some understanding that this assignment was in trust; none to show that there was a written declaration of that trust. The rule in this court is too clear to admit of a question or doubt. The direct responsive answer of a defendant as to a fact within his own knowledge, must prevail, unless overcome by more evidence than the oath of one witness. The complainants' bill must be dismissed.*

*Decree reversed, 7 *C. E. Gr.* 560.

Cleveland and others *vs.* The Citizens Gas Light Company.*

1. Any business, however lawful in itself, which as to those residing in the neighborhood where it is carried on, causes annoyances that materially interfere with the ordinary physical comfort of human existence, is a nuisance that should be restrained.

2. Smoke, noise, and bad odors, even when not injurious to health, cause a discomfort against which the law will protect.

3. To warrant enjoining a trade as a nuisance, on the ground that it produces discomfort to those dwelling in the neighborhood, the discomfort must be physical, and not such as depends upon taste or imagination. Whatever is offensive physically, to the senses, and by such offensiveness makes life uncomfortable, is a nuisance.

4. It is usual and proper, where a building or works are being erected that can only be used for a purpose that is unlawful, to restrain the erection; but when it is not made to appear that the business for which the building is intended cannot possibly be carried on without becoming a nuisance, this court will deny the injunction, and leave the defendant at liberty to proceed with the erection of the building, at the risk of being restrained in the use of it, if a nuisance is ultimately created.

5. The danger of explosion is not adequate cause for enjoining the erection of a gas manufactory, where it is not made to appear that the danger is very great, or that the complainants' buildings are sufficiently near to be seriously endangered by it, should it take place.

6. The fact that a neighborhood to be affected by the odors and offensive smell that will be caused by a business which the defendant is about to establish, and which complainant seeks to enjoin as a nuisance, already contains establishments devoted to noxious or disagreeable trades, is not enough to defeat the right to an injunction, unless such neighborhood has been by their continuance for years so wholly given up to such establishments that the addition of the one contemplated by the defendant will not add sensibly to the discomfort.

7. It appearing from the evidence, upon an application for an injunction to restrain the erection of gas works, that if the process of purifying by lime should be used in the works, it would cause an injury to the complainants, who were owners of dwellings and residents in the immediate neighborhood, by the generation of annoying and offensive vapors and odors, but that the defendants proposed to use other processes which might not so result, the court granted an injunction restraining the defendants from using the lime process, and from manufacturing gas in any way that would produce any annoyance to persons dwelling in the houses of the complainants, by any smoke, gases, or other effluvia or odors from the

*Cited *in Duncan* v. *Hayes*, 7 *C. E. Gr.* 27; *Meigs* v. *Lister*, 8 *C. E. Gr.* 201.

works, but permitted them to erect their buildings and manufacture gas subject to a perpetual injunction, if discomfort should be occasioned thereby. Costs to abide the event of the suit.

This cause came up on the argument of a rule that the defendants show cause why an injunction should not issue to restrain them from erecting or carrying on their gas works at the place on which they had begun to erect them, or in the neighborhood of that place.

The argument was had upon the bill and answer of the gas company, and the affidavits attached to them, and upon depositions taken by both parties, under an order for that purpose.

Mr. Abeel and *Mr. Bradley*, for complainants.

Gas works are, *prima facie*, a nuisance. *Carhart* v. *Auburn Gas Light Co.*, 22 *Barb.* 312, 313.

A disagreeable, though not unhealthy smoke or smell, is a nuisance; insalubrity is not essential. *Rex* v. *White & Ward*, 1 *Burr.* 337; *Bamford* v. *Turnley*, 3 *Best & Smith* 81; *Sampson* v. *Smith*, 8 *Sim.* 272; *Walter* v. *Selfe*, 4 *DeG. & Sm.* 318; *Crump* v. *Lambert*, 3 *Eq. Cas.* (*E. L. R.*) 409; *Davidson* v. *Isham*, 1 *Stockt.* 189; *Wolcott* v. *Melick*, 3 *Stockt.* 207; *Holsman* v. *Bleaching Co.*, 1 *McCarter* 343.

The locality cannot be set up as an excuse for establishing a nuisance. It will not be left to a jury to say whether it is a convenient place. *Crump* v. *Lambert*, 3 *Eq. Cas.* (*E. L. R.*) 413; *Bamford* v. *Turnley*, 3 *Best & Smith* 65; *Tipping* v. *St. Helen's Smelting Co.*, 4 *Best & Smith* 608, 616, 1093.

Other nuisances cannot justify this one. *Attorney-General* v. *Colney Hatch Asylum*, 4 *Ch. Appeals* 146.

Any substantial annoyance will entitle a party to an injunction, notwithstanding great public benefits from the nuisance. Conveniences and inconveniences will not be balanced unless power is given to take and make compensation. *Broadbent*

v. *Imperial Gas Co.*, 3 *Jur.* (*N. S.*) 221; 2 *Jur.* 1132; *Attorney-General* v. *Cambridge Gas Co.*, 6 *Eq. Cas.* 282; 4 *Ch. Appeals* 71.

The fact that the neighborhood is one for residences of expensive character, and pleasant and desirable, is a fact that the court should regard. *Walker* v. *Brewster*, 5 *Eq. Cas.* 27, 34.

A trial at law is not necessary. In any case where a plaintiff could obtain substantial damages at law, he is entitled to an injunction from this court to restrain the nuisance. *Crump* v. *Lambert*, 3 *Eq. Cas.* 413. Lord Romilly: "I do not feel sufficient doubt about the case to grant an issue." *Ibid.* 414.

It is not the duty of the court, nor of the plaintiff, to inquire how the nuisance may be obviated; that is the defendant's own concern. He must be enjoined if a nuisance is proved. *Attorney-General* v. *Colney Hatch Asylum*, 4 *Ch. Appeals* 146.

Mr. McCarter, for defendants, cited

Butler v. *Rogers*, 1 *Stockt.* 487; *Rogers* v. *Danforth*, *Ibid.* 289; *Wolcott* v. *Melick*, 3 *Stockt.* 204; *Grafton* v. *Hilliard*, (in note to Bains *v.* Baker,) *Amb.* 158; *Att'y-Gen.* v. *Sheffield Gas Co.*, 19 *Eng. L. & Eq.* 640; *S. C.*, 3 *DeG., McN. & G.* 304; *Dubois* v. *Budlong*, 15 *Abbott Pr. R.* 45.

The Chancellor.

The complainants in this case own, as tenants in common, four brick houses, occupied as dwellings, in Lombardy street, in the city of Newark. Some of these are occupied by the complainants themselves. They are designed, and suitable for dwellings for respectable and wealthy families, but are not the most costly or elegant in the city; yet are fully equal to the average of dwellings occupied by such families. The rest of Lombardy street, which extends from Front to Broad street, is built up with dwelling-houses of about the same class, which are inhabited by wealthy and respectable fami-

lies. Lombardy street ends at Broad street, opposite one of the principal public parks of the city; and Broad street there, and the other side of this park, has upon it some of the best and most costly residences in the city. The houses of the complainants are about four hundred feet from Broad street, and were built more than twelve years ago. These houses are opposite the termination of Bridge street, on which are the lime and cement works, at a distance of about six hundred feet; and east of which, nearly opposite the complainants' houses, is a small triangular park, called Lafayette Park. East of this park, and on the east side of Front street, is the Chadwick patent leather manufactory, separated from the park by Front street. From the east house of the complainants to the nearest part of this manufactory, is about two hundred and fifty feet, and to the farthest part about six hundred feet. Fulton street, which is on the south side of the block in which complainants' houses are, is built up with a good class of dwelling-houses occupied by families of respectability.

The Citizens Gas Light Company have commenced erecting their works on the east side of Front street, between it and the Passaic river, opposite the place where Lombardy street ends, in Front street. The gas holder or tank will be about one hundred and eighty feet distant from the complainants' houses, and the retort house, purifier, and other works for the manufacture, will be between three hundred and four hundred and fifty feet distant.

The complainants allege that the building and working of the gas works so near their houses, will greatly injure their value, and render them unfit for residences; that gas works always and necessarily send forth noisome and unpleasant vapors and smoke which are diffused to an extent greater than the distance to these houses, which will render living in them uncomfortable and unhealthy.

The complainants further allege that gas in holders is liable to explode, and that the explosion of so large a quantity as will be contained in this holder, which it is admitted

will be ninety-five feet in diameter and forty feet high, will destroy the buildings within several hundred feet of it, and therefore it is a dangerous erection that should not be permitted in the thickly inhabited part of a city.

The defendants deny that the manufacture of gas in the manner in which they intend to conduct it, will be a nuisance to the complainants' houses, or will render life in them uncomfortable. They answer that they do not intend to use the process of purifying the gas with lime, which is the cause of the most objectionable odor arising from gas works, and will substitute for it the process by oxide of iron, which is comparatively inoffensive. They also intend to construct a cistern under ground, into which the tar and ammoniacal liquors and other offensive fluid products will be conveyed by gas tight pipes, and from which they will be discharged by pipes into boats, which will convey them away.

The principles of law and equity that must govern this case were fully considered and determined by me, in the case of *Ross* v. *Butler*, 4 *C. E. Green* 294, and I have not found any reason to change the opinion there expressed.

Any business, however lawful, which causes annoyances that materially interfere with the ordinary comfort, physically, of human existence, is a nuisance that should be restrained; and smoke, noise, and bad odors, even when not injurious to health, may render a dwelling so uncomfortable as to drive from it any one not compelled by poverty to remain.

Unpleasant odors, from the very constitution of our nature, render us uncomfortable, and when continued or repeated, make life uncomfortable. To live comfortably is the chief and most reasonable object of men in acquiring property as the means of attaining it; and any interference with our neighbor in the comfortable enjoyment of life, is a wrong which the law will redress. The only question is what amounts to that discomfort from which the law will protect.

The discomforts must be physical, not such as depend

upon taste or imagination. But whatever is offensive physically to the senses, and by such offensiveness makes life uncomfortable, is a nuisance; and it is not the less so, because there may be persons whose habits and occupations have brought them to endure the same annoyances without discomfort. Other persons or classes of persons whose senses have not been so hardened, and who, by their education and habits of life, retain the sensitiveness of their natural organization, are entitled to enjoy life in comfort as they are constituted. The law knows no distinction of classes, and will protect any citizen or class of citizens, from wrongs and grievances that might perhaps be borne by others without suffering or much inconvenience. The complainants have houses built and held for the purpose of residences, by families of means and respectability, and anything that by producing physical discomfort would render them unfit for such residence, or drive such families from them, is a nuisance which the law will restrain. This, then, is the question before me: whether the proposed works of the defendants would produce such annoyance as would render such families, composed of women and children, as well as men, uncomfortable; not whether men accustomed to follow their occupations in places where they are surrounded, and unavoidably, by much that is offensive, may not be so accustomed to odors of like nature as not to be annoyed by these.

The application is to restrain putting up the building, and also manufacturing gas. As to the building itself, it can be of no injury to any one if no gas is ever made in it. But it is usual and proper, where a building or works are being erected that can only be used for a purpose that is unlawful, to restrain the erection. The works, if erected, might tempt the owner to use them, and it seems like trifling to permit any one to go on with a building which he can never be permitted to use. But in this case, as will appear hereafter, I am not entirely satisfied that it is impossible to manufacture gas in some way that will not be a nuisance to houses situate as those of the complainants, and therefore I

do not feel justified in restraining the erection of the buildings, but will permit the defendants to use their own discretion in going on with them, if they choose to do so after hearing the views entertained of the rights of the complainants and others in like situation.

As to the danger of explosion of the gas holder, I do not think sufficient is proved to show it to be a dangerous nuisance. In the first place, the danger of there being an explosion is small. The instances are rare, and it cannot happen from the ordinary use of the holder; and then the danger to any building at the distance of these of the complainants, does not appear. No proof is given of any injury to buildings at that distance; I do not think it as dangerous as the steam engines which are scattered every where through our cities.

I am satisfied by the evidence, that if the process of purifying by lime should be used in the works of this company, it would cause a clear and serious injury to the complainants' houses, would make living in them uncomfortable. The evidence as to the process by the oxide of iron is not so clear the other way. The evidence clearly shows that it will not be so offensive as the lime process. And in the way that the defendants intend to revivify the oxide as detailed in the affidavit and deposition of Mr. Kennedy, who is devising and constructing their works, if it shall be strictly followed, it may not be so offensive as at all to annoy the complainants. There is no proof on their side to show that it will. This process is recently introduced in this country, and perhaps sufficient is not known of it to determine that question. But unless I am satisfied by proof, that the process intended to be used by the defendants will produce annoyance, I cannot restrain them.

With regard to the coal tar, the ammoniacal water and other liquid products of the manufacture of gas, the cistern and plan for conveying them to it, and emptying them from it, if it can be, and shall be faithfully carried out, may prevent the effluvia that usually arise from these sources. I

cannot say that it will not; at least I cannot, from any evidence in the case, or from any facts or principles of which I may be entitled to take cognizance. The plan seems to me not only ingenious, but sensible and plausible. Yet the subtle and penetrating nature of the effluvia that attends the manufacture of gas is so great, that I have doubt of the experiment until demonstrated by success.

With regard to the smoke and gases evolved upon the drawing of the retorts, I have more difficulty; this operation is repeated frequently every day, and is almost continual. The defendants will erect their retort-house below the hill, so that its top will be but a few feet above the level of the ground on which these houses stand. The smoke and gases are to be discharged by the ventilators near the top, usual in retort-houses. It seems to me that in certain states of the atmosphere, a gentle wind in that direction will carry this smoke and gas three hundred feet to these houses, and if so, it is clear that it will be an annoyance which ought not to be permitted; but on this point there is no evidence, and I ought not to restrain the defendants on speculations, however probable they may seem to me.

The justification that this is a neighborhood devoted to such manufacture, in which annoyances of this kind should not be restrained, is not sustained by the proof. Only two factories that could be an annoyance are shown; one the Patent Leather Manufactory, and the other the Cement Works. No neighborhood can be outlawed from protection by the existence of only two establishments of this kind. It is only when a town or part of a town is, by their continuance for years, wholly given up to such establishments, so that one more would not add sensibly to the discomfort, that this rule applies; as if in Sheffield, Birmingham, or Pittsburgh, or any other city, begrimed and clouded with the soot and smoke issuing from hundreds of engines, one more was added, such almost imperceptible addition to the evil would not be restrained. Besides, the annoyance from the dust of the lime and cement is of a different nature and

much less injurious. And the only annoyance from the Patent Leather Works shown to reach these houses, the smoke from the boiling varnish, was only occasional, and has for some years been decreasing. The complainants are clearly in a position to be protected in the enjoyment of their property against any nuisance of the kind complained of, if it really should exist.

But on the whole I am of opinion that no injunction against manufacturing gas ought to issue at the present stage of the case. The proof is not clear, except in case the gas shall be purified by lime, that the manufacture will seriously annoy any one at these houses. Some of the witnesses indeed express their opinion that it will, but with perhaps the exception of one or two, these opinions are not supported by facts observed by them. On the other hand, eleven witnesses, some of whom at least are known to be men of character and good sense, testify, that at like distances from the Newark gas works, in the course of years, they have not noticed any offensive smell, although lime purifiers were used; and although it seems to me that in this there must be some mistake or misapprehension, which perhaps an opportunity at cross-examination would have corrected, yet I cannot disregard this evidence unless overcome by evidence more explicit than that of the mass of the proof of the complainants. Besides in this case, a preliminary injunction is not absolutely necessary; the cause can be brought to hearing before the works can be completed, or in operation, and full proof can be given, on both sides, of the effect of such works without lime purifiers, at the distance of the houses of the complainants. Upon the principles which I have adopted, I can have no hesitation on the final hearing in ordering a perpetual injunction, if it shall appear that works conducted as the defendants propose to conduct these, will annoy any one occupying the houses of the complainants, although only at intervals or occasionally, by any smoke, gas, or offensive vapors which may render living there uncomfortable; and there can be no doubt that the gases and

odors which generally come from and surround gas works, if they come to a dwelling-house so as to be in any degree perceptible, render living in them uncomfortable. And I wish to be understood, that while I say that it is not shown to me to be impossible to manufacture gas at the distance proposed from the buildings of the complainants without material annoyance, yet I much doubt if it will ever be done in practice; many things scientifically and theoretically possible are never accomplished in practice. The defendants have chosen to locate their works in the vicinity of one of the most populous parts of the city, a part for many years devoted to the residences of its most respectable citizens; they have done this for their own pecuniary advantage, contrary to the usual, if not universal, practice in locating gas works. If they are correct in their theory that it will be no nuisance at all, they are safe. But if after this, in face of the general protest against it, they go on to complete their works, they cannot expect the courts to take into consideration the total loss of their expenditure, if any annoyance to the comfort of the complainants or others similarly situated, should require the use of their works to be suppressed.

An injunction must issue to restrain the defendants, the gas company, from using what is known as the lime process in purifying their gas, or any process of which lime is a substantial part; and from manufacturing gas in any way that will produce any annoyance to persons dwelling in the houses of the complainants, by any smoke, gases, other effluvia or odors, that may issue from the works. The residue of the injunction is refused. The costs to abide the event of the suit.

Flavell *vs.* Flavell.

1. The deposition of a witness before a master must be signed by the witness; if not signed, it is imperfect, and cannot be read at the hearing.

2. The deposition of a witness, who, after his direct examination, secretes himself so that he cannot be cross-examined, will be suppressed.

3. The laws of this state and the authorities upon the subject, reviewed. The English rules stated.

4. The facts held sufficient to prove defendant guilty of adultery. Recriminating charge not sustained.

This was a suit by Abraham W. Flavell, for divorce from his wife, the defendant Charlotte A. Flavell, on the ground of adultery. The answer denied the adultery, and also charged the complainant with adultery by way of recrimination, and as a defence to the suit.

The case was argued upon the pleadings and proofs.

Mr. J. W. Taylor, for complainant.

Mr. Cummings, for defendant.

The Chancellor.

The first question to be met in this cause, is upon admitting the testimony of George Moore. He was sworn on part of the complainant, and his cross-examination had been commenced by the defendant. The examination was adjourned at the close of the day, to be continued on the next day. The witness did not appear at the time to which the examination was adjourned, and has either absented or secreted himself; both parties have endeavored, without success, to find and produce him. He had not signed his direct examination, nor his cross-examination, so far as proceeded in.

The suppression of his testimony is asked for on both grounds, that he has not signed it, and that this cross-examination has not been completed. I am not aware that either of these questions has ever been considered or decided in this court; no decision upon either has been brought to my notice. In England, the signature of the witness to his ex-

amination is held necessary to entitle it to be read. In *Copeland* v. *Stratton*, 1 *P. W.* 414, decided by Lord Chancellor Parker, in 1718, this was settled to be the rule upon consultation with the master in attendance, and it has never been questioned or varied since. The practice there is to require the witness to sign each disposition when taken, before he leaves the master's office, and he signs each sheet with his name. 2 *Daniell's Ch. Pr.* 920, 921. And he signs the direct examination and cross-examination, separately. In fact, until the new orders of Lord Lyndhurst in 1828, the cross-examination could not be taken before the same examiner who took the direct examination; and by statute, the witnesses of each party must be examined before a different examiner. 2 *Daniell's Ch. Pr.* 921.

The English mode of taking testimony, in chancery, was first changed in this state by the act of November 22d, 1790, (*Pamph. L.* 681,) by which witnesses were required to be examined in open court, and their depositions to be reduced to writing by some person appointed by the court for that purpose; nothing is said in this act about the signing of the depositions. The act respecting the Court of Chancery, in the Revision of 1799, by section 35, (*Pamph. L.* 432,) provided "that the mode of proof by oral testimony, and the examination of witnesses in open court, shall be the same in the Court of Chancery as in the Supreme Court of this state, at common law; and that such examination shall be reduced to writing by some person appointed by the court, *signed by the examinant*, filed with the clerk, and made use of in the cause." A supplement to this act, passed December 3d, 1801, (*Bloomfield's Comp.* 84,) directed that thereafter, examinations of witnesses in suits in chancery should be taken and reduced to writing by examiners of that court, who were authorized to administer the oaths to the witnesses, which, in England, could be administered only by masters; and each party was at liberty, in person or by counsel, to examine or cross-examine witnesses. These examinations were to be filed with the clerk. Nothing is provided as to signing the depositions by the witness. These provisions were substan-

tially re-enacted in the revisions of 1820, (*Rev. L.* 703, § 3,) and of 1846, (*Nig. Dig.* 110, § 41.*) There is no statute or rule of this court expressly requiring the signature of the witness.

But the act of 1801, which repealed the act of 1799, and the practice of examining witnesses in open court, which had been in use for eleven years, in requiring the examination of witnesses to be taken and reduced to writing "by examiners of that court," intended by this reference to these disused officers of the court to revive the old practice of examination, except so far as changed by that act. It provided for oral examination and cross-examination by counsel present at the time, and for filing the depositions without the formality of publication. But it must be intended that it did not mean to dispense with signing by the witness; it was at least as necessary as when the witness was examined in open court, in which case it was required by the act then repealed. Besides, the general and I believe universal practice by all examiners since the act of 1801, has been to require the witness to sign his deposition, it having been first read to him. The latter is a safe and prudent practice. And the many gross and palpable errors in the other depositions in this case, show both that it has not been attended to, and the importance of its being done. For these reasons, and especially relying on the long established practice in this state as settling both the construction of the statute and the rule of this court, I am of opinion that depositions not signed by the witness are imperfect, and cannot be read.

The settled rule in the English courts requires that the party producing a witness should retain him before the examiner for cross-examination. The rule in chancery there, requires that he should be retained at least forty-eight hours for the cross-examination to begin. 2 *Daniell's Ch. Pr.* 921; 1 *Barb. Ch. Pr.* 285, 286.

If a witness who has signed his direct examination dies before he is cross-examined, his testimony is allowed to be read. *Arundel* v. *Arundel*, 1 *Rep. in Chan.* 90, decided in 1635, by Lord Keeper Coventry, recognized by Lord Redesdale in

*Rev., p. 111, sec. 45.

O'Callaghan v. *Murphy*, 2 *Sch. & Lef.* 158, and by Sir Anthony Hart, in *Nolan* v. *Shannon*, 1 *Molloy* 157.

Lord Eldon held that if the witness appeared for cross-examination, and refused to answer, his direct examination should not be suppressed, because it was in the power of the party wishing to cross-examine to take measures to compel him to answer. *Courtenay* v. *Hoskins*, 2 *Russ.* 253. But where the witness secretes himself, it is held that his deposition should be suppressed, on the ground that such witness is not worthy of credit. Lord Hardwicke so held in 1756, in *Flowerday* v. *Collett*, 1 *Dick.* 288. The deposition in this case comes within the letter and reason of Lord Hardwicke's rule, and upon principles in which I entirely concur, must be suppressed. The authorities on this subject are collected in the opinion of Justice Story, in *Gass* v. *Stinson*, 3 *Sumner* 98.

The defendant has, in my opinion, entirely failed to sustain, by proof, her defence of adultery in the complainant, set up by way of recrimination. His admission, that when in New York and intoxicated, he had met a girl named Ella, and the fact that he called out her name in his sleep, or when partly intoxicated and half asleep, might excite suspicions, but fall far short of proof of adultery. And all the defendant's testimony with regard to his diseases, without any regard to the denials on his part, do not show or even raise any strong suspicion that he has ever had any venereal disease since his marriage with her. This view of the evidence makes it unnecessary to consider the questions of condonation by the defendant, and whether the acts of adultery set up by way of recrimination are sufficiently specified in the answer.

The main question in the cause to be determined is one of fact. It is whether the charge of adultery on which the application for divorce is founded, is sufficiently proved. Upon a careful consideration of the evidence, I am of opinion that the adultery of the defendant with George Moore, on the 31st of August, 1868, charged in the bill, is fully proved. The direct evidence of Abraham Flavell as to the position in which he found them and their conduct at the time, is

sufficient to establish the fact. The denial by the defendant under oath, and her explanation of her situation, and the facts which led to it, are plausible, and might lead me to hesitate as to her guilt, were it not that her conduct at the time, and during the whole week she continued in the house of her father-in-law, and her implied admission made to the mother and father and sister of her husband, are inconsistent with it. It is incredible that if the father of her husband found her in such equivocal situation as she admits, and she was in the act of resisting the attempts of Moore against her virtue, that she would have immediately escaped from the room in silence, as one caught in an act of shame, instead of loudly denouncing to her father-in-law, the man whom she knew he disliked, and whom he found attempting to force or seduce the wife of his son. If she found that her husband's relatives were wrongly suspecting her of crime, when she had been only sinned against, she would not for a week have submitted herself tamely, in tears of apparent penitence, to their reproaches, and to exclusion from the presence of her husband, who was in the room next to her, but would have been roused to assert her rights, and if she could not have had fair treatment there, would have gone to the house of her father, which was not far away, and appealed to him for redress and protection. When her father came to her, she made no attempt to vindicate herself before him, and did not impress him with her innocence and injury so as to make him willing to take her to his house. Her previous conduct in regard to Moore had been, before the 31st of August, such as to excite and justify suspicions in the father and mother of her husband. This conduct had caused the father to watch her movements with Moore, and to follow them to the room where he caught them in the position which he describes.

There must be a decree for divorce.*

* Decree affirmed, 7 *C. E. Gr.* 599.

Miller *vs.* Miller.*

1. A divorce can never be granted upon general charges in the bill, of adultery with "divers persons whose names are unknown." A bill for divorce should not be filed upon general suspicion, nor until the discovery of some specific act, or of the facts from which such act must be inferred.

2. If the name of the person with whom the adultery is alleged to have been committed is unknown, the time, place, and circumstances must be stated, so as to identify the offence, or the person of the adulterer must be described, and the fact that the name of such person was unknown at the time of filing the bill must be proved. If the name is known it must be stated in the bill.

3. Proof of adultery with A, will not sustain a charge of adultery with B; nor will proof of adultery with a person whose name is known to the complainant, sustain a charge of adultery with a person whose name is alleged to be unknown.

4. The precise time of the adultery, stated in the bill, is not necessary to be proved, provided the variance is not so great as to mislead the defendant.

5. The court is reluctant to grant a divorce on testimony of a single witness, uncorroborated, especially when the evidence is the betrayal of a secret confided to the witness, so long kept undivulged as to render the witness almost a *particeps criminis*.

6. Evidence sufficient to establish the fact that the defendant and her house are of ill repute, is not sufficient to entitle the complainant to a decree of divorce for adultery.

This case was submitted on bill and proofs, and the brief of *Mr. Jeffrey*, of counsel with the complainant.

The Chancellor.

This bill is for a divorce, on the ground of adultery. The adultery charged is with Edward Fehr, Lewis F. Bigelow, and John Vandoren; and also with divers persons in the states of New York and Pennsylvania, whose names are unknown.

The allegation of adultery with divers persons unknown, is too general; no divorce can be granted upon it. If the name is unknown, the time, place, and circumstances must

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* Cited *in Reid* v. *Reid*, 6 *C. E. Gr.* 333; *Black* v. *Black*, 11 *C. E. Gr.* 432.

be stated, so as to indentify the offence, and the person with whom it was committed, and if his name was really unknown at the time of filing the bill, that fact must be proved. *Marsh* v. *Marsh*, 1 *C. E. Green* 391; *Mills* v. *Mills*, 2 *C. E. Green* 444.

A suit for divorce cannot be sustained unless founded on some specific offence, known to the complainant, and specifically charged in the bill. If the name of the adulterer is known, it must be stated; if it is unknown, that fact must be stated in excuse of the omission, and proved at the hearing. His person may be described, or the time, place, and the circumstances which show that the offence was committed, may be stated. And the complainant must prove the offence, or one offence specified in the bill. The precise time is not necessary, provided the variance is not so great as to mislead the defendant. Proof of adultery with A, will not sustain a charge of adultery with B; nor will proof of adultery with a person whose name was known to the complainant, sustain a charge of adultery with a person whose name was unknown. And a divorce can never be granted upon a general charge of adultery with divers persons whose names are unknown, within a specified period of time. Such charge is bad pleading, and no bill or petition should contain it. A bill for divorce should not be filed upon general suspicion, nor until the discovery of some specific act, or of the facts from which such act must be inferred, and these should be sufficiently stated to identify the act upon which the suit is founded.

There is no proof of adultery with either of the persons named in the bill. Edward Fehr was sworn as a witness, but does not criminate himself. He occupied the basement of the building in which the parties resided, as a beer saloon, and the complainant had his shop in the first story. He testifies that Bigelow and Vandoren were "about there," meaning this building. This certainly is no proof of adultery, hardly of an opportunity to commit it.

There is proof, by a former servant, that some five years

ago the defendant committed adultery with Byron French, and that she admitted it to the witness, whom she made her confidant in the matter. The story seems strange in itself, and it is not confirmed by any facts or circumstances which could surely be proved if the tale is true. The court is reluctant to grant a divorce on the evidence of a single witness, altogether uncorroborated, especially when the evidence is the late betrayal of a secret, so long kept as to render the witness almost *particeps criminis.*

The evidence is sufficient to establish the fact that the defendant and her house, at Easton, are of ill repute, but that is not sufficient to sustain a decree of divorce.

The bill must be dismissed, without prejudice to filing a new bill for adultery with persons other than those whose names are specified in this.

Reynolds *vs.* Denman.

A direction in a will that the testator's daughter should have a support out of his estate when she should be sick *and* unable to support herself, while a widow, does not entitle her to such support, though she is old and very infirm, and unable to support herself, no sickness being alleged.

This cause was argued on a demurrer to the complainant's bill.

Mr. J. Whitehead, in support of the demurrer.

Mr. J. W. Field, for complainant, contra.

The Chancellor.

Smith Denman, the father of the complainant and of the defendant, died in April, 1844. By his will duly executed, after certain legacies to several of his children, he gave to his

wife, Esther, all his real and personal estate, for her life, and gave to his daughter Abigail, the complainant in this suit, the use of the bed-room then occupied by her, as long as she remained a widow, and directed that she should have a support out of his estate when she should be sick and unable to support herself, while a widow; and then he devised the use of all his real estate, after the death of his wife, to his son, Jacob S. Denman, during his life, and then to Jacob's children, except his said son should die without any male heir, and then he directed that one third part of the value of his real estate at the date of the will should be divided among the testator's other heirs.

The complainant alleges that she has remained and still is a widow, that she is old and very infirm, and unable to support herself, but does not allege that she is sick. Jacob was appointed executor of the will, and took out letters testamentary thereon. The bill does not allege that there was any personal property, or that the widow of Smith Denman is dead, or that the defendant received any personal estate of the testator, but alleges that she is entitled to a support out of the real estate of her father, and that she has requested the defendant to furnish such support, and that he refuses to furnish it. The bill prays a discovery of the real estate of the testator, and of all deeds relating thereto, and that the defendant may be decreed to give the complainant a support out of the real estate of the testator.

The defendant contends that there is no equity, or title to relief in equity, stated in the bill; the only right to support given by the will is in case she is sick and unable to support herself, while she is a widow, and as she does not allege that she is sick, she is not entitled to such support. Such is the plain direction of the will, and there is nothing by which any different construction can be put upon it. The support is given only in case she is sick *and* unable to support herself. That she is unable to support herself, is not sufficient to entitle her to the support, nor is the fact that she is old and infirm, sufficient. It is not the case provided for in the will;

it was not provided for, or intended to be provided for, by the testator, who knew that if she lived, she would some day become old and infirm. As he has not provided for this, it must be held that he did not intend to impose that remote burden upon his estate.

The demurrer must be sustained.

DURLING and others *vs.* HAMMAR and others.

1. Property purchased by a guardian, with funds belonging to his ward's estate, and the title to which was taken in the guardian's name, will, at the option of the ward, be declared to be held in trust for him.

2. A purchaser of property so held in trust, at a sale under an execution against the trustee, the purchaser having notice of the facts creating the trust, will be decreed to hold it as trustee.

3. A bill praying that complainant's title to one half of the property in question as *cestui que trust*, may be decreed and established, and also that it may be partitioned, and one half set off to her by metes and bounds, is not multifarious.

4. In suits between the proper parties relating to the same subject matter, several species of relief may be prayed, although each might be the subject of a separate suit.

5. Where a bill sets up a sufficient ground of equitable relief as to part, and none as to another part, and would be demurrable if that part was sustained, a general demurrer will not lie.

6. A demurrer being sustained to a part of the bill for a cause specifically assigned, objection on score of multifariousness is removed, and the complainant may proceed as to the rest of his case as if there had been no demurrer.

This cause came before the court on demurrers to the bill by two of the defendants, Martha Jane Hammar and Rittenhouse. The grounds of demurrer were that the bill was multifarious, and that it contained no ground of equitable relief against either. The other defendants did not appear in the suit.

Mr. A. V. Van Fleet, for demurrant, Rittenhouse.

The demurrer raises two objections to the bill: 1. Multifariousness; 2. Want of equity.

The objects of the bill are—1. To procure an adjudication settling the title to a farm; 2. For a partition of the farm; 3. That one defendant shall be decreed to refund certain moneys to another defendant; 4. To compel one of the defendants, who has occupied the farm under a deed made in pursuance of the decree of this court, to account for rents.

1. Multifariousness consists in joining in one bill distinct and independent matters, or in demanding several different matters of different natures in one bill, against several defendants, or in demanding several matters distinct and unconnected against the same defendant. 2 *Story's Eq. Pl.*, § 271; *Emans* v. *Emans*, 1 *McCarter* 114; 1 *Daniell's Ch. Pr.*, (1 *Am. ed.*) 383, 391, 393.

A bare statement of the objects of the bill, to a mind familiar with the principles of equity pleading, must be a conclusive argument in support of the objection that it is multifarious. No two of them could be joined in the same suit except the 2d and 4th. A bill for partition and an account has been held good.

The fundamental reason why courts of equity will not entertain a bill which is multifarious is, because such bills do not present a case which can be heard and disposed of by a single hearing and decree, but must be decided by piecemeal.

The first object of this bill concedes the title to this farm is in dispute; that, in truth, is the foundation of the action.

It is a familiar principle of equity jurisprudence, that partition will not be decreed while the title to the land sought to be partitioned is in dispute. *Manners* v. *Manners*, 1 *Green's C. R.* 384; *Obert* v. *Obert*, 1 *Halst. C. R.* 397; *Obert* v. *Obert*, 2 *Stockt.* 98.

Ordinarily, such bills are retained until the title is settled. But the matters to be litigated in this case are so foreign to

a proceeding for partition, require such different evidence and decrees, that the different inquiries cannot proceed together.

Whether an actual division or a sale shall be ordered, is a question arising in every partition case. Its solution almost wholly depends, in most cases, upon the number of owners, and the extent of the interest of each. Before that question can be reached in this case, it must be decided whether the defendant, Rittenhouse, is the owner of the whole farm, or only half, and if only half, who owns the other half.

A bill for partition and to set aside a lease made by the complainant for the land sought to be partitioned, was held to be multifarious. *Story's Eq. Pl.*, § 275; *Whaley* v. *Dawson*, 2 *Sch. & Lef.* 367.

The 3d object of the bill—that one defendant shall be compelled to refund certain moneys to another defendant—cannot be made the ground of an action by the complainant, or the foundation of any relief to her. This money was paid by the defendant, Rittenhouse, to the sheriff of Hunterdon, and by him, pursuant to the decree of this court, to Martha Jane Hammar as administratrix, in May, 1866, and must long since have been disbursed in the satisfaction of her intestate's debts, or distributed among the next of kin.

The objects of the bill in *Crane* v. *Fairchild*, 1 *McCarter* 76, were in many respects similar to the bill now under consideration. That bill was held multifarious.

2. Want of equity. The great fact upon which the complainant rests her claim, is that the land in controversy was purchased with her money. Her statement is, that under the authority of the law of Pennsylvania her father was her guardian; as such he sold land belonging to her and her brother in that state, pursuant to law; that her father invested that money in land in this state, taking title in his name; that proceedings were had in this court, by the administratrix of her brother, who died after the purchase of the land here, for the recovery of the amount due him, that she was not made

a party to that suit; that all the land was sold under the order of this court, and that the defendant, Rittenhouse, purchased with full notice that one half of it was held in trust for her.

The power and authority of a guardian are purely local, and he is accountable for the exercise of his power and the performance of his duty, only to the tribunals of the state where the relation of guardian and ward was created. A foreign guardian cannot be recognized in our courts in enforcing the rights of his ward, neither can his ward require him to answer for his conduct as guardian in the tribunals of this state. *Story's Confl. Laws*, §§ 499, 504, *a; Sabin* v. *Gilman*, 1 *New Hamp.* 193; *Morrell* v. *Dickey*, 1 *Johns. C. R.* 153; *Kraft* v. *Wickey*, 4 *Gill. & Johns.* 332, 340, 341; *Armstrong* v. *Lear*, 12 *Wheat.* 169; *Fenwick* v. *Adm'rs of Sears*, 1 *Cranch* 259; *Story's Eq. Pl.*, § 59; *Grist* v. *Forehand*, 36 *Miss.* 69; *Griffith* v. *Frazier*, 8 *Cranch* 22.

Foreign guardians and wards can only appear in our courts simply as creditor and debtor. Now whether this guardian is the debtor of his ward, must entirely depend upon the judgment of the proper court of Pennsylvania. There is no allegation in this bill, that any attempt whatever has been made in the jurisdiction creating the relation of guardian and ward to compel him to account; there is, in fact, no allegation that he has broken a single condition of his bond. Her remedy, primarily, is in the courts of Pennsylvania, and until she shows, by the judgment or decree of the proper court there, that her guardian is indebted to her, and that she has exhausted the means provided by law for her security there, she has no equity which entitles her to a standing in this court.

It appears by the bill, that when the order for the sale of the real estate in Pennsylvania was made, a bond was given by the guardian with sureties. There is no allegation in the bill that these sureties are not abundantly able to perform every condition of that bond. Until it appears that the security provided for the complainant's protection when

the relation of guardian and ward was created has failed, she has no equity which this court can enforce.

If this court takes jurisdiction, the rights and equities of all parties must be regarded. The guardian is legally entitled to expenses, commissions, and under some circumstances, to pay for clothing, maintenance, and education. Can this court make such allowances?

As between the guardian and ward, the decree of this court would be no bar to an action by the ward against the guardian in Pennsylvania. Jurisdiction of the *subject matter* as well as of the person, is essential to the validity of every judgment. *Barnes* v. *Gibbs*, 2 *Vroom* 318; *Peck* v. *Mead*, 2 *Wend.* 471.

The relation of guardian and ward was created by the local law of Pennsylvania. That law governs all the rights, duties, and liabilities growing out of that relation; and any attempt, by the tribunals of this state, to enforce duties growing out of a relation that our tribunals cannot legally recognize, would, upon the plainest principles, be wholly nugatory.

Mr. G. A. Allen, for complainants, contra.

THE CHANCELLOR.

The bill alleges that the defendant, Joseph Hammar, who had been appointed by the Orphans Court of the county of Philadelphia, guardian of the property of his two infant children, George W. Hammar and the complainant, Margaret Jane Hammar, now the wife of the other complainant, Andrew J. Durling, in December, 1858, as such guardian, and by virtue of an order of that court, sold the real estate of the two infants, in the city of Philadelphia, for $3225. And that he did in the same month, with that money, purchase a farm in Hunterdon county, in this state, and the farming stock and implements for the farm; that he took the title in his own name, but intended to purchase and hold

the same for his two children, to be conveyed to them when they should become of age; that he, with his children, resided on the farm, and were supported out of it; that his son George, after he became of age, worked on this farm, and took half of the proceeds; that George died in 1865, leaving a widow, the defendant, Martha J. Hammar, and three children, the three infant defendants; that administration of his personal estate was granted to his widow, who as administratrix, in 1865, filed in this court a bill against Joseph Hammar setting out these facts, and claiming that the land and personal estate might be decreed to be held by Joseph Hammar, in trust for her on his failure to pay to her the part of the proceeds of the sale of the lands of his son George, which belonged to him. That bill, as well as this, alleged that the sureties on the guardian's bond, as well as Joseph Hammar, are insolvent, and that all the parties reside in this state. In that suit an account was taken of the amount due to the administratrix of George for his share of the proceeds of the sale of the Philadelphia property. A decree was made against Joseph for the amount, and upon a *fieri facias* the personal estate and lands bought by Joseph with the money of his children were sold as his property, and the proceeds paid to the administratrix of George. The land was sold under the *fieri facias*, to the defendant, Rittenhouse, and one Hoagland, who both had notice of the facts creating the trust, and after the conveyance by the sheriff to them, Joseph Hammar and his wife (in violation of an injunction in that suit) gave a deed of bargain and sale for this land to Rittenhouse and Hoagland; and subsequently Hoagland conveyed his share to Rittenhouse.

The prayers of the bill are: First. That the deed from Joseph Hammar to Rittenhouse and Hoagland may be declared void as against the complainant for her undivided half, and that the same is held in trust for her. Second. That it may be decreed, if the legal title passed by the sheriff's deed, that it did not affect the trust. Third. That there may

be a partition under the direction of this court, or that if deemed more expedient the whole may be sold, and one half the proceeds paid to the complainant. Fourth. And that if more equitable and just, said administratrix should refund to Rittenhouse the purchase money received by her and the other half of the proceeds be paid to said infants, or if no sale be decreed, to be held in trust for them. Fifth. That Rittenhouse account to the complainant for her share of the rents, issues, and profits; and Sixth. The general prayer for relief.

If Joseph Hammar purchased this land and personal property with money belonging to his infant children, and in his hands as their guardian or trustee, and more especially if he at the time intended to purchase the same in trust for them, they became entitled to claim the property or the money at their election. Any trustee who purchases property with trust funds in his hands will, at the option of the *cestuis que trust*, be declared to hold it in trust for them, although title was taken in his own name, and intended for his own benefit. And if Rittenhouse had notice of the facts at the sale by the sheriff, he is affected by the trust. The complainant is entitled to relief as against him, upon the allegations in the bill.

As to the relief asked for in the fourth prayer of the bill against Mrs. Hammar as administratrix, it clearly cannot be granted in this suit, or in any other brought by this complainant. She has no interest in the refunding to Rittenhouse of the purchase money, or in having their proper share secured to the children of George; and no adjusting of the equities between these parties is necessary for the relief to which the complainant may be entitled.

This demurrer would, therefore, be sustained if it had been confined to so much of the relief sought for against this defendant as is contained in the prayer above distinguished as the fourth prayer. But as Rittenhouse, against whom the relief is sought, is a trustee for the complainant, and may be such as to the children of George W. Hammar, and as to

his estate, which is represented by the administratrix; and as under the general prayer for relief, the question may arise, whether the interest of the complainant in the land may not exceed one half, by reason of the proceeds of the personal property, which was part of the same trust, having been paid to the administratrix, she, as well as the infants, are proper parties to the bill, and the residue of the bill cannot be dismissed as against her.

The question of multifariousness is on two grounds. One is, that the complainant prays first that her title to one half of this property as *cestui que trust* may be decreed and established, and also that it may be partitioned, and one half set off to her by metes and bounds. This, if wrong, is not strictly multifariousness, but a misjoinder. It does not involve in litigation on a question in which he has no interest, a party who has an interest in a distinct question or litigation in the same bill. Rittenhouse is interested in both questions —first, whether he holds, as trustee for the complainant, and to what extent; and secondly, whether the share of the complainant should be set off to her by metes and bounds; and the other defendants so far as they are interested, are in the same manner interested in both questions.

The real question is, can both these matters be joined in one suit as against the same defendant. It is my opinion that they may. The subject matter is the same, one parcel of land. The complainant claims that she is entitled to have one half of the parcel conveyed to her as *cestui que trust*, and asks that in the conveyance instead of one equal undivided half, one partitioned half by metes and bounds shall be conveyed. In suits between the proper parties relating to the same subject matter, several species of relief may be prayed, although each might be the subject of a separate suit, as that one mortgage may be redeemed and another declared void for usury. Many of the complicated decrees, constantly made in this court, demonstrate this to be the practice in equity.

Another ground of multifariousness is, that relief is

sought against Martha J. Hammar, in which Rittenhouse is not concerned. This would sustain the demurrer for multifariousness, if the complainant showed a case in which she was entitled to the relief so asked against Martha J. Hammar, or if that part of the bill was sustained. Chancellor Walworth, in *Varick* v. *Smith*, 5 *Paige* 160, says: "A bill is not multifarious where it sets up one sufficient ground for equitable relief, and sets up another claim which, upon its face, contains no equity which can entitle the complainant to the interposition of the court, either for discovery or relief."

And in *Emans* v. *Emans*, 1 *McCarter* 114, Chancellor Green says: "The demurrer being sustained as to part of the bill, the objection on the score of multifariousness is removed. The rest of the bill not covered by that ground of demurrer remains in court, and the complainant as to that part of his case may proceed as if there had been no demurrer."

As the demurrer in this case is to the whole bill, and not to the part only on which there can be no relief, it is too broad and must be overruled. *Banta* v. *Moore*, 2 *McCarter* 97; *Story's Eq. Pl.*, § 443.

Hile *vs.* Davison.*

1. The Court of Chancery will not interfere to restrain the vendor from collecting or negotiating securities given for the price of land conveyed with full covenants of warranty, on account of alleged defects in the title not amounting to a total failure of consideration, where there has been no disturbance or eviction, and no suit is pending by an adverse claimant.

2. A partial failure of consideration, such as a defect of title, will not be admitted as a defence to the foreclosure of a mortgage for the consideration money, without eviction or a suit pending by an adverse claimant.

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* Cited *in Price's Ex'rs* v. *Lawton*, 12 *C. E. Gr.* 327.

On motion to dissolve an injunction. Argued upon bill and answer.

Mr. Shipman, in support of the motion.

Mr. J. M. Robeson, contra.

The Chancellor.

The injunction in this case was to restrain the collection or assignment of a note given in part payment of lands conveyed by the defendant to the complainant, with full covenants of warranty. The ground for the injunction was, that the title was defective, the defendant only having a life estate; the complainant remaining in undisturbed possession of the lands.

When there has been no disturbance or eviction, and no suit is pending by an adverse claimant, this court will not interfere to restrain the vendor from collecting or negotiating securities given for the price of land conveyed with full covenants of warranty, on account of alleged defects in the title not amounting to a total failure of consideration. Nor will such partial failure be admitted as a defence on the foreclosure of a mortgage for the consideration money, without eviction or suit pending by the adverse claimant; this has been repeatedly decided in this court. *Shannon* v. *Marselis, Saxt.* 426; *Van Waggoner* v. *McEwen,* 1 *Green's C. R.* 412; *Glenn's Adm'rs* v. *Whipple,* 1 *Beasley* 50; *Miller* v. *Gregory,* 1 *C. E. Green* 274. And in *Hulfish* v. *O'Brien,** decided at the present term, the same doctrine is approved and followed.

The injunction must be dissolved, and the bill dismissed with costs.

**p.* 230.

Hulfish *vs.* O'Brien.*

1. A defect of title to mortgaged premises conveyed by the mortgagee is no defence in a suit for the foreclosure of a mortgage for part of the consideration.

2. Such defence is a proper subject of exception, for impertinence.

This cause came on upon exceptions to the report of a master, which sustained exceptions taken to the answer of the defendant. The bill was to foreclose a mortgage. The answer stated that the mortgage was given at the purchase of the mortgaged premises which were conveyed by deed, with full covenants, and was part of the consideration money, and that the title conveyed was defective; that the complainant only owned and conveyed three fifths of the premises. To this part of the answer exceptions were filed as being impertinent. The answer did not allege any eviction or suit under the adverse title.

Mr. Gifford, for complainant.

Mr. T. G. Lytle, for defendant.

The Chancellor.

It has been decided in this court repeatedly, by three of my predecessors, that a defect of title to mortgaged premises conveyed by the mortgagee, is no defence in a suit for the foreclosure of a mortgage for part of the consideration. Chancellor Vroom so held, in *Harrison* v. *Marselis, Saxt.* 426; Chancellor Pennington, in *Van Waggoner* v. *McEwen,* 1 *Green's C. R.* 412, and Chancellor Williamson, in *Glenn's Adm'rs* v. *Whipple,* 1 *Beasley* 50. Such has been the uniform doctrine of this court, and it is in accord with the decisions of other states. *Davison* v. *De Freest,* 3 *Sandf. C. R.* 456; *Miller* v. *Avery,* 4 *Barb. C. R.* 582; *Bumpus* v.

*Cited *in Price's Ex'rs* v. *Lawton,* 12 *C. E. Gr.* 327.

Platner, 1 *J. C. R.* 218; *Withers* v. *Morrell*, 3 *Edw.* 560; *Tallmadge* v. *Wallis*, 25 *Wend.* 107. And it is fully adopted by the Court of Errors, in New York, in *Edwards* v. *Bodine*, 26 *Wend.* 109, on an appeal in a foreclosure case.

The exceptions to the master's report must be overruled.*

Ryno *vs.* Darby.

1. A bargain made on Sunday is void, and no subsequent recognition of it, short of a new bargain, can give it validity.

2. Specific performance of a contract will not be enforced if there was a subsequent agreement by parol to waive it and substitute a new contract for it.

3. But where the defendant, in his answer to a bill for the specific performance of a contract, admits a substituted contract, the complainant is entitled to have a decree for the specific performance of the substituted contract, if he choose to perform it on his part, and he can have such relief in his suit on the original contract.

Argued on final hearing, upon bill, answer, and proofs.

Mr. Magie, for complainant.

I. Contract charged in bill, although not in writing, would be enforced in equity, because possession was given and payments made under it; it is admitted in answer, and the protection of the statute is not claimed either by plea or answer. *Story's Eq. Jur.*, § 760 and seq.; *Van Duyne* v. *Vreeland*, 1 *Beasley* 142.

II. It is claimed that the contract charged in bill and admitted in answer, has been varied or discharged, and a new contract made.

1. A verbal discharge or variation of a contract in writing, would be a defence to bill for specific performance only when unequivocally proved, and when it appears manifest that

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* Decree affirmed, 7 *C. E. Gr.* 471.

under the circumstances it would be inequitable to enforce the original contract. *Sugden on Vendors, ch.* 3, §§ 190, 199; *Woolman* v. *Hearn,* 2 *L. C. in Eq.* 404, and note.

The rule cannot be stronger in regard to a contract not in writing, and yet enforceable in equity as the contract here, and ought to be enforced.

2. Such variation is not unequivocally proved.

3. Under all the circumstances it is not only equitable to enforce the original contract, but inequitable to enforce the alleged variation.

III. It is claimed that the contract sought to be enforced was made on Sunday.

1. Under the circumstances of this case such a defence would not avail at law, because the contract has been executed. *Bloxsome* v. *Williams,* 3 *B. & C.* 232; *Williams* v. *Paul,* 6 *Bing.* 653; *Crocket* v. *Vanderveer,* 2 *Penn.* 856.

And there were many ratifications, amounting to a new express contract. *Reeves* v. *Butcher,* 2 *Vroom* 224.

2. But if such defence is good at law, this court, for the same reasons which impel it in order to prevent fraud to enforce this agreement, notwithstanding the statute of frauds, will enforce this agreement, and not permit defendant to take advantage of his own wrong, and thereby perpetrate a fraud on complainant.

Mr. F. B. Chetwood, for defendant.

The Chancellor.

The bill is for the specific performance of an agreement to sell lands, which was in part performed. The answer admits the parol agreement as alleged, and the acts of part performance or some of them; but sets up that the complainant did not fully perform the agreement on his part as to payments, and that a new agreement was made between them for the conveyance of the same land at the same price,

which it was agreed should supersede the old agreement; that it differed from the first agreement as to the time of payment and of delivery of the deed. The defendant answers that he has always been and still is ready to perform the new and substituted agreement.

In the proof it appears that the original parol agreement was made on Sunday. The complainant in his testimony denies it; but the defendant and his son, John L. Darby, who was present at the making of it, both swear that it was on Sunday, and they are confirmed to some extent by Michael S. Torry, a witness of the complainant, who saw Ryno and the two Darbys on Sunday talking together at the place where the Darbys say the bargain was made, and the complainant testifies that he only had one conversation about the bargain with the defendant. John L. Darby states that he recollects it was on Sunday, and that his mother had gone to church, from a remark she made on coming home from church and being told of the sale, reproving them for making a bargain on Sunday. I am convinced from the evidence that the bargain was made on Sunday. If it was it is void, and no subsequent recognition of it, short of a new bargain, can give it validity. This was so decided upon consideration by the Supreme Court of this state, in the case of *Reeves* v. *Butcher*, 2 *Vroom* 224, in which it was held that subsequent payments on a note made on Sunday, were not sufficient to ratify or give validity to the note.

The stating at the time of the bargain to a scrivener, that he might reduce it to writing for the purpose of being signed was not the making of a new bargain.

But the original bargain is alleged by the defendant in his answer to have been waived, and a new bargain substituted for it by a parol agreement between the parties, made March 30th, 1868. The answer can be no proof of such new agreement. The complainant, in his testimony, denies it; but here again the defendant and his son, John L. Darby, both testify that there was such a new bargain made, and their testimony is in a measure supported as to the fact that

there was some new bargain made, by the conduct of the complainant in going to Rahway to make arrangements to take the deed left by the defendant there for him, in execution of the new contract. If the first contract had not been made on Sunday, specific performance would not be compelled, if the complainant had agreed to waive it by parol, and substitute a new contract for it.

But the defendant, in his answer, admits the second or substituted contract to convey for cash, upon an undertaking to remove the buildings in two years from April 1st, 1868. The complainant is entitled to have a decree for the specific performance of that contract, if he chooses to perform it on his part, and he can have such relief in this suit. *Wallace* v. *Brown*, 2 *Stockt.* 308.

Mitchell *vs.* Mitchell.

1. Where parts of an answer are responsive to the complainant's bill, upon matters within the knowledge of the defendant, and fully deny the equity upon which an injunction was based, it is no reason for denying the motion to dissolve that the answer in other respects is not a full answer to the bill in other allegations, and that some of the exceptions to the answer are well taken.

2. The English rule that exceptions to an answer, undisposed of, are a bar to the dissolution of an injunction upon the denials of the answer, has not been adopted in this state.

On motion to dissolve injunction upon bill and answer.

Mr. Winfield, in support of the motion.

Mr. Dixon, contra.

The Chancellor.

The injunction in this case is to restrain the defendants from conveying certain lands. It is founded on the allega-

tions in the bill, that the defendant, Johanna, before her divorce from the complainant, and while living with him as his wife, fraudulently procured the lands in question, which had been bought by him, and paid for by her with his money entrusted to her for that purpose, to be conveyed to her in her own name, instead of procuring the same to be conveyed to the complainant, as it was agreed should be done when he entrusted her with the money, and directed her to procure the deed; and that she concealed this fact from the complainant for a long time afterwards; and that she has now conveyed the lands to the other defendants in trust for her, and that they are endeavoring to dispose of the same.

The defendants have answered, denying that the lands were purchased by the complainant, or that they were paid for with his money, but allege that they were purchased by the defendant, Johanna, for her own use, and paid for with money derived from property which she had in her own right before her marriage to the complainant; and that the deeds for the same were given to her in her own name, with the knowledge and consent of the complainant.

These parts of the answer are responsive to the complainant's bill, upon matters within the knowledge of the defendant, Johanna, and fully deny the equity upon which the injunction is based. That the answer in other respects is not a full answer to the bill in other allegations, and that some of the exceptions are well taken, and will be sustained, is no reason for denying the motion to dissolve. In the English Court of Chancery, exceptions to an answer undisposed of are a bar to dissolution of the injunction upon the denials of the answer. That practice has not been adopted in this state. The dissolution depends upon a full denial of the facts which constitute the equity on which the injunction is founded.

Morris *vs.* Ruddy.

1. A broker employed to sell lands has no implied authority to sign a contract of sale on behalf of his principal.

2. But if he had such authority, if the contract varies from his instructions the principal will not be bound by it.

This cause was argued upon bill, answer, and proofs.

Mr. J. F. Randolph, for complainant.

It was decided in the case of *Moses* v. *Bierling*, 31 *New York R.* 462, that the real estate broker was legally entitled to his commissions when employed to sell, and he does so accordingly; but we have nothing to do with that in this case.

The memorandum or agreement comes within the statute of frauds. *Brown on Stat. of Frauds*, § 347; *Evans* v. *Prothero*, 13 *English L. and E. R.* 163.

As to the power of the agent or broker. *Brown on Stat. of Frauds*, § 369; 26 *Wend.* 341.

Agents for signing may be appointed by parol. *Brown on Stat. of Frauds*, § 370, *A*, *note* (2); *Fry on Spec. Perf.*, § 354.

Agent may sign his own name, and parol proof of his agency is sufficient. *Brown on Stat. of Frauds*, § 370 *B*; *Fry on Spec. Perf.*, § 354; *Wilson, assignee*, v. *Hart*, 7 *Taunt.* 295.

A subscription by agent of party to be charged, is sufficient under the statute of frauds, though the name or existence of a principal does not appear in the instrument. *Dykers* v. *Townsend*, 24 *New York R.* 57.

He also cited 2 *Parsons on Con.* 290, and note *K*; *Dart on Vendors* 106; *Coles* v. *Trecothick*, 9 *Vesey* 234; *Dart* 84, and note 1.

Mr. Ludlow, for defendant.

THE CHANCELLOR.

The bill in this case is for the specific performance of an agreement to sell lands. The agreement is in writing; the property, and price, and other terms of the contract, are specified with sufficient certainty. The contract is not signed by the defendant, but by real estate brokers, employed by him to sell the property. The first objection by the defendant is, that such brokers have not authority to sign a contract, but only to offer the property, and find a purchaser; the second is, that the contract signed varies from the terms authorized.

Brokers are persons employed to effect sales; their general business is only to bring together parties; but with regard to merchandise, it is held that they have the power to bind the principal by their signature to written memorandums of sale, known as bought and sold notes, in sales within the statute of frauds. But this power was for a long time doubted by the courts, in sales of personal property, and has never been held to exist in sales of land. For sales of merchandise, the broker, as such, has no power to receive the price or any part of it, but his authority is limited to making the bargain.

There is not the same reason, or the same necessity, for holding that the broker is authorized to sign a contract of sale in case of lands, as for merchandise. The sales of *goods* are simple transactions. The sale of real estate cannot be effected without a conveyance by the owner himself, and seldom without an examination of title, and necessarily requires time to complete it.

In this case, the defendant told the brokers, whom he knew to be real estate brokers, that if they could sell this property they should do so, and said he wanted $3000 for it. They agreed in writing with the complainant, to sell it for $3000. Nothing was said by the defendant about their signing a contract. No other directions were given than those above stated.

In New York, it is held that the authority of a real estate broker, when authorized to sell lands, only extends to finding a purchaser willing to give the price fixed; that when he has done this, he has discharged all his duty, and is entitle to his compensation, and that he cannot bind his principal by signing a contract. *Coleman* v. *Garrigues,* 18 *Barb.* 60; *Glentworth* v. *Luther,* 21 *Barb.* 145; *Roach* v. *Coe,* 1 *E. D. Smith* 175.

And the same general view seems to have been taken by the Judges of the Supreme Court of this state, in *Shepherd* v. *Hedden,* 5 *Dutcher* 334. Justice Brown expressly says that the broker has no authority to sign a contract of sale.

I am inclined to adopt this as the correct view, and to hold that this contract is not signed by a person thereunto lawfully authorized, as required by the statute of frauds. Giving authority to sell does not, by force of the terms, or by their general acceptation, give authority to sign the vendor's name to a contract. And in case of lands, it is not wise to extend this meaning by construction.

The contract is alleged to vary from the authority in this: that by the contract, the defendant who employed the broker is left to pay the commissions, while the instructions were to sell for $3000 net, or free from charge for commissions. The defendant testifies that these were the instructions; Campbell, the broker, who is the only other witness to the instructions, admits, in his cross-examination, that before the sale he was so instructed by the defendant. He says that the complainant, by a verbal agreement, was to pay the commissions; and the complainant offers to pay them. But the written bargain is for $3000, not for that and commissions. If the defendant is bound by the bargain as written, he can no more claim commissions than he could claim $3030, on a parol understanding. If authority should be given in writing, to contract to sell lands for $1000, retaining the right to occupy for three months, a written contract to sell for $1000 would not be valid, although there was a verbal understanding which the purchaser will comply with, permitting the

occupation. The defendant is bound by this written contract, to a different bargain from the one he authorized.

On both grounds, the specific performance must be refused.

BROWNLEE *vs.* LOCKWOOD and wife.*

1. The administrator of an intestate who resided out of this state, by letters granted in the place of his domicil, for assets situate in that jurisdiction, cannot be called to an account in the courts of this state.

2. And where such an administrator has died without rendering an account in the courts of the state of his intestate's domicil, the courts of this state have not the right to call such administrator's representative, and much less his heir-at-law, to account here for the administration of the estate. Nor can an administrator *de bonis non* of the first intestate, appointed in the place of such intestate's domicil, be called to account here.

3. An administrator who purchases real estate with the surplus of the personal estate of his intestate, after the payment of debts, and takes the title thereto in his own name, holds the real estate in trust for the next of kin of the intestate, at the election of the *cestuis que trust*, who are entitled to take the property if it has increased in value, or to call for an account of the trust money so misapplied; and the heir of such administrator holds it in like trust.

4. In order to ascertain, in such a case, whether the property was purchased with money of the first intestate, an investigation of the accounts of his administratrix may be made in the courts of this state, if necessary. An account thus taken is not had for the purpose of settling the account, or making a decree of distribution here, but to ascertain whether real property in this state over which this court has jurisdiction, and exclusive jurisdiction so far as the title is concerned, is held in trust by one resident of this state for another resident.

5. An administrator *de bonis non* is responsible only for such unadministered assets as he has received. He can in no way be called upon to account for the mal-administration of his predecessor.

6. The weight of authority seems to hold that the representative of a former administrator could not be called on, by the administrator *de bonis non* of the first intestate, for the proceeds of property converted into money in the hands of the administrator of the first intestate at such administrator's death; but only for assets existing in specie.

7. A general demurrer to a bill on the ground of multifariousness, which is not sustained as to the only part which makes it multifarious, will be overruled.

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* CITED *in McDonald* v. *O'Connell's Adm'rs*, 10 *Vr.* 320.

The defendants filed a general demurrer to the bill of the complainant, and upon this the cause was set down for argument.

Mr. I. W. Scudder, in support of the demurrer.

The bill was filed March 14th, 1868. To this bill, David Lockwood and Isabella his wife have filed a demurer. The following points are presented by the defendants, in support of their demurrer.

I. The proper remedy for the complainant, is by citing David Lockwood to account before the surrogate of the city of New York.

The estate of Joseph Brownlee, now deceased, was in the city of New York. Joseph Brownlee, in his lifetime, resided in the city of New York. No letters of guardianship or administration were, at any time, taken out in the state of New Jersey.

On the 23d of July, 1862, letters of administration were granted by the surrogate of the city of New York to David Lockwood, as administrator of Joseph Brownlee's estate; he gave security—two sureties, each in the amount of $2400.

The house and lot in Jersey City, which Isabella Lockwood inherited from Abigail Brownlee, cannot be the subject of a lien for the mal-administration, as alleged, of Abigail Brownlee. On the 23d of November, 1853, letters of administration were granted to Abigail Brownlee, on the estate of her husband. After fourteen years, three months, and twenty-one days, a bill was filed to reach the proceeds of such administration, seeking to establish a lien on a house and lot at Jersey City, New Jersey, in the possession of the heir-at-law. The property has passed by descent.

The Court of Chancery of New Jersey, will not take charge of, or enforce the administration of an administrator, whose letters were granted in the state of New York, and in a case where the intestate resided in the state of New York, and died there, for these, among other reasons—1. The next of kin must

be determined by the laws of the state of New York. 2. The debts must be proved in the state of New York, and paid according to the order of priority in that state. 3. The administrator, upon citation, is bound to account in New York, and the decree of the state of New Jersey will not aid or protect him. *Story on Conflict of Laws*, § 499.

The rights and powers of guardians are considered as strictly local, and not as entitling them to exercise any authority over the persons or personal property of their wards in other states, upon the same general principle and policy which have circumscribed the rights and authorities of executors and administrators. *Morrell* v. *Dickey*, 1 *Johns. C. R.* 153; *Kraft* v. *Wickey*, 4 *Gill & Johns.* 332.

There is no question whatsoever, that according to the doctrine of the common law, the rights of foreign guardians are not admitted over immovable property, situate in other countries. These rights are deemed to be strictly territorial, and are not recognized as having any influence upon such property in other countries, whose systems of jurisprudence embrace different regulations and require different duties and arrangements. No one has ever supposed that a guardian appointed in any one state of this Union, had any right to receive the profits or assume the possession of the real estate of his ward in any other state, without having received a due appointment from the proper tribunals of the state where it is situate. The case falls within the well known principle, that the rights to real property can be acquired, changed, or lost, according to the law *rei sitæ*. *Story on Conflict of Laws*, § 504 *a*. The same rule is applied by the common law to movable property, and has been fully recognized both in England and in America. No foreign guardian can, *virtute officii*, exercise any rights or powers or functions over the movable property of his ward, which is situated in a different state or country from that in which he has obtained his letters of guardianship. But he must obtain new letters of guardianship from the local tribunals

authorized to grant the same, before he can exercise any rights, powers, or functions over the same.

Can the action for money had and received by the New York administrator, be maintained against such administrator in New Jersey? He is an administrator for the creditors, and next of kin. Who and to what amount are the creditors? What were the expenses of the administration? Can any thing be fixed or ascertained until the account has been filed in New York, and a decree of distribution there made? Can the Court of Chancery of New Jersey perform the duties of the surrogate of the city of New York?

The complainant does not propose to make the creditors and next of kin parties. Suppose the Court of Chancery of the state of New Jersey should attempt to follow funds alleged to have been brought into the state of New Jersey by the New York administrator, which funds are charged to have been invested in lands in New Jersey, and the administrator should be cited to account, and should render an account in the state of New York, would the decree of the Court of Chancery of New Jersey be any protection to the administrator? *Story on Conflict of Laws*, § 512. In regard to the title of executors and administrators, derived from a grant of administration in the country of the domicil of the deceased, it is to be considered that the title cannot, *de jure*, extend as a matter of right beyond the territory of the government which granted it, and the movable property therein. *Ibid.*, § 513. It has become a general doctrine of the common law, recognized both in England and America, that no suit can be brought or maintained by any executor or administrator, or against any executor or administrator, in his official capacity, in the courts of any other country except that from which he derives his authority in virtue of the probate and letters of administration there granted. So, on the other hand, if a creditor wishes a suit brought in any foreign country, in order to reach the effects of a deceased testator or intestate, situated therein, it will be necessary that letters of administration should there be taken out

in due form, according to the local law, before the suit can be maintained; for the executor or administrator appointed in another country, is not suable there, and has no positive right to or authority over these assets; neither is he responsible therefor. *Note to* § 513. The Supreme Court of the United States, in *Vaughn* v. *Northup*, 15 *Peters* 1, decided against the doctrine that a foreign administrator might be sued in another state for an account of assets received under the foreign administration. *Bond* v. *Graham*, 1 *Hare* 482; *Price* v. *Dewhurst*, 4 *Myl. & C.* 76, 80; *Preston* v. *Lord Melville*, 8 *Clark & Fin.* 12; *Vermilyea* v. *Beatty*, 6 *Barb.* 432; *Story on Confl. of Laws*, § 514, *note* 3.

If, after such administration shall have been completed, any *surplus* should remain, and it shall appear that there are trusts to be performed in Scotland, to which it was denoted by Sir Robert Preston, it will be for the Court of Chancery to consider whether such surplus ought or ought not to be paid to the pursuers for the purpose of being applied in the performance of such trusts; and in considering that question, every attention ought to be paid to the authority under which the pursuers have been appointed trustees, and the consent which led to such appointment. It is premature to decide that point, it being at present unascertained whether there will be any *surplus* of the personal estate in this country, or what will be the amount of it; and no declaration of right by the Court of Sessions would be binding upon the Court of Chancery under whose jurisdiction the property in England is placed by the suits which have been instituted. *Preston* v. *Lord Melville*, 8 *Clark & Fin.* 14.

But where such assets have been collected abroad under a foreign administration, and such administration is still open, there seems much difficulty in holding that the executor or administrator can be called upon to account for such assets under the domestic administration, unless, perhaps, under very peculiar circumstances, since it would constitute no just bar to proceedings under the foreign administration in the courts of the foreign country. 1 *Story's Eq. Jur.*, § 583.

Normand's Administrator v. *Grognard*, 2 *C. E. Green* 426. James Normand died in Jersey City, February, 1863. He left personal property to the amount of $40,000. For several years prior to and at the time of his death, he resided in the county of Hudson, where he died. The bulk of his property consisted of bank stocks and other funds in the state of Pennsylvania. The property in New Jersey amounted to $300. In April, 1863, letters of administration were granted in New Jersey and in Pennsylvania, to Edwin M. Lewis. The inventory in Pennsylvania included the property the *situs* of which was in that state. The inventory in New Jersey included, or was intended to include, the property here. On the 26th November, 1864, the Orphans Court of the county of Hudson ordered the administrator to file an inventory of the *whole estate*, and give security in the *whole* amount of the property, or that letters of administration be revoked. Neither the Orphans Court nor this court, has any right to require that the administrator shall bring the fund to which the next of kin may be entitled, from Pennsylvania to this state for distribution. In that respect the conduct of the administration must be controlled by the judicial tribunal of Pennsylvania. Nor can the court here anticipate what their decision may be. *Ibid.* 428.

The order was made not at the instance of a creditor, but of a party claiming to be the next of kin of the intestate. *Ibid.* 429.

The distribution of the fund must be regulated by the laws of the domicil of the intestate. *Ibid.* 428.

The case of *Banta* v. *Moore*, 2 *McCarter* 97, sustains every principle contended for.

II. Letters of administration on the estate of Abigail were never taken out, in any jurisdiction.

If Abigail Brownlee, as administratrix of Joseph Brownlee, had funds of that estate in her possession, which have been changed or converted; before those funds can be reached

an administrator should be appointed to take possession of the estate of Abigail.

The complainant is not a creditor. There may be creditors. The complainant claims as next of kin, and is entitled to a distributive share. Who but an administrator can ascertain the amount of such distributive share? How can a court say that property belongs to a next of kin, unless there be a decree of distribution? How can there be a decree of distribution, unless there is an administration?

III. The bill is multifarious.

The bill cannot be maintained, for the reason that it seeks to follow the funds of *two administrations.*

November 3d, 1853, Joseph Brownlee died intestate; November 23d, 1853, Abigail, his widow, administered; January 13th, 1862, Abigail died; July 23d, 1862, David Lockwood took out letters on the estate of Joseph Brownlee, in New York.

The effort by the bill is, first, to charge the lands which Abigail purchased in New Jersey in the hands of the heir-at-law; and, secondly, to compel David Lockwood to account. If there be any equity, the grounds of equity are different. One equity is against lands descended. Another equity is against an administrator, to account. The widow would be entitled to her thirds. The decree of the surrogate in New York, in the settlement of the administration of Abigail, would be wholly different from that in the case of David Lockwood. *Story's Eq. Pl.*, §§ 271 to 278. Under this bill, nobody could tell how to direct the testimony.

IV. There is no ground whatever for the injunction.

The lands at the corner of Wayne and Varick streets were purchased by Abigail Brownlee, of Calvin Leach, and a deed made to her. She died seized of this property, and the same descended to the defendant, Isabella Lockwood, her sister and heir-at-law. The complainant has no legal lien whatever against these lands.

Mr. Gilchrist, Attorney-General, contra.

It is proper to premise that this bill was not filed, and will not be attempted to be sustained, on any principle inconsistent with the recent cases of *Moore* v. *Banta*, 2 *McCarter* 97, and *Normand's Adm'r* v. *Grognard*, 2 *C. E. Green* 425. If any one prayer of the bill claims more extensive relief than that to which the complainant is entitled, as *cestui que trust*, against the defendants, as *trustees* of real estate, it is because we suppose the complainant entitled to claim the benefit of the rule, that equity will not do justice by halves. But if we rely too confidently on the application of this doctrine to this case, and the court can yet give relief to the complainant, as *cestui que trust*, against the defendants, as *trustees* of real estate, then the demurrer must be overruled, as too broad. Can the court give the relief against defendants, as trustees?

In one of those New Jersey cases, just above mentioned, the absolute right of the administrator of the domicil to all the assets, wherever situate; and in the other, the absolute obligation of the administrator of the domicil to get in and give security, in the forum of the domicil, for all assets, wherever situate, was attempted to be maintained.

Nor will it be necessary to impugn the authority of *Vaughn* v. *Northup*, 15 *Peters* 1, in which it was held that the *next* of kin of an intestate, domiciled in Kentucky, could not file a bill for account against a Kentucky administrator in the District of Columbia, for assets received in the District; nor any of those numerous cases which hold that an asset collected in one state, under its authority, will not be an *asset* in another state, as was held in *Fay* v. *Haven*, 3 *Metc.* 114; *Peck* v. *Mead*, 2 *Wend.* 571; *Orcutt* v. *Orms*, 3 *Paige* 465; *Harrison* v. *Sterry*, 5 *Cranch* 289; *Smith* v. *Bank*, 5 *Peters* 523; *Vaughn* v. *Barrett*, 5 *Vt.* 333; *Churchill* v. *Boyden*, 17 *Vt.* 319.

Nor will it be necessary to contest the case of *Currie* v. *Bircham*, 1 *Dowl. & Ry.* 35, in which it was held that an India administratrix, who remitted deceased's assets to Eng-

land in money, retained title as *owner* by virtue of her foreign letters, and could sue for them as owner; nor the case of *Preston* v. *Lord Melville*, 8 *Clark & Finelley* 1, in which it was held that the administrator of the domicil could not call the property out of the hands of an administrator *rei sitæ*.

None of the questions settled in these cases, arise under this bill. This bill may be sustained, and all of the above cases stand. The cases above stated and those cited by the defendant, it may be admitted, establish these points: 1. That an administrator of the domicil can have no claim for an account of the assets of the same intestate disposed of by any other administrator, under authority properly obtained from a foreign jurisdiction. 2. That the next of kin cannot call to account, in one jurisdiction, an administrator appointed in another. And, 3. That to obtain relief in equity against a foreign administrator, a representative of the intestate, appointed in the forum where relief is sought, is a necessary party. The case in hand, though it is a bill by next of kin, complainant, against an administrator, defendant, is not within the first or second point, because the defendant, though an administrator *de bonis non*, is also a husband of an *heir* to the deceased *trustee* of the complainant.

As to the third point, no case is stronger than *Tyler* v. *Bell*, 2 *Mylne & Craig* 89, cited in Story's Conflict of Laws, § 513. It is a case not unlike the present, but in one feature there was a great difference; there was *no* allegation in the bill (which was demurred to,) that the administrator had *converted* the property sought to be reached. Lord Chancellor Cottenham, at page 106, says: "The bill alleges that Mr. Tyler, a husband of an administrator abroad, became a *trustee* for the plaintiff, but no facts are stated to justify this statement. No *conversion* of the rupees is stated, &c.; but the whole of it is *treated as part of the estate* of M. M. M." He then holds that an administrator, in *England*, of M. M. M., is a necessary party to the suit. By the law of New Jersey, as laid down in *Banta* v. *Moore*, and *Normand's*

Adm'r v. *Grognard*, an administrator here, being made a party would not add to the jurisdiction of our court. In fact, as we proceed against the *heir* of the deceased, the administrator is no more a necessary party, than the personal representative in foreclosure cases against the *heir*.

Lord Cottenham, two months after his decision in *Tyler* v. *Bell*, was required to consider the question when an executor *ceased* to be *such*, and became *trustee*. This was in the case of *Phillipo* v. *Munnings*, 2 *Mylne & Craig* 314. It was a bill against an executor of an executor, to obtain the payment of £400, bequeathed to the first executor, to pay over to a legatee. An act of parliament limited suits for *legacies* to a certain time. It was said this was a suit for a *legacy*. Lord Cottenham said: "A man," (*i. e.* the second executor,) who, "being in possession of a fund which he knows to be not his own, sees proper to sell it, and apply the produce to his own use, certainly does not come before the court under circumstances which entitle him to much indulgence."

He then declares that the suit was not for a *legacy*; that the fund had ceased to bear the character of a legacy; that the suit was for a breach of trust, the second executor having sold the securities in which the first executor had invested the money, and re-invested the proceeds in his own name; that the suit must be considered, not as a suit for a legacy, but as a suit to compel the party to *account for a breach of trust*, and therefore the act limiting suits for *legacies* did not apply to the suit. *Ibid.* 311, 314, 315, marginal pages.

These last two cases show the effect of a *conversion* of the fund, or of an investment of it in the name of the executor, as an individual, upon his *status*.

Vice Chancellor Wigram recognizes the same doctrine, that the fund may lose its character of a fund to be administered, and the executor his character of executor, in *Bond* v. *Graham*, 1 *Hare* 484; though, in that case, he thought neither the fund nor the executor had lost the original character. He said it was not conclusive that the fund had *not*

lost its character of an unadministered asset, and taken upon itself the character of a *trust* fund, merely because it remained in the hands of the executor, though he said that made it more difficult of proof. *Bond* v. *Graham* is the first case cited in *Story's Conflict of Laws*, § 513, for the *general* doctrine that a foreign administrator cannot be called to account out of his jurisdiction.

The case of *McNamara* v. *Dwyer*, in 7 *Paige* 240, may have been properly disregarded as an authority, by Story, (*Conflict of Laws*, § 513, note,) because there the foreign administrator had simply passed through New York with the assets, gone to New Orleans, and *there* misappropriated the assets for which he was sought to be held accountable in New York.

Brown v. *Brown*, 4 *Edw. C. R.* 346, while holding that the *general* rule is, that a foreign administrator cannot be called to account by the next of kin, admits there are cases where the court will lay their hands on an administrator; and one of them is stated to be where a foreign administrator brings *here* the asset, and is wrongfully engaged in applying it to his own use. So, the court say, that the party must "pursue his remedy according to the *lex fori* of Rhode Island, *unless*, indeed, he could show, that by some act of the defendants in removing the property from that jurisdiction, any remedy which he might undertake to pursue there would be fruitless." *Ibid.* 337.

Would not any remedy we might take in New York to reach the *New Jersey land*, and the profits and appreciation thereof—in which the plaintiff's father's personal assets were invested by the foreign administrator—be fruitless; all the parties residing in New Jersey, as they do?

Courts are reluctant to attempt to enforce liens in a foreign territory. 27 *Beav.* 246. *Gulick* v. *Gulick*, 33 *Barbour* 92, goes as far, and indeed much farther than the case of *McNamara* v. *Dwyer*, 7 *Paige*. So also does *Ordronaux* v. *Helie*, 3 *Sandf. C. R.* 518.

The doctrine that the foreign executor may so deal with

the fund as to lose the benefit of his foreign character, is approved by Westlake. *International Law*, *p.* 288, note *d.*

Story, (*Conflict of Laws*, § 523,) says: "The principle is strict that a foreign administrator cannot do *any* act as administrator in another state;" and then illustrates it by examples. Surely, a foreign administrator cannot invest the assets of his intestate in real estate in New Jersey, and defy our courts to reach the *real estate* as such. I do not see how an administrator *appointed here* could claim the *land* which had been purchased by the foreign asset; it is only the next of kin that can make such a claim.

The administrator appointed here could not claim *land* as coming under his authority, though purchased by the foreign administrator with the assets of the foreign intestate; this is the case of an infant, which is always peculiar. 1 *Story's Eq. Jur.*, § 511.

That an executor or administrator may be trustee in such a case as this, there can be no doubt. *Shaver* v. *Shaver*, *Saxton* 437. The bill alleges the payment of all debts of complainant's father; that there is a right to relief against the land purchased with the assets of complainant's father, or to a lien for the amount, is clear. *Hovenden on Frauds* 435, 442; *Steele* v. *Babcock*, 1 *Hill* 527; 1 *Story's Eq. Jur.*, §§ 581, note, 593, 596, 322, 423.

As the courts of this state have undoubted jurisdiction, upon these principles, against the *heir* of the foreign administratrix, inheriting the said land in this jurisdiction, to have it declared to be held in trust for the next of kin; so I think there are sufficient allegations in the bill to hold liable here, the *husband* of the *heir* who happens to be also the administrator *de bonis non* appointed in a foreign jurisdiction, as receiver of the *rents* of this same real estate, the legal title to which descended to his wife. He is responsible for them as trustee, no matter what his foreign character may be. But he jointly, with the original administratrix, secreted $1500 of complainant's father's estate, years before he was administrator *de bonis non*, and caused it to be de-

posited, years before his appointment, in the name of a third party, and finally spent it on this very real estate.

The court will not do justice by halves. This administrator *de bonis non* being liable to account as a trustee for his own acts last stated, should account for everything. *Van Meter* v. *Jones*, 2 *Green's C. R.* 520. That was a case where a party was required to account in every capacity. The title of the complainant as *one* of the next of kin is a several right; it is not a joint right which can be forced by two of the next of kin. To join all the next of kin would make a misjoinder; though the court *did* in *Burnham* v. *Dalling*, 1 *C. E. Green* 310, permit a conditional consolidation of the suits, but provided that if it became inconvenient, they should again become separate.

It seems to me that the demurrer is not well taken. If well taken in any part (which I do not admit,) it is too broad; as there is a large field for the jurisdiction of the court, irrespective of the doctrine of equity that once having jurisdiction of the parties, and one subject matter, it will not turn the party round and send him to law for a part of the relief to which he is fairly entitled, although he might have no right to go into equity for that part alone.

Mr. Scudder, in reply.

The complainant insists that he is entitled to relief against the defendants, as trustees of real estate.

No such principle can be invoked until after the account of the administration shall have been settled in the proper tribunal, and it shall then be shown that the administrator has assets in his hands which he declines to pay over There must be a residuum ascertained in the proper tribunal. *Shaver* v. *Shaver*, *Saxton* 438. That proper tribunal is where the account should be rendered according to law. There is no surplus charged or stated.

No case can be found where an heir at-law, who comes into possession of the estate of his ancestor by descent, can be declared a trustee, upon the charge that his ancestor was

an administrator in another state, and did not properly administer the assets of his intestate, and with such assets bought lands which descended to his heir.

Though the administratrix may be dead, her bonds stand. This appears by the evidence. This court can know that the testator left assets, only through the account of the administratrix.

If these defendants should answer this bill, and render an account as far as they could, of the two administrations, it would not prevent proceedings by creditors or parties interested, before the surrogate in the city of New York, to obtain an account there; and it would not save the bondsman of Abigail Brownlee from prosecution there. The charge that there are no creditors cannot give jurisdiction. *Shaver* v. *Shaver*, *Saxt.* 438.

It has been said to be a general rule, that the law never implies, and a court of equity never presumes a trust, except in cases of absolute necessity. 2 *Story's Eq. Jur.*, § 1195; *Cook* v. *Fountain*, 3 *Swanst.* 585, per Lord Nottingham.

The case of *Tyler* v. *Bell*, 2 *Myl. & C.* 89, supports the demurrer. It holds, that to a bill which seeks an account of the assets of an intestate, who died in India, possessed of a personal representative there, a personal representative of the estate constituted in England, is a necessary party. The merits of the case were never reached. The property as charged by the bill was personal property. It was not a case of the purchase of lands which had descended to the heir-at-law.

The case now before the court, is one in which the complainant attempts to fasten a lien on land, which has descended to the heir-at-law, upon the assertion that the ancestor, or person from whom the estate descended, was the administratrix in another jurisdiction, and converted the funds to her own use.

There must be some judgment at law, some decree of a surrogate, or other competent tribunal, establishing the unlawful conversion of the fund, before a court of equity will

enforce a lien on land, or declare the owner of the legal title a trustee.

This is not the case of a trustee bound to invest money in land, and where the court would follow the trust money into land purchased by the trustee, who had failed to declare the trust when he bought the land.

The administratrix had, as is said, a fund in the state of New York. She was authorized, as administratrix, to receive that money in New York. She gave bonds there, that she would pay the creditors of the intestate, and distribute the surplus among the next of kin.

This fund, if any, can only be got at through some administrator, the original administratrix being dead.

THE CHANCELLOR.

Joseph Brownlee, the father of the complainant, died at the city of New York, where he resided, November 3d, 1853, intestate. Administration of his estate, all of which was in that city, was granted to his widow, Abigail Brownlee, on the 23d of the same month. She took possession of his assets, and converted them all into money, except a leasehold estate in New York, of which she collected the rents until her death. In 1856, she purchased a lot in Jersey City with the money received, as administratrix, from the assets of the decedent, and built a house upon it, which was also paid for out of the assets of the decedent, she having no money except what she derived from his estate. The complainant was the son of the decedent, by a former wife, and was but a few years old at the death of his father; he had lived with and served his stepmother until he was nearly grown, and afterwards gave to her his earnings until he was almost of age, and was furnished with board and clothes by her, for which his services and wages were a full compensation; he left her in 1860, about two years before her death. She paid all the debts of his father, but never rendered any account of her administration, or paid to the complainant any part of the estate of his father. The personal estate received by her

greatly exceeded the debts of the decedent, and was expended in purchasing the lot in Jersey City, and building the house upon it. After purchasing this lot, she removed to Jersey City, and resided there until her death. She died on the 30th of January, 1862, intestate, leaving her sister, the defendant Isabella Lockwood, her only heir-at-law. In July, 1862, administration *de bonis non* of the estate of Joseph Brownlee was granted by the surrogate of New York to the defendant, David Lockwood, who resides in Jersey City, and who has since collected the rents of the leasehold property in New York; and he and his wife have, since the death of Abigail Brownlee, been in possession of the house and lot in Jersey City, and have received the rents. The complainant was the only issue of Joseph Brownlee, except one daughter, a twin sister of complainant, who has not been heard of by him for many years, and who is not known by him to be living. The complainant has no recollection of her; she was separated from the family, at an early age, and was adopted by a relative, with whom she afterwards lived. Her residence was in England.

The bill prays that the house and lot in Jersey City may be decreed to be held in trust for the complainant, as purchased with the residue of the estate of his father, which belonged to him, wholly, or in part, as next of kin; and that the defendants may account for the assets of Joseph Brownlee, received by Abigail Brownlee, as his administratrix; and that Lockwood may account for such assets as he has received. It does not appear that any one administered upon the personal estate of Abigail Brownlee, either here or in New York. These are the facts as stated in the bill, and for this argument, are to be taken as true.

An administrator of an intestate who resided out of this state, by letters granted in the place of his domicil for assets situate in that jurisdiction, cannot be called to account in the courts of this state. This position is settled by numerous cases, and is not disputed by the counsel of the complainant. So far, then, as the complainant calls upon the

defendants to account for the assets received by Abigail Brownlee, in her life, and upon David Lockwood to account for those received under his administration, he can have no relief in this court. The sureties of Abigail may be sued in New York, on her administration bond, if their liability is not barred by a statute of limitation; but whether they would be liable to the next of kin for distributive shares, if not decreed by the proper court, depends upon the provisions of the laws of New York, which are not shown in this cause. She rendered no account in New York, and as she has no personal representative there, or elsewhere, so far as appears in this cause, it may be impossible to procure an account in the proper court. But this, if shown to be the situation of the case, would not give to the courts of this state the right to call her personal representative, and much less her heir-at-law, to account here for the administration of the estate.

The defendant, David Lockwood, can be made to account in the proper courts of New York, and of course is clearly within the rule, and cannot be called to account here.

If such accounting was the only relief sought, the demurrer would be sustained; but the bill alleges that Abigail Brownlee purchased the lot in Jersey City with the assets of the estate in her hands, after the payment of the debts of her intestate. This was the surplus of his estate, and by law belonged to his next of kin, of whom the complainant was one, and it was held by her in trust for them. It was not the less held in trust because she had not yet accounted, or because no decree of distribution was made; the next of kin might not until then have been entitled to maintain a suit for it, or compel her to pay it over; but it was held by her in trust, like all money held by trustees, which is not payable to the *cestui que trust* until a certain time, or until a contingency which has not yet happened, and as such it is subject to the law of trusts. One principle of this law is, that if the trustee convert the money to his own use, and purchase property with it in his own name, such property is held in trust at the election of the *cestui que trust*, who is

entitled to take the property if it has increased in value, or to call for an account of the trust money so misapplied. If it be true, as alleged in the bill, that this property was purchased with the assets of the decedent, she held it as trustee for the next of kin; and the defendant, Isabella Lockwood, to whom it descended, holds it in like trust. To ascertain the fact whether this property was purchased with money of the estate of Joseph Brownlee, it may be necessary to investigate the accounts of his administratrix. But this is not *calling her to account* here, in the sense of the term in which such account cannot be called for in another jurisdiction than that where administration was granted. The accounting in this case is not for the purpose of settling the account, or making a decree of distribution, for which this court has no jurisdiction, but for the purpose of ascertaining whether real property in this state, over which this court has jurisdiction, and exclusive jurisdiction, so far as the title is concerned, is held in trust by one resident of this state for another resident.

There is no one before this court, who can be called to account for the administration of Abigail Brownlee, if the court had jurisdiction of the subject matter. She has no administrator, and the administrator *de bonis non* of her husband is only responsible for such unadministered assets as he has received, and can in no way be called upon to account for the mal-administration of his predecessor. And the weight of authority on the subject seems to hold that he could not call on the representative of the former administrator for the proceeds of property converted into money in her hands at her death, but only for assets existing in specie. *Toller on Executors* 450, *note;* 2 *Williams on Ex'rs* 865, *note.*

The order made in the Ecclesiastical Court, *In the goods of Hall,* 1 *Haggard* 139, would seem to have an aspect to the contrary. But in that case the suit in the court of law was in the name of the Ordinary, and was for the benefit of the next of kin and creditors, and although it is stated that it

was brought by the administrator *de bonis non*, yet it clearly was not a suit by *him*, and does not establish the position that he could sustain a suit in his own name, or that the assets when recovered would be paid to him.

David Lockwood, as administrator, is not a party to this suit, nor is it necessary or proper that he should be a party, as such.

As the suit cannot be sustained for an account, either against the present administrator in New York, or for the administration of the first administrator, the ground of multifariousness urged on the argument, disappears under the ruling in *Emans* v. *Emans*, 1 *McCarter* 114, and in *Varick* v. *Smith*, 5 *Paige* 160, followed and approved in the decision in *Durling* v. *Hammar*,* made at this Term. To make multifariousness or misjoinder, there must be a combination of several distinct matters, on which relief could be granted in equity, if separate.

As the demurrer is to the whole bill, and is too broad to be sustained, it must be overruled, as was the result in *Banta* v. *Moore*, 2 *McCarter* 97.

Thorne *vs.* Mosher.

1. When any matter of proceeding or practice is required by statute or rule of court to be within a certain number of days, the first day, or *terminus a quo*, is excluded.

2. The doctrine to be deduced from conflicting cases, in cases of forfeiture, is that the day of the event after which, in a specified number of days, the forfeiture occurs, will be excluded. In applying this doctrine to a quasi forfeiture (as where a mortgagor fails to pay interest on a day specified,) a court of equity should lean against the construction which favors forfeiture.

3. A mere offer to pay money, though the party actually has the money in a purse in her hand, and is in the act of taking it out, is not a tender, but a refusal to accept is a sufficient excuse for not making the actual tender.

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*p. 220.

4. A party is not allowed to take advantage of an act done, or the omission to do it, where such act or omission was designedly caused by himself.

This cause was heard upon bill, answer, and proofs. The bill was filed to foreclose a mortgage dated March 1st, 1868, given to secure the payment of $1200 in three years, with interest payable on the first days of March and September in each year, and a proviso that if the interest should not be paid within fifteen days after the same should become due, the whole principal should be due. The interest due on the 1st of September, 1868, was not paid, but just after sunset on the 16th, Mrs. Mosher went to Thorne's house, and offered to pay Mrs. Thorne $42, the interest thereon; she refused to receive the interest, on the ground that it was after the time, that the principal was due; and she insisted on payment of the whole. The defendant had the amount offered in her purse in her hand, which she held out in sight of the complainant, who saw the purse, but not the bills. The defendant had opened the purse, and was in the act of taking out the bills, but stopped on account of the refusal of the complainant to receive the interest.

Mr. Berry, for complainants, insisted that this offer being on the 16th day, was too late; that the time expired with the 15th. *Rex* v. *Adderley. Doug.* 463; *Clayton's Case*, 5 *Rep.* 1; *Glassington* v. *Rawlins*, 3 *East* 407.

He further insisted that what was done did not amount to a tender. The money was never offered to the complainant. That an offer of money, or its equivalent, is necessary to constitute a tender.

Mr. W. B. Williams, for defendants.

This suit is brought to compel the payment of the principal sum secured by bond, and a mortgage on the real property described in the bill, which mortgage, by its terms, will not be due until March 1st, 1870. The interest on said

principal sum was made payable semi-annually, and was due on the first day of March and September, in each year.

The bond and mortgage also contain the following interest clause: It is hereby expressly agreed, that should any default be made in the payment of the said interest, or any part thereof, on any day whereon the same is made payable, as above expressed, and should the same remain unpaid and in arrear for the space of fifteen days, then and thenceforth the aforesaid principal sum of twelve hundred dollars, &c., shall, at the option of the said party of the second part, become due, &c.

On the 1st day of September, 1868, the sum of $42 interest became due on said bond and mortgage, and the bill herein alleges that the same remained unpaid for more than fifteen days after it became due, and, in consequence thereof, the complainants had a right to elect, and have elected, that the whole principal sum should become due.

On the 16th day of September, 1868, at about six o'clock P. M., the defendant, Ellen Mosher, went to the house of the complainants for the purpose of paying said interest, which became due on the first day of the same month, and was at that time able and ready to pay, and offered to pay the same to the complainants.

The complainants then and there positively refused to receive said interest.

The defendants have, at all times since said 16th of September, been ready and willing to pay said interest to complainants. By their answer they offered to pay said interest, and brought and paid the same into court at the time of filing their answer. The defendants have paid, and complainants received the interest which has become due on said mortgage since the commencement of this suit.

The suit of complainants rests on the allegation that $42 interest was due on the 1st day of September, 1868; that the same was not paid, but remained due and unpaid for more than fifteen days after it became due.

The allegations of the bill are not sufficient.

1. It was necessary to allege and prove that default had been made in the payment of said interest on the day whereon the same was made payable, and that the same had remained unpaid and in arrear for the space of fifteen days. (See interest clause in bond and mortgage.)

2. The bill alleges that the interest was due on the 1st day of September, 1868. It was due the whole of that day, and default in payment thereof had not been made until the whole of that day had passed.

The complainants had no right of election—1, until default had been made; 2, until said interest had remained unpaid and in arrear for the space of fifteen days thereafter, that is, after default; for the interest could not be in arrear on the day on which it was due.

The complainants, therefore, had no right of election that the principal sum should become due until the 16th of September had fully passed. But on the 16th the defendants offered and sought to pay said interest, and the complainants positively refused to receive it.

3. The offer was a sufficient tender; the defendant, Ellen Mosher, having the money in her hand, though in her porte monnaie, which was exhibited to complainants. *Bakeman* v. *Pooler*, 15 *Wend.* 637, and authorities there cited.

But whether it was strictly a legal tender or not, the *bona fide* offer to pay, coupled with ability, was sufficient, for the complainant's refusal to receive the money was a waiver of tender. *Noyes* v. *Clark*, 7 *Paige* 179; *Stone* v. *Sprague*, 20 *Barb.* 509; *Bellinger* v. *Kitts*, 6 *Barb.* 273.

This is on the principle that no man is bound to perform a nugatory act. *Broom's Legal Maxims, p.* 192.

4. The plain and natural import of the words of that clause of the bond and mortgage on which complainants rely, is that the mortgagors were to have fifteen days after the day on which the interest became due, before the penalty could be claimed. Defendants so understood it.

5. But if the intent of the contract were doubtful, and a construction is to be put upon its words, the day on which

the interest became due must, according to the weight of authority, be excluded in the computation of time.

The rule is, that in the computation of time from a date, or the day of a date, or from an event happening, the day of the date or of the event is to be excluded. *Ex parte Dean*, 2 *Cow.* 605; *Snyder* v. *Warren*, *Ibid.* 518; 4 *New Hamp. R.* 267; 5 *New Hamp. R.* 462; 9 *New Hamp. R.* 304; 6 *Paige* 147.

The most that can be said in favor of complainants' construction of the default clause of the bond and mortgage is, that the rule of computation of time, in such cases, is an open one, to be decided, in each case, according to the words of the contract, the context, and the circumstances and nature of the case. *Ex parte Dean*, 2 *Cow.* 605; *Presbrey* v. *Williams*, 15 *Mass.* 193; and the English case, *Lester* v. *Garland*, 15 *Ves.*, *p.* 248.

6. The courts do not favor penalties, and will not unnecessarily so construe the language of the contract as to make a technical case and create a penalty.

The complainants show no equity; they have suffered no damage, except by their own act, and are not entitled to favor.

The only intent of the penal clause is to secure the payment of the interest; that being done, equity will not enforce a technical penalty, certainly not in a doubtful case. 2 *Story's Eq. Jur.*, *p.* 528.

7. The receiving of interest due since the commencement of this suit was a waiver of the alleged default. *Dumpor's Case*, 1 *Smith's Lead. Cas.* [15]; *Taylor's Landlord and Tenant* 361, § 497.

The bill should be dismissed, with costs.

The Chancellor.

The first question is, whether the offer was made in time. And that depends upon the question whether the first day, and the day on which the interest became due, shall both be computed as part of the fifteen days. The natural and usual

meaning of the words would reject the first day. No one would consider that any act to be done in *one* day after a stated event, should be done on the same day, but on the day after. The law disregards fractions of a day, and if the day begins and ends at twelve at midnight, any act done within the twenty-four hours succeeding midnight, is done on the next day, although done in one hour after an act referred to in the preceding twenty-four hours.

But the decided cases, both in England and this country, differ very much as to the rule in such case. Most of the law courts in this country, including the Supreme Court of this state, have settled that when any matter of proceeding or practice is required by statute or rule of court to be within a certain number of days, the first day, or *terminus a quo*, is excluded. And I find no case among the number of contradicting cases which I have examined, that holds, in case of forfeiture, that the day of the event after which, in a specified number of days, the forfeiture occurs, will be included. And in applying the doctrine to be deduced from conflicting cases to a quasi forfeiture, as this is, a court of equity should lean against the construction which favors forfeiture. I am of opinion that the offer was made in time.

This offer was neither payment nor tender, but the refusal was an excuse for not making the tender. In this case, the money was in the defendant's hands at the making of the offer, and could have been seen by the complainant, but was not. It would have been taken entirely out of the purse and offered to her, had she not positively refused to take it. This is a sufficient excuse for not making the actual tender. A party is not allowed to take advantage of an act done, or the omission to do it, where such act or omission was designedly caused by himself.

In this case, it would be most inequitable to hold that the principal of this bond is due, when the offer of payment was deliberately refused, and that refusal prevented the defendant from proceeding further. No woman, of good common sense, would think it necessary to go through the form of stretch-

ing out a roll of bills to another, who had just announced her determination not to receive them. This offer must be considered as equivalent to a tender to prevent the principal of this mortgage from becoming due.

Coddington *vs.* Coddington.*

1. The residence required by the statute concerning divorces, to give the court jurisdiction, means fixed domicil, or permanent home.

2. The requirement of the statute that a party shall be an inhabitant or resident of the state *at the time* of the desertion, refers to the whole period of three years, during which the desertion must have continued, and not to the mere commencement or act of desertion.

The bill in this suit was for a divorce *a vinculo* for desertion. The defendant being out of the state, was actually served with a notice to appear and defend the suit, as provided for by law and the rules of the court. She did not appear, and the cause was brought on upon *ex parte* proofs, taken for that purpose, and the report of J. Dixon, esq., the special master to whom the same was referred. The master reported that the case was not within the jurisdiction of this court, and that the divorce should not be granted. The parties were married in the city of New York, where they resided for nearly four years after their marriage, and until the spring of 1858. At that time, the complainant, with his wife, left the city of New York, and removed to Bergen Point, in this state, with the intention of residing there. On the 27th of July, in that year, the defendant deserted her husband, and has never since lived with him. The complainant resided at Bergen Point for a month or two after his wife left him, and then returned to the city of New York, where he was, and has continued to be, engaged in practicing law. He has continued to reside in New York ever since,

* Cited *in Meldowney* v. *Meldowney*, 12 *C. E. Gr.* 329.

except for six days, at the time when this suit was being commenced, when he went to Jersey City and occupied a room at Taylor's Hotel, taken by the day, and from which he returned to his mother's house in New York, where he resided at the time he left for Jersey City. The case was submitted on written briefs.

Mr. J. B. Vredenburgh, for complainant.

Mr. I. W. Scudder, for defendant.

The Chancellor.

In this case, neither of the parties resided in this state for more than two months after the desertion commenced. Neither of them is now, or was at the beginning of this suit, an inhabitant or resident of this state, in such manner that the matter in controversy, the marriage relation between them, had any existence in this state, so as to be subject to its laws, or the jurisdiction of its courts. Proceedings with regard to the validity, or dissolution of marriage, are, as was held in the celebrated case of the Duchess of Kingston, proceedings *in rem.* They actually operate upon the matter; they affirm, constitute, or dissolve the marriage relation. By the well settled principles of the *jus gentium,* or rules acknowledged by the codes of all civilized nations, and given effect by comity of law, when not controlled by positive enactments, the positive and relative status of every person is regulated by the law of domicil. The residence of these parties being in the state of New York, neither party, by stepping over to this state with his trunk, and taking lodgings for a few weeks, can give to this court jurisdiction of the matter. Even if the requirements of the statute of this state were strictly complied with, the decree of divorce would be a nullity; and in the state of New York, the marriage relation would still exist. To give jurisdiction over the subject matter, the complainant must have actually

changed his residence or domicil in the sense in which the Supreme Court in the case of *Cadwalader* v. *Howell*, 3 *Harr.* 138, put upon residence and domicil; or both parties between whom the relation exists, must be within the jurisdiction of the court which attempts to dissolve it.

But I think it clear that the case is not within the provisions of the statute which regulates the jurisdiction of this court in cases of divorce. The first clause of the first section of the statute, requires that the parties, or one of them, "shall be inhabitants of the state at the time of the desertion complained of;" and the last clause requires that one of them "shall have been a resident of the state for the term of five (now three) years, during which such desertion shall have continued." I shall not consider now whether the word "inhabitant" in the first clause, ought not to have a much more restricted sense than the word "resident" in the last clause, to make the two consistent, for the view I take of the case renders that necessary; both require one party to be an inhabitant or resident at the time of the desertion complained of. The desertion complained of, and the only desertion for which a divorce is authorized, is a willful, continued, and obstinate desertion for the space of three years; the three years or the time, is as much a part of the desertion or injury as that it shall be willful, or obstinate, or continued; and the words *at the time*, refer to every part of that desertion. This, in my view, would be the proper and legal construction of the first clause standing alone, and the provisions of the last clause require that construction to give consistency to the whole section taken together. It shows that the meaning of the legislature, in requiring the party to be an inhabitant at the time of the desertion complained of, was for the whole time and not at the commencement or the act of desertion. Desertion itself is no cause of divorce, but only its willful continuance for three years.

This construction was given to this act in *Yates* v. *Yates*, 2 *Beas.* 280, and in *Brown* v. *Brown*, 1 *McCarter* 78. And it is well understood that the last case was reversed in the

Court of Appeals, on the ground that the Chancellor held, that notwithstanding the act of 1857, a residence of five years during the desertion was still required; the complainant had resided in the state more than three years during the desertion; and also because the Chancellor held that a residence resumed in this state, seemingly for the purpose of bringing a suit, although there was an actual change of residence, was not sufficient under the requirements of the act.

CONOVER *vs.* WARDELL and others.*

1. A suit may be maintained to compel the performance of a contract performed only in part, and a party will not be precluded by his acceptance of a deed in performance of the contract, when such acceptance was under a mistake as to the contents or effect of the deed.

2. If parties, by writings executed at the time, settle and fix what is meant by a name used in their dealings, the meaning fixed will be taken in preference to any other.

3. Where, under a contract for the conveyance of land, the vendee got the precise land he bargained for by the very lines pointed out to him, and by the precise lines designated in the written contract, this court will not, in a suit for specific performance, compel a conveyance of additional land, because a general expression "homestead farm," used in the written contract as synonymous with the description in the deed, may be construed to mean more by certain artificial rules of legal construction, but will leave the complainant to his remedy at law.

This cause was brought before the court for final hearing, upon the pleadings and proofs.

Mr. W. H. Vredenburgh, and *Mr. J. Parker*, for complainant.

Mr. R. Allen and *Mr. B. Williamson*, for defendants.

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* CITED *in Plummer* v. *Keppler*, 11 *C. E. Gr.* 482.

THE CHANCELLOR.

Henry Wardell died in 1852, intestate, seized of a farm near Long Branch, in Monmouth county, on which he resided at his death, containing several hundred acres of land. He had, in his lifetime, conveyed several lots cut off from the south part of this tract. Administration of his personal estate was granted to the defendant, Elizabeth Wardell, his widow, and one Jordan Woolley, who, by order of the Orphans Court, sold a tract of about fifty acres of the north part, now known as the Ocean House property, to Henry E. Riell; and she, with the children and heirs of Henry Wardell, had conveyed a tract from the southeasterly part to the Long Branch and Sea Shore Railroad Company. Henry Wardell left six children, who were his only heirs-at-law, one of whom, Henry H. Wardell, in 1855, conveyed his share in the real estate of his father to Elizabeth Wardell, his mother. The widow had removed from the farm into the village of Long Branch before 1855, and one of her sons, Edward Wardell, was living in the mansion-house, and had possession of the farm.

The first course in the deed is along a fence and ditch which have been there for fifteen years or more, and the land south of it was offered for sale by the administrators a few years after Henry Wardell's death. Part of it had been sold by the defendants before 1868, by parol agreement, to the owners of the adjoining lands, who had taken possession of these parts, although the agreements were never carried out. In June, 1865, the widow and heirs of Henry Wardell had agreed among themselves to sell the farm north of this line, and to reserve the part south of it to enable them to fulfill their parol contracts, and authorized the defendant, Morris, who was a real estate broker at Long Branch, to sell the farm north of that line.

The complainant, in the latter part of June, 1865, applied to Morris to purchase a farm. Morris immediately took him to this farm, and showed it to him. The part which they first approached was the south boundary or the beginning

corner, near the school-house, on the public road over which they were driving. Morris, according to his own answer and testimony, here pointed out to the complainant the beginning corner and the south line along the fence and ditch, which is the first course in the contract and deed. But this fact is denied by the complainant in his testimony. The complainant then told Morris to procure a power of attorney from the other defendants who were the owners of the farm, to enable him to sell it, and said he would then make a bargain with him. Morris procured a power of attorney within a day or two, and on the 26th day of June, 1865, the same day on which the power is dated, made a contract, in writing, with Conover, to convey the farm to him for $30,000; Conover joined in the contract and agreed to purchase at that price. On the 30th of October, 1865, the defendants, excepting Morris, executed a deed dated October 28th, to the complainant, which was accepted by him as a fulfillment of the contract, and he paid or secured to them the price which has since been fully paid. On the 1st of November, 1865, Morris executed to the complainant a deed of bargain and sale, dated October 28th, with covenants against his own acts, by which, in consideration of $1, he conveyed all his right and title in the premises.

The complainant claims that the defendants were bound by the contract to convey to him all the homestead farm owned by Henry Wardell at his decease, except such parts as had been sold and conveyed before that contract; alleging that he was induced to accept the deeds as a fulfillment of that contract, by the false assertion of Morris, the agent, at the delivery of the deeds, that all the land south of the first course had been sold. He claims that the contract was to convey the farm known as "the Wardell farm," or the homestead farm of the defendants, except such parts as had been conveyed away.

The power of attorney authorizes Morris to sell and convey "all our homestead farm, on Fresh Pond, beginning at or near the Fresh Pond school-house, in the middle of the

highway, and running easterly as the ditch and fence now stands, to the sea or ocean," &c., to the place where it began; "supposed to contain about five hundred acres, reserving thereout say one hundred acres conveyed to a Mr. Neail (Reill,) and to the Long Branch Railroad Company." The contract agrees to convey "all that tract or parcel of land lying and being on Fresh Pond, in Ocean township, Monmouth county, *and* known as the Wardell farm, *and* begins in the middle of the road leading from Long Branch to Fresh Pond, near the corner of the Fresh Pond district school-house, and runs easterly, as the ditch and fence now stands, to the sea shore," thence and along several courses to the beginning; "supposed to contain five hundred acres, be the same more or less, reserving the right of way deeded to the Long Branch Railroad Company."

The deed from the widow and heirs conveyed all that certain farm and tract of land, situate, &c., beginning in the centre of the road from Land's End to Raccoon island, and near the corner of the Fresh Pond district school-house; thence (1) along the line of William West and others north 67° 15′ east, 25 chains, more or less, to the Atlantic ocean at low water mark, and following by courses and distances to the place of beginning, "supposed to contain five hundred acres, more or less; it being the same premises that Henry Wardell died possessed of, and it being hereby intended to convey to said Conover all the lands and premises lying within the above boundaries" (except the parts conveyed to the railroad company, and to the United States for a life boat station, in 1849.) The railroad lot and life boat lot are included in the boundaries, the lot in question is not; and it is admitted that the beginning point stated in the power of attorney, in the contract and the deeds, is the same. In the deed from Morris the description of the land is verbally the same as in the other deed, to the statement of the supposed contents; it then adds: "It being the intention of the party of the first part hereto, to convey to said Conover all the right, title, power, or interest which has vested or

may vest in him by power, or under a certain power of attorney," describing the power; and further adds: "The above premises are known as the farm of Henry Wardell, deceased, and the widow and heirs of said Henry Wardell, deceased, have, by deed of even date herewith, conveyed directly to said Conover."

It is shown that the farm occupied by Henry Wardell, at his death, included the tract in question, and also had once included a tier of lots south of it and fronting on the public road, sold to West and others, and also the Ocean House tract, sold to Reill; all which are not included in the boundaries specified in the deeds, or the contract, or power.

After the contract the defendants gave to Conover the old maps and deeds for the tract composing the farm, by which it appeared that the farm once included the disputed tract, and the tier of lots south of it. These maps and papers were given to Mr. Ryall, the counsel, who, at the request of Conover, was employed to prepare the deeds. He told Morris, in the presence of Conover, that the farm originally extended further south than the course along the fence and ditch, and asked how he ascertained this straight line to be the south boundary. Morris replied because they owned no land to the south of it, for they had sold all the land lying to the south of that line. Morris states that until long after that time he was under that impression that all south of that line was sold. At the request of Conover, he procured the land to be surveyed and mapped by W. R. Mapes, between the contract and the delivery of the deed. This map Conover and his counsel had before, and at the drawing of the deed; it showed the beginning point near the schoolhouse, and that the first course ran north of the land in question.

The bill in this case is in effect to compel the defendants to perform specifically their contract by conveying to the complainant a part of the land which, by the contract, they agreed to convey, but which was not included in the deed to him, which he was induced to accept by the representation

that it included the whole of the farm which he supposed he had bought.

A suit may be maintained to compel the performance of a contract performed only in part, and a party will not be precluded by his acceptance of a deed in performance of the contract, when such acceptance was under a mistake as to the contents or effect of the deed.

In this case there is no fraud or misrepresentation. For, although Morris said all south of the line was sold, he supposed in good faith that it was, and there was no mistake in fact, either as to the land in the contract, or the land conveyed by the deed. If Morris is to be believed, the complainant was distinctly shown the beginning corner, and the south line of the farm, as specified in both contract and deed, before the contract was signed. I am inclined to believe Morris. The testimony of Conover amounts only to the fact that he does not recollect this line being pointed out to him, and it is neither impossible nor very improbable that he would have forgotten it, as, on the first view of a strange farm, this would not impress itself as of any importance, while the testimony of Morris is positive. And it is hardly of itself probable that a broker, in showing a farm to a hoped-for purchaser, would pass the first boundary they came to without pointing it out. If this is true, the deed conveys the very tract that was shown to and examined by him in the negotiation for sale, and that was understood by him as the tract he bought, and by Morris as the tract he sold. When the deed was being made out, and when it was delivered, he distinctly understood that this was the south boundary, and that the lands south of it formed a part of the old farm or homestead of Henry Wardell. A reason was given for this not being sold or included in the deed. The reason, by the mistake of Morris, was not the true one, but this had nothing to do with the question whether Conover understood exactly what was in the deed, and that the lands he now claims were not included. The vendors were guilty of no fraud or false representation, either in fact or law.

Morris was not authorized to sell any lands south of that line, and any representations he made about them were outside of his authority.

There was, then, no fraud or mistake in point of fact, as the complainant got the land which was pointed out to him, both before the bargain and before the deed, as the land to be sold. But the claim of the complainant is based upon the position that the words of the agreement, by their correct legal construction, entitled the complainant to a conveyance of more land than Morris understood that he was selling, or the complainant understood that he was buying, and therefore he asks a conveyance for that part.

There is certainly authority for contending that, in a deed, words like those in this contract might be held to convey the whole of "the Wardell farm," if there was a farm known by that name, although the whole was not included in the boundaries specified. But there are authorities entitled to great respect on the other side. And this construction depends upon artificial rules that, even in many cases where by authority they are clearly applicable, evidently do not effect the true intention of the parties. In applying the maxim, "*falsa demonstratio non nocet*," it is sometimes difficult to say which part of the description is intended to designate the subject matter, and which is matter of description or demonstration. In a deed poll, or executed by one party, the rule of *fortior contra proferentem* would affect the construction. But, even in a deed, I doubt whether words like these in this contract, "that tract lying in Ocean township, *and* known as the Wardell farm, *and* begins in the middle of the road," &c., would be held at law to convey more than the lands contained in the boundaries specified. If the land had been described as the tract known as the Wardell farm, butted and bounded as follows, it might, by the authorities, have been conveyed; but, after mentioning the location of the tract, it designates it by the name, "Wardell farm," and by the description, both connected to it by the word *and*, in

a way that neither is entitled to preference over the other as the principal designation.

There is another difficulty which would affect these words in a deed. The words, "the Wardell farm," are only of value by being a name applied to a definite and certain tract of land well known by that name. There is not sufficient evidence of this name being applied to any tract of known and certain boundaries, and very little of it having been generally or usually, or to any extent, applied to any tract at all. It once is said to have included the Ocean house tract, once the tier of lots fronting on the road sold off by Henry Wardell, once the railroad tract; and it might be well doubted, after this tract in dispute had been set off for sale and offered for sale, parts sold by parol and put in possession of the purchaser, and not occupied or cultivated, so far as appears, with the rest of the farm, whether it would be included in the designation of the Wardell farm. The owners had the right to cut off these lots for sale, and to call them their lots, and the residue their homestead farm. If they had done so before such deed, and conveyed the residue to the purchaser, designating the rest in the deed as the homestead farm, and pointing it out on the ground to him as such, I am not aware of any rule of law that would make the deed convey the part set off as building lots, even if once part of the homestead farm, or of the tract known as such.

But in this suit I am not called upon to construe the legal effect of these words in a deed. In a court of equity, where justice and fair dealing is at the foundation of all relief, and in a suit for specific performance, when the extraordinary power of the court is called upon, and in which relief is never granted if against good conscience or if any injustice or hardship is inflicted, relief is asked in a case where the complainant has got the precise land he bargained for, by the very lines pointed out to him, and by the precise lines designated in the written contract, because a general expression, "homestead farm," used in the written contract as synonymous with this description, may be construed to mean more,

by certain artificial rules of legal construction. If one should sell to another a city lot, of twenty-five feet by one hundred, which both had inspected and agreed upon, and in the contract should agree to convey *the* land conveyed to him by A B, instead of land conveyed by A B, and should describe it by metes and bounds as a lot of twenty-five by one hundred feet, if it turned out that the tract conveyed by A B contained twenty acres, the purchaser could hardly prevail upon a court of equity to order a conveyance of the twenty acres for the price of one lot, but would leave the complainant to his remedy at law.

Besides, in this case, the deed from Morris to the complainant, executed and delivered with the deed from the other defendants, and which, perhaps, has no other significance in this suit, settles what the parties to this transaction meant to designate by the Wardell farm. Conover so used the name, Morris so used it, and the other defendants so used it. And if parties, by writings executed at the time, settle and fix what is meant by a name used in their dealings, the meaning so fixed will be taken in preference to any other.

I am of opinion that, under these circumstances, the complainant has no right to call upon this court to decree specific performance, but if entitled to any relief, must be left to his remedy at law for damages by not performing the contract.*

LEDDEL'S EXECUTOR *vs.* STARR and wife and others.

1. A bill of interpleader is only proper when there is a claim by different parties to the same fund or assets in the hands of a third party, for which he has a right to ask to be discharged.

2. When a creditor has, by written or parol declarations with regard to a debt, or by conduct tantamount thereto, declared or agreed that a debt shall be given up or relinquished, or that it has been relinquished, a court of equity will consider this an equitable release, and will not permit the representatives of the creditor to enforce the demand.

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* Decree affirmed, 7 *C. E. Gr.* 492.

3. A bequest of $6000 of the money due on a bond from a legatee, with the direction that on payment of the balance of said *bond*, and whatever interest may be due thereon, the bond shall be assigned to the legatee, does not, of itself, release the interest on the bond. But when, from previous directions in the will, and the light of surrounding circumstances, it was the evident intention of the testator to require only the *balance* of the principal, and the interest *thereon*, it was directed to be assigned upon such payment.

4. An assignment of a large amount of property, by a person of advanced years, procured by one having influence over her, without adequate consideration, will be closely examined into by a court of equity.

5. But when, although the money consideration for such an assignment was inadequate, it appeared that the principal motive of the assignor was to make up to her daughter a great inequality in her share of her father's estate, under her father's will; that the assignment was not made privately, but upon consultation with and approval of others interested; that it did not leave her in any way destitute, but the consideration therefor (an annuity) was probably equal to all her wants, and was about the income of the securities transferred; and that the business was transacted when she had sufficient capacity therefor; the assignment should be sustained.

This cause was brought to hearing on bill, answer, and proofs.

Mr. Vanatta, for complainant.

Mr. Pitney, for defendants, Starr and wife.

Testator, at his death, held two bonds, secured by mortgage, against his daughter, Mrs. Starr, one for $7800, the other for $6240, called the Livingston bond. By his will, he gave Mrs. Starr $6000, part of the $7800 bond. Since his death, Mrs. Starr has paid the complainant $2400 on account of it, $1800 for principal, and $600 for interest, which she contends is all that was due.

The complainant contends that several thousand dollars arrears of interest are due, and this is the point of controversy as to that bond.

Mrs. Starr relies, not upon actual payments of interest, but upon the *receipts* for part payment, accepted by the testator as in full, and upon the *letters* written by him to her

declaring his intention to charge interest on a *part* of the principal sum only.

We contend that these *letters* and *receipts* amount—1. To a *gift, pro tanto,* of the interest, or—2. To an *equitable release* thereof.

1. As to a *gift.*

Delivery is essential to its validity. But this, again, must be such as the circumstances admit of. The transaction must not be *executory,* it must be *finished.*

The court will not aid the donee to carry out an unexecuted *contract* to give; that is, it will not compel A to hand over to B a horse, or sum of money, which he has promised to give him. But suppose the horse or money is already in the possession of the donee, as bailee or debtor, and the intention to give *in præsenti* is clearly manifested, will the law permit the donor, in the face of his gift, to recover from the donee the horse or money on the strength of the original bailment or loan? I answer, no.

What is the thing given in the case in hand? Clearly the interest accrued or accruing on the bond. How can it be *delivered* by the creditor to the debtor? Prior to payment, it is not in the possession of the creditor, and cannot be the subject of a physical transfer. Suppose the debtor hands the sum due for interest to the creditor, and he gives a receipt for it and hands it back to the debtor as a gift. Such a transaction would undoubtedly amount to a payment, and satisfaction of the interest. How would the result be affected or varied by eliminating from the transaction the idle ceremony of handing the money back and forth?

It is not necessary for us to contend that the testator gave Mrs. Starr the $6000, part of the $7800, in his lifetime, though the evidence would sustain such contention; and the retention of the possession of the bond by him would be no infringement of the rule that *delivery* is a necessary element of a valid gift. The thing given is the *money* secured by the bond, not the bond itself. The debt may be extinguished

in whole or part, and the bond remain in the possession of the creditor, or the debt may remain unpaid and enforceable, and the bond pass into the possession of the debtor.

The *retention*, *destruction*, or *surrender* of the bond, or other evidence of the debt, is only evidence of the *intention* of the parties, which *intention* may be made manifest by other and far more decisive and satisfactory evidence. Such evidence we contend this case affords.

2. *Equitable release.*

Love and affection form a sufficient consideration, and the receipt need not be under seal.

The sensible rule is that, even between strangers in blood, debtors and creditors may agree upon anything they choose as a payment.

The rule in *Cumber* v. *Wane* is virtually exploded. It is absurd to hold that if creditor delivers to debtor his bond or note, intending to discharge him *without* payment, the debt will be discharged; while if creditor accept from debtor part payment, and in consideration thereof gives a receipt in full, retaining possession of the bond or note, the debt will *not* be discharged. There is no such charm about the bare possession of the mere paper evidence of the debt.

There are numerous cases where a parol declaration that a security should not be enforced, has been upheld in equity between strangers as well as privies in blood. *Wekett* v. *Raby*, 3 *Bro. P. Cas.* 16; *Richard* v. *Symes*, 2 *Eq. Cas. Abr.* 617; *S. C.*, 2 *Atk.* 319; *Aston* v. *Pye*, 5 *Ves.* 350, note; *Eden* v. *Smyth*, *Ibid.* 341, a case in point in all respects; *Gilbert* v. *Wetherell*, 2 *Sim. & Stu.* 254; *Flower* v. *Marten*, 2 *Myl. & Cr.* 459; *Yeomans* v. *Williams*, *Law Rep.* 1 *Eq. Cas.* 184; *Gardner* v. *Gardner*, 22 *Wend.* 526; *Toner* v. *Taggart*, 5 *Binn.* 493; *Wentz* v. *Dehaven*, 1 *S. & R.* 312; *Brinckerhoff* v. *Lawrence*, 2 *Sandf. C. R.* 400, where the cases are collected and reviewed.

The bond was held from 1858, when it matured, to the death of testator, in 1865, upon the understanding that in-

terest on a part of the principal only, was to be demanded and paid. Both parties acted on this understanding. It is dated May 1st, 1853, payable five years after date *with interest on* $3800 *only* So far as interest was concerned, it was treated by the parties first as a bond for $3800; then as a bond for $2800; and latterly for $1800 only. Again, there is a clear distinction between interest which is reserved by the terms of the contract, and that which the law gives by way of damages for the detention of a debt. One is within the contract and secured by it, and the other is not.

This bond does not, by its terms, reserve interest *after maturity.* The claim of the complainant is for damages for the detention of the debt after maturity; it is not a claim for money secured by contract, and *Cumber* v. *Wane* does not apply. Damages for detention are, in their nature, *unliquidated,* and within the exceptions to the rule of that case.

Formerly nothing was recoverable on a single bill beyond the amount expressed, but latterly damages are allowed for its detention to be computed at interest rates. *Sedg. on Dam.* 375, 389; *Osbourne* v. *Hosier,* 6 *Mod.* 167; *Walker* v. *Constable,* 1 *B. & P.* 306; *Tappenden* v. *Randall,* 2 *B. & P.* 467; *Watkins* v. *Morgan,* 6 *C. & P.* 661; 2 *Zab.* 429.

There is no *legal* or *equitable* rule which prevents a creditor and debtor from agreeing orally, that a past due specialty which is silent on the subject, shall bear interest at any particular rate not usurious.

The creditor has the option to demand damages for the detention of his debt, or not. The retention by him of the possession of the evidence of the debt, and the demand of the sum named in it, presents no barrier in the way of taking him at his word, when he says, "I demand no damages for the detention of this debt." *Watkins* v. *Morgan,* supra. It may be a pecuniary advantage to the creditor to forgive all or a part of the accruing damages, and it is inequitable to permit him to recede from his promise in that behalf, after his debtor has acted on it.

As to the Livingston bond of $6240. The bill admits that

it was supposed to be paid and the mortgage which secured it satisfied, by a transfer from Mrs. Starr to complainant of divers money securities, once the property of Jemima Leddel, the mother of Mrs. Starr, and widow of the testator, but it alleges that the securities so transferred were not the property of Mrs. Starr, and therefore the transaction intended as a payment was a nullity; it alleges that Mrs. Leddel's personal representative claims those securities and prays an interpleader between that representative and Mrs. Starr, to settle the title to them. It does not allege, but rather insinuates, that the securities were obtained by Mrs. Starr from her mother by fraud, and prays a discovery by Mrs. Starr of her title to them.

The administrator of Mrs. Leddel, though acting in concert with complainant, and employing the same counsel, does not answer. Mrs. Starr, in her answer, sets out her title fully, which is complete and formal, if not tainted by fraud. No issue of fraud, or no fraud is raised.

Complainant admits that the bond is paid, if his title to the securities derived through Mrs. Starr is perfect. He seeks *protection* by an interpleader, from a claim or suit of Mrs. Leddel's administrator.

Assuming the position of a stakeholder, seeking protection, it was his duty to proceed against the administrator on his failure to answer the bill; he must show no partiality, but take advantage of all defaults of either party, to get what he pretends to seek—*protection.*

The failure of the administrator of Mrs. Leddel to answer the bill, and pursue, in this cause, the claim set up by him, is fatal to such claim. It is an admission by him that he made the claim, and that it is unfounded; it is an abandonment by him of the claim, and a complete *protection* for the complainant. *Hendry* v. *Key*, 1 *Dick.* 291, note; *Statham* v. *Hall*, 1 *Turn. & Russ.* 30; *Hodges* v. *Smith*, 1 *Cox* 357; *Angell* v. *Hadden*, 16 *Ves.* 203; *Richards* v. *Salter*, 6 *Johns. C. R.* 445; *Badeau* v. *Rodgers*, 2 *Paige* 209; *Aymer* v. *Galt*, *Ibid.* 285; *Stevenson* v. *Anderson*, 2 *Ves. & B.*

407; *Martinius* v. *Helmuth, Ibid.* 412; *S. C., Cooper* (*G.*) 245; *Briant* v. *Read*, 1 *McCarter* 271; *Blair* v. *Porter*, 2 *Beas.* 268; *Michener* v. *Lloyd*, 1 *C. E. Green* 38; *Mount Holly Turnpike Co.* v. *Ferree*, 2 *C. E. Green* 121; *City Bank* v. *Bangs*, 2 *Paige* 572.

Upon the merits. The evidence is overwhelming that Mrs. Starr's title to the securities was unimpeachable, and complainant well knew it; and according to the authority of the cases cited the controversy may be finally settled now, though no issue was made under the prayer for interpleader.

THE CHANCELLOR.

The complainant, Samuel W. Leddel, is the executor of the last will of his father, John W. Leddel, deceased. The defendants, Sarah E. Starr, wife of Charles Starr, jun., William Leddel, and Frances Denton, wife of Jonas Denton, are the children of the testator; the five Sewards are the children of his deceased daughter Tempe, and these, with the complainant, are the residuary legatees in his will. D. W. Dellicker, administrator of Jemima Leddel, the widow of the testator, is another defendant.

The object of the bill is to settle the account of the complainant as executor, and for that end to settle and adjust divers claims and controversies between the defendants and the complainant, and also between the defendants themselves, as to the assets of the estate. The bill contains a prayer that the administrator of Jemima Leddel may interplead with the defendant, Charles Starr, and Sarah his wife, as to their right to certain bonds and notes paid to the complainant by them in discharge of a mortgage.

But this is not a case for interpleader. The complainant accepted these securities in payment of the mortgage, and gave up the mortgage and executed a satisfaction piece, by which it was canceled. The administrator of Jemima Leddel is alleged to claim these securities, and the Starrs make no claim upon them. They claim from the complainant the

bond secured by the mortgage, and which, by mistake as they allege, was not given up with the mortgage when it was paid. It is not a claim by different parties to the same fund or assets in his hands, for which he has a right to ask them to discharge him, and interplead between themselves. The relief by interpleader, must therefore be denied; but as all parties concerned are before the court, and as the account of the complainant cannot be adjusted without settling these controversies, they may be determined in this suit.

The relief asked against the children of Tempe Seward was founded upon a provision in the will, that if the testator should make any future advances to them, it should be taken as part payment of a legacy of $5000 bequeathed to them. The bill alleged such advances and prayed for a discovery, and that they might be deducted from that legacy. Pending the suit, this matter has been amicably adjusted between the complainant and the children of Tempe Seward, and is now out of the controversy.

Another controversy, as to which relief is sought, was concerning a bond and mortgage given by Starr and wife to the testator, dated May 2d, 1853, conditioned for the payment of $7800, on the 1st day of May, 1858, and the interest on $3800 of it, to be computed from the day of the date of the bond, at six per cent. per annum, and to be paid in the meantime, yearly. On May 2d, 1854, Sarah E. Starr paid the testator $168, for interest, for which he gave the following receipt: "Received of Sarah E. Starr, $168, in full for the interest due on a bond which I hold against her and her husband, given for $7800, May 2d, 1853, as it is my intention to give to the said Sarah all the interest now due, and to become due, on the said bond, except the interest on $2800. May 2d, 1854. J. W. Leddel." On November 3d, 1856, Sarah E. Starr paid the testator $420 for interest on that bond and mortgage, for which he gave a receipt in these words: "New York, November 3d, 1856. Received of Mrs. Sarah E. Starr $420, being in full for interest on

bond of $7800, to 1st instant; interest on $5000 being waived, according to agreement. J. W. Leddel."

On the 1st day of July, 1859, the testator executed his will, by which he gave to Sarah E. Starr, for her separate use, "the sum of $6000, part of the amount due on the bond for $7800, secured by mortgage executed by herself and husband;" and further stated, "and I do direct my executors, on payment of the balance of said bond, by my said daughter, and whatever interest may be due thereon, unless I make such assignment during my life, to assign the same to her." On the 21st day of October, 1859, the testator wrote a letter to Charles Starr, jun., in which he stated: "I have made some new arrangements with regard to the distribution of my property, in which I have bequeathed to Sarah, $6000, instead of $5000, over which my executor will have no control, as it is now in her hands, and will not be taken out by me or my agents, without her consent, not even by yourself. In this new arrangement, she is her own sole agent, so that if she throws away her property, she will have no redress."

On February 25th, 1861, he wrote to Charles Starr: "Sir. I received your note requesting a statement of your wife's paper in my hands. The interest on the first bond was credited up to November 1st, 1856, from which time I have only charged interest on $1800, making a present to Sarah of $6000, since which time there will be four years and four months. The interest would be $464; on which sum $400 has been received, $100 in January and $300 in October, 1859."

The complainant claims that interest on $3800 of the principal of the bond from the date, and on $4000 of it from May 1st, 1858, deducting the sums actually paid for interest, is due on the bond and mortgage and must be paid, together with $1800 of the principal, before the bond and mortgage can be assigned. Mr. and Mrs. Starr contend that the effect of these receipts and letters, and of the bequest in the will, is to release or give to her all the interest except the interest on the $1800; and that she was entitled to have the bond

and mortgage assigned to her upon payment of $2416.10 being the $1800 principal, and $616.10, the interest on $1800, from November 1st, 1856, to March 26th, 1866, less the $400 paid to the testator; and they tendered that sum on the day last mentioned, and demanded the assignment.

As to the interest due before February 1st, 1861. The defendants contend that the receipts and the letters of October 21st, 1859, and of February 25th, 1861, show that the amounts paid for interest before February 1st, 1861, had been paid and received in full for interest to that date, except the sum of $64, as stated in the letter of February 25th, 1861. Such is certainly the intention of the testator as clearly expressed in those receipts and in that letter, all written and signed by him. To accept part payment, in full for all interest due, and to give the residue to his daughter, was what he had a perfect right to do, as well as what he intended to do, and it is down in writing. But the complainant objects that the principle settled in the case of *Cumber* v. *Wane*, 1 *Strange* 426, and 1 *Smith's Lead. Cas.* 439, and the numerous cases arising from the decision in that, which is, that part of a debt cannot be accepted as payment of the whole, will prevent the intention of the testator from having any effect upon the interest not actually paid. It is not necessary here to analyze the numerous and conflicting decisions to which the seemingly absurd ruling in that case has given rise. The limitation of, and exceptions to the rule are not yet settled at law, after the lapse of nearly one hundred and fifty years. But there is a series of decisions in courts of equity in England, and in this country, which have established the principle that where a creditor has, by written or parol declarations with regard to a debt, or by conduct tantamount thereto, declared or agreed that a debt shall be relinquished or given up, or that it has been so relinquished, a court of equity will consider this an equitable release, and will not permit his representatives to enforce it.

The case of *Wekett* v. *Raby*, 3 *Bro. P. C.* 16, is the leading case on that subject. In that case the testator said a

few days before his death: "I have John Raby's bond; I keep it because I may need it; when I die he shall have it; he shall not be asked for it." Lord Macclesfield ordered the bond to be given up with costs. The House of Lords affirmed the decision except as to costs.

In *Aston* v. *Pye*, cited in 5 *Ves.* 350, note, testator held the note of Pye, and made this entry in his books: "Pye pays no interest, nor shall I take the principal unless greatly distressed." Lord Kenyon, Master of the Rolls, sent the case for trial at the law courts; they at first held that it could not be a discharge at law, but was a testament. It was refused probate in the Ecclesiastical Courts, and upon it being brought again before the Court of Common Pleas, it was held to be a conditional discharge, and that as he did not demand it in his life, his executors could not recover. In *Eden* v. *Smyth*, 5 *Ves.* 341, Lord Loughborough held that a debt of £900 from testator's son-in-law was discharged by entries in testator's books, showing that he never meant to demand it.

The same doctrine is held by Lord Cottenham, in *Flower* v. *Marten*, 2 *Myl. & Cr.* 459, and by Sir John Leach, in *Gilbert* v. *Wetherill*, 2 *Sim. & Stu.* 254. In *Yeomans* v. *Williams*, *Law Rep.* 1 *Eq. Cas.* 184, Sir J. Romilly, M. R., held that the interest on a mortgage for £1000, given by Yeomans on his homestead to his father-in-law, was discharged by a letter from the mortgagee to Yeomans' wife, telling her not to sell the house, that they could live there as they did, free of *rent*. Vice Chancellor Wigram, in *Cross* v. *Sprigg*, 6 *Hare* 552, in his minute and critical examination of these cases, endeavors to discredit some and to evade the force of others, and his authority is against the principle, yet it seems to me so well established by the weight of authority, and so consonant to good sense and the principle that should govern courts of equity, that I must adopt it as the established doctrine of the English Court of Chancery at the time when the law of that court became the law of this. And it must be held to be a modification of the harsh

doctrine of *Cumber* v. *Wane*, to that extent. The same doctrine has been adopted in New York, in *Brinckerhoff* v. *Lawrence*, 2 *Sandf. C. R.* 400, and in Pennsylvania, in *Toner* v. *Taggart*, 5 *Binn.* 490, and *Wentz* v. *Dehaven*, 1 *Serg. & Rawle* 312; and the extent to which these authorities go, would discharge the Starrs from all interest except upon the $1800 during the life of the testator.

It is contended, also, that the bequest to Sarah, in the eighth clause of the will, amounts to a gift of all the interest, except on $1800. It gives to her $6000 of the money due on this bond, and directs that, on payment of the *balance* of said bond, and whatever interest may be due thereon, the bond shall be assigned to her. If the word "thereon" is construed as referring to the balance of it, of course she will be entitled to the transfer, on payment of that sum and the interest due on it. The bequest of the $6000, of itself, would not release the interest on it, as it only takes effect from the death of the testator, until which time interest would run on; but if the testator had explicitly directed his executors to transfer the bond upon payment of $1800, and interest on that sum from February 1st, 1861, the case would be clear. The only question is, whether the word "thereon" means the same thing. The balance of the bond here evidently means the balance of the principal, else the words, "and whatever interest may be due thereon," would be surplusage. And if the clause was written as it must be interpreted, "the balance of the principal secured by said bond," there would be little hesitation in referring the word *thereon* to such balance, and not to the word bond. According to the usual construction of such phraseology, I think this would be the interpretation. The last subject matter of the direction given, was this balance of principal; and, although the word bond is used to describe that subject matter, and as such is last in the sentence, yet a relative like this is usually taken to refer to the last subject matter spoken of, and not to the last word. And if the language, when doubtful, may be read by the light of surrounding circumstances, there can be no doubt, from

the directions previously given in this case, that it was the intention of the testator to require interest on the sum of $1800 only. I am, therefore, of opinion that the amount paid to the complainant on this bond, $2416.10, is a full payment and satisfaction of it.

Another controversy relates to a bond for $6240, dated April 30th, 1853, made by Starr and wife to the executors of L. R. Livingston, and assigned to and held by J. W. Leddel, the testator, at his death, and securities to that amount delivered by Starr and wife to the complainant in payment of the same. These securities consisted of a check of the complainant for $5102.50, given by him to Jemima Leddel, the widow, and drawn payable to her order, and endorsed by her to the order of Charles Starr. This was handed over by Starr to the complainant, but not endorsed by Starr. It was accepted by the complainant. The endorsement was omitted by mistake, and Starr has offered, and still is willing to endorse it, but complainant will not permit him to do it. The other securities are eight promissory notes, and two bonds secured by mortgages, amounting, with interest, to $3391.78, which were held by Sarah E. Starr, and were assigned to the complainant, by writing under her hand and seal, dated August 18th, 1865, and were delivered to and accepted by him as payment for so much on that bond and mortgage. These securities had been assigned to Sarah E. Starr, and the complainant's check delivered to her by Jemima Leddel, on the 21st of July, 1865, in consideration of a bond and mortgage given by Mr. Starr and his wife to her, for the payment of an annuity of $500 per annum during her natural life. It is contended by the complainant that this assignment was procured improperly, and without sufficient consideration, from Jemima Leddel, when she was eighty years of age, and too old and feeble for such a transaction.

An assignment of a large amount of property from a person of the age of Mrs. Leddel, procured by one having influence over her, without adequate consideration, will be closely examined into by a court of equity. In this case,

the bond for an annuity of $500 was an altogether inadequate consideration for the transfer of assets amounting almost to $9000. The interest on them was about equal to the annuity. But the true consideration was, as clearly appears from the evidence, a strong desire on the part of Mrs. Leddel to make up to Mrs. Starr a great inequality in the provisions of the will of her husband, by which the share of Mrs. Starr was less than that of her other children, by at least that amount. That object was known to, and approved of by the complainant and one of the other daughters. She decided to provide for it by assignment in her lifetime, contrary to the advice of her counsel, but with the approval of the complainant, who, with her, was apprehensive of litigation about any will by some of her children, who had contested the will of her husband. By the evidence of her counsel, and of others, it is shown that she clearly understood and approved of the assignment which she executed, and that her capacity to do so was sufficient. She afterwards, perhaps, repented of having done this, but she continued to accept the annuity secured to her. This annuity, although not a sufficient consideration for the assignment, was probably equal to all her wants, and was about the income of the amount of the securities, and, I have no doubt, as much as she would have expended for herself, if she had retained the whole. It was, then, a disposition of her property, made for a judicious object, one that had a claim on her sense of justice; an equal provision for her own daughter, not foolishly done, so as to leave herself in any way destitute, and not done privily, but upon consultation with, and approval by others of her children, and when she had sufficient capacity for such business. In my opinion, there is no cause for questioning the validity of this transfer. I shall therefore hold that the bond of $6240 is paid and satisfied, and must be delivered up to the defendants, Charles Starr and Sarah his wife; but Charles Starr must endorse the check, and he and his wife make such additional assignment of the

other securities as the complainant's counsel may request, and as may be reasonable and proper.

The complainant is entitled to have his accounts settled in this court, and it must be referred to a master to state them on the principles declared.

Uhler *vs.* Semple and others.*

1. The mere fact that the vendor of personal property places an over valuation upon it by which the buyer is led to give more than it proves to be worth, does not entitle the latter to relief. The vendor's statements as to value merely, do not amount to a warranty nor to fraud, although he knows them to be untrue. The same rule applies to an over valuation of property contributed to a partnership as part of the capital by one becoming a partner.

2. Where a new partnership is in course of negotiation between an existing firm and a stranger, and the firm proposes to put in the old stock at a certain price, the maxim "*caveat emptor*" applies.

3. A partner cannot have relief against inequality in the terms upon which he entered the firm, upon the ground that he was induced to accept the terms in question by statements of his copartners of an opinion that the capital or facilities possessed by the proposed firm would be sufficient, and that the business would be profitable. Such representations, though false, give no ground of action.

4. A partner has a lien upon the partnership effects for moneys advanced by him to the partnership beyond his share of the capital, and can retain the amount due him before the other partners or their individual creditors or assignees are entitled to receive any of the assets.

5. He has, however, no such lien for money advanced or lent to an individual partner; though a mortgage or judgment against such partner, if properly entered or recorded, will be a prior lien on his share.

6. It seems that an agreement by the borrowing partner that the loan or debt should be a lien upon his share, and that he would execute a mortgage, would be considered as an equitable mortgage, and would give a preference over subsequent judgments and mortgages in favor of creditors with notice; though not over those creditors without notice.

Quære. Whether a promise to give a judgment bond which may be made a lien on real property, will amount to an equitable mortgage.

7. A prior debt is a sufficient consideration to protect one holding the

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*Cited *in Deveney* v. *Mahoney*, 8 *C. E. Gr.* 249.

legal right, against the prior equity of one who has no legal right, when the former had no notice of such equity.

8. A debt in good faith contracted in another state, cannot be impeached for usury in this state, when it does not appear by any evidence that the interest taken was illegal in that state, or if it is, that the validity of the contract is affected by it.

9. The laws of other states can only be brought to the knowledge of this court by proof.

10. Real estate bought with partnership funds for partnership uses, the title to which is taken in the individual names of the partners, is partnership property, and must be applied to partnership debts, as if personal estate, free from any claim of dower, except in the excess over the part required for partnership debts.

11. A mortgage may be given to indemnify the mortgagee for becoming surety or endorser. His liability forms a sufficient consideration. And such mortgage will be valid as against subsequent purchasers or encumbrancers.

This cause was heard upon bill, answer, and proofs.

Mr. Frost and *Mr. Vanatta*, for complainant.

Mr. Shipman, for defendants.

THE CHANCELLOR.

The complainant was in partnership with the defendants, John Semple, William B. Semple, and S. K. Miller, under the name of Uhler, Semple & Co. The suit is brought for a dissolution, a receiver, and an account; to have the stock of tools and machinery which these three defendants put in the partnership at an estimate of $15,000, alleged to be greatly excessive, appraised, and the excess of value allowed in the account; and to have a debt of these partners to the complainant for $8500 lent to them, and for which they promised to give him a first judgment on their interest in the partnership property, declared a lien upon their interest prior to judgments confessed and mortgages given to other defendants, who it is said had notice of the agreement to

give the complainant the first lien, and whose liens were therefore subject to that promise as an equitable mortgage.

The complainant entered into partnership with J. Semple, W. B. Semple, and Miller, by written articles, on the 26th day of December, 1864. The two Semples and Miller had, until then, been in partnership under the name of Semple & Co., in manufacturing iron at their rolling mill and foundry at Easton, in Pennsylvania, and in an iron store for the sale of iron, at Easton. The same business was to be continued, but the rolling mill and foundry were to be removed to Phillipsburg, in this state. Uhler was to contribute to the capital $15,000 in cash, as equivalent to the tools and machinery of the others, valued at that sum, and was to purchase and pay for one half the stock in the iron store, at Easton, at an appraised value. The new firm was to remove the machinery, and Semple & Co. were to furnish brick for three furnaces and one and a half stacks. Uhler was to have one half interest, and one half of the profits, and bear one half of the losses; each of the others one sixth; and each was to give his attention to the business. The new firm went into operation, and with the money of the firm bought a lot at Phillipsburg in the names of the four partners individually, and on it erected a large building, and removed the machinery from Easton to it. Uhler advanced or loaned to the firm $16,000, besides his contribution to the capital, and lent to the other partners $8500, for which they promised to give him a note and warrant of attorney to confess judgment, that he might make it a lien on their interest in the property. On this note judgment could have been entered in Pennsylvania, though not due. Finding that judgment could not be entered on this in New Jersey, and that a bond and warrant of attorney was the usual mode here, Uhler applied to them for a bond and warrant; this they gave, payable in one year, according to agreement, and gave it for $9124.87, the sum loaned, and one year's interest upon it. Uhler found that on this, judgment could not be entered in New Jersey. He says, that he then applied to them for

a mortgage, and that they said they were in negotiation with a stranger to purchase out his interest, and asked him to wait until they could find that he did not purchase, and then they would give him a mortgage; they deny this promise. The sale of Uhler's interest was not accomplished, and they did not give a new judgment bond or a mortgage, but gave mortgages and confessed judgments to the other defendants to protect them from their liabilities as endorsers for Semple & Co. The interest of these three defendants in the store at Phillipsburg, was sold out by these judgments in Pennsylvania, and they claimed that these judgments and the mortgages given on the property are liens prior to the lien of the complainant. The other defendants deny all notice of any agreement to give Uhler a first lien on their interest in the property, as security for his loan to J. and W. B. Semple, and Miller. The defendants allege that Uhler's claim for the $9124.87 is void as affected by usury, that the transaction was in Pennsylvania, where interest is not allowed above six per cent., and that seven per cent. was reserved on this loan. They also allege that Uhler had taken possession of the store at Easton, and as acting partner, sold it out at auction mainly to a bidder who bought for him, and claim that he must account for it at its real value, and not at the prices at this auction sale.

As to the over valuation of the machinery taken as the capital of Semple & Co. in the new partnership, I am of opinion that Uhler cannot go back of the price agreed upon. He knew the machinery, saw it, and could have had it valued. They represented that it was worth over $15,000. It is the ordinary representation of value which is always held not to amount to a warranty on a sale, nor to a fraud, even when the seller knows the representation is not true. And there is no reason for applying a different rule to representations of the value of property, put into a partnership as part of the capital. Uhler agreed, in the articles of partnership, to take this stock of the old firm at $15,000. They had valued it at $19,000; he refused to take it at that, but fixed an-

other value at which he agreed to take it. It is not unusual in taking a new partner into an established business, to put in the stock and machinery of the old business at a price fixed arbitrarily between the parties, as one of the conditions of the new arrangement. There is no confidential relation between partners until the partnership is formed; in the negotiations concerning it the parties are strangers, with adverse interests, each making the best terms for himself that he can obtain, and the established maxim of *caveat emptor* applies. Neither can they be made liable in this court, or in any court, for their representations that $15,000 would be sufficient cash capital to carry on the business, or that the tools and machinery in their foundry were sufficient, or that the business would be profitable. These are representations of a kind that will not sustain an action.

One partner has a lien upon the partnership effects, for moneys advanced by him to the partnership beyond his share of the capital, and can retain it before the other partners, or their creditors or assignees, are entitled to receive any of the assets, but he has no such lien for money advanced or lent to an individual partner. A mortgage or judgment against such partner, if properly entered or recorded, will be a prior lien on such partner's share. I am much inclined to think that an agreement by such partner that the loan or debt should be a lien upon his share, and that he would execute a mortgage, would be considered an equitable mortgage, and would give preference over all subsequent judgments and mortgages to creditors with notice. But such equitable mortgage would not have preference over such judgment and mortgage to creditors having no notice of them; else an agreement to mortgage, or any other equitable mortgage, would be better than an actual mortgage that must be recorded to give priority over subsequent encumbrances. In this case there is no agreement proved to give a mortgage. Uhler alone testifies to it; the three partners deny it. There is no agreement proved to give a judgment, except such judgment bond or note as was given; it was to be on a year's

credit, and a year's interest was added, showing that this was carried out. It could not, by law, be made a lien in this state until due, although both parties may have supposed to the contrary, as in Pennsylvania it could have been made a lien on land. And I do not think that any decisions, or the principle on which they are founded, go so far as to declare that a promise to give a judgment bond, which may be made a lien on property, amounts to an equitable mortgage. But this question becomes, in this case, immaterial, because these creditors had no notice of such promise, if any was made. They deny it under oath, and there is no evidence to affect them with it in any degree. The fact that A. N. Semple was attesting witness to a judgment bond not due in a year, is no proof that he knew of a promise that Uhler should have, immediately, a first lien, and that there should be no prior lien. Nor does the fact that these judgments and mortgages were given to secure prior debts or liabilities, and that no new consideration was advanced, affect their prior equity in this state. The rule that a prior debt is not sufficient to make one a *bona fide* purchaser or mortgagee for value, has never been adopted in New Jersey. Our courts have uniformly held that it is a sufficient consideration to protect one holding the legal right, against the prior equity of one who has no legal right, when the other had no notice of such equity.

The Court of Errors, in *Allaire* v. *Hartshorne*, 1 *Zab.* 665, adopted the rule laid down by the Supreme Court of the United States, in *Swift* v. *Tyson*, 16 *Pet.* 1, and not the rule adopted in the state of New York, in the case of *Stalker* v. *McDonald*, 6 *Hill* 93. The opinion of the Court of Errors of New York in that case, delivered by Chancellor Walworth, contains all the authorities on that side.

Uhler's debt of $9124.87 is not affected by usury; it was contracted in Pennsylvania, and it does not appear, by any evidence, that seven per cent. is illegal in that state, or, if it is, that the validity of the contract is affected by it. The

laws of other states can only be brought to the knowledge of this court by proof.

Uhler must, without question, account for the goods in the iron store at their real value; an auction, at which he was the chief or only purchaser, cannot fix their value.

The purchaser of the interest of the defendants, J. and W. B. Semple and Miller, in the goods in the iron store sold in Pennsylvania, on executions against them, cannot give the purchaser a right to their interest in the partnership effects in New Jersey, but only in the effects levied on. Else the sale of a wheelbarrow belonging to a firm, by virtue of a constable's execution against one partner, would vest the purchaser with the interest of that member in the whole partnership, though it amounted to $10,000.

The land and buildings, and machinery at Phillipsburg, bought with partnership funds for partnership uses, are partnership property, and must be applied to partnership debts, as if personal estate, free from any claim of dower therein, except in any excess over the part required for debts.

The proceeds of the sale of the partnership property, after payment of costs and necessary expenses, must be first applied to the payment of the debts of the firm, including the amount loaned by Uhler to the firm, and interest. The share of each partner in the residue, if any, will be in proportion to his interest in the firm; to Uhler one half, to each of the others one sixth.

John Drake and Archibald N. Semple were jointly liable, and also each of them was separately liable, as endorsers on notes for Semple & Co., which were not yet due. Three mortgages were given to indemnify them from any loss by reason of these endorsements. A mortgage may be given to indemnify the mortgagee for being surety or endorser. This is a good consideration, and such mortgage will be valid as against subsequent purchasers or encumbrancers. These three mortgages are valid encumbrances, and have priority over any claim of the plaintiff, as to the real estate mortgaged. The assignments by John Semple and W. B. Semple,

to Drake and A. N. Semple, of all their interest in the partnership assets, were given by way of mortgage to secure them against these endorsements, and to give to Drake and A. N. Semple a prior lien on the shares of these two partners in the surplus, and are valid.

The sale of the interest of J. and W. B. Semple and Miller, in the iron store at Easton, by the sheriff of Northampton, as stated above, did not convey any interest except in the property levied on. That property, like the property at Phillipsburg and elsewhere, belonging to the partnership, was first subject to the partnership debts by the rule of law, and the share of W. B. Semple and John Semple was by their mortgage assignments, first subject to the amount for which Drake and A. N. Semple were security. These mortgage assignments were on the 9th, and the sheriff's sale on the 12th, of March, 1866. I know of no rule by which the debts shall be apportioned upon separate parcels of partnership property, when these parcels lie in different jurisdictions, and the interest of some of the partners in such parcels is sold separately, by execution or otherwise. The whole assets are subject to the payment of the partnership debts; these are a lien upon them by law. Any purchaser of the whole or a part, takes subject to that lien. The true rule seems to me to be, to hold each parcel liable to its share of the partnership debts, in proportion to its value. This is the rule adopted by the courts of equity in subjecting parcels of mortgaged premises to payment of the mortgage debt, when they are sold separately, and without covenants or warranty. When sold with warranty or covenants against encumbrances, the mortgage becomes a first lien for the whole amount on the part retained by the vendor, and no part will be made out of the lands sold, if the part retained is sufficient. But here there is no warranty. The purchase of Drake, then, at this sheriff's sale, transferred to him the interest of each of these three partners in the goods in the Easton store, or rather the goods levied on, subject to their proper share of all the partnership debts; and the shares of the two Semples

were also subject to the three mortgage assignments made by them three days before.

If the share of the surplus of the partnership assets, after payment of debts and expenses, exceeds these liens held by Drake and A. N. Semple, the complainant will be entitled to have it paid to him upon his bond for $9124.87, of October 3d, 1865.

A. N. Semple and John Drake have no lien on the personal property in New Jersey, or on the debts due to Uhler, Semple & Co., except by the mortgage assignments of the two Semples. These being of the surplus, give them the right to have the whole assets taken into account to ascertain that surplus.

If the amount of the sales of the real estate included in their mortgages, above its share of the partnership debts, and the amount received by virtue of their mortgage assignments, is not sufficient to discharge the liabilities of Semple & Co. to them, they are creditors at large of Semple & Co., for the balance, and have no lien on the surplus, if any, belonging to Miller.

There must be a reference to a master, to take an account upon the principles settled, that a final decree may be made.

BABCOCK and others *vs.* THE NEW JERSEY STOCK YARD COMPANY and others.

1. The question, whether the charter of the New Jersey Stock Yard Company does not relieve it from the effect of a statute against carrying on offensive trades, is one which this court will not decide on an application for a preliminary injunction founded on that statute: 1. Because it is a doubtful question of law, or one at least in good faith disputed, and not adjudicated by the courts of law. 2. Because if the statute be in force against the company, it only makes a particular act unlawful, which will not be restrained merely because it is unlawful, if it occasion no irreparable injury.

2. The New Jersey Stock Yard Company's premises being a nuisance

by reason of the stench arising from the great number of hogs kept there, and the length of time they were kept there, the company was restrained from keeping hogs on their premises, or at any place from which the stench could affect complainants' premises, for more than three hours; this time to be shortened, if it did not protect complainants from the nuisance.

3. The permitting of blood and offal of animals to run or be deposited on the shores, or in the waters of the bay, or on the premises, enjoined.

4. The defendants having shown by the evidence of scientific and practical experts, that the matters complained of as a nuisance could be remedied, and that they had adopted certain measures, and proposed to adopt others to remedy the evils, a commissioner was appointed to examine the premises and the proposed remedial measures, with power to examine witnesses, and report; neither party to offer any testimony; either party to have the right to move for action on the report on four days notice, and upon like notice to move for any specified modification of the injunction.

The argument was upon a rule to show cause why an injunction should not issue, and upon the answer of the defendants and depositions taken.

Mr. Gilchrist, Attorney-General, and *Mr. Dixon*, for the rule.

Mr. Scudder and *Mr. Winfield*, contra.

The Chancellor.

The preliminary question was raised whether the charter of the corporate defendants relieves them from the effect of the statute of April 6th, 1865, against carrying on of offensive trades in Hudson county, east of the Hackensack. This, although it was fully argued, and with great ability, by counsel on both sides, I will not determine here for two reasons: First, because it is a question of law which may be considered doubtful, or that is at least in good faith disputed, and has not been adjudicated by the courts of law of this state, and therefore this court must not grant the preliminary injunction founded upon that statute. Secondly, and chiefly, because if that statute was in force against the operations of this company, it would simply

render the manufacture of offal and animal remains unlawful; but this court could not enjoin it any more than it could the selling of liquor by small measure without a license, or any other unlawful act simply because unlawful, unless it caused irreparable injury, for which there was no redress at law. I have no hesitation in holding, and it was not disputed by the counsel for the defendants, that this charter does not empower the defendants to carry on the business authorized, in a way that would be injurious to others, or would materially affect their health, their comfort, or their property. That question was decided upon granting the limited injunction now in force.

The question now is, whether it sufficiently appears upon examination of the evidence on both sides that the business as now carried on by the defendants, so affects the health, comfort, or property of the complainants, as to be a nuisance which this court should restrain by an unconditional injunction.

It is only injuries to the complainants and their property, that can be relieved in this suit. The proofs on the part of the complainants clearly show, that the smell or stench arising from the droves of live hogs kept on the premises in such numbers and for such length of time as has been done here, is an unquestionable nuisance that should not be permitted. This is not in any way contradicted, but it is confirmed by the proof on the part of the defendants. I shall therefore enjoin the defendants from keeping any live hogs on the premises, or at any place from which the stench can affect the premises of the complainants or any of them, for more than the space of three hours; reserving the right to the complainants to apply for a modification of the time, which is adopted merely on conjecture, if experience shall show that this time is too long to protect them from the nuisance. But in view of the quantity of animals on the road to the abattoir, and to protect the defendants as far as practicable from unnecessary loss, this injunction not to be in effect

until after the 15th instant. In the meantime, the injunction now in force will restrain them from keeping any hogs on the premises longer than absolutely necessary.

I am also satisfied that permitting the blood of slaughtered animals, the contents of their stomachs and intestines, and other offal or parts of the animal to run, or to be deposited upon the shores or in the waters of the bay, or to remain on the premises, causes a nuisance injurious to the complainants, and should be restrained. To allow time to perfect the arrangements necessary for avoiding this, the injunction will restrain it after the 10th instant. The defendants, Davis & Harrington, have not appeared or answered. The case shows that the business, as carried on by them on the part of the premises which they have leased and occupy, is an unquestionable nuisance, and should be restrained to the full extent prayed for in the bill, and an injunction must issue against them accordingly. I am satisfied that the manner in which some of the other operations of the defendants, such as boiling and the manufacturing the viscera and intestines, and the extracting the fat, as conducted by the corporate defendants, and the disposal of the products, and the condition in which the buildings and pens were kept before the commencement of this suit, were offensive and should be restrained.

But I believe, from the evidence of the scientific and practical experts and others examined, that it is practicable to remedy these matters, if not entirely, yet so as not to be an injury to either of the complainants, and some measures have been adopted and are proposed, which may so remedy them. I shall appoint some proper person a commissioner to examine the premises, and the measures adopted and proposed to be adopted to remedy these evils, and to report the result of his examination to me, at some short day, that such action may be taken as is necessary to protect the complainants; such commissioner to have power, if he deems it necessary, to examine any witnesses, or the evidence already taken, but the parties not to have the right to offer testi-

mony. Either party shall have the right to move for action upon the report of such commissioner upon four days' notice, and upon like notice to move for any specified modification of the injunction.

Gleason's Administratrix *vs.* Burke.

1. One may convey lands for a certain price, and agree to repurchase them at a fixed time, for a certain amount exceeding the price received, and interest, without the sale being construed a mortgage, or the transaction being affected with usury.

2. But such transactions are suspicious, and will not be sustained unless there is clear proof of good faith, and that there was no intention to cover usury, or to take away the right of redemption upon what was in truth a mortgage to secure a loan.

3. An agreement by a borrower upon mortgage, to allow the lender to retain part of the land mortgaged, after being repaid principal and interest of the loan, if it is a part of the mortgage transaction, is usurious, and will not be enforced, either at law or in equity.

4. But if such an agreement is independent of the loan and mortgage, and not made in consideration of the loan, or the condition of its being made, and capable of being sustained without reference to them, either as a sale on consideration or as a gift, it may be enforced. And, though the agreement was not in writing, effect will be given to it by limiting the quantity of land to be reconveyed, in ordering redemption.

This cause was heard upon bill, answer, and proofs.

Mr. S. B. Ransom, for complainant.

1. The assignment of the lease by complainant's intestate was intended as a mortgage to secure the loan of $1500. This is fully established by the evidence. And as the loan has all been repaid, the complainant is entitled to a re-assignment of the lease, with costs.

2. The pretended agreement set up in the defendant's answer, by which complainant's intestate is claimed to have

agreed to accept a re-assignment of only seventy-five feet of the lot, and to pay all taxes, water rents, assessments, and ground rents on the whole lot, during the whole continuance of the lease and of the renewal, if any such thing was ever assented to by the intestate, was a contract without consideration, and void.

It was an unconscionable contract, and such a one as a court of equity will not enforce.

The only consideration for it was the loan of $1500. That loan, with the legal interest, has all been repaid, and, in addition thereto, the complainant has already paid about $500 in ground rents, taxes, and assessments upon the twenty-five feet of the lot on which defendant has built his house, and the rents, issues, and profits of which he has received.

To enforce this contract against the complainant would compel her to continue to pay ground rents, taxes, and assessments on this twenty-five feet of the lot, for the benefit of defendant, for twenty years to come, without any benefit to her whatever. To enforce such a contract against the complainant would be most manifestly inequitable and unjust.

3. But this pretended agreement, if ever actually made by the intestate, of which I think there is some doubt, was a mere subterfuge, to evade the usury laws; a mere contrivance to give the defendant twenty-five years' use of the twenty-five feet of land, free and clear of all ground rents, taxes, assessments, and other impositions, as a bonus for the loan of $1500, over and above the seven per cent. lawful interest, and for that reason is absolutely null and void.

The ground rents alone, on this part of the lot, during the continuance of the lease and renewal, would amount to $1250; and taxes, assessments, and water rents would amount to nearly as much more. This is a very heavy premium to pay for the use of $1500 for five years.

See statute against usury, *Nix. Dig.* 437, § 2; *Grosvenor* v. *Flax and Hemp Manufacturing Co.*, 1 *Green's C. R.* 453, 456; *Douglass* 736; 1 *Espin. R.* 40; 2 *Camp-*

bell 335, 553; 1 *Paige* 613; 12 *Wend.* 41; 1 *Stark. on Ev.* 47; 18 *Wend.* 353; *Blydenburgh on Usury*, 42, 43, 44, 48, 49, 50; *Morgan* v. *Schermerhorn*, 1 *Paige* 544; *Eagleson* v. *Shotwell*, 1 *Johns. C. R.* 536; *Perkins* v. *Drye*, 3 *Dana* 173; *Ranis* v. *Kemp*, 4 *Louisiana R.* 319; *Mitchell* v. *Preston*, 5 *Day* 100; *Braynard* v. *Hoppock*, 32 *N. Y.* 571; *S. C.*, 7 *Bos.* 157; *White* v. *Ault*, 19 *Ga.* 551; *Cummins* v. *Wire*, 2 *Halst. C. R.* 73.

Mr. Gilchrist, Attorney-General, for defendant.

The Chancellor.

The complainant's intestate, in April, 1862, leased of H. M. Post a lot of land of twenty-five feet by one hundred feet, at the southeast corner of Prospect and North First streets, in Jersey City, for the term of fifteen years, with a provision for a renewal for ten years longer. He leased it for the purpose of erecting upon it a building for his business, to front on North First street. He applied to Burke, with whom he had been in the habit of dealing, for a loan of $1500 for that purpose. Burke agreed to advance this loan after he should have expended $500 on the building. Gleason proposed to secure it by mortgage, but upon applying to Mr. Clark, the counsel of Burke, to arrange the matter, he advised that a mortgage should not be taken, but that for the $1500 Gleason should assign the lease; to this Gleason assented, and executed the assignment on June 1st, 1862, absolute on its face, reciting the consideration of $1500. Before this assignment was made, Gleason had offered to Burke to let him put up a building on twenty-five feet of the rear of the lot without charge, and that he, Gleason, would permit Burke to occupy that part during the whole term, and he would pay the rent, taxes, and assessments for and upon the whole lot, so that it should not cost Burke anything. He alleged as the ground of this offer, that this rear part was of no value to him, and that such a building would bring business to him and add to the value of his premises.

At or shortly after the assignment of the lease, it was agreed that Gleason should pay the $1500 by semi-annual installments of $125, until the same and all interest on it should be paid; and that upon such payment, Burke should re-assign to Gleason the lot, except the twenty-five feet of the rear, which he should retain for the residue of the term and the renewal; and it was agreed that for the term and its renewal, Gleason should pay all rents, taxes, and assessments on the whole lot. This agreement was made by parol only, but was to be reduced to writing and signed; it was reduced to writing by Mr. Clark, but both parties neglected to sign it. After the assignment of the lease, Gleason finished his house, and Burke advanced the loan as needed for that purpose. Burke built a house on the twenty-five feet, on which he expended about $1800; it was finished in the fall of that year, after Gleason's house was finished; both were being erected at the same time. Burke has since received the rents of the rear building, amounting to about $1800, and Gleason and the complainant have paid all rents, taxes, and assessments for the lot. Gleason died in October, 1865, and until his death continued dealing with Burke, who sold him the goods used in his business, on credit.

After the complainant became administratrix, she tendered to Burke the balance of the loan and the interest accrued on it, and demanded a re-assignment of the lease. Burke refused to accept the payment or to re-assign the lease, unless he retained the twenty-five feet of the rear of the lot, and complainant would agree to pay all the rents, taxes, and assessments for the whole lot for the residue of the term; this she refused to do.

Upon this, complainant brought this suit, alleging that the assignment of the lease is a mortgage only, and that she is entitled to redeem the whole premises, and praying for a re-conveyance, upon paying the amount of the loan still unpaid, with interest, and upon paying the amount expended by Burke for the building on the twenty-five feet, above the

amount received by him for rents, of both which she prays an account may be taken.

The defendant contends that this was an absolute sale of the lease, with an agreement to convey part of the premises upon payment of $1500 and interest.

One may convey lands for a certain price, and agree to re-purchase them at a fixed time, for a certain amount exceeding the price received, and the interest, without the sale being construed a mortgage, or the transaction being affected with usury. But such transactions are suspicious; they are an easy cloak for usury, and their *bona fides* must be clear, and the court must be satisfied that it was not intended to cover usury, or to take away the right of redemption upon what was, in fact, intended as a mortgage to secure a loan. Courts of equity are very jealous of every device or contrivance intended to take away the right of redemption of what is the security for a loan. And one proof that the formal conveyance was intended as a mortgage only, is that the transaction commenced by negotiations for a loan, and conveying the land as security for the loan. In this case, the original agreement was for a loan, and the property was offered by way of mortgage, and the form only was changed at the suggestion of counsel. The transaction must be considered as a mortgage only, and not as a sale and agreement to re-convey part on payment of a fixed sum. Another indication of the transaction being a mortgage existing in this case is, that Gleason agreed to pay back the principal and interest, at fixed times.

In a mortgage, any agreement to pay more than the sum loaned and lawful interest, is usury; so also must an agreement to allow the lender to retain part of the land mortgaged after being repaid the loan in full, be treated as usurious; and neither will be enforced by courts of law or equity. If this was the whole of this transaction the complainant would be entitled to the full relief sought.

But a borrower and lender may lawfully make other bargains even relating to the mortgaged property, and if they

are not in consideration of the loan, or the condition of its being made, and are otherwise lawful, they may be enforced.

If Gleason had not borrowed money of Burke, he might lawfully have given him without consideration the right to occupy part of his lot for the term, on the conditions here agreed upon; and if Burke had erected the building in accordance with the gift, the gift would be valid, and would be enforced in equity. In this case it needed no agreement in writing, the legal title to the land for the term was in Burke, by the assignment; and effect can be given to it by limiting the quantity of land to be re-conveyed, in ordering redemption according to the actual agreement between the parties. It is certainly a case in which the gift should be shown by clear proof. But it is sustained by the testimony of Scott and Burke, and the subsequent agreement in conformity with it is proved by Clark, and by the fact that Gleason, in his life, permitted Burke to build, to rent the building, and receive all the rents, while he paid all the ground rent and the taxes and assessments for the whole lot. These facts, and the testimony of Clark, are consistent with the fact that the gift of the twenty-five feet was a usurious premium for the loan. But the evidence of Burke and Scott shows that the gift was made for other reasons, and was not connected with the loan, or a condition of its being made. There is no evidence, and no circumstance to contradict or impeach these witnesses.

The complainant is entitled to a re-conveyance of the seventy five feet of the north part of the lot, upon being paid the balance of the $1500 unpaid with interest, and upon executing an agreement making that part liable for the ground rent, taxes and assessments on the whole lot, but not for taxes and assessments on the rear building.

McMahon *vs.* O'Donnell and others.

1. A simple agreement by a firm to employ one at wages to be measured by a proportion of the profits, does not constitute him a partner.

2. An answer in which the denial is made in such form as to leave it in doubt whether the denial is of the fact alleged, or only of the facts in the form and manner and at the time alleged in the bill, is evasive, and will not avail to dissolve an injunction.

3. If some of the denials in an answer, though direct, are, by reason of the manner in which they are made, evasive, and would not be sustained on exceptions, yet, if other parts of the answer allege facts responsive to the bill, and which are inconsistent with, and thus deny the material allegations of the bill, such parts may be taken in connection with the evasive denials, and form a sufficient denial to entitle the defendant to a dissolution of the injunction.

On motion to dissolve injunction upon the answer of the defendants.

Mr. Garretson and *Mr. Scudder*, for the motion.

Mr. J. B. Vredenburgh and *Mr. P. Vredenburgh*, contra.

The Chancellor.

The equity upon which this injunction depends, arises from the facts stated in the bill, that the complainant and Hugh and Neil O'Donnell, two of the defendants, were partners and purchased certain lands with the partnership funds, and for partnership purposes, and that H. and N. O'Donnell fraudulently, without the knowledge or consent of complainant, took the conveyances in their own names, and upon a dissolution of the partnership on January 1st, 1868, claimed the same as their individual property, and fraudulently sold and mortgaged them to the other defendants. The bill prays that these lands shall be decreed to be held in trust for all the partners, and the injunction restrains the defend-

ants from selling or conveying the same, or assigning the mortgage.

The answer denies the partnership, and that the deeds were made in the names of the two O'Donnell's, without the complainant's knowledge. But this denial is made in some parts of the answer, in such form as to leave it in doubt whether the denial is of the fact alleged, or only of the facts in the form and manner, and at the time alleged. Such answer is evasive; as if a bill should charge that the defendant "executed a mortgage to complainant, and then folded it up, put it in a blue envelope, tied it with red tape, and handed it to complainant;" a denial of the facts in the words of the charge connected by the word "and," would be literally true if the tape was blue or the envelope white, and the two material facts, the execution and delivery, true. In this case the charge is, "that H. O'Donnell on a certain day entered into co-partnership with complainant, under the name of O'Donnell & Co., as coopers, for the purpose of carrying on the business of cooperage on joint account, and upon an equal division of the profits." The answer denies "that H. O'Donnell on that day, &c.," in the words of the charge. This answer is not false, although every fact denied was true, except that the division of the profits was not exactly equal. The answer abounds with such denials, and none of these are sufficient denials to dissolve an injunction, nor would they be sustained on exceptions. The complainant is entitled to an admission or denial of the allegation, that the defendants entered into partnership with him, and not merely upon the day or on the terms stated, except perhaps in a case where the whole equity depended upon the day and the share of the profits. But upon a careful perusal of the whole answer, there are positive allegations of facts as to the connection of the defendants with the complainant in the business referred to, and of facts within their knowledge, sufficient to show that there was no partnership between them as regards the capital or property of the partnership, but only an agreement that the complainant should be em-

ployed at wages to be measured by a proportion of the profits. The answer as to these facts is responsive to the bill, and is inconsistent with, and thus denies, the allegations that they were partners as to this business; and this, connected with the direct denial in the form I have mentioned, is on the whole a sufficient denial to entitle the defendants to a dissolution of the injunction. The denial that the title to these lots was taken in the name of Hugh and Neil O'Donnell, without the knowledge of the complainant, is full and explicit. If there was no partnership, except that the complainant was to be paid for his services by a proportion of the profits, and these lots were bought by the defendants through him as their agent, and the conveyance made to them in their own names, with the knowledge and in the presence of the complainant, the lots are not held in trust for him, nor can he have any right to restrain the sale of them. The injunction must be dissolved.

Phillips *vs.* Hulsizer.*

1. If a deed or transfer absolute on its face is made only as security for a loan or antecedent debt, it will be considered a mortgage, and the fact that it was so made may be shown by parol.

2. In determining whether a transaction is a contract for repurchase or a mortgage, the fact that there is no continuing debt is a strong circumstance, where there is any doubt, to show that it is a contract for repurchase. If the proof establishes that the consideration money was a loan, and the party receiving it is personally liable for its repayment, that constitutes it a debt: it does not require a writing to make it such; nor is it extinguished by or merged in a mortgage taken for its security.

3. P. having a written contract with H. to plant peach trees on land of the latter on shares, assigned his interest therein to H. to secure a loan made to him by H., who refused to receive the debt after the time for the payment expired, and claimed the property and sold the fruit. On a bill by P. to redeem and for an account, it was referred to a master to take an account of what was due to H. for principal and interest, and

* Cited *in Sweet* v. *Parker*, 7 *C. E. Gr.* 457.

of the rents and profits received by him, he to be charged only with what he had actually received, unless he had been guilty of laches or fraud in managing the property; if he made a sale in the beginning of a season, in good faith, without fraud, he was chargeable only with what he received, notwithstanding it should appear that, as the crop turned out, considerable more might have been made by a different course. H. was also to be allowed actual expenses incurred in good faith in the management and taking care of the property, and compensation for his labor, if he gave his own time to the cultivation, gathering, and sale of the crop.

4. The general rule is, that on a bill by a mortgagor to redeem, the mortgagor must pay the costs.

5. When the conduct of the mortgagee has been unfair or oppressive, he may be charged with the costs; but the mere fact that he refused to accept the debt under an error as to his rights, will not make him liable, and particularly when the mortgagor had failed to pay the debt when due, and had put the mortgagee to expense and inconvenience.

This cause was argued on final hearing, upon bill, answer, replication, and proofs.

Mr. G. A. Allen, for complainant.

Mr. Van Fleet, (with whom was *Mr. Bird,*) for defendant.

The controlling question of this case is, was the transaction between the parties a conditional sale or a mortgage?

The leading incidents of a sale are: 1. Necessitous condition of the grantor or vendor. 2. Lapse of a long time before a claim to redeem is made. 3. Absence of an agreement to repay purchase money. 4. Consideration paid being near the cash value of the property.

The leading incidents of a mortgage are: 1. The relation of debtor and creditor. 2. Vendor retaining possession of the property. 3. Great excess of value over the consideration paid. 1 *Hilliard on Mort.* 96, ¶ 3.

If the contract was a conditional sale, the complainant is entitled to no relief. In conditional sales, the time limited for repurchase must be precisely observed, or the vendor's right to reclaim the property will be lost. 4 *Kent's Com.*

148; *Longuet* v. *Scawen*, 1 *Ves.* 405; *Powell on Mort.* 138, note *t*; *Davis* v. *Thomas*, 1 *Russ. & Myl.* 506.

Do the incidents of this transaction show it was a conditional sale or a mortgage?

The vendor was in necessitous circumstances. His property had been sold by the sheriff just before the sale of this property to the defendant, and it had been selected by him as part of the $200 exempt from sale under execution.

A long time elapsed before any claim to redeem was made. The time limited for the repurchase was April 1st, 1864. The defendant informed the complainant, in May, 1864, that as the complainant had failed to repurchase within the time limited, he had lost all right to the property.

The subject of the sale was a peach orchard, in the second year of its growth. In order to preserve the health of the trees, they required constant labor and attention. After the defendant gave the complainant notice that he had lost the right to repurchase, the complainant abandoned the orchard and neglected to perform any of the terms of the contract under which the trees had been planted. He made a claim to redeem May 29th, 1865. At this time there was some prospect of a crop, but the crop failed. There was none in 1866. There was a fine crop in 1867; and, after it became certain that there would be a good crop, the complainant filed the bill in this case. He was speculating upon the chances, intending to claim that the transaction was a mortgage, if the orchard proved productive; and, if it proved worthless, and the complainant sought to recover the money paid, he intended to claim that it was a sale.

If the defendant had left the orchard in the condition in which it was when the complainant abandoned it, it would never have been worth a dollar to anybody. All it is, it has been made by the defendant's labor and skill. The complainant, since May, 1864, has never raised his hand nor expended a farthing to preserve it from destruction. By the terms of the contract under which the orchard was planted, the complainant was to do all the work, and find all the fer-

tilizers applied to it. The complainant's conduct, quite as strongly as the lapse of time, shows that he understood that the transaction was a sale.

The relation of creditor and debtor did not exist between the parties. Had the defendant preferred to recover the money, and not to hold the orchard, he could not have maintained an action for it. The absence of this relation between the parties is generally esteemed decisive as to the character of the transaction.

It is a necessary ingredient of a mortgage that the mortgagee shall have a remedy against the person of the debtor. *Conway's Ex'rs* v. *Alexander*, 7 *Cranch* 218; *Flagg* v. *Mann*, 14 *Pick.* 478.

The fact that there is no contract for the repayment of the purchase money and interest, which is binding upon the person making the conveyance, so as to make his general right to redeem as a mortgagor, and the corresponding right of the grantee to recover his money instead of keeping the land, mutual and reciprocal, is a strong circumstance in favor of construing the contract to be a conditional sale, and not a mortgage. *Holmes* v. *Grant*, 8 *Paige* 257; *Glover* v. *Payn*, 19 *Wend.* 518; *Goodman* v. *Grierson*, 2 *Ball & Beat.* 274; *Henry* v. *Bell*, 5 *Vt.* 393.

The price paid was the full cash value of the orchard. The sum paid by the defendant to the complainant was $100. The complainant's interest in this orchard was appraised, just before the sale by the complainant to the defendant, by appraisers appointed by the sheriff, at $60. The defendant expected the complainant's interest in the orchard would be sold by the sheriff. He sent a person to the sale to purchase it for him. He directed him to pay $100 for it, and if it was likely to be sold to a person who would give him trouble, to pay $10 more. The evidence of the complainant as to the value of the orchard, is simply opinion, and confined to the year 1868, when the peach business was much more prosperous than it was in 1863, when this sale was made.

There is a fact, independent of these incidents, which is

decisive as to the character of this transaction. When this sale was made the complainant first applied to the defendant for a loan of $25, offering to transfer his interest in the orchard as security for the loan. The defendant refused to make the loan, but proposed to buy, and the $100 was paid at the conclusion of the negotiation for purchase. The defendant did not understand the transaction to be a loan, for he distinctly refused to lend; the complainant could not have understood it to be a loan, for the defendant had expressly refused the security for a loan of one fourth the sum paid.

If the transaction is held to be a mortgage, the complainant must pay all costs of both parties of the proceedings thus far, and also of the proceedings under a decree to account. *Slee* v. *Manhattan Co.*, 1 *Paige* 81; *Shuttleworth* v. *Lowther*, 7 *Ves.* 587; *Harvey* v. *Tebbutt*, 1 *Jac. & W.* 197.

THE CHANCELLOR.

The bill in this case is filed for the redemption and reconveyance of one half of a peach orchard planted by complainant on the land of defendant, under a written agreement that each should have one half of the proceeds; and also for an account. In July, 1863, the complainant, by an endorsement on the agreement, and for the consideration of $100, assigned his interest in the agreement to the defendant, who at the same time signed and delivered to the complainant a writing, stating that such assignment was upon the condition that the complainant might, on the 1st day of April, 1864, pay the $100 and interest from date, and "then it is agreed by the parties, that the said Hulsizer, by receiving such payment, shall again return the said agreement so assigned by said C. T. Phillips to J. C. Hulsizer, to the said Phillips.

Phillips did not pay the money on the day set for the purpose, but tendered $112, as the amount due with interest, on the 29th of May, 1865. The defendant refused to accept it, denying that the complainant had any right in the

premises, and claiming that he had forfeited all right by omitting to pay the amount on the day specified.

The question in the case is, whether under the circumstances, this transaction was a mortgage, or a contract to reconvey on payment of the price stipulated. If it was a mortgage, the complainant is entitled to redeem; and the defendant, who has been in possession and received all the produce of the orchard, must account for it to the complainant.

By the original agreement the complainant was bound to plant the orchard and cultivate it, and to furnish and put upon it every year manure to the value of $25. On the day of the transfer he applied to the defendant for the loan of $25 for that purpose, offering his interest in the orchard as security. The defendant declined to make that loan, but offered to advance him $100 if he would transfer his interest in the orchard to him, and that he would reconvey the same if the money and interest should be repaid on the first of April next. The complainant says that this advance was as a loan, and the transfer was made only as security for its repayment. The defendant says it was advanced as purchase money, and that the paper executed by him was given only for the purpose of giving the complainant the right to repurchase the same, if he should elect so to do, by the 1st day of April, 1864. Each testifies to his own account of the transaction as the truth.

Two of the witnesses of the complainant, Isaac Bogert and Thomas A. Standish, testify, that in conversations had with them severally about this transaction, the defendant stated that he had loaned this $100 to the complainant, and had taken the assignment of the orchard as security for the payment, and that the complainant had forfeited his right by neglecting to pay at the day stipulated.

It is well settled that a transfer absolute on its face may be shown by parol proof, to have been given as a mortgage only. In this case the testimony of the two parties themselves is on equal footing, but the clear positive evidence of

the two witnesses referred to, whose testimony or credibility is not impeached, leaves the decided weight of evidence against the defendant.

Did the case depend on this evidence only, the transfer must be considered a mortgage. If a deed or transfer absolute on its face is made only as security for a loan, or an antecedent debt, it will be considered a mortgage, and the fact that it was so made may be shown by parol. This doctrine has been acknowledged and acted upon by this court in several cases. *Clark* v. *Condit*, 3 *C. E. Green* 358; *De Camp* v. *Crane*, 4 *C. E. Green* 166; *Van Keuren* v. *McLaughlin*, *Ibid.* 187.

It is also laid down and approved by text writers of authority, as law. 4 *Kent's Com.* 142; 2 *Story's Eq. Jur.*, §§ 1018, 1019.

In this case, the fact that the advance was a loan and the transfer intended as security only, is strongly supported by the circumstances. The amount which had been expended by the complainant upon the peach orchard exceeded $150, besides the time, skill, and labor of himself. The trees were in their second year, and were thrifty and in good condition; so far as could be judged the experiment was a success. The object for which the money was got, at least so far as $25, the amount applied for, was concerned, was to procure manure to put around the trees. It was bought the same day, and put upon the ground that day and the next. The purpose and its execution, were both known to the defendant. It can hardly be conceived that this would be done, if the complainant understood that he had sold the property absolutely, or that the transaction was anything else than security for a loan. The amount really received was, after taking off the sum spent for manure, only $75, or one half of the sum that complainant had expended; and of this, $10 was retained by defendant for the board of complainant and his workmen, while laboring at the trees. The fact that there is no continuing debt, is a strong circumstance, where there is any doubt, to show that a transaction

is a contract for repurchase, and not a mortgage. This was clearly and strongly stated, in the opinion of this court, in *Hogan* v. *Jaques*, 4 *C. E. Green*, 128; *DeCamp* v. *Crane*, *Ibid.* 171.

But if the evidence of the complainant, and of Bogert and Standish, is believed, the money was a loan, and the complainant was personally liable for its repayment. A loan always constitutes a debt, and it does not require a note, or bond, or covenant to make it such, nor is it extinguished by or merged in a mortgage taken for its security.

But in this case, the papers themselves, in my opinion, constitute a mortgage, and are clearly a mortgage were there no other proof of the object or intention of the parties. Such papers, when executed at one time, and part of the same bargain and transaction, must be construed as if one instrument. Then the transfer is made *on condition*, that if the money and interest is repaid on the first of April, 1864, Hulsizer shall return to Phillips the agreement so assigned by Phillips to Hulsizer. These are in substance the very terms which are most commonly used to convert a deed into a mortgage. Mortgages are generally drawn in precisely the same terms as absolute deeds, with *a condition* that the conveyance shall be void, or that the property shall be reconveyed upon repayment. This defeasance contains that condition, and expressly states that the assignment of the agreement was made upon that condition.

On both grounds, this transfer must be held to be a mortgage only, and the complainant must be allowed to redeem. The defendant having taken possession of the mortgaged property, and taken the rents, issues, and profits, must account for them, and there must be a reference to a master to take an account of what is due to the defendant for principal and interest on the loan of $100, and to take an account of the net profits received by the defendant from the orchard since April 1st, 1864. In this account he must be charged only with the amounts actually received by him, and not what he might have possibly made or received, unless he has

been guilty of laches or fraud in managing the property; and if a sale made, in the beginning of a season, of part of the crop, was made in good faith and without fraud, he will only be chargeably with what he received, although it may appear that by a different course, as the crop turned out in that season, considerably more might have been made out of it. He must be allowed all expenses, actually and in good faith incurred in managing and taking care of the property, and compensation for his labor, if he gave his own time and labor to the cultivation, gathering, and sale of the crop.

As to costs. A mortgagor on a bill to redeem is obliged to pay the costs; when the conduct of the mortgagee has been unfair or oppressive, he may be made liable. The defendant in this case erred in refusing to accept the money when tendered, and neglecting to reconvey the estate or contract. But he no doubt acted in good faith, supposing that the transaction was not a mortgage, but a mere contract to convey, which had been forfeited. The complainant, on the other hand, was in laches, in not fulfilling his contract and paying the money on the day mentioned in the condition. He had compelled the defendant to take possession of the property, and allowed him to cultivate it at his own expense for more than one year before tender, and had thus made an account necessary, extending much beyond the amount of principal and interest due. On the whole, I do not think that there is sufficient ground to take this case out of the general rule, that the costs must be paid by the mortgagor.

King *vs.* Ruckman.*

Ruckman *vs.* King.

1. The established doctrine of equity is, that, in general, time is not of the essence of a contract for the sale of lands. But it may become of the essence of the contract, either by being made so by the contract itself or from the nature and situation of the subject matter of the contract, or by

*Cited *in Nichols* v. *Williams*, 7 *C. E. Gr.* 65.

express notice given, requiring the contract to be closed or rescinded at a stated time, which must be a reasonable time according to the circumstances of the case.

2. If it clearly appear to be the intention of the parties to an agreement, that time shall be deemed of the essence of the contract, it must be so considered in equity. It will be so held when such intention appears from the nature of the subject matter or the object of the parties, or by parol proof that it was so considered at the time of making the contract. A new agreement extending the time, is evidence that the parties consider the time material.

3. A stipulation in a contract for the sale of lands, that the vendor, "upon receiving such payments and such mortgage, *at the time* and in the manner above mentioned," will convey, is not sufficient of itself to make the time of the essence of the contract. These words, taken in connection with the negotiations and statements at the time the contract was entered into, when the vendor said he wanted the money to fulfill his contracts for the purchase of some of the land, and the time was changed to a later day at the request of the vendee, and the vendor refused to accept a verbal promise by the vendee to pay it at an earlier date than the vendee wished the contract to express, create an express stipulation that time is of the essence of the contract.

4. The effect of a contract to convey lands, which does not name a place of payment, is to require the vendee to pay the money to the vendor, and to find him for the purpose of payment, or use reasonable diligence to find him.

5. Where a contract is silent as to the place of payment, the burthen of proof to show that a place other than the place of business or residence of the party to be paid was agreed on, is upon the party by whom the money is to be paid.

6. The only testimony allowed to impeach the character of a witness is as to his general reputation in his neighborhood for truth and veracity, and that such reputation is generally bad. A statement by the witness that, from what he knows of the reputation of the witness impeached, he would not believe him under oath, is not sufficient.

7. Where a contract is, as to any part of the lands a conveyance whereof is sought to be enforced, uncertain, and incapable of being rendered certain, it will not be enforced. Nor can the contract as to such part be rejected as immaterial, and performance be ordered of the residue, upon compensation, when the residue and the compensation could only be ascertained by parol.

The suit of King is for the specific performance of a contract made by Ruckman with him for the conveyance of lands. The bill was filed July 1st, 1868. The suit of Ruck-

man is to have that agreement rescinded, canceled, and declared void, on the ground of non-performance by King. His bill was filed July 8th, 1868, and is not a cross bill. Ruckman, at the time of commencing that suit, did not know of the other. By agreement, both causes were heard at the same time, the evidence taken in each being admitted to be evidence in the other.

The facts of the case sufficiently appear in the opinion of the court.

Mr. A. S. Boyd and *Messrs. Fowler & Holcomb* (of New York) for King.

King appears, by his own testimony, and from all other circumstances, to have earnestly desired and honestly labored to obtain from Ruckman a conveyance of the property sold him, upon the terms of the contract between them. It has been quite as clear that Ruckman has labored to save himself from the performance of that contract. There seems to be hardly a question of law in the case, unless King were to admit that he did nothing towards the performance of the contract until the 1st day of July; and if he did not, and we were to base our claim to a specific performance in his favor on the ground that time was not the essence of his contract, we should prepare the way for so doing by an appeal to the principle that, in equity, the estate bargained for and agreed to be sold passes to the purchaser as soon as the written contract has been signed by the parties. In the ordinary case of the purchase of an estate and affixing a particular day for the completion of the title, a court of chancery considers that a general object being the sale of an estate for a particular sum, the particular day named is merely formal, and the stipulation means, in truth, that the purchase shall be completed in a reasonable time, regard being had to all the circumstances of the case, and the nature of the title to be made. *Addison on Con., p.* 173; *Hearne* v. *Tenant,* 13 *Ves.* 287.

And a court of equity discriminates between the terms of

a contract which are formal, and 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 are of the essence and substance of the agreement. *Fry on Spec. Perf.*, § 709.

And we would ask an application to such a case, of that broad and flexible proposition, that whenever, in any particular instance, it is just and reasonable, under the circumstances, that performance of a contract should be insisted upon at the stipulated time, and no extension of that time sanctioned by the court, such will be the rule adopted, and under other circumstances the contrary rule. *Hilliard on Ven.* 180, 181–2, *notes.* For it is the business of this court to relieve against lapse of time in the performance of an agreement, and especially where the non-performance has not arisen by default of the party seeking to have a specific performance. 1 *Ves.* 450, and note.

And that time, mentioned in the contract of sale for the payment of ths purchase money, is not generally of the essence of the contract, and the purchaser does not forfeit his purchase; neither should we lose our contract by neglecting to pay at the day. *Fry on Spec. Perf.* 313, § 709, and note; *Wells* v. *Wells, Ired. Ch.* 596; *Runnels* v. *Jackson,* 1 *How.* (*Miss.*) 358; *Rogers* v. *Saunders,* 16 *Maine* 92–98; *Att'y-Gen'l* v. *Purmort,* 5 *Paige* 620; *Seaton* v. *Slade,* 7 *Ves.* 273; *Brashier* v. *Gratz,* 6 *Wheat.* 528.

Time is not generally deemed, in equity, to be of the essence of the contract, unless the parties have expressly so treated it, or it necessarily follows, from the nature and circumstances of the contract. If the party comes *recenti facto* to ask for a specific performance, the suit is treated with indulgence, and generally with favor, by the court. 1 *Story's Eq. Jur.*, § 776.

King has shown himself ready, desirous, prompt, and eager to perform the contract, and he comes before the court entitled to be treated with favor. *Alley* v. *Deschamps,* 13 *Ves.* 228; *Moore* v. *Blake,* 1 *Ball & B.* 68; *King* v. *Hamilton,* 4 *Peters* 311.

Equity holds time to be *prima facie* unessential, and will enforce the specific performance of agreements after the time for the performance has been suffered to pass. *Huffman* v. *Hummer*, 2 *C. E. Green* 263; *Williston* v. *Williston*, 41 *Barb.* 635; *Young's Adm'r* v. *Rathbone*, 1 *C. E. Green* 225.

Mere lapse of time constitutes, in itself, no bar to a decree for specific performance. A contract for the conveyance of land decreed after the lapse of twenty-three years. *Toll Bridge* v. *Vreeland*, 3 *Green's C. R.* 157.

This reference to the well known principle that time is not, in equity, the essence of the contract, would only be applicable to the case if we were to admit that nothing was done by King before the 1st day of July, or if, to the same effect, the court were to consider as nothing every effort which King made in that month toward the performance of his contract. Even if King's acts did not constitute a good tender, he has not been guilty of any such unnecessary delay or gross laches as will bar him from relief in equity. 1 *Story's Eq. Jur.*, § 776, and cases cited.

Ruckman cannot avoid specific performance by showing that some portions of the lands mentioned in the contract are not owned, or cannot be procured by him, and that other portions lie in another state.

The main body of the lands are within the state of New Jersey.

If Ruckman cannot make a good title to the whole, King may take title to such as Ruckman has, and accept compensation in damages for the residue. *Allerton* v. *Johnson*, 3 *Sandf. C. R.* 72.

A specific performance may be decreed, though the land is without the jurisdiction of the court, if the person of the defendant is within the reach of its process. 1 *Vern.* 77, 135; *Wyth* 13; 6 *Cranch* 148; 1 *Ves.* 144; *Sutphen* v. *Fowler*, 9 *Paige* 280.

A court of equity may enforce specific performance, although the lands are situated in another state, and the contract was made and was to be performed there, and the

vendor is a non-resident, the defendant being duly served with process and subject to the jurisdiction. 3 *Sandf. C. R.* 185; 9 *Paige* 281; 3 *Ves.* 170; 1 *Sim. & Stu.* 15; 6 *Cranch* 148; *Hopk.* 213; *Cleveland* v. *Burrill*, 25 *Barb.* 532; *Newton* v. *Bronson*, 3 *Kernan* 587.

The description in the contract, although not specific, is sufficiently certain. It has been held that an agreement to convey two hundred and forty acres of land owned by the vendor—defendant—in the town of A, naming also the county and state, is sufficiently certain and definite to be specifically enforced. *Richards* v. *Edick*, 17 *Barb.* 260. Thus, for instance, the expression, "Mr. Ogilvie's house," was held sufficient. *Ogilvie* v. *Foljambe*, 3 *Mer.* 53. Upon the same principle specific performance of a contract will not be refused because, in the description of the land, it omitted to state the town in which it lies. *Robeson* v. *Hornbaker*, 2 *Green's C. R.* 60.

Certum est quod certum reddi potest.

To the proposition that in equity a contract to be specifically performed must be mutual, there is an exception that the purchaser can insist on having all that the vendor can convey, with a compensation for the difference. *Fry on Spec. Perf., p.* 133, § 299. And if the vendee chooses to take as much as he can have, he has a right to that, and to an abatement. *Mortlock* v. *Buller*, 10 *Ves.* 315; *Milligan* v. *Cooke*, 16 *Ves.* 1; *Hill* v. *Buckley*, 17 *Ves.* 394; *Bennett* v. *Fowler*, 2 *Beav.* 302; *Waters* v. *Travis*, 9 *Johns. C. R.* 465.

This principle is offered in answer to the objection which may be made by Ruckman, that he has not the title to the land sold, and therefore cannot perform his contract.

Where the vendor has contracted to convey a tract of land, the title to a part of which fails, the vendee may claim a specific performance of the contract as to the residue of the land, with a compensation in damages, in relation to that to which the vendor is unable to give a good title. *Morss* v. *Elmendorf*, 11 *Paige* 287.

And it must not be understood that the incapacity of the defendant to perform a contract literally and exactly in all its parts, will be a bar to its performance. *Fry on Spec. Perf.*, § 667.

Compensation for deficiency in the purchase of land is essentially a matter of equity jurisdiction. *Castleman* v. *Veitch*, 3 *Rand.* 598; *Graham* v. *Oliver*, 3 *Beav.* 124; *Hepburn* v. *Auld*, 5 *Cranch* 262; *Couse* v. *Boyles*, 3 *Green's C. R.* 212; *Morss* v. *Elmendorf*, 11 *Paige* 287.

The general rule (for it is not universal) in all such cases is, that the purchaser, if he chooses, is entitled to have the contract specifically performed, as far as the vendor can perform it, and to have an abatement out of the purchase money, or compensation for any deficiency of title, quantity, quality, description, or other matters touching the estate. 1 *Story's Eq. Jur.*, § 779, and cases cited.

Nor will the fact that there is in the bill no prayer for compensation, deprive King of his rights to it, for even compensation may be granted for a defect appearing on the investigation of the title, though the frame and prayer of the bill and the decree made at the hearing, make no reference to compensation. *Fry on Spec. Perf.*, § 793.

And where the defendant deprives himself of the power to perform his contract specifically during the pendency of a suit to compel such a performance, the court will retain the suit, and will award to the complainant a compensation in damages for the non-performance of the contract by the defendant. *Morss* v. *Elmendorf*, 11 *Paige* 287.

The contract between Ruckman and King concludes with a provision in these words: "If either party fail to comply with this contract, the party so failing shall forfeit and pay to the other the sum of $20,000."

There are of course two possible interpretations which can be put upon these words, and these are determined by this question: What is the agreement? Is it, that this conveyance shall be made with the provision of this $20,000, as a penalty added to secure its performance, or is it, that the

payment of this $20,000 shall be received in place of the conveyance, if either party choose to pay it?

It is always the duty of this court to inquire into the peculiar facts and the peculiar merits of each case, and to decide as they may direct. 2 *Parsons on Con.* 510, and cases cited.

And so the subject matter of the contract may be inquired into, so far as respects the situation of the parties and the facts controlling the agreement, to ascertain the circumstances out of which the contract originated, and especially in regard to the consideration. *Hilliard on Vendors* 531, and notes; *Hodges* v. *King*, 7 *Metc.* 586.

With respect to the case in question, we first observe that there is no designation of this $20,000 as a penalty, or as liquidated damages, and we must observe that these words were thought by Ruckman to have been inserted as a penalty, for, after a characteristic oath, he says to King: "If you don't pay the $19,900 on the 1st of June, I will make you do it, and pay the $20,000 besides."

That this sum was inserted as a penalty, is thus shown from the opinion of one of the parties, and is made entirely clear by a thought of the stipulated value of the subject matter and all the purposes of the agreement. It cannot be supposed that the sum named would be an equivalent to the advantage of the contract to either party, or in keeping with the price named therein. If it had been intended to insert a sum as liquidated damages, one of a larger amount and more consistent with the magnitude of the transaction would have been named.

A sum specifically named in a written agreement "as liquidated damages," in case either party should fail to perform the contract, must, nevertheless, be construed as a penalty, where, upon the face of the instrument, it appears that such sum will necessarily be an inadequate compensation for the breach of some of the provisions of the contract. *Lampman* v. *Cochran*, 16 *N. Y. R.* 275.

In case of an agreement to do some act, and upon failure to pay a sum of money, the court will look into the intent

of the parties; but, although the term "liquidated damages" will not be conclusive, the phrase "penalty" is generally so, unless controlled by some other very strong considerations. *Sedgwick* 485; 2 *Story's Eq. Jur.*, § 1318.

A purchaser of land who has contracted to pay a specific sum as the price, cannot be relieved from the payment by a tender of a less sum, also agreed upon in the contract as stipulated damages, to be paid in case of non-performance on his part. *Hilliard on Vendors, p.* 22, note; *Ayres* v. *Pease,* 12 *Wend.* 393.

If it be doubtful, from the terms of the contract, whether the parties mean that the sum mentioned in it shall be a penalty or liquidated damages, then I should incline to consider the clause as creating a penalty, and not giving stipulated damages. *Hilliard on Vendors* 531, *et passim,* note; *Ibid.* 539, note; *Crisdee* v. *Bolton,* 3 *Carr & P.* 240; *Owens* v. *Hodges,* 1 *McMullan* 106; *Foley* v. *McKeegan,* 4 *Iowa* 1.

King assigned to four other gentlemen, each one fifth interest in this contract. The assignment was made after these suits were commenced.

The rule of a court of equity is simply and generally, that all persons interested in the subject matter of the suit shall be brought before it, that all the rights of all may be protected, and all questions in the matter determined. But the exception is as old as the court itself, that when persons take interests by assignment in a matter already in litigation, they are fully bound by the decree. So when he comes *in pendente,* and while the suit is in full prosecution, and without any color of allowance or privity of the court, then regularly the decree bindeth. Lord Bacon, *vol. IV, p.* 511.

Generally speaking, an assignee *pendente lite* need not be made a party to a bill, or be brought before the court, for every person purchasing *pendente lite* is treated as a purchaser with notice, and is subject to all the equities of the persons under whom he claims in privity. And it will make no difference whether the assignee *pendente lite* be the claimant of a legal or equitable interest, or whether he be the

assignee of the plaintiff or defendant. *Story's Eq. Pl.*, § 156; 1 *Story's Eq. Jur.*, § 406; *Cook* v. *Mancius*, 5 *Johns. C. R.* 95; *Bishop of Winchester* v. *Paine*, 11 *Ves.* 194, 197; 2 *Story's Eq. Jur.*, § 908; *Metcalfe* v. *Pulvertoft*, 2 *Ves. & B.* 204; *Hoxie* v. *Carr*, 1 *Sumner* 173.

The maxim, *pendente lite nihil innoveter*, prevents the denial of justice which would be caused if a party to a cause could continually assign his claim, and thus force upon his opponent so frequent an amendment of his pleadings as to create such a result. And he who purchases during the pendency of a suit is held bound by the decree that may be made against the person from whom he derives title. The litigating parties are exempted from taking any notice of the title so acquired, and such purchaser need not be made a party to the suit. 1 *Story's Eq. Jur.*, § 406. Suits would be indeterminable, if one party pending the suit could, by conveyances to others, create a necessity for introducing new parties. 2 *Story's Eq. Jur.*, § 908.

Even-handed justice can only be satisfied by a specific performance of the contract in question.

Ruckman does not come forward with clean hands. He asks for the interposition of equity upon a technicality which would not avail him in a court of law. His bill is based upon an alleged default which never occurred, and into which he vainly endeavored to entrap King. He presents himself before a tribunal to which he has by his own language, manner, actions, intentions, cunning, and evil design, rendered himself a stranger, and with peculiar ill grace demands to be relieved from the obligations of a contract drawn by his own attorney, and in all respects fair and reasonable. His reliance is neither on his own readiness nor on King's refusal to perform, but on the pretended omission of King to make one of the three payments at the place where he, Ruckman, in the face of every probability and much positive testimony, pretends it should have been made.

The advantage sought to be taken by Ruckman is repug-

nant to every principle of equity, for the "equity" demanded by him is to have the whole transaction rescinded. He asks to be relieved from all his obligations and left in the possession of the fruits of his own bad faith.

Equity will not declare as void, contracts which have been fairly entered into; nor will it lend itself to defeat the ends of justice by the application of strict technical rules of law. *Galway* v. *Fullerton*, 2 *C. E Green* 389.

The contract is certain and fair in all its parts. The consideration is adequate. King has not at any time been in default. He proffered himself ready and willing to perform, and when the bad faith of Ruckman became apparent, he promptly applied for equitable relief, and has fairly placed himself within reach of the rule laid down by this court in a recent case.

"Under such circumstances, it is as much a matter of course for courts of equity to decree a specific performance as it is for a court of law to give damages for breach of it." *Hopper* v. *Hopper*, 1 *C. E. Green*, 147; *Hall* v. *Warren*, 9 *Ves.* 608; *Greenaway* v. *Adams*, 12 *Ves.* 395, 400; 1 *Story's Eq. Jur.*, §§ 751, 771.

Mr. Ransom, for Ruckman.

I. The contract is so uncertain and undefined in regard to the location, description, quantity, and title to the land, a conveyance of which is sought, that there can be no specific performance decreed.

1. As to location, description, and quantity of the land.

Neither the contract nor King's bills describe any specific land for which a conveyance is sought. The contract describes the lands as follows:

"All the lands and premises which said party of the first part owns or holds contracts for, situate in the township of Harrington, in the county of Bergen, and state of New Jersey, which lie east of the old Closter road, leading from Piermont to Englewood, and between the Alpine road ("the old Closter Dock road,") and the north line

of the state of New Jersey; also, all his land situate in said township, lying between the Huyler's Landing road and the old Closter Dock road; also, all his lands situate in Rockland county, in the state of New York, and lying east of the old Closter road, leading from Piermont to Englewood; and also, two lots of land in Hackensack township, state of New Jersey, county of Bergen; the whole of the above described premises containing about two thousand acres; a portion of the above being bounded by the Hudson river."

This description extends from Piermont, in the state of New York, on the north, to Huyler's Landing road, in the state of New Jersey, on the south, from a road called Old Closter road, on the west, to the Hudson river, on the east, with two lots of land in Hackensack township, Bergen county, a territory some eight or nine miles in length and three or four in width.

The lands for which King asks a conveyance are not in any way described in his bills more definitely than in the contract.

Suppose a specific performance should be decreed, what kind of a decree could be made? A decree directing a conveyance must specify the lands to be conveyed, so as to leave no doubt or uncertainty as to what lands the party is directed to convey. It ought, also, to specify the terms on which the conveyance is to be made and the amount of money to be paid for the conveyance.

In this case there is no evidence to supply the uncertainty of the bill. If the uncertainty in the description of the land in the contract could be remedied by a survey, and by extrinsic evidence, if the specific land could in that way be determined, this should have been done, and a certain and clear description, with exact quantity, should have been inserted in the bill, so that a definite and certain decree could be made. But in this case, I submit that the location, description, and quantity are so indefinite and uncertain that it cannot be made definite and certain by evidence or inquiry.

How many acres are to be conveyed? How are we to

ascertain how many acres are to be included in the conveyance, and paid for by King at $275 per acre? The contract says: "The whole of the above described premises containing about two thousand acres." How are we to ascertain whether it is eighteen hundred or twenty-two hundred acres, more or less? For, before it can be conveyed, the exact number of acres must be ascertained, as it is to be paid for by the acre.

Before the court can decree a specific performance of this contract, it must be distinctly ascertained what particular land is meant by the contract, where each parcel is located specifically, and the exact number of acres the several parcels contain.

I submit that it is not in the power of this court to ascertain from the contract, the complainant's bill, or any evidence in the cause what particular lands are meant by the contract, or how many acres they contain.

The lands mentioned in the contract lie in two states, two counties, and three townships. A portion of them are described simply as "two lots of land in Hackensack township, state of New Jersey, county of Bergen.

What lots are meant? Where do they lie? How are they bounded? How many acres do they contain? These are questions which at once suggest themselves, and they are questions which cannot be satisfactorily answered. Ruckman may have lots of land lying in different parts of the township of Hackensack, containing different quantities of land. He may have power to sell other people's lands, and have none of his own. He may claim that the lots referred to in the contract lie in one place: King, that they lie in another. Ruckman may contend that they contain half the two thousand acres referred to in the contract; while King may insist that they contain only a quarter of the whole quantity. How can a conveyance of lots so described be decreed to be conveyed? How can a decree directing two lots of land in Hackensack township to be conveyed, be enforced, or to what land, under our statute, would such a

decree give title? This uncertainty is not removed by any allegations in the bill, or any evidence in the case.

2. The contract is so indefinite, undefined, and uncertain as to the title to the land referred to therein, that no conveyance can be decreed.

The contract is for lands which Elisha Ruckman "owns or holds contracts for." And he is to give a deed, conveying the fee simple of the premises; those he owns, and those he holds contracts for.

As to the lands for which he holds contracts, or for which he held contracts at the time the contract was executed. How can this court decree Ruckman to execute deeds conveying the fee simple to lands for which he holds contracts only? A deed for such lands would be a nullity.

The contract is not that Ruckman will assign his contracts for lands within the described territory, but that he will "execute, acknowledge, and deliver to the party of the second part, or to his assigns, a proper deed, for the conveying and assuring to him or them the fee simple of the said premises."

Before there can be any conveyance of such lands decreed, an inquiry must be instituted to ascertain what specific lands Ruckman, at the date of this contract, held contracts for in all parts of the twenty or thirty square miles of territory embraced in the boundaries mentioned in the contract, and then he must be directed to acquire title to those lands, and convey them to King. This, I submit, is a task a court of equity will never undertake. It would involve innumerable side issues as to the validity, force, and effect, of such contracts, whether they are still in force, or have been forfeited, or whether they ever had any binding effect, and whether the parties contracting to sell said lands ever had any title to them, or any power to sell them. It would require that all the parties to such contracts, and all persons interested therein, should be brought in and made parties to this suit.

This part of the lands referred to, therefore, is so vague,

indefinite, and uncertain, as to title, that no decree can be made concerning them.

As to the lands Ruckman *owns* within the territory described in the contract.

As to these lands, there is no such certainty of title as will enable the court to make a decree specifying the lands he shall convey.

Before King can have a decree for a conveyance of the lands Ruckman owns within the territory described in the contract, it must be definitely ascertained what lands Ruckland does own in said territory. There is not an acre of land described in either King's original or amended bill, which Ruckman is charged with owning.

Before Ruckman can be decreed to make to King a deed for the lands he owns and holds contracts for, sufficient to convey the fee simple, free from all encumbrances, the title of the whole tract included in the boundaries named in the contract, which embraces some twelve thousand acres, must be ascertained in order to see just how many acres Ruckman owns.

Controversies may arise as to the number of acres Ruckman may own in fee, free from encumbrances. Disputes may arise as to his title to certain portions, and it may be impossible—in fact, it is impossible, in this suit—to determine how many acres Ruckman owns for which he can give the deed required by the contract.

Possibly a bill might be framed so as to enable the court to decree a specific performance of this contract, but the bill in this case is not such a bill.

In support of this position, see *Fry on Spec. Perf.*, § 229, note. The learned author says: "It will be obvious, that an amount of certainty must be required in the specific performance of a contract in equity, greater than that demanded in an action for damages at law. 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 arrived at without any exact

consideration of the terms of the contract; whilst in equity it must appear, not only that the contract has not been performed, but what is the contract which is to be performed."

In *Kendall* v. *Almy*, 2 *Sumner* 278, Justice Story says: "There is no just ground to call upon a court of equity to enforce a specific performance between the original parties themselves, where its terms are not clear, definite, and positive."

In the case of *Lord James Stuart* v. *The London and N. W. Railway Co.*, 1 *De G., M. & G.* 721, which was brought for the specific performance of an agreement, by which the railway company agreed to pay £400 per acre for certain land required by the company for their railway, and for the several portions of land, south of the railway, and £100 in addition for making road passages, archway under the railway; £1250 per acre for seven acres, and £400 per acre for other portions, and £1000 for depreciation of homestead; it was held that the agreement was not sufficiently definite to be enforced. BRUCE, Justice, said, (page 735:) "I am of opinion that the language of the document, in parts of it necessary to be construed and acted upon, if there is to be a decree of any kind for specific performance against the defendant, is too vague, too uncertain, too obscure, to enable the court to act with safety or propriety for any such purpose."

In the case of *The South Wales Railway Co.* v. *Wythes*, 5 *De G., M. & G.* 880, which was on a contract for defendants to build a railway for £290,000, according to specifications to be prepared by engineer, it was held to be too vague and uncertain to be enforced by specific performance.

In *Tatham* v. *Platt*, 9 *Hare* 660, the Vice Chancellor says: "The first term of the agreement is, that the original patentees shall give a license under their patent to the second patentees, £29 per cent. less than to any other licensee. Now, licenses may be granted by patentees, for all or any part of the term, for the whole range of the patent, or for certain districts, for an indefinite number of machines, or for

a limited number. They may be granted in consideration of a sum in gross, of a certain sum per annum, of a fixed sum per machine, or of varying sums, according to the number of machines manufactured or used." The Vice Chancellor held that in this case no specific performance could be decreed, for uncertainty.

In *Colson* v. *Thompson*, 2 *Wheat.* 336, Justice Washington, in giving the opinion of the court, said: "The contract which is sought to be specifically executed ought not only to be proved, but the terms of it should be so precise, as that neither party could reasonably misunderstand them. If the contract be vague or uncertain, or the evidence to establish it be insufficient, a court of equity will not exercise its extraordinary jurisdiction to enforce it, but will leave the party to his legal remedy."

Every valid contract must contain a description of the subject matter. And where it is necessary to call in extrinsic evidence, the connection of the subject matter of the agreement and the thing in respect of which specific performance is sought, must be alleged in the bill, and supported by sufficient proof. *Fry on Spec. Perf.*, §§ 209, 210.

It is, however, essential that the description of the subject matter of the agreement should be so definite, as that it may be known with certainty what the purchaser imagined himself to be contracting for, and that the court may be able to ascertain what it is. *Fry on Spec. Perf.*, § 211.

In *Taylor* v. *Gilbertson*, 2 *Drewry* 391, a bill was filed for the specific performance of a contract for the sale of twenty-one acres of land. The purchaser refused a deed because the vendor's title was acquired at a mortgage sale, under a power which contained the following condition, *viz.*, that a footpath of the width of fifteen feet should be laid out around the whole of the northern, southern, and western boundaries of the said land. The question was, whether the purchaser would be liable to be compelled to lay out, or cause to be laid out, the footpath around the tract. The Vice Chancellor said: "There is so much uncertainty in the stipulation about

the place where the footpath is to be made, or for what purpose, or for whose use, that I think if Billings filed a bill he could obtain no relief of any kind." See, also, *Price* v. *Griffith*, 1 *DeG., M. & G.* 80.

McKibbin v. *Brown*, 1 *McCarter* 13. In this case Chancellor Green says (page 17): "No specific performance of a contract can be decreed in equity, unless the contract be actually concluded, and certain in all its parts. If the matter still rests in treaty, or if the agreement, in any material particular, be uncertain or undefined, equity will not interfere."

In *Lord Walpole* v. *Lord Orford*, 3 *Ves.* 420, Lord Rosslyn says: "I lay it down as a general proposition, to which I know no limitation, that all agreements, in order to be executed in this court, must be certain and defined."

In *Caps* v. *Holt*, 5 *Jones' Eq.* 153, it was held that where the description of land in a memorandum of contract is vague and indefinite, equity will not decree a specific performance. See *Harnett* v. *Yeilding*, 2 *Sch. & Lef.* 549.

From the above authorities, it is clear that the land described in the contract is, in every respect, so vague and uncertain that there can be no specific performance decreed. Nor can this defect be remedied, under the bill filed in this case, by extrinsic evidence; for where it is necessary to call in extrinsic evidence, the connection of the subject matter of the agreement, and the thing in respect of which specific performance is sought, must be alleged in the bill, and supported by sufficient proof. *Fry on Spec. Perf.*, § 210; *Price* v. *Griffith*, 1 *De G., M. & G.* 80.

In this case, there is no clear or definite description of the land sought to be conveyed set out in the bill, and no proof to connect such land, if it had been specifically set out in the bill, with the land contemplated by the contract.

II. There can be no specific performance in this case, because King has not performed on his part.

By the contract, King was to pay $19,900 on the 1st day of June, 1868, one month before the deed was to be deliv-

ered. This he did not do on the 1st day of June, or at any other time before the 1st day of July, when the deed was to be given.

King makes no pretence that he paid this money, but he seeks to excuse himself from paying it on various grounds:

He contends that he was not obliged to pay it before he got his deed, because time is not of the essence of the contract.

Time is of the essence of the contract. 1. Where it is so stipulated in the contract, or where it was the manifest intention of the parties that it should be so considered; and, 2. Where the object of one of the parties would be defeated by delay. 3. Where the party asking for the specific performance has acted in bad faith, or unfairly.

In this case, the simple fact that Ruckman required, and King agreed to pay, $19,900 one month before he got his deed, is at least *prima facie* evidence that the parties intended that time should be of the essence of the contract.

In *Longworth* v. *Taylor*, 1 *McLean* 395, Judge McLean gave a very elaborate opinion upon this question. He says (on page 399): "There can be no doubt but the parties may make time of the essence of the contract; and in no case is it to be considered an immaterial circumstance." On page 400 he says: "It is the province of a court of equity to relieve against penalties and forfeitures; but it would be strange if this relief was extended against the positive stipulation and understanding of the parties. This would be, not to give effect to the contract, but to make a new contract between the parties, contrary to the terms which they themselves had adopted. At law, time is always an essential part of a contract; but in chancery, the court considers it in connection with the circumstances of the case. The rule of law is so inflexible as not to admit of any excuse, however strong, for a failure to perform the contract at the time fixed. But it is otherwise in chancery. Not that chancery disregards time as immaterial, but if the party show that he has been prevented by inevitable accident, or by any justi-

fiable excuse, from performing his part of the contract at the time stipulated, and the other party has suffered no material injury by the delay, the court will not withhold its aid."

Judge McLean further says: "It may he laid down as a rule, established by adjudged cases, and stated in the elementary treatises on the subject, that where a party has failed to execute his part of the contract without a sufficient excuse, and there has been no acquiescence in the delay by the other party, the court will never decree a specific execution of the contract. The party who seeks the court to aid him, must show reasonable diligence in doing, or attempting to do, what he agreed to perform. Nearly a century and a half ago, in the case of *Hayes* v. *Caryll*, 5 *Vin. Abr.* 538, *pl.* 18, it was held that a person was not entitled to specific performance who had trifled or shown a backwardness in performing his part of the agreement."

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 original intention of the parties that it should be so, and not to have been inserted as a merely formal part of the contract. *Fry on Spec. Perf.*, § 710. It is clearly the rule, that equity will not disregard the manifest intention of the parties. It is only required that they shall make time essential, to induce the court so to construe it. *Fry on Spec. Perf.*, § 711.

Time is of the essence of the contract whenever it appears material to the parties. *Fry on Spec. Perf.*, § 713. When hardship would result from considering time immaterial, the court will incline to consider time as being of the essence. *Fry on Spec. Perf.*, § 719.

In *Earl* v. *Halsey*, 1 *McCarter* 332, it was held that a party who has failed to perform a contract on his part, can have no claim to a specific performance.

In *Steele* v. *Biggs*, 22 *Ill.* 643, it was held that time might be of the essence of a contract, and where that was made clearly to appear, the court would enforce a forfeiture.

In *Young* v. *Daniels*, 2 *Clark* (*Iowa*) 126, the court said:

"Even where time is not of the essence of the contract, one seeking specific performance, after delay in the performance of his part of the contract, must show good excuse for the delay under the circumstances." See also *Rogers* v. *Mitchell*, 41 *N. H.* 154, where it was held, "that a specific performance of contract will not be decreed in favor of one who is chargeable with any fraud or unfairness in relation to the contract."

In *O'Rourke* v. *Percival*, 2 *Ball & Beatty* 58, it was held that, "unless it appear that the party seeking a specific performance has acted not only fairly, but in a manner clear of all suspicion, equity will not interfere; for, if there be a reasonable doubt on a transaction, the party will be left to his legal remedy for non-performance of a contract."

In *Crofton* v. *Ormsby*, 2 *Sch. & Lef.* 604, it was held that "where the object of one of the parties contracting would be defeated by delay in the execution of it; if the other party delay he shall not afterwards be allowed to insist on performance."

Newman v. *Rogers*, 4 *Bro. C. C.* 391, is a case of the sale of a reversion. Part of the terms was, that the money should be paid at a certain time; not being so paid, by default of the vendee, vendor was discharged from his contract.

In *Hayes* v. *Caryll*, 1 *Bro. P. C.* 27, it was held that where a party to an agreement trifles, or shows a backwardness in performing his part of it, equity will not decree a specific performance in his favor.

Parkin v. *Thorold*, 11 *E. L. & Eq. R.* 275, 278, 279, and 280. In this case, the agreement was dated July 25th, 1850, and stipulated that the abstract should be delivered in ten days, and the purchase money paid and the purchase completed on or before the 25th of October. Abstract was delivered August 1st, 1850. The purchaser's solicitor required an inspection of an original paper, which could not be found. On the 21st of October, the solicitor of the purchaser gave the vendor's solicitor notice that unless the

missing paper was produced and the title completed by the 5th November then next, the purchaser would consider the contract at an end. On 1st March, 1851, bill was filed by vendor for specific performance, &c. The question was, whether the vendor, not being able to complete his title at the time specified, could maintain his suit. The Vice-Chancellor says: "The jurisdiction of this court to decree specific performance depends entirely on contract. Consequently, the first point to be ascertained is, what is the contract? This must be decided from the terms of the contract itself. When, therefore, it is once ascertained that the contract of a purchaser is, that he will purchase if a title is made by a given day, but otherwise that he will not, I apprehend, if there is nothing more, that a court of equity cannot, any more than a court of law can give relief to a vendor who has failed to make a title at the day specified. When, therefore, a contract has been entered into, by which a court of law decides that a purchaser is not bound unless a title be made before a given day, if a court of equity gives relief, it must be, not on the ground that it puts on the words of a contract a construction different from that put on it at law, but because there are grounds collateral to the contract on which it can found a jurisdiction, warranting its interference. What, then, are these grounds? I answer, the conduct of the contracting parties. It is sufficient to say, that the ground on which the court has professed to proceed has always been, that the parties have so acted as to enable it either to give to the original contract a meaning different from its *prima facie* obvious import, or else to say, that the original contract, so far as relates to the time fixed for its completion, has been abandoned, and a new and more extended one, by implication, has been entered into."

The result of this case was, that a specific performance was denied.

Wells v. *Smith*, 7 *Paige* 22, was a case where the vendee agreed to build a house on the lot purchased, or pay $1000 of the purchase money as a first payment, on a certain day

before the deed was to be given. He neither built the house nor paid the money. He filed his bill for a specific performance. The specific performance was denied, on the ground that it was the intention of the parties to make the building of the house, or the payment of the money at the time specified, an essential part of the contract. In *S. C.*, 2 *Edw. C. R.* 78, it was held by the Vice-Chancellor, that equity cannot relieve from the consequences of a condition precedent unperformed.

Sugden on Vendors, p. 297 (*8th ed.*)—"We may, therefore, venture to assert that, if it clearly appears to be the intention of the parties that time should be deemed of the essence of the contract, it must be so considered in equity." Also see page 382: "If it be a condition precedent, it defeats, or rather avoids, the estate, by not permitting the estate to vest until the condition is literally performed."

If, then, in making the contract between Ruckman and King, it was the manifest intention of the parties that the time for making the first payment of $19,900 on the 1st day of June should be of the essence of the contract, there can be no specific performance decreed in favor of King, if he made default in that payment.

That it was the intention of the parties that the time for the payment of the $19,900 should be an essential of the contract, or a condition precedent to the giving of the deed, is manifest: 1. From the language of the contract. 2. From the evidence.

1. The language of the contract is, that Ruckman agrees to sell his lands for $275 per acre, for which King agrees to pay as follows: $19,900 on the first day of June next, $80,000 on the first day of July next, on delivery of the deed, &c.

2. The evidence shows that this payment of $19,900 on the first day of June was provided for, to be paid at that time for an express purpose; that the time for the payment of this sum was fixed a month in advance of the giving of the deed, to enable Ruckman to put himself in a position to

give the deed; that this amount was required to complete contracts mentioned in the agreement and pay off mortgages, so he could give a clear title to the property, which he could not prepare himself to do without this money in advance; that his object in stipulating for its payment a month in advance of the time of giving a deed, was to prepare himself with the money to give the deed.

The fact that the time fixed for the payment of the $19,900 was not inserted in the contract as mere form, but for an object very material to Ruckman, and that the payment of that money at the time fixed was absolutely necessary as a condition precedent, to enable Ruckman to perform the contract on his part, is fully and completely established, and is not even contradicted.

This evidence conclusively shows that the payment of the $19,900 on the 1st day of June, 1868, was very material to Ruckman; that the time when it was to be paid was very essential to him; that it was fixed in advance of the giving of the deed, to enable him to secure his contracts. Ruckman wanted it paid in ten days. King expressed his willingness to pay it within ten days, but objected to putting it in the contract. Ruckman was unwilling to take King's word, but insisted that it should be in the contract. After a good deal of controversy over that point, they compromised on twenty days—the 1st of June.

Can there be any pretence upon this evidence that the time of the payment of the $19,900 was not vitally essential to Ruckman? He informs King that if he wanted time on the $80,000 payment he could have it by paying interest; but the $19,900 he must have, or he would lose his contracts, which would be more damage to him than the money was worth.

I can conceive of no state of facts which would establish more conclusively that the intention of the parties to this contract was, that the time mentioned in this contract for the payment of the $19,900 was of the essence of the contract.

And it is not necessary that it should appear in the writ-

ten contract itself, that the intention of the parties was to make time of the essence of the contract. This may be shown by parol testimony. It was so held in the case of *Nokes* v. *Lord Kilmorny*, 1 *DeG. & Sm.* 444. In that case, statements made by the purchaser's agent at the time of signing the contract, to the effect that time was essential, were admitted as evidence.

The time for the payment of the $19,900 named in the contract, *viz.* June 1st, 1868, if it was not originally of the essence of the contract, was made so by subsequent notice from Ruckman to King.

Fry on Spec. Perf., § 709 : "There are, however, many cases in which time proves a bar to relief. These may be considered under two heads: 1. Those cases where time was originally of the essence of the contract. 2. Where, though not so, it was grafted into it by subsequent notice."

Such notice was given by Ruckman to King. The notice was verbal; but the law does not require it to be in writing. *Fry on Spec. Perf.*, § 729.

King did not make an honest effort to make the tender on the 1st day of June. When Ruckman is in a position to receive the money, and is anxious to receive it, it is too much trouble for King to go to his house, where he is sure to find him; but when he knows Ruckman has it not in his power to give a deed and receive the money, he is fierce for the chance to tender him the money and demand a deed—is willing to pay $500 for the privilege. Does this look like good faith?

What is necessary to make a good tender?

Where a party sets up a tender in equity, he will be held to as great strictness as he would be held at law. *Taylor* v. *Jones*, 5 *Monroe* 36.

In a contract to pay money at a time and place certain, the debtor must be ready at the time and place to pay the money; and if he be not there, it is no excuse for him that the creditor was not there to receive the money, if it had been paid. *Ruggles* v. *Patten*, 8 *Mass.* 480. And in such

case, the last convenient hour of the day for transacting business is the legal time of performance. *Savery* v. *Goe*, 3 *Wash. C. C.* 140.

In this case, King was at Voorhis' office a half hour at about twelve o'clock. This was not the last convenient hour of the day for transacting business. King, at half-past twelve o'clock on June 1st, 1868, had two opportunities to go to Ruckman's house by cars, pay this money to Ruckman, and return that afternoon. The whole trip could have been made in two hours. Judge Voorhis informed him that Ruckman was at home, waiting for him, and expecting him to come and pay the money. Miss Emma Hopping says: "Mr. Ruckman went to all the trains to meet Mr. King, on the 1st day of June, except the late train." So it was the easiest thing in the world for him to have found Ruckman that day. Ruckman, the last thing he said to him, as he was leaving the Norwood Hotel, on the 28th of May, told him he would be home all day to receive this money. He therefore knew Ruckman was at home, waiting for him to come there and pay the money.

It was his duty to go there and pay it. For, where money is to be paid, it is the duty of the party who is to pay it to seek the party who is to receive it, in order to make the payment; and whatever may be the understandings or misunderstandings of the parties, the party who seeks the specific performance of a contract, on the ground that he was ready to pay money at the time specified, must show that he has used due diligence to find the party entitled to receive the money, and, if found, has offered it to him. *Goodwin* v. *Holbrook*, 4 *Wend.* 377.

King told his counsel that Ruckman had dodged him and kept out of his way on the 1st of June. Is not this a base and fraudulent pretence, in view of the facts proved? Ruckman, three days before the 1st of June, tells King where he will be to receive the money, to which King makes no objection. Ruckman remains all day at the place named, except when he drives to the depot to meet King. On the

very day, King is informed Ruckman is there waiting for him at a time when he can reach him in half an hour. And this he calls dodging him.

If this evidence does not prove bad faith on the part of King, it seems to me that bad faith cannot be proved in any case.

A specific performance of a contract will not be decreed in favor of one who is chargeable with any fraud or unfairness in relation to the contract. *Rogers* v. *Mitchell*, 41 *N. H.* 154.

In the case of *O'Rourke* v. *Percival*, 2 *Ball & Beat.* 58, it was held that unless it appear that the party seeking a specific performance has acted not only fairly, but in a manner clear of all suspicion, equity will not interfere; for if there be a reasonable doubt on a transaction, the party will be left to his legal remedy for non-performance of his contract.

So in *Hayes* v. *Caryll*, 1 *Bro. P. C.* 27, it was held, that "where one party to an agreement trifles or shows a backwardness in performing his part of it, equity will not decree a specific performance in his favor."

But King insists that he again made a tender of the $19,900 to Ruckman personally on the 4th of June, 1868. And what does this tender consist of? Why, a statement by King to Ruckman that if he would go with him to New York, he could have the money. But Ruckman swears there was no conversation between them that day, in reference to this contract.

III. Does the tender of the $99,900, in the cars, on the first day of July, entitle King to a specific performance, even if he had done all he was required to do in regard to the payment of the $19,900?

I submit it was not such a tender as would sustain his bill.

First. Because the bill was filed on the same day the tender was made, within an hour or two after it was made, and Ruckman had no time given him to prepare his deed.

King, when he offered his money and demanded his deed, was bound to wait a reasonable time for the deed to be prepared, and demand it a second time before he was entitled to bring his suit for specific performance.

In *Fuller* v. *Hubbard*, 6 *Cow. R.* 13, it was held that, "where an agreement is to convey land in fee simple on the payment of money, the vendee must not only tender or pay the money, but he must demand a conveyance; and after waiting a reasonable time for it to be made out, must present himself to receive it." *S. C.*, 7 *Cow.* 53.

In *Wells* v. *Smith*, 2 *Edw. C. R.* 78, it was held that, "the party who is to give the deed has the same drawn at his own expense; but under the covenant to convey, he is not bound to prepare the conveyance till the party who is to receive it is in a situation rightfully to demand it. And after such demand, the party is allowed a reasonable time for drawing and executing the deeds, and he is then to hold it in readiness for delivery when called for, and is in no default until a second demand is made." See also *Conolly* v *Pierce*, 7 *Wend.* 129.

Therefore, they ought not have filed their bill until they had given Ruckman time to have the deed prepared, and get it executed by himself and his wife.

Secondly. Because by the contract the sum of $19,900 was to be paid a month in advance of the delivery of the deed; and even though it should appear that Ruckman, on the first of July, had lost none of his contracts, that he could then have secured them all, yet he was entitled to the $19,900 for that purpose, and to pay off the mortgages and put himself in position to give a deed. They were, therefore, bound to tender him the $19,900, and wait a month before tendering him the $80,000, and demanding the deed.

But their demand was for a deed on the spot. They refused to give him any money without a deed.

IV. Specific performance cannot in this case be decreed, because it is not in the power of Ruckman to make the title,

to the lands mentioned in the contract, or at least to a considerable portion of them.

A specific performance will not be decreed if the vendor could not make a good title at the time when, by the terms of the agreement, he was to deliver a deed. *Richmond* v. *Gray*, 3 *Allen* (*Mass.*) 25; *Ferrier* v. *Buzick*, 2 *Clark* (*Iowa*) 136; *Nicol* v. *Carr*, 35 *Penn. St. R.* 381; *Lewis* v. *Loxham*, 3 *Mer. R.* 429; *Bayly* v. *Tyrrell*, 2 *Ball & B.* 363; *Fry on Specific Performance*, §§ 536, 538.

But they say King will take a conveyance for what Ruckman can convey, and take damages for what he cannot convey. Upon what ground can they ask for damages? Ruckman's inability to convey grows out of King's default in not making the first payment; therefore, King can have no claim for damages.

Is he then entitled to such land as Ruckman can make title to? He is not; for the contract is an entire one. The main inducement which Ruckman had in making it may have been the sale of these very lands for which he held contracts. He might not have been willing to sell the lands for which he held deeds for any such price unconnected with the other lands.

These contracts are for parcels scattered about in different places among Ruckman's other lands. He had very favorable contracts for their purchase, which he lost by reason of King's default. He could not, and cannot now, make title for these lands, until he gets money to pay for them, and gets deeds for them. One great inducement for Ruckman's making this contract with King was to get money to fulfill these contracts which he had for the purchase of these lands. If he is to lose these contracts, he loses the benefit of a large part of the contract he made with King. If he is to convey the lands he owns only, and not those for which he held contracts, he will be required to perform a very different contract from the one he made. He will lose at least $19,710 by the operation.

King, by his delay, not only subjects Ruckman to this loss, but asks that he shall pay him damages for one hundred

and twenty-four acres which he cannot convey. The demand is modest, to say the least.

To decree a conveyance of the land Ruckman can convey, under these circumstances, would inflict a gross injustice upon Ruckman.

In *Crofton* v. *Ormsby*, 2 *Sch. & Lef.* 604, it was held that where the object of one of the parties contracting would be defeated by delay in the execution of it, if the other party delay, he shall not afterward be allowed to insist on performance. *Fry on Spec. Perf.*, § 719; 1 *Story's Eq. Jur.*, § 779.

If a purchaser should insist upon a partial performance, the court will grant relief only upon his compliance with equitable terms.

From the foregoing considerations, I think it clear that there can be no specific performance of this contract decreed in favor of King. His bill, therefore, should be dismissed.

V. Ought this contract to be delivered up to be canceled?

I submit it ought; for, if an instrument ought not to be used or enforced, it is against conscience for the party holding it to retain it, since he can only hold it for some sinister purpose. If it is a deed purporting to convey lands or other hereditaments, its existence in an uncanceled state necessarily has a tendency to throw a cloud over the title. While it exists, it is always liable to be applied to improper purposes. 1 *Story's Eq. Jur.*, § 700; *Duncan* v. *Warroll*, 10 *Price* 31; *Jackman* v. *Mitchell*, 13 *Ves.* 581; *Petitt* v. *Shepherd*, 5 *Paige* 493; *Van Doren* v. *Mayor, &c., of N. Y.*, 9 *Paige* 388; *Bromley* v. *Holland*, 7 *Ves.* 20; *Kemp* v. *Pryor, Ibid.* 248; *St. John* v. *St. John*, 11 *Ves.* 535.

In 1 *Story's Eq. Jur.*, § 694, the learned author says: "It is obvious that the jurisdiction exercised in cases of this sort is founded upon the administration of a protective or preventive justice. The party is relieved upon the principle, as it is technically called, *quia timet;* that is, for fear such securities, deeds, or other instruments, may be vexatiously or injuriously used against him, when the evidence to impeach

them may be lost; or that they may throw a cloud or suspicion over his title or interest."

In this case, the contract sought to be set aside, by reason of non-performance by King, ought not to be enforced against Ruckman. That King did not perform on his part, has been abundantly shown in the preceding parts of this brief. Therefore he can have no legal remedy upon the contract, or rights under it. He ought not, therefore, to be permitted to hold it against Ruckman, for, in the language of Justice Story, (*Eq. Jur.*, § 700,) he can only retain it for some sinister purpose.

The whole conduct of King, in regard to this contract, shows that he holds on to it and retains it as a means of annoying, embarrassing, and oppressing Ruckman.

It is apparent, from the considerations already stated, as well as others, that his suit in this court for specific performance was commenced, and is prosecuted in bad faith, for the sole object of embarrassing Ruckman, and by tying up this large property, in which all he possesses is invested, forcing him to buy his peace by paying large sums of money, to free his property from the cloud fastened upon it by the record of this contract. And if he is suffered to retain this violated contract uncanceled, the same bad spirit which has prompted his suit in this court may, and doubtless will, hereafter prompt him to annoy Ruckman with a suit at law upon it, at a time, perhaps, when it may be out of his power to show the real facts of the case.

The bad faith of King, in holding on to this contract, and prosecuting his suit in this court upon it, is manifest. The evidence of it is overwhelming.

I submit the contract should be delivered up to be canceled.

THE CHANCELLOR.

The determination of both causes depends upon the same questions of law and fact. If King is not entitled to a specific performance of the contract, Ruckman is entitled to

have it rescinded and declared void. Counsel, therefore, with great propriety, agreed to have them argued and determined together, upon the same evidence, as if one suit.

By a written contract, under seal, executed by both, made on the 12th day of May, 1868, Ruckman agreed to sell to King a number of tracts of land, in the county of Bergen, and in Rockland county in the state of New York, describing them as all the lands he owned and held contracts for, in the township of Harrington, east of the old Closter road, and between the Alpine road and the north line of New Jersey; also all his land between the Huyler landing road and the old Closter dock road; also all his land in Rockland county east of the old Closter road; "and also two lots of land situate in Hackensack township, in the county of Bergen;" the whole of the premises containing about two thousand acres, portion of the above bounded by the Hudson river. The price was to be $275 per acre, which King agreed to pay as follows: $100 at the execution of the contract; $19,900 in cash on June 1st, 1868; $80,000 in cash on July 1st, 1868, on delivery of the deed; and the balance to be secured by mortgage, to be paid at times and in installments specified.

Ruckman agreed, "on receiving such payments and such mortgage at the time and in the manner above mentioned," to execute and deliver, at his own expense, to King a proper deed, with full covenants, to convey the premises in fee, free from encumbrance. The deed was to be delivered at the office of C. H. Voorhis, in Jersey City, July 1st, 1868; and the contract provided, that if either party should fail to comply, he should forfeit and pay to the other the sum of $20,000.

At the drawing of the agreement, Ruckman wanted the $20,000 to be paid, so as to enable him to perform his contracts for the purchase of lands mentioned in the agreement, and while it was being drawn they had considerable discussion about it. Ruckman wanted it fixed for May 22d. King did not want it included in the written contract, which he

wished to be for payment of $99,900, on the 1st of July, and that Ruckman should take his word for the payment of the $19,900 before that time; he said he would pay it in a few days. Ruckman refused to accede to this, but gave to the 1st of June for the payment, and insisted upon that being stipulated in the contract, as it was afterwards written.

On the 28th of May, King applied to Ruckman for an extension of the time of payment of the $19,900 to June 15th, and presented to him for signature a written agreement to that effect, endorsed on the duplicate of the contract taken by King. This, Ruckman, decidedly and with violent language, refused to do, and told King that he would hold him to strict payment on that day. Ruckman states that he also told King that he would stay at his own house all day to receive it. King states that Ruckman told him to be at the office of Voorhis to pay it, and that he would be there to receive it. King, accompanied by a man whose name he does not disclose, and which he says he does not recollect, but whom he describes as an old patient, came to the office of Voorhis on the 1st day of June, and produced $19,900, which he counted out before Voorhis. He inquired for Ruckman, and said that he came there with the money for the purpose of making the payment to Ruckman. Voorhis had no authority to receive it, and he did not offer it to Voorhis. King asked Voorhis if Ruckman would be there. Voorhis told him that he would not be there; that he had seen Ruckman a day or two before, and told him, in answer to an inquiry, that as the contract was silent as to the place of payment, it was payable at Ruckman's house, and that Ruckman said he would remain home all day to receive it. King contended that the money was payable at the office of Voorhis, because the deed was to be delivered there. Voorhis told him that it was not, and advised him if he wanted to make a valid tender to go to Ruckman's house, which could be easily reached by a train which would leave at twenty minutes past one, and from which he could return that afternoon. King declined to do this. It was then half past

twelve o'clock. King did not say to Voorhis that Ruckman had promised to meet him there. No further tender of the $19,900 was made. Ruckman testifies that on the morning of the 2d of June, about seven or eight o'clock, he left at King's house, No. 2 Grove street, New York, with a servant girl, a note, stating that as King had failed in his payment, the contract was at an end. This note King says he did not receive, but does not produce the servant girl, who still lives with him, to explain the matter or deny it. King was in the house at that time. On the same morning he went to the Bergen county clerk's office, and had the contract recorded, although he had agreed that he would not have it recorded until after the second payment was made. On the 3d of June, King met and spoke to Ruckman, both in the train and at Ruckman's house. Ruckman, at both times, was in company with H. C. Adams, who, with his son, P. C. Adams, are now concerned with King to the extent of one fifth each in the contract in controversy. P. C. Adams was then concerned and furnished the money with which the second and third payments are claimed to have been tendered. H. C. Adams and Ruckman were then, as Ruckman testifies, bargaining about this property, Ruckman considering that this contract was at an end, and not knowing that Adams or his son had an interest in it. He testifies that he told H. C. Adams so in the car in presence of King, who said he did not consider it was at an end, and that nothing else was said between them on that day about this contract. King on that day called at Ruckman's house, while he and his family and Adams were at dinner. King was asked to dinner, but declined, as he had already dined; Ruckman says that he asked him; King says Ruckman's wife asked him. King says that he asked Ruckman on that day, in the railroad car, why he did not come to the office of Voorhis according to agreement, to receive the money; that Ruckman replied he (King) was a swindler and had no money, and used profane language and opprobrious epithets; that he then offered Ruckman that if he would go back to New York with him

he would pay him the money. King says he did not see Ruckman between June 4th and July 1st. Ruckman says he saw King on June 16th, on the platform at the railroad depot, on his return from the county clerk's office, where he had just ascertained that King had, on June 2d, recorded the contract, and he then refused to shake hands with King, who stretched out his hand, called him a swindling blackguard, and asked him why he had put the contract on record. In their statements of what took place in the car on June 4th, Ruckman and King essentially differ. H. C. Adams, a friend of King, and jointly interested with him in this transaction, was present, seated directly in front of Ruckman and conversing with him. Language of the kind which King states Ruckman used, is not generally said in a mild, low tone, and Adams must have heard, and could not have forgotten it. King could have produced Adams to corroborate his statement, if he relies on it to support his case. And it is very strange that after such language from Ruckman, King should have gone to his house uninvited on the same day, when he had no business to call him there, and enter the room where Ruckman was at dinner with his family and with Adams. I think King, as to this, must be mistaken, and has transferred the language of the interview on June 16th, which he seems to have forgotten, to that of June 4th.

On the 1st of July, King went to the office of Mr. Voorhis, accompanied by P. C. Adams and Mr. Bergholz, two persons interested with him in this contract, and by two counselors-at-law, and with $99,900, to make the tender and demand the deed. Ruckman was not there, nor did he go to that office on that day. But at four o'clock all five went to the depot of the Northern railroad, where they found Ruckman seated in a car, on his way home, and tendered him the money, which he refused to receive, accompanying the refusal with profane and opprobrious language. Ruckman considered the contract void, on account of the failure of King to comply with its terms in making the second pay-

ment. King contends that he made the tender of the second payment in compliance with the terms of the contract, and the arrangement made between him and Ruckman; and that even if he did not, in this case time is not of the essence of the contract, and that the court will enforce it, upon his complying with the substantial terms required by it.

There are two questions on the performance: one a question of law, whether, in this case, time was of the essence of the contract; the other a question of fact, whether the office of Voorhis was agreed upon as the place for the second payment. There is also a question of law upon the contract, whether it is sufficiently certain and definite for a court of equity to enforce.

The established doctrine of equity is, that in general time is not of the essence of a contract for the sale of lands. But it is now also settled that in such contracts time may become of the essence of the contract, either by being made so by the contract itself, or from the nature and situation of the subject matter of the contract, or by express notice given, requiring the contract to be closed or rescinded at a stated time, which must be a reasonable time, according to the circumstances of the case.

It was at first held by the English courts of equity that in such contracts time could not be made of the essence of the contract, and that such agreement would not be enforced, any more than an agreement to limit the right of redemption by a mortgagor.

Lord Thurlow, in *Williams* v. *Bonham*, 1 *Sug. on Ven.* 303, where the contract was that if the title should not be made out in three years the agreement should be void, held that the time fixed was only formal, and not of the essence of the agreement.

In *Gregson* v. *Riddle*, (stated in 7 *Ves.* 268, in Sir S. Romilly's argument,) Lord Loughborough, as commissioner of the great seal, and afterwards Lord Thurlow, as Chancellor, held that a stipulation that the agreement should be void if the title was not completed at a given day, was of no validity. And,

in answer to a proposition of Mr. Mansfield, that it would be necessary to insert a provision that it should be void, notwithstanding the decision of the Court of Chancery, Lord Thurlow replied, "that the parties would be just as forward as they were then." Lord Thurlow, without doubt, entertained the idea that equity would not allow the parties to make time the essence of such contract. But he was the only English Chancellor who adhered to that doctrine. Lord Loughborough, who had countenanced it, afterwards, in his decisions, held the contrary. In *Lloyd* v. *Collett*, 4 *Bro. C. C.* 469, he says: "There is nothing of more importance than that the ordinary contracts between man and man should be certain and fixed, and that it should be certainly known when a man is bound, and when he is not. It is one thing to say the time is not so essential that in no case in which the day has, by any means, been suffered to elapse, the court would relieve against it and decree performance. The conduct of the parties, inevitable accident, &c., might induce the court to relieve. But it is a different thing to say that the appointment of a day is to have no effect at all, and *that it is not in the power of the parties to contract that if the agreement is not executed at a particular time, the parties shall be at liberty to rescind it.*"

Lord Eldon, in 1802, in *Seton* v. *Slade*, 7 *Ves.* 270, said: "I am inclined much to think, notwithstanding what was said in *Gregson* v. *Riddle*, that time may be made the essence of a contract." This continued to be his settled opinion, as is shown in *Levy* v. *Lindo*, 3 *Mer.* 81; *Boehm* v. *Wood*, 1 *J. & W.* 419, and *Withy* v. *Cottle*, *Turn. & Russ.* 78.

In *Eaton* v. *Lyon*, 3 *Ves.* 692, in 1798, the master of the rolls said: "The doctrine has been formerly carried to a length that became, in some degree, alarming, but undoubtedly in modern times that has been much restrained. If in the purchase of an estate, money has been covenanted to be paid at a given day, if it is not paid at that day, at law no action will lie, but if the party can show that he took the means of paying it, and has been prevented by accidents not

in his power, the court will dispense with the strict performance of it; because, as it was formerly said, time is not of the essence of the contract; *but it may be* of the essence of the contract."

In *Hudson* v. *Bartram*, 3 *Madd.* 447, Sir John Leach says: "Although it was for a long time doubted whether time could be made of the essence of a contract, yet that point has been settled by Lord Eldon. Here, as at law, it may be of the essence of the contract."

In *Hipwell* v. *Knight*, 1 *Y. & Coll. Ex.* 401, Baron Alderson, in delivering the opinion of the court, holds that time may be made the essence of a contract to convey, and that in the case before the court it was made so; and he relies upon the fact that the agreement in that case was changed from three to four months as originally drawn, to show that time was intended to be of the essence of the contract. The Vice Chancellor of England, in the case of *Lloyd* v. *Rippingale*, referred to in the argument of *Hipwell* v. *Knight*, 1 *Y. & C., Ex.* 410, held that express words would make it so. Sir J. Romilly, M. R., in *Honeyman* v. *Marryat*, 21 *Beav.* 14, held that time might be made the essence of a contract. And again, in *Parkin* v. *Thorold*, 16 *Beav.* 65, he says: "Although the dictum of Lord Thurlow, that time could not be made of the essence of the contract in equity, has long been exploded, yet time is held to be of the essence of the contract in equity, only in cases of direct stipulation, or of necessary implication. The cases of direct stipulation are when the parties introduce a clause expressly stating that time is to be of the essence of the contract. The implication is derived from the circumstances of the case, such as where the property is required for some immediate purpose, such as trade or manufacture." Lord Cranworth, when Vice Chancellor, in *Parkin* v. *Thorold*, 2 *Sim. N. S.* 1, held, that when a purchaser has agreed that he will take a title if made at a given day, but otherwise that he will not, a court of equity cannot, any more than a court of law, give relief to a vendor who has failed to make a title at the day

specified, and says: "Lord Thurlow's dictum, that a purchaser could not so stipulate, manifestly rests on no principle, and has often been repudiated as not truly expressing the doctrine of this court."

The same doctrine has been adopted and repeatedly applied in the courts of this country. *Benedict* v. *Lynch*, 1 *Johns. C. R.* 370; *Wells* v. *Smith*, 7 *Paige* 22; *Mitchell* v. *Wilson*, 4 *Edw. C. R.* 697; *Longworth* v. *Taylor*, 1 *McLean* 399; *S. C.*, 14 *Pet.* 173.

In the last case, Justice Story, in delivering the opinion of the court, says: "In the first place, there is no doubt that time may be of the essence of a contract for the sale of property. It may be so by the express stipulation of the parties, or it may arise by implication from the very nature of the property, or the avowed objects of the seller or the purchaser."

I concur in the conclusion arrived at by Sir Edward Sugden, in his valuable treatise, *p.* 305, as the result of the decisions: "If it clearly appear to be the intention of the parties to an agreement that time shall be deemed of the essence of the contract, it must be so considered in equity." Mr. Fry, in his treatise on Specific Performance, has arrived at the same conclusion, §§ 711, 712, and 713.

A time stipulated in an agreement for performance will be held of the essence, when from the nature of the subject matter or the object of the parties, the time of performance was intended to be such. *Hipwell* v. *Knight*, 1 *Y. & Coll. Ex.* 416; *Levy* v. *Lindo*, 3 *Mer.* 81; *Coslake* v. *Till*, 1 *Russ.* 376; *Withy* v. *Cottle*, *Turn. & Russ.* 78; *Walker* v. *Jeffreys*, 1 *Hare* 341; *Wright* v. *Howard*, 1 *Sim. & Stu.* 190; *McKay* v. *Carrington*, 1 *McLean* 50; *Holt* v. *Rogers*, 8 *Pet.* 420; *Young's Adm'r* v. *Rathbone*, 1 *C. E. Green* 224; *Fry on Spec. Perf.*, §§ 713 to 717.

A party will be allowed to show, by parol, that at making of the contract time was considered as of the essence. *Nokes* v. *Ld. Kilmorny*, 1 *De Gex & Sm.* 440. And a new agree-

ment extending the time is evidence that they consider the time material. *Wiswall* v. *McGowan*, 2 *Barb. S. C.* 270.

I do not think that the provision contained in the stipulation in the contract on the part of Ruckman, which is, that upon receiving such payments and such mortgage, *at the time* and in the manner above mentioned, he will convey, is sufficient of itself to make the time of the essence of the contract; the words, to have that effect, must be clearly indicative of the intention of the parties. But these words, connected with the negotiation and statements at the time of the contract, are sufficient, in my opinion, to make the time of the essence of this contract, and do make it so. Ruckman at the drawing of the contract, expressly told King that he wanted the $19,900 to enable him to fulfill his contracts for purchase, which were part of the subject matter of the agreement. The time of the payment was changed from May 22d to June 1st, at King's solicitation, and Ruckman resisted all entreaties to put it off, or to accept King's verbal promise instead of the written stipulation. The words of the contract, with these facts, create, in my view, an express stipulation that time is of the essence of the contract. The application for the written extension on the 25th of May, and the tender, or coming ready to tender, the payment at Voorhis' office on the very day, is evidence that King so understood the contract. Again: the subject matter of the contract and the situation of it, make time the essence of this contract. The subject matter was not a dwelling-house, or a manufactory, or a place for trade, or a reversion, which, among others, are held to make time essential, but it was a large number of tracts, held and bought for sale at a period when the prices of lands were high and their stability could not be relied on; this, of itself, is sufficient to make the stipulation as to time material, and therefore essential. Part of these lands depended on contracts for purchase made by Ruckman. A rise in price might induce those who had sold to him to evade their contracts, if not legally binding, or litigate and delay the fulfillment of such as were legal.

And, more than all, money was to be paid on these contracts, and the sum to be paid on the 1st of June was relied on for that purpose. Ruckman had a right to rely on it. And the fact that he did so, or stated that he did so, at the making of this contract, of itself would make time of the essence of the contract from the subject matter, without any agreement on the subject. And, in such case, as to the point whether time is of the essence of the contract when made, it is perfectly immaterial whether he actually needed the money, or whether he suffered any loss by the want of it. Where the subject is a dwelling-house, or manufactory, or a reversion, time is material, without regard to the question whether any loss or inconvenience is produced by delay.

In this case, nothing has been done by Ruckman to continue the contract; he has entered into no new negotiation with King. On the 28th of May, he told him he would insist upon payment at the time; on June 2d, he left a notice at King's house; on the 4th of June, he told him the contract was void, and, according to King's testimony, abused him violently, and in his presence proceeded to negotiate a sale with another purchaser.

The next question is that of fact: whether King made the tender required by the contract. The effect of the contract required King to pay the money to Ruckman, and to find him for the purpose of payment, or use reasonable diligence to find him. That is usually held to be accomplished by going to the place of business or to the residence of the payee; but if the parties have agreed upon another place, the place agreed upon would be the proper place to offer the payment. And this places the whole question upon the fact whether Ruckman agreed to meet King at Voorhis' office, and told him to be there to make the payment. Ruckman and King differ in their testimony as to this point. The burden of proof is upon King, and in this situation he would fail; but he has brought witnesses to impeach the character of Ruckman for truth and veracity, and, if successful in this, his testimony would prevail, as nothing is shown against his

own character. But the greatest portion of the testimony for King on this point is such as cannot be regarded. It is evidently founded upon the fact that Ruckman has been guilty of very improper conduct with regard to the cattle of his neighbors, is a troublesome, litigious man, and has made himself unpopular and odious in the neighborhood. Some of the fairest and most respectable witnesses are influenced by the fact that he was fined and judged in contempt by the Circuit Court for offering to treat the jury, in a case of his own, with oysters; and most of the witnesses against his character are persons who have been engaged in litigation with him. Such witnesses are necessarily produced when they alone know or witnessed facts required to be proved; but when selected to give character to a witness, are not of much value. The only testimony allowed in such case is as to the general reputation of the witness impeached, in the neighborhood, for truth and veracity, and that such reputation is generally bad; saying that the witness, from what he knew of his reputation, would not believe him under oath, is not sufficient. I do not think that the testimony on the part of King shows that Ruckman has a general reputation in his neighborhood as a man of untruth or an habitual liar. The evidence is abundant to show that he is a litigious, cross-grained, troublesome, and unjust man. The number of witnesses to sustain his character would be sufficient to neutralize the testimony against him, even if more directly on the point of his character for veracity. If they speak the truth, such character could not have been general.

But laying out of question the testimony of Ruckman, the evidence of Emma Hopping sustains the position taken by him. She swears expressly that when King and Ruckmon parted on the evening of May 28th, Ruckman told King that he would remain at home all day to receive this payment. It is true that she is a sister of Ruckman's wife, and may be biased by her connection with him, but this alone should not affect her credibility, as against King swearing directly for himself in his own case. Her testimony is in no

way contradicted by a third witness; her character is on a par with King's, for nothing has been stated against it except insinuations volunteered by counsel. No court or jury should disregard her testimony without some sufficient reason. But the statute provides that the interest of a party when sworn for himself, shall be considered as affecting his credit.

But the facts testified to by Mr. Voorhis, as to the transaction of the 1st of June, materially affect this question. He says that King contended that the money should be paid at his office, because the deed was to be delivered there, and although he told him that Ruckman's house was the proper place for the payment, and that Ruckman said he would stay there for the purpose, King did not mention that Ruckman had appointed that as the place. This silence, four days after he met Ruckman, is in my mind a strong support of the evidence of Emma Hopping. I shall place full confidence in the testimony of Voorhis on this point, and in all matters in this cause. He is, and has been for years, a counselor of this court in good standing; nothing is shown against his character, and I have a right to assume that nothing exists against it; he is contradicted by no one but King; he has no interest in or connection with the cause; there is nothing against him except the railing which counsel, in their zeal for their clients, have inserted as argument in the briefs submitted. These cannot in any way affect him before the court, and if such a witness is not entitled to credit, it is difficult to determine whom to believe.

King being positively contradicted in material parts of his testimony by both Voorhis and Emma Hopping, is himself seriously affected as to his credibility.

By the weight of evidence, I feel bound to believe that Ruckman did not make an agreement with King to meet him at the office of Voorhis, but told him that he would remain home to receive the payment. If there were no agreement, King was bound to seek Ruckman to make the

payment, and the burden is on him to show that Ruckman agreed to meet him at a certain place.

On this view there is no mistake or inevitable accident to excuse King. If he thought at first that the office of Voorhis was the legal place, or that Ruckman meant to meet him there, that mistake was corrected by Voorhis in time for him to go to Ruckman's house and make the payment. From his conduct on that day and afterwards, in not making any tender or proffering himself ready to perform the contract, or giving notice that he would insist upon it, Ruckman had a right to infer that he intended to abandon it, and not exert himself to be ready with the title and conveyance on July 1st. And I think such inference is fairly to be drawn by this court in disposing of the cause. These reasons are, in my opinion, sufficient to defeat King's right to a specific performance.

There is another ground taken, that the land to be conveyed is not designated in the contract with sufficient certainty. As to the parts in Harrington township and the county of Rockland, the description is sufficiently certain. It is all the lands owned by Ruckman, or for which he held contracts, within certain boundaries. The maxim is *id certum est quod certum reddi potest.* It can be shown with certainty what lands he owned or held contracts for in those boundaries.

But the last clause seems uncertain. It is simply, "also two lots of land in Hackensack township, county of Bergen." It does not describe them as two lots owned by him, for then if he owned only two lots there it might be rendered certain. This contract would be complied with by his conveying two lots of ten feet square, or two lots containing one thousand acres. Nor can this part be rejected as immaterial, and performance be ordered of the residue, upon compensation. What the lots were, and what the compensation would be, must in that case be ascertained by parol, in face of the statute of frauds. If the two lots were one thousand acres of salt meadow, worth $25 an acre, the compensation to

Ruckman would be large—$250,000. If they were each fifty acres, fronting on the Hudson, worth $2275 per acre, the compensation to King would be $200,000. Either of these suppositions is possible, and it seems to me that this is an uncertainty which must prevent a court of equity from granting relief to King.

I am of opinion that the bill of King must be dismissed with costs, and that Ruckman is entitled to have the contract declared void and given up to be canceled.*

The Mayor, &c., of Jersey City *vs.* The Jersey City and Bergen Railroad Company.†

1. The charter of a street railroad company authorized it to lay rails in the streets of a city, upon first obtaining the consent of the common council. By a supplement, it was positively authorized to construct several tracks specified in the supplement, without any condition or reference to the consent of the common council. *Held*, that as to such tracks, the consent of council was not necessary.

2. The grant of powers of local government to a municipal corporation is not a contract, but an exercise of legislative power: and the legislature may, at any time, take away, resume, or limit such power.

3. The rule of construction of statutes is, that a provision in a statute inconsistent with a provision in a former statute, repeals the first statute *pro tanto*.

This was an application for an injunction to restrain the defendant from laying an additional track of its horse railroad in Pavonia avenue, in Jersey City. It was applied for on two grounds. The first was, that the defendant was not laying the track so that the two tracks, when laid, should be *equi-distant* from the centre of the street as required by the act authorizing it. The second was, that the defendant was laying the track without first obtaining permission of the complainant.

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*Decree in both cases reversed, 6 *C. E. Gr.* 599.

†Cited *in Pat. Horse R. Co.* v. *Paterson*, 9 *C. E. Gr.* 164.

Mr. A. K. Brown, for complainants.

The question presented by this case is, does the act of 1867, authorizing the defendant to lay a second track in Pavonia avenue and other streets, repeal the section of its original charter, requiring the company to obtain the consent of the common council to lay rails in the streets of Jersey City?

1. We insist that the said section of the original act is not repealed by the supplement of 1867. See original act, *Session Laws of* 1859, *p.* 414, § 6, next to last proviso. See supplement, *Session Laws of* 1867, *p.* 53, §§ 1 and 4.

The act of 1867 is a supplement of the act of 1859, and consequently the two acts are to be read together as one act, and are to have the same construction as if they were one act, passed at the same time.

It may be said that the first section of the supplement gives the defendant full power to lay the additional track, without consent of the common council. So does the sixth section of the original charter, uncontrolled by the proviso. This proviso of the original charter is no more inconsistent with the first section of the supplement than it is with the sixth section of the original charter. In fact they are perfectly consistent with each other, and both can operate together.

2. Does the fourth section of the supplement repeal the proviso of the original act, or in other words, are they in any sense inconsistent with each other?

The proviso in the sixth section of the charter simply provides, that in constructing said railroad or branches through any of the streets or avenues of Jersey City, the consent of the common council of said city shall be first obtained; the work shall be done under the inspection of the commissioners of streets or other proper officers of said city, &c.

The provision in the fourth section of supplement is in no way inconsistent with the other. It must be understood

as to apply after the consent had been obtained from the common council to lay the track. That this was the intention of the legislature, is manifest from the language used, *viz.* "that it shall not be lawful for the municipal authorities or any of them, of any city or town through which the railroads of said company are, or shall be laid, to interfere with, hinder, or obstruct said company in constructing or running their railroads." Had the legislature intended to take from the common council the power over the streets vested in them by the city charter, and repeal the proviso of the sixth section of the original charter of the defendant, they would have used very different language from this. They would, in so many words, have repealed the proviso of section sixth of the original charter of the company. As they did not do this; and as allowing both the proviso of section sixth of the original charter, and the fourth section of the supplement of 1867 to stand, involves no inconsistency; both must be allowed to stand. Section fourth of supplement applies to the tracks, which, at time of its passage, had been laid, under the consent of common council, as well as to those to be built.

3. There is another consideration which strongly enforces this construction of these acts, *viz.*

The streets through which these tracks are authorized by these acts to be laid are dedicated streets, and have been graded and improved at the expense of the adjoining landowners to whom the fee belongs. The right of the public, or of individuals, in the streets is simply the right of travel; a mere easement. The purposes to which they have been dedicated, are those of travel solely. Any permanent occupation or use of these streets for any other purpose than that of travel, is inconsistent with the purposes of their dedication.

The charter of the city, section forty-two, sub-division sixth, gives to the common council the entire control of the streets, and requires them to keep them at all times in such

condition as to secure to the public and the *adjoining owners*, the safe and convenient use of the streets and sidewalks.

This provision of the city charter gives the common council the entire control over the streets. They alone have power to regulate travel upon them, and keep them in a safe condition. They alone can remove encroachments upon them, and protect the public in their use.

To hold, then, that the supplement to the defendant's charter of 1867, allows them to dig up the streets at their will and pleasure, and lay down tracks and operate their roads through the streets of the city without the consent of the common council, is to hold that the said supplement of 1867 repeals the forty-second section, sub-division sixth of the city charter, and either takes from the common council the entire control of such streets, and places it in the hands of the defendant, or gives to the defendant and the common council a divided control over such streets.

I am sure this court will not hold that such was the intention of the legislature in passing the supplement to the defendant's charter of 1867, unless the language of that act is such as to admit of no other construction.

Mr. L. Zabriskie, for defendant.

The application for the injunction in this case is upon two grounds:

First. That defendant, by a supplement to its charter, approved February 13th, 1867, where it should lay or have a double track, should lay the same equi-distant from the centre of the street, or as near to the centre as practicable, and that where it laid a single track, it should be in the centre of the street. That the defendant, contrary to the requirements of said act, is laying a track on Pavonia avenue at a distance of three feet two inches from the southerly curb of said avenue.

The answer of the defendant admits the act aforesaid and the requirements named in regard to laying its tracks in the

streets, but denies that it is laying its rails in Pavonia avenue in the manner alleged in complainants' bill; and states positively that it is laying its rails in said avenue in accordance with the provisions and requirements of said act; that it is laying, under the provisions of said act, an additional railroad track in Pavonia avenue, from Grove street to Provost street, and that it is removing its present track laid there in the centre of the street to one side, so that the new track and the old track, when removed, will be equi-distant from the centre of the street as near thereto as practicable.

Second. That the said track is being laid in Pavonia avenue without the consent of the complainants, who have full power and control over the streets of the city, and that the legislature cannot give to the defendant the right to lay rails in those streets without the complainants' consent; that the original charter of the defendant, approved March 15th, 1859, provided that the defendant in constructing its railroad through the streets of Jersey City, should first obtain the consent of the complainants; and as the said supplement of February 13th, 1867, did not in express terms give defendant the right to construct the tracks therein named without the complainants' consent, the said provision of the charter is operative, and such track cannot be constructed without complainants' consent.

The defendant admits that it is laying such track without having obtained complainants' consent, and insists that it is not bound to do so.

The act of February 13th, 1867, section 1, gave it full power, and enacted, that it should be "lawful" for defendant to construct the railroad in question without imposing any obligation to get the consent of complainants, and enacted, on the contrary, section 4, that it should *not be lawful* for any municipal authority "to interfere with, hinder, or obstruct" defendant in constructing or running its railroads, and that such municipal authorities should "afford all

necessary and proper facilities" to defendant in constructing and operating its railroads.

The legislature, as the sovereign power of the state, to which the complainants are subordinate, had the right to give this unconditional authority to the defendant to lay its rails in the streets of Jersey City. 2 *Kent's Com.* 275; *Grant on Corp.* 47; *Morris and Essex R. Co.* v. *City of Newark*, 2 *Stockt.* 352; *Inhabitants of Springfield* v. *Connecticut River R. Co.*, 4 *Cush.* 63; *Wellington, petitioner, &c.*, 16 *Pick.*, SHAW, J., 102, 103; *Brooklyn City R. Co.* v. *Coney Island R. Co.*, 35 *Barb.* 364; *Wager* v. *Troy Union R. Co.*, 25 *N. Y. R.*, SMITH, J., 531; *People* v. *New York and Harlem R. Co.*, 45 *Barb*, HOGEBOOM, J., 83.

Next. The legislature did, in fact, give to the defendant the right to lay its track in Pavonia avenue without complainants' consent. See *Pamph. Laws* 1867, *p.* 53. Section 1 grants defendant the right to lay an additional track in Pavonia avenue, so it can have and use a double track railroad there. Section 4 makes it unlawful for any municipal authority to interfere with defendant in laying or operating said railroad. Section 7 repeals all acts and parts of acts inconsistent with that act or any of its provisions. There is no doubt but that this act, both by its effect and by its terms, repeals the provisions of the act of 1859, which requires the consent of the complainants to the laying of this railroad. *Dwar. on Stat.* 673; *Smith's Com.*, § 778.

THE CHANCELLOR.

The allegation in the bill that the defendant was so laying the additional track in Pavonia avenue, that the two tracks would not be *equi-distant* from the centre of the street, was made by misapprehension, and is disposed of by the answer. The only question which remains is, whether the defendant has a right to lay this track without the consent of the complainant. The complainant, so far as its right to regulate the streets is concerned, is merely a municipal corporation, exer-

cising such powers as the legislature have delegated to it. It is well settled, that the grant of such powers is not a contract, but an exercise of legislative power, and that the legislature may at any time take away, resume, or limit such powers, in the same manner as those conferred upon courts, magistrates, sheriffs, and other officers, the machinery by which government is carried on. The only question then is, whether, in this case, the legislature have taken away or limited the powers granted to the complainant. By the charter of Jersey City, the complainant has the supervision of all public streets in the city, and the right to regulate the grading and paving of the same. And by the original charter of the defendant, the right granted to construct a railroad from Bergen Point to the Newark turnpike, with branches to the ferries in Hudson county, was subject to the provision, that in constructing these in Jersey City, the consent of the common council of Jersey City should first be obtained. If this track was being laid under that charter, the complainant is right in the position that the consent of the common council must first be had.

But the act of February 13th, 1867, gave the defendant express power to construct several tracks specified in it, without any reference to the consent of the complainant. No such reference can be implied, because it was required in a former grant, by a condition expressly annexed, and omitted in this. The defendant had, before this act, the power to lay a second track in Pavonia avenue, upon obtaining the consent of the complainant. This act gave it the unconditional power of laying it, and if it was still subject to such consent, it would amount to nothing; it would grant no power not had before. But the fourth section of this act expressly provides that it shall not be lawful for the municipal authorities to interfere with, hinder, or obstruct the defendant in constructing its roads. This, if it was allowed, expressly takes away the right of the complainant to withhold its consent, and is therefore a repeal of so much of the original charter as requires it. The rule of construction is,

that a provision in a statute inconsistent with any provision in a former statute, repeals the first statute *pro tanto*. And if such were not the rule, this statute, in its last section, repeals all acts and parts of acts inconsistent with any of its provisions. The absolute grant of the right to lay a new track is inconsistent with the right of the complainant by its charter to prevent it, and inconsistent with the provision in the original charter of the defendant, that the consent of the complainant must be obtained; and therefore these provisions are expressly repealed.

The injunction must be denied.

Bullock *vs.* Adams' Executors and others.

1. Courts of equity do not, in general, consider the time of performance as of the essence of a contract for the sale of lands; but hold, that it may become of the essence by being expressly made so by the contract itself, or by notice from the other party insisting upon performance at a time fixed, or by the subject matter of the contract and its surrounding circumstances.

2. The rule that allows time to be disregarded often causes injustice, and ought not to be extended further than now established.

3. Under the prayer for general relief in a bill, by a purchaser of land, for specific performance, a court of equity might have power to direct the money paid to be refunded to the complainant, if he had any legal right to have it refunded, upon the principle that when a matter is before the court properly for relief which can only be had in equity, it will grant such other relief arising out of the facts of the case as the party is entitled to, although the relief could be had at law; but it can grant only the relief which the complainant is entitled to at law.

4. In sales by auction and other sales, where it is stipulated that the per centage, or part paid at the contract, shall be forfeited if the purchaser does not comply with his contract, such payment cannot be recovered at law or in equity.

This suit was brought by Maria Bullock, wife of Smith W. Bullock, through her next friend, to compel the specific performance of a contract for the conveyance of land. The

contract was made by Mary Livingston Adams, wife of the defendant, George A. Adams, September 27th, 1864. In November, 1864, Mrs. Adams died, having made and duly executed a will, authorizing her executors to convey her real estate, and appointing the defendants, William F. Day and George A. Adams, the executors. They made a new contract with Mrs. Bullock, extending the time for performance of her part of the contract of sale from May 1st to August 1st, 1865. The contract was not performed by her within the time so extended, or within the fifteen days after, for which it was further extended by Adams. And on the 17th of October, 1866, the executors entered into a written contract with Lucia E. Lee, wife of Uriah M. Lee, to convey the lands to her. They put her in possession on the 20th of February, 1867, and delivered to her a deed for the land on the 27th of March, 1867. The bill in this case was filed on the 25th of March, 1867, praying for specific performance of the contract by a conveyance of the lands. Adams and Day are made defendants, both individually and as executors of Mary L. Adams; and Lucia E. Lee and her husband are made defendants on account of the agreement to sell to them.

The hearing of the cause was had upon bill, answers, and proofs.

Mr. B. Williamson, for complainant.

Mr. A. V. Schenck, for defendants.

The complainant is not entitled to the relief prayed for in her bill, because—

1. She is in default, and has not performed the agreement on her part. 1 *Story's Eq. Jur.*, § 771. This fact is shown by the weight of evidence in the case; and the *fact* being established, the *law* is too well settled to admit of dispute.

2. The terms for the performance and completion of the contract have not, in point of *time*, been complied with by the complainant. *Time* here is of the *essence* of the *contract.* 1 *Story's Eq. Jur.*, § 776; *Merritt* v. *Brown*, 4 *C. E. Green* 286.

Again: 1. There has been a change of circumstances since the contract in question was made: 1. By sale thereof to the defendant Lee. 2. By increase of the value thereof.

2. Compensation for delay cannot be given. The evidence shows that Adams suffered not only great loss of time in his business, but spent the money paid on the contract during the delay, in the vain expectation and hope of its being eventually performed by the complainant.

3. The complainant has not shown herself *ready, desirous, prompt,* and *eager* to perform the contract, but, on the contrary, has manifested nothing but procrastination and unwillingness.

But the complainant asks that Adams be decreed a trustee for the complainant for so much of the purchase money as has been paid by the complainant to Adams under the contract; or that the Chancellor do award compensation in damages to the complainant, by reason of Adams not being in position to convey the property to complainant, having conveyed the same to the defendant Lee.

We answer: 1. If the complainant is not entitled to *specific performance,* she is not entitled to *any relief.*

2. The complainant is bound by the terms of her own contract; and, having failed to perform this, she is not entitled to receive back the moneys which she has paid thereon.

3. A court of equity will not sustain a bill merely for the purpose of assessing damages. 5 *Johns. C. R.* 193.

Again: the cases cited by the complainant's counsel are all based and settled on the principle that the complainant *is entitled to relief:* to a *specific performance;* but that the defendant having put it out of his power to perform by having conveyed the premises, the court, having jurisdiction of the case, will award damages for non-performance. The case now before the court is entirely different in fact and principle.

The Chancellor.

The facts of the case, as to which there is little or no dispute, are these: Mary Livingston Adams, through the

agency of her husband, on the 27th of September, 1864, agreed to convey and sell to the complainant a farm, situate in Union county, known as the Crane farm, for $30,000; of which $500 was to be paid at the time of the contract, $4500 on or before the 1st day of January, 1865, $10,000 on or before the 1st of April, 1865, when a deed was to be given to the complainant, and she was to give a mortgage for $5000, and assume a mortgage for $10,000 then upon the farm. It is disputed whether this contract was in writing; but as it is admitted in the answer, and was in part performed, and its existence recognized in a subsequent written contract relating to it, that question is of no importance. The complainant paid on the contract at the making $100, September 27th, 1864; $500, October 8th, 1864; $300, October 16th, 1864; $600, February 20th, 1865; $3000, March 11th, 1865; and $2000, May 11th, 1865, amounting in all to $6500.

The complainant, not being able to make the payments as stipulated, on the 13th of May, 1865, a new agreement in writing was entered into between her and the executors of Mrs. Adams, by which they agreed that the complainant might take possession of and cultivate the farm, except the house, out-buildings, and pasture; and the complainant agreed, on or before August 1st, 1865, to pay the balance then due upon the purchase, with interest from October 1st, 1864, on all balances due, and also, to pay Adams a fair and reasonable sum for all expenses incurred by reason of her failure to make payments as stipulated; and she further agreed that if she should fail to make the payments as aforesaid by the 1st day of August, 1865, she would quit and surrender all claims of every name and nature to the farm, and everything upon it, and forfeit all payments made prior thereto.

On the 1st of August, 1865, the complainant was not prepared to make the payment, and then agreed with the defendant Adams, by a writing endorsed on this extension agreement, and signed by both, that the time should be fur-

ther extended to the 15th of that month. This agreement was made upon an arrangement that she should first pay the expenses provided for by the agreement, the amount of which was by them adjusted at $2000, and was paid. The complainant failed to pay on the 15th of August, and on the 16th, by the orders of Adams, and of a policeman placed there by him for the purpose of enforcing them, the complainant quit the possession of the property, and took away the horses and implements of husbandry used there, except one horse which her husband permitted to remain there for some days, so as to avoid the appearance of abandoning the property, and which afterwards was sent home by Adams. Adams took and kept the hay gathered and crops planted by the complainant. In some conversations after this with the complainant's husband, Smith W. Bullock, Adams told him that he considered the contract at an end, but that he would rather the complainant should have the farm than any other person; and on one occasion, in the autumn of 1865, promised S. W. Bullock to call at his office in New York to make some arrangement. But he did not go, because, as he alleges, he had made some bargain with another person about the sale of the farm, which was not reduced to writing, but which his co-executor, Mr. Day, thought had progressed too far to be abandoned with propriety. The complainant never tendered the money, or offered or tendered herself ready to perform the contract on her part, and never demanded a deed at any time before the bill was filed, or gave any notice to the defendants that she intended to insist on the performance of the contract. Mrs. Lee or her husband had no notice of any kind, of the contract, or of any claim of the complainant, until after the contract to sell to her, or until after she had paid a large part of the purchase money.

Courts of equity do not, in general, consider the time of performance as of the essence of a contract for the sale of lands; but hold that it may become of the essence, by being expressly made so by the contract itself. *Fry on Spec. Perf*, §§ 710 and 712; 1 *Story's Eq. Jur.*, § 776; *Sugd. on Vendors*,

ch. VIII., § 1, *p.* 305; *Mackreth* v. *Marlar*, 1 *Cox* 259; *Hudson* v. *Bartram*, 3 *Madd.* 440; *Baynham* v. *Guy's Hospital*, 3 *Ves., Jr.*, 295; *Seton* v. *Slade*, 7 *Ves.* 270; *Lloyd* v. *Rippingale*, 1 *Y. & Coll. Ex.* 410; *Hipwell* v. *Knight*, *Ibid.* 401; *Honeyman* v. *Marryatt*, 21 *Beav.* 14; *Benedict* v. *Lynch*, 1 *Johns. C. R.* 370; *Wells* v. *Smith*, 7 *Paige* 22; 4 *Edw. C. R.* 697. Or, by notice from the other party insisting upon performance at a time fixed. *Fry*, § 722. Or, by the subject matter of the contract and its surrounding circumstances. *Fry*, §§ 713–715; *McKay* v. *Carrington*, 1 *McLean* 50; *Holt* v. *Rogers*, 8 *Pet.* 420; *Levy* v. *Lindo*, 3 *Mer.* 81; *Coslake* v. *Till*, 1 *Russ.* 376; *Wright* v. *Howard*, 1 *Sim. & Stu.* 190; *Young's Adm'r* v. *Rathbone*, 1 *C. E. Green* 224.

This equitable doctrine often causes great injustice and positive wrong, and ought not to be extended further than established. But parties aware of this doctrine can always provide that time shall be of the essence of the contract, by stipulating that if not performed within the time it shall not bind the party.

In this case, by the express terms of the contract of May 13th, 1865, in the strongest language that can be used for the purpose, time is made of the essence of this contract. It is wise and just that parties to contracts should have the power to make time of the essence. The effect of the doctrine of equity often has been to keep one party uncertain for months or years, whether the other will perform his contract or not; during this time he cannot go on with arrangements contemplated in the change of property, from doubt whether his former homestead or place of business will be in fact taken, even if the money is not needed for a new undertaking. Unless a party is permitted to stipulate that a contract not fulfilled at a specified time shall not bind him, and such stipulation be enforced in all courts, prudent men will cease to make any contract for the sale of lands.

The rule is founded on correct principle as well as authority, and a court of equity has no more right or power to

disregard this express stipulation, than it has to give a year or ten years, or ninety-nine years, for the payment of the whole or one half of the purchase money stipulated for in cash, if it should appear that it is difficult or impossible for the purchaser to pay at the time agreed upon.

The first contract was modified and merged in the second, made on the 13th of May, 1865, by which performance at the day was plainly made of the essence of the contract. The complainant was put out of the premises on August 16th, 1865, and told that the contract was at an end; and, although told that the defendants were willing to make a fair arrangement, the complainant has never since offered to perform the terms of the old contract, or to pay the price agreed upon by it and take the property. If time had not been made the essence of the contract, the fact that she, from August 1st, 1865, to March 27th, 1867, had remained quiescent, and had done nothing to perform her part of the contract, and had not, in fact, been ready or able to perform it, and never called upon the defendants for its performance, would have been a bar to the relief sought; for a party asking for specific performance must have been ready, willing, and anxious to perform on his part. 1 *Story's Eq. Jur.*, § 776; *Fry*, § 732.

Besides, I am not aware of any case that has decreed specific performance at the instance of a party in default, when he has not, before suit, tendered himself ready to perform, and demanded performance from the defendant. Else, a contract breaker, who never intended to perform, might lie passive, and when the party willing to perform and in no fault should contract to sell in good faith, use his broken contract as a club to break up the bargain, or to deter a timid purchaser from buying, in fear of an equity suit, which would paralyze him for years in the use of the property. There is ground to suspect that in this case the contract was kept to be used for this purpose.

Under the prayer for general relief, this court might have power to direct the money paid to be refunded to the complainant, if she had any legal right to have it refunded.

This is not, of itself, a matter of equity jurisdiction, as this money could be recovered at law, if she had the right to it. But this court might have jurisdiction, upon the principle adopted in equity courts, that when a matter is before the court properly, for relief which can only be had in equity, the court will grant such other relief, arising out of the facts of the case, to which the party is entitled, although the relief could be had at law. But, in such case, it can grant only the relief which the complainant is entitled to at law. It is common, both in sales by auction and other sales, to stipulate that the per centage or part paid at the contract shall be forfeited if the purchaser does not comply with his contract, and I am not aware of any case where the payment so made has been recovered at law, even where the vendor, upon a re sale, has received a higher price. I know of no principle upon which such payment can be recovered, either at law or in equity.

The authority referred to by the complainant's counsel, in 2 *Story's Eq. Jur.*, § 798, and the cases cited, which are there cited in the note, are cases where the court held the complainant entitled to relief by specific performance, but the defendant had put it out of his power to perform, by having conveyed to a purchaser without notice, and therefore the court directed compensation, which, no doubt, would include the refunding of the money paid on the contract.

And the English courts have recently refused relief by compensation, even in that class of cases. *Fry on Speo. Perf.*, § 938; *Guillim* v. *Stone*, 14 *Ves.* 128; *Blore* v. *Sutton*, 3 *Mer.* 237; *Todd* v. *Gee*, 17 *Ves.* 273; *Sainsbury* v. *Jones*, 2 *Beav.* 462, affirmed, 5 *Myl. & Cr.* 1.

The bill must be dismissed.

Cook's Executor *vs.* Cook's Administrator and others.*

1. If the direction of the will, as to the proceeds, require a sale, it is equivalent to a positive direction to sell, and the land is deemed personal property from the death of the testator; but if it is optional with the executor whether to sell or not, or if it is only an authority to sell without any direction, then the land retains its character as land until actually sold.

2. When land, for a certain purpose, is required to be converted into money, and in the sale more is sold than is required for that purpose, the excess of the proceeds will be considered as land.

3. Such excess constituting the residue of the estate, which, by the will, went to the nephew of testatrix, who has since deceased, his widow is entitled to dower therein, free from her husband's debts, and his heirs are liable to his debts to the amount they may receive of it. If the widow will accept it, a gross sum in lieu of dower will be ordered.

4. On a bill filed by an executor for the direction of the court as to the disposition of the balance in his hands, ascertained by a decree of the Orphans Court, consisting of the surplus proceeds of the sale of real estate over debts and legacies, which surplus was claimed by the administrator of the devisee of testator, who died before the sale, and whose personal estate was insufficient to pay his debts: *Held*—That the administrator, not having obtained an order of the Orphans Court to sell the land of his intestate to pay debts, was not entitled to receive the part of the surplus, the right to which was vested in the heirs of such intestate; but as the heirs, if they received it, would be liable for the debts of the intestate to the amount they received, and as the administrator, representing the creditors, and all the parties in interest were before the court, it was referred to a master to ascertain and report what amount was required to pay the debts of intestate, over and above the personal estate that came to such administrator's hands, and in what amount the administrator should give security; also, if the widow of intestate was willing to take a gross sum in lieu of dower, to ascertain and report the amount thereof, the surplus to go according to the principles stated in opinion.

This cause was argued upon the pleadings and proofs.

Mr. Hutchinson, complainant, *pro se.*

Mr. A. S. Jackson, defendant, *pro se.*

Mr. F. Voorhees, for widow and infants, defendants.

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*Cited *in Romaine* v. *Hendrickson's Ex'rs,* 9 *C. E. Gr.* 237.

THE CHANCELLOR.

The bill in this case was filed by M. Hutchinson, executor of the will of Sarah Cook, deceased, for the direction of this court as to the estate of his testatrix in his hands. The defendants are A. S. Jackson, the administrator of Charles Cook, deceased, who was the residuary legatee and devisee in the will of Sarah Cook, and who survived her two days, and also the widow and infant children of Charles Cook.

Sarah Cook, by her will, after sundry pecuniary legacies, gave all the residue of her estate, both real and personal, to her nephew, Charles Cook, his heirs and assigns forever. She also directed as follows: "I do authorize and empower my executors herein after named, or the survivor of them, to sell and dispose of all my real estate." She appointed the complainant and Charles Cook executors of her will. Charles Cook having died two days after the death of testatrix, the complainant proved the will, and letters testamentary were issued to him. The personal estate not being sufficient to pay the debts and the pecuniary legacies, the complainant, under the power in the will, sold all her real estate. Upon the final adjustment of his accounts, there was a surplus of the estate of the testatrix in his hands after the payment of debts, legacies, and expenses of administration. This surplus, amounting to $2550.22, was the residue of the estate which was given to Charles Cook. Administration of the estate of Charles Cook was granted to the defendant, Jackson. The personal estate of Charles Cook was insufficient to pay his debts, and the administrator claims that he is entitled to have this money, the proceeds of the real estate, paid to him as personal estate to be administered. He denies that the widow has any claim to any part of it for her dower, which, he contends, she must have set off from the lands sold in the hands of the purchaser. The testatrix died January 15th, 1867, and the complainant sold the lands in May, 1868, more than a year after the death of Charles Cook.

The widow of Charles Cook claims the right to have one third of this residue invested for her life, that she may re-

ceive the interest as the value of her dower; and the infant children claim, that as the real estate on the death of their father descended to them as land, they are entitled to the proceeds, and that they are not personal property, and do not go to the administrator.

The claim of the administrator depends upon the position that, at the death of Charles Cook, this real estate must be considered as converted into money, in consequence of the authority to sell given in the will, and that it must, therefore, be treated and administered as money. This conclusion is correct, if, by the doctrine of equitable conversion, it must be considered as converted into money from the death of the testatrix.

When land is directed to be sold, absolutely and positively, without any time fixed for the sale, it is considered as converted into money from the death of the testator; but for this, the direction must be imperative. If it is optional with the executor whether to sell or not to sell, or if it is only an authority to sell without any direction, then the land retains its character as land until it is actually sold. If the direction of the will, as to the proceeds, require a sale, it is equivalent to a positive direction to sell, and the land is deemed personal property from the death of the testator. 1 *Jarman on Wills* 530; 1 *Lead. Cas. in Eq.* 674, notes to *Fletcher* v. *Ashburner; Polley* v. *Seymour*, 2 *Young & Coll. Ex.* 708.

When land for certain purposes is required to be converted into money, and in the sale more is sold than is required for that purpose, the excess of the proceeds will be considered as land. *Oberly* v. *Lerch*, 3 *C. E. Green* 346, 575.

In this case, the executor was not directed or required to sell, except so far as a sale was necessary for the purpose of paying debts and the legacies directed to be paid. As to the rest it was a mere power which he could exercise or not, at his discretion, and, therefore, the land must be con-

sidered to have retained its character as land until the actual sale.

At the death of Charles Cook, then, it retained its character of land, and he died seized of it in fee. His widow was, therefore, entitled to dower, and subject to that dower it descended to his children. The power of sale in the will of Sarah Cook conveyed the estate as she had it at her death, and thus divested the estates in the land which had devolved upon the widow and children of Charles; but their estate remained in and followed the proceeds of sale in the hands of the executor. The widow was entitled to her dower free from the debts of her husband; but the land in the hands of his heirs was subject to his debts. It could have been sold for the payment of them at any time by order of the Orphans Court of the county in which they were situate. It remained subject to these debts for a year, and until sold by the heirs. But the administrator neglected to take the proceedings necessary to procure the power to sell. Lands at common law are not subject to payment of debts; they are made so by statute. The debts of the living are raised out of them by judgment and execution; the debts of the dead by proceedings in the Orphans Court. For these objects, in both cases, the directions of the statute must be followed. Had the interest of the intestate in these lands been sold, the purchaser would have stood in his place, and would have been entitled to this surplus, subject to the widow's dower. As the matter now stands, the administrator is not entitled to receive it. But the infant heirs, if they receive it, will be liable for the debts of the intestate, to the amount which they may receive. The administrator is in court representing the creditors of the intestate, and all the parties in interest are thus before the court, and it will be for the advantage of all that their interests in this fund be ascertained and settled, and the fund be distributed under the direction of the court.

But it does not appear how much the personal estate of the intestate falls short of his debts; to that extent only can

it be directed to be paid to the administrator. The administrator, too, must be required to give bond, with sureties, for the faithful administration of this fund. It must, therefore, be referred to a master, to ascertain and report what amount is required for the payment of the debts of Charles Cook, over and above the personal estate that has come to his administrator, and in what amount the administrator should be required to give security; and if the widow is willing to accept a gross sum in lieu of her dower, what sum is a proper proportion of the surplus proceeds of the sale, according to the tables adopted by this court.

When these matters are settled and ascertained, the complainant will be directed to pay the surplus according to the principles herein declared.

The Rogers Locomotive and Machine Works *vs.* The Erie Railway Company and others.

1. Railway companies have delegated to them, as part of their franchises, much of the sovereign power of the state, in consideration of their providing the means of commerce and intercourse by constructing the roads which are the avenues of that commerce, and performing the additional duty of common carriers when authorized; and if so authorized, they are obliged to transport all merchandise and passengers on the terms fixed in the grant through which they obtain their franchises.

2. Where the injury to the complainant is of that nature that while there may be a remedy at law, as by recovery of damages, yet it cannot be adequately relieved by suits for damages, for the reason that it is continually recurring, and will require continued and repeated suits and litigation, a preliminary injunction will be granted to restrain it.

3. An injunction will not be granted to compel a common carrier to transport goods at the rates fixed by law; but it will issue to prevent a railway company, bound by law to transport goods, from entering into an agreement not to transport them at the rates fixed by law.

4. A complainant cannot have any relief against a railway company, based on allegations of dereliction in duty to the stockholders.

5. A mandatory injunction will not be ordered on a preliminary or interlocutory motion, but only upon final hearing, and then only to execute

the decree or judgment of the court. It is only in cases of obstruction to easements or rights of like nature, that maintaining a structure erected and kept as the means of preventing their enjoyment will be restrained, and the structure ordered to be removed as part of the means of restraining the defendant from interrupting the enjoyment of the right.

This was a motion for a preliminary injunction. The argument was had upon a rule to show cause upon the bill filed and an affidavit of James Fisk, jun., in reply to the allegation of the bill as to the insolvency of the Erie Railway Company.

The bill sets forth that the Erie Railway Company, by virtue of the provisions of the charter of the Paterson and Hudson River Railroad Company, of the lease of that road, and the acts of the legislature giving validity to that lease, and authorizing it to finish and extend that road to the Hudson river, and confirming the re-organization of the Erie Railway Company under its present name, became a common carrier between the city of Paterson and the present termination of its railway near the Hudson river, at the Long Dock; that it was bound to carry freight from Paterson to Long Dock at the rates fixed in these acts, which, for a locomotive engine of the size usually made and sent away by the complainants, would amount to $31.80 for each locomotive. That the company or some of its directors have devised a scheme for the purpose of illegally increasing the rate to be charged for such transportation; that they procured the company to be chartered by the name of the "Union Locomotive Express Company," with power to forward and carry locomotives and other property, and that the Erie Railway Company or its stockholders or directors are using this express company, and combining with its directors, for the purpose of increasing the rates of transportation from Paterson to Long Dock, and that it has entered into an agreement with the express company that it should have the exclusive right of transporting locomotives over the road. That the express company have the power to charge for forwarding

without any limit as to amount, and do actually charge $250 for transporting each locomotive, and assume only the liability of forwarders, and the Erie Railway Company refuses to accept for transportation at its depot at Paterson any locomotive to be transported to Long Dock, or to transport the same, unless through the express company. That the complainant built two trucks, on which it was in the habit of placing its engines and drawing them over the street railway from the manufactory to the depot of the Erie Railway Company at Paterson, which were suitable to run upon that road, and which could be taken to Long Dock with the locomotives thus loaded upon them. That the Erie Railway Company, when these trucks so loaded were last tendered to it for transportation, caused them to be taken over its road in the opposite direction, into the state of New York, and detains and keeps them there, so that the complainant has no means to offer its locomotives to the Erie Railway Company for transportation, and that this is done intentionally to carry out the fraudulent combination with the express company, so that the latter must be employed, at their exorbitant rates, to carry all the locomotives; and that new trucks can not be constructed or provided under several months.

The bill further alleges that the manufacture of locomotives has become a large and important business in Paterson, and that the complainant and others have established their works there on faith of the means of transportation provided by law over the railway of the defendants; that being compelled to pay such sum for transportation will compel them to add the amount to the price of their locomotives, and will injure their business in competition with other establishments, and omission to deliver would make them liable to damages.

The bill alleges that this combination of the Erie Railway Company is a fraud upon the stockholders, because they receive by the agreement only $10 for each locomotive transported by the express company, when, by law, they would be entitled to receive, and would receive from the complain-

ant and others, more than three times that amount for the same service, if performed directly for them.

The bill prays for an injunction to direct and compel the Erie Railway Company to return the two trucks to Paterson into the possession of the complainant, and to transport to the wharf, at Long Dock, all locomotive engines of the complainant, that may be delivered at the depot at Paterson, at the rates prescribed by law, and to direct and compel it to perform its duty as a common carrier; also to restrain it from removing the complainant's trucks out of its possession, and from preventing it from obtaining possession thereof, and restraining the other defendants, that is Jay Gould, James Fisk, jun., the Union Locomotive Express Company, N. Marsh Kasson, James G. Dudley, Henry J. Smith, and C. Valletta Kasson, from entering into any agreement or doing anything to prevent or hinder the Erie Railway Company from transporting the locomotives of the complainant over its road.

The bill charges that the Union Express Company was got up by Jay Gould, James Fisk, jun., and Frederick A. Lane, three of the directors of the Erie Railway Company, in combination with N. Marsh Kasson, James G. Dudley, Henry J. Smith, C. Valletta Kasson, and P. K. Randall, as a contrivance to shift the duties of common carriers from the Erie Railway Company, and to enable the defendants or some of them, to make illegal and exorbitant charges for transportation.

Mr. A. B. Woodruff, in support of the motion.

Mr. L. Zabriskie, contra.

1. It is beyond the *office* of an injunction to compel the continuous performance of a duty. Injunctions are granted to restrain, but not to compel an act to be done. Mandatory injunctions are sometimes granted to carry into effect decrees for specific performance, and they have often been granted to restrain the continuance of unlawful erections.

But no case can be found where a preliminary injunction like that prayed for in complainant's bill, has ever been granted. *Hilliard on Inj.*, § 5, *p.* 3; *Waterman's Eden on Inj.*, *p.* 388; *Ryder* v. *Bentham*, 1 *Ves.* 543; *Anonymous*, 1 *Ves., jun.*, 140; *Blakemore* v. *Canal Co.*, 1 *Myl. & Keene* 154; *Milligan* v. *Mitchell*, *Ibid.* 446; *Att'y-Gen.* v. *Manchester and Leeds Co.*, 1 *Railway Cas.* 436; *Drewry on Inj.*, *p.* 260; *Hooper* v. *Brodrick*, 11 *Sim.* 47; *Akrill* v. *Selden*, 1 *Barb. S. C. R.* 217; *Deere* v. *Guest*, 1 *Myl. & Craig* 516.

It has repeatedly been decided that a court of equity will not compel an actor to act at a particular theatre, according to agreement. *Kemble* v. *Kean*, 6 *Sim.* 333; *Kimberley* v. *Jennings*, *Ibid.* 340; *De Rivafinoli* v. *Corseti*, 4 *Paige* 264; *Hamblin* v. *Dinneford*, 2 *Edw. C. R.* 529.

The cases where mandatory injunctions have been granted relate to unlawful erections of buildings, &c., and to the unlawful use or obstruction of water-courses; and here even they do not direct a thing to be done, but in effect only cause a thing to be done, by restraining the continuance of some unlawful act or obstruction. Such are the following cases: *Robinson* v. *Byron*, 1 *Bro. C. C.*, *App.* 583; *Lane* v. *Newdigate*, 10 *Ves.* 193; *Rankin* v. *Huskisson*, 4 *Sim.* 13; *Spencer* v. *London & B. R. Co.*, 8 *Sim.* 193.

The case of *Ransome* v. *Eastern Co's R. Co.*, 1 *C. B.* (*N. S.*) 437, and the cases in 6 *C. B.* (*N. S.*) 639, and 12 *C. B.* (*N. S.*) 758, are all cases where relief of the sort prayed for in this case has been granted under provisions of "The Railway and Canal Traffic Act." (17 and 18 *Vict.*, *ch.* 31; 1854.)

2d. There is no irreparable injury shown by complainants' bill. The only injury to complainants is, that they have to pay a larger price for transportation of locomotives than, as they allege, they are bound to pay. It is true they allege that corporate defendant is *likely to become insolvent.* Where trespass or irreparable injury to property is threatened, proof of defendant's insolvency will often lead the court

to prevent the mischief, but it does not follow that the court will, by its injunction, compel a man to *perform* his contract or legal duties on the mere allegation of insolvency. But there is no assertion of actual insolvency. It is a mere allegation in the bill that defendant is likely to become insolvent, and is only sworn to in a general way upon belief, and is altogether insufficient. *Brundred* v. *Paterson Machine Co.*, 3 *Green's C. R.* 294.

Besides, the insolvency of defendant is distinctly denied by the affidavit of its comptroller.

Nor will an injunction be granted where courts of law can give compensation in damages. *Morris Canal* v. *Central R. Co.*, 1 *C. E. Green* 420; *Holsman* v. *Bleaching Co.*, 1 *McCarter* 335; *West* v. *Walker*, 2 *Green's C. R.* 279; *Bonaparte* v. *Camden and Amboy R. Co.*, 1 *Baldwin C. C. R.* 205; *Thompson* v. *Matthews*, 2 *Edw. C. R.* 212; *Canal Co.* v. *Railroad Co.*, 9 *Paige* 323.

3d. The foundation of complainant's right of injunction depends on the construction of a statute. It is the act of February 21st, 1856, authorizing the New York and Erie Railroad Company to extend their road from line of the Paterson and Hudson River Railroad to the Hudson river. The defendant contends that this act does not confine it to the rates of charges prescribed by the charter of the Paterson and Hudson River Railroad Company, and for which charges complainant contends defendant is bound to carry its locomotives.

The construction of this act, and complainant's right dependent upon it, never having been settled by a court of law, this court will not grant its injunction until it is so settled. *Mayor of Cardiff* v. *Cardiff Water Works*, 4 *De Gex & Jones R.* 596; *Shrewsbury R. Co.* v. *London R. Co.*, 3 *M. & Gor., p.* 70; *Morris and Essex R. Co.* v. *Prudden*, Court of Appeals, March Term, 1869.

The same rule was acted upon by this court in the case of *Babcock* v. *N. J. Stock Yard Co.*, *ante* 296.

THE CHANCELLOR.

If the allegations of the bill are true, and they are supported by the affidavits annexed, and are not denied by answer or affidavit, they present a flagrant case of refusal to perform the duties imposed upon it by law, and for which its franchises were granted, by a corporation public in its object and almost such in its character. Railway companies have delegated to them as part of their franchises much of the sovereign power of the state, in consideration of their discharging part of what are the proper duties of government, that is providing the means of commerce and intercourse by constructing the roads which are the avenues of that commerce. And when, being authorized, they assume to operate these roads, they have devolved upon them in consideration of that franchise the additional duty, which is not one of the proper functions of the government, of common carriers, and are obliged to transport all merchandise and passengers, on the terms fixed in the grant through which they obtain their franchises. In this case the wrong is attempted to be aggravated by the charge that it is done through a corrupt combination between the directors of the company and others, by which these directors, in violation of their duties and trust, conspire for their own emolument to cause the company under their control to refuse to perform the duties imposed on it by law, in such manner that the public are injured by extortionate charges, and the stockholders defrauded of their just dues; and also in such manner that the state can cause the valuable franchises of which they are possessed as a right of property, to be annulled and forfeited for the willful violation of the compact, by which they were granted.

These allegations may not be true, and may be totally disproved at the hearing; but as their truth is sworn to, and is not denied, I am bound to treat them as true, for the purposes of this application. So far as they relate to dereliction in duty to the stockholders of the Erie Railway Com-

pany, the complainant cannot have here any relief based upon them.

I will also assume for the purposes of this application, that the Erie Railway Company having, as the legal assignees of the Paterson and Hudson River Railroad Company, and of their franchises, including the right to finish the road to the Hudson river, and to tunnel Bergen hill, constructed the extension of the road to the Hudson river, holds it as part of that road, and subject to all the restrictions and duties imposed upon that road by the charter of the original company; and that it is therefore a common carrier, bound to transport goods over this extension, as well as over the residue of the road, at the rates fixed in the charter.

Whether this duty could be performed by delegating to another person or company who would discharge it in the same manner, and for the same compensation, and with the same liabilities, need not be discussed here. They have attempted to delegate it to a company who do not attempt or offer to perform the duty as common carriers, or subject to the liabilities of common carriers, but only as forwarders, and who charge for this imperfect performance more than four times the rate authorized to be charged by the Erie Railway Company. They therefore do not provide any one to discharge the duty required of them, and they utterly refuse to perform it themselves, and have bound themselves by a contract that no one but the express company shall perform it. Such contract may be void, both as *ultra vires* and contrary to law, yet it is proper to be considered as showing the intention of the company not to perform this part of their duty.

The injury to the complainant, too, is of that nature, that while there may be a remedy at law, as by recovery of damages for injury, yet is such that cannot be adequately relieved by suits for damages. It is continually recurring, and will require continued and repeated suits, and continued litigation, and the expenses of each suit would make the recovery of the excess paid an inadequate remedy. I now

assume that the Erie Railway Company is, and will remain solvent. The affidavit of the proper officer of the company, which is legally before the court, clearly shows that the company is not insolvent, or likely to prove so.

But, although the injury is proved, and the subject matter is such that a court of equity will not refuse relief, on the ground that there is adequate relief at law, the question remains, whether the injunction here applied for can be granted, or any part of it. There are injuries which this court cannot redress, although there may be no satisfactory remedy at law, and those which this court can redress, for which no preliminary injunction can issue.

The two chief objects for which the injunction is asked are to compel the railway company to return to the complainant its trucks, and to compel it to transport the locomotives of the complainant from Paterson to Long Dock at the legal rates of freight. These are to compel the company to act, not to refrain from acting. And the act commanded is the whole duty of the company, and its performance is the whole right of the complainant. It is not the case of a prohibition of keeping up a structure or maintaining some material object, the erection and continuance of which is the act that deprives the complainant of his right, and the destruction or removal of which would restore the enjoyment of it.

It is contended by the defendants that a mandatory injunction, or one which commands the defendant to do some positive act, will not be ordered, except upon final hearing, and then only to execute the decree or judgment of the court, and never on a preliminary or interlocutory motion. Or that, if it ever does so issue, it is only in cases of obstruction to easements or rights of like nature, in which a structure erected and kept as the means of preventing such enjoyment will be ordered to be removed, as part of the means of restraining the defendant from interrupting the enjoyment of the right.

Although there is some conflict in the authorities and decisions, I am of opinion, after examining into them, that this

position, with the limitation, is the established doctrine of the courts of equity, and that it is a proper and discreet limitation of the use of the preliminary injunction, as well as sustained by the weight of authority.

Justice Story, in 2 *Eq. Jur.*, § 861 says: "A writ of injunction may be described to be a judicial process, whereby a party is required to do a particular thing, or to refrain from doing a particular thing, according to the exigency of the writ. The most common form of injunction is that which operates as a restraint upon the party in the exercise of his real or supposed rights, and is sometimes called the remedial writ of injunction. The other form, commanding an act to be done, is sometimes called the judicial writ, because it issues after a decree, and is in the nature of an execution to enforce the same."

Mr. Eden begins his treatise on injunctions by saying "An injunction is a writ issuing by the order and under the seal of a court of equity, and is of two kinds. The one is the *writ remedial;* for, in the endless variety of cases in which a plaintiff is entitled to equitable relief, if that relief consists in restraining the commission or continuance of some act of the defendant, a court of equity administers it by means of the *writ of injunction.* The other species of injunction is called the *judicial writ,* and issues subsequent to a decree, and is properly described as being in the nature of an execution."

In *Drewry on Injunctions, p.* 260, it is laid down: "It seems settled that equity has not jurisdiction to compel, *on motion,* the performance of any substantive act."

In 3 *Dan. Chan. Prac.* 1767, it is said: "It is to be observed that the court will not, by injunction granted upon interlocutory application, direct the defendant to perform an act, but might, *upon motion,* order the defendant to pull down a building which was clearly a nuisance to the plaintiff."

Lord Hardwicke, in an anonymous case in 1 *Ves., jun.,* 140, restrained the further digging of a ditch, but refused, on motion before answer, to order the part dug to be filled up.

Chancellor Vroom, in the *Att'y-Gen.* v. *The New Jersey Railroad Co.*, 2 *Green's C. R.* 141, says: "The injunction is a preventive remedy. It interposes between the complainant and the injury he fears or seeks to avoid. If the injury be already done, the writ can have no operation, for it cannot be applied correctively, so as to remove it." In that case, the injury done was driving piles for a bridge, so as to obstruct navigation; a mandatory injunction to remove them would have remedied the whole evil.

In *Hooper* v. *Broderick*, 11 *Sim.* 47, a preliminary injunction to restrain a tenant from discontinuing to keep an inn was dissolved, on the ground that it was mandatory—the same as if he was commanded to keep an inn.

In *Blakeman* v. *Glamorganshire Canal Navigation Co.*, 1 *Myl. & Keene* 154, Lord Brougham, after a review of the cases (*p.* 183,) and quoting with approbation what Lord Hardwicke said in *Ryder* v. *Bentham*, that "he had never known an order to pull down, *on motion*, and but rarely by decree," refused so much of the injunction prayed for as directed the defendant, Powell, to fill up the collateral pond. The cases of *The East India Co.* v. *Vincent*, 2 *Atk.* 83; *Spencer* v. *London and Birmingham Railway Co.*, 8 *Sim.* 193; and of *Durell* v. *Pritchard*, 1 *Ch. App.* (*E. L. R.*) 244, are to the same effect. And in the last case, Lord Romilly, M. R., held that the court, *upon final hearing*, could not issue a mandatory injunction, directing a wall to be taken down, yet the Lords Justices, on appeal, held that it had the power, but that in the case before them it should not be exercised, and dismissed the appeal.

There are cases in which mandatory injunctions have been ordered on motion, but they are all, or nearly all, cases in which some erection placed and maintained by the defendant to effect the injury complained of was ordered to be removed, or its maintenance forbidden, on the ground that the defendant effected the act he was restrained from doing, by continuing such erection.

In *Robinson* v. *Lord Byron*, 1 *Bro. C. C.* 588, which is

referred to as the leading case for mandatory injunction, Lord Thurlow ordered an injunction to restrain defendant from using his dams and other erections, so as to prevent the water from flowing to the complainant's mill in such quantities as it had ordinarily done before April 4th, 1785. The effect of this may have been to compel the removal of the part erected after 1785. But as the case states the injury complained of to be that Lord Byron so used his dam and gates as to let the water flow irregularly, to the complainant's injury, I do not see in the report any direction, express or implied, to take down anything, or to do any act whatever.

In *Lane* v. *Newdigate*, 10 *Ves.* 192, the object of the injunction was to compel the restoring of a stop-gate which was wrongfully removed. Lord Eldon would not order it to be restored, but restrained the preventing the use of the water by complainant by the removal of a stop gate, which was equivalent to an order to restore it, and was so intended.

In *Ranken* v. *Huskisson*, 4 *Sim.* 13, the court restrained the defendant from permitting an erection to remain; this was equivalent to an order to remove it. But it is like the others; simply removing that by which the defendant continued the nuisance to be restrained.

In *Mexborough* v. *Bower*, 1 *Beav.* 127, Lord Langdale ordered an injunction to restrain permitting the communication complained of (by which complainant's mine was flooded) to remain open. The injunction was to prevent the flowing of the mine, by restraining or removing the means by which the defendant continued to do it.

In the *North of England Railway Co.* v. *The Clarence Railway Co.*, 1 *Coll.* 507, the injunction prayed for was against maintaining a wall, and after the rights of the parties had been referred to, and settled in the Court of the Exchequer, V. C. Bruce hesitated to grant the injunction, although he held, *p.* 521, that mandatory injunctions might be granted; yet he referred the case to Lord Chancellor Lyndhurst, who, it is stated, granted the injunction in *nearly* the

terms of the prayer; but whether it included this mandatory part does not distinctly appear. The case established the right of the complainant to build a bridge over the railway of the defendant, and to rest the supports of the scaffolding on the soil; and the mandatory prayer was that defendants should remove a wall placed on their grounds to hinder it.

In *Greatrex* v. *Greatrex*, 1 *De Gex & Sm.* 692, the injunction was against preventing the plaintiffs from having access to the books of the firm, and against removing them from, or keeping them at any other place than the place of business of the partnership, as the defendant had removed the books; this was equivalent to an order to restore them, but yet it did not command any act to be done.

In *Heracy* v. *Smith*, 1 *Kay & J.* 389, the injury was covering with tiles the chimneys from the butler's pantry of the complainant; Lord Hatherly, (the present Lord Chancellor, then Vice-Chancellor, Sir W. P. Wood,) on the authority of *Robinson* v. *Lord Byron*, granted an injunction, the effect of which was, and was intended to be to compel the defendant to remove the tiles; but he declined to adopt the mandatory form, but restrained the defendant from doing any act to prevent the smoke from arising. The substance of the judgment is grounded on the power of the court to remove an erection made by the defendant to effect the injury to be redressed, when that erection is the means by which the defendant continues to inflict the injuries from which the court intended to restrain; and the form of it is an acknowledgment of the general principle that an interlocutory injunction should not command the doing of any positive act.

A number of authorities and cases were cited on the argument to show that courts of equity will, in certain cases, decree the restitution of particular chattels. But these are all cases where it was so ordered upon final hearing. There is no case of any interlocutory injunction being granted or even applied for, for such purpose. It would be a simple and easy substitute for the action of replevin. And

there is nothing in this case to warrant such order, even upon final decree. The value of these trucks can be fully recovered at law, and as to the use of them in the meantime, new ones could be built sooner than a suit in equity be brought to final hearing.

I feel, therefore, constrained to refuse the injunction so far as these mandatory prayers are concerned; as to so much of the prayer as asks to restrain James Fisk, jun., and the other defendants named in it, from entering into any agreement, or doing anything to prevent or hinder the Erie Railway Company transporting the complainant's locomotives, I think the injunction ought to be granted. They are conspiring with the Erie Railway Company to injure the complainants in a way for which the redress at law is not adequate, and therefore should be enjoined from doing any acts to that end.

I do not intend to intimate any opinion upon the question whether this court has power on the final hearing, to give the complainants the relief they seek, by compelling the Erie Railway Company to transport their locomotives at the established fares.

Williams *vs.* Winans and others.

1. A supplemental bill is proper to bring in as a party a person who has acquired an interest in the controversy after the commencement of the suit, as assignee or successor to an original defendant, although such assignee or successor will, in general, be bound by the decree and proceedings.

2. But when such person is made a party by supplemental bill, whether filed by himself or the complainant, he comes before the court in the same plight and condition as the former party, is bound by his acts, and may be subject to all the costs and proceedings from the beginning of the suit. It is merely a continuation of the original suit, and whatever evidence was properly taken in the original suit may be made use of in both suits, though not entitled in the original suit.

3. Any defendant in a supplemental bill may demur, upon the ground

that the bill is not properly supplemental, but that it seeks to make a new and different case from the original bill, upon new matter.

4. Where a party has acquired an interest in the matter in controversy after the commencement of the suit, involuntarily, by the act of the law, as in cases of an assignee in bankruptcy or insolvency, it is necessary, in order to bind such person, that he should be made a party by supplemental bill. In other cases it may be expedient, but it is not necessary.

The argument of this cause was had upon demurrers filed by the defendants. The complainant had, on the 10th of February, 1868, filed an original bill against all the defendants, except Cutter. He became interested in the property in question by purchase at a sheriff's sale pending the suit, and a supplemental bill to have that purchase declared fraudulent and void was filed against him November 28th, 1868, in which the defendants in the original bill were joined. The defendants in the original bill had answered, except one, against whom a decree *pro confesso* had been entered. The supplemental bill prayed no relief against the defendants to the original bill, but only the prayer for relief against Cutter, without any general prayer. All the defendants filed general demurrers to *the bill* of the complainant, without stating whether to the original or supplemental bill.

Mr. C. Parker and *Mr. R. S. Green*, for demurrants.

Mr. B. Williamson and *Mr. F. B. Chetwood*, for complainant.

The Chancellor.

The original bill was to compel the specific performance of an agreement to execute a mortgage on one hundred acres of land in Union county. This agreement was alleged to be contained in a submission to arbitration between the complainant and John T. Winans, a defendant in the original bill, and, as insisted by the complainant, bound Winans to execute a mortgage to him for the amount which should be

awarded by the arbitrators, within thirty days after the award. The bill charged that the award was for a large sum, and that Winans refused to pay it or execute a mortgage to secure it, but, for the purpose of defrauding the complainant, within the thirty days mortgaged and conveyed the tract upon which he had agreed to give the complainant a mortgage, to the other defendants, and that they knew of that agreement, and joined in the scheme for the purpose of aiding Winans in defrauding the complainant, and that they paid no consideration.

The bill prayed that Winans might be compelled to execute the mortgage as agreed, and that the mortgages and conveyances to the other defendants might be declared void as against the complainant, or subject to the mortgage so to be executed to him.

The supplemental bill states that, pending the suit, the defendants, for the purpose of defrauding the complainant, procured executions to be issued upon two old judgments, against John T. Winans, which existed and were liens upon this tract of land prior to the submission, and at a sheriff's sale under these executions, procured this tract to be purchased in the name of the defendant, David Cutter, who was their uncle, for $400, and procured the same to be conveyed to him by the sheriff; that Cutter had not authorized and did not know of the purchase in his name, and paid no part of the consideration money, which was advanced by the defendants to the original bill to defraud the complainant; that Cutter insists upon holding the lands by this deed from the sheriff, and refuses, when requested, to convey or mortgage them to the complainant.

A supplemental bill is proper to bring in as a party a person who has acquired an interest in the controversy after the commencement of the suit, as assignee or successor to an original defendant. Such subsequent assignee or successor will, in general, be bound by the decree and proceedings, except when his title is acquired, involuntarily, by the act of the law, as in cases of an assignee in bankruptcy or

insolvency, in which it is necessary, in order to bind him, that he should be made a party by supplemental bill. In other cases it may be expedient, but is not necessary. But when such person is made a party by supplemental bill, whether filed by himself or by the complainant, in such case the new party comes before the court exactly in the same plight and condition as the former party; is bound by his acts, and may be subject to all the costs and proceedings from the beginning of the suit. It is merely a continuation of the original suit, and whatever evidence was properly taken in the original suit, may be made use of in both suits, though not entitled in the original suit. *Story's Eq. Pl.*, § 343; 2 *Dan. Chan. Prac.* 1609, 1611; *Sedgwick* v. *Cleveland*, 7 *Paige* 290.

If Cutter was rightly brought into the original suit as the assignee, pending the same, of the interest of John T. Winans and the other defendants in the original bill, he is bound by their answers, and he and such as have answered cannot now demur to anything in the original bill. The defendant Hays is in no better position.

But any defendant in a supplemental bill may demur upon the ground that the bill is not properly supplemental, but that it seeks to make a new and different case from the original bill, upon new matter. *Story's Eq. Pl.*, § 616.

Upon the facts stated in the supplemental bill the complainant cannot have any relief against the defendants in the original bill, on the grounds of relief there set forth. That is based upon a fraudulent transfer, by one of them to the others, of the land to be mortgaged, for the purpose of defeating the complainant's rights. By the sheriff's sale, which is set forth in the supplemental bill, the rights of all the defendants in the original bill are ended. By a sale under judgments not impeached, which were prior liens on the tract, the legal title was vested in Cutter. This title they cannot dispute, and all question as to the validity of their claims, as against the complainant, is at an end. If they have any right to claim the interest in the premises by

Cutter being a trustee, it arises under the sheriff's sale, and not under the transactions set out in the original bill.

Had the defendants in the original bill, other than John T. Winans, bought in this title in their own names at the sheriff's sale fraudulently, as is set forth in this supplemental bill, this could not have been set up in a supplemental bill. It is a different transaction—no answer to the original bill; no evidence taken in that suit could apply to it. One transaction may be honest, and the other fraudulent; they are in no wise connected.

But here is a new defendant, not concerned in the original frauds, who, by a new fraud, perpetrated by means entirely different, is brought into court to have this new transaction declared void. It can only be effected by an original bill. It is not even the proper subject of an original bill, in the nature of a supplemental bill. *Story's Eq. Pl.*, § 346.

And it is very questionable, if an original bill had been filed after the sheriff's sale, against all these defendants, on the ground of fraud in both transactions, whether a demurrer by Cutter for multifariousness would not be good.

The demurrers must be sustained.*

Seymour *vs.* The Long Dock Company.

1. A contractor excavating the Bergen Tunnel for the Long Dock Company, during the progress of the work, claimed additional compensation because of the inadequacy of the contract prices; also damages sustained by him in consequence of alleged delinquencies of the company in not furnishing cars to remove material and omitting to free the tunnel of water; and the company added $27,500 to the schedule prices, in consideration that the contractor would, and who thereupon did, release and discharge the company from all claim to damages by reason of any non-performance of certain undertakings, by the company. *Held*, that the allowance by the company was not a settlement of the accounts which then existed between the company and the contractor, but left the ques-

* Decree reversed, 7 *C. E. Gr.* 573.

tions as to the amount of work, to be settled by a subsequent account. By such allowance the contractor was simply estopped from setting up any claim for *damages* prior to the date of the release.

2. The equitable jurisdiction of the Court of Chancery in matters of account, is concurrent with that of courts of law, and no precise rule can be laid down as to the cases in which it will be exercised.

3. The jurisdiction is often exercised because a court of equity has better means than a court of law, of ascertaining the rights of the parties.

4. This court reserves to itself a large discretion upon the subject of accounting, and often assumes or rejects the cognizance of such cases, according to the circumstances of the particular case.

5. While the court in its discretion may, at the hearing, dismiss a bill for an account for want of jurisdiction, yet if the defendant has submitted to the jurisdiction, and has not made objection by demurrer or answer, he cannot, as matter of right, insist, at the hearing, that the case is not one of which the court should take cognizance, unless the court is wholly incompetent to grant the relief sought by the bill.

6. A contractor with a company, to make for the latter a tunnel, who during the progress of the work had, in consideration of an addition to the schedule prices, released the company from damages he then claimed from the company for the non-performance, by them, of what by the contracts, they were to do to facilitate the work of the contractor; and who had subsequently, and before the completion of the tunnel, surrendered the work to the company upon an agreement that he was to be employed as superintendent of the work necessary to complete the tunnel, and be paid for his services a sum depending on the cost of finishing the work and stipulations in an unexecuted agreement annexed to such agreement, the latter stating that the object of it was to give him, as wages, such profits at the termination of the work as if the former contracts had continued; and who, when the tunnel was nearly completed, relinquished the work in submission to an action of the company; filed his bill against the company, praying, besides other and general relief, that an account might be taken. *Held*, that the interest of the contractor, though under the name of superintendent, was to continue to the termination of the work; that he was to be accounted with and paid as provided for in the contracts for the work done previous to the agreement that he should act as superintendent, and that he was to be compensated for work done subsequent to the agreement, substantially as before; that he was to be charged with all advances made by the company, on account of the work, and credited with the contract prices; that he was entitled to all the profits accruing from the work according to those terms, and that an account must necessarily be taken to settle whether any profits were due the complainant under the contracts, and whether anything was still due him from the company.

7. Where a contractor, by the terms of his contract with a company for making a tunnel, was to execute the work "under the direction and con-

stant supervision of the engineer of the company, by whose measurements and calculations, the quantity and amount of the several kinds of work performed under the contract, should be determined:" *Held*, that the engineer was the special agent of the company, and not the agent of the contractor, as to the measurements and calculations made by the engineer or his assistants, and if they are not correct, and extra and unnecessary work and expenditure should result, the loss ought not to fall on the contractor, but upon the company.

8. Where, in a contract between a contractor and company, it is provided that the work shall be performed under the control and direction of the engineer of the company, and that he is to decide on the due performance of the work by the contractor, two classes of duties devolve on the engineer: ministerial, or those which relate to the giving of practical working directions, and making measurements; and judicial, or those connected with his power to decide on the due performance of the work.

9. As to a claim made for extra work under a contract, the rule was adopted that where the work was necessary to the prosecution of the undertaking, it should be allowed, as in a contract for making a tunnel, if rock should fall from the roof, or it became necessary to remove dangerous rock outside of the lines of the tunnel; an extra width of excavation where it was made under the express directions of the engineer of the company would be extra work, unless such excavation outside of the lines of the tunnel originated in the carelessness or oversight of the contractor or his workmen.

10. Where one contracts to complete for a company a tunnel which a former contractor had undertaken but abandoned, and takes upon himself the performance of the contract made with such former contractor, erroneous excavations made by the former contractor in his headings out of the true line cannot, in the account between the company and the new contractor, be estimated for the benefit of the latter.

11. Where, in the excavation of a tunnel, the work was done by a company under the superintendence of one who had formerly contracted with the company to do it, who had, as such contractor, performed a portion of the work, and who, as superintendent, was to receive as wages the profit his former contracts with the company, if they had been continued, would have yielded, and he alleged in a bill filed against the company for an account that the engineer of the company had over estimated the work of an employee of the company who had been paid therefor, by including therein work which had been done by such superintendent before he changed his relation from contractor to superintendent: *Held*, that it not appearing to the satisfaction of the court by proof that the alleged error did not arise from the negligence of the complainant in omitting to point out to the engineer, and call his attention to the work done by himself and that done by such employee, in the same vicinity, the complainant was not entitled to have so much of the payment to the employee as was al-

leged to be for work that the complainant had previously done as contractor, rejected and not included as part of the cost of the tunnel in taking the account to ascertain the profit he was entitled to receive from the company as his wages.

This cause was argued before the Hon. Thomas P. Carpenter, one of the masters of the court, sitting for the Chancellor, on bill, answer, replication, and proofs.

Mr. C. E. Schofield and *Mr. Gilchrist*, Attorney-General, for complainant.

Mr. C. Parker, (with whom were associated *Mr. S. J. Glassey* and *Mr. D. B. Eaton*, of New York,) for defendants.

The pleadings show that the claims of the complainant are of several kinds, *viz.:*

1. For money due upon contracts.

2. For damages arising from the neglects, mistakes, or incompetency of servants of the defendants.

3. For damages for torts alleged to have been committed by officers of the company.

And the analysis suggests a first question in the cause, *viz.:*

I. Has this court jurisdiction?

It seems to be asserted on three grounds;

A. That the defendants are "trustees for the complainant in respect of the matters alleged."

B. That complainant is entitled to a discovery and account; "the accounts between your orator and the said company being of long standing and complicated, and consisting of a great many items on both sides, and require a discovery of numerous documents, receipts, and other evidences in writing, most of which are in possession of said Long Dock Company, their officers and agents."

C. That the release of September 10th, 1859, whereby the company agreed to add $27,500 to contract price, on condition that the contractor should release the company from any claims he might have for damages and delay, was a

fraud, and ought so to be declared; and to these, perhaps, should be added—

D. That the court, having acquired jurisdiction of the cause, either for discovery or otherwise, will retain it for relief.

In answer to which proposition, defendants submit the following points:

1. Nothing is stated in the bill to show that defendants are in anywise trustees for the complainant. The case made by him is that of a contractor suing for stipulated payment for services. Defendants are possessed of nothing for his use, and never were. If it be said that he left with them tools, machinery, fixtures, &c., worth $19,653.50, the answer is that his remedy is in trover; or that this personal property was left by complainant with defendants by virtue of the agreement of March 22d, 1860, for sale, by their joint action, to the end that their value thus found may be added to the cost of the work in computing what Seymour earns. No such sale appears to have been asked for, and under such circumstances it is a mere bailment, not within the doctrine of trusts as a ground of equity jurisdiction.

2. Agents are not entitled to an account in equity against their principals, unless some special ground is laid, as the necessity to get proof by discovery. *Dinwiddie* v. *Bailey*, 6 *Ves.* 136; *Moses* v. *Lewis*, 12 *Price* 502; *Frietas* v. *Dos Santos*, 1 *Y. & Jervis* 574; 1 *Story's Eq. Jur.*, § 462, and note to same section (Redfield's ed.); *Jeremy's Eq. Jur.*, 513, 515.

3. No such special ground exists in this case. There is no incapacity to get proof except by discovery. The facts lie in the knowledge of officers of the company where they do not in that of complainant himself, and complainant could call it forth in a suit at law. Complainant shows his ability by actually preparing an account, and besides, had an account from the defendants long before the suit.

4. This is no bill for discovery. Such a bill should seek information of particular facts upon which complainant has

no proof, and that in order to aid him in an action already existing. 2 *Story's Eq. Jur.*, § 1483. The prayer here is general, and no such action existed. Discovery here is but a pretext to claim jurisdiction for an account, certainly not otherwise ordinarily exercised.

5. The case made as to the release is simply absurd. No facts are averred from which fraud or oppression can be inferred. And as a ground of jurisdiction, this branch of the complaint is an evident pretext.

6. There appearing, therefore, no *bona fide* separate ground of equity jurisdiction, this court will not retain the cause to give the complainant the relief which he might lawfully and advantageously seek in a court of law. *Little* v. *Cooper*, 2 *Stockt.* 276; *Brown* v. *Edsall*, 1 *Stockt.* 256; 1 *Story's Eq. Jur.*, § 74 *c*, and note 2; *Foley* v. *Hill*, 2 *Clark & Fin.* (*Ho. Lds. Cas., N. S.*,) 28, 37; *Hambrook* v. *Smith*, 9 *Eng. Law and Eq.* 226; 1 *Story's Eq. Jur.*, §§ 69, 74 *c*.

Upon the assumption that this court may entertain jurisdiction of the cause, the defendants urge—

II. That the complainant has no right to maintain any of the claims for *damages* set up by him in the bill of complaint.

A court of equity will never award compensation or damages for injury done, except as incidental to other relief sought by the bill and granted by the court, such as specific performance. There is adequate remedy at law, and the just foundation of equitable jurisdiction fails, and such compensation cannot be incidental to a mere account. 2 *Story's Eq. Jur., ch.* 19.

The assignment of his contract by John P. Cumming to Seymour, vested in him no right to precedent damages suffered by Cumming. Such right did not pass by any words in the instrument, nor could it pass by law, if there were words importing its transfer.

The release, September 10th, 1859, annulled all claim, if any there was, for any damages up to that date. There is no reasonable pretence on which that release can be attacked;

and a like effect was produced by the resolution of the directors, and the reception of the money therein named. Every payment received after that release and resolution, released all damages up to its date; hence all claims for damages perished up to the very close of the work.

The agreement of March 22d, 1860, released all claims and demands arising out of precedent contracts, and all claims and demands whatever. "All losses heretofore incurred to be borne by Seymour."

None of the claims for damages, by reason of the neglect or incompetency of the engineers or other servants of the company, are sustainable, because no employee can sustain an action against an employer for damages occasioned by the negligence of other employees; and, secondly, because by the contracts whose benefits he claims, Seymour submitted himself to the discretion and direction of the engineers, whose negligence, he says, injured him.

The complainant was an employee, not a contractor. The contract fixed his wages. He expressly abandoned the position of contractor, and took that of an employee or servant. *Harrison* v. *Central R. Co.*, 2 *Vroom* 295; *Couch* v. *Steel*, 3 *Ellis & Blackb.* 402; *Seymour* v. *Maddox*, 16 *Ad. & El.* (*N. S.*) 329.

The evidence in the cause disproves the various allegations of complainant as to the negligence or unskillfulness of the engineers and other servants of defendants of whom he complains.

The Master.

The Long Dock Company is a company incorporated by act of February 26th, 1856, (*Pamph. Laws, p.* 67,) for the purpose of constructing a tunnel through Bergen Hill, and certain accessories, intended for the use of the New York and Erie Railroad Company. The Long Dock Company made a contract, dated May 28th, 1856, with one James H. Mallery, for the excavation of this tunnel. The contract is set out in full in the complainant's bill. Mallery

had performed but a small part of the work undertaken when he abandoned it, in October, 1857.

John P. Cumming, February 14th, 1859, entered into a contract with the company to complete the tunnel, as also to perform some additional work undertaken by him; the complainant, A. B. Seymour, being a partner with Cumming, with the knowledge of the officers of the company, though, for some reasons unexplained, the contract was in the name of Cumming only. Under the contract, Cumming agreed to finish and complete all the rock work remaining to be done at its date, and to complete the tunnel and its approaches, according to the location, form, dimensions, conditions, and requirements of said work, in the terms specified in the contract of James H. Mallery, and more particularly according to certain clauses in the specifications of that contract, and also according to certain clauses of the "conditions" of the same contract, specifically referred to, and thereby thus made a part of this second contract. The Mallery contract in these particulars, and as to these several "specifications" and "conditions," so far as not conflicting with the provisions of the Cumming contract, was made a part thereof. It is not necessary now further to recite this second contract, which is also set forth in full in the complainant's bill. Cumming, June 2d, 1859, with the assent of the company, assigned his contract to Seymour, who thus became in name and in fact the contractor.

With much additional matter prescribed in the specifications and conditions set forth in the Cumming contract, by it the contractor, in substance, undertook to complete what Mallery had begun.

The company, by the Cumming contract, had engaged to furnish cars to receive the materials excavated by the contractor, and to transport those materials to the places of deposit with such promptness as not to delay the work; to free the tunnel from water; to repair the shafts; and to repair the track, &c., in order to enable the contractor to proceed

in his work with the diligence and promptness required by his own interests as also those of the company. It is not necessary to refer to these stipulations on the part of the company with more particularity for the present purpose. They will be found in the contract itself already referred to.

As the work progressed, claims for additional compensation on the part of the contractor were made, as well because of the alleged inadequacy of the contract prices, as also for *damages* sustained by him in consequence of the company failing to furnish cars when required, failing to promptly free the tunnel and shafts from water, and other alleged delinquencies. The company, on the recommendation of its engineer, about the 10th day of September, 1859, agreed to add a considerable sum to the contract price, provided for in the Cumming contract. It agreed about that day to add the sum of $27,500 to the schedule prices, in consideration of Seymour, by an instrument under seal bearing date on that day, agreeing to release and discharge the company from all right or claim to damage by reason of any violation, neglect, or non-performance of any stipulation or undertaking in said (Cumming) contract.

This agreement, I do not deem to be any settlement of the long and voluminous accounts, which then existed between the company and its contractor. It seems to have been only an allowance of an extra amount of $27,500 on the contract as recommended by Mr. Kirkwood, but in consideration of which Mr. Seymour released all claim to the *damages* alleged to have been sustained by reason of any default on the part of the company. Relinquishing such claims, he consented, from that time, to rely for his remuneration on the contract prices thus increased, to be paid to him by the company for his work.

I stop at this point of the case to say that I see no reason sustained by the evidence upon which this *release*, as it has been called, can be set aside for fraud. The company, on the recommendation of its engineer, made this large addition to

the contract price, but it did so on the express condition incorporated into the written instrument executed by Mr. Seymour, that the contractor should set up no claim for *damages* by reason of any violation, neglect, or non-performance of any stipulation or undertaking in said contract, on the part of the company, to date, &c. By the same instrument, Mr. Seymour also further proceeds to sell and transfer to the Long Dock Company all the machinery, sheds, workshops, fixtures, and tools on the premises, or used for the work, not absolutely, but it would seem by way of security, as the same were to be re-transferred on the fulfillment of the contract. I see no ground, as the case is presented to me, on which this instrument is to be invalidated. The contractor knew the condition of the work, and, it must be presumed, knew the effect of the instrument he then executed. He relinquished no part of the remuneration which had been stipulated to be given him. For the large sum of $27,500 thus paid, he simply relinquished his claim for *damages* alleged to have been sustained by the default of the company in the matters referred to. But, on the other hand, the agreement settled no questions as to the amount of the work, leaving them to be settled by a subsequent account between the parties. It simply estopped him from setting up any claim for these damages prior to the date of this release.

The work was then proceeded with by the contractor down to March 22d, 1860, when a new arrangement was made between him and the company. This new arrangement was by an agreement of that date, set forth at length in the complainant's bill.

In this agreement, after reciting that Seymour held the Cumming contract, that Seymour had requested an advance of $12,000 to pay wages, and that the company had agreed to advance that sum upon Seymour surrendering said contract, and releasing the company from all liabilities on account of the same, Mr. Seymour does, in terms, surrender this contract, and relinquish to the company all his rights under it, and all contracts supplementary, &c., and agrees to

enter into the employ of the Long Dock Company, as superintendent and manager of the work necessary for the completing of the tunnel, &c.; and the company agrees to employ him as superintendent and manager, and to pay him for his services a sum to be ascertained, in substance, as follows: the cost of finishing the work, according to the prices fixed in the Cumming contract, and such additions thereto as had been made by contracts and agreements since entered into by the company with Cumming and Seymour, or either of them; and the prices of such work as were not covered by these contracts, to be ascertained and settled according to an *unexecuted agreement* thereto annexed, with other special stipulations not necessary to be now recited, but which are stated in the agreement; "it being the object of this agreement" (as therein further stated) "to give to said Seymour, as *wages*, such profits at the termination of the work as he would have made if the contract had continued."

Under this arrangement, the work was then carried on by Seymour until January 26th, 1861, when he relinquished it nearly completed, in submission to the action of the company, and the company took the entire charge. Seymour gave the work up on the demand of the company, and a controversy then ensued in relation to his compensation, which has resulted in this suit.

The bill of complaint filed by Seymour, upon allegations therein contained, prays that the releases set out in the bill may be declared fraudulent and void; that the Long Dock Company may be declared trustees for the complainant of the matters stated in the bill; that an account may be taken, &c., and concludes with the prayer for general relief.

On the construction of this agreement, and on the force and effect of the "unexecuted agreement" appended to it by way of schedule, as upon other questions arising in this cause, great and serious differences of opinion existing between the counsel have been presented to me, and to which, in turn, I have given my attention; and first as to the question of jurisdiction.

A preliminary objection has been taken by the counsel of the defendant, and pressed with much zeal and a large citation of authority, but to which I cannot yield my assent. It is urged that this is not a case for account, and that, if the complainant has any claim for further compensation, he has an action at law, to which he ought to be referred.

The equitable jurisdiction of this court in matters of account is said to be concurrent with that of courts of law, and no precise rule can be laid down as to the cases in which it will be exercised. It is often adopted, because, in many cases, a court of equity has better means of ascertaining the rights of the parties. The court reserves to itself a large discretion upon the subject, and often assumes or rejects the cognizance of such cases, as the circumstances of the particular case may render expedient. 1 *Story's Eq. Jur.*, § 451; *N. E. Railway Co.* v. *Martin*, 2 *Phill. C. R.* 758.

The whole machinery of courts of equity is better adapted for the purposes of an account than that of the courts of common law; and in many cases, as has been said, when accounts are complicated, it would be impossible for courts of law to do entire justice between the parties. Courts of equity, in cases of complex accounts, take cognizance sometimes from the very necessity of the case, and from the incompetency of a court of law, at nisi prius, to examine it with the necessary accuracy. In this case, on this ground alone, I think jurisdiction of this cause must be maintained, even supposing the objection had been duly raised.

But while the court in its discretion, at the hearing may dismiss a bill for want of such jurisdiction as is necessary, according to the rules usually adopted; yet, if the defendant submits to the jurisdiction, and does not raise the objection by demurrer or in his answer, he cannot insist upon it as a matter of right, unless the court is wholly incompetent to grant the relief sought by the bill. *Grandin* v. *Le Roy*, 2 *Paige* 509; *Hawley* v. *Cramer*, 4 *Cow.* 727; *Gifford* v. *Thorn*, 3 *Halst. C. R.* 97; *Truscott* v. *King*, 2 *Seld.* 147.

Thus disposing of the question of jurisdiction, and decid-

ing that the complainant is entitled to an account, the great burden of the case is to decide upon what principles that account is to be made, and to what compensation under the successive contracts in this case, the complainant is entitled. I have already in a cursory way, and for a limited purpose, adverted to the new arrangement entered into between Seymour and the company, on 22d of March, 1860. Much discussion has occurred and much difference in their views has been presented by the counsel in the cause, and yet practically no difference in the result follows as to this contract. Embarrassed in his means, unable to obtain the moneys on his own credit necessary to go on with this great work, the contractor, Seymour, agreed to place the whole contract, the machinery and equipments, in the hands of the company, and to go on to the completion of the work, under the name of superintendent and manager, devoting his time and energy to the work; to be compensated substantially as provided for in the preceding agreements; any work not provided for in the preceding contracts, to be ascertained and settled according to an *unexecuted agreement* thereto annexed; provision being also made for his receiving, on the completion of the work, the value of the machinery and tools transferred to the company, but belonging in fact to him.

I may here refer to the questions raised in regard to the character and effect of what is called the "unexecuted agreement," an instrument appended by way of schedule to the contract of March 22d, 1860. Undoubtedly its weight or influence in this cause, whatever that may be, depends upon the character given to it by that contract. However or whenever drawn, it was never executed as a distinct contract between the parties. In the Mallery contract, and also in the Cumming contract, there are vague and not very clear articles relating to extra work not provided for in those instruments. Thus, in the fifteenth specification of the Mallery contract, the price of such work is referred to some future arrangement to be agreed upon before such work should be commenced. In the Cumming contract, stipula-

tions of like character are to be found, leaving the company, if no agreement could be made, to do such work in such manner as the company might see fit. Such stipulations, exceedingly loose and unsatisfactory, probably were intended to be superseded by a more definite arrangement embodied in this "unexecuted agreement," adopted by and appended as a schedule to the last contract, of May 22d, 1860. In this connection it seems to prescribe that if extra work not expressly provided for as to prices by those two contracts or any additional contract, should be done in accordance with the specifications and under the directions of the engineer, the price "shall be ascertained and settled according to an 'unexecuted agreement' herewith annexed, purporting to be," &c.

While this schedule regulates the price of extra work not otherwise previously provided for, perhaps it goes somewhat further, and stipulates what shall be the work which the engineer may direct and for which he may furnish specifications, and which the contractor should then perform for the prices mentioned.

The object, as I suppose, at any rate the effect of this new arrangement of March 22d, 1860, with its new provisions and its additional schedule of prices, while it relieved Mr. Seymour from the responsibility of himself providing the funds to go on with the work, in some respects was not to change his relations with the company. Although he had transferred the legal ownership (so to speak) of the contracts and his tools and machinery to the company, he still had an interest in them. From the very nature of the transaction it would seem that they were so transferred rather as a security to them for their advances and for his due performance of his undertakings, than as an absolute sale. Although he was to proceed as their superintendent and manager, expending their money and not his own, and relieved from many of the risks of the undertaking, he was to proceed under the same direction as before and to be paid and accounted with as provided for in the previous contracts for the work previously

done, and to be compensated for future work substantially as before; he was to be charged with all advances paid on account of the work, credited with the contract prices and entitled to all the profits accruing from the work, according to those terms. The leading feature in the change made by this last agreement, was that by which the company agreed to advance all the moneys necessary to complete the work under the contract, and his pay at its termination to be the profits ascertained in the mode therein prescribed, called his wages. His interest as contractor, though under another name, was to continue to the termination of the work. It is obvious then, that an account must necessarily be taken, upon principles consistent with these views, to settle, whether any profits have resulted to the complainant under these contracts, and whether anything is still due to him from the defendant.

Mr. Seymour's immediate interest commenced under the Cumming contract of February 14th, 1859, by which the contractor, upon certain terms, undertook to complete the tunnel commenced and abandoned by Mallery. The Mallery contract controls the subsequent contract only as expressly incorporated in it by reference. Certain specifications and conditions of the Mallery contract are in terms distinctly and specifically referred to in, and made a part of the Cumming contract. The work by those specifications and conditions, among other things, "was to be so executed as to conform to the lines, levels, and sections furnished by the engineer," &c.; and further, the "work shall be executed under the direction and constant supervision of the engineer of the company, by whose measurements and calculations the quantities and amounts of the several kinds of work performed under the contract shall be determined," &c.

The Cumming contract further, with some difference of phraseology, requires, in like manner, the work to be done under the supervision, direction, and control of the engineer. The engineer spoken of, is expressly stated to be the engineer of the company; and while nothing, according to an express

stipulation of the contract, could be done contrary to the stipulations of the contract, without the written consent of the company, yet also, by its terms, the contractor was entitled to rely on the actual "instructions and corrections of the engineer," within the scope of his authority.

Thus, it may be suggested, the working plans and directions of the engineer of the company, as to the size and direction of the tunnel, including his measurements and calculations, were matters upon which the contractor and his foreman were entitled to rely. If they were not correct, and extra or unnecessary work and expenditure should result, it does seem to me that the loss ought not to fall upon the contractor, but upon the company, whose special agent the engineer was. I do not yield to the suggestion that the engineer was the agent, in this sense, of the contractor as well as of the company; on the contrary, he was the special agent of the company, whose directions, to a certain extent, the contractor was bound to obey, and following those directions in good faith, he ought to be held harmless.

The extent of the control and authority of the engineer, under these contracts, has been the subject of considerable discussion; and particularly as affected by the clause in the Cumming contract commencing with the phrase, "If in any event, or from any oversight or other cause the party of the first part shall excavate any greater quantity or quantities than by this agreement he has undertaken, without the written consent," &c. It has been urged on the part of the company that whatever might be the directions of the engineer, the contractor could claim no compensation for work outside of the contract, and not prescribed by the contract itself. If this is meant to be carried so far as that the contractor could claim no compensation when led astray by the erroneous calculations and measurements of the engineer, I cannot concur in this view. An overstrained and harsh construction is not, unnecessarily, to be given to this clause. If susceptible of a meaning consistent with the rules, I will not say of law merely, but of justice, such meaning will be given to it.

Consider the position of the contractor. He is bound to obey the working directions of the engineer, whose science and skill are supposed to furnish safe guides to the contractor and his workmen. In the performance of the work, could the contractor or his foreman safely question the correctness of his measurements and practical directions? The clause may be construed to mean, that in any case, if the contractor, by *oversight* (neglecting the directions of the engineer, or without them,) or other like cause, makes a greater excavation than is called for by the contract, he shall bear the loss. I cannot think it can be properly called an oversight, or deemed to be any other cause standing in the like category, if the contractor is led astray by the erroneous working directions of the engineer.

Neither do I think the contractor's condition in this respect was changed by his agreement with the company of March 22d, 1860, when he surrendered his contracts, the character of which act I have already referred to. Nothing in that contract, properly considered, changes the situation of the contractor as respects the engineer. Although now called superintendent and manager, he holds the same relative position to the engineer. It is not necessary to add a word on this point, if I am right in the general view I have already taken of this contract.

Neither do I think, as suggested, that it was the duty of the engineer to give mere general directions only. His duty was to furnish accurate, exact, and complete working directions and instructions, according to the mode usual in such works, by which workmen are enabled to operate with certainty in their labor. As these directions, and the working marks to be placed by the engineer to guide the labor, required almost daily attention, which the chief engineer could not be expected to perform, duly qualified assistant engineers are necessarily employed. *Qui facit per alium, facit per se.* The directions of his assistants, continued through months and years, must be considered the directions of the chief engineer himself. I do not here allude to that higher class

of duties, perhaps properly called judicial, which by these contracts are placed on the engineer, who is authorized to decide on the due performance of the work by the contractor, and the like; but the duties more properly to be called ministerial, in the giving of practical working directions. To make measurements, and to give such practical working directions, I take to be duties of a very different character, and it is to these that I here refer, and in regard to which, as I take it, the act of the assistant engineer, acting as the agent of the company, stands on the same footing as if it had been performed by the chief engineer himself.

The views thus expressed bring me to the examination of some of the particular claims set up by the complainant. As already indicated, I exclude all claim for *damages* set up by the complainant prior to the release of September 10th, 1859. I hold them to be expressly released by the agreement of that date; indeed, I may go farther, and say that I do not see how any claim for damages as such can be set up prior to the subsequent agreement of March 22d, 1860. The complainant is entitled to be paid for his work done, both under the contracts, where the prices are expressly stipulated, and also for all extra work legitimately done, as a matter of necessity or under the directions of the engineer. What is extra work? I need not here attempt at large to particularize, as it will be the subject of examination before the master upon a reference, and where it must be shown, either from the testimony already produced, or by additional evidence to be taken. As to matters that may be deemed necessary, and which will authorize the contractor on the account to receive compensation, whether under the stipulations of the contracts, or such as it may be reasonably worth upon the general principles of law, as the case may be, I may refer, as an illustration, to an instance given by one of the counsel in the case, that of the fall of rock from the roof of the tunnel, or the taking down of dangerous rock outside the lines of the tunnel; in either case, work necessary to the

prosecution of the undertaking of the company. So as to other matters, perhaps, to which the same rule may apply.

The contract price under the Cumming contract seems to have been $200,000 in Long Dock bonds, with the stipulation subsequently made in respect to this payment in bonds, that $90 paid in cash should be credited as $100 in bonds; the Mallery mortgage and note, to which was added the additional sum of $27,500 allowed under the agreement of September 10th, 1859; and the price of certain work specifically agreed upon under certain supplementary contracts.

Compensation for labor bestowed upon the tunnel in the extra width to which it was excavated, either under the necessity of the case, as in the instance of loose rock, or under the express directions of the engineer, forms one of the leading items of the complainant's claims. I think it clear, upon the construction I have given to the clause in the Cumming contract so much discussed, that no excavation outside of the lines of the tunnel, originating in the *carelessness* or *oversight* of the contractor or his workmen, can be taken into consideration; only such as was necessary in the meaning already explained, or was done in good faith, in obedience to working directions of the engineer. Neither do I think that any erroneous excavations made by Mallery, in his headings out of the true line, can be estimated for the benefit of the contractor. He took his contract with the knowledge of, or he had the opportunity of knowing, what had been done by Mallery; and with this knowledge, he undertook to complete the tunnel.

The claim for moneys alleged to have been paid to Lavy to which he was not entitled in consequence of the over-estimates made by the engineer, I think cannot be allowed. On examining the testimony of the complainant himself, I am not satisfied that the alleged error did not arise from his own negligence. He should have called the attention of the engineer to the work done by himself and by Lavy, in the immediate neighborhood, and pointed out to him what had been done by Lavy and what by himself, respectively.

I do not see any ground on which the claims of the complainant for damages for an alleged libel by Mr. Berdell, or for the profits of a store particularly specified in the bill of complaint, can be sustained. Rejecting these claims, it must be referred to a master to take an account of, and ascertain what still remains due, if anything, to the complainant on the case made by the bill for the work done under the successive contracts of the company, and for extra work, upon the principles settled in the opinion, charging contract prices for all work done under the contracts, and ascertaining the value of the extra work, according to the schedule in the "unexecuted agreement;" or, if not provided for, then allowing so much as the work would be reasonably worth, and charging the contractor with all the sums paid to him, the profit, if any, belonging to the contractor, as well subsequent as prior to the 20th day of September, 1859, and down to the period when, at the requirement of the company, he gave up the work to them.

It is to be added to the foregoing directions that the machinery, tools, &c., conveyed to the company by the contracts of September 20th, 1859, and March 22d, 1860, having been so conveyed, not by way of transferring the interest of the contractor, but by way of security merely, he is to be credited with their entire value, to be ascertained by the result of a sale or sales, as provided for in the contracts; if not so ascertained, then by their value, to be ascertained by the master.

The Attorney-General and others *vs.* Steward & Taylor.

1. Any trade or business, however lawful in itself, which, from the place or manner in which it is carried on, materially injures the property of others, or affects their health, or renders the enjoyment of life physically uncomfortable, is a nuisance which it is the duty of this court to restrain.

2. A preliminary injunction will not be granted in behalf of the owners of building lots held for sale, to restrain the erection near them of a slaughter-house, where it is not alleged that any one intends to erect any

buildings upon them. Whether the erection of a slaughter-house or other nuisance so near such lots as to retard or injure their sale is an injury for which the law will give redress before buildings are erected, is a question proper to be determined at law, and this court will not interfere by preliminary injunction until the question is so determined.

3. An injunction will not be granted to restrain the erection of a slaughter-house and place for keeping hogs, where, by the answer and affidavits, it appears the defendants intend to carry on the business so as not to be a nuisance. If it should be carried on in such manner as that it becomes a nuisance, it will then be enjoined.

4. No one has the right to pollute or corrupt the waters of a creek, or, if they are already partially polluted, to render them more so; all whose lands border on a stream have the right to have its waters come to them pure and unpolluted.

5. If the intended use of a slaughter-house about to be erected will, by the discharge of the blood of slaughtered animals into a creek, corrupt and pollute the stream for most of the purposes for which it may be used by the owners of lands which border on it below, and so affect it as to make its waters offensive to houses in the neighborhood, an injunction will be granted to prohibit the blood from being discharged into the stream.

An order was granted that the defendants show cause why an injunction should not issue to restrain them from erecting in the city of Trenton, buildings intended to be used as a slaughter-house, a pork packing-house, and pens for keeping cattle and hogs. The attorney-general joined with the other complainants, on behalf of the state, because he alleges that the erections will be a nuisance to the Normal and Model Schools and the boarding-house attached to them, all which are owned by the state. The other complainants own land, and most of them reside in houses owned by them in the vicinity of the proposed erection, which, it is alleged, will be injured by the proposed buildings.

The argument was had on the bill, and answer of the defendants, and the affidavits annexed to them, and affidavits on part of the complainants, in reply to the answer.

Mr. Gilchrist, Attorney-General, for the state.

Mr. J. Wilson, for the other complainants.

Mr. Kingman and *Mr. Richey*, for defendants.

THE CHANCELLOR.

Any trade or business, however lawful, which, from the place or manner in which it is carried on, materially injures the property of others, or affects their health, or renders the enjoyment of life physically uncomfortable, is a nuisance, which it is the duty of this court to restrain. *Ross* v. *Butler*, 4 *C. E. Green* 294.

There are certain things and certain trades which are considered as nuisances of themselves: as a slaughter-house in a thickly populated town, a pig-sty near a dwelling-house, and, perhaps, to these may be added a fat melting or rendering-house, when carried on extensively in a populous neighborhood, or near inhabited dwellings. But these are not nuisances simply because erected within the limits of an incorporated city; and when erected as these buildings are proposed to be, seven hundred feet distant from the nearest dwelling-house owned by any of the complainants, whether they will be a nuisance depends much upon the extent to which the business is carried on and the manner in which it is conducted. The complainants, C. S. Olden and W. G. Cook, own lands for building lots within two hundred and fifty feet. But no immediate irreparable injury will be done to these by the erection of the buildings or commencement of the business, as no one lives there, and it is not alleged that any one intends to erect any buildings upon these lots. Whether the erection of a slaughter-house or other nuisance so near lots held for sale as building lots as to retard or injure the sale is an injury for which the law will give redress before buildings are erected, is a question proper to be determined at law, and the injury is not such as calls upon this court to interfere until the question is so determined, at least not by preliminary injunction. I have no doubt but that a slaughter-house or other unquestionable nuisance erected so near lots held for sale as building lots would very much affect the sale of them, and therefore would, in fact, be

an injury to the owner; but whether it is an injury which the law would redress, must be settled by the courts of law.

The injuries which it is contended will result from the business proposed to be carried on are, first, that the air in the vicinity will be corrupted by the foul odors from the slaughter-house; second, that the waters of the Assanpink creek, which runs along the defendants' premises, and along or near the premises of the complainants below the proposed erection, will be corrupted by the blood and offal that will be permitted to run into it; and, third, that keeping cattle and hogs confined in pens will produce a stench that will extend to the complainants' premises.

The defendants, by their answer, deny that they intend to carry on the slaughtering of cattle or sheep on the premises, but admit that they intend to bring live hogs, and have them slaughtered there, to the extent of five hundred per week. They deny that they intend to keep cattle or hogs upon the premises, except hogs brought there to be slaughtered, which they will keep in clean pens, and in a clean condition, only for a few hours before they are slaughtered. They state that they intend to erect a three-story building, of which the two lower stories (both under ground) will be used for an ice-house, and keeping and packing pork, and storing butter and fruits. That the third story will be used for slaughtering hogs, which will be done in such way that no stench or smell whatever will arise from it, perceptible outside of the building. That the blood will be sold for manure, and removed from the premises daily; or, if that is impracticable, it will be washed, by seven hundred times its own bulk of water, into the creek, where it will not be perceptible. That they will carry on the fat melting, or rendering business, in such way that it will not cause any perceptible odor, and, as the defendants, Steward and Taylor, have each carried it on for many years in the thickly settled part of the city, without its being perceived by any one not in the building.

I am satisfied that it is possible to conduct the business of slaughtering hogs on the scale intended by the defendants,

in such manner as not to be a nuisance to dwellings within five hundred feet; and the plan of constructing, keeping, and cleansing the floors used for the purpose, set forth in the answer, seems to me to be such as may effect that purpose; at least, I cannot say that it will not. The proposed manner of disposing of the blood, either by removing it forthwith from the premises in vessels, for manure, or by washing it off in seven hundred times its own bulk of water, seems calculated to prevent any noisome smell arising from that. The rendering of the fat or lard, so far as respects the parts of the animals which have been formerly rendered into lard by some of the defendants, can, no doubt, easily be conducted without being offensive. The boiling of the residue of the intestines and other offal may be more difficult, but I have no doubt can be so conducted as not to annoy persons occupying the premises of the complainants. If the defendants go on with this business, which is not necessarily a nuisance, in such manner as that it becomes a nuisance, it may then be enjoined. The defendants have no right to pollute or corrupt the waters of the creek, or, if they are already partially polluted, to render them more so. All whose lands border on a stream have the right to have its waters come to them pure and unpolluted. *Holsman* v. *Boiling Spring Co.*, 1 *McCarter* 335.

If the defendants discharge the blood from one hundred slaughtered hogs daily into this creek, it cannot be otherwise than that it must corrupt and pollute the stream for most of the purposes for which it may be used by those whose lands border on it below, and I think it may so affect the stream as to make its waters offensive to houses in the neighborhood. The rule laid down by those who have scientifically examined into the subject, that the blood of a healthy man is about one tenth of his weight, if applicable to swine, and it probably approximates the truth as regards them, would make a much larger quantity pass into the stream than is stated by the defendants. I think that an injunction should issue, prohibiting them from permitting the blood of

hogs, or other animals slaughtered on their premises, from flowing into the Assanpink. The blood contained in the water used to wash the pork before packing it, and to cleanse the floor of the slaughter-house, is comparatively so small that I cannot determine, and I do not believe, that it will affect the waters of the creek. Keeping live hogs in pens, in a city, is generally a nuisance. At the distance which this place is from any dwelling, I do not think that a few hogs, or even thirty or forty, cleanly kept in well constructed pens, would be a nuisance. But I very much doubt whether five hundred, or one hundred hogs, could be kept for any length of time on these premises, in any manner, without being offensive at the premises of some of these complainants. The defendants state their intention to be to keep a limited number for *a few hours* previous to their being slaughtered. A few hours is an indefinite term, but it may, and would naturally be taken to mean three or four, and I have no evidence to show that such keeping would annoy the complainants, or any of them.

From these views, I must direct that for the present no injunction shall issue against the defendants, except to restrain them from permitting the blood of the hogs slaughtered on their premises to flow into the Assanpink, or to pollute the waters of that creek, and that the complainants are entitled to an injunction for that purpose.

CASES

ADJUDGED IN

THE COURT OF CHANCERY

OF THE

STATE OF NEW JERSEY.

FEBRUARY TERM, 1870.

MARTIN'S EXECUTORS *vs.* MARTIN and others.*

1. A mortgage made before the act of Congress making notes a legal tender, must be paid in gold or silver coin.

2. The power of regulating contracts is left with the states, and includes declaring what shall be a legal tender.

3. Congress cannot, to give effect to one provision of the constitution, pass a law prohibited by other provisions, or inconsistent with its spirit.

The bill in this cause was filed on the 13th day of November, 1869, by the executors of David Martin, deceased, to foreclose a mortgage given in May, 1852, by William Martin, jun., to David Martin's testator, to secure the sum of $428. No answer was filed. On the 15th day of February, 1870, a decree *pro confesso* was taken against all the defendants, and the matters referred to a master. The master reported the amount due. The frame of the decree, as to payment, was as follows: "It is ordered, &c., that the said mortgaged premises be sold to raise and satisfy the several sums of money due to the said complainants, &c., that is to say, the sum of $836.74 in gold and silver coin, being such money as was legal tender at the time of the execution of the complainant's bond and mortgage," &c.

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*CITED *in Stockton* v. *Dundee Manf'g Co.*, 7 *C. E. Gr.* 57.

Messrs. Vanatta & Demott, for complainants.

THE CHANCELLOR.

This suit is for the foreclosure of a mortgage made in May, 1852, for $428, payable in July of that year. Both parties were, and are, residents of this state. The complainants insist that the mortgage being prior to the act of February, 1862, which declares certain notes to be a legal tender, must be paid in gold or silver coin, and that he is entitled to a decree that it be so paid.

The recent decision of the Supreme Court of the United States in the case of *Hepburn* v. *Griswold,** settles the question on which this application depends. And under ordinary circumstances, after a question so clearly within its jurisdiction had been settled by that court, I would not feel at liberty to discuss the principles on which its decision was founded, or even to state the reasons why I concur in it. My only duty would be to submit to it as authority.

But the country is already notified that an effort will be made to have this question re-considered by that court when its constituents shall have been changed, as they soon must be. The decision was the opinion of only five of the eight judges who heard the argument and re-argument of the case; and one of those five retired after the decision was agreed upon and before it was announced. The two judges to be added to the bench may agree in opinion with the minority; and the majority so constituted may feel bound to declare the law according to their individual opinions, and not as established by the court. Under these circumstances, which I cannot ignore, the question may not be definitively settled, and I feel called upon to express my own views as I would have done had there been no decision by the Federal court.

*8 *Wall.* 603. The Supreme Court (in full Bench) subsequently held the Legal Tender Acts to be constitutional, when applied to contracts made *before* their passage; on this point overruling the decision in *Hepburn* v. *Griswold.* See *Legal Tender Cases,* 12 *Wall.* 457.

The question is one of great practical importance. The power to make notes issued by the United States a legal tender for debts would, no doubt, at times when public credit is doubtful, and the need of the government pressing, give aid in raising money, and procuring what money will purchase; it might thus insure success in a foreign war or domestic insurrection. It is contended, and perhaps truly, that the exercise of this power was requisite, as it certainly was useful, in suppressing the late rebellion.

On the other hand, it is a power liable to great abuse. It can seldom if ever be exercised, especially as to past debts, without great injustice, and violating the first principles of the social compact. For the incidental advantage to the government, it in effect takes the property of the creditor and bestows it on the debtor.

But these considerations cannot aid in determining the question, which is, was such power conferred on Congress by the constitution? The magnitude of the consequences only renders it more important that the question should be carefully considered. This consideration requires also a large and extended view of the objects of the constitution, as designed by those who framed and adopted it. We must look beyond the mere letter of the instrument, to what was intended to be effected.

A constitutional government, as distinguished from an absolute government or a despotism, is one limited in its powers. The powers conferred are sovereign, but not universal. It is not necessary to attain a good and efficient government, that the people to be governed should surrender all their natural rights to its dominion. That people is most free who surrender the fewest, and none but those necessary to attain the end. This maxim applies as well when the government is purely democratic, as when vested in a single and hereditary monarch. The despotism of a majority, when unjust, is as insufferable as that of a king. Constitutions are the only social compacts which have ever had actual existence, and construing them usually consists

in determining whether the power exercised in the case presented was conferred on the government.

The Federal Constitution calls for another consideration. The sovereign power had before been vested in the state governments, with certain limitations. In all, there were many things over which neither the legislature nor any other department of government had power. The rights, over which no control was given, were reserved to the people, but were reserved to them individually. There was no power in the people as a body, as a grand democracy, by a vote of the whole, to invade these rights. When these were reserved they could not prohibit the free exercise of any religion, or affect the enjoyment of life, liberty, or property, by any bill of attainder, *ex post facto* law, or any direct vote, but only by due process of law. It is, therefore, no reason for holding that a power is conferred upon the national government, that such power would otherwise be destroyed, because there is provided no mode in which the people can exercise it. Many powers, like the power to take life, liberty, or property at will, a power only of absolute despotisms, were not intended to be exercised by any one, but to be wholly annihilated.

In forming the Federal Constitution, a limited number of sovereign powers were conferred upon the national government; some to be exercised by it exclusively, others concurrently with the states, so far as this concurrent exercise was practicable. And in no case will the mere fact that a certain power is prohibited to the state by its own or the Federal Constitution, warrant or support the conclusion that it is vested in Congress. That conclusion depends upon the express or implied grant.

These principles are admitted by every one; they are not repeated here to establish or strengthen them, but because they appear to be those which should guide me in arriving at a correct conclusion in this matter.

The constitution prepared and proposed by the convention, was adopted by the people of each state. That adop-

tion gave it validity. The intention of the people is the rule for its construction. That intention must be gathered from the instrument published to, and read by them at its adoption. Where it admits of doubt, aid may be had from the history of its origin, and from other cotemporaneous facts, known as well to those who adopted it as to us.

The people and governments of the states were anxious to retain as much of the sovereign power in the state governments as could be done consistently with an effective national government. The great object of discussion was how much should be surrendered; and the constitution declared what was surrendered. It was the understanding of all, as well as the plain effect of the instrument, before the adoption of the tenth amendment, that all powers not delegated were reserved. Without this understanding, that instrument would not have received the assent of a majority of the states.

All powers necessary to constitute the government a nation, and to conduct its intercourse with other nations, were intended to be conferred. The power to regulate commerce among the states, and the surrender of fugitives, and other matters regulated by treaty between independent states, was also conferred, of necessity, as the states were deprived of all treaty-making power among themselves. But the government and management of the internal concerns of each state, the election of state officers, the organization of their courts and local governments, and the making all laws with regard to the rights of persons and property, were intended to be left to the states. This includes all laws regulating the transfer of, and succession to property, relating to contracts, their construction, enforcement, and discharge, and to remedies for the protection of these rights.

This was at the time, and has always been, the universal understanding of the object and effect of the constitution. Chief Justice Marshall, in advocating its adoption in the Virginia convention, to obviate objections to the provision giving jurisdiction to the Federal courts in controversies between citizens of different states, declared that the law by

which such controversies must be decided, could only be the local law of the state where the contract was made, and that such was the established principle of jurisprudence. He further added in the same address, (3 *Elliott's Deb.* 553,) "Has the government of the United States power to make laws on every subject? Does he understand it so? Can they make laws affecting the mode of transferring property, or *contracts*, or claims between citizens of the same state? If they were to make a law not warranted by any of the powers enumerated, it would be considered by the judges as an infringement of the constitution which they are to guard. They would not consider such a law as coming under their jurisdiction. They would declare it void."

As part of the legislative power over contracts, and their enforcement and fulfillment, thus *left with*, not *reserved to* the states, was the power of declaring what should be a legal payment, or tender of payment, of any debt.

The states had power, by regulations properly within the province of the law-making power, to place obstacles in the way of compelling performance of contracts, and in many ways to impair their obligation. This, so far as the citizens of any state alone were concerned, might not be an evil for which the constitution was called on to provide. But, as each state gave up its nationality, and surrendered the right by which our nation may, by international law, call upon another not to shield, by its laws, its own subjects from their obligations to the citizens of the other, it was proper that the constitution should provide for this difficulty which it created. It was determined to do it by a clause which applied to debts and contracts between all, whether citizens of the same state or not. A provision so eminently just could not be made too extensive. Such laws were well classed with bills of attainder and *ex post facto* laws; and the prohibition was introduced into the constitution on the same ground as the guaranty of a republican form of government to each state. They were prohibited as inconsistent with

that liberty and security which both state and national governments were designed to provide for.

The proposition is clear, and I think has never been disputed, that the exclusive right of regulating contracts belongs to the states. This, without the provision to the contrary, would have left with them the unlimited power of declaring what should be a legal tender, as well as the power of impairing their obligations by stay laws, appraisement laws, or any of the devices contrived for that object. Luther Martin, in his letter to his constituents, upon his retiring from the convention, assumes that this would have been the case, and contends that this power ought not to have been surrendered by the states; that it was useful, and might be needed. Taking this power of making anything but coin a legal tender from the states did not confer it on the United States. It was simply reserved by the people from either sovereign; from the state by positive prohibition, from the United States by not being granted. And the fact that it was deemed necessary to insert a provision against a state making anything but gold and silver a legal tender, shows that this power was considered as reserved to the states; and if so, as in its nature it is an exclusive power, it would not be vested in Congress. The evils ensuing from the continental paper currency, at the close of the war of the Revolution, had created a general desire to be protected from any paper currency, whether national or state, being made a legal tender. That desire was thought to be accomplished by prohibiting it to the states, and not granting the power to Congress.

It was once contended that this power was conferred in the grant of power to regulate commerce. This view, I believe, is now abandoned. The power is "to regulate commerce with foreign nations and among the states." This would clearly not reach a debt due to a citizen of the same state, as was the case in *Hepburn* v. *Griswold*, and is, in this suit.

The power to coin money and regulate the value thereof,

and of foreign coin, so clearly refers to coined money alone, and to its denominational value, that it is not seriously urged as the foundation of the power. It was never claimed that this gave to Congress the power to regulate the actual relative value even of money, by declaring the value of a dollar in wheat at Chicago, in cotton at Mobile, or in labor at New York. The power of Congress to make notes a legal tender is now placed, by almost all who contend for it, on the last clause of the eighth section of the first article. This gives power "to make all laws necessary and proper for carrying into effect all powers vested by this constitution in the government of the United States."

In the great and leading case of *McCulloch* v. *Maryland*, 4 *Wheat.* 316, this clause of the constitution was carefully considered, and two rules for its construction adopted. One was, that the word "necessary" was not to be taken in its strict literal meaning, but extended to, and included such laws as were "appropriate" and "adapted" to carry into effect the other provisions, although not absolutely necessary for that end. The other rule was, that in making such laws, Congress was the sole judge of what was necessary, or appropriate and proper for that object. These two rules, if they had been made part of the constitution, or had been adopted to be applied without qualification, would confer on Congress the power to declare what should be a legal tender, and to exercise any other sovereign power, not only those not granted, but those prohibited by the letter and spirit of the constitution. Any power not granted or prohibited might be held not to exist, when exercised directly to give effect to its own purpose, or for objects not within the scope of the constitution, but when exercised for an end within such scope, to be valid and constitutional. Thus, the power to pass bills of attainder and *ex post facto* laws, to lay direct taxes in any ratio, to grant titles of nobility, to regulate the transfer of or succession to property, and the law of contracts, could not be exercised by Congress simply to establish wise and beneficial codes of law on these matters. But if

Congress, for prosecuting a war, or putting down domestic insurrection, (matters clearly within its province,) should judge it necessary or appropriate to attaint and execute, without trial, all who aided or favored the enemy or the insurgents, or to confiscate and seize their property by *ex post facto* laws, these rules would confer that power. Had it been judged necessary or conducive to success in the late war, Congress could have conferred on our successful generals and admirals hereditary titles of nobility, which would have made them equal to the Wellingtons and Nelsons of Great Britain, distinctions well deserved. So in case of any great need of money for the legitimate objects of government, as the payment of the national debt, a need that may soon occur, Congress could declare that every debtor who would advance to the United States half the amount of his debt, and pay or tender to his creditor the scrip for that amount, should be discharged from the whole debt. This would aid the government much in raising money, and a law passed for that object, and not for the purpose of relieving the debtor from his contract, which would be an incident to the law, would, on the principle stated, be constitutional. There is no power, however arbitrary or despotic, or however clearly reserved or forbidden by the Federal Constitution, that Congress might not assume, under this construction.

This would give to it absolute power without any restriction. It could pass any law by simply declaring that it was done for an object legitimate of itself. It could do anything, short of declaring a dictator, or establishing a hereditary dynasty; and even these might be done by determining that they were necessary, or useful and appropriate, for prosecuting a doubtful war, or putting down a powerful insurrection.

Such extended powers over the internal affairs of the states, even if not carried out into such flagrant abuses, would destroy the equilibrium of our well balanced system. It would totter and fall by its own weight.

There must be some limit to the power of Congress to

extend its own authority by exercising powers prohibited or not granted, to carry into effect such as are granted. The rules laid down in *McCulloch* v. *Maryland* have been so long regarded as the authoritative exposition of the constitution in this regard, that they must be received as law even by such as would have hesitated in adopting them were it a new question.

But there are contained in the opinion delivered in that case, qualifications and restrictions that are part and parcel of the decision, which take away from the rules laid down, much if not all of this pernicious effect. After showing that the word "necessary" was not to be taken in its strict sense, so that no means could be adopted if others could effect the end, and declaring that it here means "needful," "requisite," "essential," "conducive to," the Chief Justice declares: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

Bills of attainder and *ex post facto* laws, being prohibited, are not within this decision. Laws regulating contracts, if not inconsistent with the letter, are plainly so with the spirit of the constitution and the universal understanding at its adoption, and ever since. And they are prohibited by the ninth and tenth amendments as certainly and clearly as if a direct prohibition to pass any law regulating contracts had been incorporated into the constitution.

This rule is definite, it is safe. Let Congress abstain from making any laws for the purpose indicated, which are expressly prohibited, or intended to be reserved to the states exclusively, and, therefore, prohibited by the spirit of the constitution, and its legislation will not interfere with the rights of the people or the states, or endanger the perpetuity of our institutions.

This limitation does not render the clause in question nugatory. Besides the powers expressly prohibited and those

clearly reserved to the states, there is a large class, incidental to the exercise of any legislative authority, not prohibited or reserved by the letter or spirit of the constitution, powers to be exercised by each government in executing its appropriate functions. Such are, creating offices, appointing officers, limiting their powers and defining their duties, and providing for their removal. Among these was the creation of a corporation, or giving to certain persons an artificial existence by a corporate name instead of their individual names, for the purpose of discharging the duties of such offices. The power of creating corporations for state purposes was retained by the states, but like the power of appointing state officers, and laying state taxes, was not inconsistent with the like powers in the general government for its own purposes. The power to issue notes to be circulated as money, given to a corporation, was an appropriate means of collecting and transmitting the revenue, that interfered with no power reserved or intended to be reserved to the states. Each state had power to create corporations authorized to issue like notes, or to permit individuals to issue them. These are not the exercise of a substantive power, but the using incidental means to give effect to such power. In his opinion the Chief Justice says: "The power of creating a corporation is not like the power of making war, or laying taxes, or of regulating commerce, a great substantive and independent power, which cannot be applied as incidental to other powers, or used as a means of executing them. It is never the end for which other powers are exercised, but a means by which other objects are accomplished." This he could not have said of the power of regulating contracts, or of declaring what should be a legal tender in payment of their obligations. No one can read his opinion, or carefully follow his reasoning, without being convinced that he never would have applied its doctrines to the regulation of contracts, or to making the notes of a bank a legal tender in payment of debts.

The limitations in this opinion are not confined to means

expressly prohibited, but extend to such as are not consistent with the spirit of the constitution.

Before and at its adoption, it was understood that the constitution did not authorize Congress to exercise powers not granted, because they were not prohibited, or declared to be exclusively vested in the states.

Alexander Hamilton, in the thirty-third number of the "Federalist," declares: "Though a law laying a tax for the use of the United States would be supreme in its nature, and could not be legally opposed or controverted, yet a law abrogating, or preventing the collection of a tax laid by the authority of a state (unless upon imports or exports) would not be the supreme law of the land, but an usurpation of power not granted by the constitution." The power to regulate and control state taxation was not granted to the United States, or secured to the state by any positive provision. But, like the power to regulate contracts, it was understood to be beyond the control of the United States by those who framed the constitution, and by those who adopted it on the faith of these expositions. The power of annulling state taxation, if it exists because not expressly prohibited, may now be usefully exercised by Congress to aid in levying and collecting large taxes for payment of the public debt, which it would much facilitate.

A law compelling every creditor to pay to government one half of what was owing to him, would be deemed oppressive and unjust. The legal tender act is more so; it compels the creditor to accept part of the value of his debt as full payment, without the advantage of having the other part received by his government; and it enables the debtor to discharge his debt by payment of part of its value, without contributing at all to the support of government. But the constitutionality of a law does not depend upon its being just. But its injustice, and the inducements and influence that may cause the re-enactment of its baneful provisions for selfish purposes, should make courts pause in conferring the power by judicial construction, even though it may have

been, or may be in the future, of great use. The security and continuance of a free and just government is more important than its extension or its power.

The legal tender provision not only regulates contracts, a power reserved to the states by the letter and spirit of the constitution, but it clearly impairs their obligation, from doing which the states are prohibited. The word dollars in a contract means what it designated when the contract was made; it can mean nothing else. It means the coin so called. This was not only the meaning of the parties, but it was the legal construction of the contract. And the act directing a paper dollar to be received, did as much impair its obligation as if it had declared that hereafter a silver dime should be denominated a dollar, and be received, and be a legal tender, in payment for that amount. The dime would be a lawful dollar from the passage of the act and at the time of the tender, but could not discharge the contract as long as the regulation of contracts is with the states, and the provision against passing any laws impairing their obligation remains in the constitution. That alone prevents a state from making a dime, which is a silver coin, a legal tender for a dollar due on a prior contract. The state legislatures can declare thirty pounds to be a bushel of wheat, or twenty thousand superficial feet to be an acre of land; these enactments would be valid; but it is beyond their power, by any positive provision for the purpose, to make a purchaser receive them in fulfillment of a contract in which, when made, these terms required more than double that quantity. The power of impairing contracts by making anything a legal tender is not vested in Congress by its being taken from the states, any more than the power to impair them by changing the contents of a bushel or an acre.

In these cases the property, or rights of property, of an individual would be taken directly by legislative act, without process of law. This is prohibited to most of the state legislatures by the state constitutions, as it is to Congress by that of the United States. The spirit of the fifth amend-

ment, beyond dispute, shows that it was intended to prohibit, and I think its letter does prohibit, Congress from any direct interference with property or rights of property.

This reasoning includes the legal tender act, and brings it within the limitations in the decision in *McCulloch* v. *Maryland*, which excepts means prohibited by the letter or spirit of the constitution. It shows, too, that it is not authorized by the clause of the first article, which mentions laws necessary and *proper*. It would not be proper to pass a law forbidden by one provision of the constitution or by its spirit, for the purpose of giving effect to other provisions. The word proper will have no efficacy here unless it is held to mean "consistent with propriety," one of its significations, perhaps its original one. The other signification of "appropriate," or "suited to," is included and swallowed up in the word necessary. There is no propriety or consistency in violating one provision of a constitution to enforce another.

The conclusions to which I have arrived are: That the regulation of contracts was intended to be reserved and was reserved by the constitution, exclusively to the states. That this regulation includes determining what shall be a legal tender in payment of debts, confined to gold and silver coin. That the power given to pass laws necessary and proper to carry its provisions into effect, did not confer power to pass any law which other provisions of the constitution had prohibited or had reserved to the states, either by express words or by its spirit and intention. And, therefore, the law in question is void, so far as it makes the notes of the United States a legal tender for debts contracted before its passage.

The same principles would apply to debts contracted since. But as to these, the question arises whether they were not contracted in reference to this law, and whether the true meaning and effect of such contracts is not that the debts should be paid in what was then known as lawful money of the United States.

Higbee & Riggs *vs.* The Camden and Amboy Railroad and Transportation Company.*

1. An injunction will not be granted when the right of the complainant on which the relief is founded, or at least the principle of law on which it depends, has not been settled by the courts of law of this state.

2. An injuction will not be granted when the complainant has a full and complete remedy at law.

3. Nor where the injury complained of is slight compared to the inconvenience to the defendant and the public, that would result from the injunction.

4. Where for a period of twenty years a railroad company had been permitted to occupy the street of a city in front of the complainants' premises, for a railroad track, under a claim of right, without remonstrance or complaint by the complainants, or those under whom they claim, and the railroad company, by such acquiescence, was induced to enter into a lease with the city, binding itself to build a depot and platform, of a width that could add but little to the inconvenience to which the complainants were subjected by the occupation of the street by the track, and from which the company cannot be released, equity will not interfere to prevent the erection.

The cause was argued upon final hearing on the pleadings and proofs.

Mr. James Wilson, for complainants.

Mr. J. P. Stockton, for defendants.

The Chancellor.

The complainants are owners of a lot in the city of Burlington, having one front on Broad street. The railroad of the defendants was laid along and upon Broad street, near the centre of it, in front of this lot; it has been continued there for more than twenty years. The common council of the city of Burlington recently authorized the defendants to erect a platform and depot in this street in front of the complainants' lot. The defendants were preparing to erect this

* Cited *in Scanlan* v. *Howe*, 9 *C. E. Gr.* 277; *Pickert* v. *Ridgefield Park R. Co.*, 10 *C. E. Gr.* 322.

platform and depot in such manner that it would occupy part of the street in front of this lot, between it and the middle of the street, so as to leave only twenty-four feet of the roadway between the curb-stone in front of the lot free for the passage of carriages. The roadway there between the curb-stones is seventy-two feet wide, and the whole width of the street one hundred feet.

A preliminary injunction was granted, on the ground that the complainants owned a lot bounded on the street, and were, therefore, presumed to own the fee of the soil in the street to the middle of the street, subject only to the easement of the public street, and that this land was being taken without compensation first made. 4 *C. E. Green* 276. The view taken was that where a lot was bounded on a street, it would be presumed to extend to the middle of the street, unless the presumption was rebutted, or the terms of the deed excluded the street.

In the testimony the defendants have attempted to rebut the presumption, by showing that this street was granted and laid out by the proprietors of West New Jersey, under the proprietary government. These proprietors, in their *Grants and Concessions*, (*Leaming & Spicer* 390) state: "We do also grant convenient portions of land for highways and for streets not under one hundred feet in breadth, in cities, towns and villages." This does not grant this particular street to the city of Burlington, nor is it granted by the original concessions of the lords proprietors before partition. *Leaming & Spicer* 25, § 3. The act for settling the town of Burlington, passed in 1693, (*Leaming & Spicer* 523) and the survey under it, are relied on. The act directs a survey to be made of the town of Burlington, but it directs that "the streets of said town shall be laid out in the same places as formerly, and no other." The defendants produce from the surveyor-general's office at Burlington, an old map dated in 1694, as the survey made under that act; this shows Broad street laid out as one hundred feet wide. But assuming that the genuineness of this map is sufficiently shown, and that it is the original survey,

authorized by that act, it only proves that Broad street was laid out before 1693, as it now is. Provision had before that been made for laying out highways over lands of individuals, and making compensation. *Leaming & Spicer* 440, § 18, and 492, § 1. This street may have been laid out over lands before appropriated in such manner that the owner retained the fee.

The case on part of the complainants stands now as it did upon granting the preliminary injunction. The deed to them is in evidence; except the recital of the boundary it contains nothing to show that the title extends to the middle of the street. The description in the deed as to the lines in question begins from the end of the fourth course, and is as follows: "thence (5) along the line of a lot conveyed to William H. Lloyd, three hundred and eight and a half feet, to his corner *on* Broad street; thence (6) eastwardly, *along* Broad street eighty-six and one third feet, to the corner of the surveyor-general's office, (that is the extreme northwesterly corner); thence (7) south, along said office," &c. There is no evidence to show whether Lloyd's corner or the northwest corner of the surveyor-general's office, is on the side or in the middle of the street. If it had been shown by proof that Lloyd's corner, or the end of the fifth course, was on the south side of Broad street, and that the northwest corner of the surveyor-general's office was on the south side, the terms of the description might have been held to exclude any part of the street.

But the assumption made on granting the preliminary injunction is one not warranted by any decision of the courts of law in this state, and that assumption constitutes the whole of the title of the complainants, upon which they can have any relief in this suit. Since then, it has been held by the Court of Appeals that an injunction ought not to be granted by a court of equity, where the right of the complainant on which the relief is founded, or, at least, the principle of law on which it depends, has not been settled by the courts of law of this state. This was the view taken by that

court, in the case of *Prudden* v. *The Morris and Essex R. Co.*,* decided at March term, 1869. The preliminary injunction in this case was granted prior to that decision, on the assumption that if the legal right of the complainant seemed clear to the Chancellor, it was his duty to protect it. This case comes within the principles of that decision. It has not been settled in New Jersey, by decisions of the courts of law, that a conveyance bounding on a highway, in the terms of this deed, will extend to the middle of the highway.

There are on this subject, so far as I have been able to ascertain, but two decisions in the courts of law in this state. The first is the case of *Winter* v. *Peterson*, 4 *Zab.* 524. In that case, the line is described as commencing to run along the middle of the road, and then as running along the road for the two succeeding courses. That case differs so materially from this in the words of description, at the bottom of the question, that it cannot be held as deciding that a boundary "on" or "along" a road extends to the middle of the road, for the words there expressly called for the middle. The terms used in announcing the decision of the court would cover this case. But the decision in the other case alluded to, takes away the force of the mere dicta in this. In *The Hoboken Land and Improvement Co.* v. *Kerrigan*, 2 *Vroom* 13, the beginning corner of the lot granted was on the side of the highway; the other courses called for no monuments, and the highway was not again alluded to. The defendant contended that the survey, by the description, carried the last course into the road, or to the side of it. The plaintiff contended that it did not. The Justice, at the Circuit, charged "that it requires express words in the deed to exclude the road; this deed does not contain any such. If the deed goes up to the road, it goes to the middle of it." Justice Elmer, in delivering the opinion of the court, says: "It was correctly stated, in the case of *Winter* v. *Peterson*, that the inference or presumption of law is, that a conveyance of land bounded *on* a public highway carries with it the fee to the centre of the road, as part and parcel of the grant,

* Reported *post p.* 530.

unless, by the terms of the description, the road is necessarily excluded, or at least something appears to rebut the presumption." This would indicate that the view of the court was, that any lot bounded on a street would carry the fee to the centre of the street. But, in deciding the question then before the court, he says: "And, even if the tract can be run so that the last course and distance will correspond with the line of the highway, that alone will not warrant the presumption that it was intended to convey the land to the middle of the highway. The real question was, whether the words of the deed could be so interpreted as to warrant the inference that there was any intention to extend the boundary, as described, beyond its prescribed limits. It is not a case requiring words to exclude the highway."

This plainly places the point in question upon the intention to be derived from the deed, and, although consistent with the position quoted from *Winter* v. *Peterson*, yet it limits the apparent generality of that position to the case mentioned in it, where lands are generally bounded on a highway, but does not include in it cases where lands bound on a highway, with words that may render it doubtful whether it was the intention to extend the boundary to the middle of it. Consistently with these decisions, the courts of law may hold that when a monument is called for, such as the corner of a lot, or of a building, or the end of a course at a certain distance from a monument, and the point so called for is in the side of the street, and not the centre, that the presumption of an intention to convey to the middle of the street will not arise. In the absence of any such decision in the courts of law, and especially where the question is one which, as in this case, may admit of discussion, a court of equity will not be permitted to enforce a right depending upon such question, by any injunction, either temporary or permanent, but will require the right to be first settled at law.

The dictum of Chancellor Green, in *Hinchman* v. *Paterson Horse Railroad Co.*, 2 *C. E. Green* 82, that "the pre-

sumption of law is, that the owner of land on each side of a street owns the lands to the middle of the street," although upon a point which arose in the cause, was not the foundation of his decision, and at best was but a decision of an equity judge, and as it is contrary to the express holding of the Supreme Court in Kerrigan's case, that the presumption did not arise from the fact of bounding on the highway, but depends on the question whether the words of the deed warranted the inference of intention to extend the boundary, that opinion cannot aid in this question before this court.

The questions of law and fact upon which the title of the complainants depends might be determined by an issue to the courts of law. But other questions arise in the cause, which would prevent the complainants from obtaining relief here, as the law is now settled, even if their title was settled.

They have a full and complete remedy at law. If they own the fee to the middle of the street, ejectment will lie against any one occupying it by a platform or depot, and their title will be most appropriately tried before a jury in a court of law. And the injury in this case by suffering the erections to stand until a judgment at law, is neither very great nor irreparable. Complainants are not shut out from access to their lot; there is a way left in front twenty-four feet wide, and they have also access to the lot by an unobstructed side street, the same as in Prudden's case. The injury to the complainants, by occupying with a depot and platform ten or twelve feet of the land in the centre of the street, which they cannot use or occupy except for passing over, is slight when compared to the inconvenience to the defendants, and the public, by prohibiting the erections needed for the convenient transportation of passengers. Either of these grounds is held sufficient to prevent the interference of a court of equity by the extraordinary power of injunction.

The preliminary injunction in this case was issued prior to the decision by the Court of Appeals, in the case of *Prudden* v. *The Morris and Essex R. Co.*, and like the injunction

in that case, under the mistaken impression that it was the duty of this court to grant it, if in its own view of the case the complainant clearly had the right for which protection was sought. And until that decision, it had been the practice of courts of equity to interfere, by injunction, in cases of taking private property by corporations, without compensation first made, whenever it was required first to be made by law or constitutional provision; and this, not on the ground of the injury being irreparable, or that there was no redress at law, but on the grounds: That it is the only protection that the citizen can have in the great privilege now supposed to be guaranteed by the constitution, that his property should not be taken by private corporations for public use, without compensation *first* made to him. That all other modes of redress are for compensation *after* it is taken, and place him where he would have stood without this provision of the constitution, and require him to pursue his property in the hands of the wrongful taker, by the slow and expensive steps of a suit at law. That the strong arm of this court is the only remedy to secure a right of sufficient importance to warrant a special provision in the constitution, the right of being *first* paid, and therefore of sufficient importance to call for the only protection practicable; this protection was thought to be at least as necessary when the value of the property taken was small, and its importance to the party seizing it great, as in cases where its value would warrant the expense and vexation of pursuit; as necessary for the cottage grass plat as for the palatial park. And that no mere wanton and unprovoked injury was required to invoke the protective power of this court, or to entitle the owner to retain his property until *after* compensation made.

The decision in the case last mentioned has corrected these erroneous views, and must control the practice in such cases. The right there claimed was incorporeal property; and here it is land subject to the easement of a public highway; both are property, subject to, and guaranteed by, the

same law. The injunction in that case was set aside on these grounds, without regard to, or examining the question of the complainant's right.

There is another aspect of this case which must, on the principles there declared, prevent relief here. For a period of upwards of twenty years, the defendants have been permitted to occupy the street for the purposes of their railroad track, under a claim of right, without remonstrance or complaint, so far as appears, by the complainants or those under whom they claim. The track was laid in front of their premises. They have silently acquiesced ever since. The construction of a depot and platform occupying a width of ten or twelve feet, cannot add much to the inconvenience to which they were subjected by the occupation of the street by the track. And it was held that when a person encourages another, though passively, by like acquiescence, to acquire title and expend money, on the assumption that such right will not be asserted, he will not be permitted in a court of equity to assert his right to the prejudice or injury of those who have been encouraged by his acquiescence.

If this is the rule as to acquiescence in a case where the land was purchased before any track was laid or could be acquiesced in, and where the application to restrain from further appropriation was made before any money was expended in the additional track proposed, it must certainly prevent the interference of this court in this case, where, by such acquiescence, the defendants have been induced to enter into a lease with the city of Burlington, binding on them, and from which they cannot be released.

The bill must be dismissed.

Hyer *vs.* Little.*

1. Where the bill prays an answer without oath, the answer, though sworn to, is no evidence for defendant, though any facts admitted are conclusive against him.

3. Mere opinion, unsustained by any facts, is not sufficient to show mental incapacity.

3. In bargaining for his interest in land with an illiterate and ignorant man, without knowledge of the situation or value of the property, or the nature of the rights of other claimants, strict good faith should be observed by the party so bargaining, not to deceive him by any act or representation, or to allow him to deceive himself by any mistake as to facts, when he knew he was acting under such mistake and had it in his power to undeceive him.

4. In a suit to set aside a deed made by a person unable to read, for misrepresentation as to its contents, and its purport and effect, the burden of proof is upon the defendant; and in such case, it is a part of the necessary proof of the execution of the deed to show that it was read, or its contents made known to the grantor; but an acknowledgment according to the statute, before an officer designated by law, is equivalent to proof that the grantor had knowledge of the contents, if it contains the certificate that the officer made known the contents before the acknowledgment.

5. The evidence held not to sustain the charge of fraud and misrepresentation.

Quære. Whether a deed could be set aside for want of consideration, in a suit where it is not set up as a ground of relief.

6. Where one executes and delivers a deed upon terms before offered, but not positively accepted, it is an acceptance of the terms.

7. Such deed will not be declared void on the ground that the terms were hard and unconscionable, especially where it is difficult to say whether they really were so. It is not like a suit for the specific performance of an unconscionable bargain, which the court will, in its discretion, refuse to decree.

8. Courts of equity never declare deeds void for mere inadequacy of consideration, unless the inadequacy be so gross as to be of itself a convincing proof of fraud or imposition.

9. Services requiring skill, sagacity, and judgment cannot be measured by any fixed scale, and where their value has been agreed upon and fixed by the parties, it cannot be reviewed or changed by courts.

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*Cited *in Sweet* v. *Parker*, 7 *C. E. Gr.* 455.

The hearing of this cause was brought on, upon the pleadings and proofs, for final decree.

Mr. A. V. Schenck and *Mr. C. Parker*, for complainant.

Mr. McCarter, for defendant.

THE CHANCELLOR.

The object of the suit is to have a deed, given by the complainant to the defendant, declared void. The ground on which this relief is asked, is fraud in the defendant. The fraud charged consists, first, in falsely stating to the complainant the contents of the paper which he executed, which was not read to him, he being unable to read; secondly, in misrepresenting the extent and value of the property conveyed, and the extent of the complainant's interest therein.

The bill alleges that the defendant told him, that it was a small tract of land of little value, not producing enough to pay the taxes, and that the complainant had a small interest therein, as one of many heirs, which might not be worth over $50, when in fact the tract was a farm of one hundred and sixty acres, in South Amboy, worth $10,000, and the complainant was the only heir of the person who died last seized, which facts were known to the defendant, who also knew that the complainant was ignorant of them, except so far as he gave information; that the defendant told him that the paper which he executed was a power of attorney, to enable the defendant to get for him his share in the property, for which purpose the defendant said he had been employed by the other heirs, but in fact it was a deed conveying the whole farm in fee, for the nominal consideration of $100, no part of which was paid. The only ground on which relief is asked, and the only matter set out in the bill on which relief can be granted, are these matters of misrepresentation and concealment.

These facts, or either branch of them, if proved, are

abundantly sufficient to entitle the complainant to the relief asked for. The main questions in the case are, as to the truth of the facts; these must be ascertained by the evidence alone. The bill prays that the defendant may answer without oath, and, therefore, his answer, although sworn to, is no evidence for him, though any facts admitted in it are conclusive against him. The defendant, in his answer and in his testimony, denies the fraud, misrepresentation, and concealment, both as to the facts and the contents of the paper.

The main facts of the case, as admitted or proved beyond controversy, are these: William Bennett, called the first, died about the 1st of October, 1790, seized of the farm conveyed by the deed in question. By his will, dated September 16th, and proved October 11th, 1790, he devised this farm in fee to his son William Bennett, the second, then an infant, and not four years of age. He was proved to be between seventy-five and eighty at his death, in 1866. William Bennett, the second, was an idiot, and died without ever having been married, and intestate; he was the only child of his father. William Bennett, the elder, had two brothers, Hendrick and Jacob, and one sister, Agnes, wife of Walter Hyer. Both these brothers had children; but how many, what was their ages, or where they lived, and whether now living or dead, does not appear. William Bennett, the first, by his will, directed that if his son should die under twenty-one, one half of his estate should go to his brother Hendrick's son, William, one fourth to his brother Jacob's son, William, and one fourth to Walter Hyer's son, William, showing that each had one son in 1790. The complainant, Cornelius Hyer, is a son of Agnes Hyer. She had a number of children, all of whom died before William Bennett, the second, except the complainant, and one son named Charles, who had moved away and has not been heard of for thirty years, and is supposed to be dead, but nothing is known of his death, by hearsay or otherwise. The complainant had removed from the state shortly after 1812, and had not

been heard of by his relatives in the state, nor had he heard from them in many years; he was supposed to be dead. Shortly after the death of William Bennett, the second, some of the descendants of Agnes Hyer, the nephews and nieces of the complainant, supposing that all the children of Agnes Hyer were dead, claimed the property as heirs of William Bennett, the second. The claimants were numerous, and for the most part ignorant and poor. Other parties undertook to buy their claims. J. Biddle Herbert bought the claims of parties, who claimed to own fourteen nineteenths of the whole; these were conveyed to him. Joseph Imlay bought a number of these supposed rights, which were conveyed to him.

In February, 1867, J. Biddle Herbert applied to a justice of the Supreme Court for a partition, and on that application a sale was ordered; the property sold for $10,700; the sale was confirmed by the Supreme Court at the Term of June, and the deeds were to be delivered on the 6th of July, 1867. Imlay had employed the defendant as his counsel in this affair, and had agreed to pay him for his services one half of the net profits that he should realize. On Saturday, the 29th of June, Imlay had learned from some relation of the Hyers, whom he accidentally met, that the complainant had been alive a few years before, and received some information as to his residence in the interior of the state of New York. He communicated this to the defendant, and both thought that his claim, if living, would be superior to that of Herbert or Imlay, and agreed that it was important that this should be ascertained before the delivery of the deed on July 6th. The defendant was also counsel for some of the purchasers. The defendant started on Monday, July 1st, to find the complainant. He found his wife near Utica, and learned from her that her husband had for years lived apart from her, and was near Sunbury, in the state of Pennsylvania. He procured her to sign and acknowledge the deed which he had prepared, and which the complainant afterwards executed. He arrived at Sunbury on the morning of July 4th;

was directed to the house of John Ryan, the complainant's son in-law, with whom he lived; on the way he asked for direction of a man mowing in a field, who was John Ryan, and who directed him to his house, where the complainant lived. He found the complainant, told him his business; told him that he was an heir to some interest in this property, of which William Bennett died seized, and that he wanted him to go to Sunbury to execute a paper so that he could settle complainant's right. Mrs. Ryan was present part of the time. Complainant got into the buggy and went to Sunbury with the defendant, and while there executed the deed in presence of A. Jordan, president judge of the district court, before whom he acknowledged the execution; the judge certifiying in the usual form that he first made known the contents to the complainant. The defendant left the complainant at the depot, at Sunbury, at forty minutes past ten, on July 4th, taking the train by which he returned home on the evening of the 5th, so as to prevent the payment by the purchaser at the commissioners' sale, which was to have been made on July 6th, at ten A. M. He was with the complainant only two hours in the whole, and the necessity of his returning was urged as the reason why he could not delay. He gave notice to the commissioners not to deliver the deed, stating that he had a deed from Cornelius Hyer, the son of Agnes Hyer, who was still living, and in whom he believed the title was. The complainant and his son-in-law, Ryan, became dissatisfied and suspicious about the transaction, and came on to the neighborhood of the property, but did not see the defendant. They afterwards met; negotiations were had, but no settlement was effected. The complainant came in contact with John W. Herbert, a cousin of J. Biddle Herbert, who went out to see him at Sunbury, and made an agreement with him, that he, J. W. Herbert, should proceed to recover the property for complainant; Herbert to receive one third of the proceeds recovered, and to pay one third of the expenses, the complainant to receive two thirds, and to

pay two thirds of the expenses. Under that agreement, this suit is commenced in the name of the complainant.

The defendant contends that the deed to him was given upon the agreement that he should proceed and recover the property, or the right of the complainant in it, and that he should pay to the complainant one half of the net proceeds above expenses. And he further contends, that he made no misrepresentations to the complainant, either as to the property or his interest in it, and that the complainant fully understood the contents of the deed, and the effect and object of it. The contest is as to these facts.

The defendant stood in no fiduciary relation to the complainant; he was a counselor-at-law, but he was not, in any way, either the counsel of the complainant or his attorney in this matter. Neither party so understood it, nor is it claimed by the complainant that such relation existed. He presented himself as an agent, looking up the title to this estate, and as having agreed with others to take their claims, and to pay them one half of what he recovered. He presented himself as a purchaser, on speculation, of the rights in this farm, and the parties were dealing on equal terms.

Nor was the complainant of weak or disordered intellect, such as to affect the bargain. No such fact is set up in the bill as the ground of relief; but, if it had been, there is no proof to sustain the allegation. He was, it is true, seventy-six years old. Although some persons are, at that age, of impaired intellect, yet very many have their full vigor of mind past that age. We all know many illustrious examples, in our own day, of statesmen, chancellors, and judges who maintained their full vigor of intellect, and performed laborious duties requiring such vigor, at, and much beyond that age.

The only evidence to sustain want of capacity is that of the three Ryans, and of Mrs. Ryan. This evidence is mere opinion, sustained by no facts. Their own statements show that their opinions are based upon the fact that the complainant had nothing to do, more than upon his incapacity

for doing it. He had physical vigor; he walked sometimes two miles to Sunbury and back, and did it at eleven o'clock at night. He was allowed by his daughter and her husband to go alone to Sunbury with Little, to arrange this business, when they knew that the object was to execute some writing relating to his newly discovered inheritance. Had his mind been impaired so as to unfit him for business, they would not have permitted this. His own examination in this cause shows memory and intelligence, and is of itself sufficient to outweigh any evidence on that head in this cause.

Nor do I think, as was zealously contended by the counsel of the complainant, that the defendant, because he was a counselor-at-law, was bound, in a case where his profession was not concerned, by a higher and different code of law, or even morals, than that which governs other citizens; that he was bound to lay completely before the complainant, and to impress upon him, every view that could be taken of his rights in the strongest manner. No other man, in selling stock, is bound at law, or feels himself bound in morals, to proclaim to the purchaser every unfavorable fact which he has heard as to the prosperity of the corporation whose stock he offers. A counselor-at-law is not bound by any other rule. However desirable it may be, the profession has never yet been placed upon so high a pedestal, elevated above all other avocations.

But, on the other hand, he was dealing with an illiterate and ignorant man, who did not know the situation or value of the property, or the nature of the rights of other claimants. Little knew even more about his own family and relations than he did himself. In this situation, in dealing with this complainant, he was bound to observe strict good faith, not to deceive him by any act or representation of his own, or to allow him to deceive himself by any mistake as to facts, when he knew he was acting under such mistake, and had it in his power to undeceive him.

The first question is as to the misrepresentation of the contents of the deed, and of its purport and effect. On

this issue the burden of proof is upon the defendant; the complainant is not able to read, and in such case it is a part of the necessary proof of the execution of a deed, that it should be shown it was read, or the contents made known to him. The mere proof of making a cross or mark at the end of a deed by a witness who saw it made, but did not know whether the marksman was informed of the contents of the deed, would not be sufficient to give effect to the paper as the deed of the marksman. But this deed has been acknowledged by the complainant as his deed, before such officer as is designated by law for that purpose, and this acknowledgment is equivalent to proof that all the requisites of execution have been complied with; this includes knowledge of the contents, as well as signing and sealing. Even before the act of 1820, requiring the officer to make known the contents, and to certify that he had done so, the acknowledgment would have been *prima facie* proof of this. Since that act, the certificate of the officer that he first made known the contents, which is not only authorized but required by law, is plenary evidence of such fact. It is not conclusive evidence; it may be rebutted and shown to be untrue. In this case the deed of the defendant has in it such certificate. That certificate is signed by a high judicial officer of Pennsylvania, the presiding judge of the eighth judicial district, an officer who would not probably certify that he had just done an act which he had not done; the certificate is in his own handwriting, and more than all, the certifying that he first made known the contents is interlined or added in his own handwriting to the certificate after it was signed; this is evident from inspection of the paper, as well as the testimony of the defendant. The judge could not have mistaken the nature of the paper. Both on the back and upon the front of the document, the words quit claim deed are conspicuously printed; on the back, about one inch from his signature and seal. It is not to be presumed that such an officer would wilfully certify to a falsehood, or would have performed a duty to which his attention was thus called, in a careless or

insufficient way, such as to be of no use to the grantor, or that he would have represented, or allowed it to be represented to the grantor, that this deed was a mere power of attorney. This inference will be strengthened, if the account of the discussion of this matter between the judge and himself, testified to by the defendant, is believed. By this acknowledgment then, the burden of proof is thrown from the defendant to the complainant, and these attending circumstances throw it upon him with a weight to be overcome much greater than the mere technical shifting of the *onus probandi.* In this situation of the matter the only witnesses as to the fact are the complainant and defendant, each equally interested, each equally credible; if they thus neutralize each other, the certificate must decide the question for the defendant. Besides this, these two witnesses stand in a different position from this fact, that the defendant, from his profession and intelligence, fully understood the nature and effect of this paper, and the difference between it and a mere power of attorney, and could not testify as he does, without willful perjury, if he presented this as a power of attorney. The complainant might possibly confound the object for which the defendant said he wanted the deed, that is, to give him power to convey and settle up the property and receive the money, with the character of the paper, and to testify to such impression without intending to falsify. And beyond this, these witnesses disagree as to the fact whether there was any conversation between the judge and the defendant as to the necessity of the certificate of making known the contents. The fact of the addition in the manner it is made, strongly, almost conclusively confirms the statement of the defendant that he mentioned it to the judge. This leads necessarily to the conviction that the defendant is more to be relied on for accuracy or truthfulness, than the complainant. I feel constrained to hold that the allegation of the bill, that the contents of the deed were not correctly made known to the complainant, relied upon as a ground for setting it aside, is not sustained by proof.

The other branch of the fraud, as to misrepresentations of the interest of the complainant in the property, and the value of that interest, is charged in the bill in these words, that the defendant "represented to your orator that the said Bennett died without a will, leaving certain lands in the county of Middlesex, in the state of New Jersey; that there were a large number of persons interested in said lands and estate; that he, the said Little, had been appointed by a number of the heirs of said William Bennett to trace the matter out, and settle up the said estate; and that the interest of your orator in the whole matter would be very small, and that your orator's interest in the whole of said lands or estate would not exceed from $50 to $100;" and again, "that after the execution of the said paper by your orator, and on the same day, he, the said Little, again represented to your orator that the interest of your orator in said lands was very small, but inasmuch as your orator was poor, he, the said Little, would venture to advance your orator $100, although he did not think that the interest of your orator in said lands was worth that sum."

The only witness to these representations, besides the parties, is Mrs. Ryan, the complainant's daughter, who was present at part of the interview, when Little first met Hyer. According to her, Little told Hyer, "that a small property had been left to him on his mother's side of the house, and that he would have a small interest in this property." "Mr. Little did not say anything about the size and value of the farm; he said it was a small property in which father would have a small interest; he said it was not worth much if anything; that it was growed up, and they did not raise enough to pay the taxes." "That there might be $50 coming to father, and there might not be so much—he could not tell." "He said he wanted it to be settled up; this bit of property that he was an heir to, *or* partly an heir to, with the rest. He said his brothers and sisters were all dead except Charles, and he could not tell about him." "My father told Little that he did not know whether his brothers and sisters were

living or dead." If this statement is true, and Little made no more full or other statements to Hyer about the property before he executed the deed, it would go far to sustaining the charge of misrepresentation. Although some of the terms are vague, as "small property" and "small interest," yet when addressed to a man in Hyer's known circumstances, their meaning cannot be mistaken, and they did not state the truth with regard to his interest in this property. But these statements are contradicted by Little, and the statements made by him to Hyer after this interview and before the execution of the deed, were such as to make these of little consequence.

To these subsequent statements the only witnesses are Hyer and Little, and they agree as to the substantial and important parts. Little testifies that when he first met Hyer, "I told him that he had an interest in some lands in New Jersey, and that interest depended on the number of heirs there were living; that the Warnes claimed it, but I believed it belonged to the Bennetts." "I had a memorandum about the members of the family; about his mother Agnes, Hendrick Bennett, and Jacob Bennett; he said he knew nothing about the families of Hendrick or Jacob, nor did he know about his own family, that is, Agnes' children, except Charles, and he did not know whether he was living or dead." "Before we started I told him that his interest in this land was very uncertain; that I did not know what it was; that it depended upon the number of first cousins who were living, and that it also depended upon the Warne interest." "I did not name any sum as the probable value of his interest." "I stated to him that I hoped his interest was large enough to make him comfortable during the rest of his life, him and his wife, but I could not tell about that until I had prosecuted the inquiries elsewhere as to how many of the families of Hendrick Bennett and Jacob Bennett were living, and of his own family, Agnes Hyer; that it might be much or little; at the house I told him it was a farm of some one hundred and fifty or one hundred and

sixty acres." "On our way to Sunbury, Hyer wanted to know what I would give him for his interest. I told him I did not want to buy it;" "that I would not then give him $100 for it, that in my opinion it was worth a great deal more, and that I thought I might get enough out of it to make him comfortable for his life, and probably he would leave something behind for his children." "I think I told him that the property had been sold for upwards of $10,000, but the exact sum I did not know, although I was at the sale, and told him the number of acres mentioned in the deed."

On these points the complainant in his examination testifies: "I told Mr. Little that I did not know whether Charles was dead or alive, I had not heard from him in thirty years; Mr. Little asked me about my uncles, Jacob and Hendrick Bennett and their children, whether I knew anything about them; I told him I did not." "Mr. Little told me that my interest depended upon the number of children who were living of Jacob Bennett, Hendrick Bennett, and of my mother." "He told me that the property had been sold by the executors, or by somebody who had something to do with it." "He told me that he did not know, and that it was impossible for him to say what my interest was; that he hoped I would get enough out of it to make me comfortable for the rest of my life. I do not remember whether he told me that it was better for me to take my share than to sell out my right; he told me that it had been sold by commissioners, and that the deed was to be delivered on Saturday next; he said he expected he would have to law, and that it would be necessary to hunt up the family to ascertain who were living; I told him I had no means myself; I could not do it." "Mr. Little said I had an interest in a small farm in New Jersey; did not exactly say how many acres, about one hundred and fifty acres, I understood Mr. Little; he did not say how much it sold for, nor did I ask."

There can be no doubt from the evidence of both these witnesses, that Hyer understood that the commissioners' sale

was made through claims under title of second cousins of William Bennett the second, and that these claims and this sale were made void and of no account, by the fact that he, a first cousin, was living.

Then, as to his interest: both he and Little expressly state that Little distinctly told him that his share depended upon the number of the children of Hendrick, Jacob, and Agnes, or of first cousins of William the second, who were then living. This proposition is true, and Hyer distinctly understood it. As to Charles, he did not know whether he was living or dead; both no doubt supposed that he was dead, but neither said so. He had not been heard of for thirty years, and before that, was said to be consumptive. Of the children of Henry or Jacob, Hyer knew nothing, and Little seems to have known nothing; it no where in the case appears, that he or any one else knew or now knows anything about them. It was known that one child of each was living in September, 1790; they were mentioned in the will of William Bennett the elder. The complainant was then about a year old; these children may have been of the same age. William Bennett, the second, was about the same age. And it was just as probable that these two children of Jacob and Hendrick should have survived William Bennett, as that the complainant should, and just as probable that they should be found living, although not heard of for many years, as that the complainant, after an absence of fifty-five years, for the greater part of the time unheard from, should be found alive. It was possible, perhaps I may say probable, that both Jacob and Hendrick had other children younger than these, younger by fifteen or twenty years; such, at the death of William the second, would not have been over fifty-six or sixty-six years old, and their surviving him, therefore, not improbable. Now, unless it is shown that these children were all dead, and that the fact was known to Little at the time, or that he had good reason to believe that it was so, his representation was strictly true and honest, and there was no fraud or want of good faith in his making it.

And the fact that the titles of second cousins which he and his associate, Imlay, had been purchasing, were rendered worthless by the discovery of Cornelius Hyer, who was probably dead, or ought to have been presumed to be dead, would just at that time have made these possibilities seem to him of importance, and naturally induce him to present them to the complainant; he expressed no opinion as to the probability of such other cousins being in existence. And in this stage of the cause, with all the evidence produced by both sides, nothing is known by which the conclusion can be reached with any certainty, that all the children of Jacob Bennett and Hendrick Bennett are dead, or even that Charles Hyer is dead. It is highly probable that Charles is dead; he was about seven years older than the complainant. But many persons live beyond the age of eighty-four, even those of apparently feeble constitution. It is rather probable that the children of Jacob and Hendrick are all dead, but the presumption is not a violent one. Under this state of facts, no prudent counsel would to-day advise a client to take the title of the complainant, and pay full value for it. If three other cousins should have been living in 1866, the complainant's share would be reduced to one fourth.

Next, as to the value. Hyer admits that Little told him the farm contained one hundred and fifty acres. Little says he told him one hundred and fifty or one hundred and sixty; the deed, which was read to him, states one hundred and sixty acres; so that there was no design to conceal or misstate that. Little says he thinks he told him that the farm had been sold for over $10,000. Hyer states that Little told him that the farm had been sold by commissioners, but did not state the price, nor did he ask him. At all events, Little did not conceal the sale, nor did he conceal or misrepresent the price. Both admit that he told Hyer that he was in hopes to realize for Hyer's share enough to make him comfortable for life; Little says to make him and his wife comfortable, and to leave something to his children. This is a far different representation from the pretence that

Little said it was not worth $50 or $100. In fact, it is not far from what may be realized from the half of Hyer, if he proved to be the sole owner. It would require from $4000 to $5000 to yield a comfortable support to Hyer and his wife. He certainly and clearly advised the complainant, according to his own statement, that his interest in this farm was, in the opinion of the defendant, of considerable value, far, very far, above the sums of $50 or $100, which he is charged with stating to be the value. Under no aspect of the case could it be considered a fraud in Little, under the relations existing between him and Hyer, not to have mentioned the price at the commissioners' sale, after he had told him of that sale, and given him the temptation as well as the opportunity to ask the price.

Under this view of the evidence, I cannot arrive at the conclusion that Little practiced any fraud or deception on Hyer, in any statement of his interest in this property, or of the facts on which the extent of his interest depended, or of the extent or value of the property. He stated to him what was the truth, that he, or rather Imlay, had purchased the rights of others, supposed to be heirs, on the like terms. The share, one half of the proceeds of the farm, will be large, excessively large, if Hyer proves to be the sole heir and owner of the whole tract; but this excess constitutes no fraud. From the facts before the court, it is by no means clear that Hyer owns the whole or even one half of this tract, and in case he should only own one fourth, the charge could be hardly considered excessive, much less fraudulent.

The charges of fraud in representation as to the interest of the complainant and the value of the property, are, therefore, not sustained, so as to entitle the complainant to the relief sought on those grounds.

This case differs very much from the case of *Reynell* v. *Sprye*, cited for the complainant, and much relied on by counsel. That case is most fully reported in 13 *Eng. Law and Eq. Rep.* 74, but it will be found in 8 *Hare* 262 and 1 *DeGex, McN. & G.* 660. In that case, the interest of

Reynell was not doubtful or precarious, and that fact was known to Sprye, and after he knew it he represented to Reynell that it was doubtful; and he falsely represented to him that it was the practice among men of business, when the title was precarious, to give one half the value to the party giving them information of the title and conducting proceedings to recover the property. By these representations Reynell was induced to convey to Sprye one half of an estate worth £1200, or $6000, per annum, the title to which was clear beyond question. The court set aside the conveyance, and expressly placed the decision on the ground that the representations as to both matters were false, and that Sprye knew them to be so. Here the representations on both these points are true.

But it is urged that this deed should be set aside for want of consideration: but if it could be set aside on that ground in this suit where it is not set up as a ground of relief, yet it is not shown to be true. No money was paid at the time, but the defendant agreed to establish the complainant's title and settle the estate, and give him one half of the net proceeds. Little testifies positively that such was the bargain. Hyer denies that he made such bargain. He says, after he told Little that he had no means to establish his title: "I did not ask him on what terms he would do it; he proposed to give me one half of what was realized after expenses were paid, but I did not agree to it; I did not say that I would not, nor that I would; I made no answer to it. This conversation was on the way to Sunbury. I went right down to Sunbury and executed the paper." These facts constitute an agreement. When one executes and delivers a deed upon terms before offered, but not positively accepted, it is an acceptance of the terms.

It is alleged that the terms of this agreement are so unconscionable and exorbitant, that a court of equity must declare it void; that it would not decree its execution, or allow it to be set up as a defence. This is not a case of specific performance, which being in the discretion of the court, will

not be decreed of a hard or unconscionable bargain. The defendant has the title, and the complainant seeks to set it aside. A promise is a sufficient consideration for a deed; it may be by bond or promissory note, or by parol; all can be enforced at law; it may be for money, or services, or at a day certain or on a contingency. The bargain alleged in this case is not a trust, but simply to perform services and to pay money, and is a sufficient consideration to sustain a deed. Courts of equity never declare deeds void for mere inadequacy of consideration, unless the inadequacy be so gross as to be of itself a convincing proof of fraud or imposition. Under the circumstances on which this case is placed, it is very difficult to say whether this agreement is excessive and exorbitant on the part of Little. The efforts, energy, and sagacity of Little and Imlay discovered the title of Hyer. Little traced and found him, with energy that few men would have exhibited, and without which Hyer would have probably gone to his grave without learning of his inheritance. Hyer had neither money nor sagacity to establish his title, and realize any benefit from the property; he was supported by and under the control of a son-in-law, who could and would control him, and has controlled him in such a way that he will likely never reap any personal advantage from his inheritance. It was a gain at least of independence to him, to be able to assert his claim to this property, by paying the expenses out of the property instead of calling upon Ryan. And on the other side, this suit is perhaps but one out of a number which Little may have to struggle with before he realizes any proceeds. He may only recover a third or fourth of the whole. His energy and sagacity, shown in his discovering Hyer among the mountains of Pennsylvania, would be useful in tracing out the other branches of the Bennett family. Added to this, the influence upon purchasers, which his representations as to the result of his researches might have from his position, intelligence, and character, was of great importance to Hyer, and these advantages might have been worth more to him than the share

given to Little. He had also procured the conveyance of Mrs. Hyer's dower right, on his own promise to provide for her, which might be a material matter on a sale. I am not willing to say that under these circumstances the share given to Little is so exorbitant and unconscionable as to imply fraud and set aside the deed. It does not seem to be so exorbitant and unconscionable as the bargain with Herbert, under which his suit is conducted; by that, Hyer is to advance two thirds of the expenses and Herbert to have one third of the proceeds. Hyer was indebted to Little for informing him of his title; an obligation always treated as worthy of consideration. Herbert, on the other hand, seems in some way to have been connected with the adverse claimants, who had attempted to appropriate the property, and takes advantage of the result of Little's labor, sagacity, and outlay, and simply conducts the suits at joint expense.

I am inclined to think on the whole, that Hyer's original bargain with Little was a wise one, at least much more so than that since made by or for him; that the energy and ability of Little and Imlay, stimulated by a share sufficient to induce exertion, would have sooner settled the true amount of his interest, and would have secured a quicker and larger realization of benefit than will result from his later arrangement.

It is in fact difficult to determine what is a fair or what an excessive charge for services requiring skill, sagacity, and judgment. Such services are often like the fees of eminent counsel, subject to measurement by no fixed scale, and when the amount has been actually agreed upon and fixed by the parties, cannot be reviewed or changed by courts.

I think that the complainant is not entitled to the relief prayed for.

CASES

ADJUDGED IN

THE PREROGATIVE COURT

OF THE

STATE OF NEW JERSEY.

FEBRUARY TERM, 1869.

ABRAHAM O. ZABRISKIE, ESQ., ORDINARY.

RORBACK and others, appellants, and VAN BLARCOM, guardian of Mary Dorsheimer, respondent.

A mere stranger to an alleged idiot, with no allegation of relationship to her, or present or prospective interest in her property, cannot appeal from an order appointing her guardian.

This was an appeal from an order of the Orphans Court of Sussex county, appointing Lewis Van Blarcom guardian of Mary Dorsheimer, an idiot, residing in the province of Ontario, in Canada. The appointment was made under the fifth section of the act concerning idiots and lunatics, upon a record of the finding of the idiocy of Mary Dorsheimer, by the Court of Chancery of the province of Ontario, certified under the seal of the court and the hand of the registrar, verified by a certificate of the governor-general of Canada, under his official seal.

Mr. McCarter, for appellants.

Mr. Linn, for respondent.

The Ordinary.

In general, no person is entitled to an appeal unless a party to the suit, or interested in the subject matter. And the constitution of the state, which is the only foundation for this appeal, says all *persons aggrieved* by any order, sentence, or decree of the Orphans Court, may appeal from the same. A stranger to the matter could not appeal. This is not a suit *inter partes*, but a proceeding *in rem*, strictly so called. The *matter* is the guardianship of the alleged idiot. It is difficult to perceive how any one can have an interest in it besides herself. Any proper person, such as a near relative, or one who has an interest in her estate as her presumptive heir or next of kin, would be allowed to intervene on her behalf before the Orphans Court, or on appeal in her name, as her next friend; but surely a mere stranger, with no allegation of relationship to her, or present or prospective interest in her property, can be entitled to an appeal as a person aggrieved by the decree.

It nowhere appears, by proof or allegation, that the appellants have any interest in the matter, or are in any way related to the idiot.

The appeal, therefore, must be dismissed.

MAY TERM, 1869.

In the matter of the probate of the will of Henry Vanderveer, deceased.

1. The evidence held clearly to establish the testamentary capacity of testator.

2. Where the requirements of the statute, necessary to establish a will, have been fully complied with, and that fact is clearly and positively testified to by two unimpeached and respectable witnesses, the fact that important parts of the will differ from the well known and often declared intentions of the testator, before and at the time of dictating the will, and which he retained afterwards, and contrary to his settled views about his property, will not, in the absence of any proof of influence, or attempt to exercise it, over the testator, suffice to induce the court to refuse its admission to probate, and particularly where parts of the will were in accordance with the clearly established testamentary intention of the testator.

3. In a case where there is great doubt upon the evidence, the court will not reject so much of the will of the testator as from fraud in its insertion, or other cause, is not to be taken as his will, and admit the residue to probate.

4. Fraud in the making of a will should not be inferred because it was possible or even probable, but should be shown by positive proof, or circumstances of such force as not to permit of serious doubt.

This cause came on for hearing upon depositions taken before the register on part of the respective parties.

Mr. B. Williamson and *Mr. Bartine*, for proponent.

Mr. Wurts, *Mr. C. Parker*, and *Mr. Shipman*, for caveators.

The Ordinary.

In this case, the fact of the execution of the will is clearly proved by three witnesses, the two subscribing witnesses, Naylor and Wight, and F. F. Cornell, the executor, who offers it for probate. They also prove the testamentary

capacity of the testator; in fact, the general capacity of the testator, although he was about eighty-eight years old, is not seriously disputed. There is abundant evidence of capacity before and after the execution of the will, and he lived three years after this. His capacity for business on the very day is shown by Vanarsdale, a witness for the caveators, and there is no evidence showing want of capacity. His hearing was somewhat impaired, but he was not deaf; his sight was much affected, and for the purposes of this case he must be considered as blind; it is clear that he could not read this will. He had suffered a very severe attack of disease of some kind in the evening or the night before this will was executed, the effect of which remained on him for some time afterwards, and, according to his own account, continued for some time to affect his mind and confuse his intellect; he supposed he had been poisoned. But still the evidence is, that on that day he had possession of his faculties, and talked rationally about his business.

There is no proof of either the possession of influence over him by Mr. Cornell, or any undue exercise of it, such as to affect the validity of this will. In fact, there is no proof up to this time of any influence or any attempt to exercise it over him by Cornell.

Where a testator is blind, as in effect he was, it must be shown that he knew the contents of the will before it was executed by him. This is shown positively by Wight, who drew the will; he testifies that before he committed to writing each provision of it, he stated such provision distinctly to the testator; and by Wight and Cornell, who both state that before Naylor came, the will was read over in testator's presence.

The real difficulty in the case arises from the fact that important parts of the provisions of the will differ from what was his well known and often declared intentions, before and at the time of dictating the will, and which there is reason to believe he retained afterwards, and are contrary to his settled views and peculiar notions about his property.

He was a man of education and intelligence, a physician by profession, and had never been married. He was born and had always lived upon his estate, which he had named Vanderstade, consisting of a tract of seven or eight hundred acres, which his grandfather had bought in its forest state, and had reduced to cultivation. One part of this he had inherited from his father, the other he had purchased of the heir of his father's brother. In five drafts of wills found among his papers, in his own handwriting, three of which had been completed with great care, and two were signed, but not attested, he had stated that his *great wish*, above all others, was to preserve this estate in the blood and name of his family. The only relatives of the blood and name of the Vanderveer family, or of the ancestry, from whom this estate came, were his cousin, Dr. Henry Vanderveer, of Somerville, and his three children, Lawrence, John, and Louisa. In all these wills he had given this estate to Lawrence and the male heirs of his body, and in default of such heirs, to the heirs male of John; and had made their father, Henry Vanderveer, who was about thirteen years younger than himself, the executor of them. The will was written on the day it bears date, August 23d, 1865, from instructions given to Edwin M. Wight, the lawyer who drew it, after he arrived there, about four o'clock in the afternoon, and less than three hours before its completion. In these instructions he said he wanted to keep the place as a memorial, and to leave it in the Vanderveer name, and would like to tie it up in a trustee forever if he could; and when informed that he could not, but could for two lives, said he would give it to one of the Vanderveer boys for his life, and named Lawrence; and after his death, directed it to go to his heirs.

The will in question gives all the estate, real and personal, to F. F. Cornell, the executor, as trustee, during the life of Lawrence Vanderveer, who is about thirty-five years of age, and was never married, with power to expend any part or the whole of the income of all the estate, in improving Van-

derstade, at his discretion; the balance of the income to be paid to Lawrence Vanderveer; and at his death the whole estate to go to his male issue, if any, and in default of such issue, to F. F. Cornell, jun., the oldest son of the trustee and executor. The issue of John Vanderveer, who had been in the other wills directed to succeed for want of male issue of Lawrence, were not mentioned, although John had, during the instructions, been spoken of by the testator, and he was the second life in being, for which the testator had been told he could tie up this property, in his anxious endeavors to tie it up as long as he could; and this was told him, both during the instructions and by Mr. Cornell, as the result of inquiries made of different counsel at the urgent request of the testator, for the very purpose of framing this will. In this will, too, the testator omitted to provide for a family of negro servants, who had for years been first slaves and then retainers in the family, and who had remained with him, and were his only constant family and household after the death of his maiden sister, which had occurred some years before. These were provided for in the wills drawn by himself. No other person or object was named or provided for in this will. The will only contained four provisions: the first, giving unlimited control of everything to the trustee; the second, giving any residue of the income that the trustee might not choose to expend in improvements or salaries of agents, to Lawrence; the third, giving the whole at Lawrence's death to his male issue; the fourth, on failure of such issue, giving the whole to the oldest son of the trustee, then an unmarried man of twenty-five, and whom, so far as appears, the testator had never seen.

By this, neither the title nor the possession of the property can be in any one of the blood or name of Vanderveer, as long as Lawrence, the only one of the name provided for, shall live, that is, according to the usual probabilities of life, for about thirty years; and the amount of income which he may receive depends upon the discretion or fancy of the trustee in improving. A gift of the homestead, and the

income of the residue to him for life, would have been according to the known intention of the testator, as is the limitation to his male issue after his death. But the residue of the will, especially the unlimited power of indulging his taste or disposition for improvements, and of employing agents ad libitum, at the expense of the estate, is so contrary to the known intentions and views of the testator, that it is exceedingly difficult to believe that he ever understandingly made these provisions; yet it is not impossible that he did make them; and the fact that he did make them is testified to by two witnesses, whose characters are unimpeached, and who are not in this matter directly contradicted by any one.

Mr. Wight is a lawyer, and has practiced as such in the city of New York for several years, and has resided at Somerville for three years. His profession is a respectable one, and although there may be members of it in the city where he practices, of bad character for integrity, yet a large proportion of them are men of high character. If he had been wanting in character, something might have been shown which would have affected his credit, and enabled the court to give only such weight to his testimony as it might deserve.

Mr. Cornell, the other witness, is a native of the state, and has spent much of his life in Somerset county, where he is well known. He is, and has been for years, a clergyman of good repute in two most respectable denominations of similar creed and character; he is the son of a clergyman, and has brothers and brothers-in-law who are clergymen, and he is descended from a family well known in the state, whose name has, for generations, been regarded as a guaranty of pure and elevated character. Had he, in such a position, fallen from this standard, it would have been marked against him, and might have been brought to bear upon his credibility in this cause.

It is difficult to disregard the clear and positive evidence of two such witnesses, uncontradicted, solely upon what ap-

pears to me the mere improbability of such dispositions having been made by the testator.

There are some contradictions of both, by other witnesses, in collateral matters, that go to shake either their credibility, or the accuracy or credibility of these witnesses who prove them. But I do not think, on the whole, that they are sufficient to affect their credibility seriously.

There is more, in my opinion, in the story which each of them has told about his dislike of the position in which he is placed in this will, to create distrust, than in the contradictions of others. Mr. Cornell says that he was dissatisfied with the position in which he was placed in the will, on the ground that the relatives of the testator showed ill feeling, and with the position of his son, because it would be demoralizing for *a child to grow up* with the idea of being made rich by another's death. It is difficult to believe in the truthfulness of the reason as to his own position, as he must have known, when he assented to become executor in such a will as this, that almost all the testator's relatives would be dissatisfied; and his extreme haste and eagerness, after testator's death, to prove the will, in violation of the usual regard shown to the funeral rites, and of the delay required by law, showed that he had but little regard to public opinion, or the dissatisfaction of any of the disappointed. The fear for *a child growing up* seems misplaced for a counselor-at-law of twenty-five, engaged in practice, and largely in other business of a mercantile nature, especially in a father of a large family, growing up with the knowledge that at his death, or that of their mother, each would come to a large estate. He must have been inured to the anxiety, and should have reflected that the mature mind of his oldest son could have borne the prospect of a fortune contingent in itself, and which could never devolve upon him, except at the end of a life, the probable duration of which was thirty years. The honesty or sincerity of this pretence, suggested to the testator, cannot be believed. Wight says, too, that *he felt the great injustice and hardship of a position by him*

assumed in signing the first will as a witness. If he really felt it, he could have been relieved by having the will taken to the testator, and read over and re executed in the presence of two indifferent witnesses. But the great difficulty arises from his conclusion that there was hardship in the position of being a witness to the will of a testator of full capacity and independent position, and on whom no relative had any peculiar claim, unless he was conscious that there was something wrong in the concoction or execution of this will, or in what he would be required to testify, in order to support it. It is usual for a lawyer to attest any will drawn by him, in which he is neither a beneficiary or executor, without any feeling of hardship or injustice.

These pretences of these witnesses, which I cannot but regard as insincere and untruthful, have somewhat impaired their standing in my view. But yet, men often gloss over and apologize for their conduct in certain cases, with excuses devised for the purpose, and which they half believe, who would not, under oath, testify to a direct untruth.

It is difficult to adopt any theory by which this will, or any part of it, can be rejected, which does not involve the veracity and character of these two witnesses.

Besides, if this will is rejected, a part of what is the clearly established testamentary intention of the testator, which he supposed that he had provided for, and which this will will carry into effect, would be thereby defeated. He, without doubt, intended to make provision for Lawrence during his life, out of the income; this will will give effect to that intention, at least to a great extent, for the seemingly unlimited power to expend the whole in improvements and in employing agents, if he should attempt to exercise it, may be restrained within proper limits by the courts. And the gift of the whole on the death of Lawrence to his male issue, is, beyond doubt, one of the long cherished intentions of the testator. If the whole will is rejected, and the testator declared to have died intestate, this result must follow. And I am not prepared, in a case where there is so much doubt

upon the evidence, to introduce, for the first time, in New Jersey, the rule which has been adopted and repeatedly acted upon by the probate courts in England and New York, that if part of a will, from fraud in its insertion, or any other cause, is not to be taken as the will of the testator, the residue may be admitted to probate, and the part which is not his will rejected, and not recorded or copied in the transcript annexed to the probate.

Lord Chancellor Cowper, in *Plume* v. *Beale*, 1 *P. W.* 388, refused relief against a legacy of £100, interlined in the will of the testatrix, by Mrs. Beale, while watching the corpse in the room where the will was, and placed his refusal on the ground that the spiritual or probate court had power to prove the will, with a reservation of this legacy. Sir George Hay, in *Barton* v. *Robins*, 3 *Phil.* 442, note *b*, admitted part of a will, and rejected the residue; his judgment was affirmed in the Court of Delegates, in 1769. Sir John Nicholl, in *Billinghurst* v. *Vickers*, 1 *Phil.* 187, pursued the same course. Surrogate Bradford, of New York, in the case of *Burger* v. *Hill*, 1 *Bradf.* 360, approved and acted upon the same doctrine, and sustains it by many precedents. One of his predecessors, Surrogate Campbell, a judge of reputation on testamentary matters, in 1833, in the case of the will of Catharine C. Young, in an opinion which is not preserved or reported, but which I have read, admitted part of the will to probate on evidence like that in this case, showing that the part retained was according to her well known intentions declared to her family, and on proof that the part rejected differed from such intentions and was, at the instance of those by whom she was surrounded, put in a will executed in extreme illness when there was some reason to doubt her capacity to change her cherished intention. And, although in a subsequent decision upon the same will in this court, by P. Dickerson, Ordinary, the whole will was admitted to probate, it was because the court did not reach the same conclusion from the evidence, and not because of a different view of the power

of the court. In this case, by admitting the will to probate, except paragraphs marked *a* and *c*, and the part of paragraph *d*, after the word "surviving," the provisions of the will remaining would give effect to intentions which all admit were adopted by the testator, and would exclude the parts contested by the caveators, and over which serious doubt is thrown. The gift of the income of the lands to Lawrence for life, would give him the estate. The provisions omitted could not, by the force of the statute of wills now in force, be supplied. Though this, in England, was done before the statute of Victoria.

I have had great doubt whether I ought not to adopt this course with regard to this will. But notwithstanding all those considerations, and the great difficulty I have in really believing that the testator, understandingly, could have executed a will like this, I do not feel at liberty to disregard the evidence of two unimpeached and respectable witnesses, who clearly and positively testify to the facts necessary to establish this will. Courts and jurors must be cautious in rejecting positive testimony, and should never disregard it simply because of their own theories of its probability or improbability. And fraud should not be inferred, because we see it was possible or even rather probable; but it should be shown by positive proof, or circumstances of such force as not to permit of serious doubt.

For these reasons I have been constrained to come to the conclusion to admit this will to probate, entire. And if I should err in this result, to which I have arrived not without great distrust of its correctness, I am relieved by the fact that since this cause came into court, an act has been passed giving an appeal to a court composed of judges whose learning and ability will give relief from any errors into which I may have fallen, and whose numbers will give authority to, and confidence in their decision. And if they should differ from me in their view of the facts, their authority will finally settle the practice to be pursued in such

case, where one part of a will is, and another is not, the true will of the testator.

In this case, as there were clearly reasonable grounds for the action of the caveators in contesting this will to the full extent in which it has been done, their costs and expenses, including proper counsel fees, must be paid out of the estate.*

MUNN'S EXECUTOR, appellant, and MUNN, respondent.

1. Compensation for services as executor.

2. Action of respondent being for advantage of all concerned, his costs and a reasonable counsel fee allowed out of estate.

This was an appeal from the decree of the Orphans Court of the county of Essex, upon exceptions taken by the respondent to the account of the appellant. The Orphans Court reduced a charge made by the appellants of $1845 for services to the testator in his lifetime, to one half of that sum, or $922.56, reducing the rate of $30 per month to $15 per month.

Mr. W. S. Whitehead, for appellant.

Mr. J. W. Taylor, for respondent.

THE ORDINARY.

The question is one upon the evidence, as to the value of the appellant's services; whether they were worth $30 per month as charged in the account, or only $15 as allowed by the Orphans Court.

The value of services of the nature of those in this case it is very difficult to determine; they were of a very irregular and desultory kind. There is no standard by which they can be measured. They must be judged of by the circumstances under which they were rendered, and the relation of

*Decree reversed, 6 *C. E. Gr.* 561.

the parties, and the object and purpose of both parties in making the engagement.

Upon considering the evidence in the case, and looking at all the circumstances attendant upon the engagement, I am of the opinion that the amount fixed by the Orphans Court was a fair and proper allowance. I must, therefore, affirm the decree.

The costs of the respondent, including a reasonable counsel fee, to be paid out of the estate, his action being for the advantage of all concerned.

OCTOBER TERM, 1869.

In the matter of the probate of the will of Christopher Hebden, deceased.

1. A will drawn by an attorney, a few hours before the testator's death, pursuant to his instructions, but its execution postponed until he should feel stronger, though he asserted that his will was as it had been drawn, refused admission to probate as a nuncupative will.

2. It is essential to a nuncupative will that it be only a *verbal* declaration of the testator's wishes made in the presence of witnesses called upon by him to bear witness that such is his will.

The contest in this case is as to the validity of a will offered to be proved as the nuncupative will of the deceased. Citations were issued to the next of kin, who appeared by their proctor, and depositions were regularly taken to support the will. The argument was had upon these depositions.

Mr. Stone, in support of the will.

Mr. T. Runyon for contestants.

In re will of Christopher Hebden.

THE ORDINARY.

Christopher Hebden died on the 16th of July, 1866, in the city of Newark, at a house where he had been residing for sixteen weeks; he was over seventy years of age, and had personal property of more than $10,000 in value. He sent on that day for some one to draw his will. In compliance with this message an attorney came about eleven o'clock, and at his request took instructions from him for writing his will; these instructions were written down, and from them the attorney drew a will complete in its disposition, except the christian name of Mrs. Stephens, one of the three residuary legatees, but without any date or testandum clause, and without any attestation clause. This he read to the testator in presence of two other witnesses, and the testator said that was the way he wished his property to go. He had then become weary, and desired to leave the matter until Mrs. Stephens' name could be ascertained, and until he should feel somewhat stronger, and was unwilling to sign the will at that time. The attorney went away with the understanding that he was shortly to return and finish the will, and have it executed. He returned in about two hours, and the testator was dead.

The attorney afterwards reduced to writing the particulars of the transaction in these words.

"We do hereby certify that, being in the room with Christopher Hebden, formerly of Clinton township, Essex county, New Jersey, in Coe's place, rear of 57 Court street, in the city of Newark, in said county and state, on Monday, the 16th day of July, 1866, the said Christopher Hebden, then being of sound mind and memory, did, in our hearing, say to John P. Jackson, junior, lawyer, of Newark aforesaid, who was directed by the said Christopher Hebden to prepare his will, that his will was in manner following." Then reciting a copy of the draft prepared and read to the testator, it continues: "We do also certify that we were present at the time of the making of the declaration aforesaid by the said Christopher Hebden, and that the same was made

by him a few hours before his death in the house of Daniel Smith, in Coe's place aforesaid. In witness whereof we have hereunto set our hands this 20th day of July, 1866." This was signed by the three persons present on the day of its date.

There was no evidence either in this paper or the proofs, that he had bid the persons present, or any of them, to bear witness that that was his will, or that he used any words to that effect. The only proof was that he gave directions to the attorney to draw a will to that effect.

The statute of 1851, concerning wills, directs that all wills shall be in writing and signed by the testator in the presence of two witnesses, but provides that this shall not affect the existing law relating to nuncupative wills. That law was the statute concerning wills passed in 1846, and which re-enacted, almost literally, the provisions relative to nuncupative wills contained in the statute of frauds. 29 *Car.* 2, *ch.* 3. These provide that no nuncupative will shall be good, unless the testator at the time of pronouncing the same did bid the persons present, or some of them, to bear witness that such was his or her will, or words to that effect.

The objections made by the next of kin to the probate of this will are two: The first, that the testator did not make or intend to make a nuncupative will, but only to give instructions for drawing a written will to be executed at a future time. The second, that one of the essential requirements of the statute was not complied with, as he did not call on any one to bear witness that this was his will, or use any words to that effect.

The term "nuncupative will," as used in their statute of frauds, has always been held, by the English courts, to mean a will not committed to writing by the direction of the testator; one whose efficacy depended upon its being declared verbally by him to be his will. Directions or instructions for wills reduced to writing by the testator, or by some other person by his direction, have never been considered as nuncupative or oral wills, but have uniformly been treated and proved as written wills. Wills of personal estate were not

required to be signed or attested in England until 1838, by the statute of wills of 1 *Vict.*, or in this state until the act of 1851, or rather until the act of 1850, for which that was substituted. The provisions of the statute of frauds relating to nuncupative wills, which had been in force for more than one hundred and fifty years, did not prevent admitting to probate actual testamentary dispositions which had been committed to writing by authority of the testator with intention to execute, if left unsigned by accident, or the act of God.

The judgment of Sir John Nichols, in *Huntingdon* v. *Huntingdon*, 2 *Phil.* 213, shows that this was the established doctrine of the ecclesiastical courts. In 1686, shortly after the statute of frauds, the English Court of Chancery, in *Strish* v. *Pelham*, 2 *Vern.* 647, held that the instructions of Strish, committed to writing by the person to whom he gave them, constituted a good will, and none of the requirements for a nuncupative will were shown. This is referred to by Chancellor Walworth, in his opinion in *The Public Administrator* v. *Watts and Leroy*, 1 *Paige* 373. And in that case, in the Court of Errors, 4 *Wend.* 168, the will of John G. Leake, found in his safe unsigned, though with a testandum clause, showing that it was designed for formal execution, was admitted to probate, because written out by himself, though not published as required for a nuncupative will.

A nuncupative will is defined by Perkins, § 476, to be "when a man lieth languishing, for fear of sudden death, dareth not to stay the writing of his testament, and therefore he prayeth his curate and others to bear witness of his last will, and declareth by word what his last will is." In 7 *Bac. Abr.* 305, *Wills D*, the same definition is adopted. It is approved by Chancellor Kent, in *Prince* v. *Hazleton*, 20 *Johns. R.* 502.

If these authorities are correct, and they are supported by the literal meaning of the word, a nuncupative will can only be a verbal declaration, made in presence of witnesses called

on to notice it, and not reduced to writing by direction of the testator. He must intend, at the time, that the verbal declaration so declared shall be his will. This is entirely inconsistent with the position contended for, that unexecuted verbal instructions for a will, which are intended to be reduced to writing and signed, may be proved as a nuncupative will. The very essence and substance of the matter is, that the testator shall intend the declaration so made to be his will. And the words of the statute require this construction; they are "at the time of pronouncing the same, bid the persons present." These refer to the publication, or pronouncing the declarations to be his last will and testament. This is a formal adoption of the declaration as his last will, not a postponing it for future execution as the adoption of it.

I am aware that there are cases in several of the states, in which written instructions have been admitted to probate as nuncupative wills. It may be that the statutes of these states require such action; but if they do not, I am not willing to hold that written instructions can constitute a nuncupative will, in face of the statute requiring written wills to be signed, introducing a new rule that declared invalid such instructions, which had before been proved as written, not as nuncupative wills.

The second objection, that there was no *rogatio testium*, no asking of any one to bear witness, is, in my opinion, also well taken. The statute of 29 *Car.* 2, *ch.* 3, and our statute of wills, intended to adopt this requisite, which entered into the definition as given by Perkins, and in Bacon's Abridgment. It requires, explicitly, that the testator shall call upon those present to bear witness that such is his will. This is clearly a different act from pronouncing it to be his will. It is distinguished by the very words of the statute. Simply saying, "It is my will," or "I wish thus," is a declaration or pronouncing of what the will is. This the statute declares shall not be sufficient; but that the testator shall go through the form of bidding or asking those present to witness that it was his will. This is a salutary provision

against fraud that is very efficacious to prevent the talk of a testator not meant to go into effect as a will, from being proved as such. I find no authority or case in England or in this country, for dispensing with this plain requisition of the statute. The English authorities uniformly hold that all the requisitions of the statute must be strictly complied with, and the compliance clearly proved. *Bennett* v. *Jackson*, 2 *Phil.* 190; *Parsons* v. *Miller*, *Ibid.* 194.

In *Lemann* v. *Bonsall*, 1 *Addams* 389, Sir John Nicholl doubted whether a nuncupation beginning thus, "Listen all of you what I, Elizabeth Jones, do say," was a sufficient compliance with the statute. And calling upon witnesses by the testator himself, was held essential to the validity of a nuncupative will, in *Winn* v. *Bob*, 3 *Leigh* 140; *Brown* v. *Brown*, 2 *Murphy* 350; *Gwin* v. *Wright*, 8 *Humphreys* 639; *Ridley* v. *Coleman*, 1 *Sneed* 616; *Arnett* v. *Arnett*, 27 *Ill.* 247.

On both grounds, I am of opinion that probate of this will must be denied.

PRICKETT and others, appellants, and PRICKETT'S ADMINISTRATORS, respondents.*

1. Delivery of a bill by a decedent, shortly before his death, to his son, who took out letters of administration, at the same time telling him to collect it and take care of it, is not a gift, and he will be required to account for it.

2. Compensation cannot be recovered for services rendered a parent after the child attains majority, while a member of his parent's family, where no arrangement or agreement has been made as to payment for such services, and no circumstances are shown from which such an understanding can be fairly inferred.

This was an appeal from the decree of the Orphans Court of the county of Burlington, refusing to allow exceptions

*CITED *in Gardner's Adm'r* v. *Schooley*, 10 *C. E. Gr.* 154.

taken by the appellants to the final account of the respondents, as administrators of Zachariah Prickett.

Mr. F. Voorhees, for appellants.

Mr. Merritt, for respondents.

THE ORDINARY.

The first exception in the Orphans Court is, that the accountants had not charged themselves with all the estate of the deceased, which had come to their hands. The proof to sustain this was, that the accountant, Charles S. Prickett, lived with the intestate, who was his father, to the time of his death, as one of his family, and had the management of the intestate's farm, and sold the produce and received the price, which he paid over to his father. The deceedent shortly before his death handed to Charles a bill of $102, for grain sold, told him to collect it and take care of it. Charles collected the money after his father's death, but did not charge himself with it in his account. The whole question depends upon the inference to be drawn from the language of the intestate, in handing the bill for collection. The respondents contend that this was a gift. The words clearly do not import a gift, and there is nothing in the circumstances or the habit of dealing between the parties before this, which can convert this expression into a gift. I think the court should have charged the administrators with this amount received by one of them.

The second exception is to the allowance and payment of accounts presented by four of the children of the deceased, for services performed in his lifetime, while living with him as members of his family.

When a child renders services to a parent, after the child is of age, but while he is a member of the parent's family, and no arrangement or agreement has been made as to payment for such services, and no circumstances are shown from

which such understanding can be fairly inferred, the child cannot recover compensation for such services; nor, on the other hand, can the parent recover for board, clothing, or other things furnished to a child while living with him as a member of the family, without some agreement or understanding for that purpose; and especially when such services are rendered by a child who receives board, clothing, and other support from the parent while a member of the family, and no agreement or understanding is had as to payment for either, it will be inferred that neither was to be paid for. *Ridgway's Ex'r* v. *English*, 2 *Zab.* 409; *Updike* v. *Titus*, 2 *Beas.* 151; *Updike* v. *Tenbroeck*, 3 *Vroom* 105.

The fact that each of these children rendered these services for years before the death of their father, and received their support from him, and that neither kept or rendered to their father any account for their services or of their support, and that compensation or amounts were never spoken of or alluded to between them, is strong proof that compensation was not expected or intended by either party. Gilbert, one of the sons, had been away from home after he became of age, keeping school and working at wages for himself, but staying at his father's from time to time. His father told him there was a home for him, and he must help take care of it; that he could earn as much there as he could anywhere else, and that his help was needed there. After that Gilbert remained at home, worked on the farm and was supported by his father. This does not amount to an agreement to pay wages, or to an understanding that he was to return home on wages. It was the offer of a home to a son who had been engaged in desultory occupations since he had left it, with an assurance that he could make himself useful, and would be no burden to his father if he would help take care of it. Gilbert so considered this offer, for he presented no account to his father for these services in his lifetime, and testifies that he did not intend to present an account after his death, until he found that others of the children were

doing so. As to the accounts of the other children, there is no proof whatever to take them out of the established rule in such cases. The Orphans Court should have sustained this exception, and the decree must be reversed.

In the matter of the estate of James Eakin, deceased.*

1. In the settlement of estates by executors, neither the Orphans Court, nor the Prerogative Court, can make an order of distribution.

2. The order of distribution is not made by any authority or power inherent in the court, and the statute authorizes such order in cases of intestacy.

3. The Ordinary, in England, never had the power of making an order of distribution where there was a will.

Two of the executors of James Eakin, deceased, together filed their account in the Prerogative Court, showing a balance in their hands of $10,665.10. The other executor filed his separate account, showing a balance in his hands of $43,194.82. The two executors took a rule against their co-executor to show cause why he should not pay over to them so much of the balance in his hands as would, added to the balance in their hands, make the full amount in their hands at least two thirds of the aggregate balance, to be invested under the order of this court, or otherwise, pursuant to the trusts reposed in the executors, by the will. The cause was heard upon the argument of the rule.

* Note.—The reporter is indebted to Gov. Vroom for a copy of this opinion, delivered at February Term, 1858, but never reported. It settles an important question not before decided in this state, and, therefore, though greatly out of its chronological order, it is published here.

In re estate of James Eakin.

Mr. J. C. Ten Eyck and *Mr. Browning,* for the rule.

Mr. A. L. Eakin and *Mr. P. D. Vroom,* contra.

WILLIAMSON, Ordinary.

After the settlement by the executors of their accounts in this court, the following rule was taken: "The separate account of Alexander R. Shreve and Zachariah Reed, two of the executors of said testator, having been settled, by which it appears that there is a balance in the hands of the said two executors to the amount of $10,665.10, and the separate account of Alphonso L. Eakin, one of the executors of said testator, having been also settled, by which it appears there is a balance in the hands of said executor, to the amount of $13,194.82; it is therefore ordered, on motion of John C. Ten Eyck, esq., proctor of said two executors, Alexander R. Shreve and Zachariah Read, that the said Alphonso L. Eakin, executor as aforesaid, do show cause, before this court, at ten o'clock in the forenoon of the third Tuesday of November next, why so much of said balance in his hands as aforesaid, shall not be paid, or handed over by him to said Alexander and Zachariah, as will, being added to the said balance in their hands, as aforesaid, make the full amount in their hands, at least two thirds of the aggregate balance aforesaid, to be invested under the order of this court, or otherwise, in execution of the trusts reposed in said Alexander R. Shreve, Zachariah Read, and Alphonso L. Eakin, by the will of said testator. And it is further ordered that either party have leave to take affidavits, on notice, of themselves and witnesses, to be read on the final argument of this rule. Dated October 30th, A. D. 1857."

Counsel have been heard on both sides, on a motion to make this rule absolute. As it was admitted on the argument, that the success of the motion must depend upon the power of the Prerogative Court to make an order or decree of distribution, I shall confine myself to that question, as my view of it necessarily disposes of the motion before the

court. On the argument I asked the question if there was such a thing as an order of distribution, in the settlement of estates by executors. It struck me as a novelty at the moment, and as being entirely opposed to all my recollections of the history of the law in the settlement of estates.

In the case of *intestacy*, the law administers and disposes of the estate. After the debts are paid the next of kin are entitled to the residuary estate. Upon looking into the history of the law upon the subject, we shall see how it became a matter of necessity, in cases of intestacy, to make an order of distribution. But as to the settlement of estates by executors under a will, all that executors have to do is to execute the will of the testator. The rights of legatees under the will, do not depend on a decree of the court. It is true, the court settles what amount of assets are in the hands of the executors, out of which the legacies are to be paid; but a legatee is not obliged to wait for such a settlement before he can maintain a suit for his legacy. One of the propositions of the counsel, who argued for the rule, was that no suit could be brought for a legacy until the court made a decree of distribution. This certainly is a mistake. The cases cited do not sustain the position. *The Ordinary* v. *Smith's Ex'rs*, 3 *Green's R.* 94, and *Wier's Adm'rs* v. *Lum*, 2 *South.* 823, were cases of intestacy. Williams, *on Executors*, *vol.* 2, *p.* 905, remarks: "The office of an administrator, as far as it concerns the collecting of the effects, the making of an inventory, and the payment of debts, is altogether the same as that of an executor; but as there is no will, except the administration be *cum testamento annexo*, to direct the subsequent disposition of the property, at this point they separate, and must pursue different courses." Why do they separate? Because the will of the testator is to govern as to the disposition of the estate in one case, while the law regulates it in the other. The will directs the executors as to the subsequent disposition of the property; and it is because there is no such guide, that the court directs the administrators in case of intestacy. In legislating upon the subject,

the law making power have seen fit, in cases of intestacy, to impose upon the court the duty of ascertaining who are entitled, as next of kin, to the residuary estate, and to order distribution accordingly. But they have imposed no such duty in the case of executors. The next of kin founds his suit upon the order of the court. The foundation upon which the legatees rest, is the will of the testator.

The order of distribution is not made by any authority or power inherent in the court. We shall see that the court attempted to exercise such a power in vain; and that it was in consequence of such failure that the statute was passed, conferring the authority. It was insisted that the Ordinary here had the same power and authority in the settlement of estates, that the Ordinary, in England, formerly had. Admitting this to be so, it certainly cannot be shown that the Ordinary ever exercised the power of making a distribution in estates where there was a will. It would be impossible, in many cases, to exercise the power. It necessarily involves the right to settle all disputes arising upon the construction of a will, and makes the court, where the will is proved, a court of construction. This proposition being admitted, then it follows that all our orphans courts possess the same power. This certainly was never dreamed of. If it can be shown that the power is not inherent in the court, but is derived from the statute, then it becomes a mere question as to whether there is any statute covering the case.

After the crown had invested the prelates of the church with that branch of its own prerogative, the control over the transitory goods of the deceased, on the ground that none was more fit to have such control than the Ordinary, who all his life had the care and charge of his soul, such flagrant abuses grew up, that the legislature passed the statute of Edward III, which was the origin of the office of administrator. This statute compelled the Ordinaries to depute "the next and most lawful friends of the dead person intestate to administer his goods." After the Ordinary was di-

vested, by this statute, of his authority of administering, himself, the intestate's effects, the spiritual court attempted to enforce distribution, and took bonds of the administrator for that purpose. Then the temporal courts interfered, and declared such bonds to be void in law, on the ground that, by the grant of administration, the ecclesiastical authority was executed, and ought to interfere no farther. *Hughes* v. *Hughes*, 1 *Lev.* 233. Prohibition on a suit in the Ecclesiastical Court, for obliging an administrator to a distribution. And upon long and solemn arguments, and hearing of civilians at large, it was resolved: That the Ecclesiastical Court could not oblige an administrator to a distribution, and that their bonds, taken to that intent, are void. And, also, *Slawney's case*, *Hobart* 83. The result of these decisions was to give the administrator the residue of the intestate's effects, after paying off the debts and funeral expenses. This continued abuse gave rise to the statute of distribution. 22 and 23 *Car.* 2, *ch.* 10. This statute compels the administrator to give bond to the Ordinary. A part of the condition of the bond is, that "all the rest and residue of the said goods, chattels, and credits which shall be found remaining upon the said administrator's account, the same being first examined and allowed of by the judge or judges for the time being of the said court, shall deliver and pay unto such person or persons respectively, as the said judge or judges by his or their decree or sentence, pursuant to the true intent and meaning of this act, shall limit and appoint." The Master of the Rolls, in 2 *P. Wms.* 441, says: "The occasion of making the statute of distribution, was to put an end to the long contest which had been between the temporal and spiritual courts, for when the spiritual courts ordered any distribution, or bond to be given by the administrator for that purpose, the temporal courts sent a prohibition, being of opinion that the administrator had a right to all, and that the spiritual court could not break into that right; and so this statute was made in favor of the practice of the

spiritual court, which proceeded to order distribution as often as the common law courts did not prohibit them."

This statute was passed, then, because the court had not the power to decree distribution. But it is evident that it had nothing to do with the office of executor. Its object was to correct an existing abuse, which was that the administrator, instead of distributing the residuary estate among the next of kin, appropriated it all to himself. No such abuse did or could exist in reference to executors, and there was, therefore, no necessity for such a statute in case of testamentary estates. It cannot be pretended that, prior to this statute, the Ordinary ever attempted to control executors in the distribution of estates; for, it is stated, by Holt, Chief Justice, in *Petit* v. *Smith*, 1 *P. Wms.* 6, as the ground of the decisions which induced the passage of the statute of 22 and 23 *Car.* 2, that the administrator had all the power of an executor, and being in the nature of an executor, it was adjudged that he was not compellable to make distribution.

The Ordinary, in England, never had, and this court never has exercised, the power, and I think it is very clear never possessed it, of making an order of distribution where there is a will. I do not see how it can be done. The statute certainly has no application to executors, and its language is such that it cannot be applied to them. It declares, (*Nix. Dig.* 305, § 12,*) "that it shall and may be lawful to and for the judges of the Orphans Court of the respective counties of this state, after such administrators shall have legally accounted for and touching the goods, chattels, and credits of the person so deceased, to order a just and equal distribution of what shall remain clear after debts, funeral charges, and just expenses of every sort, first allowed and deducted, among the wife and children," &c. And then the statute gives to the distributees their remedy. The statute is not only confined to administrators in its language, but its provisions are not applicable to executors. It applies necessarily, by its very terms, to estates of intestates only.

The executor having settled his accounts in the Preroga-

*Rev., p. 784, sec. 146.

tive or Orphans Court, neither court has any farther control over him, or over his accounts, except such as is expressly conferred by the statute. If there are trusts created by the will, the proper execution of which requires a distribution of the assets among the executors; or, if there are reasons extrinsic the will which make it proper that the funds should be taken out of the hands of one, and committed into those of other executors; or, if there are equities to be adjusted between the executors; relief must be sought in some other tribunal. The testator has, by his will, taken away from the court the administration of his estate, and given it to the persons appointed to execute his will. The statute may give to the court power, but when no such power has been conferred by statute, none can be exercised.

If the views I have expressed are correct, this court has no control over the matters embraced in the rule, and it must be discharged.

CASES ADJUDGED

IN THE

COURT OF ERRORS AND APPEALS

OF THE

STATE OF NEW JERSEY,

ON APPEAL FROM THE COURT OF CHANCERY.

MARCH TERM, 1869.

THOMSON'S EXECUTORS, appellants, and NORRIS and others, respondents.

1. A bequest to "*benevolent*, religious, or charitable institutions" is void, as it embraces, by force of the term "benevolent," objects which are not, in a legal sense, charities.

2. The common law, as interpreted in decisions founded on the statute of 43 *Elizabeth*, *ch.* 4, prevails in this state with respect to the question, what constitutes the legal definition of a charitable use.

Quære. Whether a power to appoint a fund among *strangers* to the donee of the power, after the expiration of a life interest in the fund given to such donee, is a power in gross, and, therefore, extinguishable?

3. But conceding such power of extinguishment to exist, the donee of the power cannot release it, without the consent of all the appointees, for a consideration of benefit to himself.

4. A donee of a power, having a life interest in the fund, and having made an arrangement with the next of kin of the donor as to the distribu-

tion of such fund between herself and them, such arrangement sustained on the ground that it had been validated by an act of the legislature, although some of the appointees under the power were infants, and could not consent to it.

John R. Thomson, by his will, dated July 20th, 1862, after giving certain legacies, directed as follows: "And I further direct, that from the income of the residue of my estate there shall be paid an annual sum of $10,000, payable semi-annually, to my wife, Josephine A. Thomson; and I authorize and empower my said wife, by her last will and testament, duly executed, to direct, limit or appoint, give or devise the portion of the estate so appropriated for an income of $10,000 a year for her support, to give or devise the same to and among all and every the children of my sisters, Caroline Norris and Amelia Read, and their children, in such proportions and for such estate or estates as she may think proper; or, if my wife so chooses, she may, by her last will and testament aforesaid, direct, limit or appoint, give or devise the same to and among my sisters, Caroline, Adeline, and Amelia, and their children, and grandchildren, and my brother, Edward, in such proportions and for such estate or estates as she may think proper; and my said trustees, their heirs, executors, and administrators, are hereby required to pay, assign, convey and transfer the same to the said appointees, according to the directions, limitations, and appointments, gifts, and devises in the said last will of my said wife.

"And I further direct, that if the income from my estate, after the payment of the bequests herein before made, shall exceed the sum of $10,000 a year, that the surplus be invested in good securities; and that my said wife, Josephine, shall be authorized and empowered, by her last will and testament, to give and devise the same among such benevolent, religious, or charitable institutions as she may think proper; and in default of such directions, limitations, and appointments, and so far as the same shall not extend, then to pay, assign, convey, and transfer the residue to my said three sisters, Caroline, Adeline, and Amelia, and my brother,

Edward, their heirs, executors, and administrators, as tenants in common, to whom I give and devise the same."

The widow and the brother and sisters of Mr. Thomson, the testator, in the belief that the provision in the will in favor of benevolent, religious, or charitable institutions was void, on the 3d of April, 1868, entered into a sealed agreement whereby it was provided, that after the payment of debts, the expenses of administration, and the specific and pecuniary legacies, the estate of the testator should be divided between them; the widow, Mrs. Thomson, to take two thirds, and the brother and sisters of the testator to have the remaining third; and in consideration thereof Mrs. Thomson released, surrendered, relinquished, and yielded up her powers of appointment and covenanted not to exercise the same. In this agreement, each party requested the executors to pay to the other the share thus agreed upon, and stipulated to execute to them all proper releases and discharges.

By an act of the legislature of 10th of April, 1868, reciting this agreement, the powers of appointment in the will were declared ended and determined, and the agreement ratified and established, and the executors were authorized to carry out and effect the settlement agreed upon.

The executors, being unwilling to incur the risk of yielding up the trust funds, except upon a judicial sanction, this suit was brought to compel a distribution of the estate in conformity with the agreement between the widow and the brother and sisters of the testator. The prayer of the bill was, "that the defendants, trustees, may set forth a just and true account of the present subjects of the trust now in their hands as such trustees, and that they may be compelled, by the decree of this honorable court, to pay, assign, convey, and transfer the same to and among the said several parties to the said agreement, in the shares and proportions therein mentioned."

The decree appealed from declared the agreement valid,

and directed a distribution of the funds in accordance with its provisions.

The opinion of the Chancellor is reported in 4 *C. E. Green* 308.

Mr. Wm. Henry Rawle, (of Philadelphia) for the executors, appellants.

1. The trustees under Mr. Thomson's will are bound, as well by the confidence which their testator has reposed in them, as by the oath which they have taken as executors, to defend the trust which that will has created. They have, and can have no discretion in the matter—no personal feelings or views. The will is not theirs, it is their testator's, and unless its provisions are unlawful, they are bound to carry them into effect. If the testator's family think that they could have made a better will, and consequently get together and execute what they call a "family settlement," and then ask for the decree of this court to carry it into effect, they can only succeed on the ground of the will itself being intrinsically defective. The class of cases of which *Stapilton* v. *Stapilton,* (1 *Atkyns* 2; 3 *Lead. Cases in Equity* 684,) is the leading one, never went so far as to substitute a family settlement for a will, and to allow the latter to be repealed by the former.

As a mere family settlement, therefore, the case of the complainants has no especial merit.

II. If such be the case, no such act of the legislature as has been passed can give it validity as against the will of the testator. That will has created certain trusts, and if those trusts are valid, no legislative act can give validity to a family bargain by which they are agreed to be considered as invalid. The safety of every state requires that the difference between the judicial and the legislative branches of government should be sharply drawn, and if the trusts created by this will be in themselves valid, and a chancellor should deem himself bound to refuse to substitute the

settlement for the will, the legislature cannot rush in where the judiciary has feared to tread.

But it is urged that the act takes away no vested interest or vested estate, and therefore that under the authority of *Croxall* v. *Sherrerd*, 5 *Wallace* 268, and other cases of this class, it can validate an agreement made between all the parties now *in esse*.

But the distinction is familiar between legislative acts which operate as modes of assurance—which give powers of sale—which unfetter restrictions—which confirm defects, and legislative acts which divert the channels of the testator's bounty—which take away property from one person and give it to another. All the cases referred to are of the former class; not a case can be cited in which an act of the latter class has ever been sustained; and when this statute of April 10th, 1868, undertakes to approve and confirm the release by a donee of a power which is purely collateral, it is simply an act of confiscation of that power, and a repeal of a settled principle of the common law from the Year Books down. Unless, therefore, the trust is in itself bad, no act of the legislature can, it is submitted, have any operation whatever.

III. We, therefore, come down to the investigation of the will itself.

a. There are two powers of appointment given to the widow: one, a power to appoint the *corpus* of her annuity to the testator's family, which is a power in gross; and the other a power to appoint the surplus income accumulated at her death (in which she has, and can have no interest whatever) to certain institutions, and this is a power purely collateral.

As to the former power, the authorities seem to decide that it may be released in favor of the ulterior objects of the appointment; and if the widow had made a settlement with the appointees under *that* power, it is probable that no subsequent execution of the power, inconsistent with the

terms of this settlement, would be supported either at law or in equity.

b. It is far different in the case of a power simply collateral. From the case printed by Mr. Sugden from the Year Book of 14 *Henry* 7, and from Digge's case which followed it, down to this day, the authorities are consistent that such a power cannot be suspended, released, or extinguished. The claim, then, of these plaintiffs, must be based upon the invalidity of the power itself.

At this day, the general principles of the law of charitable uses are familiar to all. Trusts that would be invalid as to other objects, are supported in favor of charities—the rule against perpetuities has yielded in their favor—and when the charities themselves which the testator has named have, from particular reasons, been disabled from taking, others have been substituted, and thus a fund for the erection of a Jews' synagogue has been transferred to a foundling hospital. The law has followed the gospel in the prominent position which it has given to charity.

The class of cases of which *Morice* v. *The Bishop of Durham*, decided by Sir William Grant in 1804, and affirmed by Lord Eldon in 1805, is the leading one, took the distinction between objects which *might* indeed be charitable, but which *might* also be much more or much less. The trust was for such objects of "benevolence and liberality" as the Bishop of Durham should approve, and this was held bad, not because it did not include objects of charity, but that it included more, and being indivisible, was therefore bad for uncertainty.

Then followed the cases, cited by the complainants, of *James* v. *Allen*, 3 *Mer.* 17; *Williams* v. *Kershaw*, 5 *Clark & Fin.* 111, note; *Ellis* v. *Selby*, 1 *Mylne & C.* 286 (where the bequest was to "such charitable or other purposes;") and *Williams* v. *Williams*, 5 *Law Journal, ch.* 4.

It is principally upon the authority of *Williams* v. *Kershaw*, decided in 1835 by Lord Cottenham, that the complainants ask for a decree. The devise was to "such benevo-

lent, charitable, and religious purposes as the executors should, in their discretion, think most advantageous and beneficial." The decision is not reported at length, and but one part of the reasoning is given: "It is argued, in order to prove the gift to be good, that the terms must be taken conjointly; if so, every application must be to a religious purpose, which would no doubt be benevolent, and, in a legal sense, charitable; but the question is, did the testator so consider it? Did he mean that there should be no application of any part of the residuary fund, except to religious purposes? Such does not appear to me to be his intention: he intended to restrain the discretion of the trustees, only within the limits of what was benevolent, or charitable, or religious. If this be the right construction, then the question is, what the decisions have ascertained to be the rule on the subject." And after referring to the authorities already cited, and to three others, the decision was that the gift could not take effect, and that the residue was undisposed of.

Those cases are *Waldo* v. *Caley*, 16 *Ves.* 206; *Ommaney* v. *Butcher*, *Turn. & Russ.* 260; and *Vezey* v. *Jamson*, 1 *Sim. & Stu.* 69.

Waldo v. *Caley*, decided by Sir W. Grant in 1809, was a bequest of money to be spent "in promoting charitable purposes, as well those of a public as a private nature, and more especially in relieving such distressed persons, either the widows or children of poor clergymen, or otherwise as his wife should judge most worthy and deserving objects, giving a preference always to poor relations;" which was held to be good.

In *Ommaney* v. *Butcher*, (decided by Sir Thomas Plumer, in 1820,) "in case there should be any money remaining," said the testator, after making sundry bequests to charitable institutions, "I should wish it to be given in private charity." This bequest was held to be bad.

The authority of this decision has been much questioned, (see *Boyle on Charities* 294) and it seems to have been shaken by the later case of *Harde* v. *Earl of Suffolk*, 2 *Mylne &*

Keene 59, decided in 1833 by Sir John Leach, where the income of a perpetual fund was to be "given away in charity, either to individual persons or to public institutions, in such sums, ways, and manner as the trustees should think fit, without any interference or control;" and it was held that the case was not distinguishable from *Waldo* v. *Caley*.

Vezey v. *Jamson* was decided by Sir John Leach in 1822, and in that case a bequest of the residue to executors, to dispose of at their pleasure, either for charitable or public purposes, "or to any person or persons in such shares, &c., as they should think fit," was obviously held bad.

The complainants' brief suggests that Mr. Boyle, in his treatise on the law of charities, admits the correctness of this decision if the change of the disjunctive proposition be correct, which he doubts; but a consideration of all the author's strictures on the decision seems to show that his doubts had a much wider range, though, as is well known, there is not, with English text writers, the same free spirit of criticism of adjudicated cases which prevails here.

But the language in *Williams* v. *Kershaw* differs from that used in this case. There it was, "to such benevolent, charitable, and religious *purposes*." Here it is, "to such benevolent, religious, or charitable *institutions*."

In *Hill* v. *Burns*, 2 *Wilson & Shaw* 80, the bequest seems to have been to trustees, "in aid of the *institutions* for charitable or benevolent purposes established or to be established in the city of Glasgow or its neighborhood;" and it was thought that the term *benevolent* would not bear any other meaning than charitable, being employed in favor of a public institution. It was, therefore, a mere redundancy of expression, and did not communicate any ambiguity to the gift, which was accordingly upheld.

In *Miller* v. *Rowan*, 5 *Clark & Fin.* 99, decided in the House of Lords, in 1837, the bequest of the residue was to trustees, to distribute the same to such charitable and benevolent purposes as they should think proper; and Lord Brougham, in delivering the judgment, said: "Is this gift validly

given to charitable uses? The maker of the deed first says, that the residue shall be applied by the trustees to such benevolent *and* charitable purposes as they may think proper. Suppose we read 'and,' 'or;' the authorities in the Scotch law do not entitle us to hold that this is so uncertain as to be void. In Hill v. Burns, decided by this house, the fund was to be distributed among institutions established or to be established in Glasgow or its neighborhood, 'for charitable and benevolent purposes,' the same words; this was held sufficiently certain by the Court of Sessions, and their judgment was affirmed by your lordships. Indeed, the distinction between charitable and benevolent uses was not taken in that case, and there appears nothing in the authorities on this subject which should lead us to suppose that the Scotch law has ever given the technical meaning to the word 'charity' or 'charitable,' which our English law has given since the statute of Elizabeth. It is true that, in Hill v. Burns, institutions in or near Glasgow are named, but I am now citing the case on the use of the word 'benevolent' only. For that nothing can turn upon the generality of the words in the present case, namely, 'charitable purposes,' if the addition of benevolent does not vitiate the gift, appears clear from the latest decision of the house, that in Crichton v. Grierson, where it was held, after a careful consideration of all the authorities by the noble and learned lord who then presided, that a gift to trustees, to be applied to such charitable purposes as they shall think fit, is good by the law of Scotland. The addition in that case, of bequests to friends and relations, was much relied on in the argument at the bar and in the printed cases, but it does not form the ground of the decision. My noble and learned friend, Lord Lyndhurst, expressly held that charitable purposes would be sufficient by the law of England, and that the Scotch law is less strict than ours in this respect, of which, indeed, there can be no doubt."

The latest cases show a disposition to restrict the rule of Morice v. Durham. In *Whicker* v. *Hume*, 14 *Beavan* 509,

the testator, who had long resided in the East, and was skilled in Oriental languages and literature, left a fund to trustees to be appropriated "as in their uncontrolled discretion they should think proper and expedient, for the benefit, advancement, and propagation of education and learning in every part of the world, as far as circumstances would permit."

It was objected to this bequest, that inasmuch "as those purposes alone are considered charitable which the statute of Elizabeth enumerates, or which, by analogies, are deemed within its spirit and intendment, this gift was too large, as the only 'learning' mentioned in the statute is 'schools of learning,' and the only 'education,' 'the education of orphans;'" and after referring to the cases of Williams v. Kershaw, Ellis v. Selby, &c., it was urged that the bequest embraced the whole sphere of literature and science, in any civilized or uncivilized country; the fund might be given to a distinguished French astronomer or an Indian brahmin, and it would be impossible for the court to regulate its application. But it was held by Sir John Romilly, M. R, (1851,) that the trust was not too indefinite, and that, if necessary, the court would compel the proper application of the fund by the trustees, and this decision was, in 1858, affirmed in the House of Lords, (7 *Clark's Appeal Cases* 124,) Lord Chelmsford, Lord Cranworth, and Lord Wensleydale all concurring that the testator meant to use the word learning as connected with education.

In the present case, therefore, it may well be presumed that the testator did not intend to use the words "benevolent institutions," otherwise than so far as they were charitable or religious.

But, under any circumstances, it may well be doubted if there is any benevolent institution, in the proper and legal sense of those words, which is not also a charitable institution. The word institution means, in this connection, a lawful institution, one whose existence consists in perpetual succession for the purposes of general and public benevo-

lence, and every such institution must necessarily be a charity.

Mr. Robeson, Attorney-General, for respondents.

I. The powers of appointment, claimed to be in his widow, under the will of Mr. Thomson, are (to the extent to which they exist at all,) either powers "collateral or in gross," or powers "simply collateral."

They are "in gross" if the widow had, or is given any interest in the thing to be appointed; or if the power is to be exercised for her benefit in any way; and this is so whether her interest be legal or equitable. 1 *Sug. on Powers* 40, 44.

The power to appoint the portion of the estate appropriated to produce her income of $10,000, is a power "in gross," and as such determinable by the donee; and the principle applies to personal as well as real estate. 1 *Sug. on Powers* 79, 89, 90, 91, 98; 2 *Sug. on Powers, appendix, No.* 4,569; *Albany's case,* 1 *Rep.* 111; *Smith* v. *Death,* 5 *Madd.* 371; *West* v. *Berney,* 1 *Russ. & Myl.* 431; *Bickley* v. *Guest, Ibid.* 440; *Horner* v. *Swan, Turn. & Russ.* 430; *Miles* v. *Knight,* 12 *Jur.* 666; *Hillyard* v. *Miller,* 10 *Barr* 326.

But it is said that the power to appoint the accumulated income "among such benevolent, religious, or charitable institutions as she may think proper," is not a power to appoint out of an estate in which she has any interest, and is therefore not a power "in gross," but a power "simply collateral," and that the release of such power by the donee is ineffective.

This argument fails: 1. If the power itself is found to fail, or is frustrated by reason of any organic defect. 2. If, though found to be valid, it shall be shown to be a power "in gross," and thus determinable at the will of the donee. 3. If, though found to be a valid power "simply collateral," it is also found that, not amounting to a direction of the testator, it is determined by the action of all the persons interested in or with power over the estate, concurring in a family settlement, established and confirmed by an act of the legislature.

II. This power is not valid, on the general principles applying to bequests generally, and it will fail, unless brought within the requirements of some favored class of bequests.

It is void for uncertainty in its objects. Generally, where the terms of a trust are such that the objects of it cannot be surely fixed by the court, it will fail for uncertainty. 2 *Story's Eq. Jur.*, §§ 979, 1183; *Fowler* v. *Garlike*, 1 *Russ. & Myl.* 232; *Ommaney* v. *Butcher*, *Turn. & Russ.* 260–71; *Stubbs* v. *Sargon*, 2 *Keen* 255; *Baptist Association* v. *Hart's Ex'rs*, 4 *Wheat.* 1, 33, 43.

The power is void, also, as in conflict with the law against *perpetuities.*

Generally, any trust is void which ties up property to a single purpose, or in a single line, so that its disposable and distributable nature is destroyed, for a longer than the reasonable period fixed by law. *Lewis on Perpetuities* 169, 688, 708; *Owens* v. *Miss. Soc.*, 4 *Kern.* 380; *Hillyard* v. *Miller*, 10 *Barr* 326.

The single extraordinary exception to the operation of these two general principles, which are established on the highest grounds of public policy, is in favor of "*charities.*"

It follows that this provision cannot stand, except as an extraordinary exception.

But no use is a "charitable use," except it be technically such, according to the rules established on this subject.

No provisions are within the exception in favor of charities, and therefore valid, "except such as are for the purposes enumerated in the statute of 43 Elizabeth, or are within its spirit and intendment." They must be within the specific enumeration of objects in the statute to entitle them to be upheld. 2 *Story's Eq. Jur.*, §§ 1155, 1158, 1164; *Brown* v. *Yeall*, 7 *Ves.* 50; *Kendall* v. *Granger*, 5 *Beav.* 301; *Williams* v. *Williams*, 4 *Seld.* 547; *Owens* v. *Miss. Soc.*, 4 *Kern.* 397, 403–4.

We have no magistrate authorized to settle a scheme of charity under his sign manual, and the *cy pres* power, rather a sovereign than a judicial one at all times, is not recognized

by our court. *Williams* v. *Williams*, 4 *Seld.* 548; *Beekman* v. *Bonsor*, 23 *N. Y. R.* 298, and Curtis Noyes' argument, in appendix to same volume; *Owens* v. *Miss. Soc.*, 4 *Kern.* 387–8, 407–8, 410.

Thus the use must not only be clearly "charitable," but it and its beneficiaries must be so far defined that it can certainly be specifically executed by the court, or by some ascertained and surely competent trustee; or it cannot be executed by any means within the power of our Court of Chancery, and will thus fail.

Any "charity" not strictly within these requirements, can only be executed, if at all, by the authority of the legislature as "*parens patriæ.*"

III. This is not a good power, because the object of the appointment is not *necessarily* a legal "charity," and so not within the exception.

Because, while there is no ascertained trustee competent to execute the trust, and no particular beneficiary object pointed out, the special characteristics of the general objects named are neither defined by the bequest, nor are the objects limited to the state of New Jersey, and thus so confined that their characteristics may be certainly fixed by our courts.

The characteristics of the objects of the power must be such as to make a legal "charity," under the laws of New Jersey.

Heirs-at-law are not to be disinherited by conjecture, but by express words, or necessary implication. *Thomas* v. *Thomas*, 6 *Term R.* 671.

Bequests to the charities outside of their jurisdiction have indeed been sustained by the English courts, but only to a known trustee, and in cases where the special characteristics of the charity were defined by the will, "so that the extensive character of the gift was obviated by limiting and specifying the subject upon which the discretion of the trustee is to be exercised." *Whicker* v. *Hume*, 7 *H. L. C.*

155; *President of U. S.* v. *Drummond*, (case of Smithsonian Institute.)

There is no limitation here of the exercise of this power to any specific "charity," nor are the characteristics and conditions of the general objects named so defined in terms that they will certainly have, by their own limitation, the qualities of a legal charity under our laws; nor is the power so confined within the control of our courts that these qualities are thus assured.

It must therefore fail, unless it may be saved by construing the words, "such benevolent, religious, or charitable institutions as she may think proper," to mean institutions *within the state of New Jersey.*

If this cannot be done without limiting the scope of the testator's aims, as he expressed them, then the testator has attempted too much, and so failed to make a good power.

A "benevolent, religious, or charitable association" is not necessarily an incorporated society, and two defects in this power are thus developed.

A gift to a voluntary association is not necessarily a trust —certainly not for any defined purpose; and a gift to a voluntary charitable association is not necessarily a charitable use. *Owens* v. *Miss. Society*, 4 *Kern.* 385.

Only a corporation can, by force of its own succession, transmit the fund in perpetual succession, according to the design of the bequest; and since the choice of institutions is not limited to the state of New Jersey, and may fall on a voluntary one, there can in such case, should it happen, be no appointment of a new competent trustee from time to time, by the only power competent for that purpose, *viz.* our Court of Chancery. *Williams* v. *Williams*, 4 *Seld.* 549.

But, besides these objections, this power is radically defective, because the language of the bequest does not *confine* the power to a charitable use.

This bequest leaves a wide latitude of choice to the donee, outside of what the law protects as charities. The words are "such benevolent, religious, *or* charitable institutions as she

may think proper." Unless all these are "charities," then the donee has discretion outside of "charities." In such case the bequest is no longer protected, and it falls before the rights of the heir, and the law against perpetuities. The decisions of the courts are in accordance with reason and principle on this question.

A power of appointment for "charitable and *other* purposes" is void. *Ellis* v. *Selby*, 7 *Sim.* 352; 1 *M. & C.* 286. And so even if these other uses must be public, a power to appoint to "charitable and *public* uses" is void. *Vezey* v. *Jamson*, 1 *Sim. & Stu.* 69. So a power to appoint to "benevolent purposes." *James* v. *Allen*, 3 *Mer.* 17. "To objects of benevolence and liberality." *Morice* v. *Bishop of Durham*, 9 *Ves.* 399, and 10 *Ves.* 521. And so "benevolent, charitable, and religious purposes," are not necessarily charities, and a power to appoint to them will not be sustained. *Williams* v. *Kershaw*, 5 *L. J. R.* (*N. S.*) 84; 5 *Clark & Fin.* 111, note; *Whicker* v. *Hume*, 14 *Beav.* 509; 7 *H. L. C.* 124.

The conclusions of this case are the logical consequences of the established principles on the subject. Let us apply them to the case before us.

"Religious" purposes, according to the English policy, are "charitable" purposes, and are protected as such. As the greater includes the less, the whole effect of the word "religious" is included in the word "charitable," though the converse of the proposition is not true; we may, therefore, eliminate the word "religious," and the language remains, "benevolent or charitable."

Again, all "charitable" purposes are "benevolent" purposes, though the converse is not true. Again, the greater includes the less; and, for the purpose of confining the discretion of the donee, the effect of the two words is the same as if the word "benevolent" stood alone.

But we have already seen that a power to appoint to "benevolent" purposes simply, is, on principle and precedent, void. *James* v. *Allen*, 3 *Mer.* 17.

But a distinction may be sought in this case, because the words "benevolent, religious, and charitable *institutions*" are used; while in the case of *Williams* v. *Kershaw* the word is "purposes." I cannot find any distinction which will affect the principle.

The formal body which would constitute an "institution," would be only competent as a trustee for the purposes of it; and the power amounts to nothing more than a power to appoint to trustees for such "benevolent, charitable, or religious" use as the donee may think proper.

Again, a power to appoint to *any person* the donee might think proper, would be void; so a power to appoint to *any institution* the donee may think proper, would be void.

The word "institutions," then, will not save the power, unless it be necessarily a legal charitable institution.

A gift to a trustee for an object, is a gift for the object itself; thus benevolent institutions are not necessarily "charitable" institutions, such as the courts will uphold, any more than all benevolences are legal "charities."

The case of *Hill* v. *Burns*, 2 *Wilson & Shaw*, where the bequest was "in aid of institutions for charitable or benevolent purposes," the decision did not depend in any way on the word institutions, but was merely that the Scotch courts were not governed by the statute of Elizabeth, and did not give the same technical meaning to the word "charity" which the English courts did. This is apparent from the opinion of Lord Brougham in *Miller* v. *Rowan*, 5 *Clark & Fin.* 99.

IV. This power, if valid at all, is a "power in gross," and may be released by the act of the donee.

The whole "residue" of the estate, after payment of the specific legacies, is the "portion appropriated" by the testator to secure the annual income of his widow, and having an interest in the whole, her power to appoint the "surplus" income of it, is a "power in gross."

That the whole of the residue is provided as the "corpus"

of her annuity is evident from the language and implications of the will.

V. But whatever is the particular nature of this power, it is determined by the settlement of the estate made between the parties, and confirmed and established by the act of the legislature, which settlement the complainants in this suit ask may be carried out.

This settlement is a family settlement, concurred in by all the persons interested, of adverse claims *prima facie* of doubtful character, in regard to an estate in which the parties are all interested, as of the blood or immediate family of the testator, and in such character, beneficiaries under his will; which settlement was made for the prevention of present family differences and future litigation.

By this settlement no violence is really done to any intention of the testator expressed in his will.

It is concurred in by all the *fixed* and *ascertained* objects of his bounty; all the persons who have any claim to any benefit under the power relinquished, or control over the estate under the expressed intentions of the will.

The will contemplates the *possibility* of other objects, but wholly at the *option* of the widow. The fact that there shall ever be any such objects, is not insisted upon or assumed by the will; nor is their identity ascertained, if by possibility they shall hereafter exist. So far as the attention of the widow is pointed towards any object outside of the actual persons above enumerated, she was still left a complete option of choosing or refusing, as well as in the choice of objects.

No other person or objects than those enumerated can be said to have any, even moral, claim on the widow's action under this power, much less any legal interest under the will, while the widow has not acted.

The settlement is for the benefit of all. The will shows that the testator meant to benefit *all*, to the extent that all

could be benefited without reducing the measure of the widow's portion or lessening her control over the surplus.

This settlement, then, is a *family settlement* for a favored object, between all the parties having any interest in the estate or power over it, for the mutual benefit of all, attaining by its result an end to which all the definite provisions of the will are directed, and by means which destroy no *possibility* of interest, which the testator did not himself leave dependent for its possible existence on the will of those who, by this act, deny it. It thus fulfills all the conditions of favor which any family settlement can present, and will be sustained, if within the power of the court to do so. 1 *Story's Eq. Jur.*, § 131; *Stapilton* v. *Stapilton*, 3 *L. C. in Eq.* 684, and cases there cited.

VI. The legislature of the state of New Jersey has passed an act specifically to declare and effect the extinguishment of this power.

This law is both *declaratory* and *active*. It not only *declares* that the *release* is, under the circumstances of this case, effective to extinguish and determine the power, but *itself acts* to extinguish and determine it.

The direct accomplishment of this purpose was within the power of the legislature by means of a law. Our state legislature possess like powers with the English parliament, except where restrained by, or by reason of some provision of the federal or state constitution.

They possess, as the representatives of the people, the law-making power wherever the organic law does not restrain it. *Sedgwick on Const. Law* 184–5; *Cochran* v. *Van Surlay*, 20 *Wend.* 381; *Kirby* v. *Shaw*, 7 *Harris* 258; *Sharpless* v. *The Mayor, &c.*, 21 *Penn.* 147, 162.

Besides this, they are the general representatives of the people, clothed with all the powers which belong to them as a political community. They represent *all* the attributes of sovereignty, except mere executive power.

The law itself is a declaration by the body representing

the inherent power of the state, that the subject matter is within its control, and that its action thereupon is in accordance with right; and question of this by the courts would be the assumption of law-giving power. *Sedgwick* 183. *Bennett* v. *Boggs, Bald.* 74, 75. But it is not necessary to insist upon any extraordinary power in the legislature to sustain this law. It will be conceded, that it was within the power of the legislature to pass the law unless it divests or affects some "vested rights."

A vested right is a right which belongs to *some person.* A right can't belong to any *person,* if there is no person in being for it to belong to. That which does not actually exist at all cannot be said to be a *right* which belongs to any person. A right to which no one has any special claim more than any one else, does not *belong* to any person.

No right, then, can be said to be vested under this power. No right can be vested, the very existence of which depends upon the *future* exercise of an *independent* will. Nor can any person claim a vested right in an interest, the recipient of which remains to be designated.

All the parties in being who have any, even contingent, interest in any existing right to be affected by the exercise or surrender of this power, are parties to the settlement, confirmed by the act, and had done all that they could to accomplish what the act effects. Thus, there is no interest, even contingent, affected adversely by the act.

Inchoate rights are within the power of the legislature. *Butler* v. *Palmer,* 1 *Hill* 320.

But acts, both general and special, which affect and destroy contingent interests, are to be found in the statute book of every state, and have been recognized by every court.

The whole system of barring entails by fine and recovery, was of like character. The principle is, that every person interested *at the time* consents, without regard to any contingent interest, dormant and unattached. That method of alienation was a judicial invention to destroy perpetuities, and "the legislature could exercise the same power not only

by general law but by special act," and without the intervention of any legal fiction. Opinion of Justice Grier, *Croxall* v. *Sherrerd*, 5 *Wall.* 268.

VII. Particular instances, stronger than the present one, are easily found. *Holdbrook* v. *Tenny*, 4 *Mass.* 566; *Binghardt* v. *Turner*, 12 *Pick.* 539; *DePeyster* v. *Michael*, 2 *Seld.* 467, 503; *Satterlee* v. *Matthewson*, 2 *Peters* 380; *Goshen* v. *Stonington*, 4 *Conn.* 209; *Mather* v. *Chapman*, 6 *Conn.* 54; *Black* v. *Wilkens*, *Ibid.* 197.

In our own state, the law of 1780, which altered the devolution of estates by abolishing primogenitures; the law of 1817, which took away the double share from the sons; were very similar to this in effect.

These interests were not vested, perhaps not even contingent interests, but they had more real existence than any interest under this power, for the expectant heirs were ascertained or ascertainable by the operation of fixed and natural causes, and their shares would of necessity descend in default of an affirmative act (a legal will) preventing; here there is no ascertained or ascertainable person, and no interest which will come by force of law, or without some *future, optional, affirmative* act.

But special acts in our own state which divest the interest of the heir in tail, at times when that interest was secure without the action of the legislature, have been more than once passed, and recognized by the courts. *Croxall* v. *Sherrerd*, 5 *Wall.* 268; *Kearney* v. *Taylor*, 15 *How.* 494; *Richman* v. *Lippincott*, 5 *Dutcher* 44.

In these cases the contingent interest of the heir in tail was disregarded, though it depended on contract, and could not be destroyed by any act of the parties agreeing, but *must* come of course, except for the act of the legislature.

The truth is that this law is not retroactive on any *interest*, but only on the *power*, and that only to the extent desired by the person who possesses it. It is merely an *enabling* act in its nature, authorizing Mrs. Thomson to do *now* an

act which she had a right to do whenever she is authorized to act; enabling her to accomplish a result *now* of which no one has any right to complain, because the right to accomplish the result is hers, and cannot be taken from her *by lapse of time.*

VIII. The confirmation of this release is the more surely within the power of the legislature, since they are the representatives and guardians (as the representatives of the sovereignty,) of all public interests, and especially all general charities; all charities while they remain uncertain. 2 *Story's Eq. Jur.*, § 1190.

The legislature in such case, in its double capacity of law-maker and sovereign guardian of the interest of charities, may, by proper act, consent; not to relinquish any interest of any kind, for none exists; but that Mrs. Thomson may exercise *now* a right which is hers to exercise *hereafter.*

Thus, when the legislature became a party to this settlement, not only every present interest and every contingent interest, but every possible interest under this power, consents to the release and the act confirming it.

IX. But if the legislature could not, by virtue of any power over the subject itself, determine the power, it certainly could provide and declare the incidents which should, in New Jersey, attach to such a power as this.

It would certainly have been competent for it to provide and declare, by general act, that all powers of appointment, presenting conditions and circumstances like this one, might be released by the donee. Under such an act, not retroactively affecting any interest or right, a subsequent release of this power would have certainly been effective.

What the legislature may authorize they may sanction and confirm when done.

X. The courts will give effect to an act of the legislature if it can be done on any legal principle.

This act will be sustained and will be sufficient: if it can be held to be effective to determine this power by direct exercise of the law-making authority; or, if it is effective as a release of the *parens patriæ;* or, as a declaration and provision that the circumstances of this power make a "power in gross;" or, as a provision that all optional powers of appointment which, though "simply collateral," do not amount to a direction, may be released by the person at whose option they are to be exercised; or, as a declaration of public policy, providing, in a case of first impression in the state, that the settled rules in regard to "charitable uses" in England, (as distinguished from those adopted by the Scotch, or any other courts) shall apply in New Jersey, that they shall be confined to the enumeration of the statute of Elizabeth, and restrained by the principles declared in *Morice* v. *Bishop of Durham,* and *Williams* v. *Kershaw.*

The legislature may do by special act, whatever they can accomplish by the provisions or effect of a general law.

XI. The settlement made in this case, in its nature, objects, and results, and the circumstance of its legislative confirmation, appeals to the favor of the court. The court will advance as far as possible to reach and apply every principle to sustain it. Wrong principles will not therefore be announced, but if the application of correct ones seems doubtful, the character of the settlement, and the fact of its legislative confirmation, will decide it.

Mr. Bradley, on same side.

The settlement made between the parties in this case ought to be confirmed. It is a family settlement, and addresses itself to the highest favor of the court. It is a valid settlement, and, therefore, it is the duty of the executors to carry it out, in accordance with the wishes of the only parties beneficially interested.

The only question, whether a valid settlement can or cannot be made, arises upon the powers of disposition given to

Mrs. Thomson, the testator's wife. If she can lawfully divest herself of these powers, or if they are void powers, no obstacle stands in the way of a valid settlement of the estate.

I. The first power given to her is that of distributing by will, at her death, a certain fund among the testator's brother and sisters, and their descendants. The fund subjected to this power is, "the portion of the estate appropriated for an income of $10,000 a year for her support." That is to say, the testator gives her $10,000 a year for her support during her life, and gives her power to distribute, among certain of his relations, the fund appropriated for producing this $10,000 a year. She has the interest, or produce, of this fund during her life, and the power of distributing it at her death. If she does not distribute it, it is to go to the brother and sisters of the testator, who are the testator's next of kin, and with whom the settlement is made.

Such a power is called, in the law books, a power *in gross*. 1 *Sug. on Powers* 44. It differs from a power simply collateral, in that the latter is given to a party who has not, nor ever had, any estate in the land, or interest in the fund. *Ibid.* 45.

A power simply collateral cannot, by any act of the donee, be suspended or extinguished. 1 *Sug. on Powers* 48. But a power in gross, like that in the present case, may be released or extinguished. *Ibid.* 98, 102, and cases there cited; and 2 *Ibid., Appendix No.* 4, *p.* 569.

The argument of Sir John Leach, in *West* v. *Berney*, 1 *Russ. & Myl.* 431, reviewing the previous cases, seems to establish the conclusion reached by him, "that every power reserved to a grantee for life, though not appendant to his own estate, (as a leasing power,) but to take effect after the determination of his own estate, (and, therefore, in gross,) may be extinguished." *p.* 435. He held the same doctrine in *Smith* v. *Death*, 5 *Madd.* 371.

In *Horner* v. *Swan*, 1 *Turn. & Russ.* 430, an estate for life was given to the wife, with power to appoint by will to

and among the children, or their issue; and in default of such will, then to the children; almost exactly like the terms of the present will. The wife and children undertook to sell the property. The case was ably argued, it being contended, in favor of the title, that the widow, by joining in the sale and conveyance, extinguished the power. Sir Thomas Plumer so decided, following the preceding cases.

In *Bickley* v. *Guest*, 1 *Russ. & Myl.* 440, a father, tenant for life, with power to appoint in favor of children, having levied a fine of the property, afterwards actually attempted to exercise his power by making a will in favor of his children, and the court held it null, as the power was extinguished by the fine.

That the same rule is applied to personal as well as to real estate, is shown by the following extract from *Sugden on Powers, vol. I, p.* 79: "The same rule is applied to personal estate; therefore, where a man was, under a will, tenant for life of certain funded property, and then for such persons, &c., as he should appoint by will, and, in default of appointment, the trust was for his executors or administrators, it was held, that he might assign the fund absolutely; and where, in default of appointment, the fund is settled on another, the donee may, with the concurrence of that person, make a present title to the fund; for, by analogy to powers on real estate, such a power may be parted with, that is released or extinguished."

Mr. Sugden refers, for authority, to a manuscript case of *Kirkpatrick* v. *Capel;* but he is himself a great authority on a question of this kind.

The case of *Miles* v. *Knight*, 12 *Jurist* 666, decided by Vice Chancellor Shadwell, in 1848, was very similar in principle, to the present. In that case, certain consols and reduced annuities were held upon trust to pay the dividends to Eliza Miles for life; after her decease, to any husband surviving her to whom she might appoint the same; and after his decease, to such children and issue of children as she might, by deed or will, appoint; and, in default of ap-

pointments, then in trust for all her children, equally; if no children, then in trust to pay the trust moneys to such person or persons as she by deed or will might appoint; and, on failure of such appointment, in trust for her next of kin. Eliza Miles having never married, at the age of sixty-seven, by deed-poll, under the last power specified, appointed the whole fund to herself, and disclaimed and renounced and released to the trustee, and all others whom it might concern, all and every power of making appointments to any husban or child, or children or issue, and authorized and requested the trustee to assign the trust securities to herself. Having executed this deed, she filed a bill against the trustee, praying that he might be ordered to transfer the stocks to her accordingly. The case was regularly argued, and the Vice Chancellor made a decree in accordance with the prayer of the bill, and expressed the opinion that it would not be necessary for the complainant to enter into any undertaking to account.

It will be observed that the power under which the donee in the above case directed the fund to be given to herself, was not to be exercised except on failure of all the prior contingencies named in the trust. Those contingencies were her having children, or her leaving a husband and making an appointment in his favor. She was past the age of child bearing; and therefore, the only outstanding contingency was that of marrying and making an appointment in favor of her husband. The power to make such appointment was renounced and released by her by deed-poll; and the court deemed that release sufficient and decreed the transfer of stock to be made.

In the case before the court, the parties have executed as solemn instruments and assurances as the nature of the case admits of; and are ready to execute such further release and indemification as may be required to effect the desired purpose; and desire that the entire arrangement may be confirmed by the decree of the court, so as to be a matter of record as well as matter of agreement and assurance.

We, therefore, think that we are justified in concluding that the settlement is valid and final, and that by it the power in question is extinguished.

II. The next power given to Mrs. Thomson, related to the surplus income of the testator's estate, over and above the $10,000 per annum given to her. The will directs that this surplus shall be invested in good securities, and that the testator's wife shall be authorized and empowered by her last will and testament, to give and devise the same among *such benevolent, religious, or charitable institutions* as she may think proper.

This power is simply collateral, and cannot be released or surrendered. Viewed, therefore, merely as a power, if it is valid, it will remain an encumbrance on the estate, notwithstanding any settlement the parties can make, unless aided by legislation. But regarded in the light of a discretionary trust, its validity cannot be defended. The entire estate is vested in trustees, the portion of it in question being subjected to a discretionary power of Mrs. Thomson to devote it to benevolent, religious, or charitable purposes. It matters not in whom this discretionary power is lodged; whether in the trustees themselves or in a third person. The result is the same. It is that of trust property subjected to a discretionary power of disposition for the purpose named, with an ulterior limitation, if the power be not exercised, to the testator's brother and sisters.

The question is, whether such a discretionary power or trust can be supported as against the ulterior legatees, who, in this case, are the testator's next of kin? We contend that it cannot; that it is too vague and uncertain.

By the English law (which we have adopted,) a trust which is so vague and indefinite that courts of equity cannot clearly ascertain either its objects or the persons who are to take, will be held to be void, and the property will fall to the next of kin, or into the general funds of the donor.

This has been expressly decided to be the case where the

terms of the trust are to dispose of the fund for such uses and purposes as the trustee may see fit, it being left entirely to his discretion; or, where the trust is, to dispose of so much of the fund as the trustee may see fit, to either branch of the testator's family, as the trustee may deem expedient, and if the trustee should not make such disposition in his lifetime, giving him power to dispose of the same by will to those or either branch of the donor's family; in all such cases, the trust is void for uncertainty. Some limit must be set to the trustee's discretionary power. See 2 *Story's Eq.*, §§ 979 (*a*) (*b*), (Redfield's ed.)

A gift to a person to be disposed of at his discretion is an absolute gift to such person, it is true; but when the words of the disposition show the gift is not intended for the personal benefit of the party, but only as a trust for the benefit of others, then the rule applies, that some limit must be set to the discretionary powers of the trustee, or the trust will be void, and the fund may be claimed by the person next entitled.

To this general rule, trusts to charitable uses are an exception. They will be held valid, though expressed and indicated with the greatest generality and vagueness—such as would render any other trust absolutely void. So far is this partiality in favor of charities carried, that if a gift be made without any purpose at all being expressed, except only, in general, that it is intended for *charitable* purposes, or for any general purpose, (such as *religious* or *educational*), which belongs to the category of charitable purposes, still it will be upheld; and if a trustee is appointed with discretionary powers in such case, he may select the charity to be established, and the manner of carrying it out; but if no trustee be appointed or he fail to act, the King by his sign manual will approve a scheme for a charity. In the latter case, of course, the bequest would fail in this country, for want of a magistrate having the requisite power. 4 *Seld.* 548.

By another rule of the English law, a trust by which property is tied up or devoted to a special purpose for a

longer period than one or more lives, and twenty-one years after their determination, is void, it being held against public policy to allow property thus to be locked up by a perpetual restriction; perpetuities being considered odious in the laws of a commercial and progressive people. *Lewis on Perpetuities.*

An exception to this general rule against perpetuities is also made in the case of *charitable uses.* When property is given to a charitable use, it may be for ever devoted to that use, without any limitation in regard to time. The reason for this exception is, that foundations for the alleviation of misfortune, the promotion of education and religion, and the establishment and support of public edifices and easements, are for the public good, and tend to relieve the public treasury, and to lighten the burdens of taxation.

But the purposes and objects which are *deemed charitable,* and, therefore, entitled to the exemptions above referred to, are limited in number and scope. Not everything that partakes of a benevolent character is to be deemed charitable in the legal sense. Ancient laws and judicial decisions have fixed limits, somewhat definite, to the charities which will be sustained as perpetual foundations. Generally speaking, gifts in aid of the poor, the sick, and the disabled, whether for the establishment of poor-houses, asylums, hospitals, or other means of benefiting them; gifts for the promotion of education or religion, such as the establishment of schools, scholarships, academies, colleges, church edifices, support of ministers, missionaries, &c.; gifts for the public ease and advantage, such as public buildings, houses of correction, construction or repairs of highways, bridges, harbors, sea-banks, &c., are held to be charitable uses. In a word, eleemosynary, educational, pious, and public uses, are held to be charitable uses within the beneficial operation of the law. 2 *Story's Eq.*, § 1160.

When, however, the purpose indicated is not a charitable purpose, within the technical meaning of the term; or where a general purpose, merely benevolent, is indicated, or is

allowed to the discretion of the trustee, so that the gift does not, in terms, denote or confine the bequest to a legally charitable purpose, but leaves its destination so much at large that it *may* be directed to an object *not charitable*, without violating the directions of the donor; then the gift will be void, and the legacy will fall to the next of kin, or to the private residuary legatees. 2 *Story's Eq. Jur.*, §§ 1164, 1183; 2 *Redfield on Wills, p.* 830. Not being sustainable as a charity, it will be obnoxious to the objection of uncertainty, or of being an unauthorized perpetuity.

Thus in the case of *Morice* v. *Bishop of Durham*, 9 *Ves.* 399; *S. C.*, 10 *Ves.* 539; both Sir William Grant and Lord Eldon held void a gift upon trust to such objects of *benevolence and liberality* as the Bishop of Durham should approve of. Lord Eldon said that the intent of the testratrix did not seem to confine the trustee to such benevolences as the laws of England deem charities, and hence it was too indefinite and void. See 2 *Roper on Leg.* 1238.

In *James* v. *Allen*, 3 *Mer.* 17, the residue of an estate was left to trustees, to be applied by them to such *benevolent* purposes as they, in their discretion, might unanimously agree on. This was held void for uncertainty by Sir William Grant, on the ground that it is impossible to say that every object of a man's benevolence is also an object of his *charity*. The whole property might, consistently with the words of the will, be applied to purposes strictly charitable, but the court could not say that it might not be applied to benevolent purposes which are not strictly charitable. See 2 *Roper on Leg.* 1240; 2 *Story's Eq.*, §§ 1156, 1158.

The case of *Williams* v. *Kershaw*, 5 *Clark & Fin.* 111, decided by Sir C. C. Pepys, in 1835, as the language of the will in that case was construed, was very similar to the case under consideration. There the words were, "in trust for such benevolent, charitable, *and* religious purposes as the executors, in their discretion, should think most advantageous and beneficial." The Master of the Rolls construed the word "*and*" to mean "*or*," which made the language the same as

that which is actually used in Mr. Thomson's will. Having given this construction to the language, he held, that so great a latitude of discretion was given to the trustee, that he might devote the fund to purposes merely *benevolent* without being religious or charitable; and if so, the bequest was void, for vagueness and generality.

No subsequent case, to my knowledge, has overruled this one. Sir C. C. Pepys, when he became Lord Chancellor Cottenham, followed it in *Ellis* v. *Selby*, 1 *Myl. & Cr.* 286, and it is affirmed in *Williams* v. *Williams*, 5 *Law Journ., ch.* 84.

Mr. Boyle, in his treatise on charities, questions the correctness of the construction put upon the words in the last case, in changing them from a conjunctive to a distributive or alternative signification; but supposing the construction to have been right, he does not question the law of the case; on the contrary, he admits it to be as laid down by the Master of the Rolls. See *Boyle on Charities, bk. II., ch. V.*, 281, 284; especially 293.

Chief Justice Redfield, in his edition of *Story's Eq. Jur.*, in a note to *Vol.* 2, § 1164, *pp.* 378, 379, 380, gives a condensed list of donative expressions, which are held to have been void, and as not raising a charitable use and a corresponding list of such as have been sustained as indicating it with sufficient certainty. This list brings the cases down to the present time; and no case is cited by him, except Scotch cases, which is adverse to that of *Williams* v. *Kershaw.*

The Scotch law is more liberal than the English in sustaining gifts of a general benevolent character. By that law the gift in question would be sustained. *Miller* v. *Rowan*, 6 *Clark & Fin.* 99, is a Scotch case, in which the words "*such benevolent and charitable purposes as they think proper,*" were held sufficient.

We think, however, there can be no doubt that our courts will feel bound by the English decisions. It is true they are not controlled by the express regulations of the Statute of Charitable Uses, 43 *Eliz.;* but they regard themselves as

subject to the general principles of that system of charity law which has grown up in the English courts, whether on the original foundation of the common law, or under the directions of the statute; and the tendency is rather to stop short of the English cases, than to go beyond them in sustaining charitable bequests. See 2 *Story's Eq. Jur.*, §§ 1155, 1164.

Judge Denio, in the case of *Williams* v. *Williams*, 4 *Selden* 547–8, says: "In this country, the question whether a gift to a particular purpose is a valid charitable gift, is to be resolved by a reference to the determinations of the English Court of Chancery, whether that court reposed itself upon parliamentary definition, or arrived at its judgment in any other manner." See *Howard* v. *American Soc.*, 49 *Maine* 298.

It is not overlooked that in the case before us, the testator's wife is authorized and empowered by her last will and testament, to give and devise the fund in question among such benevolent, religious, or charitable institutions as she may think proper.

It may be said, that the power to give to *institutions* distinguishes the case from gifts to charitable or benevolent uses generally. I do not see how any such distinction, favorable to the validity of the bequest, can be made. Any *institution* in whose favor the appointment might be made, would be only a trustee for carrying out its objects; and if those objects should be merely *benevolent* and not *charitable*, the execution of the power would be a bequest of the fund to a trustee, for the *benevolent* purposes which that trustee was created to promote. So that it comes back to the same thing as if the power had been to give the fund to such *benevolent* purposes as the widow might think proper.

Again, the word "institutions" may mean corporations, or voluntary associations. We have then another element of vagueness which adds to the difficulty of the case. If, by the terms of the will, the widow may give the fund to a voluntary association, formed for a benevolent, though not a

charitable purpose, and thus place the property in a position to require the administration of the Court of Chancery, in a manner, and for a purpose, which the court does not recognize, such a court can never sustain the trust or authority given. The next of kin, or residuary legatees, will be entitled to the fund.

We conclude, therefore, that the discretionary power in question, being in the alternative, and enabling the widow to devote the entire fund in question to a purpose which she may deem merely *benevolent*, is void for vagueness and uncertainty; and therefore, that the arrangement which the parties have made is free from any embarrassment arising from that power or trust.

III. But if the argument respecting the validity of the last mentioned power is not conclusive, the legislative act passed to confirm the settlement, and to enable Mrs. Thomson to relinquish the power, removes all doubt and difficulty.

No one can object to this act but Mrs. Thomson herself, for no one else has any vested interest; and she joins in the agreement and acquiesces in the act. So that, if the possession of the power is of any interest or advantage to her, she has waived all objections to its extinguishment.

If, on the other hand, as we suppose is the case, the power is of no legal interest or advantage to her, but she is to be regarded as the mere instrument, or hand, by which the testator's benevolence may be carried into effect, then it is perfectly competent for the sovereign power of the state to authorize the extinguishment or release of the power; for to that sovereign, as the guardian of all public interests, belongs the administration of all charities, especially those of an undefined character.

Even in cases of private right, where no interest has become vested, the legislature may alter the devolution of estates, as in the case of estates tail. In a recent case, *Croxall* v. *Sherrerd*, 5 *Wall.*, *p.* 268, the Supreme Court of the United States decided to be valid a law of this state

which confirmed a family settlement that changed an estate tail to a fee simple, and thereby diverted the entire devolution of the property from a prescribed line of single heirs at common law to the children in common as heirs general under the statute of descents. The next heir in tail complained of this extinguishment of his entailment, and brought an action for the property. But the court held that as he had no interest when the act was passed, he was concluded by it.

Family settlements are always regarded with strong favor. 1 *Story's Eq. Jur.*, §§ 129–131.

Hon. Wm. A. Porter, (of Philadelphia,) for Mrs. Thomson, appellant, in reply.

The opinion of the court was delivered by

THE CHIEF JUSTICE.

The widow and next of kin of the late John R. Thomson, claim in this suit the right, certain specific and pecuniary legacies having been paid, to dispense with his will, and distribute among themselves, in proportions which they have agreed upon, the entire residue of his estate. In pursuance of this view of their rights, these parties entered into an agreement under seal, by force of which the widow is to take two thirds of this residue of the property, and the next of kin, being the brother and three sisters of the testator, the remaining third part. It was to enforce this contract against Mr. Thomson's executors and trustees, that the bill in this cause was filed.

The argument, before this court, in behalf of the complainants went upon three grounds: first, that one of the provisions of the will was, from an intrinsic defect, invalid; second, that a power of appointment conferred by the will upon the widow, could be legally released by her; and third, that at all events, the contract between the widow and next

of kin had been legalized by an act of the legislature of this state.

The first of the grounds thus taken, has reference to that clause of the will which, with regard to a certain portion of the accumulated income of the estate, declares, that the testator's widow "shall be authorized and empowered, by her last will and testament, to give and devise the same among such benevolent, religious, or charitable institutions as she may think proper." Such a bequest, upon the most familiar principles, is not to be sustained except upon the theory that it constitutes a gift to a charitable use. Is the purpose indicated, then, a charity in a legal point of view? I do not understand that there is any difference whatever between the common law of England and the law of this state upon the point as to what constitutes the legal definition of a charity. And by this common law I mean that system, so far as respects this question, which has grown up in a series of decisions founded, in part, upon the 43d of Elizabeth, ch. 4, (the statute of charitable uses). The doctrine of the English Court of Chancery with regard to the mere classification of things which are, and those which are not, charities in the eye of the law, has been very generally recognized in this country. The discrepancy between the English and American systems regulating charities, consists in this, that in England a bequest for a charity will be effectuated no matter how uncertain the objects or the persons may be, or whether the bequest can be carried into exact execution or not, for when a literal execution becomes impracticable, the court will administer it on the doctrine of *cy pres*. In some instances courts of this country have refused to exercise so extensive a jurisdiction. I am not aware, that in our own courts, this subject has received any elucidaton. It may well be, therefore, that a bequest, obviously for a charity, and which in England would be carried into effect, might not be enforced in our own courts, on the ground of the indefiniteness of its objects or the impracticability of its exact execution. But this is a diversity of legal administra-

tion, and not of legal classification. Upon the questions what is, or what is not, a charitable use we have no criterion but the rules of the common law, and those rules, consequently, are obligatory upon us.

Accepting this guide I readily come, on this head, to the same conclusion with the Chancellor. The bequest is to "*benevolent*, religious, or charitable institutions." This is too broad. Benevolence is wider than charity in its legal signification. In *James* v. *Allen*, 3 *Mer.* 17, the will gave property to "be applied and disposed of for, and to such *benevolent* purposes" as the executors in their discretion, might unanimously agree on. Sir William Grant, Master of the Rolls, decided this bequest void, remarking, "that although many charitable institutions are very properly called benevolent, it is impossible to say that every object of a man's benevolence is also an object of his charity." The ground of the decision was, that as the bequest could, consistently with the will, be applied to other than strictly charitable purposes, the court could not execute the trust. In *Williams* v. *Kershaw*, 5 *Clark & Fin.* 111, *note*, the devise was to "such benevolent, charitable, and religious purposes as the executors should, in their discretion, think most advantageous and beneficial." Upon a review of the authorities the decision of Lord Cottenham was, that the introduction of the word "benevolent" rendered the purposes of the testator too indefinite for judicial execution, and that the gift could not take effect. *Ellis* v. *Selby*, 1 *Myl. & Craig* 286, and *Williams* v. *Williams*, 5 *Law Journal, ch.* 4, are cases holding a similar doctrine, and are much in point. Many other decisions to the same effect will be found collected in 2 *Roper on Leg.* 1237. These decisions appear to me to rest on a proper foundation. It is important that the fact as to what are legal charities which will be executed by the courts, should be settled. To sanction the introduction of a general term of so wide a signification as the word "benevolent" would have a tendency to involve the subject in much confusion.

Upon the argument, the counsel for the respondent laid some stress on the use, in the testamentary clause, of the word "institutions." But, upon reflection, I am unable to see that this term has a tendency to give definiteness to the expression of the use intended. If, in legal contemplation, a benevolent purpose is more indefinite, embracing a larger class of objects, than a charitable purpose, it seems to follow, necessarily, that a benevolent institution may not, in a legal sense, be a charitable institution. An institution is a mere organism for the accomplishment of an object, and the existence of such organism cannot, in the nature of things, make such object definite. To make the argument of any value it should appear that the class of benevolent purposes, which are not comprehended in the definition of legal charities, are not and cannot be executed by institutions, that is, associations of persons. In *Babb* v. *Reed*, 5 *Rawle* 151, it was held that an association for the purposes of mutual benevolence among its members, is not an association for charitable uses. Here, then, was a benevolent institution which was not a charitable one. Other similar instances will readily suggest themselves. I think the word in question does not restrict the meaning of the term "benevolent" in the clause under consideration.

As I have already said, I concur in the conclusion that the disposition comprised in this clause of the will, on the ground just specified, is invalid.

The second point relates to the capacity of the widow to surrender her power of appointment over that portion of the estate which is set apart for the raising of her income.

This branch of the case was disposed of by the Chancellor, on the technical distinction which, in the doctrine of powers, exists between a power in gross and a power simply collateral. The power of appointment contained in the clause of the will now alluded to, was regarded as belonging to the former class, and, consequently, as extinguishable by the donee of the power. This question seems to me to be one of great nicety in the application of the decisions to the

present case. I have not found any case in which it was maintained that a power to appoint to *strangers*, after the expiration of an interest given to the donee of the power, was a power in gross. The decisions referred to by counsel are mostly cases of settlement on a parent, with a power of appointment among his children. In such instances, there is some reason to say the power is not simply collateral, because it is not a naked authority, the father having an interest in the distribution of the estate among his children. Under such circumstances, such a power may not inaptly, in the expression of Sir Edward Sugden, be called "an emolument of his own estate." But, on the contrary, when an interest for life or for years, is given to A, with direction, by will or otherwise, to appoint between B and C, who are strangers to A, why such an authority should be considered anything more than an authority simply collateral, it seems difficult to imagine. I have found no case which determines this question either way; those cases in which the fund, on failure of appointment, is given to the donee of the power, resting obviously on a different principle; and I shall pass the question without the expression of any opinion upon it. I am enabled to do this because, in my examination of the matters involved, I have come to the conclusion, that there is an insuperable difficulty in granting to the complainants the relief prayed for, so far as their claim to such relief rests on general legal principles.

For the purpose of considering the difficulty thus intimated, I shall assume that the power in question is one in gross, and one, consequently, that Mrs. Thomson could legally release. The proposition then arises, can she release it for a consideration? In order to comprehend fully the force of this inquiry, we must place before our minds distinctly the circumstances of her position. Her authority is given to her in the following terms: "And I authorize and empower my said wife, by her last will and testament, duly executed, to direct, limit or appoint, give or devise the portion of my estate so appropriated for an income of $10,000 a year for

her support, to give or devise the same to and among all and every the children of my sisters, Caroline Norris and Amelia Reed, and their children, in such proportions and for such estate or estates as she may think proper; or, if my wife so chooses, she may, by her last will and testament aforesaid, direct, limit or appoint, give or devise the same to and among my sisters, Caroline, Adeline, and Amelia, and their children and grandchildren, and my brother, Edward, in such proportions and for such estate or estates as she may think proper."

It will be observed, from this quotation from the will, that as appointees the children and grandchildren of Mrs. Norris and Mrs. Read are peculiarly favored. Mrs. Thomson had the right to appoint the whole of this part of the estate to them. In no distribution which she is authorized to make, could they or any of them be omitted. By the arrangement which she has, in point of fact, made with the brother and three sisters of the testator, these children are cut off from all possibility of taking any benefit under an appointment. Both the bill of complaint and the articles of agreement state that Mrs. Thomson consented to extinguish the power of appointment in consideration of the division of the residue of the estate, after the payment of specific and pecuniary legacies, by which division two thirds of such residue became her own, absolutely. The children of the sisters of the testator are no parties to this contract. In considering the legal maxim involved it must be treated, then, as a case in which a donee of a power has agreed, for a benefit moving to herself, to surrender her right to appoint.

Can any plausibility be given to such a claim? A power to appoint is not a technical trust, it is true, because the possible beneficiary has not the capacity to call for its execution. But it has never been doubted that such a function was a confidence, and as such cannot be made the subject of barter. Courts of equity have very characteristically exercised the keenest vigilance over this class of agents. The principle which I regard as established is, that they shall

gain no profit by force of their position. Any other rule would be impracticable. If it be lawful for the donee of a power to bargain for his own personal ends with a part of the appointees to exercise his authority in a certain mode, or to stipulate with the heirs-at-law or the next of kin to disappoint the expectations of the appointees by a surrender of his power, it is obvious in numerous cases the bulk of the fiduciary property would enure to the benefit of the donees themselves. It is on this obvious ground that courts everywhere have been strenuous in enforcing the utmost good faith on the part of donees of powers. I think no case can be found in which such donee has been allowed to make his position, by any device, profitable to himself. Such is the uniform language of the authorities. In *Aleyn* v. *Belchier*, 1 *Eden* 132, a power of jointuring having been executed in favor of a wife, but with an agreement that the wife should receive only a part as an annuity for her own benefit, and that the residue should be applied to the payment of the husband's debts, such arrangement was held a fraud upon the power, the Lord Keeper saying, that "no point is better established than that a person having a power must execute it *bona fide* for the end designed, otherwise it is corrupt and void." And upon the same principle it has been settled, in a series of cases, that whenever an appointment is made to one or more of a class, in exclusion of others, upon a bargain for the advantage of the appointor, equity will relieve against such an appointment as a fraud upon the power. In one of this class of cases, *Rowley* v. *Rowley*, *Kay* 242, Sir W. Page Wood, V. C., said: "I think it would be impossible to contend, if a direct bribe were given to the appointor, though out of a separate fund, that the appointment could be upheld in favor of a party to whom the fund, subject to the appointment, was given." And in *McQueen* v. *Farquhar*, 11 *Ves.* 479, Lord Eldon remarks: "It is truly said, this court will not permit a party to execute a power for his own benefit." A large number of cases illustrative of the same rule may be found in 1 *Lead. Cas. in Eq.* 304.

These authorities abundantly suffice to show that the principle is unquestionably established, that an appointment to further the selfish interest of the donee of the power will not stand. The doctrine rests upon the ground of the existence of constructive bad faith towards the donor of the power. And a gainful agreement to refrain altogether from the exercise of the power is necessarily equally fraudulent; it involves, no matter how pure the intentions of all parties may be, a constructive fraud. In *Cunynghame* v. *Thurlow*, (note to *West* v. *Berney*,) 1 *Russ. & My.* 431, the case of a release of a power to appoint was prevented, the donee gaining an advantage from such release. In this case, a fund was limited to a father for life, with remainder to his children in such shares as he should appoint, and in default of appointment, to the children equally; the father released the power as to a portion of the fund, so as to vest a share of it in himself, as executor of a deceased son, who in default of appointment, took a vested interest, but the court refused to order the transfer of this share to the father. It will be observed that in the case cited the father had the undoubted right to extinguish his power of appointment; but as he did this in consideration of a benefit to himself the act was declared illegal. The principle of this case applies, with entire aptness, to the facts contained in the bill now before this court. I feel constrained to say, therefore, that in my opinion, a court of equity cannot sanction the contract which these parties have entered into, on any of the principles which usually regulate the relations of parties having an interest under a power of appointment. And as an evidence of the strength of my own conviction on this subject, I may remark that I have been led to this result notwithstanding my most perfect confidence that the agreement thus impeached in point of law, has been entered into in entire good faith by all the parties to it. I am entirely satisfied that the interest of the other appointees has not in the least degree been sacrificed, but has been scrupulously considered. Nor have I entertained the faintest suspicion that the donee

of the power in this case has taken any advantage whatever of the position in which she was placed by her husband. I am persuaded that the agreement in question was intended to be, what it purports to be, a fair family settlement. My difficulty has been to find any legal general ground of equity on which to rest a claim in favor of the case made by the bill.

Before leaving this head of the case, it is proper to remark that I have assumed that one or more of the sisters of the testator has children living. This fact was stated on the argument. The pleadings are silent upon the subject, but, as the existence of such children is not negatived in the bill, the presumption must be in favor of their existence, on the principle that the complainants are bound to make out all the necessary circumstances on which their title to relief rests.

The only remaining foundation for the case of the complainants is the act of the legislature in confirmation of the agreement mentioned in the bill. There are but very few of these acts of special legislation which I regard as possessed of any legal validity. It does not seem to me that their inefficacy arises merely when they conflict with the positive prohibitions of the constitution, or when they disturb vested estates. As a general rule, I think they cannot meddle with vested rights. I have no belief that, by a special act, a man's right or expectancy to a contingent remainder, or under an executory devise, can be cut off. Nevertheless, there are some cases in which, from ancient custom, a power of special legislation may be said to subsist as a function of the law making power. The extent of such right will be always questionable. In the present instance, the right to be affected by the act is very remote, and of the most contingent character. These children and grandchildren, whose rights alone are affected by the statute in question, have no interest which is capable of being enforced in any court, unless they should first obtain an appointment in their favor. Their interest, then, is the mere possibility that Mrs. Thomson, in derogation of her agreement with their parents, should appoint a part of this fund to them. It may be that, against such a

mere possibility, this act of the legislature should prevail. The decision of the Chancellor is in favor of its efficiency for the purpose designed; and leaning, in a great measure, on that opinion, I shall, on this ground, vote for the affirmance of the decree rendered in the Court of Chancery.

For affirmance—Beasley, C. J., Bedle, Clement, Dalrimple, Depue, Kennedy, Ogden, Wales, Woodhull. 9.

For reversal—Olden.

The Morris and Essex Railroad Company, appellants, and Prudden, respondent.*

Same appellants, and The Attorney-General, *ex rel.* Stickle and others, respondents.

1. The remedy by indictment being so efficacious, courts of equity entertain jurisdiction over public nuisances with great reluctance, whether their intervention is invoked at the instance of the Attorney-General, or of a private individual, who suffers some injury therefrom distinct from that of the public.

2. Where an ample remedy for an invasion of the public right by indictment exists, a court of equity will not interfere by injunction at the instance of the Attorney-General, unless in case of a pressing necessity to relieve the public travel from immediate and serious inconvenience. An allegation that the laying of a second track of a railroad in the street of a town will have a tendency to depreciate the value of the property of the relators, and cause them great and irreparable injury by reason of the narrowing of the street, and also by reason of the increased annoyance that will be caused by the running of trains, and the danger to their buildings from proximity to such track, in the absence of any allegation of pressing necessity to relieve public travel from immediate and serious inconvenience, will not warrant the granting of an injunction on an information filed by the Attorney-General as a representative of the public.

3. The owners of several and distinct lots of land, having no common interest, cannot join in a bill to enjoin a nuisance common to all, where the grounds of relief are a special injury to each one's property. An information filed in the name of the Attorney-General on the relation of such

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*Cited *in Stevens* v. *Pat. & New. R. Co.*, 5 *C. E. Gr.* 130; *Higbee* v. *C. & A. R. & T. Co.*, *Id.* 438; *Carlisle* v. *Cooper*, 6 *C. E. Gr.* 584; *Stanford* v. *Lyon*, 7 *C. E. Gr.* 35; *Hackensack Imp. Com.* v. *N. J. Midland R. Co.*, 7 *C. E. Gr.* 97; *Black* v. *Del. & Rar. Canal Co.*, *Id.* 426; *Morris C. & B. Co.* v. *Fagin*, *Id.* 436; *Easton* v. *N. Y. & L. B. R. Co.*, 9 *C. E. Gr.* 59; *Att'y-Gen'l* v. *Brown*, *Id.* 92; *Scanlan* v. *Howe*, *Id.* 277; *Att'y-Gen'l* v. *Del. & B. B. R. Co.*, 12 *C. E. Gr.* 26; *Prudden* v. *Lindsley*, 1 *Stew.* 383.

owners, will not, therefore, be considered as a bill filed in their behalf, where the case disclosed is not such that relief can be afforded at the instance of the Attorney-General.

4. A court of equity will not enjoin an offence against the public at the instance of an individual, unless he suffers some private, direct, and material damage beyond the public at large, as well as damage otherwise irreparable. Mere diminution of the value of his property by the nuisance, without irreparable mischief, will not furnish any foundation for equitable relief.

5. An injunction ought not to be granted when the benefit secured by it to one party is of but little importance, while it will operate oppressively and to the great annoyance and injury of the other party, unless the wrong complained of is so wanton and unprovoked in its character as properly to deprive the wrong doer of the benefit of any consideration as to its injurious consequences.

6. Where a person entitled to a right in the nature of an easement encourages another, though passively, to acquire title and expend money on the assumption that that right will not be asserted, he will not be permitted in a court of equity to assert his right to the prejudice or injury of those who have been encouraged by his acquiescence, to expend money on the faith that his rights will not be exercised to defeat the just expectations upon which such expenditures have been made. Where such acquiescence has continued for the period of twenty years, or even less, in a court of equity his right will be extinguished by estoppel.

7. The Morris and Essex Railroad Company, by their charter, were authorized to construct a railroad to Morristown, sixty-six feet wide, with as many sets of tracks as they might deem necessary. Subsequently, the company were authorized to extend their road from Morristown, passing through the village of Dover. When the road was located to Dover, one McFarlan was the owner of lands in the village, which had previously been laid out in streets and squares, which had become dedicated to public uses; one of the streets, marked on the map as Dickinson street, was mainly coincident with an old turnpike road, which had, by act of the legislature, been declared to be a public road, and subject to vacation and alteration the same as if laid out as a public highway. In the spring of 1846 the company surveyed and located their railroad within the lines of Dickinson street, and graded the road-bed; and in 1847 laid rails thereon for a single track. Before the company commenced the extension of their road to Dover, McFarlan, as an inducement to make such extension, agreed to procure the right of way for them without cost, and to obtain the vacation of the public road over which the railroad was located. In June, 1848, the public highway over which Dickinson street, in part, was laid, was vacated according to law, and in December, 1848, McFarlan conveyed to the company a strip fifty feet in width, lying within but south of the middle line of Dickinson street, on which their single track was constructed. The company have

been in the peaceable occupation of this strip of land for a single track of their railroad for upwards of twenty years, and were engaged in constructing a second track on it, which was entirely south of the middle line of the street. An information was filed in the name of the Attorney-General on the relation of several of the owners of lots fronting on the north side of the street, and a bill was also filed by Prudden, who was the owner of a lot fronting on the north side of the street, which he purchased in 1839, to enjoin the laying of the second track: *Held*—

1. That the public right in Dickinson street having been extinguished by the vacation of it as a public highway, except for a distance of three hundred feet, and there being no allegation that the public travel over that fragment of the highway was impeded, the court would not interfere by injunction, at the instance of the Attorney-General.

2. That Prudden, having acquiesced for more than twenty years in the use of that strip of land for railroad purposes, after it had been vacated as a public highway, and there being a clear and unobstructed road-way of twenty-nine feet in width for access to his premises, and the only special injury being the inconvenience of not being permitted to have wagons stand in front of his premises to load and unload, it was not a case for a court of equity to entertain jurisdiction of by injunction.

These were appeals from orders of the Chancellor for injunctions. The opinion of the Chancellor is reported in 4 *C. E. Green* 387.

Mr. Vanatta and *Mr. Shipman*, for appellants.

Mr. Pitney, for respondents.

The opinion of the court was delivered by

DEPUE, J.

The object of the bill of the complainant, Prudden, and of the information of the Attorney-General on the relation of Munson, Young, Roderer, and Stickle, is to enjoin the appellants from laying a second track of their railroad through Dickinson street, in the village of Dover, in the county of Morris. The complainant, Prudden, and the relators are severally the owners of lots fronting on the north side of Dickinson street. The street is sixty-six feet wide. The new track is forty-one feet distant from the north side of the

street, and consequently beyond the *medium filum viæ*. The defendants are the owners of the lands on the south side of the street, opposite the premises of the complainant and the relators, and the new track proposed to be laid is entirely on that side of the middle line of the street.

The intervention of the Attorney-General is sought to be justified on the ground that Dickinson street is a public highway, and that the proposed construction of an additional track by the defendants, through the street, longitudinally, will be such an interference with public rights as to be a public nuisance. The complainant and the relators present their right to the relief prayed for in two aspects, the first of which is based on the public right, and the other upon their private rights, which they claim they became entitled to in the street, by virtue of the boundary of their conveyances thereon.

Dickinson street was never laid out as a public road. It it claimed to have become such by virtue of a dedication by Henry McFarlan, sen., who formerly was the owner of a considerable tract of land in and adjoining the village of Dover. This dedication is alleged to have been made by a survey and map made by McFarlan, about the year 1827, followed up by sales and conveyance of lots designated on said map, and described by referring to the streets laid down on the map.

The earliest map produced as an exhibit is one made by one Van Winkle, a surveyor in the employ of McFarlan, which bears date in March, 1831. A second map, made by the same person, while in McFarlan's employ, some time between the years 1831 and 1835, was also produced. Before either of these maps was made, the old Union turnpike road ran through the premises, on the line of what is now Blackwell street, to near the corner of Blackwell and Sussex streets; then, crossing the blocks between Warren and Sussex streets, and Sussex and Morris, diagonally, to Dickinson street; and thence, extending eastwardly, either on or near to the site of what is now Dickinson street. By an act of

the legislature, passed on the 22d of February, 1841, the Union Turnpike Company was authorized to surrender all that part of its road situate between Morristown and the widow Love's house, in Dover, and the part so surrendered was thenceforth declared to be a public and common highway, to be amended, worked, repaired, vacated, or altered, in the same manner, in all respects, as though the same had been laid out as directed by "An act concerning roads." *Acts of* 1841, *p.* 34.

In the spring of 1846, the defendants surveyed and located their road through Dover, within the lines of Dickinson street, as designated on the map of 1831, and in the course of the same year graded the road-bed, and in 1847 laid rails thereon for a single main track. On the 7th of December, 1848, they procured a deed of conveyance, bearing date on that day, from the trustees of the McFarlan estate, in whom the fee in the streets was vested, for a strip of fifty feet in width, within the lines of the street, on which their main track was constructed, and on which they now propose to lay an additional track.

Before the defendants commenced the extension of their railroad from Morristown to Dover, McFarlan, as an inducement to the defendants to make such extension, agreed to procure the right of way for them, without cost to the defendants, and to obtain the vacation of the public road along side of, and partly within the lines of the route on which their railroad was located. Application was accordingly made to the Court of Common Pleas of the county of Morris for that purpose, and in June, 1848, surveyors of the highways, appointed by the said court, vacated all that part of the public road situate between the intersection of Sussex and Blackwell streets and the point of the mountain easterly of the village, and laid out a new road between those points over Blackwell street, in lieu of the road so vacated. What effect this extinguishment of the public right will have upon the rights of adjoining proprietors, where the *locus in quo* is a public street in a city or town, and the origin of the public

right is a dedication by the owner by a survey and map, and their title deeds call for streets as laid out and designated on the map as boundaries, is a question not settled in this state. It is adverted to by Justice Vredenburgh in *The State* v. *Snedeker*, 1 *Vroom* 80, as a grave question for future consideration, whether the legislature can, constitutionally, vacate a public highway on which an adjacent owner had built or made improvements upon the faith of its being and remaining a public highway, and whether such vacation would authorize the owner of the soil to close it up, and thus render his improvements valueless or greatly diminish their value.

If we adopt the doctrine generally recognized in the courts of sister states, that the grantee is entitled, as against his grantor and his assigns, to have the street, by reference to which his deed is made, kept open to its full width, either as an incident of the grant itself or by force of a covenant implied from the grant; *Parker* v. *Framingham*, 8 *Metc.* 260; *White* v. *Flannigain*, 1 *Maryland* 525; *Moale* v. *Mayor of Baltimore*, 5 *Ibid.* 314; *Transylvania University* v. *City of Lexington*, 3 *B. Mon.* 27; *In matter of Lewis street*, 2 *Wend.* 472; *Livingston* v. *Mayor of New York*, 8 *Ibid.* 85; *Wyman* v. *Same*, 11 *Ibid.* 487; it would necessarily follow that such right may be released by the act of the owner, and discharged or extinguished by adverse possession for the period of time necessary to ripen a hostile possession into an indefeasable right.

The contingencies, above adverted to, of the vacation by the action of surveyors of the highways, of a public road, coincident in some parts with a street which is claimed to have become a public highway by dedication; and of a claim by adjacent proprietors of private rights, beyond the *medium filum viæ*, by reason of their boundary on a public street; and also of an adverse possession for the period of twenty years, whereby an extinguishment of such private rights is claimed to have been effected, have arisen in this cause. In view of the opinion of this court as to the propriety of re-

taining the injunctions under the peculiar circumstances of this case, it is unnecessary to express any opinion definitely upon these questions.

The remedy by indictment being so efficacious, courts of equity entertain jurisdiction over public nuisances with great reluctance, whether their intervention is invoked at the instance of the Attorney-General, or of a private individual who suffers some injury therefrom distinct from that of the public. "If," says Chancellor Kent, "a charge be of a criminal nature, or an offence against the public, and does not touch the enjoyment of property, it ought not to be brought within the direct jurisdiction of this court, which was intended to deal only in matters of civil right resting in equity, or where the remedy at law was not sufficiently adequate; nor ought the process of injunction to be applied, but with the utmost caution. It is the strong arm of the court, and to render its operation benign and useful it must be exercised with great discretion, and when necessity requires it." *Attorney-General* v. *Utica Ins. Co.*, 2 *Johns. C. R.* 378. In *Attorney-General* v. *The N. J. R. Co.*, 2 *Green's C. R.* 136, Chancellor Vroom gives expression to the hesitancy of courts of equity in entertaining jurisdiction by injunction, of injuries of this nature. He says: "In cases of public nuisance, there is an undisputed jurisdiction in the common law courts by indictment, and a court of equity ought not to interfere in a case of misdemeanor, where the object sought can be as well attained in the ordinary tribunals." In the recent case of *Hinchman* v. *The Paterson Horse R. Co.*, 2 *C. E. Green* 75, the bill was filed by the owners of lots abutting on Congress and Market streets, in the city of Paterson, to enjoin the laying of rails for a horse railroad through those streets. In delivering his opinion, Chancellor Green expresses himself against the propriety of the interference of courts of equity to redress injuries of that description, in the following terms: "The injury which the owners of lots upon the street suffer from obstructions in the street and impediments to traveling, is common to all

the public. In cases of unquestioned public nuisance, a court of equity will not interfere by injunction, except in cases of special and serious injury to the complainant, distinct from that suffered by the public at large." There must not only be a violation of the plaintiff's rights, but such a violation as will be attended with substantial and serious damage. *Bigelow* v. *Hartford Bridge Co.*, 14 *Conn.* 565. No remedy exists in these cases, by an individual, unless he has suffered some private, direct, and material damage beyond the public at large, as well as damage otherwise irreparable. *Irwin* v. *Dixion*, 9 *How.* 27. Mere diminution of the value of the property of the party complaining, by the nuisance, without irreparable mischief, will not furnish any foundation for equitable relief. *Zabriskie* v. *The Jersey City and Bergen R. Co.*, 2 *Beas.* 314.

It must not be overlooked that the defendants are engaged in a public work, by the completion of which the public interests will be greatly advanced. The injunction by which the progress of the work is arrested, must not only cause great injury to the defendants, but also is the occasion of great inconvenience to the public. In the case of *Allen* v. *Freeholders of Monmouth Co.*, 2 *Beas.* 68, it was held that although a bridge which was being erected over navigable waters without competent legislative authority, was technically a nuisance, yet as it was being built in good faith, and for the public benefit, a court of equity would not restrain its erection, even on an information by the Attorney-General in behalf of the public.

Whether the question is viewed in the aspect of a proceeding by the Attorney-General to protect the rights of the public, or of a suit by the complainant and the individual relators to protect their private rights, the most cogent reasons exist for a court of equity abstaining from drawing the controversy within its jurisdiction, until the rights of the parties are settled in a court of law. When the defendants located their road, it was with the understanding that the old turnpike road should be vacated, to permit the occupa-

tion of the road-bed by the defendants' railroad. A vacation of the old road from Sussex street, eastwardly, was shortly afterwards effected for that purpose. It is a disputed fact in the case, whether Dickinson street from that point is not, in the main, coincident with the site of the old road. The map annexed to the return of the surveyors shows that the street and the highway were coincident in front of the premises of Prudden, and along the whole block on which his lot is situate. At that time a fence was standing across Dickinson street just beyond the line of Warren, leaving along that street a single block between Warren and Sussex street, less than three hundred feet in length, between the vacated public road and the extreme limit to which there is any pretence that there was an actually opened street. From the time the company laid their rails in 1847, until the present controversy arose in October, 1867, they have been peaceably in the occupation of the premises for their single main track, and there is some evidence of an user of the residue of the strip embraced in their deed for the purposes of their business. The additional track of the defendants is to be laid on a level with the street, or nearly so, and twenty-nine feet of clear roadway outside of the sidewalk will remain unobstructed to accommodate the public travel. It is not charged in the information that the public travel will be, to any extent, impeded by the new track of the defendants. It is true that it is charged in the information that the proposed track will narrow the street and impair its utility by reducing its width, but the information studiously avoids charging that the public travel is such over that fragment of a highway that the public interests will be, to any extent, impaired thereby. The gravamen of the complaint is that the laying of such second track will have a tendency to depreciate the property of the relators, and cause them great and irreparable injury by reason of the narrowing of the street, and also by reason of the increased annoyance that will be caused by the running of trains, and the danger to which their buildings will be subjected from

their proximity to said track. The allegation of special injury in the bill of Prudden is substantially the same, with the addition of an allegation of interference with complainant's passage to and from his premises; omitting all complaint as to danger to his buildings from proximity to the track. With ample remedy for the invasion of any public right by indictment, and in the absence of any allegation of pressing necessity to relieve the public travel from immediate and serious inconvenience, the retention of the injunction at the instance of the Attorney-General is inconsistent with the principles upon which courts of equity employ process of injunction as a purely preventive remedy.

The relators being owners of several and distinct lots of land, and having no common interest, cannot join in a bill to enjoin a nuisance common to all, where the grounds of relief are a special injury to each one's property. A bill filed by them jointly, would be demurrable for misjoinder of parties. *Hinchman* v. *Paterson Horse R. Co.*, 2 *C. E. Green* 75. The information cannot, therefore, be retained and considered as a bill filed in their behalf.

With respect to the bill of the complainant, Prudden, as already observed, the highway in front of his premises was coincident with Dickinson street, and the highway has been vacated by the action of the surveyors of the highways. What rights the complainant acquired in the street beyond the *medium filum viæ* by his deed of conveyance, and the effect of the vacation of the previously existing highway, are questions proper for the determination of a court of law. It must be a strong and mischievous case of pressing necessity, or the right must have been previously established at law, to entitle the party to call in aid the jurisdiction of a court of equity. *Robeson* v. *Pittenger*, 1 *Green's C. R.* 57. For a period of upwards of twenty years the defendants had been permitted to occupy the street for the purposes of their railroad track, under a claim of title, without remonstrance or complaint. The complainant acquired title to the premises, in relation to which he is aggrieved, in 1839. He was owner when the

track was laid in front of the premises. He has silently acquiesced ever since. The construction of an additional track, occupying a width of eleven feet, cannot add much to the inconvenience to which he was subjected by the occupation of the street by the single track. A clear and unobstructed roadway of twenty-nine feet is left to admit access to his premises. The retention of the injunction will be of little benefit to the complainant, while it will work serious annoyance to the defendants. An injunction ought not to be granted where the benefit secured by it to one party is but of little importance, while it will operate oppressively and to the great annoyance and injury of the other party, unless the wrong complained of is so wanton and unprovoked in its character as properly to deprive the wrong doer of the benefit of any consideration as to its injurious consequences. *Jones* v. *City of Newark*, 3 *Stockt.* 452. The defendants will not occupy, with the proposed track, any of the complainant's lands. For the contingent and consequential damages he may suffer from any unlawful interference with his enjoyment of his property, he has his remedy by action at law, whenever, and as often as loss or damage ensues; and if the use of a railroad in front of his premises becomes a nuisance, or the aggression proves to be a permanent injury, without an adequate remedy at law, then the court will be competent to administer equitable relief by injunction to prevent its continuance or for its removal. But a strong case must be presented, and the impending danger must be imminent and impressive, to justify the issuing of an injunction as a precautionary and preventive remedy. *Drake* v. *The Hudson River R. R. Co.*, 7 *Barb.* 508.

Regarding the merits of the complainant's title to relief in the light of any private right he may have acquired in the street beyond the middle line to have it kept open its full width, by reason of the boundary of his lands thereon, a grave question arises whether his right has not become extinguished by long acquiescence. The defendants, by their original charter, passed January 29th, 1835, were authorized to lay

out and construct a railroad or lateral roads not exceeding sixty-six feet wide, with as many sets of tracks and rails as they might deem necessary. The deed of conveyance they obtained from the trustees of the McFarlan estate was for a width of fifty feet at the graded surface, and was expressed to have been made for the purpose of enabling them to build, construct, maintain, and keep up their railroad thereon; and the public road which then laid over the premises was vacated to enable the company to use the premises for that purpose. On the faith of their title and of these proceedings, which were manifestly designed to remove all impediments in the way of their use of the premises for the purposes for which they were conveyed, the company located their single track. A double track was then within their corporate powers. It has now become necessary. To permit the complainant to interpose any supposed rights that he or those under whom he claims may have had beyond the limits of the premises of which he is the owner, would defeat the purpose of the conveyance to the defendants, and render nugatory the action of the surveyors in vacating the public highway. Where a person entitled to a right in the nature of an easement encourages another, though passively, to acquire title and expend money on the assumption that that right will not be asserted, he will not be permitted in a court of equity to assert his right to the prejudice or injury of those who have been encouraged by his acquiescence, to expend money on the faith that his right will not be exercised to defeat the just expectations upon which such expenditures have been made. Where such acquiescence has continued for the period of twenty years, or even less, in a court of equity his right will be extinguished by estoppel.

The only special injury the complainant will sustain, peculiar to himself and distinct from that of the public in general, is in the inconvenience he may suffer in not being permitted to have wagons and vehicles stand in front of his premises, on which are a dwelling-house and a wheelwright shop, for

a sufficient time to load or unload. With a cross-street flanking his premises on each side, it does not appear that the exigencies of his business, or the convenient use of his property, so imperatively require that use of the street, that his being deprived thereof will cause an irreparable injury of such magnitude that a court of equity should entertain jurisdiction by injunction, when the question of right is in any doubt.

The order for an injunction is reversed in both cases.

In Prudden's case, the vote was as follows:

For reversal—Beasley, C. J., Clement, Depue, Kennedy, Van Syckel, Wales. 6.

For affirmance—Bedle, Woodhull, Ogden, Olden. 4.

In the other case, all the judges voted for reversal except Judge Olden.

The Morris and Essex Railroad Company, appellants, and The Sussex Railroad Company, respondents.*

1. Corporations are presumed to contract within the existing powers of their charters; and where general words are used in a contract between them admitting of a double construction, they must be construed consistently with the scope and powers of the charter.

2. The words, "any *future extensions or branches*," in a contract between two connecting railroad corporations for a division or drawback of freights and fares over their roads, "or any future extensions or branches of the same," must not be construed, in their general sense, to apply to extensions then unauthorized by the legislature, where there were unexhausted powers in the charter and supplements, at the time of the contract, to build other extensions or branches, sufficient to meet the requirements of the words.

3. The third section of the act of 1846, concerning corporations, (*Nix. Dig.* 168,) providing, that in addition to the powers enumerated in the first section of the act, (which are the ordinary powers of all corporations,) "and to those expressly given in its charter or in the act under which it is or shall be incorporated, no corporation shall possess or exercise any corporate powers except such as shall be necessary to the exercise of the

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*Cited *in M. & E. R. Co.* v. *Bonnell*, 5 *Vr.* 477.

powers so enumerated and given," must be taken as a prohibition of any acts not within the scope of the powers permitted, and contracts in contravention of it are illegal. *Held*—that it was not within the scope of the charter and supplements of the Morris and Essex Railroad Company, to make a contract with the Sussex Railroad Company for rates of freight and fare over extensions not authorized at the time of the contract, and that such a contract, if intended to include extensions afterwards authorized and built, was illegal, and could not be enforced as to them, (there being, in this case, no ratification by the legislature or by authority of the corporation after the extensions were authorized).

Quære. Whether the common law rule does not come up to the extent of the statute? BEDLE, J.

4. The right of railroad corporations to divide through fares and freights on authorized lines, or to offer inducements by a reduction in rates to secure freights and travel over such lines, are contracts concerning their own authorized business, and not objectionable unless unconscionable.

5. Extensions afterwards authorized and built, will not be substituted for other extensions and modes of transportation authorized at the time of the contract, without an intention to that effect in the contract, even if no question of power to contract concerning them interfered.

[The contracts of promoters of railroads in England considered; and not analogous to this case.]

The following is a copy of such parts of the contract, upon which the bill was filed, as are involved in this appeal:

"Articles of agreement made this 24th day of July, in the year of our Lord 1852, between the Morris and Essex Railroad Company of the first part, and the Sussex Mine Railroad Company of the second part:

"WHEREAS, the said Morris and Essex Railroad Company is now engaged in extending the railroad of the said company from the village of Dover to the village of Hacketts-town, and the said the Sussex Mine Railroad Company is about to reconstruct the railroad of the said company between the village of Waterloo and the village of Andover, in the county of Sussex, and to connect the same with the railroad of the said Morris and Essex Railroad Company at some point intermediate between the villages of Stanhope and Waterloo, or at or near one of the said villages, and to extend the said railroad from Andover to the village of Newton, in the said county of Sussex; *and whereas*, the

said parties, for their mutual accommodation and benefit, have, and by these presents do enter into the following articles of agreement, that is to say :

"*First.* It is understood and agreed that all freight and passengers which shall be transported over either of the roads of the said companies, or any future extensions or branches of the same, to the said point of intersection, and destined for any towns or places at the termini or on the line of the said roads, respectively, or any future extensions or branches of the same, shall be forwarded by said respective companies to the towns or places of their destination with all convenient despatch, and by the ordinary means of transporting freight and passengers upon said respective roads, and at prices not exceeding the average rates charged per mile at the time by said companies, respectively, for other freight and passengers of the same class, to and from other places on the line of the said roads, respectively ; and the said Morris and Essex Railroad Company agree to stop their trains at the said point of intersection to receive the freight and passengers, which may be brought to the said point of intersection, over the said Sussex Mine Railroad, in the trains of the said Sussex Mine Railroad Company, run to meet and connect with the trains of the said Morris and Essex Railroad Company, and to discharge freight and passengers intended for the same.

"*Second.* That the rates of transportation of all freight and passengers passing upon both of said roads shall be mutually agreed upon by said companies, and in case they fail to agree as to said rates, then that each company shall and may fix the said rates upon their respective roads ; but it is hereby expressly agreed that neither of the said companies shall fix or adopt any higher rate of transportation upon freight and passengers to and from the said point of intersection, than the average rate per mile adopted by the said company between other points and places upon the line of the road of said company, for the same classes of freight and passengers ; nor shall either of the said companies, in any

wise, so arrange its tariff of charges on freight and passengers as to discriminate against the freight or passengers which may be offered for transportation by the other company.

"*Third.* That the settlement between the said companies shall be made monthly, and that the said Morris and Essex Railroad Company shall allow and pay to the said Sussex Mine Railroad Company, in addition to the regular receipts of the said Sussex Mine Railroad Company, according to the provisions of the foregoing articles, thirty per cent. of the gross amount of the receipts of the said Morris and Essex Railroad Company for the transportation of all passengers passing on the roads of both of said companies, and twenty-five per cent. of the gross amount of the receipts of said company for the transportation of all freight passing on the roads of both of said companies, and also the same per centage on all deductions which shall be made to the said Morris and Essex Railroad Company, for the said freight or passengers by any other railroad company, from the ordinary charges of such other company over whose railroad the said passengers and freight may be transported. The said allowance and payment is not, however, to be made on any passengers or freight which shall pass over said Sussex Mine Railroad, for any distance less than two miles."

The case will be found fully stated in 4 *C. E. Green* 13. From a decree in accordance with the opinion of the Chancellor there reported, the defendants appealed.

Mr. Vanatta, for appellants.

The question as to liability of Morris and Essex road depends on two questions: 1. Whether original contract as to that per centage is a legal and binding contract? If not, of course, it can have no application to extensions and branches. 2. Whether or no it applies to extensions made under authority acquired after making the contract?

1. As to legality and validity of contract itself. I mean that portion of contract which requires payment of defendants' earnings to complainant.

It is desirable to look closely, ascertain accurately, whence this per centage is to be derived, who is to pay it, and for what it is to be paid.

It is to be observed that the Sussex road is to have the whole of its own earnings, and, in addition, these respective per centages of the earnings of the Morris and Essex road. There is no agreement to carry for the Sussex road at a cheaper rate. No such agreement was desired by the Sussex road. The more there was charged the greater was the per centage received by them. The contract does not provide for any division of the profits of the Sussex road. The Chancellor goes upon the idea that there was a contract to divide profits—a sort of partnership. The Morris and Essex road are to have no part or share at all in the earnings of the Sussex road. There is to be no division of the joint profits, but a division of the profits of the stockholders of the Morris and Essex road with aliens.

Then, what is the consideration for the surrender of the earnings of this road? What is the *quid pro quo?* In return for what, are the Morris and Essex road to pay thirty per cent. of the freight earnings and twenty-five per cent. of the passenger? The seal of the company is not sufficient consideration. There must be a valuable consideration, and a *lawful* one. Why the consideration of this contract to give such per centage of the earnings of the Morris and Essex road, was the building of the road from Andover to Newton.

A court of equity will look at the primary, moving, controlling consideration, without which the contract would not have been made: *Shrewsbury* v. *The North Staffordshire Railway Co.*, 1 *Eq. Cas.* (*Law Rep.*) 593.

This payment, then, was a reward and compensation to the complainants, for extending their road to Newton.

There are many instances where railroads connecting with each other share their profits, but not where a railroad

agrees to pay another a per centage of its profits for constructing a railroad.

Why the consideration was the building of the road to Newton, which would cost $450,000; that is, it was a mortgage on the Morris and Essex road for $450,000; and if the road to Newton was not finished by the time specified in the contract, these appellants (the defendants below) would not have been required to pay this per centage. This is the view of both the learned counsel on the other side, and of the Chancellor, entirely agreeing with my own.

A private corporation may do what its charter expressly authorizes it to do, and what is necessary to accomplish what it is expressly authorized to do. Strict construction of this doctrine is established in this state. *State* v. *City of Elizabeth*, 4 *Dutcher* 103; *State* v. *City of Newark*, 2 *Dutcher* 519; *Trenton Mutual Life Ins. Co.* v. *McKelway*, 1 *Beas.* 133.

Now the fact is, that the Morris and Essex road are here contracting to construct a road which they were not authorized to construct, and which consequently was not within their power. This doctrine is strikingly enforced in the late case of *Rar. & Del. Bay R. Co.* v. *C. & A. R. Co.*, 3 *C. E. Green* 567; see, also, *Pearce* v. *Madison and Indianapolis R. Co.*, 21 *How.* 441; *Russell* v. *Topping*, 5 *McLean* 194; *Abbott* v. *Baltimore Steam Packet Co.*, 1 *Maryland C. R.* 542. In this latter case it was also held that the corporation may itself, upon an action upon such a contract, deny its power to enter into it. See also, *Steam Navigation Co.* v. *Dandridge*, 8 *Gill & Johns.* 248; *Mutual Savings Bank* v. *Meriden Agency*, 24 *Conn.* 159; *Berry* v. *Yates*, 24 *Barb.* 199; *Talmadge* v. *Pell*, 3 *Seld.* 328.

By the original charter of the Morris and Essex road, 11th section, after defraying expenses of the road, the funds are to be divided among their stockholders, and not to be given to somebody in Sussex county to build a road.

A railroad company cannot, even with the assent of all its stockholders, use the funds for an object foreign to that of its incorporation. *East Anglian R. Co.* v. *Eastern Coun-*

ties R. Co., 11 *Com. Bench* 775 Similar cases: *McGregor* v. *Dover and Deal R. Co.*, 18 *Ad. & Ellis* (*N. S.*) 618. More strict construction yet, is *Bostock* v. *North Staffordshire R. Co.*, 4 *Ellis & Bl.* 798; *Norwich* v. *Norfolk R. Co.*, *Ibid.* 397, 441.

Although the agreement should be itself all right, yet we have the right to look below, on the question of *ultra vires*. *Royal British Bank* v. *Turquand*, 5 *Ellis & Bl.* 248. This was an action on a bond made by corporation.

The case of *Shrewsbury and Birmingham R. Co.* v. *London and N. W. R. Co.*, 17 *Ad. & Ellis* (*N. S.*) 652, seems to have been considered by the Chancellor as one similar to this. The agreement in that case was very different from this; it was an agreement for working several lines of railways in connection, proceeds to be divided among them, proportionally to the lengths of the several roads, respectively.

Here there is no proportion. The Sussex company keep all they have got, and try to get out of us all they can.

I go now to the English cases in equity. Apparently the leading case is *Colman* v. *East. Co. R. Co.*, 10 *Beav.* 1. See, also, *Attorney-General* v. *Norwich*, 16 *Sim.* 225.

Expected benefits will not justify the use of the funds of a corporation in an unauthorized manner. *Mount* v. *Shrewsbury and Chester R. Co.*, 13 *Beav.* 1; *S. C.*, 3 *Eng. L. & Eq.* 144; *Salomons* v. *Laing*, 12 *Beav.* 339; see, on *p.* 352, what the Master of the Rolls said as to any application or dealing with the capital, or the funds of the corporation in any way not authorized by the charter. *Simpson* v. *Denison*, 10 *Hare* 51; *S. C.*, 13 *Eng. L. & Eq.* 359. In this latter case, I take the distinction to be as to whether the object of the contract is simply to divide the tolls of the companies between them, or whether it is to supply funds for the purpose of constructing another work.

Bagshaw v. *The Eastern Union R. Co.*, 2 *McN. & G.* 389; *Eastern Counties R.* v. *Hawkes*, 5 *H. L. Cases* 345–8; 21 *Eng. L. & Eq.* 321; 16 *Beav.* 441.

This contract is one not fit to be enforced in equity, because it is unequal, unconscionable, against public policy.

So long as it is profitable to the Sussex Company and unprofitable to the Morris and Essex Railroad Company, all very good, but so soon as it is unprofitable to the Sussex road, they may stop bringing passengers and freight to the point of intersection. There is no mutuality; nothing reciprocal; so long as they can burden us, very good. Why reciprocity is the very essence of a contract.

They are here really for specific performance, to get accounts, manifests, way-bills, and such divers papers. Why did they not bring an action of covenant for the amounts due on the contract? Then, too, they could get damages. Why then are they here in a court of equity? For specific performance. To compel us to do what the law could not compel us to do.

See *Taylor* v. *Chichester and Midland R. Co.*, 2 *Exch.* (*Law Rep.*) 366; *Eastern Counties R. Co.* v. *Hawkes*, 5 *H. L. Cases* 331.

A railway company cannot give away its earnings. *Gage* v. *New Market R. Co.*, 18 *Ad. & Ellis* (*N. S.*) 457.

Even upon the law of partnership, I take it this contract would be held to be illegal, would be void as against a stockholder of the Morris and Essex Railroad Company. It could not be made without his consent.

How could the Morris and Essex Railroad Company bind the property of their company, as to things not possible to be contemplated? 2 *Eq. Cas.* (*Law Rep.*) 524.

But even if this contract was valid, can it be possible that the Morris and Essex Railroad Company intended this contract to apply to any extensions not authorized? Would any prudent man have attempted to bind this company in regard to extensions, not authorized, contemplated, or even known about? What did they know as to the future operations of this company? And if it applied to any future extensions beyond what were then authorized, there is no limit. They can commence on the Sussex road at two miles and one foot

beyond the intersection at Waterloo, run a road across the continent to the Pacific, and compel us to take all their passengers and freight at this per centage, which they are seeking to compel us to pay, as by the terms of this contract.

Can it be probable, or even possible that such was the intention of this contract?

Mr. McCarter, for respondents.

The bill had two objects. 1. To compel the defendants to pay drawbacks under contract, and a decree for *future liability*. 2. As to alteration in gauge of defendant's road. The second is not subject of appeal, and will not be considered here.

February 19th, 1851, the defendants were authorized to go to the Delaware, and to make contracts for transportation of passengers and freight to New York. They extended their road to Hoboken, and again to Phillipsburg, in 1867.

The suit is brought for per centage under the contract, over these extensions. Defendants interpose three objections.

1. Extensions not within the terms of the contract.

2. If broad enough to contain in its terms these extensions, there was nothing for them to apply to.

3. This contract illegal.

The remarks will be addressed first to the *construction* of this contract, and not whether the companies had the power to make it. Does contract bind defendants if they have the power?

It is perfectly clear, it seems to me, that the "further extensions" of the road include those not authorized as well as those then authorized. So far as the extension to Phillipsburg is concerned, it is recited in the preamble as being *at that time in the course of construction.* This can hardly, by any fair or natural construction of words, be taken to be a *future* extension. On this point see *Eastern Counties R. Co.* v. *Hawkes*, 5 *H. L. Cas.* 348; *Lancashire and Yorkshire R. Co.* v. *East Lancashire R. Co.*, *Ibid.* 792; *Willink* v. *Morris Canal Co.*,

3 *Green's C. R.* 398; *Seymour* v. *Canandaigua and Niagara Falls R. Co.*, 25 *Barb.* 284; *Bishop* v. *North*, 11 *Mees. & W.* 418; *Garton* v. *Bristol and Exeter R. Co.*, 4 *Hurlst. & N.* 831.

What may railway companies generally do? *Barry* v. *Merchants Exchange Co.*, 1 *Sandf. C. R.* 280. Within the scope of their incorporation they can do everything. *Angell & Ames* 271. Railroads may, under the decisions of the Supreme Court of this state, make contracts to deliver goods at places far beyond the limits of their lines.

Corporations may make perpetual contracts within the limits of their charter, to continue so long as charter continues. *Great Northern R. Co.* v. *Manchester R. Co.*, 10 *Eng. L. & Eq.* 11; *Yorkshire* v. *Great Northern R. Co.*, 9 *Exch.* 55, 642; *S. C.*, 25 *Eng. L. & Eq.* 482; *Columbus, Pequa and Indianapolis R. Co.* v. *Indianapolis and Bellefontaine R. Co.*, 5 *McLean* 450.

It is clear, upon general principles, that this contract is not beyond the powers of this corporation.

But the opposite side say that the consideration of this contract was illegal.

This contract was mutual and reciprocal.

This contract does not bind the Sussex Company to build their road from Andover to Newton. Nothing is said in the contract which compels either company to build any further road at all. It merely recites what they were doing at the time of making the contract.

It is said that the Morris and Essex road are bound to pay for building the Sussex road. Why, if the Sussex road is never finished, the Morris and Essex road will never have to pay anything. Nor will anything be paid to the Sussex road, until said road is finished, and then only the per centage under this contract. It is also said this is paid out of the earnings of the Morris and Essex road. Why, they have their own earnings separate and entire. The Sussex road only has a per centage out of such receipts as are derived from the business brought by them to the Morris

and Essex road. The Morris and Essex desired and sought the ores from the mining region. Before this contract they were sent over the Morris canal.

Not a single case cited by counsel is analogous to the one before the court, nor do they show the contract to be illegal.

Upon the authority of a corporation to do what is not directly contemplated or authorized at time of taking the charter. See 5 *H. L. Cas.* 331, 345.

This contract is not *ultra vires.*

The counsel insisted that this contract is unequal, unconscionable, &c. But in their answer they only set up the illegality of this contract. They should not here argue that this question is unconscionable; if they intended to set up that, it should have been set up in the answer, then we could have taken proof upon it, and show that it is greatly in their interest.

Mr. Frelinghuysen, on same side.

The plea of *ultra vires* should not be recognized, although fully established, except when the public good requires it.

Corporations are not permitted to exercise powers not contained in their charter, when against the public good.

Railroad companies are not authorized, here, to deliver goods in St. Louis, but if they contract to do it, if goods are lost, they will be responsible.

Still less will the court recognize doctrine of *ultra vires*, when contract has run for sixteen years, and contracts have been based upon it. Still less, where not a stockholder, but the directors alone object; where they have actually acquiesced for sixteen years. 3 *C. E. Green* 194.

The court cannot set aside this contract, because the Morris and Essex road will retain the benefits.

The court will reject the plea of *ultra vires*, when it injures other parties. *Norwich* v. *Norfolk R. Co.*, 4 *Ellis & Bl.* 449.

The directors had the legal title, and were authorized to make any contract they pleased, and the stockholders, those

beneficially interested, have acquiesced. Now, how shall they object?

The defence in this case is unconscionable, and is not to be recognized by this court, unless required by public good.

There is no *ultra vires* about this contract. Freight and passengers were to be carried over both roads. This was mutual, reciprocal.

It is within their power to make contracts to deliver freight and passengers beyond the limits of their road. This principle applies, even when it is to be delivered beyond the limits of their own road. 2 *Com. Law* 758; *Amer. Law Reg.* (*August*, 1867,) 666; 27 *Maine* 573; 19 *Wend.* 329; 6 *Gray* 539; *Weed* v. *Panama Railroad*, 17 *N. Y. R.* 363; 2 *Kernan* 245.

It is indispensable to have this power. Express power is given to this very company, by their very charter, to enter into contracts for these very purposes.

The court has no right to enter upon the question of this contract, except on the ground of fraud or mistake.

From the nature of this contract, it must be perpetual. To object to it on account of its being perpetual, is to say that that which may be lawfully done, shall not be done.

It is said this contract is unconscionable. Why, intelligent, keen, sharp men have made a bargain, and they come into court and say the bargain is bad, and they wish the court to relieve them. Unconscionable! why, the Sussex road has never paid its stockholders; its stock has never been par, or anywhere near it.

But they were authorized, if contract bad, to consolidate the stock in five years. But no; the Morris and Essex road want the business without the expense. Of course, they would rather have the supplies over the Sussex road, without paying this per centage.

Counsel say this is a contribution of the earnings of the Morris and Essex road. If this is not so, there is nothing in their argument; it fails. Was it a contribution of earnings, or a drawback to tempt passengers?

Is this contract valid and binding as to these extensions? They are certainly included in the words of the contract. 4 *Hurlst. & N.* 33.

Where the words are clear, the understanding of the parties is to be taken from the words. 18 *N. Y. R.* 363; 2 *Cowen* 153. Where the words are plain, the burden is on the party who would take himself out of their effect, to show they mean something else.

Now the contract covers the extension in words, and in contemplation of the parties.

Mortgage covers an extension not authorized at the time of giving the mortgage, but subsequently authorized. 25 *Barb.* 284; 5 *McLean* 450; 35 *Eng. L. and Eq.* 835; 14 *Penn. State R.*

Mr. C. Parker, for appellants, in reply.

These parties, being corporations, are creatures of the law, with certain prescribed powers, with others springing from necessary implication, but having no right to go beyond them.

What is the agreement between these companies? The Sussex road is to take its regular receipts for fares and to receive thirty per cent. of gross receipts of the Morris and Essex. What right has Sussex road to take them? These receipts are what is paid for transportation on another line. Does their charter authorize their deriving profit from it? Their charter says they shall not employ their means elsewhere than on their route, for any purpose not *clearly indicated.* And the general law of corporations is the same, statutory or common.

The Sussex road can have no right to receive earnings of the Morris and Essex road for its work, unless as a gift. Can it lawfully do that, without stockholders give? It cannot *earn* from the Morris and Essex, nor can the Morris and Essex give. If it is beyond power of the Sussex road to *take* the earnings of the Morris and Essex, how can the Morris and Essex give?

This is not a mere partition of through fares. No one could impugn that. Each company charges, and each receives its own. This thirty per cent. is an additional monthly *bonus*.

Through fares are always less fares. Partition then, right and necessary. But here there are no through fares, in the ordinary sense. There is something said of monthly settlements; but the payment of thirty per cent. is the settlement.

If there was no *seal*, and the parties could be bound without, would there be any obligation as to this clause in regard to payment?

If Morris and Essex road is receiving the Sussex fares, there is yet *no partition*. So, why this payment? Agreement is silent. We have to search to discover. It is not expressed.

The Sussex road may back out, if Morris and Essex don't go on with the extensions. It won't transport property till it sees Morris and Essex in earnest. Then, consolidation.

It is simply a plan to get the Newton road built, and then incorporate it with the Morris and Essex. This was confessedly unlawful, for the legislature had to be applied to.

The use of the funds is for building this road. Not able to give a bonus out and out, with which to build the road, its directors not ready to subscribe, the Morris and Essex says, drive on, finish in two years, you shall have thirty per cent., and we will consolidate, swallow you whole.

There are two reasons of illegality: 1. Legislative aid necessary. 2. Stockholders' assent.

The whole scheme is illegal, for, taken as a whole, it was the acquisition of a new branch, without authority of the legislature or consent of stockholders.

Taken more narrowly, it is the assignment away of stockholders' profits in the Morris and Essex on the speculation.

Taken as stated, it had no consideration, though it had a motive. That motive was to build a new road and so increase Morris and Essex revenues. Doubtless.

Whether the bargain be unconscionable, or the contract

ultra vires, it is a fraud on the stockholders, and so should not be enforced. It was a fraud on stockholders in the beginning, for it was seeking a new investment without their consent. It is a fraud ever since, for it yearly takes their profits and gives them to another company, operating now as a constantly increasing weight.

And now, if the decree of the Chancellor be affirmed, it will be in the way of every projected enterprise, for as fast as new branches are made they are to be subject, and all the profits on the Sussex transportation handed over.

Mr. Parker cited and reviewed the following cases: *Shrewsbury and B. R. Co.* v. *London and N. W. R. Co.*, 4 *DeG., M. & G.* 115, 21 *Eng. Law and Eq.* 319; 6 *Ho. Lds. Cas.* 114; 2 *McN. & G.* 325, 343; 11 *C. B.* 775; 10 *Beav.* 1; 9 *Exch.* 642; 22 *New York R.* 494; 21 *Howard* 441; 5 *Ho. Lds. Cas.* 348; *Ibid.* 792; 25 *Barb.* 284.

The opinion of the court was delivered by

Bedle, J.

This appeal raises the question of the right of the Sussex Railroad Company, under this contract, to compel the Morris and Essex Railroad Company to account for thirty per cent. of the gross amount of receipts for the transportation of passengers, and twenty-five per cent. of the gross amount of receipts for the transportation of freight, over the extension of the Morris and Essex Railroad from Newark to Hoboken, on the one end, and from Hackettstown to Phillipsburg on the other, (in addition to a like per cent. for passengers and freight on the rest of the road from Newark to Hackettstown.) This contract bears date July 24th, 1852; at that time these extensions were not built, or authorized by the legislature to be built. The extension from Hackettstown to Phillipsburg was mostly completed and in use by about December 1st, 1865. The authority to build that was granted by the supplements; one dated March 6th, 1855, the other March 13th, 1861. The extension from Newark to Hoboken was first

authorized by a supplement dated March 6th, 1857, and was subsequently acquired by a purchase in the year 1863, ratified by a supplement, dated April 12th, 1864, the particulars of which purchase will be found in that supplement. It will thus be seen that the authority for each of these extensions has been acquired since the date of the contract. The difficulty in question arises under the first section of the contract. That relates to all freight and passengers which shall be transported over either of the roads of the said companies, *or any future extensions or branches of the same.*

First. Do these words, "any future extensions or branches of the same," include the extensions in question. This is a matter of construction, and application of words to their subject matter. In determining it, we must necessarily look to the situation of the parties and their powers. The parties are creatures of the statute, and if these words can be fully satisfied by the objects authorized in their charters and supplements, we would not be justified in giving them an application to objects outside, uncertain, and unauthorized. Corporations in dealing with each other are presumed to contract within the powers and limitations of their charter, and any intention to contract upon matters not then authorized, even with the expectation of a subsequent legislative ratification, must be clearly expressed. There is nothing in this contract, certainly by express words, to show that the parties contemplated at any future time the construction of any lines not then authorized. Such an implication is, however, sought from the general words, *any future extensions or branches*, but that could not be permitted unless it was necessary to look beyond the scope of existing powers to satisfy the words. By the preamble of the contract it appears that the immediate purpose of the Morris and Essex company was to extend their road from Dover to Hackettstown, (it having previously been built between Newark and Dover,) and the immediate purpose of the Sussex company was to re-construct their road between Waterloo and Andover to connect it with the Morris and Essex road, and also to ex-

tend it from Andover to Newton. These objects were within the immediate contemplation of the parties, the contract undoubtedly covers them, and each company had full power to accomplish them. The Sussex road was not then extended from Andover to Newton, and the Morris and Essex was in course of extension from Dover to Hackettstown. Besides these powers, each company had at the date of the contract, legislative authority to build other extensions and branches. And first as to the Morris and Essex.

The company was incorporated January 29th, 1835, with authority to build a railroad or lateral roads, from one or more suitable place or places in Morristown, to intersect one or more suitable place or places in the New Jersey Railroad, at Elizabethtown or Newark. By a supplement, March 2d, 1836, they were further authorized to construct a lateral or branch railroad from Whippany, in Morris county, to intersect the main line of their railroad at any convenient point at or near Madison or Chatham, passing through or near the village of Hanover or Columbia, or both, or by such other route as said company may deem expedient; and also to construct a branch or lateral railroad or railroads from some suitable point of their main road to the iron works upon Rockaway river, at or near Boonton or Powerville; and also to construct said lateral or branch railroads from Denville, Rockaway, and Dover, or from any of those places, so as to connect them with the Morris and Essex railroad at some convenient point or points. *Laws*, 1836, *p.* 223, § 2. By a supplement, February 25th, 1846, it was provided in effect that the time for the construction of those branch or lateral roads should not be limited by the time limited in the original charter, and therefore, the company were at liberty to construct those branch or lateral roads at any time during the existence of their charter, unless otherwise afterwards limited by the legislature. By this latter supplement the company were further authorized, when a branch or lateral road to Dover should be completed, to continue the same to Stanhope. By a further supplement, February 19th,

1851, (the year before this contract) they were empowered to extend their road from some point at or near Dover, to any point on the Delaware river, at or near the town of Belvidere, or the Water Gap, or between those places, and in case the same should not terminate at the town of Belvidere, to construct a branch railroad from the main line to Belvidere; and were also empowered to build a bridge across the Delaware with the consent of the state of Pennsylvania. This was the full extent of the power of the Morris and Essex Company at the date of the contract, to construct extensions and branches. Under the original act their road had then been constructed from Newark to Morristown, and under the subsequent power to build branches, had been continued to Dover, and when the contract was made the work from Dover to Hackettstown was being prosecuted under the authority of the supplement of 1846, to continue the Dover branch to Stanhope, and also, by authority of the supplement of 1851, to extend the road from at or near Dover, to the Delaware at or near Belvidere or the Water Gap, or between. As already stated, judging from the contract, the immediate object of the Morris and Essex at the time of its execution, was to extend their road to Hackettstown. With the road constructed to that place, the unexhausted powers of the company were yet to extend from Hackettstown to the Delaware at or near Belvidere, or the Water Gap, or between, and in case the road did not terminate at Belvidere, to construct a branch from the main line to that town, and also to construct the Whippany and Boonton branches. These powers certainly yet existed without reference to any others that might be claimed. Here then were sufficient subject matters within the charter and supplements of the Morris and Essex to fully meet the scope of the words, *future extensions or branches*, so far as that company is concerned.

Now, next, as to the Sussex Railroad Company. That company was incorporated March 9th, 1848, by the name of the Sussex Mine Railroad Company, (this name was after-

wards changed to the Sussex Railroad Company). They were empowered to construct a railroad from the Andover mines, in the county of Sussex, to some convenient and accessible point on the Morris canal, in said county, with the privilege of extending it to the village of Newton, in the county of Sussex, and of constructing such *spurs or lateral roads*, not exceeding each five miles in length, as may be necessary to afford access to the adjacent mines in the said county. Their charter was to be void if the road was not completed and in use from the Andover mines to the Morris canal, within seven years from July 4th, 1848. The road was constructed between those points within the time limited. It was at first constructed with flat rails, and designed chiefly for the transportation of ore, but was afterwards reconstructed for passengers and freight, as contemplated in the contract. By a supplement, March 18th, 1851, the Sussex Mine Company were further authorized to extend their road to connect at points to be selected by them, in the counties of Sussex, Warren, and Morris, with the Morris and Essex, and Sussex and Warren Railroads, or either of them, and to connect the track or tracks of the said Sussex Mine Railroad with the said railroad or railroads. This supplement authorized an extension to connect with the Morris and Essex road, and also with the Sussex and Warren Railroad. The Sussex and Warren Railroad was incorporated February 21st, 1851, the same session of the passage of the supplement. The act is a public act, and we take judicial notice of it, although not referred to in the pleadings. That company was empowered to construct a railway commencing at a point in the division line between the states of New York and New Jersey, through the county of Sussex, within three quarters of a mile of the court-house at Newton, and through the county of Warren to the Delaware river, at or near the Water Gap; also to build a bridge across the Delaware, with the consent of Pennsylvania, and to connect with any railroad chartered or to be chartered in the state of New York or Pennsylvania. At the time of the contract, the Sussex

Railroad Company had only constructed their road from Andover mines to the Morris canal. That company then had power to extend their road from Andover to Newton, and also to extend it to connect with the Sussex and Warren Railroad (besides to extend it to connect with the Morris and Essex) and also to build as many spurs or lateral roads not exceeding each five miles in length as may be necessary to afford access to the adjacent mines in Sussex county. These were important powers, and they fully meet the requirement of the words, "future extensions or branches," so far as they may relate to the Sussex company, even if the extension from Andover to Newton is excluded. It is thus apparent that at the date of the contract these corporations each had powers unexhausted, sufficient to meet the requirement of the words in question, and such was the case even excluding the immediate extensions referred to in the preamble. Now, if we apply Lord Bacon's maxim, that "all words, whether they be in deeds or otherwise, if they be general, and not express and precise, shall be restrained unto the fitness of the matter and the person;" *Bac. Max. Reg.* 10; *Broom's Max.* 576; *W. L. R. Co.* v. *L. and N. W. R. Co.*, 11 *C. B.* 355; we must give an application to those words consistent with the objects authorized when the contract was made. And besides, it cannot be held with any reason, that when general words used in a contract by a corporation can be applied consistently with the scope of its act of incorporation, that simply because they are general they may be taken to refer to objects outside of it, even where, by their general application, they might include them. The conclusion to my mind is irresistible, from the considerations already stated, that these extensions, unauthorized at the time of the contract, were not intended to be included in it.

But let us look a little further and see the result of a different construction. This contract was made by the directors, but it is unnecessary now to draw any distinction between the powers of the directors to bind the corporation to

third persons, and the powers of the corporation itself. A very serious question arises as to the power of the directors to make such a contract, even if within the scope of corporate powers; but however that may be, their acts must certainly be restrained within the limits of the charter, and they cannot do what the corporation itself may be unable to do. An act concerning corporations, section three, passed in 1846, gives us an imperative rule of construction concerning corporate powers. It provides that, in addition to the powers enumerated in the first section of the act, (which are the ordinary powers of all corporations,) "and to those expressly given in its charter, or in the act under which it is or shall be incorporated, no corporation shall possess or exercise any corporate powers except such as shall be necessary to the exercise of the powers so enumerated and given." The Morris and Essex charter was granted subject to alteration, and its powers must, therefore, be controlled by that statute. The common law rule limits corporations to such powers as are given by the charter, or necessarily implied for carrying into effect the objects and powers expressly sanctioned. *Norwich* v. *Norfolk Railway*, 4 *El. & Bl.* 444 and note; *Colman* v. *E. C. R. Co.*, 10 *Beav.* 1; *Cam. and Amboy R. Co.* v. *Briggs*, 2 *Zab.* 623.

To that extent, at least, our statute is declaratory of that rule; but beyond that, the language is clear, that the legislature intended to interdict, as a matter of public policy, the exercise of any powers except such as are referred to in that third section. Whether without that section the common law would fully reach up to that measure upon any implication that powers not so granted or implied are prohibited, need not now be determined. It is sufficient that the terms of this enactment are plain and its meaning cannot be misunderstood, and that when a corporation exercises powers outside of those permitted by that section, its action is obnoxious to the charge that there is not only a want of authority, but that it is against an express enactment. The construction of corporate powers should, undoubtedly, be

reasonable, and so as to accomplish and not to defeat the purpose and true intent of the charter, in its full spirit and scope.

This is a liberal rule; but even that would not allow an implication of power in the Morris and Essex at the time of the contract, to stipulate that another company should have an interest in the freight and travel on roads or branches then unauthorized, or, taking a milder view of the contract, that the rates for freight and passengers thereon should be fixed that another company should be charged or allowed a per cent. or drawbacks thereon, even if such other company could make a contract of that character. The Morris and Essex could contract for freight and passengers over the roads then authorized. It also had special powers to enter into contracts with any other corporation or individuals for conveying passengers and freight between any point or points on the line of their road and the city of New York, and such a contract was in existence with the New Jersey Railroad Company when this contract was made, and part of this contract is in reference to that. To the full extent of these powers this contract could be made, and was to that extent within their scope, (that is, apart from any question of illegality, or want of consideration, or unconscionability, or want of authority of the directors to make it, against the stockholders); and all contracts bearing upon the traffic of the road *as authorized* that the exigencies of the business contemplated and authorized would reasonably require, would be within the scope of the company's powers; but a contract like this claimed, even in its least objectionable aspect, concerning rates of freight and fare upon extensions unauthorized, cannot be within the necessary scope of any implied power of this corporation. The corporation had no right, at the date of the contract, to build the extensions. No franchise to that effect had been granted; whether to be granted or not, was entirely at the option of the legislature. The whole subject, the enlargement of the franchise and the rates for freight and passengers, was within the control of

the legislature; and if the company should be afterwards empowered to build, it is questionable, at least, whether, without the consent or acquiescence of the stockholders, such power could be exercised. *Zabriskie* v. *Hack. and N. Y. R. Co.*, 3 *C. E. Green* 179. The power to contract upon such an uncertain subject matter ought not to be implied from any other objects authorized or the powers given to carry them out. This question is not analogous to that where railroads or other corporations agree upon a division of the tolls, or fares, or freights upon authorized lines. That can be justified from the power that each has to contract concerning its own authorized business, and such arrangements are not, to my mind, *ultra vires* the corporation. Neither is it analogous to cases where one corporation may offer inducements to another or to individuals, by a reduction in rates, in order to secure freight and travel over its road authorized. I see no objection to such arrangements, provided they are not unconscionable, for they are also in relation to the business of its own road. There are many reasons not now useful to mention, why, in justice to the state, the public, and the stockholders, and the very stability of the corporate body, the legislature should be jealous of its grants of franchise, and seek to confine them within definite limits, and to disallow any corporate act outside of them. The legislature has a policy in this matter. It is clearly declared; and that third section must be taken as a prohibition of any acts not within the scope of the powers permitted. Contracts in contravention of it are against the declared policy of the state, and must be held to be illegal and of no binding obligation. Analogies in support of this principle may be found in the following cases: *Ins. Co.* v. *McKelway*, 1 *Beas.* 133; *Pearce* v. *M. and I. R. Co.*, 21 *Howard* 442; 3 *McLean* 103; 5 *Ibid.* 194; 8 *Gill & Johnson* 318; 23 *Conn.* 511; 22 *New York* 281, (SELDEN, J.); *E. A. R. Co.* v. *E. C. R. Co.*, 11 *C. B.* 775; *McGregor* v. *Railway Co.*, 18 *Ad. & Ellis* (*N. S.*) 618; *Gage* v. *N. M. R. Co.*, *Ibid.* 457; *Taylor* v. *C. and M. R. Co.*, 2 *Law Rep. Ex.* 357; *S. and B. R. Co.* v. *L. and N. W. R. Co.*, 6 *Ho. Lords Cas.* 113.

And there is no difference in this respect between law and equity, for the prohibition is against exercising the power. In equity, a covenant to charge an estate afterwards to be acquired, or in expectancy, may be enforced when the same has been acquired. 3 *Lead. Cas. in Eq.* 653; *Smithurst* v. *Edmunds*, 1 *McCarter* 469. But if it is against public policy to make the covenant, equity will not enforce it merely upon the ground that the party has become able to perform it. There is no difficulty in enforcing the equitable contracts of individuals concerning future estates, for there is no restriction upon their power to make them, but contracts resting on powers legal or equitable, if outside the scope of a corporation, are under the ban of the law, and cannot be enforced upon their own strength and the fact of a subsequent ability to perform them. In the case of *Willink* v. *The Morris Canal and Banking Company*, 3 *Green's C. R.* 377, although lands for the canal from Newark to Jersey City not acquired at the date of the mortgage, were held to be subject to it, yet the mortgage by description was held to include the canal, and the company clearly had the power under its charter to make such a mortgage. In England, the question seems unsettled as to the extent that the promoters of a railway company may bind the corporation when created, upon contracts in contemplation of the incorporation; but equity has decreed the performance of certain classes of contracts of the promoters, particularly for the purchase of land, when such contracts were within the scope and powers of the act of Parliament when obtained, or that and the general railway acts; and that doctrine was referred to in the argument in support of the legality of this contract as to these extensions. The contracts of promoters are not analogous to this. Railway enterprises in England are instituted differently from this country. There the promoters associate under provisional deeds, and these serve as a basis of operation until a charter is obtained. *Redfield on Railways* 5. They are a preliminary association of individuals whose acts are unrestricted, save only by their provisional deeds. They

organize in reference to an incorporation, and the act of Parliament is based upon their application for a regularly defined line. They may buy land for the purpose of the road in contemplation of the act of incorporation, and even the vote of a member of parliament under color of it, if he happens to be a landowner affected, but then there is no statute limiting the legality of their action, and they are not hampered by corporate restrictions. Now, whatever may be the true basis of the action of courts of equity in holding the corporation bound upon such contracts, there is no question of public policy to prevent them from being enforced. But if a statute should limit the powers of promoters to contracts on certain subjects only, as for instance the purchase of land, and should prohibit the exercise of any other powers, I apprehend that a contract outside of the powers allowed would suffer the fate of all contracts against public policy, and not be enforced merely upon its own strength and the acquired ability of the corporation to perform it. The tendency of the more recent English cases is to confine the enforcement of promoters' contracts to such matters as are necessary in the carrying out of the purposes of the charter, and as are within the scope of it when granted. *Taylor* v. *C. & M. R. Co.*, 2 *Law Rep. Ex.* 366; *Preston* v. *Railway*, 5 *Ho. Lords Cas.* 605; *C. & D. J. R. Co.* v. *H. H. Trustees*, 39 *Eng. L. & Eq.* 28. And this is a restriction upon what was once permitted, that is, to buy off opposition to the granting of the charter. *Petrie* v. *Eastern Counties R. Co.*, 1 *Railway Cases* 462; *Edwards* v. *G. J. R. Co.*, 1 *Myl. & Cr.* 650. That, in England, not being an illegal act, strange as it may seem to us.

For the reasons stated, the doctrine concerning promoters' contracts cannot properly be applied to corporations in this state. In analogy to the action of promoters, the corporation would be the promoter in this case, but it would be subject to the restrictions upon a corporation; and here it must be distinctly understood that it is not intended to intimate, in any way, that if the contract had been ratified by the legislature or by the corporation, as to the extension, after

the necessary powers to carry it out were acquired, and the road built, that, by virtue of such ratification, it might not be enforced. No expression of opinion is necessary upon that subject, as there is no legislative ratification, and no ratification by the corporation through its stockholders, or even the directors, for they have always refused to treat it as covering the extensions. The object of this bill is to enforce this contract as to the extensions, upon its own strength, and the fact that the company has acquired the ability to perform it; and the answer to that is, that as to the extensions, at least, the contract would be illegal.

The case of *Eastern Counties Railway Company* v. *Hawkes*, 5 *Ho. Lords Cas.* 331, was much relied on by the appellees' counsel. That company applied to Parliament to build a branch railway; plans and sections of the route were deposited in the usual way. The line would pass through Hawkes' land. He opposed the bill, and the company agreed to pay him a certain price for his land, and damages after the bill should pass, and he to withdraw his opposition to it. After the bill was passed, he brought suit for specific performance, and it was decreed. The Lord Chancellor treated it as a contract not binding till the bill received the royal assent, and then that the rights and powers of the company were to be regarded the same as if they had originally been powers to make the new line, and to apply the funds of the company to a purchase within the scope of their incorporation. Lord Brougham was of opinion that there was nothing illegal in the agreement. Lord Campbell treated it as a contract for the purchase of land, with a view to the parliamentary plan and buildings after the act was obtained, remarking that where there is no offence to be committed against the public, and there is a mere *want of authority* for a transaction among *private individuals or commercial companies*, which authority can only be obtained by act of Parliament, no objection can be successfully made to the parties entering into an agreement for completing the transaction, when the necessary authority is so obtained. That case, in

fact, is not analogous to this, as it was for the purchase of land necessary for the line, and expressly to be carried out in reference to the definite plan presented to Parliament. But, apart from that, it is quite evident that no difference was made between a want of authority on the part of an individual and a corporation, and that even the implied prohibition against a corporation exercising powers outside the scope of its incorporation, which I think is the common law, and which was so indicated by the same Lord Chancellor, afterwards, in the case of *Shrewsbury and Birmingham Railway Co.* v. *North Western Railway Co.*, 6 *Ho. Lords Cas.* 137, was lost sight of. The facts of that case are not sufficiently akin to the one before us, as to necessarily require us to dispute its doctrine, but the binding force of our statute, if we treat the corporation in the light of promoters, would prevent the application of the principle of that case to this.

Viewing the contract as illegal if extended beyond the roads or branches authorized when it was made, we are bound to so construe the words in question when they admit of a double intendment, as to give them a legal operation. 1 *Parsons on Contracts* 11, and note; *Chitty on Contracts* 733, and note. That rule will restrain them and the operation of the contract so as to exclude the extensions afterwards authorized.

The suggestion that the extension or branch from Hackettstown to Phillipsburg may be treated as a substitute for the road to Belvidere or the Water Gap, and the extension from Newark to Hoboken, as a substitute for the mode of conveying freight and passengers on the New Jersey Railroad, is not warranted by the contract, even if no question of power interfered, for the contract was made in relation to existing lines and powers, and there is no provision in it to substitute any other lines for any part of them. There is nothing in the instrument from which such an intention can be gathered. The case of the *Midland R. Co.* v. *London and Northwestern R. Co.*, 2 *L. Rep. Eq. Cas.* 524, upon the

construction of a railway contract, is quite analogous to this, on this point, and that case also has an important dictum of the Vice Chancellor against the validity of a contract for traffic, not very unlike this on a line subsequently authorized.

In the conclusion to which I have come, it is not necessary to give the word *roads* in the third section of the contract, a less restricted application than to the roads and extensions or branches mentioned in the first section.

It is very evident that the issue between these parties is in regard to the right of the Sussex Company to compel a performance by the Morris and Essex of the contract as to the extensions, and that no account is necessary to be ordered for drawbacks on the rest of the line. Any expression of opinion, therefore, upon the want or illegality of consideration in the contract, apart from the extensions, or the power of the directors to make it, or on the question of unconscionability, is reserved until these questions are directly before the court for determination. The decree should be reversed, and the bill dismissed, with costs.

The decree was reversed by the following vote:

For reversal.—Beasley, C. J., Bedle, Clement, Depue, Kennedy, Wales, Woodhull. 7.

For affirmance.—Ogden, Olden. 2.

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